

## Insurance

# Court upholds unlimited coverage for construction mitigation losses

By **Christine Viney, Bruce Mellett and Patrick Schembri**



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(March 31, 2021, 1:46 PM EDT) -- In *Surespan Structures Ltd. v. Lloyds Underwriters 2021 BCCA 65*, the British Columbia Court of Appeal held that a professional liability insurance policy contained no monetary limit in relation to one component of its coverage. Specifically, while the policy included limits, these were found not to apply to loss mitigation coverage for a construction project worth approximately \$400 million.

## Background

The underlying litigation arose from the construction of health-care facilities and associated parking structures in British Columbia. For a portion of the construction, the Vancouver Island Health Authority contracted with THP Partnership, which then entered into a design services agreement with Graham Design Builders LP.



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This latter agreement required Graham to obtain professional liability insurance which provided coverage for consultants providing services to Graham. This policy was issued by members of Lloyds and included mitigation of loss coverage, which protects the insured against losses it incurs in fixing defects discovered during construction that would result in claims against the policy if left unaddressed.

Graham entered into an agreement with Surespan Structures Ltd. under which Surespan agreed to design, supply and install precast concrete components for parking structures. Surespan then contracted with HGS Limited, which provided professional services for the project.

Prior to project completion, load-bearing structures supplied by Surespan began to crack. Graham demanded that Surespan correct these defects. Surespan undertook the work and sought indemnity under the loss mitigation coverage in Graham's professional liability policy.



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Following a summary trial, in *Surespan Structures Ltd. v. Lloyds Underwriters 2020 BCSC 27* the British Columbia Supreme Court held that Surespan was entitled to indemnity for the loss mitigation work. The court also found that there was no limit on the amount of available loss mitigation coverage.

## Court of Appeal decision

The Court of Appeal unanimously dismissed the appeal, affirming the lower court's decision.

The court held that the applicable standard of review was palpable and overriding error. The court identified the issue as whether the policy had been correctly applied to the facts, and distinguished *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* 2016 SCC 37 on the basis that the policy at issue in *Surespan* was the product of negotiation between the parties.

In doing so, the court implicitly acknowledged that the factual matrix might be useful in the interpretation of the policy, and that its interpretive exercise did not necessarily have substantial precedential value for other policies.

The court concluded that the language of the policy was unambiguous. Accordingly, the court focused on the wording of the policy with little emphasis on other interpretive aids employed in insurance policy interpretation.

The policy contained four separate grants of coverage, one of which was for loss mitigation. Importantly, while the other coverage grants were expressly subject to a limits of liability clause of \$10 million, the mitigation of loss coverage did not contain such language. Similarly, the limits of liability clause referred to all of the coverages except loss mitigation, which the court found suggested the limits of liability clause did not apply to that coverage.

Further, the court noted that the limits of liability clause stated that it applied with respect to "CLAIMS made against the INSURED." The court reasoned that this did not encompass the loss mitigation coverage, because that coverage did not require a third-party "claim" to be made and was intended to avoid such claims.

The insurer argued that a statement in the policy declarations, to the effect that insurance was only provided for coverages subject to a specific limit of insurance, limited the loss mitigation coverage. The court agreed the declarations had contractual force, but held that the more specific terms found elsewhere in the policy, which did not reference limitations on loss mitigation coverage, took precedence over this more general language.

The insurer also argued that a limit was expressed in a chart in the declarations which stated that there was a limit on "any one claim and in the aggregate including costs and expenses." The court held that "claim" in this provision, although it was not capitalized, should be interpreted in the same way as the defined term "CLAIM."

As a consequence, the court found that this provision did not apply to the loss mitigation coverage for the reason, discussed above, that no third-party claim was required to engage coverage. The court also concluded that the phrase "in the aggregate" modified the noun "claim," and therefore did not extend the aggregate limit to coverage not contingent on a "claim."

Finally, the insurer argued that it was inconsistent with commercial reality to accept that the parties would have intended a policy based on a fixed premium to confer unlimited mitigation of loss coverage for a \$400-million construction project. The insurer had offered evidence from one of its underwriters as to its commercial expectations in support of this argument at trial.

The Court of Appeal noted that this evidence had been admitted but given little weight and went on to question — without deciding the point — whether such evidence was properly admissible in the absence of ambiguity.

Regardless, the Court of Appeal rejected this argument. The court held that since the policy language was unambiguous, relying upon the commercial context in the way the insurer proposed would not inform the interpretation of the policy language but would "transform its meaning." The court also noted that the insurer made no argument of mistake or claim for rectification.

## **Takeaway**

This case highlights the importance of detailed analysis of the policy language in the interpretation of the extent of insurance coverage. It indicates that courts may be receptive to carefully developed arguments based on the plain language of a policy, even where that language leads to results that insurers claim are commercially unrealistic.

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