COURT OF APPEAL FOR ONTARIO

CITATION: Surefire Dividend Capture, LP v. National Liability & Fire Insurance Company (Berkshire Hathaway Specialty Insurance), 2025 ONCA 332
DATE: 20250430
DOCKET: COA-23-CV-0891

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Zarnett, Monahan and Pomerance JJ.A.

BETWEEN

Surefire Dividend Capture, LP

Plaintiff (Appellant)

and

National Liability & Fire Insurance Company
c.o.b. as Berkshire Hathaway Specialty Insurance* and
Arthur J. Gallagher Canada Limited

Defendants (Respondent*)

Raj K. Datt and Marie-Pier Nadeau, for the appellant

Reid Lester and Steven Stieber, for the respondent

Gemma Healy-Murphy, for the intervener The Honourable Mark Falk (Ret.), in his capacity as U.S. Ancillary Receiver for Broad Reach Capital, LP

Heard: September 9, 2024

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated August 4, 2023, with reasons reported at 2023 ONSC 4535.

Zarnett J.A.:

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A. Introduction

[1] The appellant, Surefire Dividend Capture, LP ("SDC"), lost investments of over $30 million USD that it had made, or acquired, in Broad Reach Capital, LP ("BRC"), a hedge fund. Unknown to SDC when it decided to do business with BRC, Brenda Smith, BRC's CEO at the relevant time, was operating a fraudulent Ponzi scheme.

[2] SDC brought an action to recover these losses under a fidelity bond (the "Bond") issued by the respondent National Liability & Fire Insurance Company ("Berkshire").

[3] The Bond provided, among other things, coverage to SDC for losses due to dishonest or fraudulent acts of an "Employee" and for losses resulting from "Theft of Customer Property by a Registered Representative". The trial judge found that Ms. Smith was not SDC's "Employee" within the meaning of the Bond, nor had she stolen "Customer Property" as defined in the Bond. Notwithstanding that SDC had made it known to Berkshire, in the lead up to the issuance of the Bond, that it was seeking coverage for the risk of theft and fraud by "sub-advisors" including BRC, the trial judge concluded that the Bond was not worded to allow SDC to claim on the bases it asserted. Although BRC was named in the Bond as a "Subsidiary", he noted that no claim was made by it or by SDC on BRC's behalf. He dismissed the action.

[4] The trial judge's interpretation of the Bond, which contained bespoke provisions and is accompanied by a meaningful factual matrix, is entitled to deference on appeal. SDC has not satisfied its onus of showing that the trial judge made a reversible error in his interpretation of the Bond. I would therefore dismiss the appeal.

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B. Background

(1) SDC's Investments in BRC

[5] Ariel Shlien is the CEO and indirect owner of 8569606 Canada Inc., which serves as the general partner of a number of limited partnerships (the "SureFire Entities"). In general, the business of the SureFire Entities is holding investments and attempting to enhance their value using different trading strategies.

[6] In 2018, Mr. Shlien learned of BRC, a limited partnership that operated as a hedge fund. Ms. Smith, who controlled BRC's general partner, managed the hedge fund and had the title of CEO. Mr. Shlien was interested in the "dividend capture" trading strategy that BRC said it employed.

[7] SDC was formed as a limited partnership, with Mr. Shlien's corporation as general partner. Its activities focussed specifically on investing, or acquiring investments, in BRC.

[8] Between December 26, 2018, and January 31, 2019, SDC transferred $4,510,000 to BRC. The funds were paid under a Subscription Agreement that

described the transfers as capital contributions to BRC in exchange for which SDC would receive a limited partnership interest in BRC.

[9] In addition to the approximately $4.5 million it paid to BRC, SDC acquired a further interest in BRC. Bluestone Capital Management, an asset management firm, had created three funds (known as the “A Funds”). Between September 2016 and May 2018, the A Funds had made capital contributions of $26,730,000 USD to BRC. On February 27, 2019, the interests of the A Funds in BRC were transferred to SDC. The A Funds became investors in SDC.

(2) The Lead Up to the Bond

[10] Beginning in about the fall of 2018, with the assistance of an insurance broker, Mr. Shlien sought insurance coverage from Berkshire for the SureFire Entities, including SDC. As SDC stresses, one of the risks Mr. Shlien was concerned about was fraud by parties with whom the SureFire Entities invested funds, referred to as “underlying managers” or “sub-advisors”. SDC also points out that this desire was known to Berkshire.

[11] For example, an application form that had been completed by Mr. Shlien for another potential insurer was supplied to Berkshire. In response to a question on the application form about why insurance was sought, Mr. Shlien responded:

> We are [trying] to add value to investors that want to invest through our Fund of Funds structure instead of allocating directly into the Underlying Managers. We believe that by adding insurance against fraud from our

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> underlying managers, employees or by Opus as our 3rd party administrator, we are adding a layer of comfort that our investors will appreciate.

[12] Moreover, in other pre-Bond communications, sub-advisors or underlying managers that SureFire Entities were using, including BRC, were identified to Berkshire. As noted below, BRC, and another sub-advisor, came to be referred to in the final version of the Bond. As it did at trial, SDC relies on certain communications which, according to SDC, made it known to Berkshire that Mr. Shlien wanted insurance against fraud committed by underlying managers or sub-advisors, including any Ponzi scheme committed by the directing mind of an underlying manager/sub-advisor. SDC argues that there was a telephone conference in December 2018 in which a representative of Berkshire gave oral assurances about what would be covered.

[13] The trial judge, however, made the following finding of fact about the effect of the communications:

> The evidence shows that Mr. Shlien was seeking coverage from Berkshire for the SureFire entities for loss resulting from fraud and theft by BRC. Before his February 19, 2019 email, [the insurance broker] did not use the term “Ponzi scheme” in relation to sub-advisors in his emails to [Berkshire] to describe the coverage that Mr. Shlien was seeking. When [Berkshire] informed [the insurance broker] on September 28, 2018 that a loss from fraudulent securities or investments perpetrated by a sub-advisor would not be covered, [the insurance broker] responded that this “makes sense”. However, [the insurance broker’s] email to [Berkshire] on February 19, 2019 makes it clear to [Berkshire] on that day that Mr.

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> Shlien is, in fact, seeking coverage for loss to SDC resulting from a Ponzi scheme perpetrated by a sub-advisor.
>
> The evidence does not, however, show that [Berkshire] told [the insurance broker], or Mr. Shlien, that the Bond would provide coverage for SDC for theft and fraud by the directing mind of a sub-advisor. To the contrary, on February 21, 2019, [Berkshire] responded to [the insurance broker's] request about coverage for loss resulting from a Ponzi scheme by stating that coverage for such a loss under a fidelity policy would be unlikely. [Emphasis added.]

(3) The Bond

[14] Berkshire issued the Bond on January 9, 2019, and three Riders that made changes to the Bond effective February 26, 2019.

[15] Under the Bond, as amended by the Riders, SDC (along with other SureFire Entities) was a named "Insured" under the Bond.

[16] One of the Bond's conditions specified that: "This [B]ond shall be for the sole use and benefit of the Insured named in the Declarations."

[17] The Bond stated that the coverage it afforded was "excess over any valid and collectible insurance or indemnity obtained by the Insured or any Subsidiary". The Bond provided definitions of each of the capitalized terms. It defined "Subsidiary" to include an organization existing at the time of the Bond or created during the Bond period in which the Insured directly or indirectly owned more than 50% of the voting rights to elect directors. Rider 13 expressly designated BRC

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(which would not otherwise have met the definition) as a “Subsidiary” with respect to “its operations and activities on behalf of any of the SureFire Funds”.

[18] Insuring Agreement (A)(1) provided that Berkshire would indemnify the Insured for “Loss resulting directly from dishonest or fraudulent acts…committed by an Employee … with the intent…to cause the Insured to sustain such a loss … or … to obtain improper financial benefit for the Employee or other natural person acting in collusion with such Employee”.

[19] “Employee” was defined to mean: “(1) an officer of the Insured while performing the duty of an Employee, (2) a natural person in the service of the Insured at any of the Insured’s offices or premises…whom the Insured compensates directly by salary or commissions and whom the Insured has the right to direct and control while performing services by the Insured.”

[20] Insuring Agreement A(4) of the Bond provided coverage for “Loss resulting directly from the Theft of Customer Property by a Registered Representative”. In relevant part “Registered Representative” meant “any registered representative, registered principal, registered investment advisor or other registered person of the Insured” and “Customer” meant “any natural person for whom the professional services of the Insured or the Registered Representative have been engaged” as evidenced by certain documents, or absent those documents, if the Insured had been determined by a court or regulatory authority to have vicarious liability to the

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Customer in connection with the Theft of Customer Property. “Customer Property” meant “Money or securities of a Customer”. “Theft” meant “larceny, embezzlement or other unlawful taking to the deprivation of the Customer.”

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(4) The Loss and the Claim Under the Bond

[21] In March 2019, SDC issued a request to BRC to redeem its investments. BRC agreed to wire transfer the funds on May 15, 2019, but did not do so. By about the end of June 2019, Mr. Shlien suspected fraud.

[22] On July 11, 2019, Mr. Shlien formally advised Berkshire of a claim under the Bond. SDC submitted a proof of loss to Berkshire on September 27, 2019.

[23] In September 2021, Ms. Smith pled guilty in a U.S. District Court to securities fraud, under an Indictment that alleged she had misrepresented to investors that she would invest funds provided to BRC in particular trading strategies, but instead diverted tens of millions of dollars of investor funds out of BRC for purposes inconsistent with the trading strategies, including for personal use and to pay out funds to other investors.

C. The Decision Below

[24] The trial judge rejected SDC’s position that the Bond required Berkshire to indemnify it as it had obtained the Bond to protect it against losses “resulting from theft or fraud by underlying investment funds or subadvisors” in which SDC had placed funds. In his view, this is not what the Bond said.

[25] With respect to the claim under Insuring Agreement A(1), the trial judge noted that SDC did "not assert that … [Ms.] Smith was an 'Employee' of SDC, a named Insured". He rejected SDC's position "that BRC is not an insured entity under the Bond, [and] that the effect of naming BRC as a 'Subsidiary' … with respect to its operations or activities on behalf of the Surefire funds is that an additional peril was insured against, that is, peril from a dishonest or fraudulent act committed by an 'Employee' of BRC [and that] Insuring Agreement (A)(1) should be interpreted to provide coverage for the loss claimed".

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[26] Instead, the trial judge interpreted the Bond's reference to BRC as a "Subsidiary" to mean that BRC was an "insured entity" under the Bond, and "would have coverage under the Bond". He noted Berkshire's concession that "as named 'Insured' under the Bond, SDC [was] entitled to make a claim for indemnification for any loss sustained by BRC, as an insured entity, and resulting directly from dishonest or fraudulent acts committed by an 'Employee' of BRC". While Berkshire asserted that there would be no coverage for fraud by Ms. Smith because she was not an "employee" of BRC but was BRC's alter ego, the trial judge found that he did not have to consider the alter ego issue, because in his view there was no claim by SDC for any loss sustained by BRC. He stated:

> It is not necessary for me to decide whether, if BRC had made a claim for coverage for loss resulting from Ms. Smith's Ponzi scheme, or if SDC, as a named Insured, had made such a claim on behalf of BRC, there

> would be coverage under the Bond. SDC does not seek coverage for a loss claimed by BRC.

[27] The trial judge also found no coverage under Insuring Agreement (A)(4), which provides coverage for loss resulting directly from the "Theft of Customer Property by a Registered Representative". The trial judge held that there had been no theft of SDC's property because once SDC's funds were invested with BRC, SDC did not retain any property interest in the funds. He stated: "Only BRC had a property interest in the money stolen or diverted by Ms. Smith. Since SDC retained no property interest in the funds it had invested with BRC, it was unable to demonstrate a "Theft" of its "Customer Property" within the meaning of those terms under the Bond.

[28] The trial judge also made certain findings that would have been relevant had he concluded that SDC had coverage for a loss under the Bond. First, he found that section 2(x) of the Bond relied on by Berkshire would not have applied. Section 2(x) would have excluded coverage for acts committed by "non-Employee" securities brokers. Second, he found that SDC's principal, Mr. Shlien, did not intentionally make an untrue statement in a warranty letter he provided to Berkshire. Third, he found that SDC breached a duty to disclose to Berkshire the transfer of the A Funds' interests in BRC to SDC. If he had found coverage, he would have excluded coverage for any losses arising from that transfer and limited

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the amount of the loss to $4.51M USD, that being the amount of SDC's own funds which it had paid to BRC.

D. The Issues on Appeal

[29] SDC raises what are essentially five grounds of appeal.

[30] First, it argues that the trial judge erred in law by giving effect to a defence not pleaded by Berkshire that appeared for the first time in the trial judge's reasons.

[31] Second, SDC argues that the trial judge erred in law in finding that SDC could not make a claim for its own losses under Insuring Agreement A(1) because he failed to interpret the Bond as a whole.

[32] Third, SDC submits that if it has coverage for fraud of an employee of BRC under Agreement A(1) that caused SDC a loss, that coverage is not defeated by Berkshire's position that Ms. Smith is BRC's alter ego. Although the trial judge did not decide that issue, SDC asks this court to decide it.

[33] Fourth, SDC maintains that the trial judge's conclusion that there was no coverage under Insuring Agreement A(4) was erroneous as it "defies common sense".

[34] Fifth, SDC argues that the trial judge erred in finding that any claim of SDC was limited to its direct investment and could not include the investments of the A Funds that were transferred to SDC.

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[35] Because of the conclusions I reach on the first, second and fourth issues, it is unnecessary to address the third and fifth issues.[1]

E. Analysis

(1) The Trial Judge Did Not Consider a Defence That Had Not Been Raised

[36] It is an error for a trial judge to decide a case on a basis that was not pleaded: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at para. 60. SDC submits that the trial judge violated this principle by giving effect to a defence that Insuring Agreement A(1) did not cover losses resulting from a fraud committed by Ms. Smith, who was not SDC's employee but was an officer of BRC. It points to the following passage of the trial judge's reasons as giving effect to a defence that was not pleaded:

> When Rider 13 was added to the Bond, there were no changes to Insuring Agreement (A)(1) to add coverage for an additional peril. Mr. Shlien was represented by…an insurance broker, when the Bond language was finalized. If the parties had intended to expand coverage under Insuring Agreement (A)(1) to provide for indemnification to SDC for losses resulting directly from dishonest or fraudulent acts committed by an "Employee" of BRC (a

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[1] Shortly before the appeal was scheduled to be heard, the Honourable Mark Falk (Ret.), in his capacity as U.S. Ancillary Receiver for BRC sought leave to intervene as an added party in the within appeal under r. 13.01 of the *Rules of Civil Procedure*. Leave to intervene was granted*: Surefire Dividend Capture, LP v. National Liability & Fire Insurance Company (Berkshire Hathaway Specialty Insurance)*, 2024 ONCA 644. At the hearing of the appeal, the Ancillary Receiver stated its position that this court should determine the appeal without varying the determination of the trial judge about BRC being an insured entity under the Bond, and without taking up the invitation to decide whether Berkshire would have an alter ego defence to any claim by BRC about Smith's fraud.

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> Subsidiary), they could have readily accomplished this objective by adding necessary language to change the coverage provided under Insuring Agreement (A)(1). This was not done.

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[37] I do not accept SDC's submission on the first ground of appeal.

[38] The onus is on the insured to prove its claim falls within the grant of coverage: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 37, at para. 52. Thus, it was SDC's onus to prove that its claim fell within the coverage granted in Insuring Agreement A(1). To do that, it had to prove that Ms. Smith met the definition of Employee of the Insured in the Bond.

[39] The statement of defence of Berkshire clearly denied SDC's assertion that there was coverage under Insuring Agreement A(1). Berkshire also specifically alleged, in para. 18 of its amended statement of defence, that: "[SDC] has not demonstrated that there is coverage for the Loss under Insuring Agreement A(1), for the following reasons:…(b) [w]hile [SDC] alleges that Smith orchestrated the fraud, she was not employed by [SDC] and she does not satisfy the definition of Employee *vis-à-vis* [SDC]".

[40] The defence that Ms. Smith was not an Employee of SDC, and that she did not meet the definition of Employee so as to allow SDC to make a claim for coverage under Insuring Agreement A(1) was clearly on the table. The trial judge did not err by considering it. The principle in *Rodaro* was not violated.

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(2) The Trial Judge Did Not Err in His Interpretation of Insuring Agreement A(1)

i. The Standard of Review

[41] As a general rule, a trial judge's interpretation of a contract is a question of mixed fact and law because it involves the application of the principles of contractual interpretation to the words of the contract considered in light of the factual matrix. Accordingly, as a general rule the palpable and overriding error standard of appellate review applies: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 52, [2014] 2 S.C.R. 633, at para. 50; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 21-24; *Ledcor*, at para. 21.

[42] In rare cases, a correctness standard will apply to extricable questions of law that arise in the interpretation process, such as the application of an incorrect principle. Appellate courts must be cautious, however, in determining that such an error has occurred: *Sattva*, at paras. 53, 55.

[43] An exception to the general rule of appellate deference to a trial judge's contractual interpretation also applies where "an appeal involves a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process". In such cases, the "interpretation is better characterized as a question of law subject to correctness review": *Ledcor*, at para. 24

[44] In this case, the *Ledcor* exception does not apply. There is a factual matrix specific to the parties, and elements of the Bond, such as Rider 13, are not standard form.

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[45] However, SDC argues that the trial judge made an extricable legal error by failing to interpret the Bond as a whole, and a correctness standard should therefore apply. SDC points specifically to the manner in which the trial judge gave effect to the Bond's reference to BRC as a "Subsidiary" in Rider 13.

[46] I disagree. SDC does not identify a relevant provision of the Bond or its Riders that the trial judge failed to take into account. Disagreement with how the trial judge reconciled various provisions of the Bond is not the equivalent of a failure to consider the Bond as a whole. Equating them would be inconsistent with the caution that must be used in identifying an extricable legal error.

[47] Accordingly, a deferential standard of review applies to the trial judge's interpretation of the Bond.

ii. Applying the Deferential Standard of Review, the Trial Judge's Interpretation Should Not Be Interfered With

[48] As noted, central to SDC's argument that the trial judge's interpretation was flawed is its disagreement with the significance the trial judge ascribed to the Bond's reference to BRC as a "Subsidiary". The trial judge rejected SDC's position that what followed from that reference was that SDC may advance a claim for its

own losses in relation to a fraud perpetrated by its Subsidiary's employee or officer, even if that person was the directing mind of the Subsidiary. Instead, he interpreted the reference to mean that BRC had the status as an insured entity under the Bond, but that since no claim was made by it or on its behalf, that status did not assist SDC in its claim.

[49] According to SDC, the trial judge's interpretation is not plausible. SDC asserts that "BRC is not a named insured under the Bond" and that coverage is afforded only for "fraudulent act[s] … committed with the intent to cause the [named] Insured … loss". SDC further asserts that the Bond only permits actions or proceedings by the named Insured and makes no reference to loss of property of a Subsidiary.

[50] In my view, the interpretive decision the trial judge arrived at was open to him.

[51] First, the language of Insuring Agreement A(1) refers to loss caused to the Insured by conduct of an Employee, and the Bond defines Employee by reference to the position held with the Insured (for example, an officer of the Insured). Ms. Smith held no position with SDC. The trial judge properly recognized that for SDC to succeed, Employee would have to mean not only an officer of SDC – the Insured making the claim for its own loss – but also an officer of a Subsidiary, BRC. In other words, SDC's interpretation would require reading words into Insuring

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Agreement A(1) and the definition of Employee that are simply not there. As he noted, the parties did not amend the wording of Insuring Agreement A(1), or the definition of Employee, when Rider 13, with its reference to BRC as a Subsidiary, was added to the Bond. Nor did the Bond ever say that a Subsidiary's employee came within the definition of Employee of a named Insured.

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[52] In this regard, SDC's reliance on *Oshawa Group Ltd. v. Great American Insurance Co.* (1982), 132 D.L.R. (3d) 453, 36 O.R. (2d) 424 (C.A.), is misplaced. In that case, Oshawa Group Ltd. was the parent company of a corporate conglomerate and claimed indemnity under a fidelity bond for losses sustained as a result of fraudulent actions of the president of one of its subsidiaries. The fidelity policy named the insured as "Oshawa Group Limited and their subsidiaries". The dishonest "employee" was the president of a subsidiary of Oshawa Group Ltd. which the court found, as the parent company, had the right to direct his performance within the meaning of that policy's definition of "employee". The employee took secret commissions which the court held was a loss to Oshawa Group Ltd. to whom the employee owed a fiduciary duty: at pp. 460-61. In other words, the case is distinguishable from the case at bar.

[53] Secondly, SDC's references to the pre-Bond communications do not provide a justifiable basis to interfere with the trial judge's interpretation of the language of Insuring Agreement A(1) in the manner that SDC suggests. The factual matrix may be used to assist in understanding the meaning of the words used by illuminating

what the parties objectively intended and what they reasonably understood their words to mean: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at para. 64. But the trial judge's findings do not support SDC's contention about what the words in Insuring Agreement A(1), read in light of the Bond as a whole, were objectively intended or reasonably understood to mean.

[54] The trial judge found that in September 2018 Berkshire told SDC's insurance broker that "a loss from fraudulent securities or investments perpetrated by a sub-advisor would not be covered". He also found that, on February 21, 2019, in answer to a direct question about whether there would be coverage for a Ponzi scheme perpetrated at a sub-advisor, Berkshire responded "by stating that coverage for such a loss under a fidelity policy would be unlikely".

[55] The trial judge was properly sensitive to attempting to observe a line between objective facts known to the parties at the time of contracting, and evidence of negotiations. Where the line is, exactly how it is to be drawn, and whether it is necessary to draw it, can be difficult issues: see *Corner Brook v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at paras. 56-57. But in light of the trial judge's findings, the most that can be drawn from the pre-Bond communications is that Mr. Shlien wanted coverage for the type of circumstance that in fact occurred, but Berkshire never indicated that coverage was on offer. This does not assist SDC

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or demonstrate a palpable and overriding error in the trial judge's interpretation of the Bond.

[56] Finally, SDC's argument that the Bond should be read as it proposes because there is, essentially, no other way to give meaning to the reference in the Bond to BRC as a Subsidiary, also fails. The trial judge's view, that BRC is an insured entity under the Bond in the same fashion as would be the case for a more traditionally defined subsidiary formed after the Bond came into effect, is not an implausible interpretation. He rooted that conclusion in the wording of the Bond and the relevant factual matrix, including the addition of Rider 13 which provided that coverage under the Bond was excess over "any valid and collectible insurance or indemnity obtained by the Insured or any Subsidiary". He appropriately drew from this that there must be coverage under the Bond to a Subsidiary as an insured entity, otherwise there was no point in referring to the Bond's coverage being excess to a Subsidiary's other insurance.

[57] It followed from the trial judge's conclusion that BRC was a separate insured entity with the same coverages as the other Insureds, that the reference to BRC in the Bond was not pointless. As the trial judge noted and Berkshire conceded, since BRC is an insured entity, a claim could have been made on behalf of BRC for its losses caused by Ms. Smith on the basis that Ms. Smith caused a loss to BRC and was BRC's "Employee", subject to an alter ego defence of Berkshire. But SDC chose not to advance such a claim, and instead chose to claim for its own losses

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on its own behalf, which required it to show that Ms. Smith was its Employee.[2] The trial judge was entitled to reject that claim.

[58] I would therefore reject this ground of appeal.

(3) The Trial Judge Did Not Err in Declining to Find Coverage Under Insuring Agreement A(4)

[59] In my view, the trial judge was entitled to find that SDC's claim does not fit within Insuring Agreement A(4).

[60] As explained in *Sattva*, at para. 47, the interpretation of contracts has evolved toward "a practical common-sense approach not dominated by technical rules of construction"; the goal is to determine the intent of the parties, which requires the words of the contract to be considered in light of the surrounding circumstances known at the time of contracting. Although SDC asserts that common sense supports its position, it fails to show any reversible error by the trial judge in concluding that its claim does not fit within the words of this Insuring Agreement and its carefully defined terms.

[61] The trial judge was prepared to accept that Ms. Smith was a Registered Representative within the meaning of the provision and that SDC's investors were Customers.

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[2] In oral submissions on appeal, counsel for SDC made it clear that SDC claiming for its own losses and claiming on behalf of BRC for its losses is not simply a semantic difference. SDC did not wish to, and did not, advance a claim on behalf of BRC.

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[62] The trial judge identified the two critical questions: what kind of wrongful act engaged Insuring Agreement A(4), and whose property was the subject of that wrongful act when it occurred.

[63] On the first question, it was open to the trial judge to interpret Insuring Agreement A(4) to require that the loss occur through an actual taking of Customer Property, as opposed to some other form of dishonesty that may have preceded it, such as Ms. Smith's misrepresentations to Mr. Shlien about the type of trading strategy BRC followed which induced him to have SDC transfer money to BRC. Insuring Agreement A(4) defined theft to mean "larceny, embezzlement or other unlawful taking to the deprivation of the Customer" (emphasis added). This was in contrast to Insuring Agreement A(1), which spoke more broadly of fraudulent or dishonest acts. The trial judge's interpretation of the Bond's language is entitled to deference.

[64] On the second question, SDC advanced funds, even if initially raised from investors, to BRC in exchange for SDC receiving a limited partnership interest in BRC. The trial judge found that the funds then were property of BRC. No error has been shown in that finding, which is also entitled to appellate deference. When Ms. Smith stole or diverted the money, the funds SDC had transferred were not Customer Property, because they no longer belonged to investors in SDC, or to SDC itself. They belonged to BRC. Accordingly, the theft was not of Customer Property as defined in the Bond.

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[65] I would therefore reject this ground of appeal.

F. Disposition

[66] I would dismiss the appeal. In accordance with the agreement of the parties, I would award costs of the appeal to Berkshire, payable by SDC, in the sum of $80,000, all-inclusive. I would not award any costs to or against the intervener.

Released: April 30, 2025 “B.Z.”

“B. Zarnett J.A.”
“I agree. P.J. Monahan J.A.”
“I agree. R. Pomerance J.A.”

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