COURT OF APPEAL FOR ONTARIO

CITATION: Wiener Städtische Versicherung AG Vienna Insurance Group v. Infrassure Ltd., 2025 ONCA 20
DATE: 20250116
DOCKET: COA-23-CV-1153

Miller, Monahan and Dawe JJ.A.

BETWEEN

Wiener Städtische Versicherung AG Vienna Insurance Group

Plaintiff (Defendant)

and

Infrassure Ltd.

Defendant (Appellant)

Robert B. Bell, Shannon M. Gaudet and Rebecca F. Shoom, for the appellant

William McNamara, Chris Hunter and Morag McGreevey, for the respondent

Heard: November 18, 2024

On appeal from the order/judgment of Justice Barbara A. Conway of the Superior Court of Justice, dated September 21, 2023, with reasons reported at 2023 ONSC 5256.

Monahan J.A.:

OVERVIEW

[1] This appeal concerns the meaning and effect of a so-called “follow settlements” clause in a contract of reinsurance.

[2] The litigation arises from a failure that occurred in a flash furnace of the Vale (Canada) Limited ("Vale Canada") smelter in Sudbury, Ontario on February 6, 2011, resulting in a 26-week shutdown of the flash furnace. Vale Canada pursued a claim for business interruption losses under a primary insurance policy (the "Primary Policy") with its lead insurer Zurich Insurance Company Ltd. (Zurich). Zurich settled Vale Canada's claim in December 2014 for $140 million (the "Settlement").

[3] Zurich had entered into reinsurance contracts with a number of reinsurers,[1] including the respondent Wiener Städtische Versicherung AG Vienna Insurance Group ("VIG").[2] Zurich's reinsurance applied to a percentage of a settlement under the Primary Policy that exceeded US$50 million/C$63.465 million (the "Attachment Point"). In March 2015, VIG paid $8,433,643.78 to Zurich, representing VIG's portion of the Settlement pursuant to its reinsurance contract with Zurich.

[4] VIG, in turn, had entered into a retrocession agreement (the "Retrocession Agreement")[3] with the appellant Infrassure Ltd. ("Infrassure"), whereby VIG ceded

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[1] A contract of reinsurance involves one party (the reinsurer) agreeing to indemnify another party (the reinsured) against loss or liability that arises by reason of a risk that the reinsured has assumed under a separate insurance contract: See *Hill v. Mercantile and General Reinsurance Co. Plc.,* [1996] 1 WLR 1239 (U.K. H. L.), at 1251 ("*Hill v. Mercantile*").

[2] Thus, whereas under the Primary Policy Zurich was the insurer, under the reinsurance contract, Zurich was the reinsured while VIG was the reinsurer.

[3] A retrocession agreement is one whereby a reinsurer cedes some or all of the risk that it has assumed to a further reinsurer. Such "reinsurance of reinsurance" is termed a retrocession agreement in order to distinguish it from a traditional contract of reinsurance. The reinsurer ceding the risk (in this case, VIG) is

to Infrassure 99.89% of the risk and the associated premium that VIG had assumed under its policy of reinsurance with Zurich. VIG sought indemnification from Infrassure for 99.89% of the amount it had paid to Zurich, along with various other loss adjustment costs, arguing that Infrassure was bound by a “follow settlements” clause in the Retrocession Agreement (the “Follow Settlements Clause”).[4] Infrassure denied that it was required by the Retrocession Agreement to indemnify VIG. This led VIG to commence the present action for damages against Infrassure.

[5] Following a 13-day trial which included testimony from 19 witnesses, the trial judge found that Infrassure was bound by the Follow Settlements Clause in the Retrocession Agreement and that there was no basis to qualify or limit Infrassure’s obligation in that regard. She therefore awarded judgment in favour of VIG in the amount of $8,969,760.17, plus costs. Infrassure appeals, arguing that the trial judge failed to follow recognized principles of contractual interpretation, leading to errors of law and of mixed fact and law in her interpretation and application of the Retrocession Agreement.

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called the "retrocedant", while the further reinsurer who assumes the risk ceded (in this case, Infrassure) is termed the "retrocessionaire".

[4] As is explained in more detail below, the Follow Settlements Clause required that, except as expressly provided otherwise in the Retrocession Agreement, Infrassure was to "follow the settlements" entered into by Zurich under the Primary Policy with Vale Canada.

[6] For the reasons set out below, the trial judge correctly articulated and applied the relevant principles of contractual interpretation in her analysis of the Retrocession Agreement. As such, she did not commit any of the errors of law alleged by Infrassure. Nor did the trial judge make any palpable and overriding errors in her findings of mixed fact and law, which were reasonable and open to her on the record. Accordingly, I would dismiss the appeal with costs.

FACTUAL BACKGROUND

[7] The factual background to the litigation is described in some detail in the comprehensive reasons of the trial judge. What follows is a summary of the relevant background facts.

A. The February 6, 2011 incident

[8] On February 6, 2011, approximately 300 to 400 tons of molten material leaked out of “tap holes” in one of the two flash furnaces at Vale Canada’s smelter in Sudbury. The molten material severed cooling water lines and set off steam explosions. As a result, the flash furnace was shut down for 26 weeks, resulting in a significant loss of Vale Canada’s production capacity.

[9] Vale Canada took steps to mitigate its loss, primarily by increasing the grade of nickel concentrate used in the remaining flash furnace. Vale Canada also considered various repair options and ultimately decided, due to safety concerns,

to do a partial rebuild of the flash furnace instead of a local repair to the tap holes only.

B. Investigation of Vale's loss

[10] Immediately following the February 6, 2011 incident, Vale Canada, Zurich and the reinsurers became involved in the investigation of the loss. The reinsurers created a steering group (the "Steering Group") to coordinate and streamline the investigation for the reinsurance market. Infrassure was included in the Steering Group, but VIG, which had passed nearly all of its risk on to Infrassure, was not. Vale Canada, Zurich and the Steering Group each retained numerous advisors and professionals, including adjusters, forensic accountants, lawyers and technical experts.

[11] In January 2012, Vale Canada made a business interruption claim under the Primary Policy for $484 million. In July 2013, Vale Canada revised its claim to $254 million, using a different methodology and based on a 26-week period of business interruption.

[12] In July and September 2014, there were two "hot tub" meetings between Vale Canada, Zurich and their technical experts. According to the evidence of Zurich's insurance adjuster, those meetings gave the insurers a better understanding of Vale Canada's position that the flash furnace had sustained significant water damage, thereby supporting Vale Canada's position that a partial

rebuild of the flash furnace (as opposed to a local repair to the tap holes only) was necessary.

[13] By the fall of 2014, Vale Canada indicated that if its claim was not resolved by year-end, it would initiate litigation. Settlement meetings were scheduled between Vale Canada and the insurers for December 11 and 12, 2014.

C. The December 2014 settlement and Infrassure's refusal to participate

[14] On December 1, 2014, the forensic accounting experts for both sides exchanged reports. Vale Canada's December 1, 2014 revised claim was for $246 million, based on a 20-week period of business interruption. The forensic accountants for Zurich and the reinsurers submitted a joint report (the "Joint Report") which valued the Vale Canada claim at $69.9 million, based on a 10-week repair period and assuming no coverage for certain losses claimed by Vale Canada. The Joint Report also included various other scenarios which would have resulted in higher estimated losses, ranging between $86.4 million and $148.8 million.

[15] On December 11, 2014, Vale Canada, Zurich and certain of the reinsurers, including Infrassure, signed an agreement to negotiate (the "Agreement to Negotiate").

[16] On the first day of the meeting, each side made presentations. Zurich's forensic accountants detailed how they would apply a series of adjustments to the

$246 million claimed by Vale Canada, based on certain disputed items. According to the presentation slides, depending on how those disputed items were resolved, Vale Canada's loss would range from $102 million to $161.3 million. As Zurich later reported to the reinsurers, at the end of the first day, Vale and Zurich were approximately $90 million apart. Vale was still insisting on at least $200 million.

[17] On December 12, 2014, there was significant movement. It became apparent that Vale Canada and Zurich had reached an agreement to resolve the claim under the Primary Policy for $140 million. Infrassure's representative advised he did not agree with the proposed settlement and left the meeting.

[18] Zurich recommended the Settlement to the reinsurers, noting that it properly reflected the risks faced by both Vale and the insurance community. All of the reinsurers except for Infrassure agreed to pay their respective shares of the Settlement, and Vale Canada and Zurich proceeded to sign a settlement agreement (the "Settlement Agreement"). An appendix to the Settlement Agreement noted that there was an outstanding and unresolved issue as to whether Zurich was required to pay Vale the proportionate share of the Settlement that was to be contributed by VIG and/or Infrassure.

[19] In the weeks following the Settlement, VIG sought clarification from Infrassure of its reasons for refusing to participate. Infrassure sent VIG the December 1, 2014 Joint Report (which had estimated Vale Canada's losses at

approximately $70 million) and raised various issues with respect to Vale Canada's claim. VIG indicated that it did not understand how the issues identified by Infrassure resulted in the Vale Canada claim being reduced to $70 million and sought a further explanation. However, no such explanation was ever provided by Infrassure.

[20] In the meantime, Zurich demanded payment from VIG of its share of the Settlement by January 30, 2015. On January 27, 2015, VIG advised Zurich that it would not take a position that was different from that taken by Infrassure. Discussions between Zurich and VIG continued in February and March 2015, with Zurich arguing that the policy of reinsurance between Zurich and VIG required VIG to follow the settlement that had been reached with Vale Canada. On March 23, 2015, VIG paid Zurich its proportionate share of the Settlement.

[21] VIG initiated arbitration proceedings against Infrassure in Switzerland, relying on conditions in VIG's contract of reinsurance with Zurich that required a reinsurer to follow Zurich's settlements (the "Zurich Conditions").[5] Infrassure took the position that the Swiss tribunal did not have jurisdiction to hear the dispute because the Zurich Conditions did not form part of the Retrocession Agreement

[5] See, in particular, clauses 3 and 5.2 of the Zurich Conditions. The Zurich Conditions required that any disputes between the parties to the contract were to be arbitrated in Switzerland in accordance with Swiss law, which was the basis upon which VIG had instituted arbitration proceedings with Infrassure in Switzerland.

between VIG and Infrassure, an argument that was accepted by the Swiss Federal Supreme Court.[6] VIG then proceeded with its civil claim against Infrassure in Ontario.

THE RETROCESSION AGREEMENT

[22] The Retrocession Agreement between VIG and Infrassure consisted of the following:

> (i) a 15-page “Risk Details Form”, setting out the terms and conditions of the contract; and
>
> (ii) a 7-page “Contract Administration and Advisory Details Form”, addressing various matters relating to the administration of the Risk Details Form.

[23] These documents (sometimes referred to collectively as the “Slip”) were part of a global insurance program put in place by Vale S.A., a Brazilian mining company and the parent of Vale Canada. They are standard London market forms and contain standard London market clauses and terminology.

A. The Risk Details Form

[24] As noted above, the Risk Details Form set out the key terms and conditions of the Retrocession Agreement, including the parties, the risks covered, limits on coverage and cancellation rights. Of particular relevance to this appeal are two

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[6] The Swiss Federal Supreme Court found that the parties to the Retrocession Agreement (i.e. VIG and Infrassure) "did not want to be bound by any provisions which have not been included in their contracts, such as the arbitration clause under section 7 of the Zurich conditions."

provisions of the Risk Details Form: the Follow Settlements Clause and the "Claims Co-operation Clause".

(i) The Follow Settlements Clause

[25] The Follow Settlements Clause provided as follows:

> This reinsurance will follow the terms and conditions of the Original policy(ies) in all respects and will follow the settlements of the Original policy(ies), in each case save in so far as any express term on this reinsurance provides otherwise.

[26] As is evident from this wording, the Follow Settlements Clause had two operative elements. The first was that the terms and conditions of the reinsurance under the Retrocession Agreement would follow in all respects the terms and conditions of the Primary Policy. This meant, amongst other things, that the risks insured under the Retrocession Agreement were co-extensive or "back-to-back" with those under the Primary Policy.[7]

[27] The second element was that parties to the Retrocession Agreement would "follow" settlements reached under the Primary Policy, except to the extent that "any express term on this reinsurance provides otherwise". The parties differ on the circumstances in which the obligation to be bound by settlements under the

[7] For a discussion of the significance of 'back-to-back' risk coverage in contracts of insurance and reinsurance, see *Assicurazioni Generali SpA v. CGU International Insurance plc*, [2004] EWCA Civ 429 (*Assicurazioni Generali*), at para. 16.

Primary Policy is engaged, as well as what constitutes an "express term provid[ing] otherwise".

(ii) The Claims Co-operation Clause

[28] The Claims Co-operation Clause imposed a number of obligations on VIG, including that it provide Infrassure with written notice as soon as reasonably practicable of any claim notified to VIG. VIG was also required to furnish Infrassure with all information in respect of any claim and to keep Infrassure fully informed of any developments regarding the claim. VIG was further required to cooperate with Infrassure, or any persons designated by Infrassure, in the investigation, adjustment and settlement of such claims. However, the Claims Co-operation Clause did not require VIG to secure Infrassure's approval of any settlement reached under either the Primary Policy, or VIG's reinsurance policy with Zurich.

(iii) Infrassure proposes and then deletes stamp language giving it the right to approve settlements under the Retrocession Agreement

[29] Infrassure had originally sought to participate as a direct reinsurer in Vale S.A.'s global insurance program and, accordingly, had been provided with a copy of Zurich's Risk Details Form. Infrassure executed the Risk Details Form but in so doing affixed a stamp to the Form stating, *inter alia*, that "[n]otwithstanding slip conditions, all terms, changes, endorsements, policy wording and claims payments to be agreed by Infrassure" (the "Proposed Stamp Language").

[30] Vale S.A.'s broker immediately rejected the inclusion of the Proposed Stamp Language on the basis that it contradicted the follow settlements clause and would not be accepted by Zurich. Infrassure then affixed a revised stamp to the Risk Details Form in which the Proposed Stamp Language was struck out. Infrassure also signed and affixed this revised stamp to the Zurich Conditions, which included an obligation by reinsurers to follow Zurich's settlements.

[31] Despite Infrassure's removal of the Proposed Stamp Language, Zurich rejected Infrassure as a reinsurer because of concerns over Infrassure's security and capacity. Infrassure then decided to participate in the global insurance program through a retrocession agreement rather than as a direct reinsurer. Arrangements were made for VIG to serve as a fronting reinsurer so that Infrassure could participate in the program as a retrocessionaire. VIG entered into a reinsurance agreement with Zurich, while Infrassure signed the Retrocession Agreement with VIG. The latter agreement included the Follow Settlements Clause as set out above, rather than the follow settlements provisions in the Zurich Conditions.[8] The Retrocession Agreement also included an identical version of

[8] The parties differ on the precise legal effect of the "follow settlements" provisions in the Zurich Conditions. Nevertheless, as is explained below, because the Zurich Conditions were not incorporated in the Retrocession Agreement between VIG and Infrassure, those conditions do not limit or qualify Infrassure's obligation under the Retrocession Agreement to follow settlements entered into by Zurich under the Primary Policy. It is therefore unnecessary to determine the precise legal effect of the follow settlements provisions in the Zurich Conditions in order to resolve the parties' dispute regarding their obligations under the Retrocession Agreement.

Infrassure's stamp, as it had appeared on its revised initial offer, with the Proposed Stamp Language struck out.

B. The Contract Administration and Advisory Details Form

[32] The Contract Administration and Advisory Details Form included a subscription agreement (the "Subscription Agreement"), which identified Infrassure as the "Slip Leader" and, as such, as a "Claims Agreement Party". It also contained a section entitled "Basis of Claims Agreement" which provided that reinsurers under the Retrocession Agreement agreed on how claims were to be managed. This section stated that "Non-Bureau/Overseas Reinsurers" were to "agree each for their own proportion". Although the Subscription Agreement contemplates other reinsurers subscribing to the policy, no others did.

[33] As is discussed below, Infrassure argues that these provisions in the Subscription Agreement are an "express term that provides otherwise" and therefore qualify or limit Infrassure's obligation under the Follow Settlements Clause to be bound by settlements reached under the Primary Policy. For this reason, amongst others, it claims the right not to participate in any settlement to which it has not agreed.

THE TRIAL JUDGE'S REASONS

[34] After outlining the factual background, the trial judge set out the relevant principles of contract interpretation. She noted that the goal of the exercise is to

give effect to the intention of the parties at the time the contract was entered into. Relying on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the trial judge affirmed that the contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. The factual matrix against which the contract is to be interpreted consists of objective evidence of the background facts at the time of execution, such as the genesis and aim of the transaction, its background and context, and the market in which the parties were operating. Words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in accordance with sound commercial principles and good business sense.

[35] In light of these governing principles, the trial judge then considered whether Infrassure was required to follow the December 12, 2014 Settlement under the Primary Policy by virtue of the Follow Settlements Clause. She found that the wording of the Follow Settlements Clause was clear and that it required Infrassure to follow settlements reached under the Primary Policy unless “any express term on this reinsurance provides otherwise”. She noted that Infrassure’s Proposed Stamp Language may well have “provided otherwise” and overridden the Follow Settlements Clause, but that Infrassure had struck that language, a deletion that was “deliberate and significant”.

[36] The trial judge also considered Infrassure's argument that the Subscription Agreement's identification of Infrassure as a "Claims Agreement Party", and its statement that "Non-Bureau/Overseas (Re)insurers" were to "agree each for their own proportion", were an "express term on this reinsurance provid[ing] otherwise" for purposes of the Follow Settlements Clause. She rejected Infrassure's argument in that regard, finding that the wording in the Subscription Agreement relied upon by Infrassure was general and that it "does not purport to give rights that would override a clear obligation in the Risk Details Form to follow settlements under the Local Policy between Zurich and Vale." Nor, in the trial judge's view, did the Agreement to Negotiate or the Settlement Agreement purport to alter the legal rights of the parties under the Retrocession Agreement. She concluded that the Follow Settlements Clause applied and required Infrassure to follow settlements reached under the Primary Policy.

[37] The trial judge further explained, however, that Infrassure's obligation in this regard was qualified and not absolute. Relying upon a number of U.K. cases,[9] the trial judge held that even where a follow settlements clause uses unqualified language, a reinsurer is only required to follow settlements reached by the lead

[9] The trial judge noted that there did not appear to be any case law in Canada interpreting a follow settlements clause in a reinsurance contract. The British Columbia Court of Appeal in *Swiss Reinsurance Company v. Camarin Limited*, 2015 BCCA 466, 82 B.C.L.R. (5th) 68, at para. 91, made a passing reference to such "follow the settlements" clauses but, given that there was no such clause in the contract before it, did not discuss the matter in any detail. The trial judge therefore turned to relevant UK cases for guidance, including *Insurance Co of Africa v. Scor (UK) Reinsurance Co Ltd*, [1985] 1 Lloyd's Rep. 312 (C. A. (Civ. Div.)) (*Scor*); and *Assicurazioni Generali.*

insurer where: (i) the claim as recognized by the lead insurer falls within coverage "as a matter of law"; and (ii) in settling the claim, the lead insurer must have proceeded in good faith and have taken all "proper and businesslike steps". In the trial judge's view, these two conditions (the "*Scor* Conditions") fairly balance the competing interests at stake since a reinsurer that has agreed to follow settlements should not be entitled to require the lead insurer to prove every element of the insured's underlying claim, provided that the settlement by the lead insurer falls within the bounds of coverage and is entered into on the basis of proper and businesslike steps.

[38] The trial judge proceeded to find that both of the *Scor* Conditions were satisfied in this case. The first requirement – that the claim falls within coverage "as a matter of law" – is met if the claim as accepted by the insurer is "arguably" covered under the policy, even if the claim might well have failed if the matter had proceeded to trial.[10] The trial judge considered whether two exclusions in the policy applied so as to limit the claim under the Primary Policy.[11] Relying in particular on a coverage opinion provided by Zurich's coverage counsel, the trial judge found

[10] See *Assicurazioni Generali*, at para. 16.
[11] The exclusions were for (i) business interruption losses during the time needed to repair "refractory linings"; and (ii) damage resulting from "oxidation".

that it was arguable that neither exclusion applied and, thus, the settlement was within coverage “as a matter of law”.[12]

[39] The trial judge further concluded that Zurich took proper and businesslike steps before entering into the Settlement. These steps included investigating and analysing Vale’s business interruption claim over a period of over three-and-a-half-years; retaining numerous forensic and technical experts to ascertain the basis for Vale’s claim; seeking legal counsel on the terms of the Primary Policy and whether any exclusions applied; and arranging for their experts to participate in hot tub sessions with Vale’s experts in July and September 2014. The trial judge also noted that all of the issues now raised by Infrassure were considered by Zurich and the other reinsurers in the course of their detailed investigation of Vale’s claim and were taken into account before deciding to enter into the Settlement.

[40] The trial judge concluded her discussion of the ‘proper and businesslike’ steps issue as follows:

> Ultimately, Zurich entered into the Settlement based on the investigations and assessments it conducted. It sought input from and worked collaboratively with the Steering Group. It engaged qualified experts. It evaluated

[12] Some commentators have argued that the trial judge misinterpreted the first step of the *Scor* test, which merely requires that the claim "as it was accepted by the reinsured" arguably falls within the terms of the policy: see *Colinvaux’s Law of Insurance*, 13th ed. (London: Sweet & Maxwell, 2022), 2nd Cum. Supp. (May 2024), at paras. 18-81; and Clark Wilson, “Reinsurance and follow the settlements clauses: What you need to know” (January 31, 2024), online (blog) <cwilson.com/reinsurance-and-follow-the-settlements-clauses-what-you-need-to-know/>. This issue is considered further below, where I explain that it is unnecessary to come to a conclusion on the matter since, even if the trial judge made this alleged error, it would not call into question the correctness of her ultimate finding that the settled claim was "arguably within" the Primary Policy.

> the risks it faced in litigation. Considering all of the evidence before me, I find that Zurich followed proper and businesslike steps in entering into the Settlement.

[41] The trial judge also considered Infrassure's argument that VIG had failed to take proper and businesslike steps when it made the payment to Zurich under its Reinsurance Agreement. The trial judge pointed out that Infrassure was required to follow settlements entered into by Zurich and thus the requirement to take proper and businesslike steps applied to Zurich but not to VIG. In the alternative, if VIG was also required to take proper and businesslike steps before paying Zurich, the trial judge found that VIG had met this standard. The trial judge pointed out that the Settlement was recommended by the Steering Group which had been actively investigating the Vale claim and reporting to reinsurers over a three-and-a-half-year period. Further, VIG repeatedly sought a reasonable explanation from Infrassure as to why it refused to follow the Settlement, but never received any such explanation. In the circumstances, VIG satisfied any obligation it might have had to follow proper and businesslike steps before making the payment to Zurich.

[42] Accordingly, the trial judge granted judgment to VIG for $8,969,760.17, representing 99.89% of the amount VIG had paid Zurich on account of the Settlement ($8,433,674.78) plus 99.89% of loss adjustment costs VIG had paid to Zurich ($536,116.39).

GROUNDS OF APPEAL

[43] Infrassure argues that the trial judge erred in the following respects:

1. By misinterpreting the Retrocession Agreement and failing to find that Infrassure's "claims agreement rights" under the Subscription Agreement qualified its obligation under the Follow Settlement Clause, such that Infrassure was not required to contribute to a settlement to which it had not agreed;

2. By erroneously applying the "unqualified/single proviso" Follow Settlements Clause in the Retrocession Agreement, rather than the "qualified double proviso" clause in the Zurich Conditions. Had the trial judge properly applied the "double proviso" follow clause, she would have required VIG to prove on a balance of probabilities that the Settlement was in fact covered under the Primary Policy as well as the reinsurance policy, as opposed to requiring only that the Settlement was "arguably covered";

3. By failing to consider key evidence on issues of coverage, including the Primary Policy's exclusions for refractory repair and for losses from oxidization, which ought to have applied so as to reduce Vale Canada's claim;

4. By concluding that Zurich had taken all "proper and businesslike steps" before entering into the Settlement, ignoring the fact that Zurich had entered into a rushed settlement based on a fundamentally flawed analysis. Had Zurich conducted a proper analysis of the Vale Canada claim, they ought to have concluded that there was no coverage for the extended repair period claimed by Vale Canada and agreed to by Zurich; that Zurich's calculation of the loss contained significant errors; and that Vale Canada's loss did not exceed the Attachment Point.

5. By finding that VIG took all proper and businesslike steps before paying Zurich over Infrassure's objection, despite having no evidence of any assessment steps taken by VIG; and

6. By ordering Infrassure to pay adjusting fees to VIG without any evidence of an agreement between VIG and Zurich calling for such a payment. Moreover, because VIG had no obligation to contribute to the Settlement, it had no obligation to contribute to costs incurred in reaching the Settlement.

ANALYSIS

A. Standard of review

[44] It is well established that contractual interpretation, which involves questions of mixed fact and law, is ordinarily afforded deference on appellate review. Courts interpret contracts by applying principles of contractual interpretation to the words of the written contract, considered in light of the objective intention of the parties as well as the factual matrix at the time the contract was entered into. Because the trial judge is best placed to make such findings, the predominantly applicable standard of review is palpable and overriding error: *Sattva*, at para. 50; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21; *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 492 D.L.R. (4th) 389, at paras. 28–29.

[45] There are limited exceptions to this deferential standard. A correctness standard of review applies to "extricable questions of law" that arise in the interpretation process, such as "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva*, at paras. 53, 55. However, instances involving extricable questions of law will be "rare" and "uncommon", since ascertaining the objective intention of the parties is an "inherently fact specific exercise": *Sattva*, at para. 55; *Corner Brook (City) v. Bailey*, 2021 SCC 29, [2021] 2 S.C.R. 540, at para. 44.

[46] A further exception involves the application of correctness review to standard form contracts, but only where there is no meaningful factual matrix specific to the parties to assist in the interpretation process. Where meaningful evidence of the factual matrix does exist, the *Sattva* deferential standard of review will apply: *Earthco*, at para. 29. In this case, there was considerable evidence of the factual matrix within which the retrocession contract was negotiated, which supports application of a deferential standard in reviewing the trial judge's interpretation of the relevant contractual terms.

B. The trial judge did not err in her interpretation of the Retrocession Agreement, and specifically in her finding that the identification of Infrassure as a "claims agreement party" did not constitute an "express term providing otherwise" for the purposes of the Follow Settlements Clause

[47] Infrassure argues that the trial judge failed to properly apply well-recognized principles of contractual interpretation involving insurance contracts. Infrassure claims that this led the trial judge to make legal errors (as opposed to errors of mixed fact and law) in her interpretation of the Retrocession Agreement.

[48] First, Infrassure claims that it was an error of law to consider the Proposed Stamp Language in interpreting the Retrocession Agreement. Infrassure submits that evidence of pre-contractual discussion is generally inadmissible for the purposes of interpreting a contract: *Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007, 77 B.L.R. (5th) 175, at para. 112, rev'd in part, 2019 SCC 60, [2019] 4 S.C.R. 394. Infrassure argues that the trial judge erred

by considering a stamp applied to a previous offer that was never formalized into a contract and which did not involve the same parties.

[49] Second, Infrassure argues that the trial judge made a further legal error in failing to read the Retrocession Agreement as a whole to arrive at a harmonious interpretation which gave meaning to all provisions. In particular, the trial judge gave no meaning to the identification of Infrassure as a “claims agreement party” in the Subscription Agreement. Infrassure argues that witnesses for both parties testified that their mutual understanding was that the term “claims agreement party” gave Infrassure the right to settle for its own share of reinsurance. Infrassure further argues that this interpretation is reinforced by language in the Subscription Agreement stating that “Non-Bureau/Overseas (Re)insurers” are to “agree each for their own proportion.” Infrassure submits that these were express terms providing otherwise that qualified its obligation to follow settlements reached under the Primary Policy

[50] In my view, the trial judge committed neither of these alleged legal errors. Rather, she applied the correct legal principles in arriving at reasonable interpretations of the relevant terms of the Retrocession Agreement.

[51] First, the trial judge did not err in considering the Proposed Stamp Language. The trial judge made it clear that the Proposed Stamp Language was not being considered as evidence of either party’s subjective understanding, but

merely as factual evidence of what transpired when Infrassure included the language and then removed it when it sought to participate in Vale S.A.'s global insurance program as a direct reinsurer. It was thus admissible as objective evidence of the factual matrix that was known to the parties at the time the contract was executed, in the context of a global insurance program using standard London market forms and being managed by a single broker. It tended to show that both parties knew that Zurich would only accept reinsurers who agreed to be bound by settlements it reached with Vale. Moreover, it is evidence that Infrassure accepted this condition, since it resubmitted both the initial offer to reinsure and the final Retrocession Agreement with the Proposed Stamp Language struck out. As such, the evidence was admissible as part of the factual matrix, relevant to understanding the Retrocession Agreement's genesis, purpose and commercial context. This is not a case where the trial judge used the evidence to overwhelm the words of the agreement or deviate from the text to create a new agreement: *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 87 O.R. (3d) 81, at para. 55; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592, at para. 64.

[52] With respect to the second alleged error, the trial judge did not fail to consider the provisions in the Subscription Agreement relied upon by Infrassure. In fact, the trial judge accepted Infrassure's submission that the Subscription

Agreement formed part of the Retrocession Contract,[13] but went on to find that the relevant language was unclear and/or ambiguous and did not rise to the level of an "express term providing otherwise" as required by the Follow Settlements Clause.

[53] The trial judge acknowledged that Infrassure was identified as a "claims agreement party" in the Subscription Agreement, but found that this term was not defined, nor was there any indication of what rights might attach to that designation. Nor, contrary to Infrassure's submissions, was there any objective evidence that the parties had a mutual understanding of the meaning of the term "claims agreement party". While representatives of VIG and Infrassure testified as to their understanding of the term, the trial judge found that their evidence was not consistent or clear. In the trial judge's view, the term "claims agreement party" was sufficiently vague and general that it could refer to "anything along the continuum of accepting, investigating, and processing a claim under the Retrocession Agreement."

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[13] The trial judge made this finding based on the fact that the words "Subscription Agreement is not applicable to Infrassure" had been struck out of the Proposed Stamp Language by Infrassure. This highlights an internal contradiction in Infrassure's submissions on the proper interpretation of the Retrocession Agreement. On the one hand Infrassure argues that the Proposed Stamp Language should not have been considered in interpreting the Follow Settlements Clause in the Retrocession Agreement, while simultaneously arguing that this same language was properly considered in finding that the Subscription Agreement formed part of the Retrocession Agreement.

[54] As for the statement in the Subscription Agreement that (Re)insurers were to “agree each for their own proportion”, this must be read in context. It was part of a clause which began by providing that “(Re)insurers agree that all claims negotiations and settlements…shall be managed as follows”. Two aspects of this wording are significant. First, it makes reference to an agreement amongst reinsurers. Because VIG is the reinsured rather than a reinsurer, its rights could not have been affected by an agreement amongst reinsurers. Moreover, the referenced agreement between reinsurers merely applies to the manner in which claims are to be “managed”, as opposed to the substantive rights of reinsurers in relation to the reinsured.

[55] In short, the trial judge made neither of the legal errors alleged by Infrassure. Thus, her interpretation of the Retrocession Agreement is reviewable on a palpable and overriding error standard and is entitled to deference. I see no such error in her finding that the Subscription Agreement did not contain any “express term providing otherwise” for the purposes of the Follow Settlements Clause. *Blacks Law Dictionary*, 12th edition (2024) defines an “express term” as one that is “clearly and unmistakably communicated; stated with directness and clarity.” Similarly, in Fridman et al., *The Law of Contract in Canada*, 7th ed. (Toronto: Thomson Reuters, 2024), at §14:1, an “express term” is defined as “one which has been specifically mentioned, and agreed upon by the parties, and its form, character and context

expressed in the oral or written exchanges between them at the time the contract was made."

[56] As the trial judge aptly pointed out, the Proposed Stamp Language, which provided that "notwithstanding slip conditions… claims payments to be agreed by Infrassure" might well have constituted an "express term" that would have qualified Infrassure's obligation to follow settlements reached under the Primary Policy. But Zurich rejected that language when Infrassure sought to apply it to the documents that would have made Infrassure a direct reinsurer. It was then struck out by Infrassure, and ultimately was also not included in the subsequent Retrocession Agreement.

[57] No such clarity and specificity were present in the language used in the Subscription Agreement. There was no indication of whether the identification of Infrassure as a "claims agreement party" was intended to have any operative effect in its relationship with VIG, including whether it qualified or limited Infrassure's obligations under the Follow Settlements Clause. Nor could any agreement amongst reinsurers as to how they were to manage claims affect Infrassure's obligations to VIG in this regard.

[58] The trial judge's interpretation of the Subscription Agreement is reinforced by the wording of the Claims Cooperation Clause in the Retrocession Agreement. Claims cooperation clauses often include three parts: (a) notification of loss; (b)

consultation and cooperation in claims handling and investigation; and (c) approval of settlements: Edelman and Burns, *The Law of Reinsurance*, 3rd edition (2021), at paras. 5.10–5.32. Examples of such clauses may be found in *Scor* and in *Gan Insurance Co Ltd v. Tai Ping Insurance Co Ltd. (No. 2)*, [2001] EWCA Civ 1047. In *Scor*, the Claims Cooperation Clause provided not only that the reinsured would cooperate with the reinsurers, but also that "no settlement shall be made without the approval of the Underwriters subscribing to this Policy." That wording was sufficient to persuade the Court of Appeal in *Scor* that the insurers were precluded from entering into a settlement without the approval of the reinsurers.

[59] Tellingly, the Claims Cooperation Clause in the Retrocession Agreement included the first two usual sub-clauses, but makes no mention of claims or settlement approval, which is arguably the more restrictive of the three typical sub-clauses. Had the parties intended that the "Claims Agreement Party" clause restricted the Follow Settlements clause, one would have expected that they would have followed the *Scor* example and included that language directly into the Claims Cooperation Clause, and not in a Subscription Agreement that was part of the Contract Administration and Advisory Details Form.

[60] I conclude that the trial judge reasonably found that there were no "express terms to the contrary" that qualified or limited Infrassure's obligation to follow settlements reached by Zurich under the Primary Policy, in accordance with the Follow Settlements Clause. I would therefore dismiss this ground of appeal.

C. The trial judge did not commit a palpable and overriding error in applying the ‘single proviso’ Follow Settlements Clause in the Retrocession Agreement rather than the ‘double proviso’ follow settlements provisions in the Zurich Conditions

[61] Infrassure argues that the trial judge erred in failing to consider and apply a “double proviso” follow settlements clause in the Zurich Conditions, which were included in the reinsurance contract between Zurich and VIG, rather than the “single proviso” Follow Settlements Clause in the Retrocession Agreement.[14] Infrassure relies in particular on clause 5.2 of the Zurich Conditions, which provides that “all loss settlements made by Zurich, provided they are within the terms, conditions and limits of the Original Policies, and within the terms, conditions and limits of this Agreement, shall be binding on the Reinsurer.”[15] Infrassure argues that once VIG paid Zurich, over Infrassure’s objection, it assumed Zurich’s onus to prove both elements of the “double proviso” follow settlements clause in clause 5.2 of the Zurich Conditions on a balance of probabilities.

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[14] The leading UK cases distinguish between ‘single proviso’ and ’double proviso’ clauses requiring reinsurers to "follow the settlements" of the reinsured. As the trial judge explained, ‘single proviso’ follow settlements clauses, such as the relevant clause in *Scor*, trigger the liability of the reinsurer to indemnify the reinsured provided that (i) the claim that has been settled falls within the risks covered as “a matter of law”, namely, that the basis upon which the insured settled the claim is arguably covered by the policy; and (ii) that in settling the claim the reinsured has acted honestly and has taken all proper and businesslike steps. In contrast, in reinsurance contracts with a ‘double proviso’, the reinsured is normally required to prove that it was in fact liable to indemnify the insured under the original policy of insurance (rather than merely arguably so), as well as that the loss falls within the coverage in the policy of reinsurance. See Edelman, at paras. 4.14–4.16.

[15] This is a "double proviso" follow clause because it requires Zurich to prove, on a balance of probabilities, that the claim falls within the terms and conditions of the Primary Policy with Vale Canada, as well as the Reinsurance Agreement between Zurich and VIG.

[62] Whether Infrassure's obligation to follow the Settlement was governed by the Follow Settlements Clause in the Retrocession Agreement as opposed to clause 5.2 of the Zurich Conditions is a question of mixed fact and law, reviewable on a deferential standard. Infrassure has not identified any palpable and overriding error in the trial judge's finding that Infrassure is bound by the Follow Settlements Clause in the Retrocession Agreement, and that the Zurich Conditions have no relevance to this appeal.

[63] I note, first, that the Zurich Conditions are part of the reinsurance contract between Zurich and VIG, a contract to which Infrassure is not a party. Infrassure's contractual obligations to VIG are set out in the Retrocession Agreement, including the Follow Settlements Clause. Insurance policies and their reinsurance policies are separate, independent contracts: *Wasa International Insurance Co. Ltd. v. Lexington Insurance Co.*, [2009] UKHL 40, at paras. 32–33. In fact, this was the position taken by Infrassure in the Swiss courts, where it successfully argued that it was not bound by the arbitration clause in the reinsurance contract between Zurich and VIG because it was not a party to that contract. By parity of reasoning, Infrassure and VIG are not bound by any of the other provisions of the Zurich Conditions as between one another, including the follow settlement obligations in that agreement. Instead, their obligations in relation to settlements reached under the Primary Policy are governed by the contract to which Infrassure and VIG both agreed, namely, the Retrocession Agreement. It follows that VIG's obligation to

Infrassure was to prove only that it had paid Zurich and that the settlement was arguably covered as a matter of law under the Primary Policy: Edelman, at para. 4.22.

[64] In any event, even if clause 5.2 of the Zurich Conditions were somehow relevant to the dispute between VIG and Infrassure, the Zurich Conditions are subject to Swiss law.[16] At trial, both parties tendered expert evidence on Swiss law indicating that clause 5.2 would not be given the same construction under Swiss law as under English law. That expert evidence indicated that under the Swiss approach to contractual interpretation, a trial judge must seek to determine the subjective intention of the parties. The parties to the reinsurance contract were Zurich and VIG, both of whom understood and agreed that VIG was required to follow the Settlement. This is consistent with clause 3 of the Zurich Conditions which provides that the "true intent of this Agreement is that in every case to which this Agreement applies, the Reinsurer [i.e. VIG] shall follow the settlements of Zurich."

[65] Having tendered evidence of Swiss law at trial, Infrassure argued in its closing trial submissions that the court need not consider Swiss law to determine the issues in dispute. The trial judge therefore did not make a finding as to the legal effect of clauses 3 and/or 5.2 of the Zurich Conditions. Accordingly, there is no

[16] See clause 10 of the Zurich Conditions.

basis upon which this court could make any such finding, much less rely upon the Zurich Conditions to oust the Follow Settlements Clause in the Retrocession Agreement, to which VIG and Infrassure had agreed.

[66] I would therefore dismiss this ground of appeal.

D. The trial judge did not commit a palpable and overriding error in finding that the settlement arguably fell within coverage in the Primary Policy "as a matter of law"

[67] Apart from Infrassure's argument that its obligation to follow settlements should have been determined on the basis of the "double proviso" in the Zurich Conditions, Infrassure does not take issue with the fact that under "'single proviso'" follow settlements" provisions (such as the Follow Settlements Clause in the Retrocession Agreement), a reinsured is merely required to show that the settlement is covered "as a matter of law". Nor does Infrassure appear to dispute that a settlement falls within coverage as a matter of law if the basis upon which the insurer settled the claim is "arguably covered" under the relevant policy, without the necessity of proving, as a matter of fact, that the loss fell within the terms of the original policy.

[68] I note in passing that there are sound policy reasons in support of this "arguability" standard where, as in this case, the risks covered under the primary policy are identical or back-to-back with those under the reinsurance contract. As Lord Mustill noted in *Hill v. Mercantile*, at pp. 1251 to 1252, in such a case "the

interests of the direct insurers and the reinsurers are broadly the same, and it is not imprudent for the reinsurers to put themselves unconditionally in the hands of their reinsured for the settlement of claims which will be passed on to them." Moreover, it is well understood that many insurance settlements require good faith compromises on liability and quantum. Yet insurers would be reluctant to make such compromises if they understood that a reinsurer who had promised to follow the settlement could nevertheless thereafter insist that the insurer re-prove the original insured's claim. Not only would this incentivize litigation over settlement, to the detriment of both insureds and insurers who might otherwise have reasonably settled the issues in dispute, it would also tend to increase needless duplication of claims procedures by insurers and their reinsurers.[17] The arguability standard leaves scope for insurers to reasonably and efficiently settle claims, while also protecting reinsurers from being required to contribute to a settlement that clearly falls outside the bounds of the coverage that has been agreed to.

[69] In her discussion of whether the settlement was "arguably covered" by the Primary Policy, the trial judge focused on whether Vale Canada's claim fell outside of the coverage in the Primary policy by virtue of two exclusions in the Policy, for (i) claims resulting from damage to the furnace refractory lining; and (ii) losses

[17] These issues have been ably canvassed in various U.K. cases that have considered follow settlements clauses in the context of insurance and reinsurance contracts that have been written back-to-back. See: in particular, *Assicurazioni Generali*, at para. 11; *Scor*, at p. 330; *Tokio Marine Europe Insurance Ltd. v. Novae Corporate Underwriting Ltd.*, [2013] EWHC 3362 (Comm.), at paras. 72–98.

arising from ore oxidation. The trial judge found that it was at least arguable that neither of these exclusions applied, relying in particular upon a legal opinion prepared by Zurich's coverage counsel as well as her analysis of the evidence at trial.

[70] As noted above, certain commentators have suggested that it was unnecessary for the trial judge to review whether the facts of the incident, as she found them, justified a claim under the Primary Policy.[18] The academic argument is that all that was necessary was to determine whether the claim "as it was accepted by the reinsured" (i.e. based on the facts and law as found by the reinsured at the time) was one which arguably fell within the terms of the Primary Policy: John Birds, Ben Lynch & Simon Milnes, eds, *MacGillivray on Insurance Law*, 15th ed (London, UK: Sweet & Maxwell, 2022) at paras. 33–95. In other words, in applying the first *Scor* condition, the court is not required to make its own findings of fact as to how the loss occurred, but merely to determine the real basis on which the claim was settled: *Assicurazioni Generali* (QBD) at para. 40.[19]

[71] Ultimately, it is unnecessary to express a firm view on this issue since, even if, *arguendo*, the trial judge went beyond what she was required to do in order to

[18] See footnote 12 above.

[19] Infrassure's position at trial was that the "double proviso" in the Zurich Conditions applied and that, therefore, VIG was required to show that the claim as submitted by Vale Canada fell within coverage. The trial judge's findings of fact as to whether the policy exclusions actually applied can be read as responding to the way Infrassure argued its case before her.

find that Zurich's settlement was "arguably covered", this simply meant she was imposing an excessively high burden on VIG. This would not undermine her ultimate finding that the Settlement was arguably covered "as a matter of law" under the Primary Policy.

[72] I therefore find that the trial judge did not commit any reviewable error in finding that the claim recognized by Zurich was covered under the Primary Policy "as a matter of law" and would dismiss this ground of appeal.

E. The trial judge did not make a palpable and overriding error in finding that Zurich took all proper and businesslike steps in entering into the Settlement

[73] Infrassure argues that Zurich entered into a rushed settlement without properly investigating and adjusting Vale Canada's claim. In particular, Infrassure objects to the fact that the Settlement assumed that 14 to 15 weeks were needed for Vale Canada to repair the flash furnace, whereas going into the December 2014 settlement discussions the reinsurers' position was that only 10 weeks were required. Infrassure also takes issue with the fact that the Settlement accepted that a partial rebuild of the furnace was appropriate (as opposed to a localized repair), and with certain alleged calculation errors made by Zurich's experts in the adjustment of Vale Canada's claim.

[74] The relevant cases have not exhaustively canvassed what "proper and businesslike steps" include, although an allegation that a reinsured did not act in a

proper and businesslike manner is tantamount to an allegation of professional negligence: Edelman, at para. 4.22. It is also clear that insurers must turn their minds to possible defences and have regard to "the prospects and risks attaching to the claim": *Gan Insurance Co. Ltd. v. Tai Ping Insurance Co. Ltd. (No. 2)*, at para. 49. Additionally, the views of co-insurers may be an indication of whether the reinsured has acted in a bona fide and businesslike fashion: *Colinvaux*, at paras. 8–69; *English and American Insurance Co Ltd. v. Axa Re SA*, [2007] Lloyd's Rep. I.R. 359, at para. 30.

[75] The trial judge's finding that Zurich satisfied this standard was reasonable. She analysed in considerable detail Infrassure's objections to the terms of the Settlement. She pointed out that all of the issues now raised by Infrassure were considered by Zurich and the other reinsurers at the time. In fact, the negotiation brief prepared by Zurich's legal counsel in advance of the December 2014 settlement meeting canvassed these issues in detail and set out the strengths and weaknesses of Vale Canada's and Zurich's respective positions. The trial judge also pointed out that, while the reinsurers' position going into the December 2014 settlement discussions was that only 10 weeks were required to repair the furnace, Zurich's experts advised that this was a "best case" scenario and that an appropriate repair might well take an extra 4 to 5 weeks. The trial judge further found that that it was reasonable for Zurich to agree to the partial rebuild of the

furnace, given Vale's position that there had been considerable water damage from the incident.

[76] Once it was established that the settlement by Zurich was covered by the Primary Policy as a matter of law, the burden of proof shifted to Infrassure to prove an absence of good faith or that the settlement was not made in a businesslike fashion: *Charman v. Guardian Royal Exchange Assurance plc*, [1992] 2 Lloyd's Rep. 607, at p. 613; Edelman, at para. 4.22. It was also for Infrassure to show, on appeal, that the trial judge committed a palpable and overriding error in reaching her conclusion on this point.

[77] Infrassure has done neither. Instead, in substance it is once again calling into question the correctness of factual findings that were open to the trial judge on the record before her. I see no basis to intervene and would dismiss this ground of appeal.

F. The trial judge did not make a palpable and overriding error in finding that VIG took all proper and businesslike steps in paying Zurich its proportionate share of the Settlement

[78] Infrassure argues that, as a "fronting insurer" for Infrassure, VIG was required to oppose any proposed settlement to which Infrassure had not agreed. Infrassure points out that one of VIG's senior officers so advised Zurich in a January 2015 email. Infrassure further argues that the trial judge made a palpable

and overriding error in finding that VIG took all proper and businesslike steps by paying Zurich despite having no evidence of any assessment steps taken by VIG.

[79] Infrassure does not provide any legal basis for its assertion that VIG was required to oppose any settlement to which Infrassure had not agreed. As has already been pointed out, Infrassure's relationship with VIG was contractual and governed by the terms of the Retrocession Agreement. While that Agreement required Infrassure to follow settlements reached by Zurich, it imposed no obligation on VIG to follow positions taken by Infrassure. Moreover, VIG was required under its reinsurance contract with Zurich to follow Zurich's settlements under the Primary Policy, rather than positions taken by Infrassure, who was in any event a stranger to the reinsurance contract. VIG's January 2015 email to Zurich could not alter or relieve it from its contractual obligations in this regard.

[80] The trial judge made no palpable and overriding error in her analysis of the proper and businesslike steps issue. As the trial judge pointed out, Infrassure was required to follow settlements reached by Zurich under the Primary Policy. As such, the proper and businesslike standard applied to Zurich in entering into the settlement with Vale, and not to the payment by VIG to Zurich: *Tokio Marine* at paras. 70 and 120(v).

[81] In the alternative, the trial judge also addressed whether VIG itself took all proper and businesslike steps. She rejected Infrassure's submissions on the

ground that the Follow Settlements Clause did not require VIG to call on Zurich to prove coverage under the Reinsurance Agreement or to take any steps under the Reinsurance Agreement. Moreover, she concluded that VIG was faced with a settlement that was concluded after a lengthy period of investigation and adjustment. The Settlement was recommended by the Steering Group, of which Infrassure had been a member since its inception, that had been actively investigating the Vale Canada claim and reporting to reinsurers over a three-and-a-half-year period. All of the other reinsurers agreed to contribute their portion of the Settlement. Despite VIG's many requests for a detailed explanation as to why Infrassure considered the Settlement to be unreasonable, Infrassure never provided a reasoned response. In light of those circumstances, the trial judge found that VIG took applicable proper and businesslike steps.

[82] In short, the trial judge did not err in finding that VIG did not breach any obligation it had to Infrassure in making the payment to Zurich. I would therefore dismiss this ground of appeal.

G. There is no basis to interfere with the trial judge's order that Infrassure reimburse VIG for loss adjustment fees that VIG had paid to Zurich

[83] Infrassure argues that the trial judge erred in ordering reimbursement of loss adjustment fees paid by VIG to Zurich. Infrassure argues that there was no evidence of any agreement requiring VIG to make such a payment to Zurich and, accordingly, it should be under no obligation to reimburse VIG.

[84] I would not entertain this ground of appeal, which is an argument raised for the first time on appeal. At trial, Infrassure argued that VIG's claim for loss adjustment fees was statute barred, an argument that was dismissed by the trial judge. Infrassure has not appealed that finding. Instead, Infrassure now asks this court to make a finding as to whether there was an agreement between VIG and Zurich regarding the payment of loss adjustment fees. Quite apart from the fact that Zurich is not a party to the proceeding, Infrassure is once again attempting to make claims based on agreements to which it was not a party. Nor, in any event, is there any evidentiary basis upon which this court could make any such finding.

DISPOSITION

[85] For the foregoing reasons, I would dismiss the appeal. In accordance with the agreement of the parties, I would order Infrassure to pay VIG's costs of the appeal in the amount of $150,000 on an all-inclusive basis, within 30 days.

Released: January 16, 2025 "B.W.M."

"P.J. Monahan J.A."
"I Agree. B.W. Miller J.A."
"I Agree. J. Dawe J.A."