

As Justice Rothstein noted in *Progressive Homes*, “[t]he focus of insurance policy interpretation should first and foremost be on the language of the policy at issue”. More challenging is when appellate courts begin to depart from the language of the policy to adopt an approach based on general principles or jurisprudence on specific provisions as they have historically been drafted. Justice Moldaver (as he then was) wrote in *Bridgewood Building Corp. v. Lombard General Insurance Company of Canada*, an Ontario Court of Appeal decision released in 2006: “it is not now, nor, to my knowledge, has it ever been the position of this court that, standing alone, the ‘general principle’ precludes coverage of an insured’s own defective work or product regardless of provisions in the policy that evidence a contrary intent”. The rationale behind this statement also holds true when a court considers whether exclusions preclude coverage for construction defects and faulty workmanship that may constitute property damage.

GUEST ARTICLE



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ENGINEER OR PROJECT MANAGER? ASSESSING ONE PARTY’S ROLE AND RESPONSIBILITIES

The British Columbia Supreme Court’s 2016 decision of *Integrated Contractors Ltd. v. Leduc Developments Ltd.* provides an interesting analysis of one party’s attempts to demonstrate that a project engineer was actually serving as a project manager, and on that basis owed that party certain duties. Ultimately, this decision turns less on legal analysis of the roles or duties of a project manager, and more on the failure to adduce sufficient, reliable evidence to show that the engineer was anything but.

In April 2004, Leduc Development Ltd. purchased a parcel of undeveloped land in order to subdivide

the property and build residential homes on it in three phases. Leduc hired L & M Engineering Services Limited to provide engineering design services on the first phase. There was no written contract between the parties. Leduc hired Integrated Contractor Ltd. (ICL) in the fall of 2005 to serve as general contractor. Leduc’s project ultimately failed. ICL, who had not been fully paid, liened and claimed breach of contract against Leduc. Leduc counterclaimed against L & M for breach of contract and negligence. Leduc and ICL settled, leaving the counterclaim to be resolved.

Leduc’s counterclaim turned on the characterization of L & M’s role on the project. Leduc alleged that L & M had become the subdivision’s project or construction manager, and was therefore obliged by common law and contractual duties to ensure that the subdivision was constructed in a timely and cost effective manner. It was Leduc’s position that L & M breached those duties, and sought damages for its lost investment and loss of opportunity to earn profit on all three phases of the development. L & M maintained that it only provided engineering inspection services, and did not breach any common law or contractual duties.

The Test

In formulating her decision, Justice Sharma determined that in order to succeed, Leduc would need to prove, on a balance of probabilities, that:

1. L & M agreed to or did expand its role beyond providing initial design and engineering inspection services to become the subdivision’s project manager.
2. Project managers “have a duty of care to ensure, among other things, that construction is proceeding expeditiously, to monitor costs to prevent cost overruns and compel subcontractors to carry out their contractual duties”.
3. Together with (1) or in the alternative that once L & M became project manager, its contract was broadened to impose these additional duties.

4. L & M failed in these duties.
5. These failures delayed construction.
6. These delays caused the project to collapse, thereby resulting in financial loss for which L & M was responsible.

Justice Sharma ultimately concluded that Leduc was unable to prove any of this. All of these components would have been necessary for Leduc to be successful in its action, so Justice Sharma's finding that the evidence did not support the position that L & M agreed or did take on any additional professional responsibilities beyond its role as engineer (and in particular did not take on any management responsibilities) was fatal to its case.

L & M's Role

Leduc led no evidence showing that there had been an explicit discussion about L & M becoming project manager or otherwise significantly expanding its role. In addition, there had been another individual on the project, Mr. Greer, who was the project manager. Although L & M recommended Mr. Greer to Leduc, he was hired by Leduc exclusively, and not jointly hired by Leduc and L & M. When Mr. Greer left, a man named Bill Myers became the *de facto* project manager. Mr. Myers, the nephew of the owner of Leduc, directed crews on a daily basis, and otherwise managed the construction on site.

Leduc attempted to base its position on a Letter of Agency written to the town of Fort Nelson wherein Leduc advised the town that "[i]n all matters pertaining to the planning and subdivision of the proposed Angus Subdivision... L & M... is empowered to act as the agent for Leduc Development Ltd". The argument by Leduc that this letter made L & M the project manager was rejected. Leduc also pointed to a letter of credit obtained from Royal Bank, which identifies L & M as a "monitor", as evidence of L & M's broader role. This was also rejected on the basis that the letter imposed no additional duties on L & M other than those it had as project engineer. Justice Sharma also rejected Leduc's argument that L & M's recommendation of ICL as general contractor made

L & M a project manager responsible for ICL's performance.

Responsibility for Timely Completion

Leduc also failed to demonstrate that L & M had contractual and common law duties as project manager to ensure timely completion, prevent cost overruns, and compel subcontractors to complete contracts. To show that L & M could be held responsible in damages for construction delay, Leduc relied on the 1893 House of Lords decision of *Hick v. Raymond & Reid*. This decision, about whether timeliness could be implied into the terms of a contract for unloading of a ship's cargo, was not found to be helpful, particularly since there was no written contract between Leduc and L & M.

Justice Sharma stated that for Leduc to be successful in demonstrating this duty of timeliness, it would have to show on a balance of probabilities that the parties entered into a contract for L & M to become project manager, and that this contract explicitly or implicitly contained a term regarding timeliness that was broad enough to hold L & M liable for construction delays. No case law was brought forward showing that such a term can be implied if it is not explicitly laid out. Leduc's inability to stipulate the terms of this alleged unwritten contract prevented it from establishing that any implied contractual terms were breached. Leduc also referred to the 1997 Alberta Court of Appeal decision of *Homes by Jayman Ltd. v. Kallam Berg Engineering & Surveys Ltd.* in support of its position that Leduc's contract with ICL imposed project manager duties on L & M, but this was rejected as well.

Delay

Based on Justice Sharma's finding that L & M was not project manager, an inquiry into whether L & M caused delay to the project was unnecessary. However, Justice Sharma did address the causes of construction delay, which included excessive rain in Fort Nelson that shut down construction, the registration of builders' liens against the property making it difficult to get workers on site, and

Leduc's decision to rely on Mr. Greer and Mr. Myers as project managers. Justice Sharma also rejected other allegations made by Leduc, including that L & M was somehow responsible for ICL not agreeing to a contract earlier than it did and that L & M had failed to find someone else to replace ICL. Accordingly, Justice Sharma concluded that even if it were necessary to determine whether L & M caused delay on the project, L & M "performed all of its common law and contractual duties in an expeditious manner and did not cause and cannot be held responsible for any delay in construction".

Lack of Evidence

One recurring theme in Justice Sharma's decision, and perhaps its most significant take-away, was Leduc's failure to adduce adequate evidence or witnesses. In addition to failing to prove the necessary material facts, Leduc led no expert evidence about the duty or standard of care for engineers, project managers or construction managers. Justice Sharma stated that since these were matters outside the ordinary knowledge possessed by a trial judge, Leduc's claim in negligence would have failed on this basis alone. The expert report that was tendered by Leduc was deemed unreliable, and granted no weight for several reasons, including the fact that it was not a joint report as represented (but rather contained separate, dissonant sections by two authors), that Leduc failed to prove the assumptions upon which the report was based, that there were deficiencies in the substance of the report, and that the report was not neutral and "advocate[d] for Leduc's opinion rather than assist the

court". Justice Sharma also identified issues with respect to the reliability of the evidence of some of Leduc's witnesses because their memory was impaired, and indicated that Leduc even led evidence that contradicted its own claim.

This decision also shows the importance of proper pleadings from the outset. Prior to trial, Leduc attempted to amend its pleadings, but was denied from doing so since those amendments would "fundamentally alter the scope of the trial to L & M's prejudice, and would jeopardize the trial date". In addition, the new causes of action were out of time. Although Leduc argued that the proposed amendments did not create new claims (but rather particularized existing claims), this was rejected both by the Master reviewing the proposed amendments, and Justice Sharma in this decision. Because much of the evidence led by Leduc in this proceeding related to legal claims that were not properly plead, this evidence was deemed irrelevant by Justice Sharma in reaching a decision.

While this decision and the evidence clearly demonstrated that L & M was an engineer and not a project manager, it will be interesting to see whether the step-by-step inquiry used by Justice Sharma is applied to a set of facts where project roles are more blurred, and responsibility for delay more evenly apportioned. When that time comes, the *Integrated Contractors Ltd. v. Leduc Development Ltd.* decision will certainly provide a useful framework with respect to which arguments and evidence to advance, and which to avoid.