IADC COMMITTEE NEWSLETTER

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The British Columbia Court of Appeal upholds a trial decision finding that a mitigation of loss coverage contained no limits in the absence of a specific stated limit. A broad interpretation could not turn "night into day." The attempt to rely on expert evidence was "not to inform the wording of the Policy, but rather to transform its meaning."

Addendum to Insurance Policies without Limits: *Surespan Structures Ltd. v. Lloyd's Underwriters*

ABOUT THE AUTHOR

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In a prior paper "Insurance Policies without Limits: More Perils for Underwriters," published in the Insurance and Reinsurance Newsletter in April 2020, the author discussed the British Columbia Supreme Court decision in *Surespan Structures Ltd. v. Lloyd's Underwriters*, 2020 BCSC 27. The headnote to that paper read as follows:

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.

The court concluded that there were no limits to the coverage for mitigation of loss coverage based on the policy wordings notwithstanding language that suggested aggregate limits of $10 million. In a subsequent judgment, 2020 BCSC 27, the judge also awarded special costs against the defendant for reprehensible conduct in the defence of the litigation.

The defendant retained new counsel and appealed these decisions. The Court of Appeal dismissed the appeals by reasons pronounced Feb. 12, 2021: *Surespan Structures Ltd. V Lloyd's Underwriters*, 2021 BCCA 65.

While the court's reasons for dismissing the appeals are quite lengthy at 106 paragraphs, fact specific, and possibly only of interest to insurance specialists, one can make some general observations that may be of interest to our readers. The specific issue was whether the mitigation of loss coverage under the policy was outside the scope of any stated limit in the policy. The short answer was yes. Coverage was unlimited in the absence of an express limit applicable to such coverage.

There could be no dispute on the principles of policy interpretation applicable in Canada which are:

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

2. Where ambiguity exists, general rules of contract construction apply:
    a. Interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies;
    b. Where ambiguity remains, the *contra proferentum* rule is

employed to construe the policy against the insurer;

3. Coverage provisions are interpreted broadly and exclusion clauses narrowly.

Further, the question before the court was one of mixed fact and law and thus the trial decision should not be overturned in the absence of palpable and overriding error. In this case, the parties agreed that the policy was clear and unambiguous. The parties did not argue that the trial judge had failed to consider any relevant provision in the policy. The central argument of Lloyd's was that the trial judge failed to consider the proper textual analysis. The argument was put as follow:

[26] The appellants do not argue that any of the principles of construction that the trial judge relied upon when he addressed these provisions were inappropriate. They do argue that he was mistaken in asserting that there was no "textual reason" within the Mitigation of Loss Coverage that "would not also require an express reference to the limit, had that been a proper expression of the parties' intent."

[27] Specifically, the appellants argue that both the Damages Coverage and the Mitigation of Loss Coverage address "an error, omission or negligent act of the INSURED or those employees or sub-consultants … for whom the INSURED is legally liable". They argue that the two provisions are "integrally connected" or "zippered together", in that they address the same issue and there was, accordingly, no need to again refer to the "limits of liability" or to "limits language" within the Mitigation of Loss Coverage provision. They say that a reasonable insured would understand that the limits of liability that pertained to the Damages Coverage would also pertain to the Mitigation of Loss Coverage.

[28] Conversely, they argue, in relation to both the Defence Coverage and the Supplementary Payments Coverage, that a reasonable insured might want to know whether the insurer's limits of liability pertained to these additional coverages.

The Court of Appeal then went on to discuss difficulties with these arguments. In summary:

1. There were significant differences in the coverage provisions, which is analyzed in some detail

2. The arguments at trial and on appeal varied. While a party may be able to resile from a position taken at trial "such changes is position may well, however, signal a lack of coherence in a party's position."

3. While certain words, taken in isolation, can be interpreted broadly, "a broad interpretation cannot, as the respondent argues, convert 'night into day'."

They then stated this at para. 50:

[50] Ultimately, I am satisfied that this first part of the trial judge's analysis was coherent and comprehensive. That analysis established:

i) there is an explicit limit of liability in each of the Damages, Defence, and Supplementary Payments Coverages;

ii) each of the Damages, Defence, and Supplementary Payment Coverages arise out of or are triggered by a CLAIM;

iii) the Policy covers CLAIMS made against an INSURED. The Mitigation of Loss Coverage pertains to requests for consent (which consent is not to be unreasonably withheld) made by an INSURED to the INSURER for indemnity against the costs of remedying defects in the WORK;

iv) the foregoing propositions are accurate and consistent in both the Insurance Coverage provisions and the Limits of Liability Clause;

v) the Mitigation of Loss Coverage is "additional" to other forms of coverage, it is not triggered by a CLAIM, it is not based on DAMAGES arising out of a CLAIM, and it does not make any reference to a "Limit of Liability";

vi) the Limits of Liability Clause is not explicitly referenced in the Mitigation of Loss Coverage, though it is expressly referenced in each of the other forms of coverage provided for in the Policy; and

vii) the Limits of Liability Clause does not make any reference to the Mitigation of Loss Coverage, though it expressly does so in relation to each of the other forms of coverage provided for in the Policy.

The court proceeds to consider the intricacies of the policy wording in some detail and little purpose can be achieved here by reviewing them all.

A more significant point was the issue of "commercial reality." In my initial paper, I wrote the following:

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.

On this point, the defence had relied on the opinion of underwriter who was not directly involved in the negotiation of the policy. It was argued that this was extrinsic evidence. Recent cases have suggested that commercial expectations should only be considered where there is ambiguity. Here, there was no place for such an analysis as everyone agreed that the policy was unambiguous. What the appellants attempted here, according to the court was not "to inform the wording of the Policy, but rather to transform its meaning." Para. 92. While the trial judge gave little weight to the opinion of the underwriter, the Court of Appeal questioned its admissibility in the first instance. Further, commercial expectations should be objective and not subjective. The Court concluded on this point:

[93] The evidence of Mr. Pidduck is subject to other concerns. The trial judge admitted his evidence but gave it little weight. It is not clear that Mr. Pidduck's evidence was admissible. A resort to extrinsic evidence of the parties' commercial expectations may first require a finding of ambiguity: Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129 at para. 55. There is, again, no such ambiguity in this case.

[94] Furthermore, the reasonable commercial expectations of the parties must necessarily be objective and not subjective. This requires an examination of the "general commercial atmosphere" rather than the "subjective belief" of either party or of the "concerns" that an insurer alone might hold. This latter form of evidence is not admissible: Nodel v. Stewart Title Guaranty Company, 2018 ONCA 341 at para. 18; Sattva at paras. 59–61; Family Insurance Corp. v. Lombard Canada Ltd., 2002 SCC 48 at para. 36.

[95] In this case, the affidavit of Mr. Pidduck sought to do various things. It addressed internal policies that described the appellants' underwriting "appetite," it described QBE's internal practices for evaluating construction policies, and it described some of the circumstances in which a construction policy "would be declined automatically and [where] no discretion could be exercised." Still further, it interpreted documents that were signed by a Mr. Thompson, who actually underwrote the Policy. There are thus some hearsay concerns with this latter evidence.

[96] To the extent any remaining portions of Mr. Pidduck's evidence were admissible, I am satisfied that the trial judge correctly concluded that the weaknesses of that evidence "greatly reduce[d] its weight."

With respect to special costs against the defendants for reprehensible conduct in the litigation, the Court of Appeal found no error of principle and it was not truly argued. For the benefit of the readers, the conduct included the following:

[104] Second, the special costs order was based on various forms of "reprehensible" conduct that were addressed in some detail by the trial judge. This included, inter alia:

i) the appellants' failure to abide by the terms of the Winteringham Order: Special Costs Reasons at paras. 12–13, 23;

ii) the appellants' failure to make a payment into court or to seek a stay of the Winteringham Order: at paras. 16, 18;

iii) the appellants raising issues that they abandoned after the respondent "was forced to produce vast volumes of quantum material": at para. 15;

iv) the appellants "ma[king] the resolution of this claim more difficult than it should have been: at para. 20; and

v) the appellants "initially misrepresent[ing] the status of monies said to be owing": at para. 14.

[105] None of these conclusions is contested. Individually, and particularly in combination, they support the discretionary order that the trial judge made. I would also dismiss this aspect of the appellants' appeal.

As counsel, we must always remember our duty as officers of the court and our duty in the defence of first party insurance cases to observe the duty of utmost good faith that does not cease with the commencement of the litigation but continues to the end.

It should be noted that there were no allegations of reprehensible conduct by the defendant or counsel in the appeal.

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