

COURT OF APPEAL FOR ONTARIO

CITATION: Cronos Group Inc. v. Assicurazioni Generali S.p.A., 2022 ONCA 525
DATE: 20220713
DOCKET: C69340

Fairburn A.C.J.O., Brown and Sossin JJ.A.

BETWEEN

Cronos Group Inc.

Applicant (Respondent)

and

Assicurazioni Generali S.p.A.

Respondent (Appellant)

George J. Karayannides and Mark C. Mandelker, for the appellant

Andrea Laing, Doug McLeod and Gregory Sheppard, for the respondent

Heard: March 14, 2022 by video conference

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated March 16, 2021, with reasons reported at 2021 ONSC 1704.

Brown J.A.:

I. OVERVIEW

[1] This appeal concerns the interplay between the provisions of primary and excess directors' liability insurance policies. The central issues are:

- (i) Where the excess policy provides that it follows the form of the primary policy, subject to certain exceptions, and the primary policy gives the insured the option of extending coverage for an Optional Extension Period, is the insured entitled to the same option under the excess policy as one of the follow-form terms?¹ and,
- (ii) If the option is available, what is the amount of the premium?

[2] Optional Extension Period coverage extends a claims-made policy's discovery period to cover claims made against an insured after the expiry of the

¹ A follow form excess policy generally will contain the same basic provisions as the underlying policy, with the exception of those provisions that are specifically excluded by the terms of the excess policy or inconsistent with the excess policy: *Hearing v. Topa Insurance Co.* (2016), 244 Cal. App. 4th 725 (Calif. C.A.), at 734. As explained in *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's* (2007), 449 Mass. 621 (Mass. Sup. Ct.), at pp. 629-630:

An insurance program involving a primary policy and one or more excess policies divides risk into distinct units and insures each unit individually. The individual insurers do not (absent a specific provision) act as coinsurers of the entirety of the risk. Rather, each insurer contracts with the insured individually to cover a particular portion of the risk. Use of a follow form clause is advantageous in crafting such an insurance program because it makes an excess policy a carbon copy of the primary policy, with the only differences being the names of the parties and the coverage limitations. Follow form language thus allows an insured to have coverage for the same set of potential losses (and with the same set of exceptions) in each layer of the insurance program. The language does not, however, bind the various insurers to a form of joint liability should coverage at a prior layer fail. The layer of risk each insurer covers is defined and distinct.

policy's initial term, so long as the wrongful acts giving rise to the claims were committed during the original policy period.

[3] The respondent, Cronos Group Inc. ("Cronos"), held a primary Executive and Corporate Securities Insurance Policy issued by AXA XL (the "Primary Policy"). Cronos also held a secondary Excess Directors' and Officers' Liability Policy issued by the appellant, Assicurazioni Generali S.P.A. ("Generali") (the "Excess Policy"), which covered the same policy period.

[4] The Primary Policy included an Optional Extension Period ("OEP") option that allowed the insured to extend the period of coverage beyond the expiration date of the Primary Policy within 30 days of its expiry. The Excess Policy provides that it is subject to the same terms, conditions, limitations and exceptions as are contained in the Primary Policy, with certain exceptions. The OEP option is not identified as an exception.

[5] Cronos sought to exercise the OEP option under the Excess Policy. Generali took the position that the Excess Policy did not contain an OEP option.

[6] The application judge held that: (i) the Excess Policy provided Cronos with a contractual right to exercise an OEP option in respect of the Excess Policy; (ii) Cronos had successfully exercised that right by complying with each of the option requirements; and (iii) the cost payable for the OEP was US\$486,000 (or CDN\$704,700), twice the original premium of the Excess Policy.

[7] Generali appeals, seeking to set aside the order below and dismiss the application.

[8] For the reasons set out below, I would dismiss the appeal.

II. BACKGROUND

[9] Cronos is a global cannabinoid company that manufactures and markets cannabis and cannabis-derived products.

The policies

[10] Cronos was the named insured under the Primary Policy for the period February 27, 2019 to February 27, 2020. The Primary Policy provided coverage to the directors and officers of Cronos on a claims-made basis during the policy period, up to a maximum aggregate liability of US\$5 million. The Primary Policy contained a self-insured retention of US\$1.5 million.

[11] Cronos was also the named insured under the Excess Policy, which Generali issued for the same policy period. The Excess Policy covered sums owing on claims in excess of the Primary's limit, up to a further maximum aggregate liability of US\$5 million.

[12] Both policies respond only to claims made within the policy period.

[13] Under the Primary Policy, if the insured or insurer did not agree to renew the policy, the insured could, within 30 days from the expiry of the policy, exercise the OEP option. Specifically, the Primary Policy stated:

(F) OPTIONAL EXTENSION PERIOD

(1) If either the **Parent Company** [Cronos] or the Insurer does not renew this Policy, the **Parent Company** or any **Insured Person** shall be entitled, upon payment of an additional premium set forth in ITEM 5 of the Declarations, to an extension of the coverage provided by this Policy with respect only to any **Claim** or **Investigation Demand** first made or deemed first made during the period of time set forth in ITEM 5 of the Declarations after the Policy Expiration Date, but only with respect to a **Wrongful Act** occurring prior to the Policy Expiration Date. Any such **Claim** or **Investigation Demand** shall be deemed to have been made during the **Policy Period**.

(2) As a condition precedent to the right to purchase the Optional Extension Period, the total premium for this Policy must have been paid in full. The right of the **Parent Company** or any **Insured Person** to purchase the Optional Extension Period will be immediately terminated if the Insurer does not receive written notice by the **Parent Company** or **Insured Person** advising it wishes to purchase the Optional Extension Period together with full payment of the premium for the Optional Extension Period within thirty (30) days after the Policy Expiration Date.

...

(4) The purchase of the Optional Extension Period will not in any way increase the Limit of Liability set forth in ITEM 3 of the Declarations, and the Limit of Liability with respect to **Claims** made during the Optional Extension Period shall be part of and not in addition to the Limit of Liability for all **Claims, Interviews** and **Investigation Demands** made during the **Policy Period**. [Emphasis in original.]

[14] Under the OEP option, the extension would allow the insured, whose policy was not renewed, to notify the insurer of claims made against the insured after the

expiry of the policy in respect of conduct that occurred within the original policy period. Coverage limits of the expired policy would remain available to cover the loss.

[15] Item 5 of the Primary Policy's Declarations, Optional Extension Period, states:

Length of Optional Extension Period: One Year after the end of the **Policy Period**, if elected.

Premium for Optional Extension Period:
USD\$1,500,000.00

[16] The US\$1.5 million premium for the OEP was twice the Primary Policy's basic premium of US\$750,000.

[17] The Excess Policy does not specifically refer to an OEP option or any premium applicable to an OEP. However, Condition 2 of the Excess Policy provides that it operates as a "follow form" policy to the Primary Policy. Condition 2 states:

This Policy is subject to the same terms, conditions, limitations, and exceptions (except as regards the premium, the amount and limits of liability, any deductible or self-insurance provision, the obligation to investigate and defend and the renewal agreement (if any)) as are contained in the Primary Policy. The Primary and Underlying Policy will be maintained in full effect during the currency of this Policy... [Emphasis added.]

[18] Condition 8 of the Excess Policy states:

No amendment to the Primary or Underlying Policy during the Period of Insurance, in respect of which the primary or underlying insurers require an additional premium or a deductible, shall be effective in extending the scope of cover of this Policy unless and until agreed in writing by the Company.

Efforts by Cronos to renew the policies

[19] In January 2020, Cronos sought to renew both the Primary Policy and the Excess Policy through its newly appointed broker Aon Reed Stenhouse Inc. and its U.K. affiliate (collectively “Aon”). On February 11, 2020, Aon provided the applicant with quotes from both AXA XL and Generali to renew both Policies.

[20] On February 24, 2020, Cronos announced that it would delay its 2019 fourth quarter and full-year earnings releases. In response, Generali and AXA XL withdrew their quotes to renew the Policies, which would expire a few days later on February 27, 2020.

[21] On February 26, 2020, Cronos and AXA XL negotiated a 13-month extension of the Primary Policy, in lieu of renewal, in consideration of an additional premium of US\$1.5 million. Since the amendment extended the term of the policy period to March 27, 2021, the extension afforded Cronos coverage for claims premised on wrongful acts occurring after the expiry of the original policy period. The aggregate limit of liability for the policy period remained at US\$5 million but the self-retention amount was increased from US\$1.5 million to US\$3 million.

[22] Aon asked Generali for a seven-day extension of the Excess Policy to allow for further discussion before the Excess Policy expired, and Cronos provided Generali with further information about its delayed financials. Generali did not agree to an extension of the Excess Policy.

[23] On March 11 and 12, 2020, two securities class action claims were commenced in the State of New York naming Cronos and two of its officers as defendants (the “US Claims”). The wrongful acts alleged concerned the restatement of the 2019 financial statements, which pre-dated the expiry of the Excess Policy.

[24] On March 12, 2020, Aon raised the possibility with Generali that Cronos would exercise the OEP option.

[25] On March 17, 2020, Cronos announced that its financial statements for the first three quarters of 2019 would be restated and reissued. On March 19, 2020 Cronos, through Aon, notified Generali about the US Claims.

[26] On March 25, 2020, Cronos provided Generali with written notice that it was electing to exercise the OEP option. The next day Cronos delivered a bank draft to Generali in the amount of CDN\$704,700, which represented the Canadian dollar equivalent of twice the annual premium for the Excess Policy of US\$243,000. Cronos calculated this premium to reflect the same ratio between the OEP and basic premiums in the Primary Policy, namely twice the policy’s basic premium.

[27] On March 27, 2020, Generali advised Aon that the Excess Policy did not contain any language that gave Cronos a right to an OEP in respect of the Excess Policy. On March 31, 2020, Generali again rejected the US Claims on the basis that there was no language in the Excess Policy to support Cronos' right to elect the OEP. Generali subsequently destroyed the bank draft Cronos had provided to pay the premium.

[28] Cronos applied for declarations that under the Excess Policy it was entitled to purchase OEP coverage at a premium that was twice the basic Excess Policy premium.

III. THE APPLICATION JUDGE'S DECISION

[29] The application judge granted the declarations sought. She held that under Condition 2, the Excess Policy followed form with the Primary Policy, except for specified provisions which did not exclude the OEP option as a follow-form term. In reaching that conclusion, the application judge stated that: (i) the exclusion of "premium" in Condition 2 did not relate to the OEP option; (ii) the OEP option did not result in a "policy renewal" that would be caught by Condition 2's exclusion of a "renewal agreement"; and (iii) the amendment of the Primary Policy to extend it for another 13 months did not run afoul of Condition 8 of the Excess Policy, which required Generali's consent to certain amendments, because it did not change the scope of the coverage to be provided by the Excess Policy.

[30] The application judge applied to the Excess Policy OEP the 2:1 ratio of the Primary Policy's OEP premium to its basic premium and concluded that the premium for the Excess Policy OEP was CDN\$704,700, or twice the Excess Policy's basic premium, which was the amount Cronos had tendered to Generali. She also held that Cronos complied with each of the requirements to exercise the OEP, including all applicable notice requirements.

IV. ISSUES ON APPEAL

[31] Generali advances three grounds of appeal, arguing that that application judge erred in finding that:

- (i) Generali did not act in good faith toward Cronos when it sought to exercise an OEP option, and she failed to provide sufficient reasons to support such a finding;
- (ii) Cronos was entitled to purchase an OEP under the Excess Policy; and
- (iii) the premium for the Excess Policy's OEP was twice the amount of the policy's original premium.

V. FIRST ISSUE: BAD FAITH

[32] The first ground of appeal can be dealt with quickly. A review of the application judge's reasons discloses that she did not make any finding to the effect that Generali failed to act in good faith in respect of the efforts of Cronos to

exercise an OEP option. Her reference to some of the case law regarding the contractual principle of good faith was *obiter*.

[33] That leaves Generali's second and third grounds of appeal concerning the application judge's interpretation of the Policies as the main issues on this appeal.

VI. THE STANDARD OF REVIEW APPLICABLE TO THE SECOND AND THIRD ISSUES

[34] Generali submits that the motion judge failed to properly apply principles of contractual interpretation in concluding that Cronos was entitled to purchase an OEP under the Excess Policy at a specified additional premium. Generali's primary submission is that the application judge improperly focused on Condition 2 of the Excess Policy to the exclusion of other terms of the Primary and Excess Policies and, in so doing, committed errors on extricable questions of law that attract a correctness standard of review.²

[35] I am not persuaded that the alleged errors in the interpretative process in play on this appeal fall within the class of "rare" circumstances in which a question of law can be extricated from the interpretation process: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 55; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at

² The parties agree that the Excess Policy is a non-standard form contract for purposes of the standard of review analysis.

para. 63. True, *Sattva* identified certain questions that may arise in the contract interpretation exercise as constituting legal errors that attract a correctness standard.³ However, *Sattva* went on to emphasize that the fundamental goal of contractual interpretation – to ascertain the objective intentions of the parties – remains an inherently fact-specific exercise. Accordingly, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the contract means that the circumstances in which a question of law can be extricated from the interpretation process will be rare: *Sattva*, at para. 55.

[36] It is apparent from the application judge’s reasons that her interpretation of Condition 2 of the Excess Policy took into consideration the relationship between that condition and other provisions of the Primary and Excess Policies, as well as the surrounding factual matrix. Her reasons do not disclose that she applied an incorrect legal principle, failed to consider relevant factors or misapprehended the operation of the Policies’ provisions. Instead, I regard the errors alleged by Generali as ones relating to how the application judge applied the relevant legal principles to the specific facts regarding the policies before her.

³ At para. 53, the court in *Sattva* provided a list of such common legal errors in contract interpretation, for example: the application of an incorrect principle; the failure to consider a required element of a legal test; the failure to consider a relevant factor; as well as substantive matters of contract law, such as the requirements for the formation of the contract and the capacity of the parties.

[37] Those do not constitute errors on extricable questions of law; rather, they are allegations that concern questions about how the principles of contractual interpretation are applied to the words of a specific written contract, considered in light of its factual matrix. In other words, the questions of interpretation in play on this appeal are questions of mixed fact and law that are the standard fare of any contract interpretation exercise. As such, our review of those errors must proceed using the deferential standard.

VII. SECOND ISSUE: DID THE APPLICATION JUDGE ERR IN FINDING CRONOS WAS ENTITLED TO PURCHASE AN OEP UNDER THE EXCESS POLICY?

[38] Generali submits that the application judge's conclusion that the Excess Policy entitled Cronos to exercise the OEP option was flawed because several terms of the Excess Policy, and one aspect of the factual matrix, implicitly indicated that such a right would be inconsistent with the agreement of the parties reflected in the Excess Policy. Specifically, Generali points to five matters to support its submission that the application judge erred in her interpretation:

- First matter: The Excess Policy does not contain an explicit reference to an OEP option;
- Second matter: Condition 2 of the Excess Policy expressly excludes "renewal agreements" as a follow-form term;

- Third matter: Condition 8 of the Excess Policy prevents Cronos from electing to make unilateral extensions of coverage;
- Fourth matter: The Excess Policy lacks an express mechanism, or formula, for calculating a premium for the OEP option; and
- Fifth matter: Generali's interpretation that the Excess Policy did not contain an OEP option was consistent with the view expressed by an employee of Aon (Cronos' insurance broker), not at the time of execution of the Policies, but at the time Cronos sought to exercise the OEP option.⁴

[39] The application motion judge squarely dealt in her reasons with each of the first four matters.

[40] As to the first matter, the application judge stated:

[42] [Generali's] submission [that the Excess Policy had no OEP option and that such option could not be incorporated into the Excess Policy by reference to the Primary Policy] is not supported by a plain reading of the terms of the Primary Policy and the Excess Policy. The OEP in the Primary Policy clearly states that if the Policy is not renewed, the insured shall be entitled to the extension upon payment of the additional premium;

(...)

[44] The Excess Policy follows form with the Primary Policy "(except as regards the premium, the amount and limits of liability, any deductible or self-insurance provision, the obligation to investigate and defend and

⁴ Aon responded to a summons to witness on the application by providing answers to written interrogatories from Generali.

the renewal agreement (if any)).” Notably, Condition 2 of the Excess Policy does not exclude the OEP option. Accordingly, I find that the OEP is included in the Excess Policy.

[41] As to the second matter, the application judge concluded that the exercise of the OEP option did not give rise to a policy renewal, which Condition 2 would exclude from the follow-form terms. She stated, at para. 49:

I do not agree that the extension afforded by the OEP is a renewal. The OEP merely extends the discovery period. A policy renewal, by contrast, creates a new policy on new terms, with potentially fresh limits, and, unlike an OEP, would cover claims for wrongful conduct following the termination of the expiring policy. In this case, the applicant was specifically denied the chance to renew both the Primary Policy and the Excess Policy. **It was the non-renewal event that triggered the right to exercise the OEP.** [Emphasis added.]

[42] As the application judge had noted earlier in her reasons, at para. 14, the Primary Policy stipulated that the option for an OEP only arose in the event the insurer did not renew the policy. Accordingly, the language of the Primary Policy treated the OEP option as a different creature from the renewal of a policy.

[43] Regarding the third matter, the record before the application judge disclosed that the amendment to the Primary Policy which extended the policy period for a further 13 months did not abrogate or reduce that policy’s coverage limits. The maximum aggregate limit of liability under the Primary Policy remained that set out in Item 3 of the Primary Policy’s Declaration, namely US\$5 million. In those circumstances, the application judge held that the 13-month extension of the

Primary Policy did not offend either Conditions 2 or 8 of the Excess Policy. Condition 2 stipulated, in part, that “[t]he Primary and Underlying Policy will be maintained in full effect during the currency of this Policy”;⁵ Condition 8 provided, in part, that no amendment to the Primary Policy would “be effective in extending the scope of cover of [the Excess Policy] unless and until agreed in writing by [Generali]”. The application judge fully explained the basis for her conclusion at paras. 53 through 55:

It is undisputed that the respondent did not provide its written consent to the amendment to the Primary Policy. Therefore, it did not agree to any change to the scope of the cover, and it would not be bound by any such change. The coverage under the OEP to be provided by the respondent would continue to be limited to wrongful conduct that occurred prior to the expiry of the Primary Policy; but the discovery period for those claims would be extended by an additional twelve months.

...

[Cronos] conceded that only losses from claims arising from wrongful conduct that occurred prior to the expiry of the Excess Policy on February 27, 2020 should erode the Primary Policy limits for the purposes of determining when the Excess Policy limits are engaged.

I note that the terms of the extension of the terms of the Primary Policy were disclosed to the respondent on

⁵ American jurisprudence has held, in the context of a similarly worded excess insurance policy, that to maintain an underlying policy “in full effect” requires the insured to maintain the underlying policy without any abrogation or reduction of the coverage or coverage limits of the underlying policy, except as may be specified, without regard to whether such abrogation or reduction was substantial or *de minimis*: *Northwest Pipe Co. v. RLI Insurance Co.*, 2013 WL 3712418, at para. 10 (U.S. Dist. Ct., Dist. of Oregon); *aff’d in part*, 2013 WL 3712416.

February 26, 2020. The respondent raised no objection to the extension at that time. At no time during the discussions between the parties did it assert this extension somehow invalidated the OEP option. [Emphasis added.]

[44] With respect to the fourth matter, Generali had submitted that the absence of an explicit payment term for an Excess Policy OEP option created an ambiguity that supported the exclusion of an OEP option. The application judge assessed that submission in light of the principle that contracts of insurance are to be interpreted to give effect to their terms and in a commercially reasonable manner. She found support for such an approach in the decision in *Re Canada 3000 Inc.* (2002), 35 C.B.R. (4th) 37 (Ont. S.C.). Although she clearly recognized that in *Canada 3000* the insurer took a different position than Generali, appearing to agree that an OEP option was available under the excess policy, she adopted the analysis in *Canada 3000* that the excess policy was “subject to the same insuring clauses, definitions, terms, conditions, exclusions and other provisions as those set forth in the Primary Policy,” except as regards the premium, and the amounts and limits of liability. Since the Excess Policy did not list the OEP as an exclusion in Condition 2, it was one of the follow-form terms.

[45] The reasons of the application judge on these four matters disclose that: (i) she was aware of the key issues in play in determining whether an OEP option was a follow-form term incorporated into the Excess Policy, including the meaning of central terms such as “renewal agreement” and “premium” and the effect of

Condition 8 in the Excess Policy; (ii) she identified and applied the relevant principles of interpretation for insurance contracts; (iii) she properly understood that, in the circumstances, the OEP would only operate to extend the discovery period for claims for wrongful conduct that occurred prior to the expiry of the initial term but would not extend coverage to wrongful acts committed after that time; (iv) she reasonably relied on Cronos' concession on the application (repeated before us) that only losses from claims arising from wrongful conduct prior to the expiry of the Excess Policy on February 27, 2020 could erode the Primary Policy limits for the purposes of determining when the Excess Policy limits are engaged;⁶ and (v) she applied the teaching of *Sattva*, and its progeny, that the interpretation of contracts involves a practical, common-sense approach, not dominated by technical rules of construction, in which the overriding concern is to determine the intent of the parties and the scope of their understanding: *Sattva*, at para. 47. In those circumstances, I see no palpable and overriding error in this part of her analysis that would justify appellate intervention.

[46] As to the fifth matter, it is true that the application judge did not refer in her reasons to a March 9, 2020 internal email amongst employees of Aon, the brokers

⁶ Para. 1 of the application judge's order states: "THIS COURT DECLARES that the applicant Cronos had the right to exercise the Optional Extension Period under the terms of the Excess Policy, under which the \$5,000,000 coverage limit of the Excess Policy remains available to cover the losses reported, and the right was enforceable against Generali." [Emphasis added.]

for Cronos at the time, in which the author, Mr. Ed Smerdon, wrote in respect of Conditions 2 and 8 of the Excess Policy:

I interpret the above to mean that whatever the Primary does in relation to renewal or non-renewal, including granting an extension or invoking the ERP [Extended Reporting Period, i.e. OEP], does not bind Generali. This is consistent with other clauses in the Generali policy that make clear Generali makes up its own mind in respect of significant matters.

Generali submits that this portion of Mr. Smerdon's email confirms, as commercially reasonable, Generali's interpretation that the Excess Policy did not contain an OEP option.

[47] I query how the view expressed by a non-party to a contract about the meaning of a contractual provision that was made prior to the person's involvement in the contractual dispute, at a time when Aon was not the broker for Cronos, could have any relevance to the contract interpretation exercise.⁷ In any event, I see no error in the application judge failing to advert in her reasons to this email. I do not read the email as one in which Mr. Smerdon volunteered an opinion on whether the Excess Policy contained an OEP option as a follow-form term. The email simply states the common-sense proposition that Generali is not bound by what

⁷ The factual matrix consists of the surrounding circumstances known or that reasonably ought to have been known to the parties at the time of formation of the contract, not at some later date: *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 45.

AXA XL, the primary insurer, may do but by the obligations that bind Generali under the Excess Policy.

[48] For these reasons, I see no reversible error in the application judge's conclusion that the Excess Policy contained an Optional Extension Period option that Cronos could exercise against Generali.

VIII. THIRD ISSUE: DID THE APPLICATION JUDGE ERR IN FINDING THAT THE PREMIUM FOR THE EXCESS POLICY'S OEP WAS TWICE THE AMOUNT OF THE POLICY'S BASIC PREMIUM?

[49] The Excess Policy did not specify the premium payable in the event Cronos exercised its option for an OEP. While the Primary Policy stipulated the premium payable in the event Cronos purchased the OEP option under the Primary Policy – twice the basic premium – it made no mention of the premium payable in respect of the OEP under the Excess Policy.

[50] Generali argued before the application judge that, in the event she found the Excess Policy provided Cronos with an OEP option, the amount of the premium for the Excess Policy's OEP should not follow the form of the premium structure in the Primary Policy where the OEP premium was twice the amount of the basic premium for the initial term. Instead, the premium for the Excess Policy OEP should be exactly the same as that specified for the Primary Policy OEP, namely US\$1.5 million.

[51] The application judge rejected Generali's submissions. She decided that the relationship between the Excess Policy's basic premium and OEP premium should follow the 1:2 ratio set out in the Primary Policy for two reasons. First, she was persuaded by the reasoning in the *Canada 3000* decision about the appropriateness of such an approach. Second, she did not regard Condition 2's exclusion of "premium" from the follow-form terms as applying to the premium for the OEP, writing, at paras 58 and 59 of her reasons:

[Generali] argues that the word "premium" in Condition 2 is ambiguous. Specifically, [Generali] argues that because "premium" is included as an exclusion, the calculation of the premium for the OEP under the Excess Policy cannot follow form with the Primary Policy.

I do not find an ambiguity in the use of the word "premium" as set out in Condition 2. The term is singular, which leads to the logical conclusion that it refers to the original premium paid at the time the Excess Policy was purchased. If the language was intended to also include the premium related to the OEP option, the word "premiums" would have been the more appropriate term to include in Condition 2. If [Generali] had intended to also exclude the additional premium payable for the extension, it could have included that exclusion in Condition 2, but it did not.

[52] Finally, she was not persuaded that the Excess Policy impliedly gave Generali the right to fix the amount of the OEP premium stating, at paras. 60-61:

The respondent asserts that even if the OEP provision is included by reference in the Excess Policy, the respondent should have the right to fix the premium. It asserts that this must be the case, especially in light of

the Claims of which it became aware following the expiry of the Excess Policy.

I disagree. The premium is determined at the time the policy is written, not when the loss arises. The respondent had the opportunity to assess the risk for the February 27, 2019 to February 27, 2020 period when it negotiated the Excess Policy. The OEP extends the period during which claims may be made, but the wrongdoing must have occurred during that initial term. That risk was priced into the Excess Policy when it was written. The OEP does not alter this risk.

[53] On appeal, Generali contends the application judge erred by failing to interpret the Excess Policy's follow-form OEP option as requiring payment of the same premium payable under the Primary Policy for its OEP option.

[54] I am not persuaded by Generali's submission.

[55] First, I see no palpable and overriding error in the application judge's interpretative process that led her to determine the amount of the additional premium for the OEP. Indeed, there is a certain inconsistency in Generali's use of Condition 2 on this point. On the one hand, Generali relies on Condition 2's exclusion of "premium" from the follow-form terms to argue that no OEP option exists in the Excess Policy, yet, on the other hand, contends that the specific OEP premium from the Primary Policy should be imported into the Excess Policy when dealing with the issue of the amount of the OEP additional premium. I regard the application judge's interpretation of the additional policy as more consistent with the provisions of both Policies.

[56] Second, the application judge's interpretative approach of applying the ratio between the Primary Policy's basic and OEP premiums was based on an assessment, known to both parties at the time of entering into the Excess Policy, of the relative risks associated with the extended discovery period afforded by the OEP option. The ratio between the two premiums reflects the relative risks as between coverage during the original term of the policy and the insurer's exposure during the OEP's extended discovery period. That degree of relative risk was known to both Cronos and Generali as the Excess Policy designated the Primary Policy as the underlying policy.

[57] By contrast, Generali's submission would result in the amount of the premium for the Excess Policy's OEP option (US\$1.5 million) being over six times the amount of the Excess Policy's basic premium of US\$243,000, a radical departure from the relative risk assessment embedded in the 1:2 ratio between the basic and OEP premiums in the Primary Policy, which was known to both parties to the follow-form Excess Policy.

[58] Accordingly, I reject this ground of appeal advanced by Generali.

IX. DISPOSITION

[59] For the reasons set out above, I would dismiss the appeal.

[60] Based on the agreement of the parties regarding the costs of the appeal, Generali shall pay Cronos its costs of the appeal fixed in the amount of \$50,000, inclusive of disbursements and applicable taxes.

Released: July 13, 2022 "J.M.F."

"David Brown J.A."
"I agree. Fairburn A.C.J.O."
"I agree. Sossin J.A."