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BRIEFING NOTE

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How similar must new property be to old one for replacement cost coverage?

A recent decision of the BC Supreme Court, *LMLTD Holdings Corp. v. Co-operators General Insurance Company* (25 February 2025), VLC-S-171963 (BCSC), provides a practical answer to the question: when is the insured entitled to a replacement cost for the insured property? The applicant in this case, LMLTD Holdings Corporation ("**LMLTD**"), tried to argue that no matter how much a new building differs from the replaced property, the insurer must fully compensate the insured as long as it bought the replacement cost coverage policy. Following the summary application hearing, Justice Ormiston decided otherwise and provided a useful summary of the law on replacement cost insurance and the principle of relief from forfeiture under s. 13 of the *Insurance Act*, R.S.B.C. 2012, c. 1.

Replacement Building

In March 2015, the four-storey residential rental building owned by LMLTD was damaged by a fire. LMLTD decided not to repair the old building but to build a new one, and in May 2019, it completed the construction of the new property, also a four-storey residential rental building. Relying on its insurance with Co-operators General Insurance Company ("**Co-operators**"), LMLTD argued that it was entitled to full compensation for the construction costs for the new building since the old building was insured against all risks of loss or damage. Co-operators, however, was prepared to compensate LMLTD only for the actual cash value of the original property, which was substantially lower than the replacement cost (LMLTD calculated the shortfall at $735,481; while Co-operators estimated the difference was $549,484). The main issue between the parties was how similar the properties must be to fall within the replacement cost coverage.

Justice Ormiston noted that apart from being low-rise residential buildings, the two buildings differed significantly:

Old Building	New Building
Three residential floors above basement floor	Four residential floors above parkade
Net building area - 42,900 sq. feet	Net building area - 73,650 sq. feet
54 residential suits	108 residential suits
N/A	New facilities: bike storage, common room, laundry room, lounge, concierge office, fitness yoga studio with a small gym.

"Like kind and quality"

LMLTD asked for a generous interpretation of the insurance policy provision that the replacement cost coverage required the new building to be of "like kind and quality." It argued that as long as the new building was sufficiently similar to the old one and the owner purchased the relevant insurance, it should be fully compensated.

The Court did not accede to this argument; Ormiston J. noted at para. 19 that although the new building does not have to be identical to the old one, "like kind and quality" does not mean that the insured is free to replace their property with a better one.

Based on the increased square footage, greater number of units and additional facilities of the new building, Ormiston J. decided that the new property did not meet the "like kind and quality" requirement of the policy. The Court did not accept the other argument of LMLTD that it was reasonable in using the fire as an opportunity to construct a better property; Ormiston J. agreed that LMLTD was entitled to make business decisions that it found appropriate, however, that does not mean its insurer had to fund those decisions.

Relief from Forfeiture

The second ground on which LMLTD was seeking full replacement costs was s.13 of the *Insurance Act*. This provision applies when the insured has achieved imperfect compliance with a statutory or contractual condition, and it is inequitable that the insurance be forfeited. In that case court may grant the insured relief against forfeiture.

Co-operators argued that this discretionary and equitable remedy did not apply due to non-compliance of LMLTD with the conditions of the insurance policy. At para. 26, Ormiston J. agreed that the requirement to replace the original building as defined in the insurance policy was "akin to a condition precedent." She further noted at para. 29 that "relief from forfeiture is not available if the property has not been replaced, as that term is defined in the policy."

However, even if the condition of replacement property was met, Ormiston J held that the case still did not warrant granting the equitable relief. At para. 31, Ormiston J. noted that s. 13 of the *Insurance Act* requires the Court to consider the following three factors:

1. the conduct of the parties;
2. the gravity of non-compliance; and
3. the disparity between the forfeiture and the loss for non-compliance.

With regard to the first criterion, Ormiston J. stated at para. 33 that the reasonableness of the conduct of the breaching party is key to the analysis. LMLTD tried to argue that it was acting reasonably, but was misled by Co-operators who denied replacement cost coverage only after the new building had been constructed. The Court did not find this argument persuasive and said it was always a duty of the insured to comply with its policy and construct a replacement building; and

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furthermore, Co-operators were not properly informed about the size and the features of the new building. The Court found at para. 41 that the insurer was not provided with any building plans or other details of the new building under construction. LMLTD also tried to argue that it made a "good faith" decision to rebuild based on advice from the Maple Ridge chief building official who recommended tearing down the old building damaged by the fire. The Court, however, noted that reasonableness applies not to the decision to construct a new building, but to steps taken by the insured to comply with the policy.

With regard to the second factor, gravity of non-compliance, the Court noted at para. 53 that not only the degree of the breach is relevant, but also the nature of non-compliance; and "if a party barely breaches a central condition of the contract, the non-compliance may still be considered quite grave." In this case, the requirement to build a sufficiently similar replacement property was the "central condition" of the policy; and Ormiston J. stated at para. 54 that the new building, being significantly bigger, will increase the income-earning potential of LMLTD, which brings the case "squarely within the kind of moral hazard that the 'like kind and quality' provisions are designed to avoid."

Lastly, Ormiston J. found at para. 56 that with the replacement cost estimated at $2,245,559, the disparity between forfeiture and the loss from non-compliance in the amount of $549,484 (the Court accepted Co-operators' evaluation of the shortfall) was a "neutral factor." The Court concluded:

> [58] The requirement to replace was essential to indemnification based on replacement cost. A replacement building is expressly one that is of like kind and quality. That is not the property the applicant built. Sophisticated parties such as this corporate entity can be expected to appreciate the importance of such a condition. There is an absence of evidence explaining the reasons for the breach. The non-compliance with a critical requirement was not a minor departure from the original building. It enhanced the building in ways that could financially benefit the applicant and, as such, strikes at the heart of what a condition of this nature is meant to avoid.

Takeaways

To fall under the replacement cost coverage, the new property must be sufficiently similar to the old one. While a bigger and better property may make business sense to build, its construction will not necessarily be compensated by the insurer.

Relief from forfeiture is granted "sparingly"; thus, to rely on this equitable remedy, insured must first meet the policy requirements ("imperfect" compliance may be acceptable, but full non-compliance will not).

Next, insureds have to satisfy the criteria of s. 13 of the *Insurance Act* and show that they took reasonable steps to comply with the policy, the non-compliance did not affect the central condition of the insurance policy, and the disparity between

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forfeiture and the loss from non-compliance is sufficiently significant to justify the equitable remedy award.

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