NOVA SCOTIA COURT OF APPEAL

Citation: *3258042 Nova Scotia Limited v. Transport Canpar L.P.*, 2021 NSCA 84

Date: 20211217
Docket: CA 502538
Registry: Halifax

Between:

3258042 Nova Scotia Limited

Appellant

v.

Transport Canpar L.P. by its general partner,
Transforce Administration Inc.

Respondent

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: September 8, 2021, in Halifax, Nova Scotia

Subject: The interpretation of lease agreement, implying terms into a contract; allocation of risk, negligence, standard of care;

Summary: The appellant, 3258042 Nova Scotia Limited (the "Landlord") is the owner of 180 Thornhill Drive, Dartmouth, Nova Scotia (the "Building"). The respondent, Transport Canpar L.P. ("Canpar") was a tenant in the Building. On February 22, 2015, a portion of the building's roof collapsed causing damage to Canpar's property.

Canpar commenced an action against the Landlord claiming it was liable in contract and/or tort.

Canpar was successful at trial. The trial judge implied a term into the lease agreement between the parties that the premises were designed and constructed in accordance with the standards of the 1990 *National Building Code of Canada*. He found that the Landlord had breached the implied term in the lease and awarded damages to Canpar in the amount of $188,856.86 plus pre-judgment interest and costs.

In the alternative, the trial judge found that the Landlord was liable in negligence.

Issues:

(1) Did the trial judge err by implying a term into the Lease that the Premises were designed and constructed in accordance with the Code?
(2) Did the trial judge err by finding that the non-liability provisions of the Lease did not apply to the roof collapse?
(3) Did the trial judge err by finding that the Landlord was negligent?
(4) Did the trial judge err by making findings of fact which were inconsistent with the parties' Agreed Statement of Facts?
(5) Did the trial judge err in using advertised prices (rather than actual sale prices) to assess the values of the damaged vehicles?

Result:

Appeal allowed and the order of the trial judge for damages, pre-judgment interest and costs is set aside.

The trial judge erred in implying the term into the lease agreement. The lease agreement allocated any risk of loss to Canpar's property to Canpar. The allocation of risk in the lease agreement governed whether the loss occurred by a breach of contract and/or negligence.

Although it was not essential to decide the issue, the finding that the Landlord had breached the standard of care to the tenant was not based on any evidence led at trial and, as a result, was unreasonable.

As the appeal was decided on issues not fully argued at trial or on the appeal, no costs were awarded to either party.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.

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Appellant

v.

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Transforce Administration Inc.

Respondent

Judges:	Wood, C.J.N.S.; Farrar and Derrick, JJ.A.
Appeal Heard:	September 8, 2021, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Farrar, J.A.; Wood, C.J.N.S. and Derrick, J.A. concurring
Counsel:	Michelle Awad, Q.C. and Melanie Gillis, for the appellant Colin D. Piercey, Sarah Walsh and Ben Johnson, for the respondent

Reasons for judgment:

Introduction

[1] The appellant, 3258042 Nova Scotia Limited (the “Landlord”), is the owner of 180 Thornhill Drive, Dartmouth, Nova Scotia (the “Building”). The respondent, Transport Canpar L.P. (Canpar), was a tenant in the Building.

[2] On February 22, 2015, a portion of the roof of the Building collapsed resulting in damages to Canpar’s property.

[3] Canpar commenced an action against the Landlord claiming it was liable in contract and/or tort. In a decision dated October 8, 2020, Justice C. Richard Coughlan found the Landlord was liable in both contract and tort and awarded Canpar damages in the amount of $188,856.86, plus $90,000 pre-judgment interest and costs (reported 2020 NSSC 274).

[4] For the reasons that follow, I would allow the appeal and set aside the trial judge’s Order for damages and costs. I would not award costs to either party for the trial or this appeal.

Background

[5] The Building is approximately 130,000 square feet. It was purchased on an “as-is, where-is” basis by the Landlord in November 2011. Portions of it were subsequently rented to commercial tenants, including Canpar who rented a 15,500 square foot space (the “Premises”). The date the Premises were constructed is unknown. For the purposes of the trial, the parties entered into an Agreed Statement of Facts specifying the Premises were constructed between 1986 and 1996.

[6] The Building itself was comprised of multiple sections, each built at a different time using different construction. The Premises were a pre-engineered building manufactured by Butler Manufacturing.

[7] On February 1, 2012, the Landlord and Canpar entered into a lease agreement for a term commencing February 1, 2012, and ending January 31, 2016 (the “Lease”).

[8] As the trial judge noted at the outset of his decision, the winter of 2014-2015 was not a typical Nova Scotia winter. It started to snow in January 2015, and the snow kept falling throughout February and March. On February 22, 2015, the partial roof collapse occurred.

[9] Canpar operated a ground service shipping and transport company from the Premises. As a result of the roof collapse, some of Canpar's property in the Premises was damaged.

[10] On April 27, 2016, Canpar filed a Notice of Action and Statement of Claim in the Supreme Court alleging breach of contract by the Landlord. It claimed the Lease contained an implied term the roof was designed and constructed in accordance with the *National Building Code of Canada 1990* (the "*Code*"). Canpar also alleged that the Landlord was negligent in the design, installation, and maintenance of the Premises.

[11] The trial judge implied a term into the Lease that the Premises were designed and constructed in accordance with the standards set out in the *Code* (¶ 76). He found that the premises were not constructed in accordance with the *Code*, and the snow load on the roof at the time of the collapse was less than the load the building was required to withstand under the *Code*. As a result, he found the Landlord breached the implied term of the Lease. He further found that if the roof was built to the standard in the *Code*, the roof would not have collapsed (¶ 80).

[12] In the alternative, the trial judge found that the Landlord breached the standard of care it owed to Canpar in failing to have a regime in place to monitor the snow conditions on the roof (¶ 94).

[13] The Landlord appeals on the basis that the trial judge erred in implying a term in the Lease, in finding the Landlord was negligent, and in his assessment of damages.

[14] I will add further factual context, as necessary, when addressing the individual grounds of appeal.

Issues

[15] The Landlord outlines five issues in its factum.[1] I will address them in the following order:

1. Did the trial judge err by implying a term into the Lease that the Premises were designed and constructed in accordance with the *Code*?
2. Did the trial judge err by finding that the non-liability provisions of the Lease did not apply to the roof collapse?
3. Did the trial judge err by finding that the Landlord was negligent?
4. Did the trial judge err by making findings of fact which were inconsistent with the parties' Agreed Statement of Facts?
5. Did the trial judge err in using advertised prices (rather than actual sale prices) to assess the values of the damaged vehicles?

[16] I will address the first two issues together as they are interrelated.

Standard of Review

Issue 1: Did the trial judge err by implying a term into the Lease that the Premises were designed and constructed in accordance with the *Code*?

[17] In *Jeffrie v. Hendriksen*, 2015 NSCA 49, this Court held the correctness standard continues to apply to extricable legal questions, including the application of an incorrect principle or failure to consider a required element of a legal test or a relevant factor:

> [6] In the recent decision of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court clarified that contractual interpretation is a question of mixed fact and law generally attracting a "palpable and overriding" error standard of review. Nevertheless, correctness continues to apply to extricable legal questions. These include the application of an incorrect principle or failure to consider a required element of a legal test or failure to consider a relevant factor, (*Sattva*, 53).

[18] Whether to imply a term into a lease is an extricable legal question. The trial judge was required to identify the appropriate legal test and to apply it correctly.

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[1] On November 4, 2021, the Panel requested Supplementary Submissions from the parties on what impact (if any) the insurance clause in the Lease may have on the interpretation of the obligations of the parties. Supplementary Submissions were received from both parties on November 25, 2021. Each party also filed a reply to the other's Supplementary Submissions on December 2, 2021.

Issue 2: Did the trial judge err by finding that the non-liability provisions of the Lease did not apply to the roof collapse?

[19] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court found that contractual interpretation involves questions of mixed law and fact and appellate courts are to show deference to trial judges (¶ 50-52). The Court went on to set out certain circumstances where extricable questions of law may arise:

> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[20] Therefore, absent an extricable legal question, the trial judge's interpretation of the non-liability cause is entitled to deference.

Analysis

[21] The trial judge properly identified the test for implying a term into a lease (¶ 71) as set out by Iacobucci J. in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 ("*M.J.B.*"), as follows:

> [27] The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R, 711. Le Dain J., for the majority, held that terms may be implied in a contract: (l) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.

[22] Although the trial judge correctly identified the test, in my view, he failed to first interpret the Lease to determine it was necessary to imply a term to give effect to the parties' intention.

[23] The trial judge's rationale for implying a term was that it was necessary to give business efficacy to the Lease:

> [75] It would make no sense to require all alterations or repairs to comply with building codes, if the leased premises did not comply with the code requirements. If the parties required alterations and repairs comply with building codes, as they did, they would, if asked, have assumed the leased premises complied with the Building Code.
>
> [76] Given the terms of the lease and the fact it would make no commercial sense to lease premises without an implied term the building was designed and constructed in accordance with the *National Building Code*, <u>I find the parties intended the lease contain an implied term the leased premises be designed and constructed in accordance with the standards set out in the *National Building Code*. I further find the lease contains that implied term. The implied term is necessary to give business [efficacy] to the lease and meets the officious bystander test.</u>
>
> [77] In this case the Landlord did not design or construct the premises. The Landlord did not repair, alter or change the roof on the premises at any time. Is the Landlord responsible for a breach of the implied term if the roof did not comply with the *National Building Code*?
>
> [Emphasis added]

[24] When the trial judge said that it would make no commercial sense to lease the Premises without the implied term, he slipped into the territory Justice Iacobucci warned about in *M.J.B.* He focused on what he considered to be reasonable rather than looking at the express language of the parties to the contract to determine their intention and assess whether the suggested implication was necessary. Iacobucci J. explained:

> [29] As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the <u>actual</u> parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of <u>reasonable</u> parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> [Original emphasis]

> In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.
>
> [Emphasis added]

[25] The trial judge never looked at the contract as a whole to determine whether it was necessary to imply a term. The first question he had to consider, which he failed to do, was whether the suggested implication was necessary to give effect to the intention of the parties.

[26] The test is not whether it would be desirable, reasonable, or logical to imply such a term, but rather what these parties intended. This point is made in the *Canadian Encyclopedic Digest*[2]:

> **§682** […] To be implied on this ground, such a term must be reasonable, necessary, capable of exact formulation, and clearly justified, having regard to the intentions of the parties when they contracted. Therefore, it is insufficient to show that it would be reasonable or logical or desirable to imply such a term, or that the parties would probably have agreed upon such a term if they had put their minds to it, or, that having put their minds to it, chose not to express it; there must also be proof that it is necessary to imply the term in order to give business efficacy to the contract. If the contract works without the proposed term, then there is no basis for implying it under the business efficacy test. Terms will not be implied if to do so would require deciding a large number of complex matters clearly not contemplated by the parties.
>
> [Emphasis added]

[27] There is a clear distinction between the interpretation of contractual provisions and the implication of terms into a contract. This was explained in *Iroquois Falls Power Corporation v. Ontario Electricity Financial Corporation*, 2016 ONCA 271, as follows:

> [112] There is, however, an essential difference between implying a term into an agreement, and interpreting a term in an agreement. Kain, at p. 172, makes a distinction in the course of his helpful summary of the judgment in *Attorney General of Belize and Ors*:
>
> > The question of implication arises where an instrument does not expressly provide for what is to happen when an event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of

[2] CED 4th (online), Contracts, "Terms Implied as Matter of Business Efficacy" (XI.2) at §682.

> the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.
>
> Occasionally, the reasonable addressee of the instrument will conclude that the *only* meaning which the instrument can have is that something is to happen in response to the relevant event. In that case, the court is said to imply a term as to the response.

> [113] The same distinction is drawn by G. Hall in *Canadian Contractual Interpretation Law*, 2nd ed. (Markham: LexisNexis, 2012), at p. 150:
>
> > While the principles governing the implication of terms into a contract are closely related to broader themes in contractual interpretation, implying a term into a contract is a separate process from simple interpretation of the contact. Interpretation gives meaning to the words used by the parties; implication fills gaps in those words.
> >
> > [Original emphasis]

[28] In this case, a partial collapse of the Building's roof caused damage to five delivery vehicles and a conveyor belt in the Premises. Therefore, the first question was whether the parties to the Lease contemplated the allocation of risk if an event occurred which caused damage to the property of Canpar. This involves the interpretation of the Lease.

[29] I pause here to explain why we requested additional submissions from the parties on the insurance provisions of the Lease, and what, if any, impact they may have on the issues before us. Upon reviewing the submissions of the appellant, the respondent, and the decision of the trial judge, it became apparent that no one considered the insurance provisions of the Lease in determining the intention of the parties and whether it was necessary to imply a term into the Lease.

[30] Unsurprisingly, in its supplementary submissions, the Landlord says the insurance provisions confirm the parties' intention that the risk of loss to Canpar's property was the responsibility of Canpar. Canpar took the opposite view.

[31] I agree with the appellants. A review of the Lease in its entirety leads to no other conclusion but that the parties had turned their minds to who would be responsible for any loss to Canpar's property and agreed Canpar would bear that risk.

[32] I will start with Clause 10.01 of the Lease which provides:

> 10.01 **Non-Liability of Landlord.** The Tenant agrees that, save for cases of negligence or misconduct by the Landlord, the latter will not be liable or

> responsible in any way for any personal injury that may be sustained by the Tenant or any employee or agent or customer of the Tenant, or any other person who may be upon the Premises or on the Common Area or sidewalks, parking areas, highways, or loading areas adjacent thereto, or for any loss or damage or injury to, property belonging to or in the possession of the Tenant or any employee or agent or customer of the Tenant or any other person, and without limiting the generality of the foregoing, the Landlord will not be liable or responsible in any way for any injury, loss or damage to person or property caused by smoke, steam, water, ice, rain, snow, or fumes which may leak, issue or flow into through or from the Premises or from the water sprinkler, drainage or smoke pipes or plumbing equipment therein or from any other place or quarter or caused by or attributable to the condition or arrangement of any electrical or other wiring or the air-conditioning equipment or by reason of the interruption or stoppage of any public utility or service or, for any matter or thing of whatsoever nature or kind arising from the Tenant's use and occupation of the Premises or otherwise.
>
> [Emphasis added]

[33] The trial judge found as follows in relation to Clause 10.01:

> [85] Clause 10.01 includes the words "or, for any matter or thing of whatsoever nature or kind arising from the Tenant's use and occupation of the Premises or otherwise" after setting out specific exclusions all of which relate to leaks or other sources of damage caused or arising from the operation or use of the leased premises.
>
> [86] In looking at the lease as a whole, it is clear that parties' intention was any construction, alterations, or repairs meet all *Code* requirements. The exclusion clause deals with damage caused by or arising from the operation or use of the leased premises. The damage suffered by Canpar is the result of the breach of the implied term that the building comply with *Code* requirements, and did not arise from or caused by the use, operation, or occupation of the leased premises.
>
> [Emphasis added]

[34] Despite saying he was "looking at the lease as a whole", the trial judge did not do so. He looked at Clause 10.01 in isolation and parsed its words.

[35] The trial judge rested the foregoing interpretation largely on his finding the words "or, for any matter or thing of whatsoever nature or kind arising from the Tenant's use and occupation of the Premises or otherwise" meant that the entire clause only applied to issues arising from Canpar's use and occupation of the Premises. From this, I take him to have meant that the loss must be caused by an

act or omission by Canpar. With respect, the clause lends itself to no such interpretation.

[36] If Canpar were not using or occupying the property, the loss could not occur. Those terms do not modify what is clear and unequivocal: the Landlord would not be responsible for any loss or damage to property belonging to or in the possession of Canpar on the Premises. I will address the issue of the exception relating to the Landlord's negligence or misconduct later.

[37] The trial judge's focus was on what caused the damage, i.e., the roof collapse, as opposed to what damage occurred. Had he turned his mind to the latter question and read the Lease in its entirety, he should have concluded it was the intention of the parties that the risk of loss to property in the Premises was allocated to Canpar.

[38] The non-liability clause applies regardless of the manner in which the damage is caused. It limits the liability of the Landlord for the damage to Canpar's property. This makes commercial sense—the Landlord has no control over what property Canpar may store in the Premises. Canpar is in the best position to know what property is in the Premises and its value.

[39] Reference to other portions of the lease agreement supports the conclusion that the intent of the parties was to allocate the risk of any loss within the Premises to Canpar. Clause 10.02(b) is consistent with Clause 10.01 in that Canpar would indemnify and save harmless the Landlord from any liability arising from any damage to the property of the tenant (again subject to the Landlord's negligence or misconduct):

> 10.02 **Indemnification.** Save for instances of negligence or misconduct by Landlord, <u>the Tenant will indemnify and save harmless the Landlord from and against any</u> and all liabilities, <u>damages</u>, costs, expenses, causes of action, actions, claims, suits and judgements <u>which the Landlord may incur or suffer</u> or be put to by reason of or in connection with or arising from:
>
> […]
>
> > (b) <u>any damage to the property of the Tenant</u>, any sub-tenant, licensee, and all persons claiming through or under the Tenant or any sub-tenant or licensee, or any of them, or damage to any other property howsoever occasioned by the condition, use, occupation or maintenance of the Premises;
>
> [Emphasis added]

[40] There is no ambiguity in Clause 10, the risk of loss to Canpar's property was allocated to Canpar.

[41] I now turn to the issue of Canpar's obligation to insure against the Landlord's negligence (there is no suggestion the loss resulted from the misconduct of the Landlord which is also exempted from Clause 10). Canpar was obligated to maintain insurance to cover any lease improvements that it may have made to the Premises and any contents of the Premises, whether owned by Canpar or a third party.

[42] Canpar was also required to name the Landlord as insured with a cross-liability clause under its insurance policies and to ensure the policy contained a waiver of subrogation. In other words, the Lease obligated Canpar to obtain insurance to cover the Landlord for any loss Canpar suffered to its property, even if the loss was caused by the Landlord's negligence. Clause 11 of the Lease provides:

> 11.01 Tenants Insurance. The Tenant will purchase and keep in force throughout the term:
>
> > (a) fire insurance with extended coverage endorsement (including sprinkler leakage) <u>covering all leasehold improvements made to or installed in the Premises by or on behalf of the Tenant in an amount equal to the full replacement value</u>;
> >
> > (b) <u>fire insurance with extended coverage endorsement (including sprinkler leakage) covering all the contents of the Premises whether owned by the Tenant or for which the Tenant is responsible in an amount at least equal to the actual cash value</u>;
> >
> > (c) Commercial general liability insurance (including without limitation, tenants fire, legal liability and contractual liability to cover the responsibilities assumed under Article 10.02 hereof) with a cross-liability clause and otherwise in an amount of $3,000.000 and on terms acceptable to the Landlord.
>
> 11.02 Policies. The Tenant will furnish to the Landlord copies of all insurance certificates and will provide written notice of the continuation of such policies not less than ten (10) days prior to their respective expiry dates. The Tenant will pay the premium for each policy. If the Tenant fails to purchase or keep in force such insurance, the Landlord may effect such insurance. the cost thereof being recoverable from the Tenant forthwith on demand as Additional Rent hereunder.
>
> 11.03 Landlord as Insured. The Tenant will cause each of its policies to contain an undertaking by the insurer(s) to notify the Landlord at least thirty (30) days prior to the cancellation of any other change material to the Landlords interests.

> The liability policy will include the Landlord as an additional insured with a cross-liability clause.
>
> 11.04 Subrogation. The Landlord and Tenant will each cause any insurance policy obtained by it pursuant to this Lease to contain a waiver of subrogation clause in favour of the Landlord and Tenant, as the case may be.
>
> 11.05 Landlord to Insure. The Landlord, throughout the Term, will carry insurance against fire and other perils as described in the definition of Common Costs.
>
> [Emphasis added]

[43] Again, the insurance requirements were commercially sound. Canpar was in the best position to know what insurance is necessary to cover any loss it might suffer.

[44] In *Orion Interiors Inc. v. State Farm Fire and Casualty Company*, 2016 ONCA 164, the Ontario Court of Appeal dismissed a tenant's appeal from a summary dismissal of his action against a landlord. The action arose as a result of a flood which caused damage to the commercial premises. The lower court held that a lease agreement which requires a party to obtain insurance against certain risks operates to transfer the risks associated with the insured loss to that party, irrespective of any negligence on the part of the counterparty (2015 ONSC 248):

> [31] […] when a party to a lease agreement undertakes to obtain insurance against certain damages, such an undertaking operates as an assumption by that party of the risks associated with the insured losses. The undertaking bars the party from claiming damages against the other party to the lease, even if the former's loss is caused by the latter's negligence. An explicit provision to the contrary is required to avoid this consequence.

[45] Similar to the Lease in the present case, the lease agreement in *Orion* required that the tenant obtain certain forms of insurance, including all-risks insurance and comprehensive general liability insurance, and contain a waiver of subrogation clause and a non-liability provision in favour of the landlord. Considering the agreement as a whole, the lower court held that the parties intended to allocate to the tenant the risk of loss to its property:

> [39] The intention of the parties in terms of assumption of risk is consistently and clearly repeated throughout the contract. […] Reading the lease as a whole, the intent of the parties is clearly to allocate to the Plaintiff tenant the risk of loss to its own property. The Plaintiff tenant elected not to purchase sufficient

> insurance. This does not change the contractual allocation of risk between the parties to the lease.
>
> [40] Nor is the allocation changed by the Defendant landlord's negligence. The language of Section 7.04 allocates the risk to the Plaintiff tenant despite the negligence of the Defendant or anyone with whom it contracts. The Defendant landlord can embrace its negligence without assuming the risk of loss to the Plaintiff tenant's own property.
>
> [Emphasis added]

[46] In dismissing the appeal, the Court of Appeal affirmed that the effect of the lease agreement was to shift the risk of property damage to the tenant irrespective of the landlord's conduct:

> [18] […] The terms of the lease respecting insurance had the effect of shifting to the appellant the risk of damage to its property from an insured peril, in this case, flooding. This is so regardless of whether the landlord's conduct in relation to the flooding is characterized as a breach of the lease or, as the appellant argues in the alternative, a "fundamental breach" or "gross negligence". The tenant had a contractual obligation to insure its property against such a risk to its full replacement cost value and failed to do so. As the motion judge noted at para. 23 of her decision, the assumption of risk that was bargained for cannot be transferred simply because the appellant failed to properly insure itself.
>
> [Emphasis added]

[47] In another Ontario case, *Harlon Canada Inc. v. Lang Investment Corporation*, 2008 CanLII 14532 (ON SC), a contractor who was retained by a landlord to conduct roof repairs brought a summary judgment motion seeking the dismissal of a subrogated claim for an insured loss arising from water leakage. In a decision affirmed by Justice Mackinnon of the Divisional Court (2010 ONSC 5264), Master MacLeod described the structure of the lease and the purpose of its provisions as follows:

> [4] The lease between Lang and Harlon is a fairly typical commercial lease. Amongst its other provisions, it provides that the tenant will carry "all risks" insurance including insurance for "water damage, sprinkler leakage" and other perils. The landlord agrees to maintain replacement value insurance on the complex "excluding any property that the tenants are obliged to insure", rental income insurance, and comprehensive general liability insurance. The tenant's insurance section requires that the landlord and its mortgagee be named insureds and it contains a waiver of subrogation against the "landlord or those for whom the landlord is in law responsible".
>
> […]

> [6] The purpose of these lease terms is to allocate risk between the landlord and the tenant and to require each party to insure its portion of the risk. It is an integral part of the bargain that the allocation of risk and therefore cost will not be disturbed by exercise of subrogation rights. […]
>
> [Emphasis added]

[48] Canpar, in its pre-hearing brief, addressed the issue of whether the insurance provisions applied in this case. Its position was two-fold:

1. Because Canpar never filed a claim with its insurer, Clause 11 of the Lease did not impact the liability of the Landlord;
2. The Lease required Canpar to purchase fire insurance with extended coverage endorsement, not all risk insurance; therefore, Canpar, who had obtained an all-risk policy, was not obligated to claim for the loss here because there was no evidence the fire insurance would have covered the loss.

[49] Canpar explained its position as follows:

> 78. First, this is not a subrogated claim. If Canpar's insurer had reimbursed Canpar for losses arising out of the roof Collapse, then subsequently sought recovery of amounts paid to Canpar from the Landlord, that could be captured by this clause. That is not the case. Canpar has not made an insurance claim and has not been reimbursed by any insurance company for losses arising out of the roof Collapse.
>
> 79. Canpar did not purchase the basic "*fire insurance with extended coverage endorsement.*" Instead, Canpar purchased "*All Risks Coverage.*" Regardless, even if Canpar had purchased the so-called "fire insurance with extended coverage endorsement," there is no evidence that this type of policy would have covered the loss at issue. Canpar says that this is a question of fact. It is anticipated the Landlord will not adduce any evidence to establish that this type of policy was available and would have covered the loss. Therefore, it will fail in its evidentiary burden to show such coverage was available that would have covered the loss.

[50] With respect to Canpar, this completely misses the point. Canpar was obligated to purchase insurance to cover the property in the Premises to the full replacement cost. The fact it did not make an insurance claim or may not have purchased appropriate insurance coverage in these circumstances is completely irrelevant to the bargain struck by the parties.

[51] The trial judge appears to have bought into Canpar's line of thinking in concluding that the insurance provisions had no impact on the claim made by Canpar:

> [100] In its pre-trial brief, the Landlord submitted although Canpar did not advance a subrogated claim, it was in the reasonable contemplation of the parties that upon entering the lease, Canpar would seek recovery of any damages to its property from its insurer and not the Landlord.
>
> [101] Canpar submitted clause 11.04 did not apply as its claim is not a subrogated claim. Canpar has not made an insurance claim and has not been reimbursed by any insurance company for losses arising out of the roof collapse. Secondly, no evidence has been adduced to support the Landlord's submission or whether any policy was available which would have covered the loss suffered by Canpar.
>
> [102] The Landlord did not adduce any evidence in support of its position. Clause 11.04 does not provide a defence to Canpar's claims.

[52] Again, with respect, this analysis fails to address the issue of the allocation of risk between the parties. The evidence at trial was that Canpar had purchased insurance, but that insurance had a $1,000,000 deductible which precluded coverage for the amount of this loss. Canpar's failure to secure adequate coverage for the property located on the Premises does not shift the allocation of risk to the Landlord.

[53] In *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2016 ONCA 246, the Court addressed the tenant's failure to obtain proper coverage and found the failure could not be laid at the landlord's door:

> [70] Here, the parties specifically agreed that the tenant would insure against the risk of loss or damage to its property by fire. That is the very risk that materialized. No coverage exclusion applied under the Lumbermen's policy and the tenant's claim was paid to the extent of the policy limits. The fact that, as it happens, the tenant was underinsured for this risk does not mean that its failure to obtain full protective coverage can be laid at the landlord's door. See for example, *Orion Interiors*, at para. 18.

[54] Similarly, in *Royal Host GP Inc. v. 1842259 Ontario Ltd.*, 2018 ONCA 467, the Court cited a trilogy of cases from the Supreme Court of Canada (*Agnew-Surpass v. Cummer-Yonge*, [1976] 2 S.C.R. 221; *Ross Southward Tire v. Pyrotech Products*, [1976] 2 S.C.R. 35; *T. Eaton Co. v. Smith et al.*, [1978] 2 S.C.R. 749)

which held it is the terms of the lease that govern the obligations of the parties and not the insurance policy:

> [15] In the trilogy, the Supreme Court determined that it is the terms of the lease that establish the rights and obligations between landlord and tenant, and not the insurance policy. In *Agnew-Surpass*, Laskin C.J. stated, at p. 230, that "the question of the scope of the indemnity as it arises in this case is not dependent on the policy but, rather, so far as the lessor and lessee are concerned, on the terms of the lease." In *Pyrotech Products*, Laskin C.J. said at p. 41 "…the relations between landlord and tenant in respect of the tenant's liability to the landlord for damage from fire caused by negligence must be determined on the basis of the lease and not by reference to insurance policy considerations."
>
> [Emphasis added]

[55] It is apparent from all these authorities the lease determines the rights and obligations of the parties, not the insurance obtained.

[56] The trial judge failed to properly consider the insurance provisions of the Lease and instead focused on what insurance may have been available. In fairness to him, the submissions of both parties on this point failed to emphasize the significance of the insurance provisions in looking at the provisions of the Lease as a whole in relation to the issue of whether it was necessary to imply a term into the Lease.

[57] I am satisfied that, on reading the Lease as a whole, it is abundantly clear the parties intended the risk of loss of Canpar's property would be allocated to Canpar, regardless of whether the loss occurred as a result of the Landlord's negligence or breach of contract.

[58] It was not necessary for the trial judge to imply a term into the contract to give effect to the intention of the parties.

[59] Canpar, in its supplementary submissions, asked us to ignore the insurance provisions of the Lease in determining the obligations of the parties. It bases its position on the fact that the provisions were not fully argued at trial nor on appeal. Canpar is correct—while the insurance provisions were referred to briefly in the submissions to the trial judge, they were not referred to at all in the submissions of either party before this Court.

[60] However, this Court is required to review the Lease in its entirety to determine if it was necessary for the trial judge to imply a term into it. In doing so,

we cannot ignore the insurance provisions which, along with Clause 10, allocate the risk of loss to Canpar. As set out above, a considerable body of law has addressed the impact of insurance provisions in a lease on the allocation of risk between the parties. Ignoring the insurance provisions would be an unacceptable precedent for this Court, limiting its Lease-interpretation analysis to the submissions of the parties on appeal. The parties were given a full opportunity to address the issue through their post-appeal submissions.

[61] I would allow this ground of appeal.

Issue 3: Did the trial judge err by finding that the Landlord was negligent?

Standard of Review

[62] The Landlord argues that the trial judge erred in finding it owed a duty of care to Canpar. Alternatively, it argues if it owed a duty of care it did not breach the standard of care.

[63] The trial judge assumed the Landlord owed Canpar a duty of care. The Landlord did not argue to the contrary at trial. The parties appear to have assumed that there was a duty of care and the issue was whether the Landlord breached the standard of care owed to Canpar.

[64] It is not necessary for me to address whether a duty of care was owed, and I would decline to do so where it was not a live issue at trial. In my view, this ground of appeal turns on the standard of care owed to Canpar and whether it was breached.

[65] The identification of the appropriate standard of care is a question of law and is subject to review on a correctness standard. (See *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, at ¶ 80.) The translation of that standard into the obligations owed to a plaintiff in a given case is a question of fact and is entitled to deference (*Krawchuk v. Scherbak*, 2011 ONCA 352, ¶ 125).

Analysis

[66] For the reasons I have set out above, it is not essential to decide this issue—the risk of any loss to Canpar's property was allocated to Canpar whether that loss occurred by negligence or breach of contract. However, I will address it as both parties have done so in their facta.

[67] In determining the Landlord's standard of care, the trial judge rested his analysis on the knowledge of Peter Henderickson, who was the owner of the Landlord at the relevant time. He found that Mr. Henderickson was aware of another roof collapse which occurred at the Halifax Curling Club on February 15, 2015. He then concludes:

> [95] Knowing the unusual snow conditions in the winter of 2015 and being aware of the collapse of the Halifax Curling Club roof and all the evidence, I find a reasonable landlord would be aware that if it breached the standard of care by failing to monitor the snow load capacity of the roof and to properly clean the roof and remove snow and ice from it the roof could collapse and its tenant suffer damage. Being aware of the excessive snowfall and the prior roof collapse (Halifax Curling Club) a reasonable landlord would have checked the amount of snow and ice on the roof. The evidence shows, and I find, the Landlord breached the standard of care it owed Canpar as its tenant.

[68] With respect, Mr. Henderickson's knowledge of the roof collapse at the Halifax Curling Club could not, without more, form the basis of a finding of the standard of care. The trial judge's conclusion that the evidence showed the Landlord breached the standard of care by failing to check the amount of snow on the roof is not at all borne out by the record. In fact, there was no evidence led on the standard of care the Landlord owed to Canpar.

[69] In *R. v. Gardner and Fraser*, 2021 NSCA 52, Beveridge, J.A., set out how a trier of fact should determine the standard of care:

> [73] How then is a trier of fact to determine what the content of the standard of care is and whether it was breached? These are quintessentially questions of fact. They can be determined, as described above, by credible expert opinion evidence or other evidence that permits the trier to draw the necessary inferences. That evidence may include what others do or should do in similar circumstances and any policies or directives relevant to the conduct.

[70] The Ontario Court of Appeal also addressed the issue in *Krawchuck v. Scherbak*, *supra*, where it held that evidence of industry practice and other external indicators of reasonable conduct will inform the standard of care:

> [125] To avoid liability in negligence, a real estate agent must exercise the standard of care that would be expected of a reasonable and prudent agent in the same circumstances. This general standard, a question of law, will not vary between cases and there is no need for it to be established through the use of expert evidence. see Wong v. 407527 Ontario Ltd. (1999), 179 D.L.R. (4th) 38 (Ont. C.A.), at para. 23, Fellowes, McNeil v. Kansa General International

> Insurance Co. (2000), 138 O.A.C. 28 (Ont. C.A), at para. 11. The translation of that standard into a particular set of obligations owed by a defendant in a given case, however, is a question of fact (Wong at para. 23, Fellowes at para. 11). External indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standard, may inform the standard. Where a debate arises as to how a reasonable agent would have conducted himself or herself, recourse should generally be made to expert evidence.
>
> [Emphasis added]

[71] In this case, no evidence was led to establish the standard of care of a reasonable and prudent landlord in the circumstances. There was no evidence that other landlords were inspecting their premises prior to the roof collapse. There was nothing in the record from which the trial judge could have determined the standard of care owed by the Landlord, let alone find the standard of care was breached.

[72] The trial judge found the Landlord should have conducted regular inspections of the roof or structure and removed snow and ice from it:

> [94] Prior to the collapse on February 22, 2015 the Landlord did not conduct regular inspection of the roof or structure. The Landlord did not go up on the roof and inspect it for ice and snow. The Landlord did not have a regime in place to deal with snow and ice on the roof. The Landlord had access to the roof. There was a hatch and ladder which provided access. Prior to the collapse, Mr. Barrett used the ladder and hatch for access to repair leaks in the roof in the summer. The ladder and hatch are how Mr. Hendrickson and others accessed the roof on February 23, 2015 to remove snow and ice.
>
> [95] Knowing the unusual snow conditions in the winter of 2015 and being aware of the collapse of the Halifax Curling Club roof and all the evidence, I find a reasonable landlord would be aware that if it breached the standard of care by failing to monitor the snow load capacity of the roof and to properly clean the roof and remove snow and ice from it the roof could collapse and its tenant suffer damage. Being aware of the excessive snowfall and the prior roof collapse (Halifax Curling Club) a reasonable landlord would have checked the amount of snow and ice on the roof. The evidence shows, and I find, the Landlord breached the standard of care it owed Canpar as its tenant.

[73] The evidence of Canpar's expert witness, John Richardson, did not support the trial judge's finding. He gave evidence with respect to his recommendations to clients regarding approximately 50 roofs in the Halifax Regional Municipality from February to April 2015:

Q: And when to your recollection do you start making recommendations about the snow on the roof being such that it was unsafe to occupy?

A: I don't know the exact date but I know it was in March. We didn't make any recommendations to remove snow from roofs in February. There were only I think four or five, maybe six at the very most, buildings that we suggested that it needed to have snow removed. And they were all later in the spring and March.

[…]

Q: Okay. So on Page 5 of your report you talk about, the second paragraph on Page 5 you say,

> "Based on observation of snow and ice buildup on roofs across HRM through the late February and March 2015, it is the opinion of the undersigned that generally roofs did not experience loadings beyond NBCC design loads until March. Assuming that these buildings were designed in accordance with the buildings codes in effect at the time of the construction."

Why do you say that?

A: Well I just mentioned there a moment ago that we had structural drawings for a lot of buildings.

Q: Yes.

Q: There were some buildings that we were on the roof for, there was no – there were no structural drawings available.

Q: Yes.

A: So we didn't analyze those roofs, we assumed those roofs were designed in accordance with the codes that would have been in effect at the time they were built. So we didn't measure all the structural members and analyze them, we just assumed that if the building was built in 1987 let's say, it would have been built in accordance with the 1985 National Building Code. And we compared the loads we calculated against the capacities that the code would prescribe, or I guess the loads that that code would prescribe.

[Emphasis added]

[74] Mr. Richardson did not recommend that building owners remove snow and ice from their roofs in February 2015. He did not make that recommendation until March 2015, well after the Building's roof collapsed.

[75] In my view, the trial judge erred in failing to properly identify the standard of care and his inference that the standard of care had been breached was unreasonable.

[76] I would allow this ground of appeal.

Issue 4: Did the trial judge err by making findings of fact which were inconsistent with the parties' Agreed Statement of Facts?

[77] Again, it is not necessary to decide this issue; however, I will provide some guidance to counsel about the preparation, use and effect of an Agreed Statement of Facts.

[78] The Landlord's complaint with respect to the trial judge's decision was that he made findings inconsistent with the Agreed Statement of Facts.

[79] The Landlord says the trial judge's finding at ¶ 63 that there was approximately twelve inches of snow and ice on the roof at the time of the collapse is contrary to what the parties had agreed. In particular, it was contrary to what Archie Frost, the Landlord's consultant, observed when he was on the Premises on February 25, 2015. Unfortunately, Mr. Frost passed away prior to the trial in this matter.

[80] The Agreed Statement of Facts provides:

> 2. The Plaintiff retained Archie Frost, P. Eng. (now deceased) who attended the scene on February 25, 2015, to inspect the site conditions following the Collapse. Mr. Frost took measurements and made observations at his sight inspection. The parties have agreed to Mr. Frost's measurements, observations, and photographs (set out below and attached) as fact without further proof.
>
> […]
>
> 14. Mr. Frost observed approximately two to two-and-a-half feet of snow and ice on the roof and amongst the collapsed members of the structure (as depicted in the photographs at **Tabs 9 and 10**), during his site visit on February 25, 2015.

[81] The Landlord says the Agreed Statement of Facts established there was two to two-and-a-half feet of snow and ice on the roof at the time of the collapse.

[82] With respect, the Landlord's position is entirely without merit. A plain reading of the Agreed Statement of Facts does not reveal the parties agreed that <u>at the time of the collapse</u> the snow and ice on the roof was between two to two-and-a-half feet in depth. The best that can be said for the Agreed Statement of Facts is that on February 25, 2015, when Mr. Frost was on site, he observed approximately two to two-and-a-half feet of snow and ice on the roof and among its collapsed

members. The Agreed Statement of Facts says nothing about the amount of snow and ice on the roof at the time of the collapse.

[83] If the parties had intended Mr. Frost's observation to be determinative of the amount of snow and ice on the roof at the time of the collapse, the Agreed Statement of Facts would have had to say so explicitly.

[84] Further, there was evidence from several witnesses at trial about the level of snow and ice on the roof at the time of the collapse. If the issue had been settled by agreement, there would have been no reason for the parties to call evidence on it. Indeed, there should have been objections to the evidence being led if such were the case.

[85] Parties need to be diligent in drafting and placing an Agreed Statement of Facts before a court. They need to ensure the document properly reflects what the parties agreed to and explain how it impacts on the evidence necessary to be called at trial.

[86] Finally, I would add the amount of snow on the roof—or, for that matter, the cause of the roof collapse—was irrelevant. Whatever caused the loss to Canpar's property, the Lease allocated the risk of that loss to Canpar.

Issue 5: Did the trial judge err in using advertised prices (rather than actual sale prices) to assess the values of the damaged vehicles?

Analysis

[87] At the time of the oral hearing in this matter, the Panel was unanimously of the view that this ground of appeal was without merit. After hearing from counsel for the Landlord, we advised counsel for Canpar that it was not necessary to address this issue. As a result, I would dismiss this ground of appeal.

Conclusion

[88] I would allow the appeal and set aside the Order of the trial judge for costs and damages awarded to Canpar at trial. However, because this appeal was determined largely on matters not addressed by the parties at trial and only after they were raised by the Panel on the appeal, I would make no Order as to costs for either the trial or the appeal.

Farrar, J.A.

Concurred in:

Wood, C.J.N.S.

Derrick, J.A.