Date: 20230222
Dockets: CI 18-01-15382
(Winnipeg Centre)
Indexed as: 4268113 Canada Ltd. et al. v. King et al.
Cited as: 2023 MBKB 35

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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

4268113 CANADA LTD. and 3063935 NOVA SCOTIA COMPANY, 4482850 MANITOBA LTD. and ANDREW MARQUESS as Beneficial Owners and 5642940 MANITOBA LTD. as Bare Trustee, on behalf of 3221073 NOVA SCOTIA COMPANY,	)	Dave G. Hill and Brett A. Steidl for the plaintiffs
plaintiffs,	)	Jason D. Kendall and Brian E. Roach for the defendants
- and -	)	
JOSHUA KING, JOHN RUBAN and RUBAN INSURANCE BROKERS INC.,	)	
defendants,	)	
-and-	)	
CONTINENTAL CASUALTY COMPANY operating as CNA and CNA CANADA,	)	
third party.	)	Judgment Delivered: February 22, 2023

McCARTHY J.

[1] This decision relates to a claim initiated by the plaintiffs who are the owners of 44 Hargrave Street in Winnipeg, Manitoba ("the property") as insureds under a policy of insurance ("the policy") with Continental Casualty Company operating as CNA ("CNA").

[2] The defendants, Joshua King ("King"), John Ruban ("Ruban") and Ruban Insurance Brokers Inc. ("Ruban Insurance"), are the insurance brokers who acted for the plaintiffs in arranging the insurance coverage for the property.

[3] The third party claim against CNA was abandoned prior to trial.

[4] On April 6, 2015 there was a fire at the property while the building remained under construction. The fact that the fire resulted in a complete loss was not in dispute.

[5] The plaintiffs filed a Proof of Loss Claim in August 2016, seeking payment for the replacement cost for the existing building, soft costs and delayed start-up rental income. The claim was denied on the basis that the coverage was for actual cash value ("ACV") and the costs sought were not covered.

[6] The plaintiffs and CNA attended to an arbitration with respect to the coverage under the policy. The arbitrator issued his decision on March 2, 2017 and set his award at $1,416,911.59 for the ACV of the loss occasioned on April 6, 2015. This amount was payable by CNA under the policy.

[7] The defendants were not involved in the arbitration process, but understood that the arbitrator would determine the issue of coverage under the policy. The defendants had believed that the coverage under the policy was full replacement cost coverage ("RCC"), which included bylaw and ordinance coverage, as well.

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[8] Prior to commencement of the arbitration, the plaintiffs decided to accept the position of the insurer CNA that the policy coverage was for ACV pursuant to clause E.6.b.(2) of the policy. This change in position was not communicated to the defendants in this case.

[9] After receipt of the arbitrator's award the plaintiffs commenced the within action claiming negligence against the brokers for:

(a) failing to procure adequate insurance based on the plaintiffs' business requirements and/or in accordance with the plaintiffs' instructions;

(b) failing to identify, inform, and explain to the plaintiffs any existing gap in coverage such that the plaintiffs could ensure that appropriate coverage was obtained;

(c) failing to continually monitor the coverage of the plaintiffs to ensure that it was appropriate; and

(d) failing to exercise a reasonable degree of skill and care as the circumstances required by a reasonably prudent insurance broker.

[10] At trial the issue was whether the defendants were negligent in obtaining inadequate insurance coverage for the plaintiffs and, if so, whether they should be held liable for damages to the plaintiffs.

[11] Most of the facts at trial were not in dispute.

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THE ISSUES

[12] The issues to be determined are:

(a) did the defendants breach their duty of care to the plaintiffs with respect to the policy in place at the time of the loss?

(b) if so, what are the compensable damages and what is the appropriate damage award?

(c) does the claim by the plaintiffs constitute an abuse of process and/or are the plaintiffs estopped from pursing this claim because of their participation in the arbitration?

(d) costs.

BACKGROUND FACTS

[13] The plaintiff, Andrew Marquess ("Marquess") is a land developer in Winnipeg, Manitoba who testified on behalf of himself and the corporate plaintiffs.

[14] The defendants Ruban and King are insurance brokers working for Ruban Insurance in Winnipeg, Manitoba.

[15] Marquess had a long-standing business relationship with Ruban Insurance. He dealt with Ruban Insurance as a broker for many of his commercial properties and projects between 2002 or 2003 until the trial of this matter in 2022. Marquess dealt primarily with Ruban until 2009 and thereafter dealt with either Ruban or King depending on their availability. Ruban retired in 2020.

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[16] Marquess estimated that he had placed insurance with Ruban Insurance on 10 to 30 properties, Ruban testified it was at least 20, and that the projects usually had financing with requirements for RCC.

[17] In 2007 the plaintiffs purchased the property at 44 Hargrave Street in Winnipeg, Manitoba for $475,000.00. The property included a fully occupied four-storey, 24-suite apartment building which the plaintiffs intended to renovate.

[18] Financing was obtained by the plaintiffs for the purchase.

[19] At the time of purchase, Marquess met with Ruban at Ruban Insurance to obtain a course of construction ("COC") insurance policy for the property.

[20] There was no dispute that at that time Marquess requested insurance on a replacement cost basis and that obtaining RCC for commercial developments had been his practice in the past.

[21] Ruban testified that the vast majority of his clients had existing offices or commercial buildings, but Ruban Insurance dealt with COC coverage from time to time. He testified that as projects under construction have more inherent risks, such as exposure to elements and vandalism, there is a higher premium payable for such coverage.

[22] Most COC policies, in Ruban's experience, were for replacement cost and it was Ruban Insurance's practice to have their clients provide a completed value estimate to ensure that adequate coverage was placed. Estimates of replacement value were cross-checked by the brokers using the Marshall & Swift construction guide.

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[23] On November 1, 2007 Marquess provided Ruban with an initial Statement of Values indicating a replacement cost of $3,450,000.00 and rental loss estimate of $195,000.00.

[24] At that time, COC builder's risk replacement cost, equipment breakdown, and liability coverage were placed on the property and building with Aviva Insurance Company of Canada ("Aviva"). The initial coverage was in place for a period of six months and then was renewed several times. This coverage was in place until November 2012, with the exception of a short period when there were no tenants and no construction so ACV coverage was put in place.

[25] During the period of coverage by Aviva, Marquess provided the defendants with regular Statements of Values for the purpose of the RCC.

[26] On November 1, 2012, Aviva expressed concerns about the construction delays and advised the defendants that they were no longer prepared to assume the risk of insuring this project.

[27] At that time Marquess was advised by the defendants that the plaintiffs had been given 30 days to find a new insurer. King and Ruban undertook the task of finding an alternative insurer. King filled out a Builders Risk Insurance - Questionnaire using information he obtained from the prior policy with Aviva and over the phone with Marquess. The information in the questionnaire was approved by Marquess and then sent to prospective insurers. The completed value which was intended to represent the value to replace the building with a building of like kind and quality when completed, was set at $3 million.

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[28] The request for coverage was marketed to another broker for several insurers, and at least three commercial insurers. The only insurer approached by King who offered the coverage requested on behalf of the plaintiffs was CNA. King testified that he had dealt with CNA on builder's risk policies several times (but less than six), and that he had received copies of and reviewed their policies, in the past. He and Ruban testified on cross-examination that CNA had approached them as a construction specialist and they had been working with them recently to build a referral relationship.

[29] The written coverage request from King to Rick DeBruyn ("DeBruyn"), senior underwriter for CNA, was made by email on November 29, 2012. The email references a prior conversation with "John" who is understood to be the defendant Ruban. The email requests "…$3,000,000 Builder's risk including Existing Structure,…$100,000 Soft Costs, $224,000 Delayed Rental Income, $5,000,000 Wrap up…[and a] 12 Month Term."

[30] A quote was received from CNA on November 30, 2012. King reviewed the quote and then had a discussion with Marquess. The existing coverage with Aviva was expiring the next day, and after the discussion with King, Marquess instructed him to bind the policy with CNA. There were no other discussions between King and Marquess at that time and the insurance was placed.

[31] King prepared and signed a Certificate of Insurance (the "Certificate") and provided a copy to the plaintiffs' mortgagee in satisfaction of their requirement for RCC. A copy of the Certificate was likely also provided to Marquess at that time and a copy of the policy was requested from CNA.

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[32] Upon receipt of the policy documents issued by CNA on December 22, 2012, they were reviewed by King and two emails were sent to DeBruyn on January 3, 2013 noting errors in the coverage outlined. The first email dealt with the required addition of coverage for temporary structures, property in transit, soft costs and delayed rents which were missing from the policy. The second email reads:

> …Just noticed another correction –
> Value of Existing Building should read as "Included" not (Not covered)
> The $3,000,000 value includes the cost of the renovation as well as the existing building.

[33] A Change Endorsement ("Change") issued by CNA on May 16, 2013 shows the Total Project Limit of Insurance as the "Value of Temporary Structures at $100,000", plus the "Value of Existing Building(s) (if applicable) as Included". The Change also added coverage for Property in Transit and Property at a Location Other Than the Job Site.

[34] There was no evidence of any other communications between King and DeBruyn or any other representative of CNA about the policy coverage.

[35] The policy was not reviewed with Marquess at any point and Marquess testified that he did not read the policy and did not recall receiving a copy of the policy. He stated that he usually received a couple of pages and a bill. There was no evidence from the defendants that the full policy was actually provided to the plaintiffs.

[36] Both Ruban and King testified that they understood at the time of placing the policy, and still at the time of trial, that the plaintiffs had all risk RCC under the CNA policy. Marquess testified that he had requested and understood that he had obtained RCC.

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[37] King's involvement with the plaintiffs between placing the insurance in 2012 and the loss in 2015 was limited to confirming the length of extensions needed and the work in progress to secure renewals of the existing policy.

[38] Subsequent to placement of the insurance with CAN, the plaintiffs commenced renovation of the building on the property. Current bylaws and building codes required that the footprint of the building be reduced and plans were formulated to add two floors to maintain the rental capacity. Demolition of parts of the building had occurred with plans to retain some of the structure and replace significant portions.

[39] On April 6, 2015 a fire occurred resulting in significant damage to the structure in existence at that time. The Property Loss Notice generated by Ruban Insurance was completed by King on behalf of the plaintiffs based upon information obtained from Marquess over the phone.

[40] The defendants attempted to assist and facilitate the claim by the plaintiffs for replacement cost of the building, including bylaw and ordinance coverage and rental loss compensation.

[41] After the plaintiffs were unable to agree upon replacement cost values with CAN, they received correspondence from CAN's legal counsel that the coverage under the policy was limited to ACV not replacement cost.

[42] As a result of the position of CNA that they were not prepared to pay replacement cost, Marquess testified that he understood from his lender that they would need to pay their loans. The decision was then made by the plaintiffs to sell the property and pay the mortgage loan from the sale proceeds.

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[43] The property was sold in February of 2017 for $858,500.00.

[44] After becoming aware of the position taken by CNA as to the coverage limits, the defendants attended a meeting between the plaintiffs, CNA and their counsel to discuss resolution. At that meeting the defendants expressed the opinion that the coverage sought and obtained for the plaintiffs, and reflected in the wording of the policy, was RCC.

[45] When the parties were unable to resolve matters, the defendants understood that the plaintiffs and CNA were going to participate in arbitration. They understood that the issue of the interpretation of the policy coverage would be decided at arbitration.

[46] This is consistent with the arbitration terms of reference agreed upon initially with the arbitrator. However, prior to the arbitration commencing the plaintiffs changed their position, conceding that the policy did not provide for replacement cost of the existing building. The defendants were not advised of this change in the terms of reference.

[47] The arbitrator accepted the agreement as to the policy interpretation in arriving at his arbitration award. The plaintiffs then sued the defendants for breach of their duty to the plaintiffs with respect to the failure to secure appropriate or requested insurance coverage on their behalf.

[48] The defendants assert that this claim by the plaintiffs is both wrong in substance, because the defendants had secured COC RCC and had fulfilled their duty to the plaintiffs, and that proceeding to court in the circumstances is an abuse of process.

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ANALYSIS

Were the Defendants Negligent?

[49] Central to the determination of whether the defendants were negligent in their placement of insurance on behalf of the plaintiffs is whether or not the policy at the time of the loss was actually RCC.

[50] The defendants argued that it was, and as a result the defendants were not responsible for any loss occasioned by the plaintiffs. They said that they placed adequate insurance which was the only coverage available at the time on short notice. They relied upon the expert opinion of Stephen J. White ("White"), of Somerset Insurance Consulting, in support of their position that, while they owed a duty of care to the plaintiffs, they did not breach that duty of care. They argued that any losses the plaintiffs incurred were attributable solely to the delays of the plaintiffs which resulted in the requirement for new coverage, the decision of the plaintiffs not to rebuild, and to sell the property prior to the coverage being determined.

[51] It was their position that had the plaintiffs rebuilt, CNA would have been required to pay the replacement cost of the building to the coverage maximum, including soft costs, other costs of rebuilding including code upgrades, and lost rental incomes, all of which were covered by the policy. When they decided not to rebuild, these benefits were no longer available. Therefore, any losses were occasioned by the choices the plaintiffs made and not by any liability of the defendants.

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[52] The defendants further argued that the Court should apply the principle of *contra proferentem* to the interpretation of the policy and resolve any ambiguity in the meaning against the insurer who was the party that drafted the policy.

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[53] The plaintiffs argued that there is no ambiguity in the policy wording and that the correct legal interpretation of the policy is the interpretation applied by CNA and accepted by the plaintiffs at the arbitration hearing. The interpretation was also accepted by the arbitrator in making his award, although that issue was not in dispute. The plaintiffs submitted that upon a careful reading of the policy it is clear that the existing building is only covered for ACV under clause E.6 of the Builder's Risk Coverage provisions of the policy. Specifically, the plaintiffs argued that the policy section applicable to the valuation of this loss is clause E.6.b.(2).

[54] They further argued that the opinion of the defendants' expert was based upon the flawed premise that the defendants had obtained a builder's risk replacement value policy, and therefore, his opinion that the defendants were not in breach of their standard of care in placing the insurance cannot be given any weight by the Court.

[55] The defendants argued that the applicable clause is E.6.b.(1) which they say provides for replacement value. They relied upon the opinion of their expert, White, that the defendants met their standard of care in arranging the coverage.

[56] In my view, the plaintiffs' position on the interpretation of the policy coverage in place at the time of the loss is the correct one.

[57] The Commercial Inland Marine Declarations ("Declaration") set out the summary of the coverage provided with the "completed Value of Project" at $3 million and the

"Total Project Limit of Insurance" at $3 million. It shows the "Value of Existing Building(s)" as "Not Covered". That Declaration was amended at the request of the defendant, King, to show "Value of Existing Building(s)" as "Included". I have not listed all other provisions which are not the subject of this litigation.

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[58] The policy then goes on to include several pages of "Common Policy Conditions", followed by a specific "Builder's Risk Coverage" section which states at the beginning of that section:

> VARIOUS PROVISIONS IN THIS COVERAGE FORM AND IN THIS POLICY RESTRICT COVERAGE. READ THE ENTIRE FORM AND POLICY CAREFULLY TO DETERMINE RIGHTS, DUTIES AND WHAT IS AND IS NOT COVERED.

[59] Under section E, the "Inland Marine General Conditions", of the Builder's Risk Coverage, the policy specifically indicates with respect to valuation:

> 6. Valuation
>
> The Valuation General Condition is replaced by the following:
>
> We will determine the value of the **Covered Property** in the event of **loss** as follows:
>
> . . .
>
> b. The value of the **Covered Property** in the process of renovation and temporary structures used in the renovation will be determined as follows:
>
> (1) If the value of the existing structure is NOT indicated in the Declarations, the value of **Covered Property** in the process of renovation is the least of the following amounts:
>
> (a) The Limit of Insurance applicable to the lost or damaged property;
> (b) The cost to repair, replace or rebuild:
> (i) the renovation work completed as of the time of the **loss**; and
> (ii) the lost or damaged temporary structures;
> with materials of similar or like kind and quality; or

(c) The amount you actually spend that is necessary to repair, replace or rebuild:

(i) the lost or damaged renovation work completed as of the time of the **loss**; and

(ii) the lost or damaged temporary structures.

This amount includes the cost of labor and reasonable overhead if such costs are included in the Limit of Insurance indicated in the Declarations.

(2) If the value of the existing structure IS indicated in the Declarations, the value of **Covered Property** in the process of renovation will be the lesser of:

(a) The Limit of Insurance applicable to the lost or damaged property; or

(b) The value determined in b.(1) above, plus the least of the following amounts:

(i) the actual cash value of the existing structure;

(ii) the cost of reasonably restoring the existing structure to its condition immediately before the **loss**; or

(iii) the cost of replacing the existing structure with property of similar or like kind and quality.

Except as provided in the Additional Coverage Ordinance or Law, the cost of building repairs or replacement does not include the increased cost attributable to enforcement of any ordinance or law regulating the construction, use or repair of any property.

In the event of loss the value of the property will be determined as of the time of loss. In no event will we pay more than the Limit of Insurance shown in the Declarations.

[60] A careful reading makes it clear that the applicable provision must be E.6.b.(2) because E.6.b.(1) makes no mention of an "existing structure". Subsection (1) provides only for compensation for losses to "renovation work" or "temporary structures".

[61] King was therefore correct on reviewing the policy Declaration to request that the "Value of Existing Building should read as "Included" not (Not covered)". Had he not asked for that to be corrected the value of the loss would have fallen under E.6.b.(1) and there would have been no coverage for the existing structure at all. However,

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unfortunately he did not go so far in his request as to point out or ensure that it must be covered for replacement value.

[62] Section E.6.b(2) provides for the lesser of ACV, restoring, or replacing the existing structure. This is not full RCC.

[63] In my view, the expectation is that professionals working in the insurance industry should be able to read and understand these provisions. On my reading of the valuation provisions they are not ambiguous, and therefore, the doctrine of *contra proferentem* does not apply.

[64] In any event, that doctrine is intended to be applied in the event of a dispute between two parties to a contract, where any ambiguity is resolved in favour of the party who did not draft the contract. Here the defendants were not a party to the contract and the dispute as to the correct interpretation does not involve the party who drafted it. The parties to the contract in fact agree on the interpretation of the wording.

[65] Based upon my finding that the coverage placed by the defendants was not RCC, the opinion of their expert is of no assistance on the issue of whether they met the required standard of care. His opinion was premised entirely upon the fact that the defendants had placed RCC and as such they had discharged their duty of care.

[66] I, therefore, give no weight to White's opinion that the defendants had met their standard of care. I do find, however, that his evidence was of assistance in outlining the components of the standard of care owed by an insurance broker to clients seeking insurance coverage. I also note that the defendants themselves acknowledged most of these expectations and obligations during their testimony.

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[67] White, whose expertise as an experienced broker and educator within the insurance industry for 40 years was not challenged, outlined the role of a broker as being one requiring competence, and candid and honest communication and advice to clients, as defined in the Insurance Council of Manitoba's General Insurance Agent Code of Conduct ("Code") that governs the industry. He also found their role to include:

- obtaining and understanding the client's instructions;
- determining the client's needs and requirements;
- providing appropriate counsel and advice;
- effectively marketing the client's risks;
- confirming coverage and/or the absence of coverage; and
- servicing the client's ongoing coverage needs.

[68] With respect to the obligation of competence, he referred to the Code which regulates the conduct and expectations of all insurance brokers in the province. He noted that the commentary in the Code defines competence as having the necessary knowledge and skill to provide the services, and that a client is entitled to assume that the broker is competent. The commentary also notes that competence may require a broker to obtain advice from other professionals such as lawyers or accountants.

[69] The duty to advise is also set out in the Code. White stated that, in his opinion, this encompasses the duty to confirm coverage or any absence of, or gap in, coverage.

[70] As the commentary in the Code points out, a finding of a Code violation does not necessarily equate to a finding of negligence, and the opposite is certainly also true.

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However, it is one helpful piece of evidence in determining the standard of care expected of a broker, and whether there has been a breach of that standard in any given case. In this case, the obligations required of the broker are not in dispute. The question is, in the context of this case did the brokers adequately carry out those obligations.

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[71] The decision of ***Fine's Flowers Ltd. et al. v. General Accident Assurance Co. of Canada et al.***, 1977 CanLII 1182 (ON CA) ("***Fine's Flowers***"), was cited with approval by the Supreme Court of Canada in ***Fletcher v. Manitoba Public Insurance Co.***, 1990 CanLII 59 (SCC), and is considered to be the leading case with respect to the duty of insurance brokers to their clients.

[72] As stated by the Court in ***Fine's Flowers*** at paras. 43 and 44:

> In many instances, an insurance agent will be asked to obtain a specific type of coverage and his duty in those circumstances will be to use a reasonable degree of skill and care in doing so or, if he is unable to do so, "to inform the principal promptly in order to prevent him from suffering loss through relying upon the successful completion of the transaction by the agent": Ivamy, General Principles of Insurance Law, 2nd ed. (1970), at p. 464.
>
> But there are other cases, and in my view this is one of them, in which the client gives no such specific instructions but rather relies upon his agent to see that he is protected and, if the agent agrees to do business with him on those terms, then he cannot afterwards, when an uninsured loss arises, shrug off the responsibility he has assumed. If this requires him to inform himself about his client's business in order to assess the foreseeable risks and insure his client against them, then this he must do. It goes without saying that an agent who does not have the requisite skills to understand the nature of his client's business and assess the risks that should be insured against should not be offering this kind of service. As Mr. Justice Haines said in Lahey v. Hartford Fire Ins. Co., …:
>
>> The solution lies in the intelligent insurance agent who inspects the risks when he insures them, knows what his insurer is providing, discovers the areas that may give rise to dispute and either arranges for the coverage or makes certain the purchaser is aware of the exclusion.

[73] As further set out in ***2049390 Ontario Inc. v. Leung***, 2018 ONSC 5759:

> [31] There is no dispute that insurance brokers owe a duty of care to their clients. The leading authorities on the duty owed by insurance brokers to their clients are *Fine's Flowers Ltd. v. General Assurance Co. of Canada*, [1977], 17 O.R. (2d) 59 (C.A.) and *Fletcher v. Manitoba Public Insurance Co.*, 1990 CanLII 59 (SCC), [1990] 3 S.C.R. 191. In *Fletcher*, Wilson J. described the duties of insurance brokers as follows:
>
>> 54 In my view, *Fine Flowers* stands for the proposition that private insurance agents owe a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs. I note that Professor Snow has summarized the effect of *Fine's Flowers* in "Liability of Insurance Agents for Failure to Obtain Effective Coverage: *Fine's Flowers Ltd. v. General Accident Assurance Co.*" (1979), 9 Man. L.J. 165, in the following terms, at p. 169:
>>
>>> The implication of this case and many others like it in recent years seems clear. Consumers who place their faith in insurance agents holding themselves out as competent and find their faith misplaced, will frequently be able to find recourse against the agent. ... [T]he extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, as set out in this case, is a fairly stringent one for the agent. Moreover, given the general situation of the principal relying very heavily on the expertise of the agent, it does not seem to be an unreasonable burden for an insurance agent to bear.

[74] In this case the defendants, and Ruban in particular, had a long-standing brokerage relationship with Marquess. They also had a great deal of experience with marketing of commercial insurance needs for various kinds of business ventures over many years. Both Ruban and King were familiar with COC, or builder's risk, insurance. They both testified that they had placed this kind of insurance for clients in the past. In fact, Ruban had placed this kind of insurance for Marquess and his companies on prior occasions, and had placed the Aviva COC coverage on the property for four years prior to the change to the CNA coverage.

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[75] King had also worked for Aviva for a period of three years and had reviewed and underwritten COC policies on their behalf.

[76] The evidence is that at the time of the placement of the CNA insurance, Ruban had deferred some administrative responsibilities relating to the plaintiffs' insurance to King, primarily with respect to renewals, but that he had remained the plaintiffs' primary broker. In November of 2012, when Aviva gave 30 days notice that they were no longer prepared to provide coverage, the evidence of Marquess, Ruban and King was that the task of finding new coverage was largely delegated to King. However, there was also evidence in the initial email between DeBruyn and King, that Ruban had been involved in speaking with DeBruyn about the request for coverage for this property. Ruban testified that he recalled having one or two conversations with DeBruyn at CNA prior to placement of the policy.

[77] With respect to the CNA policy in question, there is no disagreement between the parties that the defendants were working on a short timeline to find replacement coverage. King had expressed to Marquess that this was an arduous task. However, the defendants undertook that task, and in doing so had an obligation to make their best efforts to find appropriate coverage, and if unable to do so, to advise Marquess of that fact and his options. These obligations are accepted by the defendants, Ruban and King, in their testimony.

[78] They also, as the experts in insurance, had an obligation to determine what coverage would best meet their client's needs and then to communicate those needs clearly to prospective insurers. Finally, they had a duty to ensure that the coverage

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placed was the coverage sought and offered. The law is clear that brokers must be diligent at each step of the process to ensure that there are no errors, omissions or inadequacies in the coverage, and if there is to immediately draw it to the attention of the insurer and the client.

[79] In this case, the defendants determined that the plaintiffs needed COC builder's risk insurance coverage for replacement cost. The evidence is that that was their recommendation to Marquess and he in turn requested that they find and place the recommended coverage. Several "Statement of Values" documents, completed and signed by Marquess, were filed in the proceedings ranging from 2007 to 2014. In every case the document indicated the value of the building and building materials and stated that he certified the values given, and the cost provided represented, to the best of his knowledge and belief, the cost of replacement on a "REPLACEMENT COST BASIS". Each form also included a value for "Extended Rental Income including Delayed Start Up". The evidence from Marquess was that he was providing the values, but he was relying upon the brokers' expertise to know what coverage he needed and that that was what he had.

[80] In my view, the brokers accurately identified that COC RCC insurance would best protect the plaintiffs' interests. That assessment had been made by Ruban at the outset of the project and such coverage had been obtained for the plaintiffs for the first several years of the project. There is no dispute that the Aviva coverage was for replacement cost. The policy wording for that coverage clearly and concisely sets out that it is RCC.

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[81] The defendants appropriately recommended the same kind of coverage when the Aviva coverage ended. They were aware that RCC was a requirement of the plaintiffs' lenders and had received a request for such coverage in writing.

[82] The problem came, however, when the brokers marketed the plaintiffs' needs to potential insurers. Nowhere in the written communication with CNA, or any requests for coverage filed in these proceedings, was there an indication that they were seeking "replacement cost" coverage for these clients. While I accept the defendants' evidence that that is what they were looking for on behalf of the plaintiffs, it is obvious upon review of the emails sent to prospective insurers or brokers that that requirement was not made clear. While Ruban testified that in his experience most COC policies are for replacement value, it is not sufficient to operate under assumptions when ensuring that a client's insurance needs are adequately provided for. The coverage sought must be clearly communicated and confirmed.

[83] Then, when the insurance policy wording arrived at the defendants' office, two weeks after binding the coverage, both King and Ruban testified that they did not read the policy wording to ensure that it provided for replacement cost and that it met their clients needs in other respects. Ruban testified that he had never placed insurance with CNA before and had never read the policy, but had reviewed it generally with a representative from CNA that he had met with at some point prior. King testified that he thought Ruban had read the policy.

[84] Even if reviewing a policy every time is not standard practice, in a situation as existed here it was necessary. First, this was a new policy for this client, not a renewal

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of an existing policy that may have been reviewed on an earlier occasion. Second, it was a relatively new insurer to the brokers. And third, King had noticed a number of significant omissions on the Declaration upon its receipt, including the fact that coverage for the existing building had been excluded altogether. In the circumstances, the policy wording should have been reviewed to ensure that the policy provisions were accurate, adequate and could be confirmed to the client.

[85] King stated at trial that although he did not read the policy, he was familiar with coverage of that type and had seen CNA policies before. It is clear that King made assumptions about the terms and contents of the policy wording, rather than reviewing the policy to satisfy himself that the coverage was complete and accurate. In my view, when placing a new policy for the first time the broker must satisfy himself as to the terms of the coverage.

[86] I accept that King believed that he had obtained RCC for the plaintiffs because he drafted and signed a Certificate of Insurance and provided it to Marquess and the plaintiffs' lenders to confirm that the insurance as required was in place. The correspondence from the plaintiffs' mortgagees to the defendants had been clear that replacement cost insurance with loss payable to the lenders was required. The Statement of Values completed by the client also clearly indicated replacement value. As a result of King's error both the plaintiffs and their lenders were inadequately protected under the policy.

[87] In my view, had King taken the time to review the policy wording he would likely have noted that the valuation provisions relating to the existing building allowed for

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payment of the lesser of ACV or the cost to replace. At that point he could have sought an amendment, or clarification, and advised the clients of the issue.

[88] It is not an adequate response to say that the CNA policy was the only coverage available so there was nothing more that could have been done. That may have been true, but the broker was obligated to ascertain that the coverage was adequate, and as expected, and if not to advise the client of that. It is conceivable that the defendants may have been able to have the policy corrected at that point to cover replacement cost, or to negotiate improvements to the coverage. Having the correct information would have allowed the plaintiffs to make informed decisions, including whether to accept the coverage or not, and whether to continue shopping for another insurer, even if they did accept the coverage.

[89] The time to clarify any uncertainty in the coverage is at the time of placing the coverage, not after a loss has occurred. As stated by the Code governing the defendants' profession, a broker's obligation may extend to consulting other professionals for advice. Legal advice could have been sought on the policy meaning if it was not clear to the broker, but that could only be determined by reading the policy.

[90] I also do not accept the defendants' argument that Marquess, as an experienced property developer, had an obligation to read the policy and draw any concerns to their attention. In fact the opposite is true. The brokers are in the insurance business and selling the service of assisting clients in obtaining appropriate coverage. It is their obligation to ensure the terms of the coverage are those contracted for. Further, it was Marquess' evidence that prior to experiencing this loss he did not understand the meaning

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of ACV coverage versus replacement cost coverage. He was relying, as he was entitled to, upon the expertise of his brokers to know what was needed to protect the plaintiffs' interests.

[91] In all of the circumstances I find that the defendants were negligent in not ensuring that the insurance in place at the time of the loss was RCC and not advising the plaintiffs of the gap and inadequacy in their coverage.

Damages

[92] The question then becomes what the proper measure of damages is in this case.

[93] I am not persuaded by the argument that it was the plaintiffs' decision not to rebuild and that replacement coverage only applies when the insured property is rebuilt, and therefore, the defendants are not liable for any loss to the plaintiffs. The decision to rebuild is only a *choice* where the RCC is actually in place. Where the policy is not for RCC, and particularly here where the requirements of the lender were that there be RCC, the insured cannot be faulted for the decision not to rebuild.

[94] The defendants argued that to award damages for replacement value in this case would amount to a windfall to the plaintiffs, which they submit is contrary to the principle that damages are intended to compensate a party for their actual loss and no more.

[95] There is, however, a difference where the damages sought relate to a contract for a specific amount of insurance coverage. As well, replacement cost insurance by its nature offends the general principle that only actual losses are compensable. RCC insurance can often put an insured in a better position than he was in prior to the loss

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because there is no reduction for depreciation of the value of the asset. Insured parties pay more for this kind of coverage as a result.

[96] The issue is what was the loss to the plaintiffs resulting from the breach of the defendants' duties to them? In other words, what is the difference had they had RCC as opposed to ACV coverage?

[97] While the plaintiffs reportedly did not lose money on the sale of their property, in the sense that they sold it for more than they purchased it for, they did lose what it would have been worth if they had rebuilt and received the replacement cost value that they understood they were entitled to. At that point their asset would have been worth far more and would have had the potential of rental revenue as well.

[98] The plaintiffs in this case paid their premiums and made financial and business decisions relying upon the representations of the defendants that they had coverage for the replacement value of the property they were renovating, plus rental delay coverage. The loss occasioned by the negligence of the defendants was the loss of the coverage to replace the building. The proceeds from the sale of the property without the building are irrelevant to that determination.

[99] The plaintiffs are entitled to compensation that puts them in the position they would have been in, but for the negligence of the defendants. Measuring that loss in this case where the building was not rebuilt because of the inadequate coverage is challenging. I have determined that as a measure of their damages they should be entitled to the full benefits under the policy at replacement cost values, less the ACV they received from CNA.

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[100] With respect to the calculation of the plaintiffs' damages, the plaintiffs relied upon calculations prepared by an employee of the plaintiff corporations based upon a quote from two contractors. Neither the employee nor the contractor testified at trial, but their estimates and calculations were filed in an Agreed Book of Documents as evidence in the trial.

[101] The defendants argued that the appropriate estimate of the replacement cost is that prepared by HFS Construction Consultants. That report, prepared by Tomas Herperger ("Herperger"), who testified at the trial, was based upon the same contractor quotes as the plaintiffs' calculations. Herperger's report is essentially a critique of the methodology used by the plaintiffs arriving at a different replacement cost estimate.

[102] Having reviewed the calculations and considered all of the evidence with respect to the replacement cost of the building, as it existed at the date of the loss, I have concluded that I accept portions of each valuation as follows.

[103] Generally, I prefer Herperger's methodology with respect to the reduction of the costs on an item by item basis to reflect the actual portion of the expense related to replacing the existing structure. The plaintiffs, on the other hand, proposed that 75% of the total cost to rebuild represented the fact that 75% of the building was standing at the date of the loss. This does not, however, account for the fact that the building was gutted on the inside except for supporting walls and had a fully existing foundation. The plaintiffs' numbers also include many upgrades necessitated by code and bylaw requirements which were covered separately under the policy and were subject to a limit of $250,000.00. There are also things included in the plaintiffs' calculations, such as a

second stairwell, that did not exist before the loss. Herperger has adjusted for these considerations and backed some items out. He has also backed out GST on the basis that the plaintiffs should be able to self-assess and not pay the GST.

[104] Therefore, I accept Herperger's number of $1,611,228.83 as the reasonable cost "for the work required to reconstruct the building to its pre-loss configuration" (Report dated October 17, 2016, at p.2). He also stated at p. 3 of his report that "[t]his cost contemplates reconstruction of the building using like kind and quality materials with allowances for modern construction practices".

[105] In arriving at his number Herperger has backed out $410,570.10 for renovation scope and approximately $110,000.00 for heating and hoarding costs. I do not agree with all of those reductions.

[106] With respect to renovation scope, Herperger testified that the costs to replace the roof, doors and windows were all backed out of the estimate at the request of the insurer because the plaintiffs' plan had been to replace them as part of the renovation. However, as Herperger himself indicated, replacement coverage is intended to replace that which existed on the date of the loss. The evidence was that the building had a roof, doors and windows prior to the fire. The renovation had already been planned for years and no improvements had yet been made. It is conceivable that the plaintiffs could have decided to replace what was there under their coverage and then sell the property without further improvements. They were entitled, in my view, to be paid for the reasonable costs to rebuild the building with the features that it had before the fire. That condition included a roof, doors and windows. I see no basis in the contract wording, or otherwise, for

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removing the coverage for these items and I have therefore added the cost to replace these items back in. I added back $188,882.00 for those items, grossed up by the same factors used by Herperger in his report, for a total amount of $241,046.00.

[107] With respect to the heating and hoarding costs, his explanation was that if the construction was timed to be completed during the summer months this cost would not be required. The contractor had included $110,000.00 for these costs in their estimate of the requirements to complete the project. In my view, heating and hoarding would have been required at some point when reconstruction was estimated to take a year. I therefore added back $55,000.00 in anticipation that not all such costs could have been avoided.

[108] Finally, having understood that there was $250,000.00 in bylaw and ordinance coverage Herperger backed out code upgrade costs of over $670,000.00 related to making the building code compliant. I am awarding the $250,000.00 policy limit for that coverage.

[109] I have also included the value of the coverage for soft costs at $100,000.00.

[110] I have not awarded the $895,377.18 in other costs backed out in the Herperger Report. Based upon his methodology those numbers are, to some extent, excessive and to some extent subsumed in the "general conditions allowance" of approximately 18.1% of the reconstruction cost that he has added. I accept his evidence on this issue.

[111] Finally, with respect to the plaintiffs' claim for a further award of $224,000.00 for extended rental income coverage, I am not awarding any damages. While I agree that the plaintiffs had this coverage, the reality is that there is no evidence before the Court

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upon which a determination can be made that there would have been a rental loss. While the coverage maximum is known, there was no evidence presented to support such a claim. The evidence suggests that the building had been vacant for several years prior to the loss and no evidence as to rental plans, estimated occupancy, timelines or rates was provided. The plaintiffs have not proven that damages in this regard are appropriate.

[112] In making this award I am mindful of the argument by the defendants that I am awarding the plaintiffs costs that they did not in fact incur. However, I am awarding damages for the loss to the plaintiffs of amounts to which they would have been entitled had the defendants not breached their obligations to them.

[113] Because of the breach, the building was never replaced and, therefore, there is no way to quantify what the value would have been to the plaintiffs. In my view, the loss of the insurance proceeds that they would have been entitled to for replacement of the building is the only measure of their damages available in the circumstances, through no fault of the plaintiffs.

[114] Damages are therefore awarded as follows:

$1,611,228.00 (cost to replace per: Herperger)

+ $241,046.00 (renovation scope addbacks)

+ $55,000.00 (heating and hoarding)

+ $250,000.00 (Code upgrades policy limit)

<u>+ $100,000.00 (soft costs)</u>

$2,257,274.00

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[115] This amount is reduced by the arbitrator's award of $1,416,911 payable by CNA toward the plaintiffs' loss.

[116] Judgment will therefore be for $840,363.00.

Abuse of Process

[117] The defendants argued that the actions of the plaintiffs in changing their position at arbitration without notice to the defendants, and then suing the defendants for any shortfall in coverage, was an abuse of process.

[118] I do not agree. Parties are entitled to settle aspects of losses with some parties but not others, both before and during litigation. Here the plaintiffs settled their claim under their policy through arbitration which they were entitled to do. They then came to court taking the same position on the policy coverage as they had taken at the arbitration. They accepted the insurer's position that the policy was for ACV and not RCC.

[119] There is nothing inappropriate in my view about this approach. The plaintiffs took a risk at trial that the Court may have found the policy to be for RCC and that the defendants were not negligent, in which case they would have been bound by the settlement with the insurer and would have had no further recourse. That was their risk to take.

[120] With respect to the allegation that the plaintiffs were estopped from making this claim, the parties to this action are not the same parties that participated in the arbitration process. There was nothing preventing the plaintiffs from pursuing this claim for negligence.

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CONCLUSION

[121] The defendants are jointly and severally liable for negligence in failing in their duties to place and maintain appropriate insurance coverage and failing to recognize and advise the plaintiffs of the existing gaps in their coverage.

[122] The plaintiffs are entitled to judgment in the amount of $840,363.00.

[123] The judgment shall bear interest at the Court of Queen's Bench rate from the date of filing the Statement of Claim to the date of judgment and post-judgment interest at the Court of King's Bench rate from the date of judgment.

[124] If costs cannot be agreed upon, time may be set before me to address this issue.

McCarthy J.

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