

Date: 20191009  
Docket: CI 17-01-09950  
(Winnipeg Centre)  
Indexed as: Sher-Bett Construction (Manitoba) Inc. v.  
The Co-operators General Insurance Company  
Cited as: 2019 MBQB 148

## **COURT OF QUEEN'S BENCH OF MANITOBA**

**B E T W E E N:**

	)	
	)	
SHER-BETT CONSTRUCTION (MANITOBA) INC.,	)	<u>MICHAEL G. FINLAYSON</u>
	)	<u>GABRIELLE C. LISI</u>
plaintiff,	)	for the plaintiff
	)	
- and -	)	<u>DAVID E. THERA, Q.C.</u>
	)	<u>KATHERINE S. MELNYCHUK</u>
THE CO-OPERATORS GENERAL INSURANCE	)	for the defendant
COMPANY,	)	
	)	JUDGMENT DELIVERED:
defendant.	)	October 9, 2019

**LANCHBERY J.**

### **INTRODUCTION**

[1] St. Croix Cycle & Marine, located in Pine Falls, Manitoba, constructed a larger building for its growing business. This action concerns the concrete floor for that building. The plaintiff, Sher-Bett Construction (Manitoba) Inc. ("Sher-Bett"), subcontracted Pedrick's Paving to pour the concrete slab, which took place on November 4, 2016. In December 2016, James Schuerbeke (on behalf of Sher-Bett) ("Schuerbeke") or an employee under his direction, spread de-icing salt over the icy

concrete slab to ensure that his workers who were erecting roof trusses at the time would be safe. Schuerbeke testified he read the warning on the de-icing salt bag after applying the salt to the concrete surface. It was after he spread the de-icing salt that he realized his error.

[2] In an effort to remediate the action, Schuerbeke, or one of his workers acting on his direction, threw snow on the de-icing salt in an attempt to dilute the effect of the salt. He also applied three gallons of windshield washer fluid to the area of the de-icing salt application. He then squeegeed the salt, windshield washer fluid and melted snow towards the floor drain.

[3] St. Croix obtained a builders risk broad form policy as a condition of financing prior to the construction commencing. St. Croix assigned the rights under the policy to Sher-Bett after this action was commenced (Exhibit 3).

[4] The defendant, the Co-operators General Insurance Company ("Co-operators"), denied coverage stating that the freezing exclusion in the policy applied.

[5] The question is whether Co-operators may rely upon the freezing exclusion to deny coverage.

## **EVIDENCE**

### **Ronald James Bard**

[6] Ronald James Bard ("Bard"), the directing mind of St. Croix testified. Bard testified as to how Sher-Bett became the contractor chosen. The parties entered the terms of the contract into evidence (Agreed Book of Documents, Tab 16).

[7] Bard noted that his insurer for general liability, building and garage policy is Co-operators. He acknowledged that his bank advised that he needed to obtain builders risk broad form policy as a condition of financing, which was done.

[8] The policy was in effect for the times in question.

[9] Bard testified that he was present during the concrete pour, which took all day to complete. He noted that he was happy with how things went during the pour. Bard testified that he was on-site almost every day up until December 17, 2016, when he left for vacation in the United States, returning on December 29, 2016.

[10] Bard indicated that the temperature for November was warm for Pine Falls. However, it turned cold in December. Bard noted it snowed after the concrete was poured, beginning in late November and into December. He maintained that after it snowed, Schuerbeke and/or his crew would remove the snow from the concrete slab.

[11] Bard testified he received a telephone call from one of his employees just prior to Christmas Day. His employee told him that one of Sher-Bett's employees applied de-icing salt, snow, and windshield washer fluid on the concrete causing damage.

[12] When Bard returned to Manitoba, he reported the loss to Colin Bodley ("Bodley"), the claims representative for Co-operators. Bodley did not attend to the new construction in Pine Falls until the end of February 2017. Bard related that most of the discussions with Bodley occurred by telephone. Bodley seemed concerned about the concrete tickets, which were provided by ABM Concrete Ltd. Bard believed that testing would be performed to determine the cause of the loss. To his knowledge, this



did not occur. In May 2017, Co-operators verbally communicated to Sher-Bett that due to the freezing exception, coverage was denied.

[13] Following this communication, Bard arranged for the necessary remedial work to be completed. He obtained two quotes, and accepted the lower quote. This quote was from a friend for \$76,570. He paid the invoice, but withheld \$51,867.67 from the final payment to Sher-Bett.

[14] Under cross-examination, Bard confirmed that he drew a diagram showing the location of the damage (Exhibit 1, Tab 14).

**James Schuerbeke**

[15] Schuerbeke testified that he was the directing mind of Sher-Bett. He acknowledged he submitted a quote for the St. Croix project. He acknowledged he reviewed a set of drawings from Olympic Building Centre and provided a quotation to Bard. He was awarded the contract and commenced work in mid-October 2016.

[16] Schuerbeke testified that he arrived on-site between 8:30 a.m. and 8:45 a.m. on November 4, 2016, the day the concrete was poured. He stayed for approximately two to three hours. After a discussion with Pedrick's Paving whether it would be necessary to tarp the concrete to protect the slab during curing, he decided that tarps were not required, but instead he would apply sealer to the concrete.

[17] Schuerbeke testified that he was confident that the weather was going to hold out. When he returned to the job site in the late afternoon, the crew was just finishing up. He observed a highly polished slab, and described it as the "nicest I had ever seen".

[18] Schuerbeke testified that he applied the sealer on November 5, 2016. He noted that it was very warm that day and even took his shirt off while applying the sealer. He described the concrete as "perfect". He testified that he had used this same sealer on previous jobs.

[19] Schuerbeke testified that on November 15, 2016, he rented a diamond saw to cut control joints into the concrete. He noted the concrete to be very hard and November 15 or 16, 2016 to be another warm day. He cut control joints in the concrete slab.

[20] On November 25, 2016, Schuerbeke stripped the forms surrounding the concrete edges.

[21] In late November or early December, construction began. Schuerbeke said that once it had snowed, he and members of his crew would remove the snow from the concrete slab with a snow blower, a quad with a blade attachment or by hand with snow shovels. Once cleared, Schuerbeke described the concrete slab to be in perfect condition, but was very slippery. He noted that it was difficult to stand on the concrete slab and walking on it required one to be very careful.

[22] Schuerbeke noted that he employed a scissor lift attached to a forklift to install the roof trusses. He testified that the forklift and scissor lift became very unstable due to the presence of ice on the concrete slab. This was when he determined that one of his employees should spread the de-icing salt. The employee spread almost one full bag prior to reading the warning label about applying the de-icing salt.

[23] The employee applied the de-icing salt 10 feet into what would be the show room area and 30 feet into the garage area. Schuerbeke estimated this took place on December 20 or 22, 2016.

[24] On December 23, 2016, while preparing to shut down until after the Christmas break, Schuerbeke unhooked a spreader bar holding the trusses causing the equipment to dig into the concrete. It was at this time that he first noticed that the concrete spalled. He noticed that spalling had occurred in other areas as well.

[25] Schuerbeke believed that applying liquid to the surface of the concrete may help in reducing the effect of the de-icing salt. He applied snow first. The next day, he purchased containers of windshield washer fluid and applied the fluid to the area where the de-icing salt was applied. He then took a squeegee and moved the liquid in the direction of the floor drain.

[26] Schuerbeke testified that he had no contact with Co-operators' representative, Bodley, or with Derek James Mizak, P.Eng., Co-operators' expert.

[27] Schuerbeke confirmed the holdback as testified to by Bard. He stated that the interest rate on his line of credit is 6.1 percent.

[28] On cross-examination, Schuerbeke acknowledged that he had not provided any documentation to support his interest rate.

[29] He agreed that the purpose of applying concrete sealer was to protect the new concrete from oil drips from cars and trucks serviced by St. Croix.



[30] Schuerbeke decided to wait 10 or 11 days before cutting control joints into the concrete. His information was that the cuts into the concrete would be cleaner, and less stressful on the diamond blade if one did not wait until the concrete got too hard.

[31] Schuerbeke confirmed his experience in making control cuts into finished concrete was limited to couple of occasions. He disagreed with Co-operators' counsel that he only cut the control joints after seeing cracks in the concrete.

[32] He acknowledged that he would not have applied the de-icing salt if he had first read the warning label on the bag. He further acknowledged that he had not used de-icing salt on other projects he had done when ice was present because those surfaces were not as slippery as the St. Croix site.

[33] Schuerbeke agreed that at the examination for discovery, he stated that the de-icing salt application occurred on December 20, 2016. However, at the examination for discovery, he did not have all the information now in his possession to be certain of the date in question. Therefore, he cannot rule out the de-icing salt was applied on December 22, 2016.

## **EXPERT EVIDENCE**

### **Dr. Norbert Karl Becker**

[34] Dr. Norbert Karl Becker testified on behalf of Sher-Bett. Dr. Becker has a Ph.D. in civil engineering. His thesis was in concrete technology. He was qualified as an expert in failures of concrete. Dr. Becker agreed that his task report was a peer review of the work of Derek Mizak, P.Eng., as he had never attended the work site. Dr. Becker

agreed that as he was never on-site, his opinion could not be superior to someone who was on-site.

[35] Dr. Becker testified that concrete is a peculiar substance. It requires proper placement, handling and curing to achieve the ultimate purpose. Time is relevant to these three processes. Therefore, it is vital to understand the steps and the timing of those steps when pouring the concrete. Concrete develops strength over time. It is also true that problems develop over time. Time is a very significant indicator of what the cause of a problem might be.

[36] Dr. Becker commented that the design of the building was for economy and not for elegance or durability.

[37] Dr. Becker described chain dragging as a sounding survey to determine if there is an issue with the concrete. Chain dragging can actually show delamination or defects beneath the surface of the concrete.

[38] Dr. Becker testified that saw cuts are placed into newly poured concrete as a preventative measure to keep random cracking from becoming problematic. Cracking occurs due to shrinkage of the concrete as it dries. If there are no control joints, random cracks may appear in both directions spreading across the surface of the concrete. Mizak surmised that the concrete raveling occurred as the saw cuts were placed too soon. Dr. Becker disputed Mizak's findings, as Mizak did not know when Schuerbeke made the saw cuts. Dr. Becker knew the saw cuts occurred on November 14 or 15, 2016. Dr. Becker disputes this theory as the person operating the saw cutting machine would see the raveling immediately. They would have to be "deaf,



dumb and blind to not see it". Dr. Becker opined that proper practice, in his opinion, would be for saw cuts to occur as early as possible, as soon as 24 hours after pouring, to create a weak plane to cause the cracks to form there.

[39] Dr. Becker noted that concrete sealer was entirely appropriate to this job, as the sealer causes enough water to remain inside the concrete to hydrate the substance. The sealer decreases permeability. Sealer itself does not contribute to scaling or spalling.

[40] Dr. Becker disputes Mizak's conclusions for the following reasons:

- he does not know what evidence Mizak relied on criticizing original finishing practices. The photographs do not show evidence of incompetent or improper original finishing practices;
- Mizak did not provide any information to suggest that curing was inadequate. Curing rate is a function of temperature, weather conditions, wind speed, sun or cloud – concrete does not cure at one speed. Mizak did not provide any information to support his conclusion. The weather in November 2016 was unusually warm. The application of the sealer assisted in the curing process;
- he does agree with Mizak that exposure to de-icing salt was a cause of the damage to the concrete. However, this cause discounts conclusions made by Mizak about improper curing or finishing; and
- the fact that the spalling occurred only where Schuerbeke applied de-icing salt is significant.

[41] Dr. Becker's direct testimony concluded with him expressing his opinion that Mizak's conclusions were erroneous as he was not made aware of the procedures undertaken by Sher-Bett to complete the work, or the timelines of those procedures to reach his findings.

[42] Under cross-examination, Dr. Becker agreed that any suggestion that this building was governed under Part 4 as opposed to Part 9 as identified in the National Building Code, is irrelevant.

[43] Dr. Becker agreed that when water freezes it expands by approximately nine percent.

[44] He also agreed that scaling damage could occur without the presence of de-icing chemicals. He also agreed that water, if having a place to rise to the surface, may cause scaling.

[45] Dr. Becker maintained that it is possible for the trained eye to identify the cause of scaling.

[46] Dr. Becker described the types of damage to concrete as:

- disintegration - the basic crumbling of the small bits at the top that dust off;
- scaling - scab-like pieces of concrete that separate from the concrete;
- spalling - more serious as it involves more areas of damage; and
- delamination - the layer or stratum covering even larger areas.

[47] All these defects affect the quality and strength of the concrete and subject the product to conditions not contemplated by the designer.

[48] Dr. Becker agreed that if the freezing and thawing cycles were eliminated, the de-icing salt would not cause any damage.

**Derek James Mizak, P.Eng.**

[49] Derek James Mizak, P.Eng., was qualified as an expert on investigation and rehabilitation of concrete, including investigations into the causes of damage to concrete.

[50] Mizak performed a visual inspection of the site on March 17, 2017. His inspection included:

- a) a review of the drawings prior to the site visit;
- b) a site walk around;
- c) chain drag and hammer soundings; and
- d) crudely mapping out some of the areas that were observed to be unsound.

[51] In his report, Mizak recommended petrographic testing be performed, but this was never done. Mizak could not offer an opinion as to why.

[52] Mizak found 400 square feet or approximately 20 percent of the area of the concrete slab in the showroom and also 440 square feet or approximately 10 percent of the shop area to be unsound. Surface deterioration was generally less than five millimetres in depth.

[53] Based upon the information obtained, Mizak opined three potential causes of the scaling. First, excess water that was worked into the surface. Second, ambient air



temperatures were lower than the recommended minimums during the curing process.

Third, exposure to de-icing chemicals.

[54] Mizak detailed a common misconception of salt attacking the concrete. In fact, salt causes ice to turn into water. Then when the temperature drops, this water returns to ice. The freeze-thaw cycle repeats permitting the water to get into the concrete itself. Once frozen, the water expands. The freeze-thaw cycle subjects the concrete to stresses affecting its structural integrity.

[55] Mizak admitted in his second report dated January 23, 2018 following a review of Dr. Becker's report, that he was mistaken as to the timing of the saw cuts and amended his opinion accordingly.

[56] Mizak admitted that he was not privy to the weather statistics for November 2016 at the time of his initial report. Having now reviewed those statistics, he remains of the opinion that the overnight lows being below five degrees Celsius are still significant.

[57] Mizak opined that during the curing process, the temperature is only one factor for consideration. The pore structure of concrete permits water to enter the concrete permitting what is known as a recharging of water. This recharging slows the curing process.

[58] When asked to opine about the extent to which the application of the de-icing salt contributed to the damage, he stated it was not possible. In the absence of petrographic testing results, he could not provide an opinion.

[59] Mizak noted that he returned to the site in late June 2018 to see if it was possible to conduct petrographic testing, but the owner had refinished the floor by removing any loose material, preparing the base and then installing a form of epoxy or resinous flooring system. Mizak opined that the petrographic testing may have shown air voids within the concrete, but any information with respect to curing was lost once remedial actions were undertaken by the owner.

[60] Under cross-examination, Mizak agreed that during the course of his investigation:

- he did not speak with the general contractor;
- he was not aware who applied the de-icing salt, other than he believed it was the owner;
- he was not aware that the owner was out of town when the de-icing salt was applied;
- during the March 17, 2017 site visit, he did not ask who applied the de-icing salt;
- it was only after his first report that he became aware sealer had been applied to the concrete surface;
- he was not aware that the concrete had been air-entrained until after his first report; and
- he did not know the ambient air temperatures as contained in the Government of Canada Daily Data Report for November and December 2016.



[61] Mizak agreed that all he knew was the address and general location of the building prior to his inspection.

[62] Mizak opined that concrete may be subject to scaling whether exposed to de-icing salt or not. However, he stated that the area where spalling occurred is consistent with the location where Sher-Bett applied de-icing salt, snow, windshield washer fluid, followed by squeegeeing towards the drain.

[63] Mizak disagreed that the ambient air temperatures during the first three days of the pour were ideal for curing as the overnight lows were below ideal. Mizak did agree that on November 5, 2016, the overnight low was 4.7 degrees Celsius. He also agreed that this was the only night when the overnight temperature fell below the recommended minimum standard.

#### **POSITION OF SHER-BETT**

[64] Sher-Bett argued that Co-operators never conducted a proper investigation. The investigator failed to interview witnesses yet opinions were offered that later turned out to be erroneous. The petrographic testing could have provided a definitive answer. Co-operators denied coverage when its expert, Mizak, could not pinpoint the cause of the loss.

[65] Co-operators' position is that the builders risk broad form policy does not cover this type of loss, the Court must consider that the policy includes named insureds and



implies that others are covered. This is confirmed by the policy language on subrogation (Exhibit 4):

#### **IV. POLICY CONDITIONS**

...

##### **A. Subrogation**

The Insurer, upon making payment or assuming liability for payment under this Policy, shall be subrogated to all rights of recovery of the Insured against others and may bring action to enforce said rights.

[66] And goes on to say:

All rights of subrogation are waived against any corporation, firm, individual or other interest with respect to which insurance is provided by this Policy.

[67] Sher-Bett submits that the builders risk broad form policy states that there will be others who are insured other than the named insured. When examining the policy itself, the insurer specifically retains the right of subrogation against "any architect, engineer or other consultant if insured by this policy who is responsible for such fault or defect" (Exhibit 3, Section 6(A)(a)(iii)). There is not a similar clause retaining the right of subrogation against contractors or subcontractors.

[68] Further, the builders risk broad form policy covers property in the course of construction, installation, reconstruction or repair. It includes property (Exhibit 3):

#### **2. PROPERTY INSURED**

This Form, except as provided in this Form, insures the following property at the 'Project Site' for the limit if insurance specified in the 'Declarations' for the 'Project Site':

- (a) property in course of construction, installation, reconstruction or repair . . .
  - (ii) owned by others, provided the value of such property is included in the limit of insurance;  
all to enter into and form part of the completed project including expendable materials and supplies, not otherwise excluded, necessary to complete the project.

[69] Sher-Bett argued that this policy wording is identical to the cases in *Sylvan Industries Ltd. v. Fairview Sheet Metal Works Ltd.* (1994), 113 D.L.R. (4<sup>th</sup>) 493 (B.C.C.A.), *Madison Developments Ltd. v. Plan Electric Co.* (1997), 152 D.L.R. (4<sup>th</sup>) 653 (Ont. C.A.) and *529198 Alberta Ltd. v. Thibeault Masonry Ltd.*, 2001 ABQB 1108. The language implies an intent on the part of the insurer to insure persons other than the named insured.

[70] Sher-Bett argued that the very purpose of the type of insurance is to provide broad coverage on a construction project where any error or accident has the ability to stall a construction project for months or years due to litigation. The courts have regularly held that contractors and subcontractors were unnamed insureds.

[71] Further, Sher-Bett is also an assignee of St. Croix's rights under the builders risk broad form policy (Exhibit 10). This provides two reasons why coverage extends to Sher-Bett and Pedrick's Paving. If the Court found this not to be the case, the result would be St. Croix could sue Sher-Bett and Pedrick's paving, which would lead to more litigation, which the builders risk broad form policy was designed to avoid.

[72] On causation, the evidence is clear. The freeze-thaw cycle allowed moisture to enter the concrete slab. Without the de-icing salt, the freeze-thaw cycle would not occur.

[73] The policy exclusion is (Exhibit 3):

**6. PERILS EXCLUDED**

...

B. This Form does not insure against loss or damage caused directly or indirectly:

...



- (e) by . . . frost or freezing, or contamination unless caused directly by a peril not otherwise excluded in this Form.

[74] Sher-Bett also argued that one should examine that the ambient temperature was well below freezing for the month of December. The application of the de-icing salt introduced the freeze-thaw cycle. These facts are distinguishable from a freezing pipe that caused water to flow resulting in damage.

[75] When looking at the evidence, how is it possible to state that the de-icing salt was benign if the concrete slab outside the area where the de-icing salt, snow and windshield washer fluid was applied did not appear damaged.

[76] The suggestion Co-operators' counsel made in his closing is that Schuerbeke's evidence is unreliable due to certain inconsistencies. By failing to put those inconsistencies to Schuerbeke during cross-examination is a violation of *The rule in Browne v. Dunn* and should be given no weight.

### **POSITION OF CO-OPERATORS**

[77] Co-operators re-iterated in their opening statement that the cause of the damage to the concrete was freezing. Damage due to freezing is an exclusion under the terms of the policy. Dr. Becker confirms that the de-icing salt itself is a benign substance. In ***Lodge et al. v. Red River Valley Mutual Insurance Company et al.***, 2017 MBCA 76, the Manitoba Court of Appeal directed that one must look to the specific wording of a policy and not just how one case may have turned out.

[78] ***Canevada Country Communities Inc. v. GAN Canada Insurance Co.***, 1999 BCCA 339, set forth the analysis required by the court. ***Canevada***, quoting from



***Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.***, [1993]

1 S.C.R. 252 at 268-69, the court stated the obvious principle (at para. 20):

In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine if the events in question fall with the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis.

[79] Direct cause means direct cause. It is not the "but for" test associated with negligence law. What is the direct cause? In this case, Dr. Becker confirms that the application of de-icing salt is not the direct cause.

[80] The facts of ***Canevada*** involved an interior pipe subjected to freezing conditions. Eventually, the pipe burst causing the release of water into the building, causing damage to the electrical, flooring and other parts of the building. The court held that the damage to the pipe was caused by freezing, which was excluded from coverage.

[81] Applying this logic, the examination from either party's perspective will show consistent results. Direct means direct as the event leads to consequence. In ***Wynward Insurance Group v. MS Developments Inc.***, 2015 BCSC 324, the court found that the failure of the heat wrap caused the pipe to freeze. The pipe eventually burst. The court found that the freezing was the direct cause of the damage, and the exclusion applied.

[82] Co-operators submits that Sher-Bett's evidence is deficient for:

- why would Sher-Bett apply de-icing salt in the showroom area where the work had been completed;

- Schuerbeke's testimony that there was a dusting of snow shown on the December 21, 2016 photograph, but when Co-operators' counsel showed Schuerbeke a clearer version of the same photo, he agreed that the concrete is snow covered;
- Schuerbeke's testimony that he first noticed spalling extending in all directions from where the equipment hit the ground. This can only lead us to believe there was so much snow on the concrete slab that observation of spalling was not possible. The spalling could not have happened instantaneously with the equipment striking the ground, so if there had not been snow on the concrete slab it would have been noticeable prior to December 23, 2016; and
- Dr. Becker's evidence is that scaling typically begins in shallow areas, but expands geographically and deeper over time. If that is how the slab appeared on December 23, the spalling had been in progress for some time.

[83] Co-operators submits that petrographic testing is expensive. The reason for lack of testing is irrelevant to the decision required. The petrographic testing does not change the direct cause of the loss, being freezing.

[84] Dr. Becker testified that in any job he was associated with, control saw cuts would not have occurred 10 days after the concrete pour meaning the control saw cuts were made too late. This should give the Court pause in accepting Dr. Becker's testimony.



## **ANALYSIS**

[85] The facts of this case are not in dispute. As was indicated during submissions, people at the job site when the damage to the concrete slab was first discovered, were not called. Although more evidence may have been preferable, it is not fatal to either side.

[86] It is also true that the investigation by Co-operators may be less than ideal, but this does not affect the decision. That may not always be the case, but it is here.

[87] This is a claim based in contract. The questions for the Court are:

- a) What property is covered under the builders risk broad form policy?
- b) What are the exclusions, and does the evidence show that the exclusions are at play?

[88] The property covered under the builders risk broad form policy entered as Exhibit 3 states:

### **2. PROPERTY INSURED**

This Form, except as provided in this Form, insures the following property at the 'Project Site' for the limit of insurance specified in the 'Declarations' for the 'Project Site':

- (a) property in course of construction, installation, reconstruction or repair other than property described in Clause 2. (b):
  - (i) owned by the Insured;
  - (ii) owned by others, provided the value of such property is included in the limit of insurance;all to enter into and form part of the completed project including expendable materials and supplies, not otherwise excluded, necessary to complete the project;
- (b) landscaping, growing trees, plants, shrubs or flowers all to enter into and form part of the project provided that the value of such property is included in the limit of insurance;
- (c) temporary buildings, scaffolding, falsework, forms, hoardings, excavation, site



preparation and similar work, provided that the value thereof is included in the limit of insurance and then only to the extent that 'Replacement' or restoration is necessary to complete the project.

[89] Although each side argued extensively about the builders risk broad form policy, the purpose of such a policy is to simplify insurance coverage on complicated construction projects where numerous contractors and subcontractors are on-site. The purpose of the policy is to cover the contractors and subcontractors in the event disputes occur on-site that would result in delay. The contractors and subcontractors are protected as the builders risk broad form policy ensures the owner has sufficient funds to rebuild in the event of loss prior to completion.

[90] The parties agree that the builders risk broad form policy issued to St. Croix and assigned to Sher-Bett is applicable. Where the parties disagree is whether the damage to the concrete slab was caused by freezing, and therefore subject to the policy exclusions. The exclusions are identified in section 6 of the broad form. Section 6B(e) states:

**6. PERILS EXCLUDED**

. . .

B. This Form does not insure against loss or damage caused directly or indirectly: . . .

(e) by rust or corrosion, frost or freezing, or contamination unless caused directly by a peril not otherwise excluded in this Form.

[91] The parties submitted cases on the freezing exclusion in support of their respective positions. A pipe burst due to freezing causing water to flood the basement causing loss to the floor and electrical (**Canevada**), and heat wrap surrounding a drain pipe failed causing the pipe to burst due to freezing causing damage (**Wynward**).

[92] Case law is replete with reference to coverage and exclusions. It is unnecessary to repeat the fact circumstances of those cases at length in this decision. The Manitoba Court of Appeal in **Lodge** found the following:

[71] In addition, the law in this area is not settled. There are numerous 'chain of event' cases which have come to different conclusions as to whether, and to what extent, an insured peril must be a direct or proximate cause of the loss in question. For the most part, these decisions are fact specific and turn on the wording of the policy under consideration. See, for example, *Edwards v Wawanesa Mutual Insurance Co*, 1959 CarswellBC 9 (CA); *Filkow v Gore Mutual Insurance Co*, 1965 CarswellMan 68 (CA) (where this Court expressed the view that (at para 4): 'the question is one of fact to be decided in light of the circumstances'; *Arfin v Howick Farmer's Mutual Fire Insurance Co*, [1972] OJ No 738 (SC (CA)); *Pavlovic, Derksen v 539938 Ontario Ltd*, 2001 SCC 72 (CanLII); *Rivard; Balon; 942325 Ontario Inc. v. Commonwealth Insurance Co*, 2006 CarswellOnt 1389 (CA); and *The Owners, Strada Plan NW2580*. There are other cases that suggest that the word 'necessary' and the phrase 'made necessary by' must be viewed in context. See, for example, *Mayrand v 768565 Ontario Ltd*, 1990 CarswellOnt 556 (CA); *Fitzpatrick v Red River Valley Mutual Insurance Co*, 2004 SKQB 300 (CanLII) (which considered Riders 2150 and 2155); and *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45 (S.C.C.).

[93] In light of the circumstances of this case, Mizak's initial report stated there were three potential causes. After Mizak became aware that the conclusions from his initial report were not properly founded, he amended his report.

[94] Mizak opined three potential causes of the scaling: first, excess water that was worked into the surface; second, ambient air temperatures were lower than the recommended minimums during the curing process; and third, exposure to de-icing chemicals.

[95] Based upon all the evidence, I find that the concrete was of the proper formula, the pour was proper, the ambient temperature was correct, the application of sealant was proper, the saw cuts occurred within an acceptable time range and the concrete



was air-entrained. The mere fact that one person may prefer a slightly different timing of these activities, or that on one evening the temperature fell below optimal temperatures during the curing process by .3 degrees Celsius, is insignificant to my decision.

[96] This finding rejects Mizak's first two proffered opinions. I find that the entirety of the circumstances supports a finding that the only direct or proximate cause, as confirmed by the opinions of Dr. Becker and Mizak, is the freeze-thaw cycle.

[97] The evidence also demonstrates that the areas where the spalling occurred in the showroom and the shop areas are consistent with the locations where de-icing salt was applied. The locations where spalling was observed are also consistent with the areas where the windshield washer fluid was applied. The areas where de-icing salt and windshield washer fluid was applied and subsequently squeegeed in the direction of the floor drain constitute all the observed areas of spalling.

[98] The fact that no other area of the concrete slab was affected in any way, by scaling or spalling, confirms that the concrete pour was performed correctly. The concrete would not have spalled if the de-icing salt, snow and windshield washer fluid had not been applied and squeegeed in the direction of the floor drain.

[99] What remains is the answer to "what is the direct or proximate cause of the loss in the circumstances"?

[100] The de-icing salt came with the following warning:

All deicers increase the number of freeze-thaw cycles which can accelerate surface damage to concrete. Any poor quality concrete regardless of age, is susceptible to damage. Use this product only on properly formulated, cured, placed, air-entrained concrete that is more than one year old (Agreed Book of Documents, Exhibit 1, Tab 10).



[101] In chain of events cases like this, the warning on the de-icing salt bag must not be considered in isolation. I find Dr. Becker's testimony about the dangers in applying de-icing salt to new concrete to be both credible and reliable given his extensive experience in these areas. His testimony was clear and concise. The application of de-icing salt does not cause damage. The application of de-icing salt introduces the freeze-thaw cycle. The freeze-thaw cycle in newly poured concrete occurs when it is exposed to de-icing salt. The freeze-thaw cycle causes damage to newly poured concrete. Dr. Becker's evidence is confirmed by the warning on the de-icing salt bag, "deicers increase the number of freeze-thaw cycles which can accelerate surface damage to concrete".

[102] Further, the warning goes on to say that poor quality concrete is susceptible to damage, and that even properly formulated, cured, placed, air-entrained concrete must be more than one year old prior to the application of de-icing salt.

[103] I find that in considering all the circumstances of this case, it is clear that no matter the care taken at the time of the pour, the formula of the concrete, the ambient temperature, the sealant application, air-entrained and cured, the application of the de-icing salt would have resulted in the damage to the concrete.

[104] The evidence is clear that it was the increase in the number of freeze-thaw cycles as testified to by Dr. Becker, and clearly set out in the warning that is the direct cause of the loss for the following reasons:

- ice was present on the concrete slab;
- there was some snow on the surface of the concrete slab;



- the ice and snow would melt once they came in contact with the de-icing salt;
- the warning on the de-icing salt bag that the salt was not to be applied to concrete that had cured for less than a year;
- concrete having cured less than two months old would be susceptible to damage;
- the freezing, followed by thawing, and the number of repetitions in this freeze-thaw cycle caused damage to the concrete surface; and
- the spalling is within the area where the concrete was susceptible to the freeze-thaw cycle.

[105] I find that the freeze-thaw cycle caused the spalling to the concrete slab. The multiple times the concrete slab froze in the freeze-thaw cycles bring the exclusion in section 6(B)(e) into effect.

[106] In applying **Lodge** and **Canevada**, and the remaining cases cited by counsel to these fact circumstances, I find the "chain of events" began with the first freeze in the freeze-thaw cycle. It continued with additional freeze-thaw cycles until the spalling occurred. It was the freeze/thaw cycles that caused the damage and the loss is excluded due to the freezing exclusion.

[107] Considering the agreement between both experts that the freeze-thaw cycle caused the damage, I find Schuerbeke's evidence that the areas of spalling were present prior to the de-icing salt being applied are not credible or reliable.

[108] Therefore, Sher-Bett's case is dismissed.

[109] If the parties cannot agree on costs, they may be spoken to.

S. Linchay J.