IADC COMMITTEE NEWSLETTER
SUPERIOR ADVOCATES. GLOBAL PERSPECTIVE.
CELEBRATING 100 YEARS 1920-2020

INSURANCE AND REINSURANCE

April 2020

IN THIS ISSUE

In the recent Supreme Court of British Columbia decision in Surespan Structures Ltd. v. Lloyds Underwriters, the Court considered issues of insurance limits where the policy failed to provide a specific limit for one type of coverage notwithstanding broader language suggesting limits for all coverage available. The Court also considered the issue of commercial reality in the absence of specific limits of coverage.

Insurance Policies without Limits: More Pitfalls for Underwriters

ABOUT THE AUTHOR

Harmon C. Hayden is internationally recognized as one of the world's leading lawyers in insurance, reinsurance, and product liability. He has served as a nominee of the Attorney General of Canada on the Minister's Judicial Advisory Committee and has appeared in the Supreme Court of Canada in *EDG v. Hammer* [2003] S.C.R. 459 (one of a trilogy of cases heard at the same time regarding institutional liability for sexual abuse). He has published and lectured extensively, and has served as an Adjunct Professor of Insurance Law, Faculty of Law, at Thompson Rivers University. He can be reached at harmon.hayden@haydenlaw.ca.

ABOUT THE COMMITTEE

The Insurance and Reinsurance Committee members, including U.S. and multinational attorneys, are lawyers who deal on a regular basis with issues of insurance availability, insurance coverage and related litigation at all levels of insurance above the primary level. The Committee offers presentations on these subjects at the Annual and Midyear Meetings.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Bryan D. Bolton
Vice Chair of Newsletters
Funk & Bolton
bbolton@fblaw.com

The recent case of *Surespan Structures Ltd. v. Lloyds Underwriters*, 2020 BCSC 27 is another cautionary tale for underwriters. Underwriting errors in policy drafting are legion including coverage for risks left undefined providing essentially unlimited coverage for such risks. Such errors are particularly common in manuscript wordings where some employ a cut and paste approach without careful regard to the interpretation of the policy as a whole. Such an error arose in this case where the policy failed to provide a limit for one type of coverage.

Justice Branch conveniently and succinctly set out the primary issue in this case and his conclusion:

[1] This summary trial application seeks the interpretation of a construction project insurance policy. The core issue is whether any limit exists on the amount payable under the policy's "mitigation of loss" coverage. For the reasons expressed below, I find that the insurer failed to provide for a limit on this type of coverage.

While some of the history and facts of this case are complex in their entirety, for the purposes of this paper, we will focus on the core issue. The basic facts can be summarized as follows:

- Surespan Structures Ltd. (Surespan) was a design-build contractor focused on the design, manufacture and erection of precast concrete structures.
- Surespan was contracted in 2014 to provide service regarding the design, supply and installation of concrete components for the parkade of a construction project for the Vancouver Island Health Authority for acute care facilities in Campbell River and Comox.
- In late 2016, defects in the precast elements of the parkade were discovered and Surespan was required to perform remediation work to mitigate the project delay.
- Surespan incurred over $9.9 million in remediation expenses, together with financing charges.
- They sought reimbursement under a policy issued by QBE.
- The policy had been obtained by one of the prime contractors and it covered all parties providing professional services to the project, including Surespan.
- QBE initially denied that Surespan was a named insured under the policy.
- By order of Justice Winteringham on June 27, 2018, Surespan was found to be a named insured: 2018 BCSC 1058.

This then led to the issue of whether there were any limits to the "mitigation of loss coverage". I will only refer to the key provisions of the insurance policy.

> THIS COMMERCIAL INSURANCE POLICY CONSISTS OF THIS (THESE) DECLARATION PAGE(S) ALONG WITH

THE "GENERAL CONDITIONS" (OR "STATUTORY CONDITIONS"), AS WELL AS ALL COVERAGE WORDINGS, RIDERS OR ENDORSEMENTS THAT ARE ATTACHED HERETO.

. . .

INSURANCE IS PROVIDED ONLY FOR THOSE COVERAGES FOR WHICH A SPECIFIC LIMIT OF INSURANCE IS SHOWN - ON TERMS AND CONDITIONS CONTAINED IN THE FORMS INDICATED.

. . .

Liability
Professional Liability (Claims Made)
Type of professional services
Consultant
Limit of Liability
Any one claim and in the aggregate including costs
and expenses 10,000,000

Deductible
Any one claim including costs and expenses 500,000

. . .

PART II - INSURANCE COVERAGE THE INSURER'S OBLIGATIONS

THE INSURER is formally undertaking to fulfil the following four (4) obligations for the INSURED'S benefit. The INSURED'S POLICY EXCESS applies to all the obligations.

1. DAMAGES

In excess of the INSURED'S EXCESS, THE INSURER will pay on behalf of the INSURED all sums which the INSURED becomes liable to pay as DAMAGES arising out of a CLAIM In regard to the PROJECT, providing the INSURED'S liability is the result of an error, omission or negligent act of the INSURED or those employees or sub-consultants or sub-contractors for whom the INSURED is legally liable, in the performance of PROFESSIONAL SERVICES.

The maximum amount THE INSURER will pay for each CLAIM and in the aggregate for all CLAIMS made against the INSURED during the POLICY PERIOD and covered by this POLICY is, no matter how many INSUREDS there are under this POLICY or how many persons or organizations make a CLAIM, as shown on the SCHEDULE page of this POLICY as the Limits of Liability per CLAIM and Aggregate Amount Payable respectively.

2. MITIGATION OF LOSS

The INSURERS will additionally indemnify the INSURED against the costs of remedying defects in the WORKS in order to fulfil contracts undertaken for others where such costs are necessarily incurred prior to SUBSTANTIAL COMPLETION with the prior written consent of THE INSURER (such consent not to be unreasonably withheld).

Provided that such defect in the WORKS must result from an error, omission or negligent act in the performance of PROFESSIONAL SERVICES by the INSURED or those employees or sub-consultants for whom the INSURED is legally liable and the onus of satisfying this provision rests with the INSURED.

3. DEFENCE

THE INSURER has the obligation and right to defend the INSURED in any civil suit or arbitration proceeding arising out of a CLAIM in regard to the PROJECT for which coverage is provided by this POLICY, even if the allegations against the INSURED are groundless, false or fraudulent. THE INSURER will conduct such investigation, negotiations and defence as it deems expedient. THE INSURER'S obligations to defend the INSURED cease as soon as THE INSURER'S Limits of Liability have been exhausted.

4. SUPPLEMENTARY PAYMENTS

Until THE INSURER'S Limits of Liability have been exhausted, THE INSURER will pay, for each CLAIM covered by this POLICY, the following:

a) CLAIM EXPENSES;

b) all premiums on appeal bonds and bonds to release attachments, where such bonds are in regard to judgements which ought reasonably to be appealed and which fall within the remaining Limits of Liability at the time of appeal or attachment. THE INSURER has no obligation to furnish such bonds but only to pay the premiums thereon;

c) all costs taxed against the INSURED, all court and arbitration costs owed by the INSURED, and all interest upon that part of the judgement which falls within the remaining Limits of Liability at the time.

The coverage numbered 1-4 above were "Damage Coverage", the "Mitigation of Loss Coverage", the "Defence Costs Coverage" and the "Supplementary Payments Coverage" respectively. QBE argued that there was a $10 million insurance limit for Mitigation of Loss coverage subject to various deductions. Surespan argued that the coverage was unlimited. Both parties agreed that the clause was unambiguous, but clearly only one could be (unambiguously) right.

The general principles of insurance policy interpretation were cited from *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37:

a) Where the policy is unambiguous, effect should be given to the clear language, reading the contract as a whole.

b) Where ambiguity exists, reasonable expectations can be considered.

c) If ambiguity exists, *contra proferentum* can be employed to construe the policy against the insurer.

d) Coverage is interpreted broadly and exclusions narrowly.

Here, each of the subparagraphs granting the Damages, Defence Costs, and Supplementary Payments Coverages referred to and applied a limit of liability. The Mitigation of Loss Coverage contained no such reference. There was no grammatical or textual reason why this coverage would not express a limit if that was the intention. It was not subsidiary to the other coverage. Further, it was more in the nature of first party coverage as a claim by a third party was not required.

QBE argued that the "Limit Requirement Preamble"—Insurance is provided only for those coverages for which a specific limit of insurance is shown—must be read to limit coverage. Such an interpretation could not be maintained. If taken to its logical conclusion, there would be no coverage at all, an argument that QBE did not advance. Reading the policy as a whole, the detailed wordings of the policy did not support QBE's contention.

Then, QBE argued that the Declarations Limit Language—expressing a limit of $10 million for any one claim and in the aggregate including costs and expenses—must be read as creating a limit for all coverages. However, the Mitigation of Loss Coverage did not require any claim be made at all. The object was to avoid claims entirely. The Limit of Liability applied only to those coverages that were in fact "claims made".

Further esoteric arguments were made and they fared no better. I will not review them all.

In conclusion on this issue, Justice Branch said this:

> [105] I am left with a suspicion that the failure to include limits language for the Mitigation of Loss Coverage may have been an oversight on the part of QBE. The available evidence suggests that such coverage is not a common element of Canadian insurance policies. The parties were unable to find any Canadian cases interpreting this type of coverage. The Policy was individually negotiated. The potential for errors and mistakes is heightened in such a situation.
>
> [106] I have a suspicion that there may have been an underwriting error in granting Mitigation of Loss Coverage in a situation where all professional

> design professionals were covered under the policy, which impinges on the ability of the insurer to seek subrogation for its mitigation losses against the ultimate wrongdoer.
>
> [107] But the potential remedy for any policy drafting mistakes is rectification, which itself is controlled by a strict legal test: 5551928 Manitoba Ltd. v. Canada (Attorney General), 2019 BCCA 376. No such application for rectification was made here. Absent rectification or the applicability of some other equitable doctrine, the unambiguous words of the Policy govern, even if there has been a unilateral mistake by the insurer: PCL Constructors, at paras.41-43; Probyn v. Sovereign Life Assurance Co. of Canada (1952), [1953] O.R. 361 at 363.

On first reading, I was struck with the thought that limitless policies lead to commercially unrealistic results that could not have been within the reasonable intentions of the parties. However, Justice Branch referred to several cases in which insurers wrote policies in which there were no limits on certain aspects of coverage. A common example is the absence of limits on defence costs. With respect to commercial reality, the reader can be comforted that there were certain natural limits. It was explained thusly:

> [116] Finally, as to the issue of commercial reality, there is evidence of careful consideration of the scope and cost of the Project by QBE as part of its underwriting process. As such, QBE would have known that the Mitigation of Loss Coverage had certain natural limits in terms of the potential worst-case scenario of a complete rebuild. QBE was aware of the costs of construction of the Project as a whole, and the parkades in particular.
>
> [117] I find that, if there is an ambiguity in the Policy, the concept of reasonable expectations considered alongside the effect of the principle of *contra proferentum* still, on balance, supports Surespan's proposed interpretation.

Underwriters will want to give careful consideration to the principles expressed in this case. If limits to coverage are intended, then clear limits should be expressed with respect to each grant of coverage. As in statutory interpretation, there is a principle referred to as "failure to follow a pattern of express reference." (See para 56.) Once a pattern is established, such as the express reference to limits for the other grants of coverage, it is assumed that variations are intended. Such applies to exclusions as well as grants of coverage. As stated, these underwriting issues are particularly important in manuscript policies.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MARCH 2020
Texas Supreme Court to Decide Two Eight-Corner Duty to Defend Cases This Term
Bob Allen

FEBRUARY 2020
Toeing the Line: When Professional Services are not Professional Services
Matthew S. Brown and Bryan M. Pritikin

JANUARY 2020
Seepage or Leakage: What Coverage Exists for the First 13 Days?
Karen K. Karabinos

DECEMBER 2019
Georgia Court Takes Bright-Line Approach to Question of When Liability Insurer Has a Duty to Settle, Thereby Limiting Insurers' Potential Bad Faith Exposure Where No Formal Settlement Demand within Policy Limits Has Been Made
Eric R. Mull and Katelyn E. Fischer

NOVEMBER 2019
New ALI Restatement on Liability Insurance Draws Criticism
Mark Behrens and Christopher E. Appel

Travel Medical Insurance and Perils of Bad Faith Claims
Harmon C. Hayden

OCTOBER 2019
When the Tortfeasor Claims to be the Victim: Eleventh Circuit to Consider Claims that Uninsured Motorist Carrier and Liability Insurer Conspired to Strip Tortfeasor Insured's Liability Protection
Sharon D. Stuart

SEPTEMBER 2019
Advertising Liability in Canada: *Blue Mountain Log Sales Ltd. v. Llloyd's Underwriters*, 2019 BCCA 240
Harmon C. Hayden

AUGUST 2019
Sixth Circuit Rejects Disparate Impact Discrimination Claim against Health Insurer under the Affordable Care Act
Bryan D. Bolton