IN THE SUPREME COURT OF BRITISH COLUMBIA BETWEEN: LEILA CROSBY, Administratrix of the Will of Sidney Thomas Crosby, and the said LEILA CROSBY PLAINTIFFS AND: NATIVE FISHING ASSOCIATION DEFENDANT REASONS FOR JUDGMENT OF HONOURABLE MR. JUSTICE LOWRY

Counsel for the Plaintiffs: Daniel S. Parlow
Counsel for the Defendant: H. Peter Swanson Pauline V. Gardikiotis

Place and Date of Hearing: Vancouver, B.C. January 4 - 7, 1999

[1] Sidney Crosby was a 'highliner', a very productive native fisherman. In 1996 he lost his life in a tragic accident. He was 69 years of age. His boat, his last of several, was the "Haida Girl" which he paid over $800,000 to have built in 1990. He owned her outright save for the balance owed to the Native Fishing Association on a mortgage loan of $250,000 he obtained to finance the construction. The loan was insured under a policy on Mr. Crosby's life that was arranged by the Association. His wife, Leila Crosby, says that he told her on many occasions that the loan was fully insured, but, after he died, she learned that only $75,000 of the $175,000 then outstanding was covered. She sues the Association as the executrix of her husband's will alleging negligence in its failure to inform him of the limitations on the insurance coverage. She maintains that by its conduct the lender effectively became the insurer of the uninsured portion of the loan.

[2] The question on which the case is argued in the main is whether there was an actionable breach of any duty owed to Mr. Crosby to inform him of two limitations:

> that the maximum coverage available under the policy was $150,000, and
>
> that the coverage would reduce by one half upon his attaining age 65 in June 1992.

[3] Lenders who represent to borrowers that loans they make are, or will be, life insured can be held liable in negligence for their failure to obtain the coverage or to advise of its limitations where such conduct causes a loss: *Newbury v. Prudential Insurance Co. of America* (1996), 35 C.C.L.I. (2d) 61 (B.C.S.C.), affirmed (1997), 148 D.L.R. (4th) 765, *Labreche Estate v. Harasymiw* (1992), 89 D.L.R. (4th) 95 (Ont. Ct. Gen. Div.), *Affleck Estate v. Tenneco Canada Inc.,* [1988] S.J. No. 617 (Q.B.) (QL), *Twardy et al v. Humboldt Credit Union Limited*, [1985] 6 (W.W.R. 538 (Sask. Q.B.). A loss will have been caused where it is established that alternative insurance could and would have been obtained: *Blais v. Royal Bank of Canada*, [1997] O.J. No. 2288 (Ont. Ct. Gen. Div.) (QL).

[4] However, in this case, unlike in any of those cited above, the provision of life insurance was an express term of the Association's offer to loan that Mr. Crosby accepted and it ultimately formed part of the loan agreement which he executed. Under the heading of "Insurance", the offer provided in part as follows:

> With certain restrictions (age, health, maximum coverage of $150,000), the Native Fishing Association will automatically provide Mortgage Insurance on your loan. Premiums will be paid by you and in the event of your death the insurance proceeds would be applied to the loan outstanding.

[5] The Association required that all of the loans it made be insured under a group policy it had obtained from the Sun Life Assurance Company of Canada in 1988, the year before Mr. Crosby applied for his loan. He first met with the Association in the spring of 1989. Thomas Robinson was the loan officer with whom he dealt, and they appear to have met on at least two occasions when the terms of the loan were discussed. Mr. Crosby's application for his loan was made in June. It was approved in August and he received the Association's offer in mid-September. He signed his acceptance of all of the terms proposed and in so doing expressly acknowledged that he had read the offer. He engaged a solicitor to facilitate the execution of the loan documentation, but he took no legal advice on the transaction. The loan agreement was executed in March 1990.

[6] It is clear that, where the subject of a pre-contractual representation said to have been relied on is incorporated in the terms of the contract subsequently made, absent overriding considerations arising from the context in which the transaction occurred, no action in negligence based on what was or was not said can be brought: *Queen v. Cognos* (1993), 99 D.L.R. (4th) 626 at 644-47 per Iaccobucci J. The parties are confined to contractual remedies.

[7] There is no allegation that anyone at the Association actually told Mr. Crosby that his loan would be fully insured. The most that can be said is that, from his discussions with Mr. Robinson, who can now recall little, Mr. Crosby understood that his loan would be insured and apparently did

not appreciate that there would be some limitations. But even accepting that to have been the case, the provision in the Association's offer that was subsequently made and accepted would appear to foreclose any action in negligence. The provision of insurance discussed became a contractual obligation. The obligation was to provide insurance that was subject to limitations of age, health, and coverage, and it was fulfilled.

[8] For Ms. Crosby it is contended that the Association bore a duty to inform Mr. Crosby of the details of the coverage, and in particular the limitations, despite the contractual obligation it assumed with respect to providing insurance. It would of course have to follow that the duty was not limited to the insurance considerations but extended to all aspects of the transaction. Although no authority is cited in support, this is said to be so because of special circumstances associated with the Association making loans to native fishers. The circumstances are said to have been such that Mr. Crosby had no reason to read the documents he signed.

[9] Importance is attached to the fact that the Association was, and continues to be, an unusual kind of lender. It is a non-profit organization the mandate of which is to promote stable development of the native fishing industry on the West Coast through the administration of federal funding. It is operated by natives for the benefit of natives and provides business advice and instruction on the management of commercial fishing vessels. While there is no evidence that Mr. Crosby considered the Association anything more than a source of funding for the one loan he obtained from it, it is said that, because it is concerned with the protection of their interests, native fishers have reason to rely on the Association as a source of advice in respect of the financing it provides, although it does have a policy of advising borrowers to obtain legal advice in respect of all loan transactions.

[10] There is, in my view, nothing in the circumstances that bears on the context in which the Association's loan to Mr. Crosby was made that distinguishes the transaction such as to have raised in the lender a duty to do more than fulfill its contractual obligation.

[11] Although Mr. Crosby is said to have been a man who was careful about his finances and concerned about discharging his debts, he has not been shown to have ever purchased life insurance he was not required to carry. While he was in good health and could probably have obtained additional insurance coverage, I question whether he would have done so had he been aware of the limitations in the Sun Life policy. He and his wife expected to retire the loan as quickly as they could, and, with what was a substantial equity in the boat and their home, he regarded her financially secure in the event of his death. But even if he could and would have obtained additional coverage had he been aware of the limitations of insurance the Association had arranged, there is no case in negligence that can be made out against it here.

[12] The action will accordingly be dismissed with costs.

"Lowry J."