CANADA / JUDGMENT

Lehigh Hanson Materials Limited v. Sea Imp Xi (Ship)

2022 BCSC 1556

COURT
Supreme Court of British Columbia

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2022 BCSC 1556 Lehigh Hanson Materials Limited v. Sea Imp XI (Ship)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lehigh Hanson Materials Limited v. Sea Imp XI (Ship),

2022 BCSC 1556

Date: 20220902

Docket: S195927

Registry: Vancouver

Admiralty Action in Rem Against

the Ship "SEA IMP XI" and in Personam

Between:

Lehigh Hanson Materials Limited

Plaintiff/Defendant by Counterclaim

And

The Owners and all others interested in the Ship "SEA IMP XI",

Catherwood Towing Ltd. and John Doe

Defendants/Plaintiffs by Counterclaim

- and -

Admiralty Action in Rem Against

the Ship "SEA IMP X" and in Personam

Docket: S1812798

Registry: Vancouver

Between:

Lehigh Hanson Materials Limited

Plaintiff/Defendant by Counterclaim

And

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

Catherwood Towing Ltd. and John Doe

Defendants/Plaintiffs by Counterclaim

Corrected Judgment: The cover page and the text of this judgment at paragraph 1

were corrected on November 25, 2022.

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff/Defendant by Counterclaim:

S. Chapelski

A.J. Stainer

M. Liauw, Articled Student

Counsel for the Defendants/Plaintiffs by Counterclaim:

W.G. Wharton

J. Vodsedalek

Place and Dates of Trial:

Vancouver, B.C.

July 18-19, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 2, 2022

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Facts

[5] The parties put into evidence an extensive agreed statement of facts that I have relied on in this section.

[6] Lehigh is a supplier of construction aggregates and concrete, with operations in Western Canada.

[7] Catherwood is the owner and operator of the vessels "SEA IMP X" and "SEA IMP XI", tugs registered out of the Port of Vancouver.

[8] In February 2014, the parties signed the Barging Agreement for Catherwood's tugs to transport Lehigh's barges. It governed both groundings in issue.

The first grounding

[9] On November 29, 2016, the first barge grounded while under tow by the SEA IMP X, in the Pitt River in British Columbia (the "First Grounding").

[10] The First Grounding occurred while the barge was under the control of Catherwood. But for the defences alleged by Catherwood in the Barging Agreement, Catherwood would be liable for the reasonable cost of repairing the damage to the barge arising from the First Grounding up to the limit in the Marine Liability Act, S.C. 2001, c. 6 [MLA].

[11] The reasonable cost of repairing the damage to the barge from the First Grounding was $372,930.31.

[12] At the time of the First Grounding, Lehigh had arranged for Hull and Machinery Insurance on the barge (the "First Lehigh Policy"). The agreed value of the barge under the First Lehigh Policy was US$800,000. The applicable deductible was US$500,000.

[13] Lehigh did not make a claim under the First Lehigh Policy for the First Grounding. The costs of repairing the damage to the barge fell below the deductible.

The second grounding

[14] On November 15, 2017, the second barge grounded while under tow by the SEA IMP XI, in the Pitt River in British Columbia (the "Second Grounding").

[15] The Second Grounding occurred while the barge was under the control of Catherwood, and, but for the defences alleged by Catherwood in the Agreement, Catherwood would be liable for the reasonable cost of repairing the damage to the barge arising from the Second Grounding up to the limit set out in the MLA.

[16] The reasonable cost of repairing the damage arising from the Second Grounding is in excess of $500,000.

[17] At the time of the Second Grounding, Lehigh had arranged for Hull and Machinery Insurance on the barge (the "Second Lehigh Policy"). The agreed value of the barge under the Second Policy was US$800,000. The deductible under the Second Lehigh Policy was US$500,000. Lehigh made a claim under the Second Lehigh Policy for the Second Grounding and received partial compensation for its losses under the Second Policy.

[18] Catherwood is entitled to limit its maximum liability for the Second Grounding to $500,000, plus interest, costs and disbursements, pursuant to s. 29(b) of the MLA which limits property damage in maritime claims to $500,000 plus interest.

The Barging Agreement

[19] The Barging Agreement contained cross-indemnities from each party for damages due to their negligence or breach of contract. Catherwood's indemnity of Lehigh was as follows:

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

ARTICLE 7

LIMITATION OF LIABILITY

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

7.3 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.

[Emphasis added.]

[20] Regarding obligations to insure, Catherwood was required to obtain general liability insurance and Hull and Machinery insurance for its tugs.

[21] Lehigh's obligations included obtaining Hull and Machinery insurance for its barges (the "H&M Insurance"). Its insurance obligations were stated as follows:

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 LEHlGH Barges in an amount equal to its agreed value and Protection and Indemnity 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.

9.3 LEHIGH and the Supplier shall have the insurance required in full force and effect prior to execution of this Agreement and prior to the commencement of the provision of Services and shall, on demand, and at such times as may be reasonably requested, provide the other party with evidence of all insurance in the form of certificate(s) of insurance.

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.

[Emphasis added.]

[22] As I understood it, there was no dispute that the H&M Insurance contemplated by s. 9.2 provided broad coverage for marine "perils of the sea" which included both the First and Second Groundings.

Case Law on Promises to Insure

[23] The parties referred to numerous cases on allocation of risk in contracts containing an indemnity from one party and a promise to insure from the other. The cases consistently take the approach that it is reasonable to infer the parties allocated the risk to the party promising to insure against it unless the contract indicates otherwise.

[24] Madam Justice Newbury's decision is Kruger Products Limited v. First Choice Logistics Inc., 2013 BCCA 3 (leave to appeal ref'd, [2013] SCCA No. 109), is a leading case containing much analysis of this issue. Kruger (known at the time as "Scott Paper Ltd.") stored its paper products in First Choice's warehouse. A fire broke out, started by one of the warehouse forklifts, and Kruger's inventory was destroyed.

[25] The warehousing agreement contained a broad indemnification of Kruger for the warehouse's negligent acts. It also required Kruger to insure its inventory and name the warehouse as an insured with primary coverage for property damage. The insurance clause said this:

Scott will maintain general liability insurance, tenant's legal liability insurance, and insurance of its inventory and property within the warehouse.

All insurance shall name Scott or the Contractor as applicable as an additional insured against all liability for bodily and/or personal injury and property damage, arising from the insured's fault or negligence...

All insurance policies contemplated hereunder shall constitute and respond as primary coverage

[26] In the result, Newbury J.A. found the contract allocated the losses to Kruger, under its covenant to insure, rather than to the warehouse under its indemnity. She held that a party's covenant to insure should be interpreted to benefit the other contracting party unless the contract indicated to the contrary, otherwise no benefit would be conferred by the promise to insure.

[27] Justice Newbury referred to the Supreme Court of Canada's well-known "trilogy" of cases in the 1970s regarding covenants to insure in commercial leases. These culminated, she said, in the landlord's promise to insure being "regarded as a 'supervening covenant' that prevailed even where the tenant's negligence had caused the loss" (para. 36).

[28] Justice Newbury adopted a summary of these cases from the Ontario Court of Appeal in Madison Developments Ltd. v. Plan Electric Co. (1997), 152 D.L.R. (4th) 653 (Ont. C.A.). She said :

[37] A helpful summary of the evolution of the trilogy was provided in Madison Developments Ltd. v. Plan Electric Co. (1997) 36 O.R. (3d) 80 (Ont. C.A.), where Carthy J.A. stated:

... The law is now clear that in a landlord-tenant relationship, where the landlord covenants to obtain insurance against the damage to the premises by fire, the landlord cannot sue the tenant for a loss by fire caused by the tenant's negligence. A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law, but, of course,

the insurer can be in no better position than the landlord on a subrogated claim. The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence.

[Emphasis added in Kruger.]

[29] Justice Newbury then referred to North Newton Warehouses Ltd. v. Alliance Woodcraft Manufacturing Inc., 2005 BCCA 309 (leave to appeal ref'd, [2005] SCCA No. 375), and quoted, among other parts, its statement: "One might properly say that there is something approaching a presumption in favour of a tenant benefitting from a landlord's covenant to insure" (para. 39).

[30] Justice Newbury found the approach described in Madison and North Newton generally applicable to contracts where one party had taken possession of the goods of another in a manner giving rise to possible liability. She quoted the Supreme Court of Canada in Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd., [1978] 1 S.C.R. 317:

In certain fields of mercantile law, e.g. bailment in the widest sense, full insurable interest has for a long time been held to exist in others than the owner because of their special relationship with the property entailing possibility of liability.

..

In all these cases, there existed an underlying contract whereby the owner of the goods had given possession thereof to the party claiming full insurable interest in them based on a special relationship therewith.

[Emphasis added in Kruger.]

[31] In the result, Newbury J.A. held that "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." She found no conflict between this outcome and the warehouse's indemnity clause because "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" (para. 56).

[32] She concluded that a promise to insure should supersede an indemnity unless the contract indicated to the contrary:

[61] The better view seems to be, however, that the insertion of a covenant to insure (which was not present in Rose v. Borisko) on the part of a bailor or landlord is generally regarded as intended for the benefit of the bailee or tenant As the Court stated in North Newton, "where there is in a lease a covenant by a landlord [in this case bailor] to insure, the tenant [in this case warehouser] should benefit from it unless there is something inconsistent with such a result contained in the lease document [here the WMA]."

[62] I see no inconsistent wording in the WMA, and indeed the parties' express acknowledgement that insurance obtained under para. 17A would "respond as primary coverage" strengthens the case for tort immunity on FCL's part. I conclude that Scott's obligations under para. 17A were clearly intended for the benefit of FCL. Paraphrasing Madison, there would be no benefit to FCL from the provision if it did not apply to a fire caused by FCL's beach of the applicable standard of care.

[33] The same approach was taken in the barge-towing case of Rough Bay Enterprises Ltd. v. Budden, 2003 BCSC 1796. Justice Davies adopted the following from the Ontario Court of Appeal in another barge-towing case, St. Lawrence Cement Inc. v. Wakeham & Sons Ltd. (1996), 26 O.R. (3d) 321 (Ont. C.A.) (leave to appeal ref'd, [1995] S.C.C.A. No. 553):

[92] As to the issue of the extent of the protection of the covenant given by the owners to obtain insurance, the Court stated, at pp. 341-342:

The covenant by the respondent to be responsible for insuring the "Robert Koch" and its cargo was for the benefit of the appellant and relieved the appellant from liability in case of loss caused by its negligence. The insurance policy obtained by the respondent, which covered loss or damage suffered by reason of the negligence of the appellant, was for the benefit of the appellant as well as for the respondent. Neither the respondent, nor its insurer, by way of subrogation, can recover damages for the loss of the barge or its cargo.

[34] After noting that the St. Lawrence Cement decision was approved in Laing Property Corp. v. All Seasons Display Inc., 2000 BCCA 467, Davies J. said:

[94] In my view, the authorities amply support the proposition that if the owners of a barge covenant with the owners of a tugboat to insure the barge for the benefit of "all parties", the owner's insurer may not advance a subrogated claim against the tugboat and its owner for losses occasioned by the negligence of the tugboat, its operators or its owners.

[35] In this case, Lehigh relied on the Ontario Court of Appeal's recent decision in Crosslinx Transit Solutions Constructors v. Capital Sewer Servicing Inc., 2022 ONCA 10, where an indemnity clause was enforced despite an insurance covenant.

[36] Crosslinx was the general contractor for construction of a light-rail transit line in Toronto. It hired Capital Sewer as a subcontractor to perform sewer work. Sewage backup damaged some surrounding properties, the owners of which sued both companies in negligence.

[37] The subcontract ("Subcontract") required Capital Sewer to indemnify and save Crosslinx harmless, and obtain general liability insurance protecting Crosslinx from liability from Capital Sewer's work or operations.

[38] In the construction contract between the project's owner and Crosslinx ("Construction Contract"), Crosslinx contracted to maintain insurance covering such risks and to name all contractors and subcontractors as primary insureds. This obligation was incorporated into the Subcontract.

[39] As in Kruger and Rough Bay, the Court said 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 added.]

[40] In the result, the court upheld the trial judge's decision that, despite Crosslinx's insurance obligation in the Construction Contract, the Subcontract required Capital Sewer to indemnify Crosslinx for any liability to the property owners not caused by Crosslinx's own negligence. It agreed that the Subcontract directly addressed the intentions and obligations of the parties regarding allocation of this risk to Capital Sewer. The key reasons for this conclusion were:

a) The Subcontract required Capital Sewer to secure insurance against its own negligence. As the Court of Appeal quoted from the trial judge, "Given that Capital agreed to secure insurance against its own negligence, Capital has, on its own argument, assumed liability for the risk of its own negligence" (para. 32).

b) Although the insurance covenants from Crosslinx in the head contract were incorporated into the Subcontract, the Subcontract said the incorporation was subject to "the changes necessary to give full effect to the intent of the Parties as set out in this Subcontract", and that the Subcontract's terms had priority in the event of any "conflict, ambiguity or contradiction" (para. 33).

c) The Subcontract made clear that Crosslinx was not to incur any liability for the conduct of Capital Sewer, and that Capital Sewer would be liable for its own negligence and indemnify Crosslinx and hold it harmless against claims arising from Capital Sewer's conduct under the Subcontract (para. 38).

d) The nature and scope of Capital Sewer's entitlement to recover, from the insurance under the Construction Contract, specific amounts paid or payable to Crosslinx under the indemnification provision was not before the application judge. The Court of Appeal said "It may be, as counsel for Crosslinx submitted in oral argument, that for practical purposes this application is about responsibility as between Crosslinx and Capital for amounts, such as deductibles, that are not recoverable under the insurance coverage" (para. 39).

[41] Lehigh also relied on Royal Host GP Inc. v. 1842259 Ontario Ltd., 2018 ONCA 467 (leave to appeal ref'd, [2018] SCCA No. 316). The commercial lease obligated the landlord to purchase fire insurance, and the tenant to pay its proportionate share of the cost. The Ontario Court of Appeal found the landlord's insurance covenant did not preclude its insurer from bringing a subrogated claim against the tenant for fire caused by the tenant's negligence. This outcome turned on the lease expressly holding the tenant responsible for damages caused by its negligence despite the landlord's obligation to insure:

Notwithstanding the Landlord's covenant contained in this Section 7.02, and notwithstanding any contribution by the Tenant to the cost of any policies of insurance carried by the Landlord, the Tenant expressly acknowledges and agrees that:

(i) The Tenant is not relieved of any liability arising from or contributed to by its acts, faults, negligence or omissions;

(ii) No insurable interest is conferred upon the Tenant under any policies of insurance carried by the Landlord, and

(iii) The Tenant has no right to receive any proceeds of any policies of insurance carried by the Landlord.

[Emphasis added.]

[42] The Court's conclusion was:

[28] According plain meaning to the language of s. 7.02 does not make the clause inconsistent with the lease as a whole. The lease provides in clear, express and unambiguous language that the tenant has the benefit of the insurance the landlord has covenanted to purchase in all circumstances except where the damage is caused by its own negligence. The motion judge erred in not giving effect to this language.

Findings and Analysis

How does the Barging Agreement allocate these damages?

[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.

[51] Regarding Lehigh's reliance on Crosslinx, the contractual circumstances were entirely different. As described above, in the Crosslinx sub-contract Capital Sewer not only indemnified Crosslinx but was also required to obtain insurance against its negligence for Crosslinx's protection. Crosslinx's obligation to insure was found only in the Construction Contract with the owner and, although incorporated into the Subcontract, the Subcontract's own terms had priority in the event of any conflict.

[52] Regarding Lehigh's reliance on Royal Host, in my view it too is distinguishable because of the express term that the tenant was liable for damages caused by its negligence "notwithstanding" the landlord's covenant to insure. If anything, this case demonstrates the contractual language one might expect when the parties intend to carve-out, from a party's obligation to insure against a certain risk, responsibility for that risk if caused by the other side's negligence.

[53] Lehigh argued that the H&M Insurance should be interpreted to benefit Catherwood in ways unrelated to allocating the risk of damage to Lehigh's barges. It argued the purpose of the clause might be to ensure the barges' seaworthiness by demonstrating their insurability. I find no support for this theory anywhere in the Barging Agreement or the evidence. If the intention was to ensure the barges' seaworthiness, there would be simpler and more direct ways to deal with that.

[54] Lehigh argued alternatively that the purpose of the H&M Insurance might be to enable Lehigh to quickly repair or replace a damaged barge, resulting in more business for Catherwood. Again, I find no support in the Barging Agreement or evidence for this theory.

[55] Finally, Lehigh relied on cases where a party's indemnity was enforced because the other party was found not to have agreed to an obligation to insure. In my view, that is not our situation, as the Barging Agreement contained Lehigh's promise to Catherwood to obtain the H&M Insurance. See Shooters Production Services Inc. v. Arnold Bros. Transport Ltd., 2003

BCSC 92 at para. 57; Leung v. Takatsu, [1980] B.C.J. No. 1350 (C.A.) at para. 6; Ruge v. Kennedy, [1991] B.C.J. No. 230 (S.C.); Perlitz v. Nan (1997), 51 B.C.L.R. (3d) 130 (S.C.), at paras. 41-42.

Lehigh's deductible

[56] According to the Agreed Statement of Facts, Lehigh's H&M deductible was US$500,000. This raises the issue of whether Catherwood, though entitled to receive the benefit of Lehigh's insurance, might be responsible for Lehigh's damages falling within the deductible. In this case, that would amount to the entire CDN $872,930.21 claimed by Lehigh.

[57] Lehigh did not pursue this issue. It is not mentioned in its written submissions or the additional written submissions it handed up on the second day of the hearing. Nor, to my understanding, did Lehigh pursue it in oral submissions. Catherwood, on the other hand, did provide some written and oral submissions on the issue.

[58] Lehigh not having pursued the issue, suffice it to say that I do not see this distinction drawn in the cases referred to above. That is, having found the covenant to insure to supersede the counterparty's indemnity, the cases did not make an exception for the insuring party's deductible. Instead, the entire loss was allocated to the party obliged to insure against the risk.

[59] Also, as suggested by counsel for Catherwood, it would appear logically problematic for the party promising to insure to be able to reduce the insurance protection of the counter-party by increasing its own deductible (and thereby also presumably reducing its premiums).

Costs

[60] Catherwood submitted that, if Lehigh's claims were dismissed, Catherwood should receive a costs award for its actual legal fees and expenses for these proceedings.

[61] It relied on two clauses in the Barging Agreement:

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.

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.

[62] In my view, these provisions do not apply. Regarding s. 6.8, Lehigh has been found neither negligent nor in breach of the Barging Agreement. It has been found unsuccessful in its claim for damages. Regarding s. 9.4, in my view it does not apply because Lehigh was not obliged to obtain insurance for Catherwood's legal costs in these circumstances.

[63] Catherwood's written submissions say that, in Kruger, similar wording entitled the warehouse to solicitor and client costs. No cite was given. I have found two Supplementary Reasons in Kruger regarding costs, 2013 BCCA 362 and 2014 BCCA 187, but neither sets out the contractual language in issue.

[64] I therefore award costs of the proceedings to Catherwood at Scale B, subject to the parties having leave to make further submissions on that issue if they wish. If so, they should kindly arrange a brief case management conference within the next 30 days to address the scheduling of submissions.

Conclusion

[65] Lehigh confirmed during the hearing that its remaining claims against Catherwood and the other defendants are no longer being pursued and should be dismissed. Catherwood's counterclaims relate only to costs.

[66] Therefore, Lehigh's claims and Catherwood's counterclaims are dismissed. Catherwood is awarded costs at Scale B unless it wishes to make further submissions in that regard.

"Coval J."

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