IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Sable Offshore Energy Inc. v. Ameron International Corporation , 2008 NSSC 250

Date: 20080827
Docket: SH 220343
Registry: Halifax

Between:

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the **Sable Offshore Energy Project, Exxonmobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd.**, and **Pengrowth Corporation; Exxonmobil Canada Properties** as operator of the **Sable Offshore Energy Project**

Plaintiffs

and

Ameron International Corporation; Ameron (UK) Limited; Ameron B.V.; Allcolour Paint Limited; Amercoat Canada; Rubyco Ltd.; Danroh Inc.; Serious Business Inc.; Barrier Limited; Parker Brothers Contracting Limited; RKO Steel Limited; Cherubini Metal Works Limited; Comstock Canada Ltd.; Adam Clark Company Ltd.; A.B. Mechanical Limited; A & G Crane Rentals Limited carrying on business as **A & G Crane Limited; A.M.L. Painting Limited; Argo Protective Coatings Incorporated; Allsteel Coating Limited; Mills Painting & Sandblasting Limited**

Defendants

and

Amec E & C Services Limited, successor to Agra Monenco Inc., in their own right, **Kellogg Brown & Root**, a division of Haliburton Group Canada Inc. and **Amec Black & McDonald** Limited operating as BMS Offshore, successor to BMS Offshore Limited, in their own right and/or collectively operating as BBA, a joint venture

Third Parties

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	May 27, 2008 in Halifax, Nova Scotia
Written Decision:	August 27, 2008
Counsel:	**Hillel David** for the applicant (defendant), AML Painting Limited **William Chalmers** for the applicant (defendant), RKO Steel Limited **Robert G. Belliveau**, Q.C. and **Aidan Meade**, for the respondent (plaintiff) Sable Offshore Energy Inc.

By the Court:

[1] AML Painting Limited and RKO Steel Limited, two of the parties in the Sable Offshore Enterprises Inc. ("SOEI") litigation make application for summary judgment or alternative remedies.

ISSUES

1. Should RKO or AML, or either, have summary judgment or partial summary judgment, or

2. Alternatively, should AML have an order limiting the scope of damages recoverable "to the part of the loss, if any, that was not covered" under the Builder's All Risk policy;

3. Alternatively, should SOEI defend and indemnify RKO with respect to crossclaims against RKO.

FACTS

[2] AML and RKO are defendants in an action by SOEI with respect to paint failures on the Sable project. That project consists of both onshore and offshore facilities for the production of natural gas. SOEI alleges "widespread and premature failure" of the paint used on the facilities. The defendant, AML, was a paint applicator and the defendant, RKO, provided structural steel fabrication and erection.

[3] SOEI purchased Builder's All Risk Insurance from Zurich, Commonwealth and American Home (the "Zurich policy") and has commenced action against them. In that action, SOEI claims against them for "the expenses they have incurred in repairing the failure of the coating system used to paint the offshore and onshore facilities." (para. 9, statement of claim in SH 203176). That action was commenced in August 2003. The defendants have filed a defence denying coverage.

The AML Application

[4] The AML application is for 1) summary judgment to dismiss the action against them with costs; or 2) alternatively, to limit the damages to the loss not covered by the Zurich policy.

[5] AML and SOEI entered contract AG-6042 for painting services. The relevant provisions of that contract are as follows:

> **9.0 REPRESENTATIONS, WARRANTIES AND GUARANTEES**
>
> 9.1 CONTRACTOR represents, warrants and guarantees that the WORK shall meet all of the requirements set forth in this AGREEMENT and shall conform to COMPANY'S drawings and specifications and also that the WORK shall be of highest quality and first-class in every particular and free from defects in design, engineering, materials, construction and workmanship. ...
>
> 9.3 CONTRACTOR agrees that all of its and its subcontractors representations, warranties and guarantees contained in this AGREEMENT are and shall be deemed material and shall survive completion or termination of this AGREEMENT.

11.0 INSURANCE

11.1 CONTRACTOR Furnished Insurance

11.1.1 CONTRACTOR shall, at its sole cost, purchase and maintain insurance as described in this Article 11.1. Such insurance shall include COMPANY, the PARTICIPANTS and their AFFILIATES as additional insureds.

11.1.8 Insurance to be provided by CONTRACTOR shall include the following:

(a) Employer's Liability Insurance covering each employee, to the extent of $5,000,000 where such employee is not covered by Workers' Compensation. Prior to commencement of the WORK, CONTRACTOR shall provide proof that CONTRACTOR is in good standing with the Workers' Compensation Board.

(b) Automobile Liability Insurance which complies with all applicable governmental requirements including coverage for all automotive equipment owned, hired or otherwise procured by CONTRACTOR for the WORK, subject to a limit of not less than $5,000,000 per occurrence.

(c) If required by the Scope of WORK, All Risks Hull and Machinery Insurance full conditions, covering each and every marine vessel or craft, if any, owned, chartered, hired or otherwise procured by CONTRACTOR for the WORK, for full Replacement Value.

(d) If required by the Scope of WORK, Protection and Indemnity Insurance, full conditions, (including pollution), including statutory and voluntary Removal of Wreck coverage, and/or removal of debris covering each and every vessel and craft specified in Sub-Article 11.1.8(c) to a limit to be determined by CONTRACTOR on a Maximum Foreseeable Loss basis.

(e) If required by the Scope of WORK, All Risks Hull Insurance covering each and every aircraft, if any, owned, chartered,

hired or otherwise procured by CONTRACTOR for the WORK, for full Replacement Value.

(f) If required by the Scope of WORK, Aircraft Liability Insurance including Passenger Liability, covering each and every aircraft specified in Sub-Article 11.1.8(e) subject to a limit of not less than $100,000,000.

11.2 COMPANY Furnished Insurance

...

11.2.2 Builder's All Risk (BAR) Insurance shall provide:

(a) All Risk Coverage, on a Replacement Cost Value, against physical loss or damage to the Facilities, up to the date of first gas.

...

The deductibles listed below for each and every loss occurrence involving insured property in CONTRACTOR'S care, custody or control shall be for the account of CONTRACTOR. CONTRACTOR shall also be solely responsible for; (i) the cost of rectifying any breach of CONTRACTOR's representations, warranties or guarantees, and ... This shall not, in any manner, limit or qualify the Liabilities and obligations otherwise assumed by CONTRACTOR under this AGREEMENT.

11.7 Insurance to be provided by COMPANY under 11.2 shall be primary, except where there exists an obligation under 11.1.8 for primary insurance to be provided by CONTRACTOR.

11.9 The COMPANY shall procure the insurance referenced in 11.2.1 and 11.2.2 for the benefit of the COMPANY and CONTRACTOR, it being understood that CONTRACTOR is an 'Additional Insured' for the duration of the term of the policies and is entitled to the benefits available thereunder. Furthermore, CONTRACTOR is hereby empowered to pass on such benefits as herein before defined to Sub-contractors, where Sub-Contractors contain specific provisions to this effect or where

CONTRACTORS intended to include such specific provisions but failed to do so.

12.0 GENERAL INDEMNIFICATION

...

12.2 Except as provided in Article 11.2, COMPANY and CONTRACTOR agree that each PARTY shall, with respect to:

12.2.3 its own property (which for the avoidance of doubt includes Construction Equipment, marine vessels or other equipment used by or on behalf of CONTRACTOR in the performance of the WORK);

(a) be liable for all losses, costs, damages, expenses and legal fees which it may suffer, sustain, pay or incur, in any manner whatsoever, directly or indirectly arising from or in connection with this AGREEMENT on account of bodily injury to or death of such persons, or damage to such persons, or loss of or damage to such property; and in addition;

(b) indemnify the other PARTY against all actions, proceedings, claims, demands, losses, costs, damages, expenses and legal expenses whatsoever which may be brought against or suffered by the other PARTY or which the other PARTY may sustain, pay or incur, in any manner whatsoever, directly or indirectly arising from or in connection with this AGREEMENT on account of bodily injury to or death of such persons, or loss or damage to such property.

...

12.14 The terms of this Article 12 shall survive the expiration or any termination of this AGREEMENT.

28.0 SURVIVAL OF PROVISIONS

28.1 In order that the PARTIES hereto may fully exercise their rights and perform their obligations hereunder arising from the performance of the WORK under this AGREEMENT, such provisions of this AGREEMENT which are required to insure such exercise or performance shall survive the termination of this AGREEMENT for any cause whatsoever.

The RKO Application

[6] The RKO application is for:

1. A dismissal of the action against it;
2. Sable to defend the cross-claims against it;
3. To consolidate the SOEI action with the Zurich action or try them together; and
4. Costs

The parties have agreed that in the absence of Zurich the third matter was not to be proceeded with.

[7] RKO entered two contracts with SOEI: AG-6009 entitled "Structural Steel Fabrication for the Goldboro Gas Plant" and AG-6022 entitled "Structural Steel Erection for the Goldboro Gas Plant." In the former, the "description of the work" in Exhibit 1 to the contract provisions is as follows:

> **1.0 SCOPE OF WORK:**
>
> Supply of all labour, materials, and equipment necessary to produce the GOODS shown and described on the PURCHASE ORDER drawings and specifications in order to complete the WORK within the PURCHASE ORDER schedule:

In the latter contract, the "Work" is described in Article 1 as follows:

> **ARTICLE 1 - THE WORK**
>
> ... The WORK includes: engineering, design, procurement, construction, installation and pre-start-up mechanical testing of the STRUCTURAL STEEL ERECTION for the FACILITIES; taking delivery of, inspection of and incorporation into the FACILITIES of the MATERIALS and providing all necessary personnel, labour, MATERIALS and services.

[8] In contract AG-6022, the Steel Erection Contract, the insurance provisions are similar to those in the contract between SOEI and AML. Other provisions differ. The relevant Articles are:

ARTICLE 9 - REPRESENTATIONS, WARRANTIES AND GUARANTEES

9.1 CONTRACTOR represents, warrants and guarantees that the WORK and the FACILITIES and all MATERIALS incorporated therein shall meet all of the requirements set forth in this AGREEMENT and shall conform to the final APPROVED plans and specifications; that the WORK and the FACILITIES in every particular are best quality and are free from all defects in design, engineering, MATERIALS, construction, workmanship or otherwise. CONTRACTOR further represents, warrants and guarantees that all MATERIALS that become a part of the FACILITIES shall be new and of best quality unless otherwise APPROVED.

9.6 At any time during the execution of the WORK or during the WARRANTY PERIOD, if any representation, warranty or guarantee set forth in Sections 9.1 or 9.2 or obtained by CONTRACTOR pursuant to Section 9.4 is breached, or if CONTRACTOR is found to have failed or be failing to fulfill the requirements of this AGREEMENT, CONTRACTOR, within seven (7) days of receipt of COMPANY'S written notice of the breach, shall mutually agree with COMPANY when and how it intends to remedy such breach or failure. If CONTRACTOR does not begin and diligently proceed to complete the remedy within the time agreed, or if CONTRACTOR and COMPANY fail to reach agreement within seven (7) days of CONTRACTOR'S receipt of COMPANY'S written notice of breach, COMPANY, after advising CONTRACTOR in writing, may perform or have performed by third parties the necessary remedy, and COMPANY'S costs of this performance shall be borne or paid by CONTRACTOR.

ARTICLE 12 - INSURANCE

12.1 CONTRACTOR Furnished Insurance

12.1.1 CONTRACTOR shall, at its sole cost, purchase and maintain insurance as described in this Section 12.1. Such insurance shall include COMPANY, the PARTICIPANTS, CONSTRUCTION MANAGER and their AFFILIATES as additional insureds.

12.1.8 Insurance to be provided by CONTRACTOR shall include the following:

(a) Employer's Liability Insurance covering each employee, to the extent of $2,000,000 where such employee is not covered by Workers' Compensation. Prior to commencement of the WORK, CONTRACTOR shall provide proof that the CONTRACTOR is in good standing with the Workers' Compensation Board.

(b) Automobile Liability Insurance which complies with all applicable governmental requirements including coverage for the automotive equipment owned, hired or otherwise procured by CONTRACTOR for the WORK, subject to a limit of not less than $5,000,000 per occurrence.

(c) If required by the Scope of Work, All Risks Hull and Machinery Insurance full conditions, covering each and every marine vessel or craft, if any, owned, chartered, hired or otherwise procured by CONTRACTOR for the WORK, for full Replacement Value.

(d) If required by the Scope of Work, Protection and Indemnity Insurance, full conditions (including pollution), including statutory and voluntary Removal of Wreck coverage, and/or removal of debris covering each and every vessel and craft specified in Section 12.1.8(c) to a limit to be determined by CONTRACTOR on a Maximum Foreseeable Loss basis.

(e) If required by the Scope of Work, All Risks Hull Insurance covering each and every aircraft, if any, owned, chartered, hired or otherwise procured by CONTRACTOR for the WORK, for full Replacement Value.

(f) If required by the Scope of Work, Aircraft Liability Insurance including Passenger Liability, covering each and every aircraft specified in Section 12.1.8(e) subject to a limit of not less than $100,000.000.

12.2 COMPANY Furnished Insurance.

...

(b) Builder's All Risk (BAR) Insurance shall provide:

(i) All Risk Coverage, on a Replacement Cost Value, against physical loss or damage to the FACILITIES, up to the date of FINAL ACCEPTANCE plus a maintenance period for the duration of any WARRANTY PERIOD remaining at the date of FINAL ACCEPTANCE.

(ii) All Risk Coverage against physical loss of or damage to insured property while in transit, including, to the extent reasonably obtainable, the perils of war, strike, riot and civil commotion, on a warehouse to warehouse basis.

The deductibles listed below for each and every loss occurrence involving insured property in CONTRACTOR's care, custody or control shall be for the account of CONTRACTOR. CONTRACTOR shall also be solely responsible for; (i) the cost of rectifying any breach of CONTRACTOR'S representations, warranties or guarantees. ...

12.9 COMPANY shall procure the insurance referenced in 12.2 (a) and (b) for the benefit of COMPANY and CONTRACTOR, it being understood that CONTRACTOR is an "Additional Insured" for the duration of the term of the policies and is entitled to the benefits available thereunder. Furthermore, CONTRACTOR is hereby empowered to pass on such benefits as herein before defined to Sub-contractors, where Sub-contracts contain specific provisions to this effect or where CONTRACTOR intended to include such specific provisions but failed to do so.

ARTICLE 27 - SURVIVAL OF PROVISIONS

27.1 In order that the PARTIES may fully exercise their rights and perform their obligations arising from the execution of the WORK, such provisions of this AGREEMENT as are necessary to ensure such exercise or performance, and in particular but without prejudice to the generality of the foregoing, Articles 5, 9, 13, 14, 15, 19, 24, 25, 26 and 29, shall survive the completion or termination of this AGREEMENT for any cause whatsoever.

ARTICLE 29 - GENERAL INDEMNIFICATION

29.2 Except as provided in Article 12.2, COMPANY and CONTRACTOR agree that each party shall, with respect to:

...

iii) its own property (which for the avoidance of doubt includes CONSTRUCTION EQUIPMENT, marine vessels or other equipment used by or on behalf of CONTRACTOR in the performance of the WORK):

(a) be liable for all losses, costs, damages, expenses and legal fees which it may suffer, sustain, pay or incur, in any manner whatsoever, directly or indirectly arising from or in connection with this AGREEMENT on account of bodily injury to or death of such persons, or damage to such persons, or loss of or damage to such property; and in addition;

(b) indemnify the other party against all actions, proceedings, claims, demands, losses, costs, damages, expenses and legal expenses whatsoever which may be brought against or suffered by the other party or which the other party may sustain, pay or incur, in any manner whatsoever, directly or indirectly arising from or in connection with this AGREEMENT on account of bodily injury to or death of such persons, or loss of or damage to such property.

29.12 CONTRACTOR'S indemnity obligations in this Article 29 shall be independent of and not relieve CONTRACTOR from its other obligations and liabilities set forth elsewhere in this AGREEMENT.

ARTICLE 31 - ENTIRETY OF AGREEMENT; MODIFICATION; NON-WAIVER; STRICT PERFORMANCE

31.1 This AGREEMENT, as signed by authorized representatives of COMPANY and CONTRACTOR, constitutes the entire agreement between the PARTIES with respect to the matters contained within it, and there are no oral or written understandings, representations or commitments of any kind, express or implied, that are not expressly set forth in this AGREEMENT. ...

[9] In contract AG-6009, the Structural Steel Fabrication Contract, there is no reference to insurance to be provided by SOEI. The contract is entitled "Purchase Order Agreement." That agreement contains the following relevant provisions:

10.0 REPRESENTATIONS, WARRANTIES AND GUARANTEES

> 10.4 SELLER represents, warrants and guarantees to BUYER and BUYER'S REPRESENTATIVE that:
>
> a) the GOODS are fit for use and the purpose for which they are intended and are free from all defects in design, workmanship and material and are in strict accordance with the specifications and requirements of this PURCHASE ORDER.
>
> ...
>
> **12.0 LIABILITY AND INDEMNIFICATION**
>
> 12.1 Responsibility Prior to Acceptance
>
> SELLER shall be responsible and liable to BUYER for, and shall defend, indemnify and hold harmless BUYER and BUYER'S REPRESENTATIVE against and from, loss of or damage to the GOODS until care, custody and control thereof has been transferred to and accepted by BUYER pursuant to Article 6.

[10] In its application documents, RKO provided only contract AG-6002, the Structural Steel Erection Contract, and SOEI provided contract AG-6009, the Fabrication Contract. RKO submitted that the former contract subsumed AG-6009 because of Article 31 which provided that agreement was the entire agreement between the parties. However, in my view, the two contracts are distinct. One was for the fabrication of structural steel by purchase order agreement and the other contract was for its erection on site. Since the former was an agreement for the fabrication and provision of goods, it is understandable why there would be no insurance provision. The work pursuant to that contract would be done by RKO at its fabrication plant. Once the goods were ready for installation, a second contract was entered into for the erection of the structural steel at the Goldboro Gas Plant. Different considerations applied then and the insurance provision was included in that contract.

[11] There are two RKO contracts and only one contains insurance provisions for the benefit of RKO. RKO's application for summary judgment, on the basis that the effect of the insurance and indemnification provisions in the Steel Erection Contract are to bar a claim against RKO, must fail. SOEI's claim against RKO

with respect to fabrication of the steel is not affected by any insurance coverage by SOEI for the benefit of RKO.

[12] The indemnification provision in the Fabrication Contract was a limited one and for the benefit of SOEI. Accordingly, the RKO application for SOEI to defend the cross-claims against it must fail as well.

ANALYSIS OF AML APPLICATION

Civil Procedure Rule 25

[13] AML brought its application pursuant to both *CPR 13* and *CPR 25*. It submitted that it could be dealt with under the latter Rule. SOEI disagrees. There may be exceptional circumstances where an application under *Rule 25* may proceed without an agreed statement of facts. I do not find this to be such a case. AML did not pursue this in its oral submissions.

The Law With Respect to Summary Judgment

[14] *Rule 13* provides for summary judgment by a defendant.

> **RULE 13**
>
> **SUMMARY JUDGMENT**
>
> **Application for a summary judgment**
>
> **13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
>
> (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[15] The parties agree on the test as set out in *United Gulf Developments Ltd. v. Iskandar*, 2004 NSCA 35, 35 D.L.R. (4th) 609, 222 N.S.R. (2d) 137 where Roscoe, J.A., in para. 9, quoted from *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) at para. 27:

> 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. ... Once the moving party has made this showing, the respondent must then 'establish his claim as being one with a real chance of success'....

[16] The applicant must satisfy me that there are no material facts in dispute. If there are none, I can consider the issue of whether summary judgment should be granted. The onus then shifts to the respondent, SOEI, to show its claim has a real chance of success.

Material Facts

[17] AML submits there are no material facts in dispute; SOEI says there are. As I understand its submissions, SOEI says they are:

1. Which contracts are in issue in this application?
2. What insurance coverage was to be provided by the All Risk Coverage?
3. What was the intent of the parties with respect to insurance?
4. Did damage or loss occur within the time limits of the insurance coverage?
5. How to apply the Zurich policy.

[18] With respect to the insurance and indemnity provisions, I do not agree there is any issue about which contracts are in issue. I have dealt above with the RKO application. With respect to the AML application, it seeks summary judgment only with respect to its contract with SOEI (AG-6042) and its sub-contract under the contract between Cherubini and SOEI, AG-7014 (the "Cherubini Contract").

[19] Nor do I agree with SOEI that there is a material factual dispute about the application of the Zurich policy. The interpretation of the insurance policy is a question of law, not of fact.

[20] SOEI also raises as a disputed material fact whether the loss or damage occurred within the time limits of the Zurich policy. In its statement of claim against Zurich, SOEI says that its claim falls within that policy. As between SOEI and Zurich, that may be a material fact but, as between SOEI and AML, SOEI, in my view, cannot be heard to say it is in dispute.

[21] That leaves two related matters which SOEI says are disputes of material fact: 1) what coverage was to be provided; and 2) what the intent of the parties was with respect to insurance and indemnity. SOEI says the court will need evidence about Builder's All Risk Insurance. In my view, both are issues which can be resolved by looking at the contract wording. That too is a question of law not a question of fact.

[22] I conclude that there are no issues of material fact in dispute. Consequently, I can consider summary judgment.

Real Chance of Success

[23] The onus now shifts to SOEI to satisfy me that its claim has a real chance of success. SOEI says that, read properly, the contract provisions and the insurance policy do not bar a claim against AML for negligence and breach of contract. SOEI says, if AML's actions caused losses or damage to SOEI property, AML is liable to SOEI. Otherwise, it says there would be no leverage for SOEI to obtain the benefit of its contract with AML. AML, it says, would have no reason to perform its contract as required since any damage or losses would be covered by the insurance.

[24] AML says it is entitled to the benefit of the insurance SOEI was contractually obliged to obtain for its benefit.

[25] SOEI says I should look at the wording of the insurance policy but AML says it is the wording of the contract which governs.

[26] In *Active Fire Construction Ltd. v. B.W.K. Construction Co.*, 2005 CarswellOnt 2917, 25 C.C.L.I. (4th) 103 (Ont. C.A.), the general contractor was to obtain an "All Risks" property insurance policy but did not. The court considered the wording of the contract between the general contractor and the sub-contractor, Active Fire, which gave the sub-contractor the benefit of the policy which was to have been obtained. Cronk, J.A. said in paras. 19 and 20:

> 19 ... But, its commitments to obtain the requisite insurance (all-risks property insurance under the Main Contract and fire insurance under the Subcontract) operated as a voluntary assumption by the appellant of the risk of loss or damage caused by the perils to be insured against. As a matter of contract, it assumed the risks.
>
> 20 When the appellant's commitment to obtain all-risks property insurance was incorporated as a term of the Subcontract, it became a specific contractual covenant in favour of the respondent. ...

It was the wording of the contract upon which the court relied.

[27] In *Hoban Construction Ltd. v. British Columbia*, 1994 CarswellBC 1134, 17 C.L.R. (2d) 103 (B.C.S.C.), Spencer, J. interpreted the contract between the parties to determine upon whom the risk fell, saying in para. 11:

> 11 In the quotation from the contract which I have already set out, the plaintiff is made 'solely responsible for all damages.' Morever, the contract term which requires that all insurance policies must contain a waiver of subrogation rights against the defendant shows that the intention of the parties was to preclude any claim for damages to the excavator arising from any cause whatsoever from being brought against the defendant. The obligation to insure against all risks was put upon the plaintiff and, according to Mr. Hoban's evidence, the cost of that insurance was recognized as part of the plaintiff's overhead covered by the hourly rental.

[28] Similarly, in *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*, 1995 CarswellOnt 1198, 26 O.R. (3d) 321 (Ont. C.A.), Dubin, C.J.O. interpreted the agreement between the parties with respect to insurance not the insurance contract itself. He said in para. 22:

> 22 In my opinion, the respondent's agreement to be responsible for insuring the 'Robert Koch' and its cargo could have no purpose other than to relieve the appellant from liability for losses caused by its negligence. ...

[29] Based upon these decisions, I conclude that, as between SOEI and AML, it is the wording of the contract between them (and the wording of the contract on which AML was a subcontractor) which governs. In my view, there is good reason for this: AML had no control over the obtaining of the insurance coverage under the Zurich policy. It is entitled to rely upon the contractual obligations to it made in its contract with SOEI (and in its subcontract).

[30] The contract wording required that SOEI obtain insurance and that AML would be an additional named insured. A similar contractual provision extended to AML as a subcontractor on the Cherubini contract.

[31] The insurance requirement quoted above was for the benefit of SOEI and AML (insofar as this application is concerned). SOEI could make a claim and has done so. I must interpret the insurance provision in the contract in light of all the contractual provisions.

[32] The insurance coverage SOEI was to obtain was for "All Risk Coverage ... against physical loss or damage to the Facilities ... ." The insurance AML was to provide is listed in Article 11.1.8 (quoted above). That article does not require AML to obtain Builder's All Risk Insurance.

[33] Other contractual provisions are relevant as well. In Article 9.1, AML represents, warrants and guarantees "that the WORK shall meet all of the requirements set forth in this AGREEMENT and ... also that the WORK shall be of highest quality and first-class in every particular and free from defects in design, engineering, materials, construction and workmanship." AML also agreed in Article 9.3 that these "representations, warranties and guarantees ... shall survive completion ... of this AGREEMENT."

[34] Article 11.2.2 not only deals with builders all risk coverage but goes on to provide that AML "shall also be solely responsible for: (i) the cost of rectifying any breach of [its] representations, warranties, or guarantees ... . This shall not, in any manner, limit or qualify the Liabilities and obligations otherwise assumed by [AML] under this AGREEMENT."

[35] The General Indemnification Article, Article 12, refers back to Article 11.2. Article 12.2 begins with the words "Except as provided in Article 11.2 ... ." It then provides for both SOEI and AML with respect to "its own property" to be liable for any loss or damage to that property and to indemnify the other for any loss or damage to its own property.

[36] I must interpret these articles using the ordinary rules of interpretation. In Chitty on Contracts, 2d ed. (London: Sweet & Maxwell, 2004), the authors say in para. 12-063 at p. 738:

> **12-063** **The whole contract is to be considered.** Every contract is to be construed with reference to its object and the whole of its terms, and accordingly, the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated word ro clause. 'It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense if that may be done.' And so Lord Davey said in *N.E. Railway v. Hastings*, quoting

> Lord Watson: 'The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible'."

[37] In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* [1997] 3 S.C.R. 1210, Iacobucci, J. said at para. 118:

> ... Rather, in my view, one should examine the contract as a whole with a view to searching for the intention of the parties by recognizing the natural meaning that flows from the language chosen.

[38] In *Eli Lilly & Co. v. Novopharm Ltd.* [1998] 2 S.C.R. 129, Iacobucci, J. said at para. 54:

> 54 ... The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[39] Also, in *Continental Insurance Co. v. Law Society of Alberta* (1984), 14 D.L.R. (4th) 256, (Alta. C.A.), Lieberman, J.A. said at para. 18 and 19:

> 18 As I have pointed out, it is difficult to reconcile the two parts of section 4. Because of this difficulty I would apply the principle set out by the Supreme Court of Canada in *Cotter v. Gen. Petroleums Ltd.*, [1951] S.C.R. 154, [1950] 4 D.L.R. 609. In that case Kerwin J., as he then was, speaking for the majority, approved the adoption by Harvey C.J.A. [[1949] 2 W.W.R. 146, [1949] 3 D.L.R. 634] of the statement of the principle by Lord Wrenbury in *Forbes v. Git*, [1922] 1 A.C. 256 (P.C.), wherein that learned Law Lord said at p. 259:
>
> > If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails ... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.
>
> 19 The rule to be applied is, in my view, well summarized in 7 C.E.D. (West 3rd) *Contracts*, para. 473:

> 473 If at all possible, effect is to be given to all terms of the contract and none rejected as surplusage or as having no meaning. Similarly, one must strive to harmonize apparently conflicting terms unless they are so clearly repugnant that the effect of one clause virtually destroys that of another, in which case a later qualifying clause is to be rejected in favour of an earlier clause creating a right or obligation. When different pars of the instrument are in conflict, effect is given to the real intention of the parties as gathered from the instrument as a whole.

[40] If there is inconsistency within the document to be interpreted, Chitty on Contracts says in para. 12-078 at p. 744:

> **12-078** **Inconsistent or repugnant clauses.** Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected, but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. A term may also be rejected if it is repugnant to the intention of the parties as it appears from the document. However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement. Thus, if there is a personal covenant and a proviso that the covenantor shall not be personally liable under the covenant, the proviso is inconsistent and void. But if a clause merely limits or qualifies without destroying altogether the obligation created by another clause, the two are to be read together and effect is to be given to the intention of the parties as disclosed by the instrument as a whole.

[41] Fridman's The Law of Contract in Canada, 5th ed. (Thomson Carswell 2006) says at p. 457:

> (iii) The contract should be construed as a whole, giving effect to everything in it if at all possible.

> No word should be superfluous (unless of course, as happened in one instance, it is truly meaningless and can be ignored). In *Cooke (Barchak Estate) v. Anderson*, one clause in a contract fixed the price of land at $5,000. A later clause referred to payment not in cash but by the provision of a certain quantity of beets. It was held that these clauses must be read together so as to create harmony, and not dissension among the different terms of the contract. Thus, the later clause to the necessary extent modified or limited the earlier one. In such cases of repugnancy within the contract, therefore, as was stated in *Forbes v. Git*, if the dissonant clauses can be read harmoniously this must be done. If not, then the repugnant part must be rejected in order to give effect to the general intent of the parties, as evidenced by the contract as a whole, rather than any particular, and jarring language. If there is conflict between two parts of a document, the dominating purpose must prevail, as indicating the real intentions of the parties.

[42] Another important principle with respect to interpretation, and one on which AML relies, is the doctrine of *contra proferentem.* It applies when there is ambiguity in the document being interpreted. In the context of insurance contracts, this was dealt with by the Supreme Court of Canada in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 390, 1979 CarswellQue 157. In that case, Estey, J., writing for the majority, referred to a two step process in interpretation. He quoted in para. 5 from Meredith, J.A. in *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 at p. 137:

> ... effect must be given to the intention of the parties, to be gathered from the words they have used. ...

[43] Estey, J. said in para. 25:

> Such a proposition may be referred to as step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:
>
> > If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

[44] Later in *Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd.*, [1986] 1 S.C.R. 57, 25 D.L.R. (4th) 649, 1986 CarswellNS 147, the Supreme Court of Canada made it clear that these rules of construction apply not only to insurance contracts. Le Dain, J. said in para. 17:

> 17 Given this ambiguity as to whether the distributor's agreements could be terminated pursuant to clause 23 with immediate effect or whether such termination could take effect only upon reasonable notice, I also agree with Richard J. that it should be resolved against Wynn's and in favour of Hillis by application of the *contra proferentem* rule of construction. It is true that this rule has been most often invoked with reference to the construction of insurance contracts, particularly clauses in such contracts purporting to limit or exclude the insurer's liability. Statements of the rule and its application in such cases may be found in the decisions of this Court in *Consolidated -Bathurst, supra*, and *McClelland and Stewart, supra*. The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. The rule is stated in its general terms in *Anson's Law of Contract* (25th ed. 1979), at p. 151, as follows:
>
> > The words of written documents are construed more forcibly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.
>
> The rule is also stated in general terms by Estey J. in *McClelland and Stewart, supra*, at ap. 15 as follows:
>
> > That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

[45] Before I can apply the doctrine of *contra proferentem*, there must be an ambiguity in the contract being interpreted. I must look at the words of the contract to determine if there is any ambiguity or repugnancy.

[46] AML did not have to obtain Builder's All Risk Insurance. It was not one of its requirements under Article 11.1.8. According to Article 11.2.2 (a), it was the

responsibility of SOEI to obtain Builder's All Risk Insurance and, according to Article 11.9, AML was to be an additional insured entitled to the benefits of that insurance. Builder's All Risk Insurance is first party insurance with the benefits to be paid to the persons insured and their beneficiaries for their personal losses, not to third parties for losses they may incur as a result of the insured's actions. Third party liability insurance is provided for in Article 11.2.1, Wrap-up General Liability Insurance. As a result, AML is to have the benefit of the Builder's All Risk coverage for its losses. Both parties agree that losses resulting from defects in products it supplied or its workmanship are normally excluded in a Builder's All Risk Policy. SOEI says they are excluded in this case and AML says they are not. Both rely on the contract wording in support of their positions.

[47] SOEI says that AML's representations, warranties and guarantees set out in Article 9.0 and its obligation to indemnify (Article 12) would be meaningless if AML were to be protected from its own negligence by the Builder's All Risk Insurance. SOEI also points out that in the insurance provision itself (Article 11.2.2 (c)), AML is held responsible for rectifying breaches of its representations, warranties and guarantees. SOEI also says that it would have no way to obtain the benefit of its contract with AML if it could not recover against AML for defects in its workmanship. SOEI says such a result is out of step with the rest of the contract and is an unrealistic result in the commercial context.

[48] As McIntyre, J. said in *ITO-International Terminal Operators Ltd. v. Milda Electronics Inc. et al*, [1986] 1 S.C.R. at para. 53:

> I think it is important, in determining what was within reasonable contemplation, to recognize that this is a commercial contract between two parties who, in essence, are determining which of them is to hear the responsibility for insurance at the various stages of the contract.

[49] In response to SOEI's argument that it would have no way to ensure it obtained the benefit of its contract if AML's interpretation were correct, AML points to the decision of Moldaver, J.A. in *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada* (2006) 266 D.L.R. (4th) 182, 79 O.R. (3d) 494, (C.A). In that case, Lombard argued what SOEI argues here. The court in *Bridgewood* relied on the general principles of interpretation of insurance contracts. In para. 8, Moldaver, J.A. quoted from *Westridge Construction Ltd. v. Zurich Insurance Co.* (2005), 25 C.C.L.I. (4th) 182 (Sask. C.A.) where

Sherstobitoff, J.A. quoted from Hilleker, Liability Insurance in Canada, (3rd ed.) (Toronto: Butterworths, 2001) at p. 147 as follows:

> It is therefore necessary to turn to the policies. In doing so, it is well to repeat the general principles of interpretation of such provisions referred to in paragraph [31 of *Monenco Ltd. v. Commonwealth Insurance Co.* [2001] 2 S.C.R. 699], that coverage provisions should be construed broadly, while exclusion clauses should be given a narrow interpretation, and that the *contra proferentem* rule should be applied.

[50] Moldaver, J.A. stated Lombard's argument at para. 17:

> 17 Lombard's argument against the 'interpretative aid' approach centres on the policy considerations that inform the 'general principle'. In short, Lombard maintains that the approach taken by the application judge converts CGL policies into performance bonds, something they were never meant to be. Accordingly to Lombard, such an approach provides general contractors, like the respondents, with a windfall. For low premiums, they are able to obtain insurance that permits and indeed encourages them to hire inexpensive subcontractors, comforted in the knowledge that they will be fully indemnified if the subcontractors do their work badly.

He then said in para. 18:

> 18 While I acknowledge Lombard's concerns, they do not alter my view that the 'interpretative aid' approach is the correct one. ...

[51] However, in that case, and in *Poole Construction v. Guardian Insurance Co.* 1977 Carswell Alta 470 (Alta S.C. (T.D.)) the courts were interpreting the insurance contracts. In *Poole Construction*, in his interpretation of the insurance contract, Bowen, J. referred to the principles of interpreting insurance contracts and concluded in para. 69:

> 69 ... the clear intent of the section is to make it clear that the insurer will not indemnify the insured for costs caused by the insured's own use of faulty workmanship, materials or design. To do otherwise would give insured carte blanche to use faulty materials, workmanship or design. This opinion is bolstered by the fact that the second exception talks of 'damage resulting from'.

[52] AML says the benefit to it of the Builder's All Risk Insurance would be lost if it did not cover its defective workmanship. It says the existence of the insurance provision for its benefit and the representations, warranties and guarantees provision are inconsistent. Therefore, it says, the latter provision is repugnant and void. It says SOEI voluntarily assumed the risk by agreeing to provide Builder's All Risk Insurance with AML as an additional insured. It says the insurance provisions govern over the liability provisions.

[53] AML also says, in the commercial context, it would make no sense for AML to obtain insurance when SOEI was to do so.

[54] AML relies on *Active Fire* in support of its argument that SOEI undertook the risk of the losses which have allegedly occurred.

[55] In *Active Fire*, there was no dispute that, had the insurance been obtained, it would have covered the loss incurred. Also, Active Fire admitted its negligence. It alleged, however, that it did not have to respond to the claim for damages resulting from that negligence because of the contractor's requirement to obtain all-risks insurance.

[56] As I noted above, the court construed the contractual obligation to obtain insurance even though it had not been obtained. Having done so, it considered what the critical issue was. Cronk, J.A. said in para. 29:

> 29 ... The critical issue here ... is whether the respondent subcontractor is entitled under the contractual bargain made between the parties to derive the benefit of the insurance obligations undertaken by the appellant general contractor. In my view, the contractual arrangements between the parties establish this entitlement.

[57] In that case, Active Fire's contractual obligations under its subcontract included those set out in Article XII, quoted in para. 6:

> Article XII. The subcontractor hereby assumes entire liability for any and all damage or injury or any kind or nature whatever to all persons, whether employees or otherwise, and to all property resulting from the performance of the work provided in this Agreement, and agrees to indemnify the appellant from and against any and all loss. ...

> Until the completion and final acceptance of the work the subcontractor shall maintain, at his own expense, the following: 'WORKER'S COMPENSATION INSURANCE' in accordance with the laws of the Province in which the Work is situated: 'PUBLIC LIABILITY INSURANCE' and 'PROPERTY DAMAGE' of sufficient coverages to protect and indemnify owners, [the appellant] and others from all claims that may arise.

[58] Cronk, J.A. cited *Madison Developments Ltd. v. Plan Electric Co.* (1997), 152 D.L.R. (4th) 653 (Ont. C.A.) [leave to appeal to S.C.C. refused] as "dispositive of this appeal" (para. 18). She quoted from it in that para as follows:

> 18 ...
>
> [9] Let me begin with an analogous circumstance. 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 indemnity 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*.
>
> ...
>
> [11] In my view, this interpretive reasoning as to the terms of a lease applies equally to this contract between contractor and subcontractor. This is a sizable building construction project in which the contractor has agreed with the owner to obtain comprehensive fire insurance covering losses arising from any cause. The anticipation was that a group of subcontractors would contribute their efforts to the overall project and it was undoubtedly expected that if a fire occurred it would most likely be caused by the negligence of one of those subcontractors. *Given the contractor's obligation in favour of the owner to obtain comprehensive fire insurance it makes no business sense for each subcontractor to pay premiums to duplicate that coverage. There would be no purpose for Article VI in the subcontract if it was not to protect the subcontractor from claims for fire damage caused by its negligence*; there could be no claim if the subcontractor was not negligent.

[59] With respect to the liability Active Fire assumed in Article XII (quoted above), Cronk, J.A. said in para. 22:

> 22 The respondent agreed to assume the liability described in Article XII in the face of the appellant's obligations to obtain all-risks property and fire insurance. In assuming that liability, the respondent was entitled to expect performance by the appellant of those contractual obligations, to its benefit and to the benefit of the owner of the project, the Town of Whitby. Were it otherwise, the respondent's assumption of such liability may well have been differently expressed or reduced.

[60] She also distinguished the two types of insurance to be provided by the contractor and by Active Fire. She said in para. 27:

> 27 Under Article XII of the Subcontract, the insurance to be obtained by the respondent was intended to respond to those third party claims against the appellant that were in amounts in excess of the limits that were to be provided under the insurance polices *(sic)* that the appellant was required, and failed, to obtain. Moreover, Article X11 of the Subcontract, properly read, is concerned with third party claims, not claims by the appellant against the respondent.

[61] Each contract must be interpreted based upon its own wording. When that wording is similar to that in decided cases, those cases are helpful in interpreting a contract. In my view, the differences between the contractual provisions in *Active Fire* and this case result in different interpretations. Although in *Active Fire,* Active Fire had liability for damage, it was in a separate provision from that requiring the contractor to obtain insurance. In this case, the liability of AML for rectifying breaches of its contractual obligations was set out in the clause requiring SOEI to obtain Builder's All Risk Insurance. In my view, it was a clear limitation on the insurance coverage to be provided by SOEI.

[62] Furthermore, the losses in *Active Fire* were losses caused by the flooding resulting from Active Fire's negligent installation of the main intake connection on the sprinkler system. In this case, the damages are alleged to have been caused directly by AML's breach of contract provisions warranting good workmanship. The damage alleged is directly to what AML provided not indirect or resulting damage arising from some act of AML. Had AML's actions or breach of contract resulted in damage to the property of another, the situation would be more like that

in *Active Fire* where the failure of Active Fire resulted in flooding not just damage to the sprinkler system it installed.

[63] AM also relies on *St. Lawrence Cement*, *supra*, in support of its position. Wakeham & Sons Ltd. provided tugboat services and St. Lawrence Cement hired it to haul a barge owned by it carrying its cargo. As part of the contract between them, St. Lawrence Cement was to obtain insurance on the barge and its cargo. It also provided that the services Wakeham would provide were provided at the "sole risk" of St. Lawrence Cement.

[64] St. Lawrence Cement claimed under its insurance policy and the claim was paid. The insurer then brought a subrogated claim against Wakeham. At issue was whether the insurance covered the risk of Wakeham's negligence.

[65] The trial court had concluded that these provisions did not relieve Wakeham from liability for its negligence. The finding that Wakeham was negligent was not contested on appeal. On appeal, Dubin, C.J.O. reviewed the contract provisions between the parties including the insurance provision and the "sole risk" clause. He then said in para. 51:

> 51 With respect, in my opinion, the term 'at the sole risk of such vessel or craft and of the owners' is not ambiguous. Words such as 'at sole risk', 'at customers' sole risk', at owner's risk' and 'at their own risk' will normally cover negligence.

[66] He had previously said in para. 22:

> In my opinion, the respondent's agreement to be responsible for insuring the 'Robert Koch' and its cargo could have no purpose other than to relieve the appellant from liability for losses caused by its negligence.

[67] In conclusion, he said in paras. 81 and 82:

> 81 ... The covenant by the respondent to be responsible for insuring the 'Robert Koch' and its cargo was for the benefit of the appellant and relieved the appellant from liability in case of loss caused by its negligence. The insurance policy obtained by the respondent, which covered loss or damage suffered by reason of the negligence of the appellant, was for the benefit of the appellant as well as for the respondent. Neither the respondent, nor its insurer, by way of subrogation, can recover damages for the loss of the barge or its cargo.

> 82 Furthermore, the provision in the Standard Towing Conditions that the towing operation was to be done 'at the sole risk of such vessel or craft and of the owners' also allocated the risk of the tower's negligence to the barge owner and precluded the respondent from suing for the damages suffered by it.

[68] In my view, the contractual provisions in *St. Lawrence Cement* and the contractual provisions in this case are not to the same effect. The Ontario Court of Appeal concluded that the contractual requirement to obtain insurance was for the benefit of both parties even in the event of the negligence of the towing company. Dubin, C.J.O. quoted from Parks, The Law of Tug, Tow, and Pilotage that this is a common requirement and one which has been upheld by the courts.

[69] In this case, both parties acknowledge that Builder's All Risk Insurance normally does not cover defective workmanship. There must then be some specific wording that such coverage is included. In *St. Lawrence Cement*, there was an industry practice and the further wording, upon which the court also relied, that the barge and cargo were at St. Lawrence Cement's "sole risk." No such provision exists in these contracts.

[70] Having read the contract as a whole and interpreting the contract provisions leads me to conclude that SOEI has a real chance of success in its action against AM. A real chance of success is not a certainty of success. It is something more than a faint hope of success.

[71] In my view, properly interpreted, the contract requires SOEI to obtain Builder's All Risk Insurance but does not prevent SOEI from claiming against AM for breach of its representations, warranties and guarantees. If SOEI can establish that AM's negligence or breach of contract caused it losses or damage, it has a real chance of success and this claim is not barred by the existence of the Builder's All Risk Insurance. It also has a real chance of success in its argument that the Builder's All Risk Insurance excludes defective workmanship.

[72] The article requiring SOEI to obtain Builder's All Risk Insurance with AM as an additional insured specifically refers to AML's responsibility for breaches of its representations, warranties and guarantees. These are set out in Article 9.0. Furthermore, the indemnity provisions in Article 12 are expressly made subject to

Article 11.2, the insurance provision, which in turn, refers to the representations, warranties and guarantees.

[73] I disagree with the submission of AM, first advanced by RKO, that the indemnity provisions only apply when there is no longer any insurance. My interpretation of the indemnity provisions is inconsistent with such an interpretation.

[74] There is, in my view, no ambiguity in the contractual provisions nor is there repugnancy. The articles are clear and not inconsistent with each other. The benefits AM obtains from the Builder's All Risk Insurance are limited by AML's obligation to meet its contractual representations, warranties and guarantees. If it does not do so and thereby causes losses or damage to SOEI's facilities, it is responsible for those. It is protected by the insurance for losses or damage caused to its own property and for resultant losses to others.

[75] Interpreting the contract in this way is, in my view, consistent with the rules of contract construction. Every word is given a meaning and the whole of the contract is considered in interpreting it. Where there is no ambiguity, the *contra proferentem* rule has no application. Nor are there any repugnant provisions to which no effect can be given. The references to AML's representations, warranties and guarantees qualify the insurance provisions.

[76] As Sharpe, J.A. said in *Venture Capital USA Inc. v. Yorkton Securities Inc.*, 2005 CarswellOnt 1875, 75O.R. (3d) 325, (C.A.) at para. 26:

> 26 The cardinal rule of contract interpretation 'is that the court should give effect to the intention of the parties as expressed in their written agreement', and where the intention of the parties 'is plainly expressed in the language of the agreement, the court should not stray beyond the four corners of the agreement'.

[77] The application for summary judgment by AML is dismissed.

[78] Based upon my interpretation of the contractual provisions, AML's alternative submission also fails. If SOEI recovers under the Zurich policy, it will not prevent SOEI from claiming against AML for its contractual representations, warranties and guarantees.

COSTS

[79] SOEI has been successful in defending these applications. It is entitled to its costs. If the parties cannot agree on costs, I will accept written submissions.

Hood, J.