

CANADA / JUDGMENT

Surespan Structures Ltd. v. Lloyds Underwriters

2020 BCSC 27

COURT

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2020 BCSC 27 Surespan Structures Ltd. v. Lloyds Underwriters

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Surespan Structures Ltd. v. Lloyds Underwriters,

2020 BCSC 27

Date: 20200110

Docket: S1810530

Registry: Vancouver

Between:

Surespan Structures Ltd.

Plaintiff

And

Lloyds Underwriters, QBE Lloyd's Syndicate 1886 and QBE Lloyd's Syndicate DCH 386

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for Plaintiff:

K. Johanson

D. Miachika

Counsel for Defendants:

Counsel for Stantec Architecture Ltd.:

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E. Barchuk

J. Singleton Q.C.

Place and Date of Hearing:

Vancouver, B.C.

September 11-12 and October 17, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 10, 2020

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Introduction

- [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.

Background

The Project

- [2] The plaintiff, Surespan Structures Ltd. ("Surespan"), is a design-build contractor. Its work includes designing, manufacturing, and erecting precast concrete structures.
- [3] On June 25, 2014, the Vancouver Island Health Authority entered into an agreement with THP Partnership ("Project Co.") whereby Project Co. agreed to design, build, finance, maintain and perform life cycle rehabilitation for two new acute care facilities and associated parkades in Campbell River and Comox (the "Project").
- [4] Project Co. subcontracted the design-build portion of the Project to Graham Design Builders LP ("Graham"), pursuant to a design services agreement (the "DSA").
- [5] Graham in turn engaged Stantec Architecture Ltd. ("Stantec") to undertake the design portion of the Project and to retain the necessary sub-consultants. Graham also entered into subcontracts with Surespan whereby Surespan agreed to provide services regarding the parkade structures, including the design, supply and installation of all the precast concrete components.
- [6] Surespan then entered into its own subcontracts with HGS Limited ("HGS"), whereby HGS agreed to perform professional services with respect to the design of the parkades.

The Parkade Problem

- [7] In late November and early December 2016, Graham advised Surespan of the discovery of cracks in the load-bearing precast elements of the parkades (the "Parkade Defects") and asked Surespan to investigate. Surespan notified HGS of the Parkade Defects and sought its input on remediation.
- [8] On January 24, 2017, Graham demanded that Surespan repair the Parkade Defects.
- [9] Surespan engaged a structural engineer, Kassian Dyck & Associates ("KDA"), to review HGS's design and remediation recommendations. KDA prepared a report that identified a series of errors made by HGS.

The Parkade Remediation

- [10] HGS produced designs for the remedial work to address the Parkade Defects. KDA reviewed and revised these recommendations (the "Remediation Design"). Graham requested that Surespan perform remediation work in accordance with the Remediation Design in order to satisfy its obligations under its subcontract and to mitigate the Project delay.

- [11] Surespan undertook the remedial work. Surespan incurred over \$9.9 million in this effort. Surespan borrowed money to help finance this work and incurred financing charges as a result. Surespan sought reimbursement for the amounts it expended under an insurance policy issued by the defendants ("QBE").

The Policy

- [12] Pursuant to the DSA, Graham was required to obtain project specific professional liability insurance to cover not just Stantec and its sub-consultants, but all other consultants providing services to Graham. Graham obtained the Project Professional Liability Policy No. SPRO10778 (the "Policy") from QBE covering all parties providing professional services to the Project.

- [13] The Policy has a series of declarations pages (the "Declarations"). On the top of each Declarations page is the following language:

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.

- [14] After certain other heading language, the following appears near the top of each Declarations page, in very small type:

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.

- [15] The other material aspects of the Declarations are as follows:

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

- [16] The provision of insurance coverage is found in the body of the Policy, which follows the Declarations:

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.

I will refer to the coverages numbered 1 to 4 as the "Damage Coverage", the "Mitigation of Loss Coverage", the "Defence Costs Coverage" and the "Supplementary Payments Coverage" respectively.

[17] A subsequent clause in the body of the Policy speaks to the question of the limits of liability (the "Limits of Liability Clause"):

THE INSURER'S LIMITS OF LIABILITY

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 are, no matter how many INSUREDS there are under this POLICY or how many persons or organizations make a CLAIM, as shown in the Schedule Page of this POLICY as the Limits of Liability per CLAIM and in the aggregate for the POLICY PERIOD.

THE INSURER'S obligations to defend and make supplementary payments is included in the INSURER'S Limits of Liability.

[18] The relevant part of the schedule referenced in the Limits of Liability Clause (the "Schedule") states as follows:

Project Specific Professional Liability Insurance Schedule

Limit of indemnity: CAD \$10,000,000 any one claim and in the aggregate including costs and expenses

[19] The policy has a provision addressing the time when actions can be brought against the insurer (the "Action Against Insurer Clause"):

ACTION AGAINST THE INSURER: No action shall lie against THE INSURER unless as a condition precedent thereto ... the amount of the INSURED'S obligation to pay has been finally determined either by judgment against the INSURED after actual trial or by written agreement between the INSURED, THE INSURER and the claimant.

[20] The policy includes a clause regarding the policy period (the "Policy Period Clause") the material terms of which are as follows:

POLICY PERIOD

THE POLICY covers CLAIMS made against the INSURED for the first time during the POLICY PERIOD no matter when the actual or alleged error, omission or negligent act took place

Also, for the protection of the INSURED, if during the POLICY PERIOD circumstances of an error, omission, or negligent act which any reasonable person or organization would expect to subsequently give rise to a CLAIM are reported to THE INSURER, then THE INSURER will consider these a CLAIM even if a formal demand is advanced against the INSURED only after the POLICY PERIOD.

Any such CLAIM shall be subject to the Limits of Liability and EXCESS in effect at the time the circumstances were reported to THE INSURER.

[21] The Policy defines the material terms as follows (the "Definitions"):

Part 1 - DEFINITIONS

Throughout this POLICY certain words have been capitalized to indicate that they have a specific meaning as shown below:

CLAIM

- a) a written or an oral demand for money or services, or
- b) a written or an oral allegation of breach in the rendering or failure to render PROFESSIONAL SERVICES; received by the INSURED and resulting from a single error, omission or negligent act.

All CLAIMs arising from a single error, omission or negligent act shall be considered a single CLAIM regardless of the number of INSUREDS or the number of persons or organizations making a CLAIM.

CLAIM EXPENSE

All the expenses THE INSURER incurs to investigate, defend, mitigate, settle, arbitrate, or litigate a CLAIM covered by this POLICY. This includes costs and fees for the hiring of investigators, adjusters, experts, consultants, arbitrators, mediators, and lawyers and also court and arbitration costs and costs for the attendance of witnesses other than the INSURED.

DAMAGES

Compensatory DAMAGES payable to claimants but does not include interest, fines, penalties (whether contractual or other), or liquidated, punitive or exemplary damages, or fees which have either not been paid to the INSURED or which the INSURED has been asked to return.

PROFESSIONAL SERVICES

Whether as part of or incidental to the INSURED's business as building or engineering contractors the PROFESSIONAL SERVICES shall be defined as those services specifically described in the application which THE INSURED is legally qualified to perform for others, including but not limited to PROFESSIONAL SERVICES as an:

1. architect or engineer;
- ...; or
5. specialist engaged in a building science related to the construction process.

QBE's Response to Surespan's Request for Coverage

- [22] On January 13, 2017, Surespan gave notice to QBE of potential costs that would need to be incurred to remediate the parkades. Surespan sought QBE's consent to incur repair costs without prejudice to the QBE's other rights.
- [23] On January 30, 2017, having received no response, Surespan again wrote to QBE requesting coverage under the Policy.
- [24] QBE did not respond until March 31, 2017 when it wrote to Surespan acknowledging the request, but denying coverage on the basis that Surespan was not a named insured under the Policy.
- [25] On August 2, 2017, Surespan brought an action against HGS for negligence and breach of contract (the "HGS Litigation"). HGS then advanced third party claims against Stantec and KDA on September 8, 2017. Graham was added as a defendant on April 24, 2018. On November 21, 2018, Graham advanced a third party claim against HGS and a counter-claim against Surespan.
- [26] On August 29, 2017, Surespan filed a Petition (the "Surespan Petition"), seeking a declaration that it was insured under the Policy. HGS filed a similar petition. On June 27, 2018, Justice Winteringham issued an order (the "Winteringham Order"), declaring that:
- a) Surespan and HGS are each an insured under the Policy;
 - b) On or before 30 January 2017, QBE received a notice of a claim and a claim for coverage under the Policy from Surespan and HGS;
 - c) QBE, having received Surespan's notice of claim, was required to provide its written position on coverage and the reasons for it, and pay all covered claims within 60 days of the order, i.e. by 27 August 2018; and
 - d) By consent, Surespan would receive special costs for the hearing of the Surespan Petition

- [27] On August 15, 2018, on behalf of QBE, Charles Taylor Adjusting (the "Adjuster") contacted Surespan for the first time. The Adjuster requested additional information. Surespan provided that information. Thereafter, the Adjuster requested, and Surespan provided, further information about Surespan's expenses.
- [28] On August 20, 2018, QBE requested from Surespan an extension of the time to pay the claim under the Winteringham Order. Surespan agreed to extend the deadline to September 10, 2018.
- [29] On September 10, 2018, QBE wrote to Surespan suggesting that it would be necessary for a court to first pronounce judgment on Surespan's claim against HGS in the HGS Litigation in order to determine whether its expenditures arose from professional services under the Policy. QBE did provide Surespan with a cheque for \$47,978.71, but this was only for Surespan's defence costs incurred to defend the allegations made by Graham against Surespan in the HGS Litigation.
- [30] On September 28, 2018, Surespan filed this action to enforce the Winteringham Order and obtain payment under the Policy.

Stantec's Claim

- [31] As explained further below, there is an issue as to whether certain other commitments made by QBE under the Policy reduce any policy limit available to pay Surespan. The key commitment relates to amounts said to be payable to or on behalf of Stantec.
- [32] On November 4, 2016, Stantec advised QBE that Stantec had been put on notice of Graham's intention to advance a claim for loss or damage allegedly arising from Stantec's provision of design services (the "Graham Claim"). Stantec also advised QBE that it would potentially be making a claim under the mitigation of loss provisions of the Policy (the "Stantec Mitigation Loss Claim").
- [33] On July 31, 2017, Stantec provided QBE with details of the Stantec Mitigation Loss Claim expenses incurred totalling \$477,646.75.
- [34] On August 31, 2017, QBE authorized Stantec to settle the Graham Claim for up to \$1.2 million (with QBE to contribute \$700,000, and Stantec to pay the \$500,000 deductible).
- [35] On March 7, 2019, Stantec and Graham entered into an agreement in principle to settle the Graham Claim for \$1,409,000.
- [36] On April 6, 2019, Stantec provided the terms of the agreement in principle to QBE. Stantec's position was that QBE should now pay \$909,000 towards the settlement amount (\$1,409,000 less the \$500,000 deductible). In addition, Stantec sought confirmation that QBE would pay the \$477,646.75 in satisfaction of the Stantec Mitigation Loss Claim.
- [37] On April 12, 2019, QBE confirmed that it would pay the amounts requested by Stantec.

[38] On July 4, 2019, counsel for QBE wrote to counsel for Stantec, Surespan, and others stating:

Stantec Architecture submitted a claim for coverage under the Policy in relation to its potential liability to Graham Design Builders LP arising out of alleged defects occurring at the hospital buildings. Graham alleged errors, omissions, and negligent acts on the part of Stantec, and asserted damages in the amount of \$7,063,492. Stantec is the named insured on the face of the Policy.

Stantec submitted the Graham claim to QBE for coverage consideration. QBE investigated and confirmed coverage under the Policy for Stantec's exposure. The claim was ultimately resolved for \$1,886,646.75, of which QBE paid \$1,386,646.75 (i.e. the settlement sum less the deductible)

Between the Supplementary Payments and the Stantec Settlement, \$1,702,830.79 has been eroded.

QBE is prepared to accept the invitation of defence counsel for Surespan and pay the Remaining Limits into Owen Bird's trust account to allow those making claims for coverage under the Policy to determine a mechanism for payment of their respective claims.

[39] QBE's agreed amount has not yet been delivered to Stantec. The funds said to be payable to Stantec remain in trust with QBE's counsel. QBE's counsel advised the court that QBE was reluctant to pay out the amount to Stantec given that others were also making requests for payment that could impinge on a \$10 million limit under the Policy.

Other Insureds

[40] As noted above, HGS advanced its own request for payment from QBE, which was addressed as part of the Winteringham Order.

[41] On July 13, 2018, Graham delivered to Surespan its own interim proof of loss under the Policy and demanded that it be indemnified for its losses arising from the HGS Design Errors. Graham claimed \$2,914,862 for labour, material, equipment, supervision, and legal costs related to the parkade repair.

[42] In order to simplify the number of competing claims, Surespan was able to come to certain agreements with these other insureds before the hearing of this matter. HGS advised that it abandoned any claim it may have made on its own behalf for further recovery from QBE. Graham also agreed to refrain from making any objection to Surespan's summary trial effort, and agreed not to pursue HGS for amounts exceeding the available insurance from QBE. Graham also agreed with Surespan that any funds QBE was ordered to pay to Surespan would be put into trust for the benefit of both Surespan and Graham.

Chronology

[43] Surespan provided the following chronology of events which was of particular assistance in considering the "first past the post" issues. QBE did not take issue with the chronology:

4 November 2016

Stantec warns QBE that Graham has indicated an intention to claim; states Stantec is assessing its mitigation costs.

13 January 2017

Surespan warns QBE, via Aon, of the cracks discovered at both parkades and Graham's demand to repair them.

30 January 2017

Surespan urgently requests QBE's consent to incur mitigation costs.

1 March 2017

Surespan delivers invoice #1 to QBE for mitigation costs of \$262,852.36 (Affidavit of M. Sargent, Ex. "C").

31 March 2017

QBE denies that Surespan is "INSURED".

12 April 2017

Surespan delivers Invoice #2 to QBE for mitigation costs of \$243,599.22. Surespan has now claimed a total of \$506,451.58 in mitigation costs.

8 June 2017

Surespan delivers Invoice #3 to QBE for mitigation costs of \$585,163.34. Surespan has now claimed a total of \$1,091,614.92 in mitigation costs.

25 July 2017

Surespan issues invoice # 4 to HGS and QBE for mitigation costs \$422,985.17. Surespan has now claimed a total of \$1,514,600.09 in mitigation costs.

31 July 2017

Stantec provides QBE with a list of mitigation of loss costs "incurred to date" totaling \$477,646.75.

29 August 2017

Surespan brings petition against QBE

31 August 2017

QBE authorizes Stantec to settle with Graham for up to \$700,00; however, no settlement is made at this time.

4 December 2017 and 31 January 2018

Surespan's petition is heard.

27 January 2018

Surespan obtains judgment and QBE is ordered to adjust and pay Surespan's covered claim within 60 days.

28 June 2008

Surespan offers to deliver monthly cost reports with all back-up to QBE along with KDA's peer review report.

13 July 2018

Not having heard from QBE, Surespan delivers, among other things, its monthly costs breakdown (along with KDA's peer review report). Invoice #7 includes mitigation costs in the amount of \$68,252.76. Surespan has now incurred a total of \$9,142,208.41 in mitigation costs.

10 September 2018

Court-ordered deadline (as extended by agreement) to pay Surespan's covered claim expires.

28 September 2018

Surespan files notice of civil claim.

18 March 2019

Graham makes settlement offer to Stantec.

1 April 2019

According to affidavit of L. Mather (9 July 2019), QBE receives De Simone Consulting Engineers' report confirming (according submissions of QBE's counsel) HGS's professional error and that Surespan's repairs were reasonable.

12 April 2019

QBE authorizes Stantec to settle per Graham's 18 March 2019 settlement offer and agrees to indemnify Stantec \$1,386,646.75.

16 April 2019

Counsel for Surespan delivers Wayne Kassian's expert report to counsel for QBE.

24 May 2019

Stantec demands that QBE tell the other insureds that Stantec's claim has priority and reference a scheduled meeting in London with "QBE lead underwriters on our practice cover".

20 June 2019

Surespan files summary trial application materials and supporting evidence claiming at least \$9,905,849.81.

4 July 2019

QBE tells Surespan, for the first time, in a "WITHOUT PREJUDICE" letter, that it has "paid" \$1,386,646.75 to Stantec (QBE now admits it has made no such payment).

10-11 July 2019

Surespan's summary trial application is set to be heard, but is adjourned due to lack of judges.

QBE's Own Expenses

[44] There is an issue as to whether QBE should be able to deduct certain of its own Claim Expenses in the determination of any limit. QBE says that it incurred the following Claim Expenses:

- a) Investigation and adjustment by the Adjuster: \$112,185.00;
- b) Expert engineering advice from LEA Consulting Ltd. ("LEA"): \$8,136.00;
- c) Expert engineering advice from De Simone Consulting Engineers (De Simone): US\$144,995.82/CDN\$191,905.06; and
- d) Quantity surveying by MKA Canada Inc. ("MKA"): \$3,957.98.

Analysis

The Issues Remaining at the Hearing

[45] The issues between the parties narrowed somewhat by the time the hearing commenced. For example, save for the financing costs, QBE no longer disputed that the amounts expended by Surespan were reasonably incurred.

[46] However, QBE did still seek to argue that the amounts payable to Surespan must be constrained by:

- a) a \$10 million insurance limit, reduced to account for:
 - i. QBE's agreement to pay out amounts to or on behalf of Stantec, and
 - ii. the Claim Expenses incurred by QBE itself;
- b) the need for Surespan to establish that the amounts expended were incurred as a result of professional design failures rather than construction failures; and
- c) a lack of coverage for any financing costs.

[47] At the outset of the hearing, QBE no longer took the position that the matter was unsuitable for summary trial. However, as the arguments evolved, QBE appeared to reverse course on this issue to some extent. To the extent that this issue was properly resuscitated, I find that this was an appropriate matter for summary determination, in particular given the driving importance of ensuring that the Winteringham Order was respected. Given that (1) the core issue was a point of contractual interpretation; (2) there was a great volume of evidence available covering all issues; and (3) there was no material conflict on the relevant evidence, I am comfortable that the matter can be fairly determined at this time. I discuss this in some further detail below.

General Principles of Insurance Policy Interpretation

- [48] The general principles governing insurance policy interpretation are summarized in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37:
- [49] The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in *Progressive Homes*. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole
- [50] Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the 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
- [51] 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 *Progressive Homes* provides that a corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.

[Citations omitted.]

Applicability of the Limit

- [49] Surespan argues that the Mitigation of Loss Coverage under which it made its demand is outside the scope of any stated limit in the Policy.
- [50] Both sides argued that the Policy is clear and unambiguous on this issue. I also agree that the Policy can be interpreted without a resort to the principles applicable in the case of an ambiguity. However, only one party can be (unambiguously) correct. I find that it is Surespan's proposed interpretation of the Policy that should be accepted.

Generally

- [51] Given that the Winteringham Order already established that Surespan is insured and it is QBE that relies on a limit to its coverage, the burden rests on QBE to establish the extent of any limit: *PCL Constructors Westcoast Inc. v. Royal & Sun Alliance Insurance Company of Canada*, 2019 BCSC 822, at paras. 31-32; *Lombard Canada Ltd. v. Zurich Insurance Co.*, 2010 ONCA 292, at para. 34.[1]
- [52] The Mitigation of Loss Coverage should be interpreted broadly in favour of coverage: *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72 at para. 49.

The Applicability of the Limit to Certain Coverages Only

- [53] As outlined above, there are four separate coverages provided by the Policy:
- a) Damage Coverage;
 - b) Mitigation of Loss Coverage;
 - c) Defence Costs Coverage; and
 - d) Supplementary Payments Coverage.
- [54] Does the \$10 million limit apply to all four? I find that it does not.
- [55] First and most importantly, as a matter of pure textual construction, the subparagraphs granting the Damages, Defence Costs, and Supplementary Payments Coverages each expressly refer to and apply a limit of liability. Notably, the grant of Mitigation of Loss Coverage includes no such reference.
- [56] I find this absence of limits language in one of the four coverages of particular significance to the proper interpretation of the Policy. In the world of statutory interpretation, this is referred to as a "failure to follow a pattern of express reference". Ruth Sullivan describes the principle as follows in *Construction of Statutes*, 6th ed. (Markham: Lexis Nexis, 2014) at 251:

As much as possible, drafters strive for uniform and consistent expression, so that once a pattern of words has been devised to express a particular purpose or meaning, it is presumed that the pattern is used for this purpose or meaning each time the occasion arises. This convention naturally creates expectations that may form the basis for an implied exclusion argument. This point is made by Iacobucci J. in *R. v. Ulybel Enterprises Ltd.* when he writes:

[H]ad Parliament intended the phrase "any proceeds of its disposition" [in s. 72(1) of the Fisheries Act] to be limited to proceeds of [seized] perishables, it could have done so expressly, as it did in ss. 72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it refers more generally to all forms of property seized under the Act and proceeds thereof.

Patterns in legislation are assumed to be intended rather than inadvertent. Once a pattern has been established, it becomes the basis for expectations about legislative intent.

[Footnotes omitted.]

- [57] "Just as in statutory interpretation, so also in contract interpretation." :*Jacobsen v Bergman*, 2002 BCCA 102 at para 4. See also *Hanna Collision Repair (1984) Ltd. v. Insurance Corp. of British Columbia*, 2010 BCCA 490 at para. 58.
- [58] I see no grammatical or textual reason why the Mitigation of Loss Coverage would not also require an express reference to the limit, had that been a proper expression of the parties' intent.
- [59] QBE suggests the limits language may have been omitted because the Mitigation of Loss Coverage is subsidiary to the Damage Coverage, i.e. the Mitigation of Loss Coverage is designed to avoid the potential for a Damage Claim, and hence is subsidiary to that coverage and can effectively "free ride" on the reference to the limit in the Damage Coverage.
- [60] However, were that analysis correct, the Defence Costs Coverage would be even more subsidiary. Indeed, there is never a need for defence costs to be incurred unless and until a claim for damages is made against an insured. Nonetheless, the Defence Costs Coverage still specifically references the limit.
- [61] The Mitigation of Loss Coverage is less subsidiary than the other coverages. As QBE acknowledged, it is more in the nature of first party coverage. Under this coverage, expenses incurred by the insured are reimbursed to the insured, rather than being losses of a third party paid to a third party. There is no need for a claim by a third party in order to trigger the coverage. The amount paid under such coverage does not reflect damages suffered by another, but rather the "costs of remedying defects in the WORKS in order to fulfil contracts".

The Limits of Liability Clause

- [62] A second basis supporting Surespan's interpretation is the language of the Limits of Liability Clause. This clause specifically refers to the limit being applicable in the case of "CLAIMS made against the INSURED". However, in the case of the Mitigation of Loss Coverage, there is no need for a "CLAIM" to be made against the insured. Indeed, the purpose of the provision is clearly to avoid the prospect of a Claim being advanced against the insured, by allowing defects to be corrected before the situation necessarily develops into a Claim. The potential for a claim is precisely what is being "mitigated". Indeed, as QBE conceded, it is possible for a mitigation of loss claim to be made by an insured without the owner or head contractor ever knowing that the problem existed. Further, as noted above, payment under the Mitigation of Loss Coverage is made to the insured, not to a third party who has advanced a claim against the insured.

- [63] Surespan's position is further supported by the reference in the Limit of Liability Clause to the Schedule. The Schedule again refers to the limit being applicable to "any one claim and in the aggregate".

The Declarations

- [64] QBE raises a series of arguments flowing from the language of the Declarations.

Limit Requirement Preamble

- [65] QBE relies on the pre-printed very small font statement at the top of each Declarations page (the "Limit Requirement Preamble"):

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.

- [66] QBE's invocation of the Limit Requirement Preamble as support for its position faces two challenges.
- [67] First, QBE cannot argue that the Limit Requirement Preamble actually creates the limit on the Mitigation of Loss Coverage. Rather, applied independently, if there were no Limit of Liability found elsewhere in the Policy, the implication of the Limit Requirement Preamble would be that there would be no Mitigation of Loss Coverage at all. However, QBE does not go this far. QBE agrees that the Policy must be interpreted so as to maintain the Mitigation of Loss Coverage. As such, QBE is left arguing that this preamble is more in the nature of an interpretative aid, rather than driving QBE's proposed result on its own.
- [68] Hence this case is not akin to that in *Yip v. Davies*, [1999] B.C.J. No. 1836 (S.C.), where the court allowed a broad exclusion to cover a situation where there were also specific exclusions governing specific situations. Here, there is no overarching limit clause that overlays the Mitigation of Loss Coverage. At best the Limit Requirement Preamble sets out what would happen if there is no limit. It does not impose an overarching limit on its own.
- [69] QBE's second difficulty is that the Limit Requirement Preamble itself states that it applies "on terms and conditions contained in the forms indicated". In other words, it is subject to the rest of the Policy. This makes sense since, as QBE acknowledged, the Declarations pages are only a summary of some of the Policy's key terms: Alan S. Rutkin and Robert Tugander, *The Reference Handbook on the Commercial General Liability Policy*, 2nd ed. (Chicago, IL: American Bar Association, 2014) at 3.
- [70] Once one accepts that the Policy is to be interpreted as a whole, there is far more detailed and specific language on the applicability of the limit in the body of the Policy itself. We have already carefully examined these detailed words in the body of the Policy, and illustrated how the specific language does not favour QBE's interpretation.

Declarations Limit Language

[71] QBE also seeks to rely on the Declarations' language cited below (the "Declarations Limit Language"):

limit of

Form No. Type of Coverage DEDUCTIBLE COINS.%INSURANCE

Liability

Professional Liability (Claims Made)

Type of professional services Consultant

Limit of Liability

Any one claim and in the aggregate including costs 10,000,000

and expenses

[72] QBE argues that the Declarations Limit Language must be read as creating a limit for all coverages, including the Mitigation of Loss Coverage. However, this argument faces similar challenges to those discussed above.

[73] First, although this summary language refers to the Policy being "claims made" and the limit applying to "any one claim and in the aggregate", we have already noted that the specific Mitigation of Loss coverage at issue does not in fact require that a claim be made. It is more akin to first party coverage that can be triggered in the absence of a claim. This suggests that the Declarations are not intended to be a comprehensive free-standing statement of the details of the specific coverages provided by the Policy. The Declarations Limit Language is summary, short-form, and not stated in complete sentences. For these reasons, it is difficult for QBE to argue that the Declarations Limit Language should be given greater weight than the comprehensive language found within the Policy itself.

[74] Second, the Declarations Limit Language can in fact be read consistently with the coverage grant language, in that it suggests that the Limit of Liability applies only to those coverages that are in fact "claims made".

CLAIM v. claim

[75] QBE relies on the fact that the word "claim" is in lower case in the Declarations. QBE argues that Surespan cannot rely on the defined term in upper case ("CLAIM") to assist its position. Indeed, QBE suggests that the use of lower case in the Declarations must mean that "claim" is actually intended to have a different and broader meaning that includes the Mitigation of Loss Coverage.

- [76] QBE places too much weight on the form of the Definitions language. The Definitions do not affirmatively state that the same word cannot have the same meaning absent capitalization when used outside the core Policy language. This interpretation is supported by the fact that the Declarations do not use capitalized terms outside of its headings. For example, it uses the words "Insurer", "Insured" and "Professional Services", all without using the capitalized form found in the Definitions.
- [77] As Surespan argued, an insurer who uses an undefined term to exclude or limit coverage does so at its peril. Such terms will generally be construed in favour of coverage for the insured, in order to avoid a "trap for the unwary": *Axa Insurance (Canada) v. Ani-Wall Concrete Forming Inc.*, 2008 ONCA 563 at para. 17. In my view, allowing "claim" to have a broader scope than "CLAIM" for the benefit of the insurer would be such a trap.

"In the Aggregate"

- [78] Next, QBE relies on the language, "in the aggregate", to argue that this must be intended to capture all types of coverage under the Policy. The main problem with this argument is grammatical. I find that the words "in the aggregate" are intended to modify the noun "claim", rather than purporting to alter or add a new noun of a different character.

Costs and Expenses

- [79] QBE argues that the reference to "costs and expenses" in the Declarations must be a reference to the "costs of remedying defects" available through the Mitigation of Loss coverage. However, I find that this expression more logically refers to the Defence Costs and Supplementary Payments Coverages. Because it is in such close proximity to the word "claim", it is more logical that "costs and expenses" refers to these costs and expenses associated with defending a "claim". This is consistent with the language of the coverage grant within the Policy which does impose the limit on the Damage, Defence Costs and Supplementary Payments coverages.

The Redundancy Problem

- [80] Under QBE's interpretation of the Declarations, there is a redundancy issue. The reference to the limit in three of the four coverages in the coverage grant provision of the Policy would be unnecessary, since the limits protection would already have been created by the Declarations.
- [81] Although redundancy is not fatal, it is preferable to adopt an interpretation in which all words of a contract are given meaning: *Duncan v. Sherman*, 2006 BCCA 14 at paras.14-15.

- [82] It is true that where a term of a Policy is clear, unambiguous, and capable of only one interpretation, it will not be ignored merely because it is redundant: *Yip; Harbour Machine Ltd. v. Guardian Insurance Company of Canada* (1985), 60 B.C.L.R. 360 (C.A.). For example, a clearly implemented "belt and suspenders" approach to exclusions may properly support overlapping exclusions.
- [83] But an interpretation that would render certain words "meaningless", "useless or inexplicable", is nonetheless to be avoided: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2009 BCCA 129 at paras. 77-78, rev'd on other grounds 2010 SCC 33. QBE has not adequately explained the alleged redundancy: *Cabell v. Personal Insurance Co.*, 2011 ONCA 105 at para.22.
- [84] In *Bridgewood Building Corp. v. Lombard General Insurance Co. of Canada*, [2006] O.J. No. 1288 (C.A.) at para. 14, leave to appeal to SCC ref'd [2006] S.C.C.A. No. 204, Moldaver, J.A. (as he then was), stated:

The approach suggested by Lombard is problematic for several reasons. It defies basic principles of contract interpretation -- we are asked to read a host of exclusionary provisions out of the insuring agreement on the ground that they are redundant and thus meaningless.

- [85] As such, I find that an interpretation of the Policy that avoids redundancy, and which is still consistent with the language of the Policy, is to be preferred.

Case Law and Academic Commentary on the Treatment of Declarations

- [86] The key authority upon which QBE relies to support its interpretation of the Declarations does not support the principle for which it is advanced. The decision in *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142 Wash.2d 654 (2000) actually supports the view that limits may apply to certain coverages and not others. The court noted at p. 665:

We first consider whether the supplemental policy contains a property damage aggregate of \$1,500,000, limiting the insurer's total liability for property damage to this sum for the policy period. The trial court held that the policy language imposes no aggregate limit for property damage claims, only aggregate limits for products liability and personal injury claims... We agree.

[Emphasis in original.]

- [87] *Weyerhaeuser* involved claims for property damage under an excess insurance policy for comprehensive environmental response. The excess policy would be triggered if the underlying policy paid the full amount of its liability, stated in the excess policy to be (at p. 666):

\$[500,000] ultimate net loss in respect of each occurrence, but \$[500,000] in the aggregate for each annual period separately in respect of Products Liability and separately in respect of Personal Injury...

[Square brackets in original.]

[88] At that point, the excess insurance would be engaged, and the excess insurer would pay up to (at p. 666):

[\$1,500,000] ultimate net loss in respect of each occurrence--subject to a limit of [\$1,500,000] in the aggregate total for each annual period during the currency of this Policy, separately in respect of Products Liability and separately in respect of Personal Injury"

[Emphasis in original, square brackets in original.]

[89] Similar to QBE's position here, the excess insurer argued that the use of the term "aggregate" meant that there must be a limit of \$1,500,000 for all claims. The appeals court disagreed. The majority found that the clause "imposes an aggregate limit for products liability and personal injury claims but calls out no general aggregate limit for other types of claims, including property damage". The court went on to say at p. 688:

[I]f CU had intended to place an aggregate limit on property damage it would have said so. ... If there are multiple occurrences within an annual period the plain language of this policy does not limit the insured's aggregate recovery for property damage or other types of loss aside from products liability and personal injury."

[90] As such, Weyerhaeuser stands for the proposition that, where a limit of liability clause sets out the specific coverages to which the limit applies, the limit does not necessarily apply to other coverages not mentioned in the limit clause.

[91] More generally, U.S. case law supports the view that a policy's declaration pages are generally subordinate to specific terms in the policy absent specific language to the contrary. In *Auto-Owners Ins. Co. v. Barnes* (1988), 188 Ga. App. 439, the court held that general provisions in the declarations did not control later specific provisions of the policy. The court stated at p. 440:

[W]e find the language in the declarations to be merely a general statement as to the type of property covered by the policy, the terms of coverage for which are set out specifically later in the policy.... It is well established that "[u]nder the rules of contract construction, a limited or specific provision will prevail over one that is more broadly inclusive"...

[References omitted.]

[92] See also *Geico Casualty Co. v. Clampitt*, 521 S.W.3d 290 at p.293 (Mo. Ct. App. 2017); *Owners Ins. Co. v. Craig*, 514 S.W.3d 614 at pp.617-618 (Mo. 2017).

[93] In *Bond v. Liberty Ins. Corp.*, 272 F. Supp. 3d 1112 (W.D. Mo. 2017), the court held that a deductible referenced in the declarations did not apply to all coverages. The court stated:

Liberty, however, contends that the Declarations page, which includes reference to the general Section I deductible, is enough to require Plaintiffs to pay a deductible on all claims. According to Liberty, the Declarations show that the "default" rule is that a deductible always applies to a loss

unless expressly excluded. Contrary to Liberty's argument, this provision does not state that the class members' claims are subject to a deductible regardless of the compensation style selected. First, the Declarations' reference to a deductible does not "clearly communicate the coverage" of the deductible to a policy holder's claim because on its face-nothing in the Declarations references under what circumstances the Section I deductible will be applied. Instead, the conditions governing when this deductible is applied are set out in the remainder of the policy. Therefore because the Declarations are not clear standing alone as to when deductible applies, the Court must turn to the terms laid out in the remainder of the policy. And, as described above, the terms of the base policy and Home Protector Plus Endorsement do not require the payment of a deductible on ACY claims.

[94] QBE relies on an excerpt discussing aggregate limits from Craig Brown, Glenn Zakaib and Thomas J. Donnelly, *Insurance Law in Canada*, (Toronto, Ont: Carswell, 2002) (loose-leaf release 2019-7) ch. 18.10 (b) stating "[t]he aggregate limit, as its name implies, caps the total amount available under all the coverages during the period." However, this quote relates to the policy wording found in a standard form IBC 2100 CGL policy also excerpted in the text:

The Limits of Insurance stated in the Declarations and the rules below fix the most we will pay regardless of the number of a. Insureds; b. "Claims made or 'actions' brought"; or c. Persons or organizations making claims or bringing 'actions'.

The Aggregate Limit is the most we will pay for the sum of: a. Medical expenses under coverage C; and b. Compensatory damages under Coverage A, Coverage B, and Coverage D."

[95] As such, the IBC policy carefully provides that the aggregate limit applies to a specific list of available coverages, and expressly incorporates the language of the Declarations. This is different from the Policy here.

[96] The text goes on to state at chapter 18-10(a):

Section 3 of the Declarations Page of the CGL specifies the amounts for five types of insurance limits: ... The first clause of Section III [of the policy] sets out rules for interpreting these limits ... The limits apply only to the compensatory damages payable under Coverages A, B, and D, and medical expenses payable under Coverage C. The limits do not apply to the costs and expenses incurred in defending claims.

[Emphasis added.]

[97] This extract illustrates that, even in the standard form IBC policy, it is possible to have an aspect of coverage that is not bound by the limits.

The Policy Period

- [98] In sur-reply, QBE argued that the wording in the Policy Period Clause also supports its position. Specifically, QBE argued that this clause recognizes a situation where expenses are incurred prior to a formal third party claim, but the Clause suggests that the insurer will nonetheless consider this situation a CLAIM, to which must be applied the Limits of Liability.
- [99] Given that this argument arose very late in the day, I provided Surespan with the opportunity to make further written submissions.
- [100] Upon review of those submissions, I agree with Surespan that this clause was intended to control what it is stated to control -- the timing of claims that will be accepted under the Policy -- and was not created to govern the content or limits to the coverages.
- [101] As discussed above, three of the four coverages require a CLAIM in order to trigger the policy. Even QBE acknowledges that a CLAIM is not always required under the Mitigation of Loss Coverage. I find that the Policy Period Clause's reference to CLAIMS cannot be read as seeking to govern or amend the language of the Mitigation of Loss Coverage or the Limits of Liability.
- [102] The Policy Period Clause states that the Policy applies only to CLAIMS made "for the first time during the Policy Period". There are three preconditions to trigger coverage for "CLAIMS", namely: 1. the Insured must report the CLAIM to the Insurer during the Policy Period; 2. the Insured must have no knowledge of the CLAIM prior to the Policy Period; and 3. there must not be any other collectible insurance available concerning the CLAIM.
- [103] An additional element said to be added for the "protection of the Insured" states that, if the Insured becomes aware during the policy period of a negligent act which may subsequently "give rise to a CLAIM", and reports it to the insurer during the Policy Period, it will be considered a "CLAIM" even if the formal CLAIM is first made after the Policy Period. This clause is expressly stated to control the management of CLAIMS and concerns the timing of such CLAIMS. Absent this provision, a claim based on a negligent act during the policy period, but not advanced by a third party against the Insured until after the Policy expired, would not meet the conditions for coverage. The Policy Period Clause makes the policy more forgiving in favour of the insureds by providing coverage for any such claim made after expiry if the potential claim is reported during the Policy Period. It was not intended to narrow or limit the Mitigation of Loss Coverage.
- [104] I find that the Policy Period Clause does not convert the first party Mitigation of Loss cover into third party claims-made coverage governed by a limit.

Insurer Intention and Mistake

- [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.

What if the Policy is Properly Found to be Ambiguous

- [108] If I am wrong in concluding that the wording of the Policy is clear, and the Policy is determined to be ambiguous, I would still conclude that a finding should be made in Surespan's favour.
- [109] A finding of ambiguity does allow for a broader review of extrinsic evidence and commercial reasonableness. Where the language of the insurance policy is ambiguous, the court may prefer an interpretation that is consistent with the reasonable expectations of the parties. However, such an interpretation must still be supported by the text of the policy. Reasonable expectations are simply an interpretive tool that may assist a court in resolving ambiguities. It does not operate to create ambiguity where there is none in the first place: Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., 2016 SCC 37 at para. 50.
- [110] As it relates to the use of extrinsic evidence, the Supreme Court of Canada stated as follows in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (Hayes Forest Services, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall,

at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

- [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.
- [111] Extrinsic evidence is not admissible to "insert words into a contract" or re-write the parties' agreement. Evidence of one party's subjective intent is never admissible: *Le Soleil Hospitality Inc. v. Louie*, 2007 BCSC 595 at para. 7, *aff'd* 2008 BCCA 206; *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at para. 25.
- [112] In *Insurance Law in Canada*, ch. 18-10(b), footnote 328, the authors make the following point about the effect of ambiguity in relation to insurance limits:
- Any uncertainty or vagueness in the drafting of the aggregate limit and its interpretation in the CGL policy will usually be construed against the Insurer, *per contra proferentem*, such that each occurrence claim could be interpreted as having a maximum limit equal to the aggregate limit. See e.g. *Continental Insurance Co. v. Law Society (Alberta)* (1984), 8 CCLI 13 (Alta. CA), leave to appeal *ref'd*, where the insurer was ordered to respond to claims involving its aggregate limits for two separate claims in the same policy year because the aggregate limit was deficiently drafted.
- [113] The defendants proffered certain information from an underwriter who was not directly involved in the negotiation of the Policy, which evidence was designed to suggest that QBE would never write coverage without a limit. Surespan criticized the admissibility and weight of this evidence as follows:
- a) Mr. Pidduck vaguely refers to an "underwriting philosophy or 'appetite' mandated by QBE European Operations", but he does not explain who mandated it, what it is, or how he knew about it (para. 4). Instead, Mr. Pidduck relies on a document created after the Policy was issued (paras. 6-7). Mr. Pidduck does not depose that he was the author of the document, so the paragraphs of his affidavit that purport to interpret it are simply argument (7- 11).
 - b) As the Policy was admittedly negotiated and it was not a QBE standard form, similar fact evidence of QBE's practice is irrelevant. It is also telling that Mr. Thompson, who was directly involved, has not provided any evidence about QBE's "appetite".

- c) Mr. Pidduck does not establish the source of his knowledge for his assertions at paras. 11-12 or why he would know that QBE "has never" done something. Again, Mr. Pidduck did not underwrite the particular Policy and has not confirmed (and could not confirm) that the Policy was underwritten in accordance with QBE's normal underwriting procedures. In fact, it appears that it was not. The evidence of Mr. Thompson confirms that the Policy was negotiated and it was not a QBE standard form policy.
- d) Above all, Mr. Pidduck was not involved and does not know whether QBE's normal practice was in fact followed in the case of the Policy. Further:
 - i) Mr. Pidduck does not explain in any detail QBE's normal practice and does not confirm that it was an invariable practice;
 - ii) Mr. Pidduck does not state whether the practice is followed in the U.K. as well as in Toronto;
 - iii) Mr. Pidduck does not state whether this "practice" was found in any written policy (but since he has sought to enter into evidence a later document, it can be inferred that no such written policy existed at the time the Policy was issued), or whether QBE engages in any training or enforcement of its "normal practice"; and
 - iv) Mr. Pidduck does not provide any detail as to why he believes that this practice was followed in the circumstances.

[Emphasis in Original.]

- [114] I agree that these weaknesses in Mr. Pidduck's evidence greatly reduce its weight. In particular, it does not tilt the scales against the weight of the contra proferentum principle. Specifically, the evidence is insufficient to establish that QBE would never write a policy without a limit upon its Mitigation of Loss Coverage.
- [115] In terms of commercial reality, it is worth noting that the decisions in Weyerhauser and Bond show that it is not impossible to find examples of insurers writing policies that have no limit on certain aspects of their policies. Further, as QBE accepted, it is common for defence costs not to be limited.
- [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.

Reductions to the Available Limit

[118] Given that I have found that the limit does not apply to the Mitigation of Loss Coverage, it is not necessary for me to resolve what amounts would need to be deducted from a limit, if it applied. However, as this issue was comprehensively argued, I provide my alternative findings below.

Generally

[119] Both parties agree that the "first past the post" principle should govern. In other words, if amounts have previously been committed under a limit, the insurer is entitled to reduce the amount payable to any remaining insureds by those amounts committed. The insurer can pay out its commitments in the order in which they were incurred without fear of reprisal from subsequent insureds: *Re: Aviva Canada Inc.*, 2006 BCSC 1578 at paras. 20-23, 29-30.

[120] The Alberta Court of Queen's Bench considered the application of the "first past the post" rule in the context of a project professional liability insurance policy in *Commerce & Industry Insurance Company Canada, Inc. v. Singleton Associated Engineering Ltd.*, 2005 ABQB 500. While acknowledging that there are potential inequities in the application of the rule, where the ordering of determined claims is established by an insurer fulfilling its duty of utmost good faith to all of its insureds, the court held that such an ordering should be upheld for reasons of commercial efficiency: at paras. 40-41, 45.

When did Stantec and Surespan's Expenses Pass the Post

[121] Surespan argued that the Mitigation of Loss Coverage created a duty on QBE to indemnify insureds as qualifying expenses were incurred.

[122] Neither party was able to turn up a decision that considered how to apply the "first past the post" principle in the context of first party insurance. However, Surespan draws an analogy to a type of coverage akin to first party coverage -- that for defence costs. In *Laidlaw Inc. (Re)*, 2003 CanLII 24570 (Ont. S.C.J.), the court was asked by the insurer to approve payment of defence costs and settlements and judgments in the order in which they were incurred, agreed to, or obtained. The court granted the declaration. Surespan argues that *Laidlaw* stands for the principle that where an obligation to indemnify arises when the costs are incurred, the post is reached when such costs are incurred.

[123] The weight of the *Laidlaw* decision is somewhat weakened by the fact that this aspect of the order was not contested (para. 3). The same can be said regarding the decision in *Aviva*. However, these courts did consider the underlying policy basis for the rule, which also applies generally in the case of pure first party insurance (*Laidlaw*, paras. 14-17; *Aviva*, para. 23). In *Aviva*, this policy was expressed as follows:

[23] Such an approach is the fairer option as it encourages early settlement which lessens the burden on the courts; it rewards those claimants who diligently move their claims forward; and it affords judgment creditors the opportunity to realize the fruits of their judgments as soon as possible.

[124] More importantly, the findings in these decisions are consistent with the language of the Policy here. The Mitigation of Loss Coverage states:

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).

[Emphasis added.]

[125] As such, under this coverage, the right to obtain payment from the insurer is contingent on (1) when the expenses are incurred, and (2) when consent is either granted or unreasonably withheld.

[126] Surespan says that it first passed the post by the end of March 2017 when QBE declined to pay Surespan's first invoice submitted under the Mitigation of Loss Coverage. By this date, the two qualifications noted above were met. Expenses had been incurred. Consent was sought and, as is now clear, consent was unreasonably withheld. The denial was based on the position that Surespan was not an insured under the Policy, but Justice Winteringham determined that Surespan was an insured.

[127] However, it is only the amounts incurred and refused at that time that passed the post in March 2017, or \$262,852.36. The crystallization of Surespan's later expenses is discussed further below.

[128] I find that under the Mitigation of Loss Coverage, the passing of the post should generally be deemed to have occurred on the earliest of a formal denial of coverage, or sixty days after the submission of the expense. I apply this time frame as the Insurance Act, R.S.B.C. 2012, c. 1 effectively gives the insurer sixty days to adjust an expense before it can be subjected to litigation. Section 23(2) reads:

(2) An action must not be brought for the recovery of money payable under a contract of insurance until the expiration of 60 days after proof, in accordance with the contract

(a) of the loss, or

(b) of the happening of the event on which the insurance money is to become payable,

or of such shorter period as may be set by the contract of insurance.

[129] This general rule is subject to potential exceptions. For example, if it is clear that the sequence of submissions to an insurer has been artificially managed in bad faith, a different ordering may be justified: *Aviva*, at para. 21; *Commerce*, at para.45. However, there is no evidence of such manipulation here.

Can the Amount Payable be Determined at this Time?

[130] QBE argues that it is not yet known whether it failed to properly adjust even Surespan's first submitted expense because it remains possible that a court in the HGS Litigation could find that some or all of the problems were caused by difficulties other than those that relate to professional services. Hence, QBE argues that it is possible that Surespan has not yet passed the post at all.

[131] However, the Winteringham Order (and subsequent short extension agreement) required that QBE pay what is covered now. It is not an option for QBE to ignore the timing provided for in the Order. QBE could have appealed the Winteringham Order if it was of the view that it was not possible to determine the amounts owing at this time.

[132] Furthermore, I find that whether the amounts were incurred in relation to errors in the performance of professional services can be determined now. Surespan has filed sufficient expert evidence for the Court to conclude that the errors arose as a result of professional services. I rely, in particular, on the April 16, 2019 report from KDA, which concludes as follows:

3.17 With respect to precast design services performed by HGS and HGS's failure to meet the standard of practice of a reasonably prudent and competent structural engineer performing precast design services in British Columbia, the above items are not a complete list and there are other HGS errors and omissions that are not included in this opinion.

4. Remedial work describe in HGS's 2017 Repair Drawings was reasonably required to ensure the CMX Parkade and CBR Parkade conformed with the BC Building Code 2012 and CSA A23.3

[133] This evidence is sufficient to establish that there was a "defect in the WORKS result[ing] from an error, omission or negligent act in the performance of PROFESSIONAL SERVICES". Surespan's contractual onus has been met.

[134] If QBE wished to contest this evidence, they could have done so at this hearing. QBE had an obligation to put its best foot forward: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 32. QBE did not file the expert evidence that it did in fact obtain. I find that this failure raises an adverse inference: *Liu v. Luo*, 2018 BCSC 1237 at para 33.

[135] While it is true that in its pleadings in the HGS Litigation, Surespan raises the potential for errors beyond design, I find that this is simply understandably cautious pleading. It does not prevent this court from making the necessary findings to assess Surespan's entitlement to coverage for expenses incurred based on the available evidence.

- [136] Indeed, to suggest that the amount payable under Mitigation of Loss Coverage cannot be determined until the resolution of any underlying litigation, is inconsistent with the purpose of such coverage. This coverage is primarily designed to avoid a claim ever being launched. As such, it must have been intended that payments might be made before the issue is finally determined in third party litigation. This is consistent with the policy underlying the "first past the post" rule, expressed as follows in Aviva:
- [25] Should those claimants who have diligently brought their claims forward and now wish to negotiate settlements with Aviva be forced to wait until all potential claimants have come forward and had their cases heard? To deny those claimants who wish to enter into negotiated settlements in order to receive their just compensation as soon as possible is to impose upon them a profound unfairness.
- [137] The implication of QBE's argument is that no request for payment under the Mitigation of Loss Coverage could ever be paid until all potential tort claims are finally resolved. This cannot be correct, as it would largely defeat the purpose of such coverage.
- [138] QBE seeks to rely on *Hertay v. Insurance Corp. of British Columbia*, [1990] B.C.W.L.D. 1932 (S.C.). I note that this decision did not involve an insurer's obligation to pay first party expenses already incurred. Rather it involved a request for an indemnity payment on a third party claim before that third party claim was resolved. Further, other potentially interested parties in that case declined to participate, whereas the other interested parties here were served and either made special arrangements allowing the matter to proceed without their involvement, or, in the case of Stantec, did appear to make submissions.
- [139] There are other problems with QBE's position that Surespan's coverage is not yet ripe for determination:
- a) QBE suggested on the first day that this matter was presently capable of summary determination;
 - b) QBE suggested earlier in the hearing that it was not contesting Surespan's expenses. Their counsel stated:

MR. SMITH: With apologies to my friend and the court. What you will not hear from us is, given where our investigation had led us, that there is any grounds upon which to assert that there are construction defects. Those are nowhere in my submissions. They remain an issue in the underlying proceedings, and there has been a certain amount of caution that had dictated, given our obligations to HGS. So we do not take issue with that. We do not take issue that -- with Surespan's expenditures.

[Emphasis added.]

The Rest of the Horse Race

[140] The next events in the horse race to exhaust any limits were Surespan's submissions of invoices 2, 3 and 4 for \$234,599.22, \$585,163.34, and \$422,985.17 respectively. I find that each of these amounts passed the post upon their submission, given that the earlier denial was still operative.

[141] The next event was the submission of Stantec's Mitigation Loss Coverage expense of \$477,646.75. If Surespan's earlier invoice submission qualifies as having passed the post, then so must Stantec's. I did not take Surespan to be seriously contesting this point.

[142] The key question is when did the amount QBE agreed to pay towards Stantec's settlement of the Graham Claim reach the post. I find that this did not occur until April 12, 2019. QBE argued that Stantec reached the post in relation to this amount as early as August 31, 2017. However, all that occurred on that date was that QBE authorized a \$700,000 contribution towards Stantec's settlement effort. At that time, Graham had not agreed to any particular settlement figure. Indeed, it had advanced a claim for \$7,063,492. A claim alone is insufficient to create a drain on a limit. As QBE acknowledged in their own brief:

The law maintains that the contractual duty undertaken by a liability insurer is to hold harmless the assured against third party liability. No obligation on the part of the insurer arises until the liability of the assured to a third party is established and quantified by judgment, arbitration award or settlement. *Cox v. Bankside Members Agency Ltd.* [1995] CLC 180 (Eng QB), at page 8; *aff'd Cox v. Bankside Members Agency Ltd.*, [1995] CLC 671 (Eng CA), at page 16

[143] There was no guarantee that any settlement would ever be arrived at as of August 31, 2017. It would be a strange thing if amounts could be placed off limits by the mere provision of instructions to counsel to try and settle for a certain amount. Such an approach would also be administratively cumbersome. What would happen if no settlement was ever achieved? How and when would the reserved funds come back into the limits pool?

[144] Indeed, as matters came to pass in this claim, this original settlement instruction was insufficient. More money was required. QBE could presumably have withdrawn its earlier instructions at that point if it determined that a settlement at the new higher level was inadvisable.

[145] In *Laidlaw*, the court stated at para. 13:

I do not see that there is any provision in the subject Policies which would allow or require [the insurer] to consider claims or potential claims which have not been finally determined by judgment or settlement as opposed to its obligation to pay claims which have been finally determined.

[Emphasis added.]

See also *Solway v. Lloyd's Underwriters*, 75 O.R. (3d) 129 (S.C.) at paras. 65-69, rev'd in part on other grounds 80 O.R. (3d) 401 (C.A.).

[146] This approach is also consistent with the Action Against Insurer Clause, which provides that no action shall lie against an insurer until the amount of the insured's obligation to pay has been "finally determined".

[147] Here, the Graham Claim was not "finally determined" until April 12, 2019. Surespan's Invoices 5, 6, and 7 were incurred and submitted before the funds required for Stantec to settle the Graham claim were committed. As such, I find that Surespan reached the post first in relation to those invoices.

[148] I am prepared to accept that the amount required to pay the Graham Claim against QBE passed the post as of April 12, 2019.

[149] There is one complication that must be addressed in relation to the amount that QBE has committed towards the Graham settlement. As part of the settlement, Stantec apparently entered into an agreement with Graham that it would provide Graham with a "discount" in the amount of up to \$400,000 if retained on "future projects". Surespan argues that this is a contingent obligation that may never occur and should not take precedence over the mitigation costs that Surespan has actually incurred. I disagree. QBE has agreed to pay an amount that includes \$400,000 representing this obligation. As such, it has been paid pursuant to a final settlement. It is more akin to a settlement payable over time. The fact that a settlement is payable over time does not change the fact that the amount has been properly committed so that a final settlement could be achieved.

[150] As such, in the race by the insureds against any limits, the final results are as follows (assuming for the moment that the limit applies to the Mitigation of Loss Coverage, and we disregard Sureplans' financing charges and QBE's own Claim Expenses, discussed in the next sections):

1. Surespan's Invoices 1, 2, 3, 4;
2. Stantec's Mitigation of Loss Claim;
3. Surespan's Invoices 5, 6, 7;
4. Stantec's Graham Claim settlement amount;
5. Any Surespan invoices submitted after April 12, 2019.

QBE's Claim Expenses

[151] QBE argues that it is also necessary to deduct \$316,184.04 from the limit for its own Claim Expenses. This includes expenses incurred by its Adjuster and amounts incurred by various experts.

- [152] I was unable to determine, on the evidence before me, precisely how much of these amounts are properly deductible from any limit. To the extent that the expenses properly relate to the defence of Surespan's coverage lawsuit, they are not properly within the scope of Claim Expenses reducing the limit. The retainer letters with the firms that incurred the expenses suggest that a component was more in the nature of litigation support. As one example, the De Simone retainer letter is said to be subject to "litigation privilege" and advises that their report should be prepared for use in court.
- [153] There were also expenses incurred after the Winteringham Order which appear to be more responsive to the litigation rather than being proper Claim Expenses. QBE itself admitted in argument that certain time entries appeared to be more related to the underlying litigation.
- [154] Nonetheless, I find that sufficient detail was provided to conclude that at least a portion of the expenses would properly fall within the Claim Expense category.
- [155] By failing to carefully segregate the reason for each time entry, and by simply attaching the invoices to a legal assistant's affidavit, QBE made it challenging to determine the proper Claim Expense amount. Although I accept that QBE carried the burden of establishing reductions to the limit, I do not believe that it would be fair or reasonable to deny its claim for expenses completely. Had a limit applied, I would have referred the determination of the proper Claim Expense amount to the Registrar for consideration and certification.
- [156] Of the Claim Expenses properly included, I would have directed that they were "past the post" on the date that each was incurred. This is consistent with the approach adopted above for the insured's expenses.

Additional Financing and Legal Fee Damages

- [157] Surespan says that as of May 2019 it had incurred \$626,934.37 in interest and fees (the "Financing Costs"). Surespan estimates that between May 2019 and the date of judgement, it has been incurring \$45,525 per month in interest. Surespan also says that it incurred approximately \$56,106 in legal fees outside of the present litigation that would not have been incurred absent QBE's wrongful refusal of coverage. At the hearing, Surespan estimated that its total costs under this heading had reached approximately \$889,000.
- [158] Surespan clarified at the hearing that it sought recovery of these amounts not on the basis that they were covered by the Policy per se, but rather as contractual damages flowing naturally from QBE's breach of its contractual duty to promptly adjust the claim and, in particular, its conduct in failing to meet the deadline established in the Winteringham Order.
- [159] QBE argues that Surespan only had to incur financing costs as a function of its individual financial situation, which was not a risk factor for which QBE should be obliged to indemnify Surespan. Surespan would not have had to finance the repairs if it had adequate cash on hand.

- [160] I accept that financing costs should not be routinely paid in an insurance coverage claim: *British Columbia Buildings Corp. v. Reed Stenhouse Ltd.* (1989), 35 B.C.L.R. (2d) 94 (S.C.). Otherwise insurers would, for example, be called upon to pay a home insured's credit card interest every time an insured uses their card to replace stolen goods before an insurer's adjustment process is complete. Furthermore, such an approach would create an artificial distinction between insureds with sufficient funds to fund replacement versus those who do not.
- [161] That said, I find that it is appropriate to make an order for damages in the unique circumstances of this case. This is driven primarily by the fact that QBE failed to respect the timetable for adjusting the claim required by the Winteringham Order.
- [162] There is no basis for the covered amount awarded in this judgment not to have been paid at an earlier date. QBE simply took too long to adjust the claim, longer than QBE agreed to take before this Court. As noted above, the Insurance Act contemplates that adjustment of a claim be completed within 60 days. The Winteringham Order and the extension agreed to by Surespan already provided QBE with more time than the statutory allowance. QBE failed to seek an amendment of the terms of the Winteringham Order. For this, there is no excuse. QBE argues that the claim was difficult to adjust. However, if it were more difficult to adjust than expected, there was a clear route back to court to apply to adjust the date to which it had previously agreed. QBE essentially engaged in "self-help" by adopting its own timetable and disregarding the court order.
- [163] Furthermore, QBE's reason for delay appears to have been driven in part by its effort to get all the insureds under the Policy to agree on how the funds should be distributed. But this approach is inconsistent with QBE's own position before this Court that "first past the post" principle governs in such a situation. QBE need not, and should not, have waited for all insureds to collectively agree on who should get paid out, in what order, and in what amount. QBE was in a position to pay out amounts as each submission passed the post. It failed to do so.
- [164] Surespan argues that such an award need not meet the test for aggravated or punitive damages, or the test for special costs. Rather, this aspect of their claim flows from the breach of contract, and hence is treated as consequential damages. Surespan relies on *Ferme Gérald Laplante & Fils Ltée. v. Grenville Patron Mutual Fire Insurance Co.*, 61 O.R. (3d) 481 (Ont.C.A.), leave to appeal ref'd, (2003), [2002] S.C.C.A. No. 488, where the court stated:
- [76] The implied obligation to act in good faith has been extended beyond mutual disclosure requirements in relation to the nature of the risk being undertaken. In particular, the courts have recognized that the insured, having suffered a loss, will frequently be in a vulnerable position and largely dependent upon the insurer to provide relief against the financial pressure occasioned by the loss underlying the claim. Hence, the obligation to act in utmost good faith requires an insurer to act promptly and fairly at every step of the claims process.

See, in particular, the judgment of Laskin J.A. of this court in *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280 (C.A.) and that of O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London* (2000), 184 D.L.R. (4th) 687, [2000] I.L.R. 1-3826 (Ont. C.A.). In *702535 Ontario Inc.*, O'Connor J.A. provided a useful analysis of the insurer's duty of good faith during the claims process. He stated as follows (at paras. 28-30):

The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment.

[Citations omitted]

The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith: *Palmer v. Royal Insurance Co. of Canada* (1995), 27 C.C.L.I. (2d) 249 (Ont. Gen. Div.).

What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim

[78] A breach of the duty to act fairly and in good faith gives rise to a separate cause of action that is distinct from the cause of action founded on the express terms of the policy and that is not restricted by the limits in the policy. Hence, it may result in an award of consequential damages distinct from the proceeds payable under the policy. It is important to note, however, that the duty to pay promptly, as a component of the duty of good faith, must be considered in that context; it is not an absolute obligation giving rise to an automatic claim for consequential damages in the event of any failure to make a timely payment in accordance with the policy. The latter contention was made by the insured in *702535 Ontario Inc.* and rejected by this court. O'Connor J.A. stated as follows (at para. 37):

... the broader interpretation urged by the appellants could have far-reaching effects for the insurance industry. In some cases, the risk of being found liable for consequential damages resulting from unsuccessfully contesting a claim under a policy would constitute a substantial disincentive for insurers to deny claims, even those which they reasonably and in good faith consider to be either unfounded or inflated. In a general sense, insurers and insureds have a common interest in ensuring that only meritorious claims are paid. Increased payments by insurers lead to increased premiums for insureds. In order to effectively screen claims, insurers must be free to contest those claims which in good faith they have reason to challenge, without running the risk that if they are ultimately found to be wrong, they will be liable to indemnify the insured for losses not underwritten in the policy contracted for by the insured.

[Emphasis added.]

See also 702535 Ontario Inc. v. Lloyd's London (2000), 184 D.L.R. (4th) 687 (Ont. C.A.) at para. 58; Wilson v. Saskatchewan Government Insurance, 2012 SKCA 106 at paras. 58-59

[165] Pursuant to the principles set out in *Ferme Gérald*, I agree that damages are appropriate in the unique circumstances of this case. The effect of the Winteringham Order and the present decision is that the amounts claimed should have been paid much earlier. The time taken was unreasonable. The amount required to affect the necessary repairs was in the millions, a figure well beyond what one could reasonably expect a company to have available in the form of cash on hand. It was reasonably foreseeable that the insured would have to obtain financing if payment under the Policy was not made promptly.

[166] That said, I find that QBE's conduct in the period prior to the Winteringham Order did not reach a level that supports a claim for compensatory damages. There is insufficient evidence of improper or unreasonable delay before the Winteringham Order: *Johnson v. AXA Pacific Insurance Co.*, 2011 BCSC 305 at paras. 171-172. Furthermore, I need to be careful to ensure that any award does not address the same conduct that underlay the special costs award made in the Winteringham Order.

[167] I find that it is only the delay after the date for payment in the Winteringham Order (as subsequently extended by the parties) which merits a compensatory damages award.

[168] To be clear, in making this award I look only to QBE's contractual breach relating to the conduct of the adjustment process, and not to their conduct of this litigation.

[169] The amounts claimed by Surespan under this head of damage were incurred from about March 2017 until the date of judgment, or about 34 months. The problematic period I have identified runs only about 16 months, from September 2018 to date. I find that an appropriate compensatory contractual damages award in all of the circumstances is \$250,000. As a mathematical cross-check on the amount of this award, a calculation of pre-judgment interest based on the direct remediation costs in Invoices 1-7 over the 16-months, plus the pre-judgment interest on Invoice 8 over the 9-month delay from its incurrence to the date of this judgment, would be approximately \$225,000.[2]

The Effect of this Judgment on Stantec's Position

[170] Nothing in this judgment should be treated as determinative of what amounts Stantec is entitled to receive from QBE, either under the Policy, or under other enforceable agreements between Stantec and QBE. I provided Stantec with a limited ability to make submissions at the hearing, not in order to bind them to the result, but simply to obtain their assistance in relation to arguments being advanced, given that certain arguments being advanced had the potential to affect their legal position.

Deductible

[171] Neither party provided argument in relation to how or if any deductible should apply to any award. As such, the parties are at liberty to provide for further argument on this point if necessary.

Conclusion

[172] Surespan is entitled to judgment in an amount calculated as follows:

a) the Mitigation of Loss Coverage expense amounts that have been submitted by Surespan to QBE (not including financing or unrelated legal costs),

plus

b) \$240,000 in additional compensatory damages,

less

c) any applicable deductible.

[173] If the parties are unable to agree on the proper calculation of this figure, the costs payable, or any other collateral issues arising from this judgment, Surespan may file written submissions of no more than thirty pages within thirty days of this judgment. QBE may respond with written submissions of the same length within thirty days of receipt of Surespan's submissions. Surespan may then reply with a further ten pages of reply argument within a further ten days.

"Branch J."

[1] This statement of general principle is subject in this case to Surespan's particular contractual onus to establish that its Mitigation of Loss expenses were the result of professional services, which is discussed further below.

[2] Sept 2018 to Jan 2020 = 16 months; April 2019 to January 2020 = 9 months.

Invoices 1-7 submitted prior to Winteringham Order total \$9,142,208 and Invoice 8 Submitted April 2019 totals \$84,335. Pre-Judgement rates of 1.45% and 1.95% running from September 10, 2018 to January 10, 2020 for the \$9,142,208 and for the \$84,334 from April 24, 2019 to January 10, 2020 yields \$224,197 + \$1,180.46 or \$225,377.46

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