COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Catherwood Towing Ltd. v. Lehigh Hanson Materials Limited,* 2024 BCCA 348

Date: 20241015
Dockets: CA48575; CA48580; CA48771; CA48772

Docket: CA48575

Between:

Catherwood Towing Ltd.

Appellant/
Respondent on Cross Appeal
(Defendant/Plaintiff by Counterclaim)

And

Lehigh Hanson Materials Limited

Respondent/
Appellant on Cross Appeal
(Plaintiff/Defendant by Counterclaim)

– and –

Docket: CA48580

Between:

Lehigh Hanson Materials Limited

Appellant/
Respondent on Cross Appeal
(Plaintiff/Defendant by Counterclaim)

And

The Owners and all others interested in the Ship "SEA IMP X" and John Doe

Respondents
(Defendants/Plaintiffs by Counterclaim)

And

Catherwood Towing Ltd.

Respondent/
Appellant on Cross Appeal
(Defendant/Plaintiff by Counterclaim)

– and –

Dockets: CA48771; CA48772

Between:

Catherwood Towing Ltd.

Appellant
(Defendant/Plaintiff by Counterclaim)

And

Lehigh Hanson Materials Limited

Respondent
(Plaintiff/Defendant by Counterclaim)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Mr. Justice Grauer

On appeal from: Orders of the Supreme Court of British Columbia, dated September 2, 2022 (*Lehigh Hanson Materials Limited v. Sea Imp Xi (Ship)*, 2022 BCSC 1556, Vancouver Docket S195927); and December 2, 2022 (*Lehigh Hanson Materials Limited v. Sea Imp Xi (Ship)*, Vancouver Docket S195927 and S1812798).

Counsel for Catherwood Towing Ltd.:	H.P. Swanson B.H. Hughes
Counsel for Leigh Hanson Materials Limited:	S. Chapelski A.J. Stainer
Place and Date of Hearing:	Vancouver, British Columbia December 5, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 15, 2024

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten

Dissenting Reasons by:
The Honourable Mr. Justice Grauer (Page 36, para. 103)

Summary:

The parties entered into a Barging and Towing Services Agreement. Catherwood, the tug owners, agreed to be responsible to Lehigh, the barge owners, for any damage to Lehigh's barges caused by Catherwood's negligence. Lehigh agreed to obtain, in a form acceptable to Catherwood, Hull and Machinery Insurance covering Lehigh's barges. On two occasions, a barge owned by Lehigh was grounded while under tow by a Catherwood tug. For the purposes of this proceeding, Catherwood conceded that its negligence resulted in the damage to Lehigh's barge. Lehigh commenced actions against Catherwood for damages, arguing that Catherwood agreed to indemnify it for all losses resulting from Catherwood's negligence. In resisting the claims, Catherwood relied on Lehigh's covenant to insure its barges, arguing that the effect of this provision was to immunize Catherwood from Lehigh's claims. Relying on a different provision of the Agreement or, in the alternative, an implied term, Catherwood counterclaimed, seeking judgment for solicitor and client costs, arguing that Lehigh's pursuit of its actions constituted a breach of the Agreement. In the absence of clear contractual language to the contrary, and relying on Kruger Products Limited v. First Choice Logistics Inc., the judge gave effect to the legal presumption that Lehigh's covenant to insure its barges relieved Catherwood of liability for the loss. In the result, Lehigh's actions were dismissed. Catherwood's counterclaims for solicitor client costs were also dismissed, the judge rejecting its position that the commencement of suit by Lehigh constituted a breach of the Agreement. Both parties appealed from the dismissal of their respective claims. In its appeals, Lehigh argued that the judge committed an extricable error in law by failing to give any effect to the provision of the Agreement by which Catherwood agreed to be responsible to Lehigh for damage to a barge caused by Catherwood's negligence.

Majority (per Fitch J.A.; DeWitt-Van Oosten J.A. concurring): Held: The appeals are dismissed. The judge committed no extricable error of law in concluding that Lehigh's covenant to insure was a supervening provision. Further, the judge committed no palpable and overriding error in rejecting Catherwood's position that Lehigh breached the Agreement by unsuccessfully bringing suit. Dissenting in part (per Grauer J.A.): Lehigh's appeals should be allowed. The judge erred in law by interpreting the agreement in a manner that rendered superfluous the term of the agreement that placed upon Catherwood responsibility for loss to Lehigh's barges occasioned by Catherwoods's negligence, and in failing to have regard to all aspects of the covenants to insure. Given the marked difference in the relevant agreements and the surrounding circumstances and context, Kruger did not give rise to a presumption that the parties intended tort immunity beyond what the Marine Liability Act already provided.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] These appeals arise out of actions initiated when a barge owned by Lehigh Hanson Materials Limited ("Lehigh") was grounded on two separate occasions while under tow by tugs owned and operated by Catherwood Towing Ltd. ("Catherwood"). A Barging and Towing Services Agreement (the "Agreement"), entered into by the parties in February 2014, was in effect at the time of both groundings. The appeals turn on the interpretation of the Agreement; Lehigh's on the determination of which party had contractually assumed responsibility for damage to the barge caused by Catherwood's negligence; and Catherwood's on its entitlement to solicitor and client costs as a consequence of Lehigh's unsuccessful suit.

[2] The Agreement contains, in Articles 6.7 and 6.8, cross-indemnity covenants by which each party agreed to indemnify the other from losses caused by its own negligence. Each party also agreed to be responsible for and to indemnify and defend the other from all losses and expenses, including legal fees and expenses on a solicitor and client basis, resulting from any breach of the Agreement. Lehigh's obligation to do so is reflected in Article 6.8.

[3] In Article 7.3, Catherwood agreed to be responsible to Lehigh for any damage to Lehigh's barges caused by Catherwood's negligence.

[4] Article 9.2(c) reflects Lehigh's agreement to obtain, in a form acceptable to Catherwood, Hull and Machinery Insurance ("H&M Insurance") covering Lehigh's barges.

[5] The effect to be given to Catherwood's acceptance of responsibility under Article 7.3 in circumstances where Lehigh covenanted—under Article 9.2(c)—to insure its barges, and do so in a form acceptable to Catherwood, lies at the heart of this appeal.

[6] Contractual provisions like Article 9.2(c) are known as “covenants to insure”. Provisions of this type are common in leases for real property, and are generally interpreted not only to require the covenanting party to obtain insurance, but to benefit the counterparty by relieving that party of liability for losses subject to the covenant, even if such losses are caused by its own negligence: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed (Toronto: LexisNexis Canada, 2020) at §9.9. For this reason, covenants to insure are sometimes said to give rise to tort immunity as they may have the effect of shielding a party to a contract from the consequences of its own negligence.

[7] The interpretation of a covenant to insure as an agreed-upon assumption of risk by the insuring party is not a rule of law, but is sometimes characterized as a presumption that can be rebutted by clear language reflected in other provisions of the contract: see *North Newton Warehouses Ltd. v. Alliance Woodcraft Manufacturing Inc.*, 2005 BCCA 309 per Hall J.A. at para. 45; *Royal Host GP Inc. v. 1842259 Ontario Ltd.*, 2018 ONCA 467 at paras. 14, 16, 27–28, leave to appeal ref’d [2018] S.C.C.A. No. 316; *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2016 ONCA 246 at paras. 43–45, leave to appeal ref’d [2016] S.C.C.A. No. 249.

[8] Lehigh commenced actions against Catherwood for damages, including the cost of repairs to the barge following both groundings. Lehigh argued that pursuant to Article 7.3, Catherwood agreed to indemnify Lehigh for all losses resulting from Catherwood’s negligence. Catherwood resisted the claim, arguing that Lehigh assumed the risk of loss when it undertook in Article 9.2(c) to insure its barges while under tow by Catherwood’s tugs.

[9] Catherwood counterclaimed against Lehigh, seeking judgment for solicitor and client costs based on the wording of Article 6.8. Catherwood argued that Lehigh breached the Agreement by suing Catherwood to recover the cost of repairing its barges in circumstances where Lehigh had covenanted to insure for these losses. In the alternative, Catherwood argued that it was an implied term of the Agreement that

a lawsuit for damages arising from a peril covered by Lehigh's covenant to insure would constitute a breach of the Agreement.

[10] Following a two-day summary trial, the judge dismissed Lehigh's claims, finding that the Agreement allocated to Lehigh the risk of damage to its barges while under tow by Catherwood. Relying on *Kruger Products Limited v. First Choice Logistics Inc*., 2013 BCCA 3, leave to appeal ref'd [2013] S.C.C.A. No. 109, and related authorities, he concluded that Lehigh's covenant to insure superseded the indemnity provisions of the Agreement.

[11] The judge acknowledged the existence of indications in the Agreement that Catherwood was not to benefit from the H&M Insurance Lehigh had taken out on its barges. Considering the agreement as a whole, however, he held that it did not contain the kind of clear and express language upon which he could conclude that the parties intended to oust the effect of Lehigh's covenant to insure in Article 9.2(c).

[12] The judge also dismissed Catherwood's counterclaims. He concluded that the purpose of Article 6.8 was to indemnify Catherwood for third-party claims against it resulting from Lehigh's negligence or breach of the Agreement. Even if the clause was intended to apply to claims between Lehigh and Catherwood, he rejected Catherwood's position that Lehigh's unsuccessful lawsuit constituted a breach of Article 6.8 of the Agreement. He also declined to read such an implied term into the contract.

[13] Both parties appeal from the dismissal of their respective claims. For the foregoing reasons, I would dismiss the appeals and cross appeals.

II. Background

1. The Barging and Towing Services Agreement

[14] The litigation proceeded on an Agreed Statement of Facts filed by the parties. No witnesses were called at trial.

[15] Lehigh is a supplier of construction aggregates and concrete. It is the owner of a flat deck cargo barge, the EVCO NO. 92. Catherwood is the owner and operator of two tugs, the SEA IMP X and the SEA IMP XI.

[16] On November 5, 2013, Lehigh sent to Catherwood and other towing companies a Request for Proposal ("RFP") and a draft Barging & Towing Services Agreement (the "Draft Agreement"). The Draft Agreement was prepared by Lehigh.

[17] Representatives of Lehigh and Catherwood communicated with one another regarding certain information sought in the RFP and possible changes to the rate structure and duration of the Draft Agreement.

[18] On February 11, 2014, Lehigh emailed Catherwood a revised version of the Draft Agreement. The Agreement, in final form, was executed later that month.

[19] At no point prior to the execution of the Agreement were there any discussions between the representatives of Lehigh and Catherwood regarding the provisions contained in Articles 6, 7 and 9 of the Draft Agreement. The provisions contained in those Articles were accepted by Catherwood in the form presented by Lehigh.

[20] As previously noted, Article 6 of the Agreement, in which Catherwood is the Supplier, contains cross-indemnities from each party for damages due to their negligence or breach of contract. In addition, each party agreed to indemnify and defend the other against any and all losses, damages, expenses, claims and suits (including legal fees and expenses on a solicitor and client basis) resulting from a negligent act or breach of the agreement:

> **ARTICLE 6**
> **FURTHER COVENANTS OF LEHIGH AND SUPPLIER**
>
> …
>
> 6.3 The Supplier agrees that it shall have full care, custody and control of the Barges and the Cargo once the barge lines have been released from the berths at the Sites by the Supplier in the course of providing the Services.
>
> …

6.7 The Supplier shall be responsible for and shall indemnify, hold harmless and defend LEHIGH and its affiliates and their respective directors, officers, employees, agents, subcontractors and invitees from and against any and all losses, damages, expenses, claims, suits, and demands of whatever nature (including legal fees and expenses on a solicitor and client basis) suffered or incurred by LEHIGH resulting from:

(a) any breach of this Agreement, failure to perform the Services in accordance with the terms of this Agreement or any negligence, wilful act or omission of the Supplier, its subcontractors and their respective employees, servants, agents, or representatives in the performance of the Services; and

(b) all claims, suits or demands made against LEHIGH by any other person arising out of or in connection with the Supplier's performance, or failure to perform its obligations under this Agreement, unless and to the extent attributable to any negligence or breach of this Agreement by LEHIGH, its servants, agents and employees.

6.8 LEHIGH shall be responsible for and shall indemnify, hold harmless and defend the Supplier and its affiliates, and their respective directors, officers, employees, agents, subcontractors and invitees from and against any and all losses, damages, expenses, claims, suits and demands of whatever nature (including legal fees and expenses on a solicitor and client basis) resulting from a negligent act or omission of LEHIGH or for any breach of this Agreement by LEHIGH.

[21] Article 7 of the Agreement includes these provisions. The effect and meaning to be given to Article 7.3 is central to the determination of this appeal:

ARTICLE 7
LIMITATION OF LIABILITY

7.1 In no event shall either party be liable for indirect damages, including lost profits or punitive damages.

7.2 Notwithstanding any other provision in this Agreement to the contrary, Supplier shall have the duty to put and keep the Tugs and Supplier Barges in a seaworthy condition, properly maintained, manned and equipped as per Transport Canada regulations and operating with a current Canada Steamship Inspection (CSI).

7.3 Supplier shall also be responsible to LEHIGH for any loss or damage of or to the LEHIGH Barges and any machinery or equipment (fuel containers, front-end loaders, etc.) owned by LEHIGH and carried aboard a LEHIGH Barge caused by the negligence of the Supplier, its employees, subcontractors, agents or servants, or other persons for whom the Supplier is responsible.

[22] Under Article 9.1 of the Agreement, Catherwood was required to obtain, in a form acceptable to Lehigh: Commercial General Liability insurance ("CGLI") in an amount not less than $5 million per occurrence; H&M Insurance upon its tugs; and Protection and Indemnity Insurance ("P&II") insuring it as owner of the tug for, among other things, third-party claims. Catherwood's CGLI and P&II policies were to name Lehigh as an additional insured.

[23] Under Article 9.2 of the Agreement, Lehigh was required to obtain, in a form acceptable to Catherwood: corresponding CGLI and P&II; marine cargo insurance for the aggregate being transported on Lehigh's barges; and H&M Insurance upon its barges. Lehigh's CGLI and P&II policies were to name Catherwood as an additional insured.

[24] Neither party was required to name the other as an additional insured under its H&M Insurance policy.

[25] The Agreement did not require either party to obtain a waiver of subrogation from their respective H&M insurers. But for the covenant to insure, there is nothing in the Agreement preventing Lehigh (or its insurers through subrogation) from suing Catherwood for damage to its barge caused by Catherwood's negligence.

[26] In the event either party failed to procure the required insurance, the insurance failed, or an insurer, due to any act of the insured, refused to pay, Article 9.4 stipulates that the responsible party would be deemed to be the insurer or self-insurer and shall pay all claims which would otherwise be covered by the failed insurance and indemnify the other party from any loss, damage, claim or liability which would have been covered by that insurance.

[27] For convenience, Lehigh's insurance obligations pursuant to Article 9.2 of the Agreement, and the contractual provisions to be given effect in the event that either party failed to procure the required insurance, are reproduced below:

ARTICLE 9
INSURANCE

…

9.2 LEHIGH shall at its own expense, obtain and maintain in full force and effect during the Term the following insurance coverage in a form acceptable to the Supplier:

(a) Commercial General Liability Insurance in an amount not less than five million dollars ($5,000,000.00) per occurrence combined single limit including products and completed operations, personal injury, contractual liability, contractor's liability and contingent employer's liability. The Supplier, its affiliates and its respective directors, officers, employees, agents, invitees and subcontractors shall be named as additional insured on LEHIGH's policy. The policy must be primary and include a cross-liability clause;

(b) All Risks Marine Cargo Insurance on any Cargo aboard the Barges in an amount equal to its full insured value, on terms equivalent to coverage based on Institute Cargo Clauses "A", "All Risks" or similar;

(c) Hull and Machinery Insurance upon the LEHIGH Barges in an amount equal to its agreed value and Protection and Indemnify Insurance with minimum limits of five million dollars ($5,000,000.00) each loss/vessel, insuring LEHIGH against liability as owner of the LEHIGH Barge for wreck removal expenses and for third party claims and standard pollution liability insurance. The Supplier shall be named as an additional insured on the Protection and Indemnity policy.

…

9.4 In the event either party fails to procure the required insurance, an insurance fails for any reason (including breach of condition or warranty), or an insurer otherwise, due to any act of the insured, refuses or is unable to pay, the responsible party shall be deemed the insurer or self-insurer, and shall accept and pay all claims which would otherwise be covered by the failed insurance and shall indemnify and hold harmless the other party of and from any loss, damage, claim, liability and/or suit (including reasonable legal fees and costs) which would have been covered by that insurance.

2. The Two Groundings

[28] While the agreement was in force, Lehigh's barge grounded twice while under tow by a Catherwood tug.

[29] On or about November 29, 2016, Lehigh's barge grounded in the Pitt River while under tow by Catherwood's tug, the SEA IMP X. It was an agreed fact that, but

for the defences alleged by Catherwood to be contained in the Agreement, Catherwood would be liable for the reasonable cost of repairing the barge up to the limit of $500,000 then set out in s. 29(b) of the *Marine Liability Act*, S.C. 2001, c. 6 [*MLA*]. The cost of repairing the damage to the barge arising from the first grounding was agreed to be CAD $372,930.31. At the time of the first grounding, Lehigh had in place H&M Insurance on the barge. The agreed value of the barge under this policy was USD $800,000. The deductible was USD $500,000. As the cost of repairing the barge fell under the deductible, Lehigh did not make a claim under this policy.

[30] On or about November 15, 2016, the barge was again grounded in the Pitt River, this time while under tow by Catherwood's tug, the SEA IMP XI. As in the case of the first grounding, it was an agreed fact that, but for the defences alleged by Catherwood to be contained in the Agreement, Catherwood would be liable for the reasonable cost of repairing the barge up to the limits set out in the *MLA*. The cost of repairing the damage to the barge arising from the second grounding was agreed to be in excess of CAD $500,000. At the time of the second grounding, Lehigh had in place H&M Insurance on the barge. The agreed value of the barge under this policy was USD $800,000. The deductible was USD $500,000. Lehigh did make a claim under this policy in relation to the second grounding and received partial compensation for its loss.

[31] It was common ground in the court below that the H&M Insurance contemplated by Article 9.2(c), and obtained by Lehigh, provided broad coverage for marine perils of the sea, which included damage to the barge resulting from both the first and second groundings.

[32] In two separate actions, Lehigh claimed for damages to its barge totaling $872,930.21, plus interest and costs.

[33] Relying on Article 6.8, Catherwood commenced counterclaims for judgment against Lehigh for legal fees and expenses on a solicitor and client basis attributable to its defence of Lehigh's actions and the prosecution of its counterclaims. The essence of Catherwood's position was that Lehigh, having covenanted to insure its

barges, breached the agreement by commencing its claims against Catherwood for damages.

III. Reasons for Judgment

1. Lehigh's Claims

[34] In written reasons for judgment ("RFJ") given on September 2, 2022 and indexed as 2022 BCSC 1556, the trial judge relied on the general principle that, in the absence of clear contractual language to the contrary, a covenant to insure not only obligates one party to obtain insurance, but also relieves the other party of liability for losses subject to the covenant, even if such losses are caused by its own negligence.

[35] As noted earlier, the judge relied on *Kruger* as "a leading case containing much analysis of this issue": RFJ at paras. 23–34. In *Kruger*, a warehouse fire destroyed the paper inventory of Kruger Products Limited ("Kruger"). The loss was caused by the negligence of the warehouser, First Choice Logistics Inc. ("First Choice"). The warehousing agreement contained a broad indemnification of Kruger for First Choice's negligent acts. For its part, Kruger covenanted to insure its inventory. Unlike the case at bar, Kruger's covenant to insure required it to name First Choice as an additional insured for property damage arising from an insured's negligence.

[36] Writing for the Court in *Kruger*, Newbury J.A. found that the contract allocated the losses to Kruger under its covenant to insure rather than to First Choice under its indemnity. In the absence of contractual language to the contrary, a presumption arose that the covenant to insure supervened. Otherwise, the covenant would confer no benefit on First Choice. In the result, the covenant to insure, clearly intended for the benefit of First Choice, was found to act as a bar to Kruger's subrogated claim.

[37] The judge in this case distinguished authorities relied on by Lehigh, including *Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions Constructors*, 2022 ONCA 10 [*Crosslinx*] and *Royal Host* on grounds that, in both cases, the

contract contained express and unambiguous language that the covenant to insure would not relieve the counterparty of responsibility for damage caused by its own negligence: at RFJ paras. 35–42.

[38] The judge made no express reference to Article 7.3 of the Agreement in his reasons. The meaning and effect to be given to this provision was, however, one of the key issues argued at trial. The following exchanges between the judge and counsel reflect the judge's concern about how to resolve the potential conflict between Article 7.3 and Article 9.2(c), and give meaning to both:

> Counsel for Lehigh: …Lehigh relies very, very much on clause 7.3…the crux of the case of Lehigh against Catherwood is for having damaged its barges…and Lehigh claims pursuant to 7.3 for indemnification of those damages.
>
> …
>
> The Court: …So…you say… Catherwood's position [on the meaning and effect to be given to the covenant to insure in Article 9.2(c)] renders [Article 7.3] ineffective?
>
> Counsel for Lehigh: Yes
>
> …
>
> Counsel for Lehigh: …if Catherwood wanted tort immunity, they could have asked for a waiver of subrogation. They could have asked to be added as insured's --
>
> The Court: Yeah.
>
> Counsel for Lehigh: -- to Lehigh's hull and machinery policy.
>
> The Court: Yeah.
>
> Counsel for Lehigh: All that's left is an implied term of tort immunity along with the conflicting clause, 7.3, that says… [Catherwood is] responsible for damage to the barge.
>
> The Court: Yeah, we've got a conflict between an express liability clause and a covenant to insure.
>
> Counsel for Lehigh: … the covenant to insure is express…but implied tort immunity arising from the covenant to insure.
>
> The Court: Well, that's the question. Do we have tort immunity? So, the question is when you've got…an express liability clause for the towing company but a covenant to insure for the barge owner… does the tug company have… immunity or not?
>
> Counsel for Lehigh: Yeah.
>
> …

The Court: …how do you say I'm supposed to reconcile the covenant to insure with 7.3? What…do you say the…intention of the parties was objectively ascertained?

Counsel for Lehigh: That 7.3 makes…Catherwood liable for the repairs to the barges and the covenant of each party to insure their own vessels is irrelevant to that responsibility.

The Court: … but … why is Lehigh's obligation to insure in the contract? What's the purpose of that?

…

The Court [Addressing Counsel for Catherwood]: On your interpretation, 7.3 … has no effect …your position is [the covenant to insure] it's wiping 7.3…

Counsel for Catherwood: No, it doesn't. … the specific obligation for the…barge owners to insure for hull and machinery insurance will show you that [Article 9.2(c)] does cover…the situation that we've got here.

…

The Court: So, what's left of [Article] 7.3?

…

The Court: So –… just to make sure I've got the point…. You say that 7.3 still does have a purpose.

Counsel for Catherwood: It does.

The Court: And the purpose is that Catherwood is liable for damages [to the barges] caused by their negligence which…are not covered by the hull maintenance policy.

Counsel for Catherwood: Precisely.

…

The Court: Let's just have a look at 7.3 because this is obviously, you know, very important.

…

The Court: …If 7.3 and [the covenant to insure] cover the same subject matter, then we have a problem…

…

Counsel for Catherwood: … [The clauses] still work together… [Catherwood has] this responsibility [under Article 7.3] and [it] can look to the insurance that [Lehigh], the owner of the barge, is supposed to obtain in order to satisfy that.

The Court: But if… [Lehigh's insurance] completely covers [Catherwood's liability obligations] …then why even have… [Article 7.3] at all? …If they cover exactly the same subject matter then there is no point to 7.3. Now, you say they don't cover the same subject matter. You say

> 7.3 is broader…it creates greater liability than Lehigh's obligation to insure.
>
> Counsel for Catherwood: But even if it doesn't…it's two separate things: One is the liability, and one is…the financial support for that liability. In other words, if [Catherwood] didn't have [Lehigh's covenant to insure] …they would simply go out and buy insurance themselves…But they do have a covenant. And so, what [Catherwood says] is, under this covenant Lehigh must call on its insurance…
>
> The Court: Yes.
>
> Counsel for Catherwood: Our liability clause never comes into question.
>
> The Court: Right. So why even have it? That's the point. Why even have it?
>
> Counsel for Catherwood: …this contract could live perfectly without [Article 7.3] …
>
> The Court: Well, but that's…not a good principle of contractual interpretation…my eventual interpretation of this contract shouldn't find that 7.3 has no …purpose.
>
> …
>
> The Court: What's the purpose of 7.3 if the [covenant to insure in Article 9.2(c)] always covers anything that falls within 7.3, why have 7.3 at all?
>
> Counsel for Catherwood: You'll see in the cases it says it can support it. They're not in conflict. The cases say you can have this negligence clause…and the covenant to insure supports that liability…
>
> …
>
> The Court: …What liabilities does 7.3 create for Catherwood that the covenant to insure doesn't cover? ...I'm trying to find a role for 7.3. I'm trying to find how 7.3 and the covenant to insure can co-exist. How can there be a role for both.
>
> …
>
> The Court: …Even if 7.3 has the same scope as the [covenant to insure], you say, but look, you've still got to look at the contract as a whole. And you not only have the covenant to insure but you have 9.4 and -- in other words the self insurance clause, and you have the fact that Catherwood has to approve the insurance. When you put all of that together, even if 7.3 has the same scope as the covenant, the party's intentions are clear that all the covenant to insure is to protect Catherwood.

[39] The judge emphasized in his reasons that his interpretation of the contract was based on consideration of the Agreement "as a whole": RFJ at paras. 43; 50. He must be taken to have rejected Lehigh's position that Article 7.3 operated as a "carve out" from the covenant to insure in Article 9.2(c): RFJ at para. 52.

[40] The thrust of the judge's reasoning is reflected in the paragraphs excerpted below:

> [39] As in *Kruger* and [*Rough Bay Enterprises Ltd. v. Budden*, 2003 BCSC 1796], the Court said [in *Crosslinx*] that promises to insure will usually be interpreted to allocate responsibility for any damages should the risk arise, but this remains a question of interpretation of the contract as a whole:
>
> > [26] In many, if not most circumstances, a promise to insure against a certain risk will lead to the logical conclusion that the party undertaking to insure against the risk had agreed to be responsible for any damages should the risk ensue. That conclusion does not however reflect a free-standing legal principal of contractual interpretation but is an example of how the contractual intention of the parties is determined through an objective consideration of all of the circumstances. An undertaking to insure leads to the reasonable inference that the parties intended that the party promising to insure would undertake the risk to be insured against. However, that inference can only properly be drawn after a reading of the contract as a whole in the factual context of the particular circumstances. The language of the contract and the context control the interpretation of the contract, including any insurance covenant in the contract. There is no legal rule that a party's covenant to insure against a risk must mean it was intended that the party undertaking to insure assumed the risk of the harm insured against: *Royal Host G.P. Inc. v. 1842259 Ontario Ltd.*, 2018 ONCA 467, 422 D.L.R. (4th) 661, at para. 16, leave to appeal refused, [2018] S.C.C.A. No. 316.
> >
> > [27] The correct approach to the interpretation of insurance covenants is captured by G.R. Hall in *Canadian Contractual Interpretation Law*, 4th ed. (Markham, Ont.: LexisNexis, 2020), at pp. 340-41:
> >
> > > The interpretation of a covenant to insure as an allocation of risk is not a rule of law, meaning that if the contractual language indicates that the covenant is to insure, not to act as an allocation of risk precluding liability for the event subject to the covenant, the text will prevail and the covenant will not have that effect. Each contract containing a covenant to insure must be interpreted based upon its own wording. Decided cases can be helpful, when the wording considered is similar to that in the agreement in issue. However, differences in the wording between each case can be determinative.
> >
> > [Emphasis in original.]
>
> …
>
> [43] Reading the Barging Agreement as a whole, I find the parties allocated to Lehigh the risk of damage to its barges while under towing by Catherwood, despite Catherwood's indemnity. In my view, this is indicated by the following three aspects of the agreement.

[44] First, in s. 9.2(c), Lehigh covenants to Catherwood that it will obtain the H&M Insurance.

[45] Second, s. 9.2 requires Lehigh's insurance coverage to be "in a form acceptable" to Catherwood. In my view, this indicates that Catherwood is to have the benefit of the insurance. I can see no reason for this requirement unless that were the case.

[46] Third, s. 9.4 states that, if a party fails to procure the required insurance or the insurance fails for any reason, that party "shall be deemed the insurer or self-insurer, and shall accept and pay all claims which should otherwise be covered by the failed insurance and shall indemnify the other party… which would have been covered by that insurance." In my view, this is another clear indication that Catherwood is to benefit from Lehigh's H&M Insurance. To paraphrase an argument made by counsel for Catherwood, it would make no sense for Catherwood to be liable to Lehigh if Lehigh obtained the requisite H&M Insurance, but for Lehigh to self-insure if it did not.

[47] Lehigh argues that it was important to Newbury J.A.'s decision in *Kruger* that the contract required the warehouse be named as an additional insured, an obligation that is absent from Lehigh's obligation to obtain the H&M Insurance. In *Kruger*, Newbury JA said:

> [60] … Paragraph 17A required Scott to maintain "insurance of its property and inventory within the warehouse" and to name FCL as an additional insured under this "primary coverage*".* The terms of the agreement itself were to prevail over those in Appendix C in the event of a conflict.
>
> [Emphasis in original.]

[48] Moreover, Lehigh pointed out that s. 9.2 required Catherwood be added as a party to Lehigh's liability insurance, and so the lack of requirement to do so for the H&M Insurance was intentional and meaningful. Counsel for Catherwood argued the reason for the difference was that Catherwood needed to be named as an additional insured under Lehigh's liability insurance for protection against third party claims.

[49] Lehigh also pointed to Catherwood not receiving any waiver of Lehigh's subrogation rights for its H&M Insurance.

[50] I agree with Lehigh that these points could be taken as some indication that Catherwood was not to benefit from the H&M Insurance. Considering the Barging Agreement as a whole, however, in my view they do not provide nearly the clarity regarding the parties' intentions as the terms described in paragraphs 44-46 above, which in my view clearly indicate that Catherwood was to have the benefit of Lehigh's H&M Insurance.

2. Catherwood's Counterclaims

[41] In his reasons dismissing Lehigh's claims, the judge purported to dismiss Catherwood's counterclaims for solicitor and client costs, holding that Article 6.8 had

no application as Lehigh was not found to be negligent or in breach of the Agreement. Before the order was entered, counsel reminded the judge of their request that costs be dealt with separately after the determination of Lehigh's claims. On consent, the judge heard full submissions on costs, including Catherwood's claim for solicitor and client costs based on the language of Article 6.8.

[42] Catherwood argued that Lehigh breached the Agreement by suing Catherwood for the recovery of its losses, despite Lehigh's covenant to insure for such losses. In support of its position, Catherwood relied on the costs order made in favour of First Choice on similar (but not identical) contractual language used in *Kruger*. In the alternative, Catherwood argued for an implied term of the contract that the lawsuit for damages arising from a peril covered by the covenant to insure would constitute a breach of the Agreement.

[43] There is a presumption against adding an unexpressed term to a contract by implication: *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 48. Nevertheless, terms may be implied in a contract based on the presumed intention of the parties where implying the term is necessary to give business efficacy to a contract, or where doing so otherwise meets the 'officious bystander' test in the sense that, if questioned, the parties would agree it is obvious they intended to include the term in the contract: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 at 775, 1987 CanLII 55. Catherwood argued that in the absence of such an implied term, Lehigh's covenant to insure would be rendered meaningless as Catherwood would be deprived of a benefit it obtained under the contract.

[44] In unreported oral reasons for judgment given on December 2, 2022 ("ORFJ"), the judge rejected Catherwood's position. He started from the well-established proposition that a contractual right to full indemnification and legal expenses must be "clearly and unequivocally expressed" in the contract: at para. 19; citing *Bakshi v. Shan*, 2013 BCSC 969 at para. 44.

[45] The judge read Article 6.8 as indemnifying Catherwood for third-party claims against it resulting from Lehigh's negligence or breach of the Agreement, rather than for claims as between the contracting parties. He noted that this interpretation was supported by: (1) Lehigh's stated obligation under Article 6.8 to "defend" Catherwood from claims which would apply to third-party claims, but not to claims as between the parties; and (2) the list of Catherwood's related parties to be indemnified which also suggested that the clause was intended to protect against third-party claims, rather than addressing the allocation of legal costs for litigation as between the contracting parties: ORFJ at paras. 22–23.

[46] Even if Article 6.8 was interpreted to apply to claims between Lehigh and Catherwood, the judge concluded that the indemnity for solicitor and client costs was not triggered because Lehigh had not breached the Agreement. As he put it:

> [26] …Lehigh's claim was for a determination of how the Barging Agreement allocated the risk of the losses in question, and for damages if its interpretation was correct. I do not see how Lehigh's unsuccessful lawsuit…is a breach of the Barging Agreement. Catherwood had no authority for such a characterization.

[47] The judge rejected Catherwood's alternative position that it was an implied term of the contract that a lawsuit for damages arising from a peril covered by the covenant to insure would constitute a breach of the Agreement. He noted that Catherwood neither pleaded an implied term nor had any authority to support its position: ORFJ at para. 27. In any event, he rejected Catherwood's argument that a costs indemnity must be implied to give effect to Lehigh's contractual assumption of the risk through its covenant to insure. He noted that Lehigh's assumption of this risk was commercially effective in the litigation in that Catherwood defeated Lehigh's claims for compensation: ORFJ at paras. 28–30. He held that Catherwood's receipt of tariff costs, as opposed to indemnity costs, would not undermine the commercial effectiveness of the allocation of risk in the Agreement. As he put it:

> [30] …Catherwood's position also does not come close to meeting the reasonable bystander test: it does not go without saying that a party should expect to be indemnified for its legal expenses when defeating its counterparty's interpretation of their contractual obligations. That is an issue for negotiation between the parties.

[48] Finally, the judge rejected Catherwood's submission that the award of indemnity costs to First Choice in *Kruger* on similar contractual language was binding. The judge noted that the Court in *Kruger* provided no rationale for its award of indemnity costs to First Choice: see the Court's Supplementary Reasons on Costs in *Kruger* at 2013 BCCA 362 and 2014 BCCA 187. He proceeded to distinguish the costs order made in *Kruger* on two grounds. First, the indemnity clause in *Kruger* did not refer to the duty to defend and, on its face, appeared to provide indemnity against both third-party claims and claims as between the contracting parties. Second, it appeared that Kruger had breached the parties' warehousing agreement by failing to obtain first party insurance on its inventory, not just for itself but also for the benefit of First Choice: *Kruger* at para. 34; ORFJ at para. 35. As a result of this apparent breach, Kruger's insurer was able to bring its subrogated action against First Choice. If Kruger had made First Choice a first-party insured, as required under the contract, Kruger's insurer would not have been able to pursue a subrogated action. Thus, the judge concluded that there may well have been a breach of the contract by Kruger that triggered the indemnity and First Choice's entitlement to its legal fees.

IV. Lehigh's Appeals

[49] Lehigh submits that the judge erred in finding that the Agreement allocated the barge repair costs to Lehigh, under its covenant to insure the barges in Article 9.2(c), rather than to Catherwood who agreed to be responsible for damage to Lehigh's barges caused by its negligence under Article 7.3.

[50] In particular, Lehigh argues that, in interpreting the Agreement, the judge committed extricable errors in law by:

1. failing to consider the Agreement as a whole, evidenced by his failure to accord Article 7.3 any meaning;

2. treating *Kruger* as governing even though the language used in that case, and analogous cases in which tort immunity was found, is significantly different than the language used in this Agreement; and

3. concluding that the only reason for Lehigh to agree to insure its barges was to assume the risk of damage even if caused by the negligence of the counterparty.

[51] I do not understand Lehigh to argue that the judge's interpretation of the Agreement reflects palpable and overriding error. To succeed on this appeal, Lehigh must, therefore, establish that the judge's interpretation of the Agreement reflects extricable error in law.

[52] The parties are divided on the issue of the applicable standard of review. Contractual interpretation typically involves issues of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50. Absent an extricable error of law, the standard of review is highly deferential. Appellate intervention is warranted only where a judge has made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 37. Put simply, it is not open to this Court to set aside the judgment below simply because we might interpret the contract differently: *Rosas v. Toca*, 2018 BCCA 191 at para. 34.

[53] The correctness standard applies to extricable legal errors: *Sattva* at paras. 50, 53. Extricable questions of law include legal errors involving the application of an incorrect principle, the failure to consider a required element of the legal test, or the failure to consider a relevant factor. The circumstances in which a question of law can be extracted will be uncommon and *Sattva* cautions appellate courts not to strive to unearth extricable error. As noted in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 45, courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law), and a party alleging that a conventional application of a legal test should have resulted in a different outcome (a question of mixed fact and law). The lesson from *Teal Cedar* is that counsel are, for strategic reasons, adept at framing issues to appear to be something they are not. A net may commonly be understood as a meshed instrument designed to catch fish, but characterized by counsel for strategic purposes as a collection of holes tied

loosely together with string: Julian Barnes, *Flaubert's Parrot* (New York: Alfred A. Knopf, 1985) at 38.

[54] A correctness standard of review may also apply in circumstances where interpretation of the contract has precedential value, and there is no meaningful factual matrix to assist in the interpretation process, as is the case when courts are called upon to interpret standard form contracts, sometimes known as contracts of adhesion: *Ledcor Construction Limited v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 4, 39–43. Standard form contracts are specialized contracts that bind large groups of customers without negotiation of terms.

[55] *Sattva* directs courts to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": at para. 47. Language used in the contract will often be derived from contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement. Even so, surrounding circumstances "must never be allowed to overwhelm the words of that agreement": at paras. 48, 57. Finally, while the meaning of words is a matter of dictionaries, the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean: *Sattva* at para. 48, citing with approval Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) at 115.

[56] Lehigh submits that the judge's reasons reflect extricable error in law and that the correctness standard of review applies on this appeal. Lehigh advances several arguments in support of its position on this issue. In my respectful view, only one of them has arguable merit and I will deal with it last.

[57] First, Lehigh submits there is virtually no factual matrix to assist with the interpretation of the Agreement in this case. As a consequence, it seeks to analogize this case to *Ledcor* and claim the benefit of the principles underlying the adoption of

a correctness standard of review applicable to the interpretation of standard form contracts.

[58] Second, the appeal is said to have precedential value because the protection afforded by covenants to insure has not hitherto been applied outside of landlord-tenant and bailor-bailee cases.

[59] Third, Lehigh submits that the judge erred in law in treating the reasoning and result in *Kruger* as being dispositive of this case in circumstances where the language of the contract in *Kruger* had different terms. Specifically, Kruger was required to name First Choice as an additional insured on the policy insuring its inventory. Lehigh was under no similar contractual obligation to name Catherwood as an insured under the H&M Insurance policy insuring its barges.

[60] Fourth, Lehigh submits that the judge erred in law by concluding that the only reason for Lehigh to agree to insure its barge was to assume the risk of damage or loss even if caused by Catherwood.

[61] Finally, Lehigh argues that the judge erred in law by failing to interpret the Agreement in such a way as to give meaning to all of its terms, including Article 7.3. It is black letter law that courts must strive to interpret contracts in a way that gives meaning to all of its terms, and avoid interpretations that render one or more terms ineffective. The interpretive approach taken by the judge is said by Lehigh to have orphaned Article 7.3, giving it no meaning within the Agreement as a whole.

[62] I see no merit in Lehigh's first four submissions on the standard of review. With respect to Lehigh's first point, the application of a legal standard to facts, even agreed-upon facts, gives rise to a question of mixed fact and law. Further, I see no merit in Lehigh's submission that an analogy should be drawn between the case at bar and the principles that inform articulation of the standard of review in cases involving contracts of adhesion. While the Agreement was the subject of very little negotiation between the parties, it is not a standard form contract. It is a unique instrument, the interpretation of which turns on its particular—and unwieldy—terms.

Ledcor principles therefore do not apply in this context. Further, to the extent Lehigh relies on *Royal Host* on this point, I do not see that it assists Lehigh as the parties agreed in that case that the standard of review was correctness. It appears that the Court was content to proceed on this basis given the judge's error in principle by proceeding as if the existence of a covenant to insure is dispositive despite contrary language used elsewhere in the Agreement. As the Court explained at para. 16, it is a fundamental tenet of contractual interpretation that it is necessary to discern the intentions of the parties in accordance with the language they have agreed to in the contract. In *Royal Host*, the judge allowed the general principle to override the plain language of the lease that made the tenant liable for damages caused by its negligence notwithstanding the landlord's covenant to insure against fire.

[63] With respect to Lehigh's second point, I do not see this case having the kind of precedential value that motivated the adoption of a correctness standard of review for the interpretation of standard form contracts. As noted, interpretation of the Agreement turns on its unique terms.

[64] I would also reject Lehigh's submission that the determination of this appeal has precedential value because the effect of the judgment below is to extend the protection afforded by covenants to insure well beyond the legal relationships to which it has traditionally been confined. The doctrine of immunity arising from covenants to insure has not been confined to landlord-tenant and bailor-bailee cases as Lehigh suggests. It has been considered and applied in a variety of different contexts: see Nigel P. Kent, "Tort Immunity: Covenants to Insure and Waivers of Subrogation" (February 1998, updated February 2006), online (pdf): <https://www.cwilson.com/app/uploads/2013/01/tort-immunity.pdf> at 5–6. Indeed, *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80, 1997 CanLII 1277 (Ont. C.A.), one of the leading cases in this area, arose in the context of a construction contract. In that case, Carthy J.A., writing for the Court, confirmed that the interpretive approach to covenants to insure, developed in the landlord-tenant context, "applies equally" to an agreement between a contractor and subcontractor: at para. 11. The same interpretive principles have been applied in tug

and tow cases: see *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.* (1995), 26 O.R. (3d) 321, 1995 CanLII 2482 (Ont. C.A.), and *Rough Bay Enterprises Ltd. v. Budden et al.*, 2003 BCSC 1796. Lehigh has offered no logical reason why the protection afforded by covenants to insure should not have general application, and no case was brought to our attention suggesting that tort immunity arising from covenants to insure is restricted to landlord-tenant and bailor-bailee relationships.

[65] With respect to Lehigh's third point, I do not accept that the judge erred in law by overreading the reach of *Kruger* or otherwise failing to recognize its distinguishing features. The judge's statement at para. 24 of the RFJ—that *Kruger* is a leading case in this area containing a good deal of analysis of the issues pertinent to the resolution of Lehigh's claims— is factually and legally correct. Further, the judge recognized that the contract required Kruger to name the warehouser as an additional insured under its policy, an obligation Lehigh did not assume with respect to its H&M Insurance: RFJ at para. 47. I see no extricable error of law in any of this.

[66] With respect to Lehigh's fourth point, the judge did not suggest that the only reason for Lehigh to insure its barge was to assume the risk of damage caused by Catherwood. Viewed in context, what the judge was attempting to convey is that there was no reason for Lehigh to covenant to insure its barges on terms acceptable to Catherwood unless the parties intended for Catherwood to benefit from Lehigh's H&M Insurance policy. The point was not, in any event, pursued in oral argument.

[67] There is more merit in Lehigh's submission that extricable error in law may be sourced in this case from the failure of the judge to have regard to the whole of the provisions of the Agreement, including, most significantly, Article 7.3. I turn to that issue next.

[68] I should emphasize, at the outset, that I am unpersuaded by Lehigh's related argument, that Articles 7.2 and 7.3 should be read together. Lehigh submits that the language used in Article 7.2—"notwithstanding any other provision of this agreement to the contrary"—which gives priority to Article 7.2 over any other provision in the Agreement, should be read as applying to Article 7.3. Lehigh further submits that the

nexus between Articles 7.2 and 7.3 is underscored by use of the word “also” in Article 7.3, emphasizing Catherwood’s responsibility to Lehigh for damage to Lehigh’s barges caused by Catherwood’s negligence despite Lehigh’s covenant to insure.

[69] First, I do not see that this argument raises an extricable question of law. In any event, Lehigh’s position on this point would have us redraw the terms of the contract. Had the parties intended the prioritizing language reflected in the opening phrase of Article 7.2 to apply to Article 7.3, it would have been a simple matter to draft the contract to achieve this result. If, for example, Articles 7.2 and 7.3 were intended to be read together, one would expect the contract to read:

> Article 7.2 Notwithstanding any other provision in this Agreement to the contrary, Catherwood shall: (a) have the duty to put and keep its Tugs and Supplier Barges in a seaworthy condition…and (b) be responsible to Lehigh for any loss or damage of or to the Lehigh Barges…caused by the negligence of Catherwood…

That the Agreement was not worded this way is significant and, in my view, must result in the rejection of Lehigh’s invitation to read these two Articles as if they were one. The judge’s implicit rejection of this argument certainly does not reflect palpable and overriding error in his interpretation of the contract.

[70] Lehigh’s argument that Article 7.3 must be given some meaning in construing the obligations of the parties under the contract as a whole does not, however, depend on its position that Articles 7.2 and 7.3 should be read together.

[71] It is a fundamental principle of contractual interpretation that a contract must be construed as a whole. An interpretation which ignores a specific and relevant provision of the agreement is not one that takes into account the whole of the contract. Such an interpretation would generally give rise to an extricable question of law: *Sattva* at para. 64.

[72] In my view, however, Lehigh’s claim that the judge committed an extricable error in law by ignoring Article 7.3 or failing to interpret the Agreement in such a way as to give it meaning cannot survive this Court’s analysis in *Kruger.* In that case, the

warehousing agreement contained covenants on the part of both parties with respect to insurance. Kruger agreed to obtain insurance on its inventory being warehoused by First Choice. First Choice agreed to obtain insurance covering the risk of damage to Kruger's inventory arising from First Choice's negligence. Kruger's inventory was, in fact, lost as a consequence of the negligence of First Choice. The trial judge found that Kruger's subrogated claim against First Choice was not barred by its covenant to insure inventory in the warehouse. Consistent with the position advanced by Lehigh on this appeal, the trial judge in *Kruger* held that disallowing the claim would "make meaningless" the indemnification provisions of the agreement under which First Choice had covenanted to hold Kruger harmless for losses from property damage caused by its negligence.

[73] On appeal, First Choice argued that the judge erred in declining to give effect to Kruger's covenant to insure against the risk of loss of its inventory. The appeal was allowed on grounds that Kruger's covenant to insure supervened over First Choice's agreement to indemnify Kruger for losses caused by its own negligence.

[74] In coming to this conclusion, Newbury J.A., writing for the Court, traced the development of tort immunity beginning with the trilogy of landlord-tenant cases in which it was held that, unless the result is inconsistent with other language used in the lease, a contractual undertaking by a landlord to secure property insurance operates as an assumption by that party of the risk of loss caused by the peril to be insured against: *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd*., [1976] 2 S.C.R. 221, 1975 CanLII 26, *Ross Southward Tire Ltd. v. Pyrotech Products Ltd*., [1976] 2 S.C.R. 35, 1975 CanLII 25, and *T. Eaton Co. v. Smith*, [1978] 2 S.C.R. 749, 1977 CanLII 39. This is so notwithstanding a covenant by the tenant/counterparty to indemnify the landlord for losses caused by its own negligence. As explained in *Madison* at 84, the rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant and the tenant would derive no benefit from the covenant if it did not apply to a fire caused by the tenant's negligence.

[75] Newbury J.A. found no conflict between the general covenant to indemnify given by First Choice and the covenant to insure given by Kruger:

> [56] With respect to the trial judge's policy concerns regarding the warehouser's obligation to indemnify [Kruger] for negligent acts, I must also, with the greatest of respect, disagree. First, I do not see any conflict between a general covenant to indemnify given by a warehouser (in this case, by [First Choice] at para. 12 of the [warehousing agreement] …), and insurance provisions such as para. 17A [Kruger's covenant to insure]. Indeed, one may see insurance covenants as a means of strengthening indemnification obligations, which alone are only as strong as the indemnifier's particular financial circumstances. Furthermore, the obligation of a negligent warehouser to indemnify its bailor for breaches of its duty of care arises even without a provision such as para. 12. It would make no commercial sense to permit an indemnity provision to overwhelm or supersede an insurance provision such as para. 17A — the "supervening covenant" discussed in *T. Eaton*. As was stated in *Economical Mutual Insurance Co. v. 1072871 Ontario Ltd.* [1998] 20 R.P.R. (3d) 154 (Ont. Ct. J. (Gen. Div.)), aff'd (1999) 1999 CanLII 18664 (ON CA), 9 C.C.L.I. (3d) 224:
>
> > Counsel for the plaintiff further seeks to distinguish the *T. Eaton* case on the basis that para. 8(1) of the lease before me contains a provision requiring the tenant to keep the Landlord indemnified with respect to any damage to the premises occasioned by the negligence of the tenant...whereas there is no such provision in the leases in the *T. Eaton* case.
> >
> > I do not accept this submission. In my view para. 8(2) does not impose upon the tenant any greater liability for fire caused by its negligence than exists in the absence of such a provision...
> >
> > ...
> >
> > This [omitted quotation from *T. Eaton* at 428] clearly indicates that even in the absence of a specific provision requiring the tenant to indemnify for damage caused by its negligence, there is no doubt as to the liability of the tenant for a fire caused by its negligence. I therefore cannot see how the presence of a provision such as para. 8(2) changes the effect of the landlord's obligation to insure. I note that para. 8(2) does not ... purport to override the operation of the para. 8(1) [i.e., the covenant to insure]. In my view the practical effect of the *T. Eaton* case is that the presence in a lease of a covenant on the part of the landlord to insure for fire, unless a clear intention to the contrary is expressed, will result in the tenant being protected from liability for negligently caused fires. I do not regard para. 8(2) as expressing such a contrary intention. [At paras. 11-3; emphasis added.]

[76] *Economical Mutual Insurance* was cited with apparent approval by this Court not only in *Kruger*, but in *North Newton* (at para. 41). In that case, Economical

Mutual Insurance Company ("Economical Mutual") brought a subrogated claim alleging that fire-related damage to commercial premises was caused by the negligence of the defendant tenant. As in this case, the issue was whether, under the terms of the agreement, the negligent party was immunized from the claim. There are significant factual parallels between *Economical Mutual Insurance* and the case at bar.

[77] In *Economical Mutual Insurance*, the landlord covenanted to maintain insurance coverage on the premises for fire. The tenant covenanted to indemnify the landlord with respect to any damage to the premises occasioned by its negligence. An additional feature of the case was that the landlord and tenant agreed that the rent would include fire insurance premiums, but the existence of this term was not relied on by the judge in concluding that the landlord's covenant to insure protected the tenant from a claim for liability for fire damage caused by its own negligence. Relying on the trilogy, Spiegel J. held that the term of the lease imposing an obligation on the landlord to insure should be seen as benefitting the tenant since its inclusion would be unnecessary if it were meant solely to benefit the landlord: at para. 9. As in *Kruger*, the effect of the holding in *Economical Mutual Insurance* is that the covenant to insure supervenes over the agreement of the counterparty to indemnify for loss attributable to its negligence.

[78] An appeal by Economical Mutual was dismissed [(1999), 122 O.A.C. 94, 1999 CanLII 18664 (Ont. C.A.)] in an endorsement reproduced below:

> … Looking at the lease as a whole, we agree with [the judge's] conclusion that, by virtue of the terms of the lease, the risk of damage as a result of fire, includes fire damage caused by the negligence of the tenant, was assured by the landlord. Accordingly, no subrogated action can be brought by the landlord's insurer for such damage by the tenant. The appeal is dismissed with costs.

I agree with Catherwood's position that *Economic Mutual Insurance* appears to be on "all fours" with the case at bar.

[79] Newbury J.A. noted in *Kruger* at para. 61, that some of the decided cases are difficult to reconcile on the question of what wording is necessary for the "covenant

to insure" principle to result in the barring of a subrogated claim. In her view, the very insertion of a covenant to insure in an agreement should generally be regarded as a benefit extended to the counterparty. I take from her analysis that this may be so even when the party covenanting to insure is not contractually obliged to name the counterparty as an additional insured under the policy, although I acknowledge that the existence of such a provision would, in this case, strengthen Catherwood's argument for tort immunity.

[80] Against this background, I do not think it can be said that the judge ignored Article 7.3. Consistent with governing authorities, he concluded that Lehigh's covenant to insure was a supervening provision.

[81] I would also observe that *Kruger* was decided in 2013, more than a year before the parties entered into the Agreement. In my view, they must be taken to have known of the effect of including a covenant to insure in the Agreement where, as here, the contract contains no language making it clear that the covenant was not intended to prevail over a counterparty's agreement to indemnify. Put simply, there was no need for Lehigh to include in the Agreement a covenant to insure the barge, and do so in a form acceptable to Catherwood, unless the term was intended to benefit Catherwood.

[82] If it were necessary to do so, I would call on the principle of *contra proferentem* to resolve any ambiguity in the agreement in favour of Catherwood. As explained in *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311 at para. 15, the principle may be invoked as a tool of last resort to favour construction of the ambiguity against the party that drew the agreement. Lehigh prepared this Agreement. To the extent there remain ambiguities despite efforts to search for an interpretation that reflects the true intent and reasonable expectations of the parties when they entered into the contract, Catherwood should not be made to shoulder the consequences of them.

[83] I wish to record that even if I were to assume the judge committed an extricable error in law by failing to give meaning to Article 7.3, I would not be inclined

to overturn the judge's order dismissing Lehigh's claims. Our task in this event would be to interpret the contract afresh with due regard to the factual findings of the judge, subject to any palpable and overriding error or misapprehension of the evidence in relation to those findings.

[84] Following this approach, Articles 7.3 and 9.2(c) can both be given effect without altering the general rule that a covenant to insure relieves the counterparty of liability for losses subject to the covenant even if those losses are caused by its own negligence.

[85] For the purposes of this alternative analysis, I adopt the scenario addressed by counsel for Catherwood in oral argument. H&M Insurance policies typically have trading limits restricting where an operator can take a vessel. Lehigh's policy provided that its barge not enter areas north of a specified latitude or to any port or place in the Queen Charlotte Islands (now Haida Gwaii). The scenario assumes that Catherwood obtained instructions from Lehigh to take the barge to Vancouver Island but, through its own negligence, misunderstood those instructions and towed the barge to Haida Gwaii where it was run aground. Lehigh's H&M Insurance would not apply because the loss occurred outside the trading limits. Catherwood would, however, be responsible for the loss under Articles 7.3 and 9.4. In this scenario, Articles 9.2(c) and 7.3 can both be given meaning.

[86] To be sure, the effect of a covenant to insure, like the effect of any contractual term, depends on the objective intention of the parties determined by an examination of the contract as a whole. In this respect, I agree with the judge that the requirement in Article 9.2 for Lehigh's H&M Insurance to be in a form acceptable to Catherwood is a strong indication that Catherwood is to have the benefit of the insurance. Like the judge, I can see no reason for this requirement unless this was, in fact, the intention of the parties.

[87] Further, the "clear language" required to rebut the presumption that Catherwood was intended to benefit from Lehigh's covenant to insure is absent in this case: *North Newton* at para. 45; *Royal Host* at para. 28, *Economical Mutual*

Insurance at para. 13. While I agree with the judge's observations (at paras. 47–49 of the RFJ) that there are indications in the Agreement that Catherwood was not to benefit from Lehigh's H&M Insurance, I would independently reach the conclusion he did—that the language of the Agreement as a whole is insufficient to displace operation of the presumption.

[88] In his thoughtful dissenting reasons, my colleague concludes (at para. 160) that "the parties must have intended" that the benefit Catherwood would derive from Lehigh's H&M Insurance would not include any loss Catherwood caused to Lehigh's barges up to the statutory limit of $500,000. While Lehigh did argue on appeal that Catherwood's agreement to be responsible for damages to Lehigh's barges arising from its own negligence was intended by the parties to operate as a carve-out from the effect that would otherwise be given to Lehigh's covenant to insure its barges, the interpretation favoured by my colleague was not advanced by Lehigh at trial or on appeal. Where, as here, the parties are sophisticated commercial entities who have been represented throughout, a court should be slow to impute to those parties an intention neither of them purported to have at the time of the formation of the contract.

[89] For the foregoing reasons, I would dismiss Lehigh's appeals.

V. Catherwood's Appeals

[90] For ease of reference, and stripped to its essentials, Article 6.8, upon which Catherwood relies in support of its claim for solicitor and client costs, reads as follows:

> Lehigh shall indemnify, hold harmless and defend Catherwood from any expenses (including legal fees and expenses on a solicitor and client basis) resulting from any breach of this Agreement by Lehigh.

[91] On the issue of its entitlement to solicitor and client costs pursuant to Article 6.8, Catherwood argues that the judge erred in distinguishing *Kruger* from the case at bar. Catherwood seeks to characterize *Kruger* as precedential and governing. In its factum, Catherwood also argued that the judge erred in failing to

find that it was an implied term of the Agreement that Lehigh would not sue Catherwood for damages arising from risks assumed by Lehigh through its covenant to insure.

[92] The parties reverse roles on the standard of review applicable to Catherwood's appeals. Catherwood submits that the judge's interpretation of the effect of Article 6.8 raises a question of "precedential value", that *Ledcor* principles govern, and that this Court is obliged to apply a correctness standard of review. Lehigh submits that Catherwood's claim for solicitor and client costs arising out of Lehigh's unsuccessful claim for a determination of how the Agreement allocated the risk of loss to its barge involves an issue of mixed fact and law. Lehigh therefore submits that the standard of review is deferential and that the judge's interpretation of Article 6.8 should not be overturned absent palpable and overriding error: *Sattva* at paras. 50–55; *Housen* at para. 36.

[93] I agree with Lehigh's position on the standard of review applicable to Catherwood's appeals. The judge's interpretation of Article 6.8 is an issue of mixed fact and law involving, as it did, bringing the principles of contractual interpretation to the words of the Agreement, considered in light of the factual matrix. The standard of review is, therefore, highly deferential.

[94] I see no palpable and overriding error in the judge's interpretation of the scope of Article 6.8 or in his conclusion that Lehigh did not breach the Agreement by unsuccessfully bringing suit.

[95] The award of solicitor-client costs made in *Kruger* does not assist Catherwood. As the judge pointed out, the agreements in *Kruger* and in the case at bar requiring one party to indemnify the other for solicitor and client costs are not identical and do not necessarily lead to the same interpretive result: RFJ at paras. 17, 22–23.

[96] Further, the absence of any analysis of the issue in *Kruger* renders the result in that case of limited value to Catherwood or the Court. Counsel for Catherwood in

the court below (not counsel who appeared on appeal) candidly acknowledged that the Court in *Kruger* did not provide any rationale for its award of indemnity costs to First Choice: RFJ at para. 31.

[97] Finally, as the judge noted, Kruger "may well" have breached the parties' warehousing agreement by failing to obtain first party insurance on its inventory for the benefit of First Choice. In its main judgment in *Kruger*, the Court noted the pleadings of First Choice suggesting that Kruger had failed in its contractual obligation to name First Choice as an additional insured on its policy: at para. 34. This Court acknowledged that it did not have the evidence to definitively resolve the point. Having reviewed the supplementary submissions of counsel made in *Kruger* on the costs application together with the Court's reasons for judgment granting First Choice costs on a full indemnity basis, I accept that we, too, do not have the evidence necessary to conclusively resolve the matter. What can be said, however, is that if Kruger had added First Choice as an additional insured, a subrogated action could not have been pursued because such an action would not lie against an insured. The inference that Kruger may well have been in breach of the contract for reasons going beyond commencing suit in the face of its covenant to insure was available to the judge on the limited evidence before him. I do not think the judge overstated its certainty or import.

[98] Catherwood's reliance on *North Newton* in support of its appeals is also misplaced. In *North Newton* (at para. 33) Hall J.A. cited *Madison Developments* for the uncontentious proposition that where a landlord covenants to obtain insurance against damage to the premises caused by fire, the landlord "cannot sue" the tenant for loss by fire caused by the tenant's negligence. Neither *North Newton* nor *Madison* purport to address the cost consequences that could conceivably flow had the landlord brought unsuccessful suit against the tenant in spite of its covenant to insure. Those consequences would, in any event, inevitably be tied to the language of the applicable agreement. Neither case is of any assistance to Catherwood on its appeals.

[99] Further, I see no palpable and overriding error in the judge's refusal to accede to Catherwood's implied term argument. Leaving aside the fact that Catherwood did not plead an implied term, I see no basis upon which we could properly interfere with the judge's conclusion that it does not go without saying that a party should expect to be indemnified for its legal expenses upon defeating its counterparty's interpretation of their contractual obligations. Indeed, it seems strange to even consider giving effect to an implied term argument in circumstances where contractual entitlement to solicitor and client costs must be clearly and unequivocally expressed. In any event, the implied term argument was not pressed in oral argument.

[100] At the end of the day, Catherwood recycles for appellate purposes the same submissions it unsuccessfully made to the judge. I see no extricable error of law in the judge's reasons dismissing Catherwood's claims for solicitor and client costs based on the language of Article 6.8. Further, I see no palpable and overriding error in his analysis.

[101] For the foregoing reasons, I would dismiss Catherwood's appeals.

VI. Disposition

[102] I would, therefore, dismiss the appeals and cross appeals of Lehigh and Catherwood.

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

Reasons for Judgment of the Honourable Mr. Justice Grauer:

INTRODUCTION

[103] I have had the advantage of reading, in draft, the reasons for judgment prepared by my colleague, Mr. Justice Fitch. Regretfully, I find myself unable to agree with his proposed dismissal of the appeals of Lehigh.

[104] I adopt the background, definitions and terms used by Mr. Justice Fitch, and I agree with much of his summary of the applicable legal principles. Respectfully, however, I depart from him on the legal effect of those principles in this case. While I agree that Catherwood's appeals must be dismissed, I have concluded that Lehigh's cross-appeals should be allowed.

OVERVIEW

[105] I begin with a brief review of what I consider to be the key facts in this case.

[106] As outlined by my colleague, Catherwood entered into an agreement with Lehigh to provide towing services: Catherwood to provide the tugs to tow Lehigh's barges. Crucially, that agreement provided in Article 7.3 that Catherwood would be responsible to Lehigh for any loss or damage to Lehigh's barges caused by Catherwood's negligence. Equally crucially, by Article 9, the parties each agreed to obtain and maintain insurance coverage in a form acceptable to the other that included Commercial General Liability Insurance, to which the other was to be named as an additional insured and which "must be primary," and Hull and Machinery Insurance (the H&M Insurance)—in Catherwood's case, on its tugs, and in Lehigh's case, on its barges. Neither was required to be named an additional insured under the other's H&M Insurance, those policies being first party property insurance. Accordingly, neither would have direct access to the other's.

[107] As a result of two incidents of grounding while under tow, Lehigh twice suffered damage to its barge that Catherwood concedes for the purpose of this proceeding was caused by negligence on its part. To Lehigh's claim against it for its losses, Catherwood pleaded that it was entitled to tort immunity by reason of

Lehigh's covenant to obtain H&M Insurance on its barges. In short, Catherwood argued, by undertaking to obtain H&M Insurance in a form satisfactory to Catherwood, Lehigh agreed that it would not look to Catherwood for recovery of losses from damage to its barges, but rather must look to its H&M Insurance coverage. As an alternative defence, Catherwood pleaded section 29(b) of the *Marine Liability Act*, SC 2001, c 6 [*MLA*].

[108] By that section, the maximum liability for a maritime claim involving a vessel the size of those involved here was $500,000 (since increased to $750,000 by SC 2023, c 26, s 312; all dollar amounts are expressed in Canadian currency unless otherwise specified). It was not contested that this provision limited the liability of each party to $500,000 for claims involving their vessels. This meant that the most Lehigh could claim against Catherwood for damage caused by Catherwood's negligence in operating its tug, in the absence of any contractual exclusion or limitation, was $500,000 per incident. For any loss above that, Lehigh would have to look to its H&M Insurance or to its own resources. It was not contested.

[109] While Lehigh referred to this statutory limitation in explaining the amount of its claims, the parties did not otherwise discuss its significance.

[110] It is also noteworthy that, by the conditions of Lehigh's H&M Insurance, the coverage was subject to a deductible per claim of US $500,000. For anything below that, Lehigh would have to look to Catherwood in the event of loss due to Catherwood's negligence—or, failing that, to its own resources.

[111] Hence, the claim Lehigh brought against Catherwood arising from the first grounding was the cost of repairs in the amount of $372,930.31—under the *MLA* limit, but within the H&M deductible. There was, accordingly, no coverage for that loss under Lehigh's H&M Insurance.

[112] Lehigh's loss arising from the second grounding was US $800,000, being the value of the barge—above the *MLA* limit, which Lehigh recognized was applicable, and also above the H&M deductible. Hence Lehigh was partially compensated by its

H&M insurer. Accordingly, the claim Lehigh brought against Catherwood arising from the second grounding was for the amount within the deductible that was also within the *MLA* limit: $500,000 (the *MLA* limit of $500,000 being slightly lower than the H&M deductible of US $500,000).

[113] As the judge observed at paras 56–59, Lehigh did not pursue an argument, based on the amount of the deductible, that while Catherwood would be entitled to the benefit of Lehigh's H&M Insurance, it would nevertheless remain responsible for Lehigh's losses falling within that deductible. Accordingly, I do not take the deductible into account except to note that one consequence of these circumstances is that no part of Lehigh's claim against Catherwood was or could be subrogated. There could be no subrogated claim because the insurer paid nothing for the first loss (as it was below the deductible), and what it paid for the second loss was above Catherwood's maximum exposure under the *MLA*, and so not claimable by either Lehigh or its insurer.

[114] Catherwood itself was covered by Protection and Indemnity Insurance and Marine General Liability Insurance, both subject to a deductible of $10,000 for each accident or occurrence. Consequently, in the event Lehigh could claim against it for negligence, Catherwood would be indemnified under its Marine General Liability Insurance for any liability in excess of its deductible of $10,000 (within the *MLA* limit of $500,000 or otherwise). For that $10,000 deductible it would have to look to its own resources. But, apart from that deductible, should Catherwood's liability to Lehigh be covered by its liability insurer, or by Lehigh due to its covenant to obtain H&M Insurance? Each party agreed to obtain the insurances in question, and each agreed that the insurance would be in a form acceptable to the other.

[115] What the parties intended turns, of course, on how one interprets the terms of their agreement read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*Sattva* at para 47).

[116] As my colleague has noted, the tension is between Article 7.3 and the covenants to insure set out in Article 9. I set out Article 7.3 here for ease of reference:

> 7.3 Supplier [Catherwood] shall also be responsible to LEHIGH for any loss or damage of or to the LEHIGH Barges and any machinery or equipment … owned by LEHIGH and carried aboard a LEHIGH Barge caused by the negligence of the Supplier, its employees, subcontractors, agents or servants, or other persons for whom the supplier is responsible.
>
> [Emphasis added.]

[117] In the absence of the Article 9 covenants to insure, there can be no doubt that, in accordance with this clause, Catherwood would be liable for any loss or damage caused by its negligence to Lehigh's barges and equipment up to its *MLA* liability limit of $500,000. Lehigh has not suggested that the agreement exposes Catherwood to liability above that amount, and it limited its claim to the amount of its losses coming within that limit. What, then, is the effect of the covenants to insure?

[118] As my colleague aptly puts it:

> [5] The effect to be given to Catherwood's acceptance of responsibility under Article 7.3 in circumstances where Lehigh covenanted—under Article 9.2(c)—to insure its barges, and do so in a form acceptable to Catherwood, lies at the heart of this appeal.

[119] As we have seen, Catherwood defended the claims on the basis that Lehigh's covenant to insure its barges under H&M Insurance amounted to an agreed-upon assumption of risk by Lehigh, benefiting Catherwood by relieving it for losses subject to the covenant even if caused by Catherwood's negligence. In this way, Catherwood maintains, the promise to insure against a risk should be construed as an agreement to be responsible for any damages should that risk occur. In short, the covenant gives rise to tort immunity notwithstanding Catherwood's contractual acceptance of liability for loss caused by its negligence. The judge accepted this argument, as does my colleague.

[120] Lehigh argues, in essence, that when the agreement is construed in accordance with the proper principles of contractual interpretation, giving effect to all

of its provisions and reading them in light of the agreement as a whole and the surrounding circumstances, it is evident the parties did not intend the covenants to insure to give rise to tort immunity on the part of Catherwood that would shield it from the consequences of its own negligence. Lehigh submits that, in the circumstances of this agreement, its covenant to insure cannot be construed as an intention to assume the risk of loss as a benefit to Catherwood. It follows that Catherwood's contractual acceptance of liability must be given the effect its plain and obvious meaning dictates.

[121] Connected to this argument is Lehigh's proposition that, in any event, Article 7.3 is excluded from the application of Article 9. This, Lehigh submits, is because Article 7.3 is part of Article 7, "Limitation of Liability," and when read and interpreted together with Article 7.2, is to apply "[n]otwithstanding any other provision in this Agreement to the contrary." This turns on the effect to be given to the word "also" at the beginning of Article 7.3. Like my colleague, I do not think that the word can be given the effect for which Lehigh contends.

[122] As I see it, then, the principal question is whether, as Lehigh contends, the judge erred in failing to arrive at an interpretation that determined the intention of the parties by giving effect to all of the words of the agreement. This involves the question of whether the judge erred in his application of *Kruger* and like cases.

DISCUSSION

Overview: principles of contractual interpretation

[123] My colleague and I do not differ on the principles of contractual interpretation. As this Court has said, "each word and clause of the contract is assumed to have a purpose; courts do not prefer interpretations that render contractual terms ineffective or meaningless": *Blackmore Management Inc v Carmanah Management Corporation*, 2022 BCCA 117 at para 50; see also *Union of British Columbia Performers v Morton*, 2023 BCCA 57 at para 33, and *Ryan Mortgage Income Fund Inc v Alpine Credits Ltd*, 2017 BCCA 206 at para 22.

[124] As my colleague observes at para 71:

> It is a fundamental principle of contractual interpretation that a contract must be construed as a whole. An interpretation which ignores a specific and relevant provision of the agreement is not one that takes into account the whole of the contract. Such an interpretation would generally give rise to an extricable question of law: *Sattva* at para. 64.

[125] In my view, the judge below erred in law in failing to give effect to these principles. He did so, respectfully, in two ways. First, he arrived at an interpretation that rendered Article 7.3 meaningless and superfluous. That interpretation, in my respectful view, gives rise to an extricable question of law. My colleague concludes otherwise, stating at para 72 that the proposition that the judge committed an extricable error in law in this way cannot survive this Court's analysis in *Kruger*.

[126] Second, in considering the parties' intentions, the judge relied on Lehigh's agreement to obtain H&M Insurance, without considering the Article 9 covenants to insure as a whole. As I see it, that compounds the first described error.

[127] I turn, then, to consider *Kruger* and the question of tort immunity.

Kruger and tort immunity

[128] As my colleague has noted, *Kruger* does not stand alone. It follows on the heels of several decisions of the Supreme Court of Canada, which are not entirely consistent in their approach.

[129] It is important to note at the outset that *Kruger* does not purport to lay down principles of contractual interpretation. As Mr. Nigel Kent (now Justice Kent) explained in his paper, *Tort Immunity: Covenants to Insure and Waivers of Subrogation*, at p 1, "While the subject of immunity arising from insurance covenants most often arises as a liability defence to subrogated claims by property insurers, the genesis of the immunity is the intent of the parties, as evidenced by their contract, to restrict recoveries for certain types of property losses to available insurance without recourse to the other contracting party or their beneficiaries" (emphasis added).

[130] Similarly, as the Ontario Court of Appeal put it in *Crosslinx*:

> [26] In many, if not most circumstances, a promise to insure against a certain risk will lead to the logical conclusion that the party undertaking to insure against the risk had agreed to be responsible for any damages should the risk ensue. That conclusion does not however reflect a free-standing legal principal of contractual interpretation but is an example of how the contractual intention of the parties is determined through an objective consideration of all of the circumstances. An undertaking to insure leads to the reasonable inference that the parties intended that the party promising to insure would undertake the risk to be insured against. However, that inference can only properly be drawn after a reading of the contract as a whole in the factual context of the particular circumstances. The language of the contract and the context control the interpretation of the contract, including any insurance covenant in the contract. There is no legal rule that a party's covenant to insure against a risk must mean it was intended that the party undertaking to insure assumed the risk of the harm insured against: *Royal Host G.P. Inc. v. 1842259 Ontario Ltd.*, 2018 ONCA 467, 422 D.L.R. (4th) 661, at para. 16, leave to appeal refused, [2018] S.C.C.A. No. 316.
>
> [27] The correct approach to the interpretation of insurance covenants is captured by G.R. Hall in *Canadian Contractual Interpretation Law*, 4th ed. (Markham, Ont.: LexisNexis, 2020), at pp. 340-41:
>
> > The interpretation of a covenant to insure as an allocation of risk is not a rule of law, meaning that if the contractual language indicates that the covenant is to insure, not to act as an allocation of risk precluding liability for the event subject to the covenant, the text will prevail and the covenant will not have that effect. "Each contract containing a covenant to insure must be interpreted based upon its own wording. Decided cases can be helpful, when the wording considered is similar to that in the agreement in issue. However, differences in the wording between each case can be determinative." [*Sanofi Pasteur Ltd v UPS SCS, Inc*, 2015 ONCA 88 at para 48, leave to appeal refused [2015] SCCA No. 152 (SCC)]
>
> [Emphasis added.]

[131] *Kruger* is to the same effect. As this Court observed at para 34, the "tort immunity" defence raised by the defendant warehouse operator, FCL, as a bar to Scott Paper's subrogated claim for the loss of its inventory stored in the warehouse "depends entirely on the terms of the contract between Scott and FCL …".

[132] The relevant issue in *Kruger* was whether the subrogated claim brought by Scott's insurer against FCL for the inventory loss was barred. Their agreement, like the one in this case, contained covenants to insure on the part of both parties, set out in para 17 of the warehousing agreement.

[133] With respect to liability insurance, FCL was to maintain comprehensive general liability insurance and industry-standard warehouseman's legal liability insurance. That insurance was to cover against all risk of loss of inventory and property belonging to Scott arising from or relating to FCL's "gross negligence."

[134] Scott was to maintain general liability insurance, tenant's legal liability insurance, and insurance of its inventory and property within the warehouse.

[135] With respect to all such insurance (including the property insurance), each party was to name the other as an additional insured against all liability arising from the insured's negligence. All such insurance policies were stated to constitute and respond as primary coverage to any insurance otherwise available.

[136] With respect to insurance on building contents, Scott was, at its own cost and expense, to insure and keep insured its own property in, on or about the warehouse.

[137] As far as liability for negligence was concerned, para 12 of the agreement contained a mutual indemnification provision by which each of Scott and FCL covenanted to hold the other harmless from all losses and claims arising from property damage related to its negligence.

[138] As my colleague observed at para 72, the trial judge in *Kruger* held that disallowing Scott's subrogated claim on the basis of tort immunity would "make meaningless" the indemnification provisions in para 12 of the agreement. This Court disagreed, concluding that Scott's covenant to insure supervened over the indemnity agreement relating to losses caused by negligence.

[139] Of course, I accept the correctness of that conclusion based on the terms of the agreement between Scott and FCL. I also accept that this Court's analysis in *Kruger* is helpful in approaching the problem presented in the case at bar. But I am unable to find that it compels the same result or imposes any presumption. I note what I consider to be four significant differences between the agreements.

[140] First is the difference in the covenants to insure in the two agreements. In our case, Article 9 provides for each party to obtain matching Commercial General Liability Insurance, H&M Insurance, and Protection and Indemnity Insurance. While both parties were to obtain and maintain the insurance coverage in a form acceptable to the other, they were required to name the other as an additional insured in the case of both the Commercial General Liability Insurance and the Protection and Indemnity Insurance—but *not* in the case of the H&M Insurance.

[141] Lehigh submitted, and I agree, that this is an indication of the difference between the nature of the insurance coverage in the two cases. With the H&M Insurance, each party insured their own vessels, consistent with the context of the maritime environment and their mutual obligation to maintain their vessels in seaworthy condition. In the *Kruger* case, however, Scott was obliged to name FCL as an additional insured not only with respect to general liability insurance, but also with respect to "insurance of [Scott's] inventory and property within the warehouse."

[142] Second is the disparity in *Kruger* between the parties' obligations specifically in relation to the warehouse contents. While Scott was specifically obliged to insure its own property in the warehouse, FCL's obligation was to provide coverage for Scott's property in the warehouse only for loss caused by FCL's gross negligence—suggesting no intention to be liable for loss to Scott's property due to FCL's ordinary negligence. Our case is markedly different. While Lehigh was obliged to insure its barges generally, Catherwood specifically agreed to be responsible to Lehigh for loss or damage to the barges caused by its (ordinary) negligence, and further covenanted to obtain liability insurance that would cover such responsibility.

[143] Third is the mutuality of para 12 in the *Kruger* agreement by which each party agreed to indemnify the other for property damage caused by its negligence, paralleling the mutuality of the insurance covenants. That is significantly different from our case. Although the agreement between Catherwood and Lehigh also included mutual general indemnity agreements in Articles 6.7 and 6.8, Article 7.3 is different from anything in the *Kruger* agreement. By that article, Catherwood

specifically agrees to be responsible to Lehigh for any loss of, or damage to, *Lehigh barges* caused by Catherwood's negligence. There is no corresponding undertaking by Lehigh in relation to Catherwood's tugs.

[144] In my respectful view, these three differences indicate that missing from our case are the primary circumstances that led the Court in *Kruger* to conclude that Scott's own covenant to insure its property was intended to supervene over the mutual indemnity provisions.

[145] Fourth is the difference between the commercial contexts surrounding the two agreements. *Kruger* involved fire damage to property of a tenant stored in a landlord's warehouse and a covenant to insure that property against that risk. The maritime context of our case is very different. As Lehigh pointed out, the condition of the vessels provided by each party was important to their business relationship: hence both parties undertook and agreed to keep their own vessels properly maintained and in seaworthy condition (Articles 7.2 and 8.1) and further undertook to have H&M Insurance in place with respect to each of their vessels. Moreover, in the maritime context, there are many risks of loss apart from negligence and fire. Marine insurance is a specialized field; the perils covered by Lehigh's H&M Insurance demonstrate this. They include: "Adventures and Perils … of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People …"—risks not commonly arising in warehouses.

[146] This different context demonstrates substantial value to the parties from the covenants to obtain H&M Insurance apart from any suggestion of cross-indemnity: each can be satisfied that the other will be protected against loss due to the unique, and potentially catastrophic, perils of the sea that they faced in everyday operation—whether or not the loss involved negligence to which their liability policies would respond.

[147] In the circumstances, I am, with respect, unable to agree that Lehigh's proposition—that the judge erred in law by interpreting the agreement in a manner

that ignored Article 7.3—"cannot survive this Court's analysis in *Kruger.*" As I see it, we are dealing here with a different agreement, a different context, and different circumstances. The extricable error of law remains.

Interpreting the agreement

[148] As my colleague points out at para 83, in the event an extricable error of law is established (as I believe it was), then "our task […] would be to interpret the contract afresh with due regard to the factual findings of the judge subject to any palpable and overriding error or misapprehension of the evidence in relation to those findings." Here, there were few factual findings as the parties proceeded on the basis of an Agreed Statement of Facts, which included the terms of their agreement, Lehigh's H&M Insurance and Catherwood's liability insurance.

[149] The judge below reasoned as follows:

> [43] Reading the Barging Agreement as a whole, I find the parties allocated to Lehigh the risk of damage to its barges while under towing by Catherwood, despite Catherwood's indemnity. …
>
> [Emphasis added.]

[150] In short, the judge gave no meaning to Article 7.3. He then went on to describe the basis of his conclusion:

> … In my view, this is indicated by the following three aspects of the agreement.
>
> [44] First, in s. 9.2(c), Lehigh covenants to Catherwood that it will obtain the H&M Insurance.
>
> [45] Second, s. 9.2 requires Lehigh's insurance coverage to be "in a form acceptable" to Catherwood. In my view, this indicates that Catherwood is to have the benefit of the insurance. I can see no reason for this requirement unless that were the case.
>
> [46] Third, s. 9.4 states that, if a party fails to procure the required insurance or the insurance fails for any reason, that party "shall be deemed the insurer or self-insurer, and shall accept and pay all claims which should otherwise be covered by the failed insurance and shall indemnify the other party… which would have been covered by that insurance." In my view, this is another clear indication that Catherwood is to benefit from Lehigh's H&M Insurance. To paraphrase an argument made by counsel for Catherwood, it would make no sense for Catherwood to be liable to Lehigh if Lehigh

> obtained the requisite H&M Insurance, but for Lehigh to self-insure if it did not.

[151] Lehigh argued that the agreement should not be construed as intending that Catherwood was to benefit from the H&M Insurance. It based this argument primarily on the absence of a requirement that Catherwood be named an additional insured, and the absence of a waiver of subrogation rights. The judge did not accept these distinctions as meaningful.

[152] I agree that, as the judge stated, the requirement that all the insurance be in a form acceptable to the other party may suggest, in this instance, that Catherwood was to benefit from Lehigh's H&M Insurance. But benefit how?

[153] The question comes down to what the parties intended in terms of the allocation of risk. In my view, Article 7.3 is not merely a recognition of tort liability that would exist in the absence of any contract; it is a specific contractual allocation of risk to Catherwood for damage to Lehigh's barges caused by Catherwood's negligence, backed by liability insurance. Why, in this case and this context, should Lehigh's agreement to obtain H&M Insurance operate as a supervening allocation of risk?

[154] In accordance with the principles of contractual interpretation reviewed above, the parties must have intended Article 7.3 to mean something, or they would not have included it—unless it is clear from the agreement that they intended the covenant to insure to supervene, as in *Kruge*r. But that can follow only if the two clauses cannot both be given effect. In my opinion, viewing the agreement in its proper context, and considering it as a whole, they can both be given effect without eliminating the allocation of risk that the parties specified through Catherwood's undertaking to indemnify Lehigh for losses to Lehigh's barges resulting from Catherwood's negligence.

[155] I should add that I do not accept Catherwood's alternative argument that both clauses can be given effect on the understanding that the parties intended the Article 7.3 undertaking to operate only in the event of there being no coverage under

the H&M Insurance. The example suggested was if Catherwood negligently towed the barge to Haida Gwaii instead of Vancouver Island, and damaged it there (Haida Gwaii being outside the navigating limits permitted under the H&M Insurance). But it seems to me that if tort immunity was intended to flow from Lehigh's covenant in the agreement to obtain H&M Insurance on its barges, it ought not to diminish in accordance with the conditions of the insurance obtained unless so stated, or understood as a surrounding circumstance: see the discussion in *Agnew-Surpass* at pp 236–237, where Chief Justice Lakin (dissenting in part) noted that the lessor's failure to obtain full protection in the insurance coverage it was obliged to secure cannot be laid at the lessee's door.

[156] Returning to the context of this agreement, the H&M Insurance was the only kind of insurance where the parties were not obliged to add the other as an additional insured. Its primary benefit was accordingly intended for its insured, Lehigh. On the other hand, Lehigh was clearly to benefit from Catherwood's liability insurance, covering Catherwood (among other things) for liability for damage caused by its negligence. Why should this be overridden or ignored because Catherwood was to have some benefit from Lehigh's H&M Insurance? The judge did not consider the fact that the notion of benefit works both ways in Article 9. He paid attention only to Article 9(2)(c).

[157] I come back to the question of what benefit was to be conferred on Catherwood. Was it tort immunity—to be relieved of any liability for any loss or damage it negligently caused to Lehigh's barges (statutorily limited in any event to $500,000), notwithstanding its own obligation to obtain liability insurance that was primary and was to benefit Lehigh? Or was it to have the more limited benefit of being satisfied that Lehigh would be protected by H&M Insurance in the event of losses from Catherwood's negligence above the statutory limit, and protected also from all other perils of loss—including the very real perils of the sea and weather (problems having nothing to do with negligence)?

[158] This case is not like *Agnew-Surpass* or *Economical Mutual Insurance*, both of which disallowed subrogated claims against tenants for fire damage due to the tenant's negligence, where the landlord was obliged to insure against all risk of loss by fire. As Justice Pigeon, for the majority, observed in *Agnew-Surpass* at p 247, the intention to permit a party to escape payment for damages caused by its own negligence must be adequately expressed. There, a clause exculpating the tenant from responsibility to repair damage caused by fire was considered adequate as far as property damage was concerned (but not loss of profits). That is, as I see it, a far cry from the agreement in this case, where the party seeking to escape payment specifically undertook responsibility for loss caused by its negligence.

[159] It is true that, in *Economic Mutual Insurance*, a trial decision, the tenant had given a covenant to indemnify the landlord with respect to any damage to the premises occasioned by its negligence and was still held to benefit from tort immunity accruing by reason of the landlord's covenant to maintain insurance coverage on the premises for, among other perils, fire. But, like *Kruger*, the context there was very different. There were no concerns about seaworthiness and "perils of the sea" to worry about, and no statutory limits to liability. Thus, Justice Spiegel commented at para 9: "In my view, the provision in a lease of an obligation to the landlord to insure should be seen as benefiting the tenant since its inclusion would be unnecessary if it were meant solely to benefit the landlord."

[160] In my respectful view, the same cannot be said about this case. The parties faced serious risks from perils of the sea, they depended upon each other's vessels being maintained and seaworthy, and, as a surrounding circumstance, their liability was statutorily limited by the *MLA*. It seems to me that what the parties must have intended, given this context and their covenants, is that while Catherwood was to benefit from Lehigh's H&M Insurance, Catherwood's undertaking to be responsible for damages to Lehigh's barges arising from its own negligence effectively carves out from that benefit any loss Catherwood negligently caused to Lehigh's barges up to the statutory limit of $500,000, beyond which Catherwood would be immune in any event. Consistent with what I understand to be Lehigh's submissions, with which

I agree, Catherwood would benefit from Lehigh's barges being insured beyond what it could recover from Catherwood (as occurred with the second grounding), and against all other maritime perils, which might otherwise lead to irremediable loss or unseaworthiness of the barges and impair their ongoing business arrangement.

[161] In my respectful view, this is consistent with the approach I noted above from *Sattva*: what the parties intended turns on interpreting the terms of their agreement read "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (at para 47). Doing so as I have proposed gives purpose to all of the words of the contract: the inclusion of the mutual covenants to obtain H&M Insurance cannot be seen as unnecessary (both parties depending upon the condition and seaworthiness of the other's vessels), the Article 7.3 covenant to indemnify is not rendered meaningless, and Lehigh benefits, as it should, from Catherwood's covenant to obtain liability insurance.

DISPOSITION

[162] For these reasons, I would allow Lehigh's appeals, set aside the order of the judge, and direct in CA48575 that judgment be entered for Lehigh in the amount of $372,930.31 plus interest, and in CA48580 that judgment be entered for Lehigh in the amount of $500,000 plus interest.

[163] On the basis of this conclusion, Catherwood's appeals must fail. I would therefore dismiss them.

"The Honourable Mr. Justice Grauer"