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ACCIDENTAL UNDERWRITING: INSURERS BOUND BY BROAD COVERAGE PROVISION INCLUDED IN ERROR

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In the recent Supreme Court of British Columbia decision in *Surespan Structures Ltd. v. Lloyd's Underwriters*, 2018 BCSC 1058, the Court found that a design-build contractor and an architectural and engineering firm were both entitled to coverage under a policy that included a broad provision to insure "any firm(s)" providing "professional services" to a construction project. The decision was made despite the insurer's argument that the broad coverage provision "was included in error and does not reflect the intent of the parties with respect to the scope of coverage provided by the Policy".

The Facts

In 2014, the Vancouver Island Health Authority entered into an agreement with THP Partnership (**"Project Co."**) to design and build two hospitals and parkades in Campbell River and Comox on Vancouver Island (**"the Project"**). Project Co. subcontracted the design-build portion of the Project to Graham Design Builders LP (**"Graham"**).

Graham subcontracted the design-build work for the parkades to Surespan Structures Ltd. (**"Surespan"**), and Surespan, in turn, subcontracted much of the design work for the parkades to HGS Limited (**"HGS"**), an architectural and engineering firm.

In late 2016, cracks said to present an imminent risk were discovered in both parkades. Graham alleged the parkade defects were the result of errors or omissions in the design by Surespan and HGS, and demanded that Surespan repair the alleged defects immediately. In response to correspondence from Surespan and HGS notifying it of the potential loss regarding the parkades and requesting coverage, the insurer denied coverage on the basis that Surespan and HGS were not named in the Policy.

The Dispute

Surespan and HGS filed Petitions seeking declarations that they are "insureds" under the Policy. The Petitions were solely concerned with the issue of whether Surespan and HGS are insureds under the insurance policy; the Court was not asked to determine the issue of coverage generally, or fault for the

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alleged defects in the parkade.

The insurer issued a project professional liability insurance policy for the Project. Under the heading "INSURED(S)", the Policy included a broad provision to insure "any other firm(s) which have or will provide PROFESSIONAL SERVICES in regard to the Project" (**"Clause 3"**). Also included as insureds under the Policy were "any other firm(s) which have or will provide professional services in regard to the Project provided that such additional firms are reported and accepted by the Insurer…" (**"Clause 5"**).

The insurer argued that Clause 3 of the Policy "was included in error and does not reflect the intent of the parties with respect to the scope of coverage provided by the Policy". Interestingly, it did not seek rectification of the Policy to correct the "error", but rather submitted that the Court should simply ignore Clause 3. To explain this "error", the insurer relied on the Affidavit of an insurance broker regarding his negotiations with the representatives of the Project, and asserted that the parties intended Clause 5 to govern the scope of the term "insureds". Since neither Surespan nor HGS had been reported to and accepted by the insurer (as required by Clause 5), it argued they were not insureds and should be excluded from coverage on that basis.

Surespan and HGS primarily argued that they fit under the clear and unambiguous definition of insured set out in Clause 3 and Clause 3 could only reasonably be interpreted in their favor when the Policy was read as a whole.

The Ruling

The Court began its analysis by reviewing the purpose of a project liability insurance policy, which is intended to cover all project participants to ensure that there are funds available to the parties performing the insured services in order to rebuild in case of loss by professional negligence and to avoid litigating amongst themselves, followed by a review of the governing principles of insurance policy interpretation.

In response to the insurer's invitation to review the circumstances surrounding the issuance of the Policy, the Court acknowledged the authorities allow the Court to consider evidence of the commercial purpose of the contract and its aims and objectives, the nature of the industry in which the contract was executed and the parties' objective intentions. However, the Court agreed with the Petitioners' objection to the admissibility of extrinsic evidence regarding negotiations prior to the Policy being issued (in the form of the insurance broker's Affidavit), stating "this evidence does not affect the interpretation of the language of the Policy".

In interpreting the Policy language, the Court determined that:

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- Clause 3 provides coverage for firms that provide professional services, including the design and construction of the parkades;
- The professional services provided by the Petitioners were a component of the services contemplated in the insurance application;
- The language of the Policy generally and Clause 3 specifically was unambiguous, and the Petitioners fell within the definition of insured which did not require that the Petitioners be specifically named in the Policy;
- Clause 3 and Clause 5 could be read "harmoniously"; and
- When read as a whole, the meaning of insured is clear and unambiguous in the circumstances.

In reaching its decision, the Court rejected the insurer's invitation to simply ignore Clause 3 in the interpretive exercise, which would, in the Court's view, be tantamount to using the surrounding circumstances to "deviate from the text such that the Court effectively creates a new agreement" and "creating an ambiguity where none exists".

Practical Considerations for Insurers

The Court's decision in *Surespan Structures Ltd.* serves as an example of the principle that insurers are bound by clear and unambiguous policy language, despite such language being included in a policy in error. Evidence of an underwriting error will not prevail or even affect the Court's interpretation of the clear language of the policy.

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