

CITATION: *Fluid Hose & Coupling Inc. v. Allianz Global Risks US Insurance Company et al.*,
2025 ONSC 2517

COURT FILE NO.: CV-23-00703708

DATE: 20250428

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FLUID HOSE & COUPLING INC., Applicant

AND:

ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, AON REED STENHOUSE INC., RIOCAN MANAGEMENT INC., RK (SHEPPARD CENTRE) INC., RIOCAN EAST VILLAGE LP, 35 GREENFIELD INC., RC PIVOT LP, by its general partner, RC NAGP 2 TRUST, by its trustee, RIOCAN FINANCIAL SERVICES LIMITED and SIGMA CONVECTOR ENCLOSURE CORP. (carrying on business as "SIGMA" and "SIGMA CORPORATION"),
Respondents

BEFORE: Schabas J.

COUNSEL: Luciana Amaral for the Applicant

Robert Sottile, Andrei Lezau and Sadaf Karimi, for the Respondents

HEARD: March 20, 2025

REASONS ON MOTION

Overview

- [1] This is an application for a declaration that Superior Court of Justice Action CV-22-006824-0000 (the “Subrogated Action”) is barred against the Applicant, Fluid Hose & Coupling Inc. (“Fluid Hose”), on the basis that Fluid Hose is an insured pursuant to a Builders' Risk Insurance Policy (the “Policy”) issued by Allianz Global Risks US Insurance Company (“Allianz”). The Applicant also seeks a declaration that Allianz is obligated to indemnify it for any amounts found to be owing in the Subrogated Action, and for all of its legal and administrative costs associated with defending the action.
- [2] In short, as Fluid Hose was a supplier to a construction project covered by the Policy, it submits that it is covered by the broad wording of the Policy and cannot be sued for damage that it may have caused and which was insured by Allianz. Allianz disagrees.
- [3] The issue is essentially about contractual interpretation, which is appropriate to decide on an application without hearing *viva voce* evidence.

- [4] For the reasons that follow, I find for the Applicant. In my view, taking into account the purpose of builders' risk policies and the broad wording of the Policy in this case, Fluid Hose is an insured entity and the action against it is barred. However, I am not persuaded that Fluid Hose is entitled to full indemnity costs for its defence of the Subrogated Action of this Application. Instead, I have fixed costs of both proceedings on a partial indemnity basis.

Background

- [5] The application arises from a Subrogated Action commenced by Allianz against, among others, Fluid Hose, pursuant to the Policy. The action seeks damages for property damage caused by a water leak on June 8, 2020 from the HVAC cabinet on the 32nd floor of a residential high-rise building under construction, at 35 Greenfield Avenue, Toronto (the "Project").
- [6] The cause of the water leak was determined to be a 1/2 inch ball valve in the water supply line for the heat pump in unit 3201 (the "Valve"), which broke in half, resulting in a large amount of water escaping and travelling all the way down to the ground floor. This resulted in damage to the building which cost approximately \$420,000 to repair.
- [7] The Plaintiffs in the Subrogated Action (which I will call, collectively, "RioCan") are or were the owners and developers of the Project. RioCan contracted with PCL Constructors Canada Inc. ("PCL") to provide general contractor and construction management services for the Project. RioCan and PCL are, with others, named as insured parties in the Policy ("named insured").
- [8] In turn, PCL contracted with Malfar Mechanical Inc. ("Malfar") to supply and install mechanical, plumbing and fire protection for the building, including HVAC cabinets and heat pumps.
- [9] Malfar then subcontracted with HTS Engineering Ltd. ("HTS") to purchase HVAC cabinets and heat pumps required for the building. HTS contracted with Omega Heat Pumps Inc. ("Omega"), for custom heat pumps. This subcontract was based on a quotation dated July 28, 2018. Omega fulfilled the HTS contract by working with its sister company, Sigma Convector Enclosure Corp. ("Sigma"), to manufacture and supply the HVAC cabinets and heat pumps. These custom cabinets and pumps were manufactured using ball valves supplied by Fluid Hose to Sigma.
- [10] Following the damage caused by the leak, Allianz paid for the repairs. Pursuant to the Policy, the Subrogated Action was commenced, naming RioCan and other named insured as Plaintiffs, against Fluid Hose and Sigma for allegedly failing to ensure the Valve was fit for its intended purpose and reasonably durable.
- [11] Fluid Hose has denied the allegations, pleading that the Valve failed as a result of over-torquing during the installation of the Valve in the heat pump, which was the responsibility of Sigma, or during the installation of the heat pump in the field, which was the

responsibility of the mechanical contractor, Malfar. Fluid Hose cross-claimed against Sigma.

- [12] Like Fluid Hose, Sigma brought an application for declaratory relief on the ground that it is an insured under the Policy. That application was to be heard together with this case; however, I was advised that the Subrogated Action is no longer being pursued against Sigma, having been settled by way of a “Pierringer Agreement.”¹ In accordance with the Pierringer Agreement, Fluid Hose’s liability in the action is now limited to its proportionate share of fault; however, this means that Sigma, and potentially Malfar, will continue to be involved in the action, should it be allowed to proceed.

The Policy

- [13] The “Builders' Risk Insurance” policy issued by Allianz, subject to specific limitations and exclusions, provided comprehensive coverage of “All Risks” for any direct physical loss or damage at the Project site between July 9, 2018 to July 9, 2020. The Policy described the “Name of Insured” as follows:

RioCan Management Inc., RioCan East Village LP., RK (Sheppard Centre) Inc., RioCan Real Estate Investment Trust., RioCan (KS) Management LP., KingSett Canadian Real Estate Income Fund LP., KingSett Canadian Real Estate Income Fund GP Inc., PCL Constructors Canada Inc. *and all contractors, sub-contractors, consultants, sub-consultants, architectural consultants, engineering consultants, construction and project managers and/or any other entities with an insurable interest in the project* and as per individual Project Certificate(s) attached. [Emphasis added]

- [14] The terms “contractor” and “subcontractor” were defined as follows:

CONTRACTOR

Contractor shall mean any person, firm or corporation not being the first Named Insured, entering into a contract with or agreeing with or being requested by the Named Insured to provide, supply or lease work, services, materials, or equipment or any combination thereof, in connection with the project shown in the Declarations.

SUBCONTRACTOR

¹ Named after *Pierringer v. Hoyer*, 124 N.W. 2d 106, 21 Wis. 2d 182 (U.S. Wis. S.C. 1963), the purpose of a Pierringer Agreement is to facilitate a settlement between a plaintiff and a defendant while maintaining a level playing field for the remaining (non-settling) defendant against whom the plaintiff wishes to proceed to trial: see *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013 SCC 37](#), [2013] 2 S.C.R. 623, at paras. 6, 23-26; *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 at para. 52.

Subcontractor shall mean (i) any person, firm, or corporation entering into a contract with any Contractor, and (ii) *any person, firm or corporation entering into a contract derived through any such contract with a Contractor to provide, supply or lease work, services, materials or equipment, or any combination thereof, in connection with the project shown in the Declarations. "Contractor" and "Subcontractor" shall not include consulting engineers or consulting architect.* [Emphasis added]

[15] The “property insured” under the Policy was identified in relevant part as follows:

PROPERTY INSURED

(a) Property in course of site preparation, construction, installation, erection, demolition, reconstruction, repair or testing, including excavations, whilst at the risk of the Insured and whilst at the location of said site preparation, construction, installation, erection, demolition, reconstruction, repair or testing operations (all of which are herein referred to as "the construction operations"), forming part of the Insured Project.

(b) Property of every kind and description (including materials, supplies and scale models) owned by the Insured or in which the Insured has an insurable interest, used or to be used in, a part of, or incidental to the construction operations, including temporary works.

(c) *Property of others used or to be used in, a part of, or incidental to the construction operations, which the Insured has agreed to insure or for which the Insured may be responsible or shall prior to any occurrence for which claim may be made hereunder, have assumed responsibility.*

[16] The Policy contained a provision prohibiting Allianz from making a subrogated claim against any “named or additional insureds, contractors or subcontractors, consultants and subconsultants” for repayment of amounts paid out under the Policy. Allianz has acknowledged that Malfar, HTS and Omega were all subcontractors on the Project and therefore “insureds” under the Policy.

[17] In bringing the Subrogated Action, Allianz refused to recognize Sigma and Fluid Hose as subcontractors and insureds under the Policy, although Allianz has now appeared to recognize Sigma as an insured as Allianz has settled against Sigma and, I am advised, paid its costs.

Issues

[18] The parties agree that the issues to be determined are as follows:

(a) Whether Fluid Hose is a “subcontractor” under the Policy;

- (b) Alternatively, whether Fluid Hose is an unnamed insured with an insurable interest under the Policy; and
- (c) Whether Allianz is required to pay Fluid Hose its full indemnity costs of this Application and for defending the Subrogated Action.

Legal principles

[19] In *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, the Supreme Court of Canada held that the following principles apply to the interpretation of builders' risk policies:

(a) where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole;

(b) where the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity, namely that the interpretation should be consistent with the reasonable expectations of the parties;

(c) only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer.

[20] This approach was confirmed in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37. The Court emphasized that in cases involving builders' risk policies the factual matrix is usually of little assistance, as the policies are broad, standard form contracts. Rather, one must consider the purpose behind such contracts, which was recognized many years ago in *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd. et al.*, [1976 CanLII 138 \(SCC\)](#), [1978] 1 S.C.R. 317: "to provide certainty and stability by granting coverage that reduces the need for private law litigation" (quoting from *Ledcor* at para. 68). As the Court stated in *Ledcor*, at para. 66:

In a nutshell, the purpose of these policies is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage — in exchange for relatively high premiums — provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved.

[21] Builders' risk policies, therefore, are a unique species of insurance contract, providing broad coverage to complex construction projects, protecting those involved in the project and the value of project itself, subject to the specific wording of the policy. They simplify insurance coverage and serve the salutary purpose of reducing or avoiding litigation. It has also been suggested that, while such policies are expensive, they may in fact reduce the overall cost of insurance: *Sylvan Industries Ltd. v. Fairview Sheet Metal Works Ltd.*, 1994 CanLII 8701 (BC CA) at para. 13.

- [22] As a practical matter, and consistent with the purpose of these policies, “coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly”: *Ledcor*, para. 51.
- [23] On the other hand, coverage is not unlimited and must respect the contract. In some cases courts have limited coverage to parties who are an “integral and necessary part of the construction process itself”, and parties who are “collateral to that process” have been excluded, but those cases turn on their facts and the specific wording of the policy in issue: see, e.g., *Canadian Pacific Ltd. v. Base-fort Security Services (B.C.) Ltd.*, 1991 CanLII 767 (BC CA), at paras. 11, 18; *Stuart Olson Construction Ltd. v. Allan Forrest Sales Ltd.*, 1994 CanLII 9218 (AB KB).

Is Fluid Hose a “subcontractor” under the Policy?

- [24] Fluid Hose submits that it is a “subcontractor” under the Policy. In particular, under subsection (ii) of the definition of subcontractor, it was an entity “entering into a contract *derived through* any such contract with a Contractor to provide, *supply* or lease work, services, *materials* or equipment, or any combination thereof, *in connection with the project* [emphasis added].
- [25] This definition is undoubtedly broad, extending well beyond a subcontractor who has contracted with the contractor, as contained in subsection (i) of the definition. The intention of such wording, Fluid Hose submits, is to cover any party within the supply chain of the Project.
- [26] Counsel could not direct me to any cases that have interpreted the phrase “derived through any such contract.” A common definition of “derive” is “to get something from something else”: *Cambridge Academic Content Dictionary*, Cambridge University Press, <https://dictionary.cambridge.org/dictionary/english/derive>. The *Merriam-Webster Dictionary* defines “derive” as “to take, receive, or obtain especially from a specified source.”
- [27] In my view, the word “derived” is indeed broad and can extend to suppliers to subcontractors, such as Fluid Hose.
- [28] Here, Fluid Hose contracted with Sigma to supply ball valves for HVAC cabinets and heat pumps which Sigma was manufacturing for its sister company, Omega, in order to fulfill a contract Omega had with HTS, which in turn had contracted with Malfar to provide the cabinets and heat pumps to the Project. As Malfar had contracted with PCL – a named insured under the Policy – Malfar was clearly a “contractor” under the Policy which, in turn, caused contracts to be entered into which were “derived” through Malfar’s contract with PCL.
- [29] Allianz submits that the supply contract with Fluid Hose is not “derived through” the contract involving Malfar because Fluid Hose was an ongoing and regular supplier of valves to Sigma, having provided approximately 15,000 valves between 2014 and 2019, far more than just the valves used on the Project.

- [30] The 728 valves Fluid Hose supplied to Sigma for the Project's HVAC units were supplied pursuant to a Purchase Order dated August 22, 2018. This Purchase Order was for 5000 valves. Fluid Hose confirmed the order in five confirmations dated August 23, 2018, and subsequently ordered the valves from a manufacturer in China. None of the documents associated with Sigma's order to Fluid Hose referred to the Project.
- [31] Further, it was only on August 24, 2018, that HTS submitted its Purchase Order to Omega for the supply of the heat pumps for the Project, which was one day after Fluid Hose had confirmed the order for 5000 valves. There is, however, evidence that Omega had previously provided a quote to HTS for the heat pumps to be supplied to the Project. On the other hand, there is no evidence that Fluid Hose knew that any of the valves would be included in heat pumps in the Project; but that is not surprising as Fluid Hose simply supplies valves to Sigma.
- [32] In my view the fact that the specific contract between Fluid Hose and Sigma was entered into one day prior to the contract between HTS and Omega is irrelevant. Omega (the sister company of Sigma) was aware of the need for HVAC units for the Project prior to Sigma making the order with Fluid Hose. I also infer from the ongoing relationship between Sigma and Fluid Hose at the time, including the number of valves delivered, that the supply of valves would be for use in Sigma's and Omega's heat pumps which were installed in large-scale construction projects such as the Project here. There is also uncontradicted evidence that the ball valves were unique and designed specifically to meet Sigma's specifications. Thus, the fact that the valves were not specified to be for the Project is of little import.
- [33] The term "derived through" is broad and not seen in the cases cited above. It does not require that contracts be executed in chronological order or that contracts "derived through" a contract refer to that contract or the Project. Nor is there a requirement that the contract be exclusively for the Project. Rather, as the Policy states, the supply of materials must simply be "in connection with the project." This phrase is also broad and inclusive. It is not limited to those who are "part of the construction process itself" but includes suppliers who are "collateral to that process" so long as the supply contract is "in connection with the project."
- [34] Unlike several of the cases referred to in argument, the Policy here is not limited to subcontractors "engaged in the construction of the Project": see *Stuart Olson Construction Ltd. v. Allan Forrest Sales Ltd.*, 1994 CanLII 9218 (AB KB), at para. 13. Nor does it have a provision excluding "suppliers whose sole function is material delivery": see *Sherritt Gordon Ltd. v. Dresser Canada Inc.*, 1994 CanLII 9006 (AB KB), at para. 34. In *Sherritt Gordon*, the definition of subcontractor was much more narrowly defined than in the Policy: *Sherritt Gordon Limited v. Dresser Canada, Inc.*, 1997 ABCA 156.
- [35] The words "derived through" and "in connection with" must also be read in the context of the Policy as a whole and with regard to its purpose. This includes the opening line of the Policy where Allianz agreed to "insure against All Risks of direct physical loss or damage" to the property during construction. The description of "property insured" is also very

broad. This broad coverage was required by the general construction contract between RioCan and PCL, which obligated RioCan to obtain a builders' risk policy “covering all risks of physical loss or damage to the Project” and that coverage would be “100% of the total contract price.”

- [36] The “Property Insured” clause is also broadly worded. It includes property “owned by the Insured or in which the Insured has an insurable interest” and “property of others used or to be used in, a part of, or incidental to the construction operations.” RioCan clearly had an “insurable interest” in the HVAC units; indeed it purchased them. The valves were an integral and essential part of those units which, in turn, were integral and essential to the building. An additional indication of the broad scope of the Policy is found in s. 7(d) dealing with “miscellaneous unnamed property” which states: “This Policy is extended to insure property of every description used or to be used in, part of, or incidental to the construction operations.”
- [37] The Policy is also clearly worded that Allianz is required to pay a loss regardless of how it happened and regardless of who caused it. As Fluid Hose claims the failure of the Valve was due to the negligence of Malfar and/or Omega, allowing Allianz to subrogate against Fluid Hose would frustrate the expectations of contractors and subcontractors, namely Malfar and Omega/Sigma, to not be pulled into disputes and litigation about potential liability amongst the various subcontractors. One of the purposes of these comprehensive builders’ risk policies is to avoid such disputes. As the Supreme Court stated, “contractors believe indemnity will be available in the event of an accident or damage on the construction site arising as a result of a party's carelessness or negligent acts.” These policies “account for the fact that work of different contractors overlaps in a complex construction site and ‘there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole’”: *Ledcor* at paras.70 – 71.
- [38] Should the Subrogated Action continue, the parties will be fighting over liability for damage on the construction site itself between various contractors and subcontractors. This is precisely what builders’ risk policies, including this Policy, are designed to avoid. It may well be that some policies are not as broadly worded as the Policy here, but in my view this Policy is unambiguous and clear that it includes suppliers such as Fluid Hose within the definition of subcontractor.
- [39] In the event I am incorrect in this conclusion and the term subcontractor is ambiguous, pursuant to the interpretive principles set out in *Progressive Homes* I would reach the same conclusion, as I would resolve any ambiguity to accord with the purpose of such policies which would be consistent with the reasonable expectations of the parties. To the extent that might not accord with the expectations of Allianz, the *contra proferentem* rule would apply to construe the policy against the insurer.
- [40] I am aware of the concern expressed by counsel for Allianz that the Policy, while broad, should not be unlimited in its scope. Allianz submits that finding for Fluid Hose “leads to the result that the policy would cover all suppliers of material that ultimately found their way to the construction site, no matter how remote or tenuous.” I disagree. The Policy, as

I have found, includes contracts “derived through” a contract with the contractor, and includes a contract of supply, which is “in connection with the project.” This is broad, but it is not indeterminate or unlimited. In any event, the cases emphasize that the purpose of such policies is to provide “broad coverage” and that courts should give effect to that purpose and read them expansively as long as they do not “disregard or do violence to the policy’s language and ordinary meaning”: *The Dominion of Canada General Insurance Company v. Viking Fire Protection Inc.*, 2019 NLCA 13, at para. 53. Thus, if an insurer is prepared to provide a very broad policy, as it has done here, and which it presumably priced accordingly, it must live with the consequences.

- [41] In my view, having regard to the wording of this Policy and the Policy as a whole, Fluid Hose is covered as a subcontractor, barring the Subrogated Action against it.

Is Fluid Hose an unnamed insured under the Policy?

- [42] Having concluded that Fluid Hose is a subcontractor under the Policy, it is unnecessary for me to consider the alternative argument that Fluid Hose is an “unnamed insured” under subsections (b) and (c) of the “Property Insured” clause.

Is Fluid Hose full indemnity costs for the Subrogated Action and the Application?

- [43] The Applicant seeks full indemnity for all legal and administrative costs arising from the Subrogated Action.
- [44] Fluid Hose relies on cases that arose in situations where an insurer wrongfully denied coverage and forced the insured to pursue costly litigation for coverage: e.g., *Loblaw Companies Ltd. v. Royal & Sun Alliance Insurance Co. of Canada*, 2022 ONSC 1897, at paras. 27, 29; *The Corporation of the City of Markham v Intact Insurance Company*, 2017 ONSC 3150, at paras. 67-69.
- [45] Fluid Hose also submits that Allianz has breached its obligation to respond to a claim in good faith: *702535 Ontario Inc. v. Lloyd’s London, Non-Marine Underwriters* (2000), 2000 CanLII 5684 (ON CA), at para. 29, quoted with approval in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 63. In short, it is Fluid Hose’s position that Allianz did not investigate the claim to assess whether Fluid Hose was an insured under the Policy, as had been asserted by Fluid Hose, and therefore Allianz acted in bad faith.
- [46] In my view the cases cited do not compel an award of full indemnity costs. Fluid Hose did not make a claim under the Policy. It suffered no loss. Rather, it raised a defence to the Subrogated Action that it was an insured and simply could not be sued. Accordingly, there was no denial of a claim by Fluid Hose.
- [47] I am also not able to conclude that Allianz has acted in bad faith in commencing the Subrogated Action. Allianz, when put on notice of Fluid Hose’s position, was entitled to consider the contracts and invoices, and take legal advice, which it did. While I have found against Allianz on the position it took, there is no evidence that Allianz acted unfairly or in

bad faith in commencing the Subrogated Action. And there is no suggestion of bad faith or misconduct by Allianz in opposing this application.

- [48] Accordingly, I dismiss the Applicant's claim for full indemnity of its legal and administrative costs incurred in defending the Subrogated Action, and dismiss its claim for full indemnity costs of this Application.
- [49] Fluid Hose has provided a Costs Outline claiming approximately \$37,000.00, including tax and disbursements, for this Application on a partial indemnity basis. This is substantially less than the amount sought in the Respondents' Costs Outline. In my view, the amount claimed by the Applicant is fair and reasonable and an amount that Allianz ought to have reasonably expected to pay. I fix those costs at \$37,500.00.
- [50] Fluid Hose has also provided a Bill of Costs for its defence of the Subrogated Action. That Bill, including tax and disbursements, totals \$17,381.99. I see nothing unreasonable in the time spent as set out in that Bill; however, it is based on a full indemnity hourly rate of \$350.95. As I have the benefit of the appropriate partial indemnity rate from the Costs Outline (\$245.67), I apply it to award costs payable for the Subrogated Action in the amount of \$12,337.80, inclusive of tax and disbursements.

Conclusion

- [51] I make the following orders:
- (i) A declaration shall issue that the Subrogated Action is barred against Fluid Hose;
 - (ii) The Respondents shall pay the Applicant \$37,500.00 for costs of this Application; and
 - (iii) The Respondents shall pay the Applicant \$12,337.80 for costs of the Subrogated Action.

Schabas J.

Date: April 28, 2025