CITATION: JDC Ltd. et al. v. CAW Ltd. et al., 2022 ONSC 1611
COURT FILE NO.: CV-11-430155
DATE: 20220516

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Dick Construction Limited and Mara Limestone Aggregates Ltd., Plaintiffs

AND:

Courtice Auto Wreckers Limited and Courtice Industries Inc., Navis Pack and Ship, David Norman Corneil, Nancy Anne Corneil and Flav Inc., Defendants

BEFORE: Carole J. Brown J.

COUNSEL: Jason Squire and Rebecca Shoom, Counsel for the Plaintiffs

David Zuber, Counsel for the Defendants

HEARD: November 8, 9, 10, 12, 15, 16, 17, and 18, 2021

REASONS FOR DECISION

[1] The plaintiffs, James Dick Construction Limited ("JDC") and Mara Limestone Aggregates Ltd. ("Mara"), bring this action for damages arising from a fire loss involving two buildings that JDC leased to the defendants. The fire occurred on August 5, 2009. The cause of the fire is unknown.

[2] The two buildings in question, located at 1123 Farewell Rd. in Oshawa, had been constructed in the 1970s by the then-owner, Lantic Sugar, for the purpose of sugar storage. JDC purchased the property from Lantic Sugar in 1991 for the purpose of developing a ready-mix concrete plant in Oshawa.

[3] The larger building was a unique, timber-framed structure approximately 54,000 ft.² in size with a large dome-shaped roof (the "dome building"). There was a built-in conveyor belt system in the roof, which allowed the building to be filled with material. The smaller building was an A-frame steel structure approximately 42,000 ft.² in size ("A-frame building"). In November 1995, JDC entered into a lease agreement with the defendant Courtice Auto Wreckers Limited ("CAW"). CAW needed storage space to store recyclable newsprint. The lease provided that CAW would lease the dome building on a month-to-month basis and, should it be required, the A-frame building. CAW ceased leasing the buildings pursuant to the 1995 lease approximately two years later when it no longer required an external location to store materials.

[4] In November 2006, CAW entered into a subsequent lease agreement with JDC for both buildings for the purpose of storing recyclable materials. The lease was essentially the same as the

1995 lease, with two significant changes, which are at issue in this action, namely amendments to the repair clause and to the insurance clause.

[5] The provisions of the lease contained the following clauses.

[6] Both leases contained a repair obligation for major repairs. The 1995 lease provided as follows:

> All buildings are leased in an *as is* condition and the lessee has inspected same and is satisfied that they are suitable for intended use. Minor repairs (i.e. Over-head doors on 6000 sq. ft. warehouse) are to be for the account of the lessee. Where major repairs or modifications are required both parties will meet and resolve, to their mutual satisfaction, as to who pays for what.

[7] This repair obligation was modified, in the 2006 lease, to add the following exception pertaining to the maintenance of the dry sprinkler system:

> The exception will be the maintenance of the dry fire system which shall be maintained and repaired at the Lessees expense. Estimated costs for repair of the fire system are $3,000.00 for the 54,000.00 square foot building and $9,000.00 for the 42,000 square foot building. Heat must be maintained in the sprinkler rooms at all times.

[8] The covenant to insure clause, which was in both the 1995 and the 2006 leases, provided as follows (per the 2016 lease):

> The Lessor of the facility will at all times, for the life of this agreement, maintain general property insurance sufficient to cover the replacement costs of the buildings in the event of loss. The Lessee will at all times, for the life of this agreement, maintain warehousing and contents insurance in amounts sufficient to cover the value of stored product in the event of a loss. Both parties agree to maintain a minimum of $5,000,000.00 liability insurance and to name each other co-insured.

[9] Both leases also contained an indemnification provision, which provides as follows (per the 2016 lease):

> **INDEMNIFICATION**: Both the Lessor and the Lessee agree to indemnify and hold each other safe and harmless from any suits or litigations of any kind arising from the day-to-day operations at the aforementioned premises.

[10] The evidence of both Mr. Sweetnam of JDC and Mr. Ambrose of CAW indicates that the leases were drafted and modified by JDC. Any ambiguity as regards the provisions contained in the lease would be subject to *contra proferentem*. The *contra proferentem* rule is of great importance especially where the clause being construed creates an exemption, exclusion or limitation of liability. Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

[11] It is undisputed that JDC did not maintain general property insurance "sufficient to cover the replacement costs of the buildings in the event of loss". JDC's property policy only provided for $700,000 for the dome building and $100,000 for the A-frame building. JDC maintains that the cost to repair and replace the buildings amounts to $10,687,024.46 plus interest, and that the valuation of the two buildings for purposes of the general property insurance for which they were responsible was done in error by JDC.

[12] CAW's insurance policy provided for coverage of the value of the stored product in the buildings, as was required pursuant to the lease.

[13] The landlord covenanted to insure against loss of the buildings by maintaining general property insurance sufficient to cover the replacement cost of the buildings in the event of loss. The tenant had the responsibility of maintaining warehousing and contents insurance sufficient to cover the value of stored product in the event of loss. The lease therefore manifests an intention on both parties to put the risk of loss of the building or the inventory onto insurance; the risk of loss of the buildings on the landlord and the risk of loss of the contents on the tenant.

[14] The mutual indemnification from litigation with respect to the day-to-day operations of the facility demonstrated that there would be no litigation between landlord and tenant and, further, that the risk for third parties would be allocated to insurance through liability insurance.

[15] The buildings were rented in an "as is" condition, which reflects the fact that they were older and had repair issues. Minor repairs were stipulated to be covered by the lessee. Major repairs were to be discussed and an agreement arrived at regarding payment. The dry fire sprinkler system was stipulated in the 2006 lease to be "at the lessee's expense". Whether this also meant that the lessee was to arrange for or undertake repairs as opposed to simply covering the cost thereof had, according to the evidence, caused some confusion or disagreement. JDC maintained that CAW was responsible for undertaking repairs and paying for them. CAW maintained that its responsibility was only to pay for repairs. However, CAW's evidence was that when JDC failed to undertake or arrange for repairs, CAW undertook to arrange for or undertake those repairs.

Evidence

[16] Below is a brief summary of the seminal, relevant evidence given in this trial.

Admissions and Uncontested Facts

[17] The following admissions and uncontested facts were provided to the court:

> 1. In August 2009, CAW was leasing a 54,000 square foot structure referred to as the "dome" building, which was cigar-shaped with ends resembling salt dome halves.
>
> 2. CAW also leased a 42,000 square-foot structure referred to as the "A-frame" building, which was connected to the dome building by a "breezeway".

3. Both buildings were constructed in the 1970s. The dome building was made of wood, covered in roofing material and shingles, constructed to accommodate the storage of sugar.

4. The dome and A-frame buildings were among a number of buildings on the property in 1991, when a JDC-related entity purchased the property at 1123 Farewell Rd., Oshawa. As of August 5, 2009, the A-frame and dome buildings were two of six buildings on the property.

5. JDC as lessor and CAW as lessee entered into a lease agreement regarding the A-frame and dome buildings in November 2006. The lease contained a covenant to insure, according to which the lessor undertook to "maintain general property insurance sufficient to cover the replacement costs of the buildings in the event of loss."

6. In November of 2006, CAW made repairs to the sprinkler systems of both buildings.

7. Each building had separate "dry fire" sprinkler systems. In a dry fire sprinkler system, the pipes leading to the sprinkler heads throughout a building are filled with compressed air. The compressed air holds back the water from the municipal water supply, which constantly presses against the air, ready to fill the pipes in the event that a sprinkler head bursts. In a dry sprinkler system, provided the water valves are in the "on" position, a burst sprinkler head will cause water to surge through the pipes for distribution. Dry fire sprinkler systems suit cold climates as in Ontario, where water-filled pipes can freeze.

8. The water valves to the dome building's dry fire system were located in a small sprinkler valve room at the south end of the building.

9. A pinhole leak in a dry fire sprinkler system means that water may spray out, but it does not prevent the sprinkler system from functioning.

10. In July 2009, a pinhole leak appeared in one of the dome building's sprinkler pipes.

11. On and before August 5, 2009, CAW was storing recyclable "blue box" materials in the dome and A-frame buildings. The recyclable blue box materials had been purchased by the defendant Courtice Industries, from the City of Toronto.

12. CAW attempted to repair the pinhole leak using two of its own employees, Robert Pettis and Greg Redden. During the attempt to repair the pinhole leak, CAW (Mr. Pettis) disabled the dome building's sprinkler system by turning off the water valve. Water was spraying out of the pipe and therefore the workers turned off the system in order to protect the inventory of recyclable materials in the dome building and to prevent continued loss of inventory.

> 13. CAW did not complete the repairs on the pinhole leak and did not turn the water valve back on for the sprinkler system. They did not notify the Chief Fire Official that the sprinkler system in the dome building had been disabled.
>
> 14. After working on the system for the last time, four or five days prior to the fire, which occurred on August 5, 2009, the two employees locked access to the dome building's sprinkler control room in which the valves were located.

Testimony

Plaintiffs' Case

Gregory Sweetnam

[18] Gregory Sweetnam testified on behalf of JDC. Mr. Sweetnam has worked with his father-in-law, James Dick, the owner of JDC, for 42 years. He is the executive vice president of JDC. JDC is primarily an aggregate producer, but also runs a large transportation division. The company headquarters are located in Bolton and Breechin, Ontario. The property was purchased from Lantic Sugar, to locate a concrete/ready mix cement factory.

[19] The dome and A-frame buildings were not used for the concrete/ready-mix cement factory, but were leased. In 1995, they were leased to CAW to store recyclables. JDC initially paid for repairs to the dry sprinkler system pursuant to the original lease. In 2006, a new lease was signed in which CAW was to cover the cost of repairs of the dry sprinkler system.

[20] On August 5, 2009, a fire occurred which engulfed and destroyed the dome building and also damaged the A-frame building. JDC's insurance paid a total of $800,000 coverage for both buildings.

[21] In cross-examination Mr. Sweetnam stated that there has, to date, been no effort to replace or repair the buildings. Both were leased out "as is". From January 24, 2014, the property, including the entire cement processing plant, has been leased to Lafarge for a long-term lease through 2034. Lafarge also purchased the concrete making plant, but not the ready-mix cement factory. JDC also sold all mobile equipment and ready-mix vehicles.

[22] Mr. Sweetnam confirmed that there were frequent issues with the dry sprinkler system and that it required significant maintenance. He further admitted that prior to 2006, when JDC was responsible for the maintenance of the sprinkler system, the system had been shut down or non-functional on numerous occasions. During these times, no fire watch was ever ordered and the fire department was not notified.

Jan Svihra

[23] Jan Svihra, a structural engineer, was qualified as an expert in the area of cost estimates for large structural projects. He gave his opinion as to the cost of restoring the dome structure.

[24] He stated that the building was unique and the components were not readily available. He opined that the total cost for restoration of the building would be $10,390,888 (rounded to $10,400,000). He believed this to be a reasonable estimate.

[25] In cross-examination he testified that a structural steel building rather than an all-wood building would be cheaper. He did not visit the site after the fire.

Thomas Wright

[26] Thomas Wright was qualified as an expert in fire protection systems, particularly the objectives, design and implementation of sprinkler systems and the applicable US National Fire Protection Act (“NFPA”) standards. He was not qualified as an expert with regard to the Ontario Fire Code (“OFC”), the Ontario Building Code (“OBC”) and the application and objectives of the Ontario legislation, as he was from the United States and did not have formal training in the OFC or OBC, nor did he sit on any of the committees regarding the OFC or OBC.

[27] He confirmed that the objectives of the fire protection system, implemented at the design phase, are the protection of life, the protection of property and the control of the fire.

[28] He explained the operation of the dry sprinkler system and indicated that a fire suppression system is designed to protect life and property.

[29] A fire suppression system does not detect smoke or fire, but instead detects heat emanating from the fire. Heat rises, causing the sprinklers to activate and operate. Before the sprinklers are activated and alerts go out, the fire would already be in progress. The system is not designed to suppress the fire, although it often does. Sprinklers wet the fire directly, as well as spraying around the fire to wet the contents around the fire, to control the fire, which permits fire services to enter the building and suppress the fire. In his opinion, had the system been on and maintained, the fire would have been suppressed and would have prevented collapse of the roof. Even with the leak, it could have been set “wet”.

[30] In cross-examination, he admitted that if someone saw smoke and called 911, this would be faster and better than waiting for the heat to reach the sprinkler heads and melt the lead therein in order to activate the system.

Defendants’ Case

Harvey Ambrose

[31] Harvey Ambrose owned CAW from 1975 and operated it through 2015. He also purchased the company that ran the Port of Oshawa, an international commissioned port. By 1995, CAW had expanded significantly. He became involved in recyclables and, in 1995, entered into a two-year lease with JDC which was to end November 30, 1997, with JDC to lease two buildings

on JDC property, a wooden dome structure and an A-frame structure. Pursuant to the lease, property insurance was the responsibility of the lessor and warehouse contents insurance was the responsibility of the lessee. There was an indemnification provision. All buildings were leased in an "as is" condition. Minor repairs were the responsibility of the lessee and, as regards major repairs, the parties were to meet and discuss responsibility. He did not recall any meetings for the purpose of discussing major repairs.

[32] Mr. Ambrose testified that there had been discussions about the sale of the JDC property and discussions about a property swap, but nothing was done. CAW declined the opportunity to purchase the JDC property.

[33] In 2006, a new lease was signed between JDC and CAW. The lease was essentially the same as that of 1995, with a change in wording as regards the repair provisions. In the 2006 lease, the lessor was responsible for minor repairs, while major repairs were to be discussed as between the lessor and lessee. The one difference between the 1995 and 2006 leases was that under the 2006 lease the cost of repairs and maintenance of the sprinkler system was to be CAW's responsibility. It was his understanding that CAW was responsible for the cost of the sprinkler system repairs, while JDC would continue to be responsible for the maintenance and repair thereof. However, JDC had not continued to maintain and repair the system, so he told his own employees that they had better undertake those tasks.

[34] There were ongoing repairs of the sprinkler system. During this period, CAW's recycling operation changed from sorting and storage to storage only. At the time of the fire, CAW was using the building for storage only. The buildings were locked. There was a crew watching the buildings, mainly for exterior activity or people coming onto the land who should not be there. He was not aware that a company had come onto the site to pick up some equipment on the day of the fire. It was those workers who were on site, smelled smoke and contacted Mr. Ambrose. By the time he reached the property, the fire had consumed the dome building.

Jonathan Rubes

[35] Jonathan Rubes is a mechanical engineer, certified in Ontario. He has had experience on numerous committees related to the national fire codes and building codes. Alarm/sprinkler systems are dealt with in the building codes, while maintenance and repair of said systems are dealt with in the fire codes. The OBC has largely adopted the national codes.

[36] Mr. Rubes was qualified as an expert in fire protection systems; in fire and building code application, design and objectives; and to give an opinion on the building code and fire protection code requirements for 1123 Farewell Rd. and the effect of any breach of those requirements.

[37] As regards the general requirements of the OFC and OBC, the principal objectives are for protecting life and ensuring safety. The principal objective is for the safety of persons or occupants of the building and persons in adjacent buildings. Protection of the building to be able to evacuate occupants and to ensure their life and safety are paramount objectives. Another objective is protection of the building, but this is not the principal objective.

[38] He testified that the dry sprinkler system detects the fire. When it reaches a certain temperature, the lead in the fusible link in the sprinkler head melts and the water flows through the

system. In an 83-foot-high building, depending on where the fire started, activation of the sprinkler system would depend on how long it would take for the lead to melt.

[39] In cross-examination, when asked about the standards and guidelines of the NFPA, Mr. Wright clarified that the NFPA is primarily used in the United States, although referred to in Canadian codes. Where there is a difference between the NFPA and the OFC standards, the OFC takes precedence in Ontario.

Credibility

[40] I found the majority of the witnesses called to testify in this trial to be generally credible and reliable.

[41] I note that the evidence of the plaintiff's expert, T. Steven Wright, an engineer and an expert in the origin and cause of fires, in inspecting fire sites for protection, and in sprinkler systems, is qualified in the United States. He does not have training in Canada or Ontario with respect to applicable building and fire codes. His expertise was qualified and limited to an expert in fire protection systems, particularly the objectives, design and implementation of sprinkler systems and the applicable NFPA standards. He was not qualified with regard to the OFC and the OBC, and the application and objectives of the Ontario legislation.

[42] The defendants' expert, Jonathan Rubes, is an engineer, certified in Ontario. He served on numerous committees related to the national fire and building codes, which are adopted by provinces, sometimes with modifications. He was qualified as an expert in fire protection systems and in the application, design and objectives of fire and building codes, so as to give an opinion on the building code and fire protection code requirements for 1123 Farewell Rd. and the effect of any breach of those requirements.

[43] However, I found the evidence of Gregory Sweetnam to be less credible and reliable than the others. I found him to be defensive. He took certain positions and would refuse to vary his evidence even when confronted with contradictory documentation, some written by him and his company. He refused to admit numerous things regarding an intention to sell the JDC property, despite being shown JDC correspondence that stated the opposite, namely an interest in selling the property. This is one example of several. Where his evidence is contradicted by others, I prefer their evidence, unless otherwise stated.

Positions of the Parties

[44] As regards the covenant to insure, the plaintiffs maintain that this claim is valid and not barred by its covenant to insure, because other provisions in the lease related to the maintenance of the dry fire system created an exception to the effects of the covenant to insure that were engaged in the circumstances of this case. The plaintiffs further maintain that the defendants breached their lease and failed to maintain and repair the sprinkler system. They submit that the loss occasioned to the buildings was the result of the defendants' failure to properly maintain and repair the sprinkler system. Finally, it is the plaintiffs' position that the proper assessment of damages in this case is replacement value for the buildings.

[45] It is the defendants' position that the plaintiffs' claim is barred by the plaintiffs' covenant to insure, which places the responsibility for general property loss with the lessor/landlord. In the event that it is found that the plaintiffs' claim is not barred, the defendants submit that they were responsible for expenses related to maintenance and repair of the sprinkler system, but not to actual repair itself, based on the clear wording of the repair provisions contained in the lease. They maintain that their conduct did not cause the losses occasioned to the buildings. Finally, as regards damages, they maintain that any damages that may be assessed should be on the basis of diminution in value. Further, all other/private insurance proceeds should be deducted from any value assessment.

Issues

[46] The following issues must be determined:

1. Is this action barred by the plaintiffs' covenant to insure?

2. Did CAW breach the lease?

3. Did CAW's actions cause the damage?

4. If so, what is the measure of damages?

The Law

Analysis

Is This Action Barred by the Plaintiffs' Covenant to Insure?

[47] The effect of the covenant to insure is ultimately a matter of contractual interpretation that will be sensitive to the particular language of the agreement and the surrounding circumstances. In general, a covenant to insure will represent an intention by the parties to allocate the risk of the peril insured against to the covenantor. It is recognized that this is a presumption that may be rebutted by evidence of some other intention: *North Newton Warehouses Limited v. Alliance Woodcraft Manufacturing Inc*., 2005 BCCA 309, 44 B.C.L.R. (4th) 227, at para. 45, leave to appeal refused, [2005] S.C.C.A. No. 375; see also *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc*., 2016 ONCA 246, 130 O.R. (3d) 418, at para. 42.

[48] The Court of Appeal for Ontario in *Madison Developments Ltd. v. Plan Electric Co*. (1997), 36 O.R. (3d) 80, at para. 9, leave to appeal refused, [1997] S.C.C.A. No. 659, has stated as follows:

> 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

[49] This provision continues to be followed in Ontario courts, including the Court of Appeal, and across Canada. While the presence of a covenant to insure is not an absolute bar to claims by the covenantor against the covenantee, the covenant does have presumptive effect unless the covenantor is able to establish something specific that displaces it.

[50] While the plaintiffs maintain that the covenant to insure was not for the defendant lessees' benefit, when the lease is read as a whole, and the parties were intended to bear the risk of loss caused by their own negligence, the case law indicates the contrary. A landlord's covenant to insure will run to the tenants' benefit unless there is evidence of a contrary intention which, based on all of the evidence, I do not find in the circumstances of this case. The rationale for this principle is that the landlord would be free to obtain insurance of its own initiative, such that the inclusion in the lease of a covenant to do so must have meaning; it must be for the benefit of the tenant: *T. Eaton Company v. Smith et al.*, [1978] 2 S.C.R. 749, at pp. 754-755. This rationale holds whether or not the tenant contributes to the cost of the insurance: *D.L.G. & Associates Ltd. v. Minto Properties Inc.*, 2015 ONCA 705, 391 D.L.R. (4th) 505, at para. 19.

[51] A landlord's covenant to insure will cover damage or loss caused by the tenant, even that occasioned by the tenant's negligence. Courts have held that the ordinary concept of insurance embraces negligence, whether by the covenantee or others, and the legal characterization of the claim for loss is not relevant, including when the plaintiff claims "fundamental breach" or "gross negligence": see *Agnew-Surpass v. Cummer-Yonge*, [1976] 2 S.C.R. 221 at pp. 229-230; *Minto Properties*, at para. 17; *T. Eaton Company*. The jurisprudence requires very express language in order for a covenantee to retain liability for their own negligence despite a provision stipulating that the covenant to insure is the responsibility of the covenantor: see *Royal Host GP Inc. v. 1842259 Ontario Ltd.*, 2018 ONCA 467, 422 D.L.R. (4th) 661, leave to appeal refused, [2018] S.C.C.A. No. 316; *Deslaurier*.

[52] The covenantor's covenant to insure only transfers the risk of loss caused by the perils against which the landlord is obligated to insure. A covenant to insure against a particular peril does not constitute an assumption of risk at large. At issue is how the parties intended to allocate the risk under the lease: *Deslaurier*, at para. 33, citing *Cummer-Yonge*, at p. 224.

[53] The plaintiffs have argued that the parties' failure to specify "fire insurance" or "all risks insurance" distinguishes the present case from those where the covenant to insure has successfully barred a claim for loss by fire. In this regard, I make three comments. The 2006 lease was drafted by JDC. In that lease, there is no specification of "fire insurance" or insurance for other specific perils that would circumscribe the interpretation of "general property insurance" for which the covenantor, JDC, was responsible. Further, the insurance provision in the lease specifically allocates to the covenantor the responsibility of maintaining "general property insurance sufficient to cover the replacement costs of the buildings <u>in the event of loss</u>" (emphasis added). I find no

ambiguity as regards the allocation of risk for loss of the buildings to the covenantor. Nor do I find anything in the lease which would circumscribe, modify or change that allocation of risk as specified or the responsibility of the covenantor as specified.

[54] The parties may allocate risk differently through other terms of the agreement. However, to alter the allocation of risk represented by the covenant to insure, express language must be used. The plaintiffs relied principally on two cases as standing for the proposition that other terms of the agreement can prevent the presence of a covenant to insure from barring a claim. However, in both of the cases relied upon, very clear language was used that provided that the covenantee was to remain liable in negligence for specific losses: see *Sanofi Pasteur Limited v. UPS SCS, Inc.*, 2015 ONCA 88, 124 O.R. (3d) 81, leave to appeal refused, [2015] S.C.C.A. No. 152; *Royal Host*. That is not the situation in this case.

[55] Repair covenants are generally not sufficient to alter the allocation of risk. In general, a party's repair obligations by themselves are not sufficient to allocate to that party the risk of loss associated with the failure to fulfil those obligations in cases where there is also an applicable covenant to insure. In other words, the covenant to insure will continue to bar the claim even where the loss was caused by the covenantee's breach of their covenant to repair. The parties may provide otherwise, but must use express language to do so: see *Orion Interiors Inc. v. State Farm Fire and Casualty Company*, 2016 ONCA 164, 63 R.P.R. (5th) 173.

[56] In the present case, where there are specific covenants to insure, including the covenantor's covenant to maintain general property insurance sufficient to cover the replacement costs of the buildings in the event of loss, and there is no express language that would reallocate to the covenantee the risk of loss associated with a failure to fulfil repair obligations, I find that there is nothing that would transfer liability for fire loss to the covenantee. Absent such explicit language, the lessor's covenant to insure, namely to maintain general property insurance sufficient to cover the replacement costs of the buildings in the event of loss, remains the responsibility of the lessor. In considering the kinds of perils that could result in loss of the buildings, I would find it difficult to conclude that the parties intended to exclude fire.

[57] In conclusion, the lease, when read as a whole, provides that the plaintiffs' covenant to insure the buildings allocated to them the risk of loss, which would include loss by fire, the risk that ultimately materialized. The 2006 lease shares the key features of covenants to insure that barred subsequent claims by the covenantor in other cases, as above noted, and to the extent that it differs from other covenants to insure, I do not find these differences to be determinative.

[58] In my view, the proper interpretation of the repair provisions of the 2006 lease is that the defendants assumed responsibility for the cost of maintenance and repairs to the sprinkler system, but not responsibility for the consequences of a failure to maintain the sprinkler system, as urged by the plaintiffs. Previous decisions have rejected the argument that a repair provision alters the allocation of risk expressed by the covenant to insure. Accordingly, I find that the obligation on the defendants to assume responsibility for the expense related to the maintenance and repairs of the sprinkler system, contained in the lease, does not create an exception to the overall allocation of risk of loss of the buildings evinced by the covenant to insure.

[59] Thus, I find that the plaintiffs' covenant to insure, contained in the lease, bars their action against the defendants.

[60] While I have found, on the basis of the evidence before me and the applicable jurisprudence, that the plaintiffs' covenant to insure, as contained in the lease, bars the plaintiffs from bringing this action against the defendants, I will continue on to determine the other issues presented, in the event that I am in error with respect to the first issue.

[61] Nevertheless, I reiterate that the following issues are moot, given my findings on the first issue.

Did CAW Breach the Contract?

[62] It is the position of the plaintiffs that, pursuant to the lease, CAW was responsible for maintaining and repairing the sprinkler system, which it failed to do. The plaintiffs argue that records admitted that CAW was charged, following the fire, by the Oshawa Fire Services with failing to maintain the sprinkler system in operating condition and for failing to notify the Chief Fire Official that the system had been turned off, contrary to the OFC and the *Fire Protection and Prevention Act, 1997*, S.O. 1997, c. 4. They argue that CAW pled guilty to the charges and was fined. The plaintiffs further maintain that CAW prioritized its financial bottom-line over fire safety standards and that their conduct amounts to a breach of the standard of care and a breach of their contractual obligations under the 2006 lease.

[63] It is the position of CAW that the obligation on it, pursuant to the 2006 lease, was to be responsible for the costs of maintenance and repair of the dry fire system. They maintain that the wording of the lease was clear as regards the repair obligations, which read as follows: "The exception will be the maintenance of the dry fire system which shall be maintained and repaired <u>at the Lessees expense</u>" (emphasis added).

[64] As regards the non-criminal charges pursuant to the OFC and the *Fire Protection and Prevention Act*, to which Mr. Ambrose pled guilty, I do not find this guilty plea determinative. The evidence of Mr. Ambrose was that it was less time-consuming and costly to plead guilty and pay a fine rather than to retain a lawyer to defend CAW with respect to the charges.

[65] Based on the reading of the repair obligations in the lease, the cost of the maintenance and repair of the dry fire system was to be borne by the lessee. There was nothing to indicate that the dry fire system was to be maintained and repaired by the lessee. Had this been the intention, it should have been so stated. The evidence indicates that, in the past, the dry fire system had always been maintained by JDC. Mr. Sweetnam testified that the system was difficult to maintain. The evidence further indicated that it was costly and that, on occasion, CAW's equipment caused damage to the system. For that reason, JDC wanted the cost of the system to be borne by CAW.

[66] It was the evidence of Mr. Ambrose, of CAW, that his understanding was that he was responsible for only the cost of repairs to the system stating "we were responsible for the cost". He further testified that despite the wording of the lease, when it became clear that JDC was not attending to the required repairs and maintenance of the fire suppression system, CAW took it upon itself to attempt to repair the old, failing system. It was leaking and causing significant problems for them. Mr. Ambrose testified that "as time went on when it wasn't being repaired in

a timely or maintained in a timely fashion, that is when I had to instruct our people to start doing something". He indicated that "the James Dick people didn't respond or didn't have an interest in maintaining it". He therefore gave instructions to his employees to undertake repair of the system, which they began to do. There was no evidence to indicate when CAW began to undertake repairs.

[67] It appears that at some time shortly before the fire, the sprinkler system in the dome building developed a pinhole leak. It further appears that, in order to repair the sprinkler system, parts had to be ordered. As a result, the sprinkler system was turned off until the parts were received and the repairs completed.

[68] As stated above, I am not satisfied that the obligation to maintain and repair the dry sprinkler system was allocated to the lessee, CAW, pursuant to the 2006 lease. It certainly was not clearly stated to be the responsibility of CAW. The clear reading of the lease was that CAW was responsible for the expense related to the repair and maintenance of the dry fire system.

Causation

[69] The plaintiffs and defendants agree that the cause of the fire is unknown.

[70] Nevertheless, it is the position of the plaintiffs that, by disabling the dry fire sprinkler system and failing to notify the proper authorities, CAW breached its contractual obligations and the standard of care. The plaintiffs maintain that while the fire may have occurred in any event, the specific damage that occurred was caused by CAW's conduct. It is their position that the evidence supports their position on the basis of the standard "but for" causation test applied on a balance of probabilities. In the alternative, they maintain that the circumstances of this case would engage the "material contribution" test for causation as the alternative to the "but for" test.

[71] It is the position of the defendants that there was no breach of contractual obligations and, further, that the evidence before this court does not support or establish the plaintiffs' positions. The defendants admit that there is no issue that CAW turned off the system to effect repairs; nor is there an issue that CAW had an obligation to notify the Oshawa Fire Department and did not do so. Further, there is no issue that CAW pled guilty to the failure to notify and failure to maintain the system. However, the plea of guilty is only *prima facie* proof of guilt and is subject to explanation: see *Becamon v. Wawanesa Mutual Insurance Company*, 2009 ONCA 113, 94 O.R. (3d) 297. As indicated above, the evidence given by Mr. Ambrose indicated that it would cost more time and money to defend the charges than to plead guilty and pay a fine. Mr. Ambrose did not have counsel and the cost of fighting the charges as opposed to paying a fine would have been prohibitive. The plea of guilty does not assist this court in its interpretation of the obligations under the lease. The breach of the notification provision would still require the court to perform the analysis of causation in terms of a negligent allocation. As indicated above, I do not find the charge or guilty plea to be determinative.

[72] The basic test for causation is the "but for" test, which requires that the plaintiff show on a balance of probabilities that the defendant caused or contributed to the injury in the sense that the injury would not have occurred but for the negligence of the defendant. "But for" causation will not always be capable of being determined with scientific precision. While the onus remains on the plaintiff, in the absence of evidence to the contrary adduced by the defendant, the court may

take a “robust and pragmatic” approach to the facts and draw an inference of causation despite positive or scientific proof of causation not being adduced: *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 330; see also *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 16.

[73] In this case, the complaint, as framed by the plaintiffs, concerns both action and omission on the part of the defendants. In cases in which the defendant is alleged to have omitted to do something in breach of the standard of care, the court must determine the fact situation in the moment before the defendant’s alleged breach of the standard of care and then imagine that the defendant took the action the standard of care obliged it to take in order to determine whether doing so would have prevented or reduced the fire. In this case, the failure was in not notifying the Oshawa Fire Department that the sprinkler system was going to be inoperable while parts were being ordered and it was being repaired. The question then becomes if the fire department had been so apprised, would this have prevented the damage and loss sustained.

[74] The plaintiffs argue that the defendants breached the standard of care by disabling the sprinkler system and the loss would not have occurred had the sprinkler system been on at the time of the fire. The plaintiffs rely on the evidence of their expert, Mr. Wright, who opined that the sprinkler system would have pre-wet the materials, slowing the spread of the fire, and would have automatically notified the fire department through the monitoring system. As a result, the fire department would have had “the opportunity to attack the fire when the fire was smaller.” Mr. Wright opined in his testimony that the building would not have collapsed had the sprinkler system been turned on at the time of the fire.

[75] Mr. Wright did acknowledge that his conclusion assumed that the fire department would have been automatically notified by the monitoring system, allowing them to arrive and attack the fire when it was smaller. There was, however, no evidence to indicate that, at the material time, the monitoring system was operational. Further, there was no or insufficient evidence with respect to burn time from commencement of the smouldering fire to its peak. Further, there was no evidence of how long it would take and how high the heat would have to be in order to activate the sprinklers which were in the roof, some 83 feet above the ground. The plaintiffs’ expert, Mr. Wright, confirmed that the sprinkler heads do not detect smoke or fire but, rather, detect a change in temperature and, as the heat rises, this change in temperature would melt the lead in the heads and, as a result, would trigger the opening of the sprinkler heads. Further, Mr. Wright admitted, in cross-examination, that it would be important to know how the stored material in the dome building was organized and the orientation of the piles of combustible material as that would impact how the fire spread. Mr. Wright did not comment on this in his report and had no information in this regard. These had all formed parts of the basis for Mr. Wright’s opinion that the fire department would have been notified and would have arrived in time to prevent the loss.

[76] Indeed, there is some evidence capable of supporting the conclusion that the loss may have occurred even if the sprinkler system were on. The building was storing large quantities of combustible materials, suggesting that the fire would grow quickly and, as noted above, it is unclear how much the fire may have been able to spread before triggering the sprinklers. Moreover, there is simply no evidence as to whether a functioning sprinkler system in the dome building would or would not control the fire sufficiently to let the Oshawa Fire Department save the building.

[77] I find the conclusions of Mr. Wright that (i) the sprinkler system would likely have limited the size of the fire, (ii) the fire along the surface of the combustibles would likely have been slowed, and (iii) the ceiling temperatures would likely have been reduced such that the Oshawa Fire Services would have been contacted earlier, giving them an opportunity to make entry and supress the fire when it was smaller, to be speculation.

[78] The plaintiffs further argued that the defendants did not have to turn the sprinkler system off, despite the pinhole leak. There was no concern that the system would freeze as it was warm weather at the material time. They indicated that the system could have been left on, although this would have wetted the recyclable materials, or indeed buckets could have been placed under the leak. There was no evidence as to whether the latter would even be feasible. I note that the defendants argued that, pursuant to the contract with the City of Toronto, the recyclable materials were to be kept dry. Again, there was no evidence proffered in support. I place no weight on either party's arguments in this regard.

[79] As regards the issue of the alleged breach of the standard of care and the failure to implement alternative measures such as a fire watch, the evidence indicated that pursuant to the OFC, there are no specifications stating what interim measures are to be implemented during the closing of valves or repairs to the fire suppression system. Indeed, it was up to the fire department, once notified, as to whether any measures would be put in place. While the plaintiffs maintain that a fire watch would or should have been put in place, there is no evidence to indicate that the fire department would have made such an order. Indeed, based on the records of the fire department, adduced in evidence, during the time that JDC maintained the fire suppression system prior to 2006, there had been numerous times when the fire suppression system was not functional and turned off—at one point, for over two months. There is no evidence of any Order of the fire department to implement a fire watch or any other alternative action during those times when the sprinkler system was not operational. It is further of note that a fire watch, which normally occurs every 30 to 60 minutes, simply calls the fire department when a fire has started. There is no allegation or evidence that there was a delay in the fire department being notified by the plaintiffs' workers or the Navis employees who were working in and around the buildings at the material time.

[80] The plaintiffs maintain that the defendants had, further, locked the door to the sprinkler valve room, which was, they argued, highly risky and deliberate. It was the uncontroverted evidence of the plaintiffs' witness, Chris Pettis, that he was ordered to place the lock on the door by the Oshawa Fire Department. Mr. Pettis confirmed he placed the lock on the door and keys were given to JDC. It appears that the lock remained on the door through 2013, as Oshawa Fire Department notes indicated that the lock was cut off at that time in an incident summary report dated December 20, 2013.

[81] Based on all of the evidence adduced, I find that there was no or insufficient evidence to conclude, as the plaintiffs urged, that the loss and damage to the dome building and A-frame building were caused by the actions or omissions of the defendants. There was simply no sufficient evidence to establish the conclusions that they wished to draw that the loss would not have occurred had the sprinkler system been on at the time of the fire.

Damages

[82] The plaintiffs maintain that the proper measure of damages with respect to the loss of or damage to the dome and A-frame buildings is the cost of replacement and repair of the buildings. The plaintiffs maintain that they intend and have always intended to rebuild the structures and that the buildings have strategic value to them with respect to their business.

[83] It is the position of the defendants that the proper measure of damages is diminution in the value of the property. They submit that the plaintiffs, at no time after the fire, demonstrated an intention to rebuild. Based on all of the evidence, they argue that this would not have been a reasonable choice in any event.

[84] In the event that damages were awarded to the plaintiffs, which they are not, given my decisions above, the parties agree that, as a starting point, the plaintiffs are to be put in the position they would have occupied but for the damage/loss of the buildings. The appropriate measure of damages is determined having regard to the particular facts of the case: *Bowman v. Martineau*, 2020 ONCA 330, 447 D.L.R. (4th) 518, at para. 11.

[85] Both parties rely on the case of *Scaffidi-Argentina v. Tega Homes Developments Inc.*, 2016 ONSC 5448, 60 C.L.R. (4th) 138, as regards when the cost of replacement or repair will apply. As held in that case, at para. 10, the court is to consider whether the plaintiff has shown an intention to rebuild and, if so, whether that intention to rebuild is reasonable even though the cost of rebuilding may be substantially greater than the amount by which the property has been diminished; see also *James Street Hardware and Furniture Co. v. Spizziri* (1987), 62 O.R. (2d) 385 (C.A.).

[86] Pursuant to the case law, the plaintiff must actually intend to rebuild or repair what was lost in order for replacement cost to be appropriate. This is a question of fact. The courts may consider what steps the plaintiff has taken toward rebuilding, if any, as well as other conduct of the plaintiff following the loss. In *Scaffidi-Argentina*, the court found, at para. 16, that the plaintiffs had no real intention to rebuild their multi-unit residential rental property, having taken "few steps toward rebuilding" and having spent "only a fraction of their insurance proceeds". The building had been rendered uninhabitable in June 2011 and remained unoccupied until the time of trial in 2016. See also *Shorey v. Sesco Design/Build Inc.*, 2021 ONSC 869, at para. 61.

[87] Where it has been found that the plaintiff has demonstrated an intention to rebuild or repair the damaged property, the intention must be found to be reasonable in the circumstances. The plaintiff's desire to rebuild may be found to be reasonable where the property has a special and unique value to the plaintiff, the loss of which could not be compensated for by paying the diminution in value of the property: *Scaffidi-Argentina.*

[88] The court found rebuilding to be reasonable in cases involving the destruction of the plaintiff's personal residence where the plaintiff's home was destroyed by a fire: see *Nan v. Black Pine Manufacturing Ltd.* (1991), 55 B.C.L.R. (2d) 241 (C.A.). Courts have also found rebuilding to be reasonable as regards certain commercial buildings: *James Street Hardware*; see, also, *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.,* [1970] 1 Q.B. 447, 1 Lloyd's Rep. 15 (C.A.). The jurisprudence indicates that where the replacement/repair cost is substantially

greater than the diminution in value of the property, an intention to rebuild may be unreasonable if the property's only value to the plaintiffs is income generation or its market value (*i.e.* sale of the property): *Scaffidi-Argentina.*

[89] In determining the proper assessment of damages, the first question is whether the plaintiffs intended to rebuild. The evidence of Mr. Sweetnam was that JDC always intended to rebuild and that the property was strategic to their cement mix operation since it was located on the port, allowing JDC to be competitive in negotiations as regards the purchase of cement powder. While evidence was led of correspondence suggesting that JDC was looking at selling the property, Mr. Sweetnam denied this despite being shown the actual correspondence suggesting otherwise. He indicated that he knew that there was a series of people coming through to look at the buildings, and that JDC leased the buildings on a month-to-month basis, as they were not being used for operation of their concrete plant. I note that they never used the buildings for purposes of their concrete plant.

[90] The fire occurred on August 5, 2009. From that date to the time of trial, no repair to or rebuilding of the damaged A-frame or destroyed dome building was undertaken, despite the fact that JDC insurance paid them $800,000 ($700,000 for the dome building and $100,000 for the A-frame building). From January 24, 2014, the entire property, and all buildings (in other words the entire cement processing operation) has been leased to Lafarge on a long-term lease until 2034. Lafarge purchased the concrete making plant, but not the ready-mix factory. JDC also sold all mobile equipment and ready-mix vehicles to Lafarge. Therefore, JDC could not rebuild the A-frame and dome buildings until after 2034 at least.

[91] Based on the evidence, I am not satisfied that JDC had an intention or a reasonable intention to rebuild or repair the subject buildings. I note that prior to leasing the property to Lafarge on a long-term basis, approximately 4½ years passed without the plaintiffs taking any steps to repair or rebuild either of the buildings. At present the property is leased until 2034, meaning that no repairs or rebuilding of the A-frame and dome building can occur for another 12 years, at least. Based on the evidence, I do not find that the plaintiffs had or have an intention to rebuild the subject buildings.

[92] While the plaintiffs maintain that the property held strategic value for them given its location, I note that the buildings in question were never used in the cement processing operation, which undermines their assertion that the buildings had and have strategic value for their business. Consequently, I do not accept the plaintiffs' submissions that the appropriate assessment of damages in this case is replacement cost.

[93] I find that the appropriate measure of damages in this case is diminution in value. The parties have both agreed that the amount for diminution in value is $1,040,000.

[94] It must next be determined whether the insurance proceeds received by the plaintiffs from their own insurance in the amount of $800,000 should be deducted from the total damage award. I note, again, that in order to get to the damages stage, it would have had to be determined that the covenant to insure did not cover the loss that occurred in the circumstances of this case, and that the defendants' actions were the cause of the loss. I have not made such findings. Rather, I have

found that the covenant to insure did cover the loss in this case and barred this action. I will nevertheless continue with the analysis of this portion of the damages.

[95] Were it found that the defendants' actions were the cause of the loss, which is not the case here, it would have to be determined whether the insurance proceeds received by the plaintiffs from their own insurance in the amount of $800,000 should be deducted from the total damage award. As a general rule, the plaintiff is entitled to recover to the full extent of the loss, and no more: *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, at pp. 369-370. However, the law has recognized an exception to the rule against double recovery in the form of the private insurance exception: in general, benefits received by a plaintiff through private insurance are not deductible from the damage awards: *IBM Canada Ltd. v. Waterman*, 2013 SCC 70, [2013] 3 S.C.R. 985, at para. 41. The private insurance exception has been extended to include other kinds of benefits beyond insurance, such as pension benefits: *Waterman*, at para. 16.

[96] The rationale for the private insurance exception, as currently stated, is based on fairness – that a wrongdoer should not "benefit from the private act of forethought and sacrifice of the plaintiff" in obtaining private insurance: *Cunningham*, at pp. 400-41; see also *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 103. And see S.M. Waddams, *The Law of Damages*, loose-leaf (2021-Rel. 1), 2nd ed. (Toronto: Thomson Reuters Canada, 2021), at para. 15.11.

[97] The principles for determining whether a benefit falls within the private insurance exception in the circumstances of a particular case were set forth by the Supreme Court of Canada in *Waterman,* at para. 76. The Court also set out, at para. 56, the general propositions based on its previous decisions.

[98] While the Court has upheld the relevance of whether or not the plaintiff contributed toward entitlement to the benefit, it has expressly acknowledged that "the basis for this is debatable" and there are strong arguments against placing much weight on this factor: *Waterman*, at paras. 67 and 76; see also *Cunningham*, at pp. 381-382, per McLachlin J. (dissenting). Notwithstanding critiques of the contribution factor, it remains the controlling law that, in general, where the plaintiff has contributed towards their entitlement to an indemnity benefit, that benefit will not be deducted from the damages award payable by the defendant to the plaintiff. This accords with the rationale outlined by the majority in *Cunningham* that the wrongdoer should not be allowed to benefit from the plaintiff's forethought and sacrifice in obtaining the insurance or other benefit entitlement.

[99] The benefit issue in this case is the insurance payment the plaintiffs received under their insurance policy. This is an indemnity benefit to which the plaintiffs contributed premiums to obtain and maintain entitlement. Accordingly, the majority opinions in *Cunningham* and *Waterman* indicate that the private insurance exception applies and the insurance proceeds should not be deducted from the damages award. And see: *Belluz v. 779457 Ontario Ltd*. (2003), 36 C.L.R. (3d) 313 (Ont. S.C.), aff'd (2004), 14 C.C.L.I. (4th) 190 (Ont. C.A.).

[100] The terms of the plaintiffs' insurance policy indicate that the insurance money is an indemnity benefit rather than a non-indemnity benefit paying out as a matter of contract based on a contingency: *Waterman*. That is, it does not contemplate the paying out of a predetermined sum

upon the happening of a specified event but, rather, indemnifies the plaintiffs for the actual amount of their loss (in this case, up to a maximum amount). Clause 1 of the policy states that "[i]n the event that any of the property insured be lost or damaged by the perils insured against, the Insurer will indemnify the Insured against the direct loss" up to a maximum amount.

[101] The plaintiffs contributed to obtain entitlement to the insurance proceeds by paying insurance premiums. Accordingly, as in *Cunningham* and *Belluz*, the insurance proceeds would not be deducted from a damages award payable to the plaintiffs by the defendants. While the indemnity nature of the insurance means that the insurance proceeds were compensating the plaintiffs for the loss caused by the defendants, giving rise to a double recovery problem, pursuant to the private insurance exception, the insurance proceeds would not be deducted, as the plaintiffs had paid premiums toward the insurance for which the defendants should not have benefit.

[102] Therefore, the proceeds from the insurance received by the plaintiffs would not be deducted from the total award of damages.

Conclusion

[103] In conclusion, I find that the plaintiffs' action is barred by the covenant to insure.

[104] In the event that I am not correct in this conclusion, I have also determined the other issues as follows:

(1) CAW did not breach the contract;

(2) CAW's actions did not cause the damage; and

(3) The measure of damages, had they been awarded, would be diminution in value. The private insurance exception would apply.

Costs

[105] I strongly urge the parties to come to an agreement as to costs to be paid in this trial. In the event that they are unable to do so, I would ask them to provide their bills of costs, of three pages maximum, within 60 days of the release of this decision.

C.J. Brown J.

Date: May 16, 2022