

CANADA / JUDGMENT

Surespan Structures Ltd. v. Lloyds Underwriters

2020 BCSC 617

COURT

Supreme Court of British Columbia

DECIDED

23 April 2020

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2020 BCSC 617 Surespan Structures Ltd. v. Lloyds Underwriters IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Surespan Structures Ltd. v. Lloyds Underwriters, 2020 BCSC 617 Date: 20200423 Docket: S1810530 Registry: Vancouver Between: Surespan Structures Ltd. Plaintiff And Lloyd's Underwriters, QBE Lloyd's Syndicate 1886 and QBE Lloyd's Syndicate DCH 386 Defendants Before: The Honourable Justice Branch Supplemental Reasons for Judgment Counsel for Plaintiff: K. Johanson D. Miachika Counsel for Defendants: D. Smith Place and Date of Written Submissions: Vancouver, B.C. February 21, 2020, March 12, 2020, and March 24, 2020 Place and Date of Supplementary Judgment: Vancouver, B.C. April 23, 2020 Table of Contents Introduction. 3 Background. 3 Remaining Issues. 3 Deductible. 3 The Form of Order 4 Costs. 5 SCHEDULE "A": SURESPAN'S DRAFT FORM OF ORDER. 10

Introduction

- [1] This decision addresses certain issues left for determination following my decision on a summary trial application reported at Surespan Structures Ltd. v Lloyds Underwriters, 2020 BCSC 27 (the "Judgment"). The parties were unable to agree on particular residual issues. As such, after receipt of written submissions, these issues have come back to me for resolution.

Background

- [2] The background to this case was reviewed in the Judgment, and I will not review them except as necessary to resolve the issues presently before the court. The same defined terms will be used in this supplementary judgement.
- [3] In general terms however, the plaintiff Surespan is a design-build contractor who incurred certain expenses addressing a problem in parkades it was retained to design and construct. It sought reimbursement for these expenses under the Mitigation of Loss Coverage provided by the defendant QBE's Policy.

- [4] In an earlier Petition proceeding seeking coverage under the Policy, reported at *Surespan Structures Ltd. v Lloyd's Underwriters*, 2018 BCSC 1058, Justice Winteringham concluded that there was coverage available under the Policy. In my Judgment, I further concluded that the insurer had failed to provide for a limit on the Mitigation of Loss Coverage. Remaining Issues Deductible
- [5] After reviewing Surespan's supplementary written argument, QBE states that it no longer disputes that no deductible should apply in the circumstances. Hence there is no need for me to evaluate this issue, and I will not opine on the merits of same. The Form of Order
- [6] Surespan has prepared a draft order attached as Schedule "A". QBE seeks the following changes to that order:
- a) removal of the phrase "without excuse" from page 1, paragraph 2;
 - b) substitution of the phrase "or a deductible pursuant to" in place of the phrase "as defined in" on page 1, paragraph 5; and
 - c) addition of a paragraph saying "No deductible applies to reduce the foregoing judgment" on page 2, between paragraphs 1 and 2.
- [7] In their reply argument, Surespan takes the following positions:
- a) With respect to removing the phrase "without excuse", Surespan opposes the change because only "lawful excuses are relevant" and no lawful excuse justified QBE's conduct. Alternatively, Surespan indicated that it would consent to the declaration stating that "QBE failed to comply with the Winteringham J. Order 'without lawful excuse'".
 - b) With respect to the latter two changes regarding the application of a deductible, Surespan submits that no orders with respect to the application of a deductible are necessary. Surespan says that it is not necessary to make any ruling about the deductible because the Judgment did not make any such ruling, and QBE does not subsequently ask for any such ruling to be made, other than by way of seeking to alter the proposed terms of the order.
- [8] I agree with QBE that the words "without excuse" are unnecessary in the circumstances. The real problem with their inclusion is that they are editorial rather than necessary. The final order is only to record the outcome of the hearing, letting the reasons speak for themselves about how that outcome was reached: *Bishop of Victoria v. Victoria (City)*, [1933] 4 D.L.R. 524, [1933] B.C.J. No. 66 (B.C.C.A.) at paras. 22-27.
- [9] In terms of the last two proposed changes, the applicability of the deductible was not addressed in oral argument, or in the Judgment, as the parties asked that this issue be deferred. As the parties appear to have subsequently arrived at an agreement on this issue, it would seem more appropriate for this agreement to be the subject of a separate consent order, rather than as part of the order that reflects the outcome of the contested issues resolved in the Judgment (assuming that the entry of such a consent order is consistent with the parties' agreement): *Van Mol v. Ashmore*, [1999] B.C.J. No. 2194 (C.A.) at paras. 10-12.

Costs

- [10] Surespan argues that a special costs order is appropriate in these circumstances, as QBE's conduct qualified as "reprehensible". QBE argues that the order should simply be ordinary party and party costs at Scale B.
- [11] I find that there should be a more refined costs order in the unique circumstances of this case.
- [12] I agree that QBE's conduct in failing to respect the timing required by the Winteringham Order (as extended to a certain date by the parties) is deserving of special costs sanction. QBE failed to provide its position on coverage by that date, failed to seek Justice Winteringham's direction if compliance were no longer possible, and has still failed to pay any further covered claims: Judgment at para. 29.
- [13] QBE's basis for declining to propose payment of any more than an initial \$47,978.71 in defence costs is inconsistent with QBE's own "first past the post" position adopted at the hearing before me, and is inconsistent with the fact that a fixed date had been established by the Winteringham Order. Although QBE raised a concern about certain responsibilities it may have had towards Stantec, QBE would still have had funds remaining on the Policy that were payable to Surespan even on QBE's own theory of the case. Rather than propose any further payment, QBE threw up its hands, and essentially asked its various insureds to sort out their respective entitlements. That was not an acceptable adjusting approach, particularly given the existence of this litigation and the terms of the Winteringham Order.
- [14] QBE also initially misrepresented the status of monies said to be owing to Stantec, complicating Surespan's consideration of its "first past the post" position. QBE suggested that payment had already been received by Stantec, whereas the amounts were actually held in trust by QBE's counsel. I agree with Surespan's argument that there is no evidence to suggest that this misrepresentation was simply a typographical error.
- [15] QBE raises certain difficulties it faced in quantifying the claim. However, this argument is undercut by the concession it made at the hearing that the amounts paid by Surespan were reasonably incurred, save for a legal argument it advanced on Surespan's entitlement under the Policy to financing costs. Furthermore, QBE's adjustment process simply took too long. QBE chose not to file the DeSimone Report it commissioned on quantum, the need for which they invoke to support their delay in payment: Judgment, para. 134. It was only on the first day of argument that QBE finally made the quantum concession noted above. Surespan was forced to produce vast volumes of quantum material for the hearing, which material instantly became irrelevant with QBE's late concession.
- [16] QBE never made a formal application to pay into court any further amount under the Winteringham Order, even at a level supported by QBE's own interpretation of the Mitigation of Loss limits issue, or the "first past the post" sequencing issue.

- [17] I note that Surespan made an offer to settle on July 17, 2019 for \$8.29 million (plus legal costs and Court Order Interest Act interest). This fact provides some further support for my conclusion that the defendant's approach is deserving of rebuke: *Northmont Resort Properties Ltd. v Golberg*, 2018 BCSC 151 at para. 38.
- [18] I note that QBE has still not yet paid any of the amount owing under the Judgment, and has not sought a stay of execution.
- [19] Of the circumstances traditionally invoked as supportive of a special costs order, the most germane here is the deliberate and persistent failure to comply with a court order: *Friedlander v. Claman*, 2015 BCSC 482 at para. 45; *Grewal v. Nijjer*, 2011 BCSC 332 at para. 20, *aff'd* 2011 BCCA 505 at para.17; *Sound Contracting Ltd. v. Regional District of Comox-Strathcona*, 2005 BCCA 167 at para. 17.
- [20] More generally, QBE also made the resolution of this claim more difficult than it should have been: *Mayer v. Osborne Contracting Ltd*, 2011 BCSC 914 at para.11.
- [21] The fact that the quantum of the claim was the subject of a denial to a Notice to Admit is relevant: Rule 7-7(3), 14-1(14), *Ceperkovic v. MacDonald*, 2016 BCSC 939 at paras. 38, 42. Surespan asked QBE to admit, *inter alia*, that "Remediation Work was necessary to correct the Design Defects and the Observed Parkade Defects and to make the parkades safe and fit for their intended use". QBE refused to admit this fact but did not end up challenging it at the hearing before me. I find that it was unreasonable to refuse to make the admission at the time the refusal was made.
- [22] QBE's argument that it could not pay out under the Policy because the defects did not arise from the performance of professional services was wholly without merit. Although this Court's finding on that issue was largely based on the KDA report prepared at Surespan's behest, that does not relieve QBE from properly adjusting Surespan's claim itself in the first place. QBE argues that it "could not reasonably be expected to admit facts outside of its knowledge". But an insurer has a good faith obligation to adjust in a timely fashion. It cannot stick its head in the sand and make the insured do its adjusting for it: Judgment at para. 164. QBE cannot claim that it refused to admit facts because they were outside its knowledge, when those facts should reasonably have been within its knowledge by the time of the denial if it had adjusted the claim in a proper and timely manner.
- [23] Finally, I note that QBE was "on notice" that its conduct to date had already merited a special costs award as part the Winteringham Order. With its continued failure to properly respond to Surespan's claim for coverage through this litigation, QBE was "playing with fire".
- [24] That all said, I do accept that it was not unreasonable for QBE to seek a judicial determination as to (1) the applicability of the limit, (2) the proper sequencing of payments under a "first past the post" approach to paying competing claims under the Policy, and (3) the coverage available for financing costs. These were difficult legal issues, with little judicial precedent upon which to ground the parties' decision making. In order to comply

with the Winteringham Order however, QBE itself should have moved these issues forward for determination if they were preventing QBE's compliance with the terms of that order. The insurer in *Re: Aviva Canada Inc.*, 2006 BCSC 1578 sought such directions on its own initiative. In the present case, the insured Surespan was compelled to push this separate proceeding forward to summary judgment.

- [25] Considering all of these factors, I find that the appropriate order as to costs should be as follows. QBE will pay special costs for this proceeding, save and except for any of Surespan's costs reasonably attributable to the preparation of materials and argument of its position in relation to (1) the applicability of the limit to the Mitigation of Loss Coverage, (2) the proper sequencing of payments by QBE amongst the various insureds, and (3) the coverage available for financing costs.
- [26] Although the general rule is that special costs are awarded for the entire proceeding, the court has the discretion to fine-tune its costs order to ensure that the payor party is only held responsible for costs that are attributable to any conduct deemed reprehensible: *Wilson v. Lougheed*, 2012 BCSC 1166 at paras. 24-32; *J.D.C. v. K.L.M.F.C.*, 2015 BCSC 2398 at paras. 139, 153; *Prince Rupert (City of) v. Pederson*, 1994 CanLII 2135 (B.C.C.A.) at paras 31-34; *Coulter v. Ball*, 2003 BCSC 1186 at paras. 13, 89.
- [27] In terms of the appropriate scale for the costs of the three issues I have found would have required judicial consideration in any event, although these issues were intellectually challenging, they were relatively simple to prepare and present as they turned primarily on contractual interpretation principles. Hence, Scale B should be applied in relation to these costs: *Wilson* at para. 31.
- [28] The further particularization of the costs award payable flowing from these supplementary reasons shall take place before the Registrar, absent agreement of the parties. "Branch J." SCHEDULE "A": SURESPAN'S DRAFT FORM OF ORDER No. S1810530 Vancouver Registry In the Supreme Court of British Columbia Between Surespan Structures Ltd., Plaintiff and Lloyds Underwriters, QBE Lloyd's Syndicate 1886 and QBE Lloyd's Syndicate DCH 386, Defendants ORDER MADE AFTER APPLICATION BEFORE THE HONOURABLE MR. JUSTICE)) 10/JAN/2020 ON THE APPLICATION of the Plaintiff coming on for hearing at on 11-12 September 2019 and 17 October 2019, and on hearing for the Plaintiff, for the Defendants, and John Singleton, Q.C., for Stantec Architecture Ltd., and on reading the materials filed herein, AND JUDGMENT being reserved to this date: THIS COURT DECLARES that:
1. This matter is suitable for summary trial;
 2. The Defendants failed to comply with the Order of the Honourable Madam Justice Winteringham pronounced on 27 June 2018 in Petition proceeding S.C.B.C. No. S-178116 (Vancouver Registry), without excuse;

3. The Plaintiff's claim arises from defects in the works resulting from an error, omission, or negligent act in the performance of professional services by the Insured and triggers coverage under Project Professional Liability Policy No. SPRO10778 (the "Policy") issued by the Defendants for the North Island Hospitals P3 project (the "Project");
4. The Plaintiff incurred costs of \$9,174,830.63, arising from an error, omission or negligent act in the performance of professional services in regard to the Project, to remedy defects in the works in order to fulfil contracts undertaken for others (the "Mitigation Costs"), and such costs were necessarily incurred prior to substantial completion and after the Plaintiff sought the Defendants' written consent, whereby such costs are insured losses and trigger coverage under the Policy; and
5. The Mitigation Costs are not subject to The Insurer's Limits of Liability of \$10 million as defined in the Policy; THIS COURT FURTHER ORDERS that:
 1. The Defendants pay to the Plaintiff judgment in the amount of \$9,424,830.63, calculated as follows:
 - a. the Mitigation Costs submitted by the Plaintiff to the Defendants totaling \$9,174,830.63, plus
 - b. \$250,000.00 in additional compensatory damages;
 2. The Defendants pay to the Plaintiff pre-judgment interest on \$9,424,830.63 pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 as amended, in the amount of \$331,922.38;
 3. The Defendants pay to the Plaintiff post-judgment interest on \$9,424,830.63, from the date of judgment until payment, at such rates as may be prescribed pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 as amended; and
 4. The Defendants pay to the Plaintiff its costs of this action on such basis as may be ordered by the Court. THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT: Signature of lawyer for Signature of lawyer for Lloyds Underwriters, QBE Lloyd's Syndicate 1886 and QBE Lloyd's Syndicate DCH 386

Signature of lawyer for Stantec Architecture Ltd. John Singleton, Q.C. By the Court. Registrar

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