Date: 20230616
Docket: CI 20-01-29353
(Winnipeg Centre)
Indexed as: Linde v. Max Insurance Company
Cited as: 2023 MBKB 74

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

NICOLE LINDE,	)	Richard M. Beamish
	)	for the plaintiff
plaintiff,	)	
- and -	)	
	)	Kevin T. Williams, K.C.
	)	J. Matthew Nordlund
MAX INSURANCE COMPANY,	)	for the defendant
defendant.	)	JUDGMENT DELIVERED:
	)	June 16, 2023

LANCHBERY J.

[1] The defendant filed an application for judicial review of a decision of an Umpire appointed under ***The Insurance Act***, C.C.S.M. c. I40 ("the ***Act***"). This application was scheduled for the first day of trial. In its brief, the defendant's counsel alleged judicial review was ordered by me. I advised counsel the court's role is not to determine procedural matters for the parties. Defendant's counsel abandoned its judicial review application and the trial commenced.

[2] The first issue is whether Max Insurance Company ("Max") in the administration of Nicole Linde's ("Linde") insurance claim for fire loss amounts to

bad faith. Max's adjuster was Centra Claims Management Ltd. ("Centra"), whose principal adjuster was Doug Friesen ("Friesen"). Unless otherwise noted, a reference to Max includes all of the above.

[3] The second issue is the impact of ss. 121 and 123 of the ***Act*** on Linde's claim. The provisions of the ***Act***, which are the subject matter of the trial, are attached as Schedule "A" to these reasons.

Duty of Good Faith

[4] The duty of good faith was defined in ***Fidler v. Sun Life Assurance Co. of Canada***, 2006 SCC 30. In ***Fidler***, the Supreme Court of Canada (at para. 63) adopted the following paragraph from ***702535 Ontario Inc. v. Non-Marine Underwriters Members of Lloyd's London*** (2000), 2000 CanLII 5684 (ON CA), 184 D.L.R. (4th) 687 (Ont. C.A.) as follows:

> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[5] In the final paragraph of Brenda Hollingsworth's paper, Behaving Badly: Bad Faith in Insurance, 2019 39th *Annual Civil Litigation Conference* 11C, 2019 CanLIIDocs 3835, she concluded:

> It may seem as if we are back where we started. While some cases have provided specific instances and indicators of bad faith, they do not provide a hard and fast rule or a blueprint to mounting a bad faith claim. The best wisdom may be found back in *Fidler*, where the Supreme Court of Canada made the following observation about bad faith claims:
>
> > Ultimately, each case revolves around its own facts. As O'Connor J.A. stated in *702535 Ontario*:
> >
> > > What constitutes bad faith will depend on the circumstances in each case. A court considering whether the duty has been breached will look at the conduct of the insurer throughout the claims process to determine whether in light of the circumstances, as they then existed, the insurer acted fairly and promptly in responding to the claim. [para.. 30]
>
> In other words, lawyers will continue to be challenged to predict the outcome in a case where bad faith and/or fraud is in play with very little assistance from the recent case law.

[6] In ***3746292 Manitoba Ltd. et al v. Intact Insurance Company et al***, 2018 MBCA 59, Mainella J.A. outlined how trial judges should consider the insurer's duty of good faith in the claims handling process:

> [21] At different stages of the life of an insurance contract, one of the parties may be vulnerable to the other (e.g., information advantage of an insured in negotiating the contract and the economic and technical advantage of an insurer in the claims-handling process) (see Barbara Billingsley, *General Principles of Canadian Insurance Law*, 1st ed (Markham: LexisNexis, 2008) at 48). Accordingly, beyond the obligations on the parties to an insurance contract created by statute or the terms of the contract, the common law imposes a reciprocal duty of good faith. The objective of the reciprocal duty of good faith is to place the parties on an "equal footing" (*Greenhill v Federal Insurance Co* (1926), [1927] 1 KB 65 at 76 (CA (Eng)).
>
> [22] In *Bhasin v Hrynew*, 2014 SCC 71, the Supreme Court of Canada recognised good faith as the general organising principle of the common law of contract and that the duty of honest performance of a contract was a manifestation of the general organising principle. Before *Bhasin*, the courts had accepted that there was an obligation of good faith placed on an insurer to dispose of insurance claims openly, honestly and without unreasonable delay (see *702535 Ontario Inc v Lloyd's London, Non-Marine Underwriters* (2000), 2000 CanLII 5684 (ON CA), 184 DLR (4th) 687 at

para. 27 (Ont CA), leave to appeal to SCC refused, 2000 CarswellOnt 4335).

[23] This duty of an insurer applies to both "the manner in which it investigates and assesses the claim and to the decision whether or not to pay it" (*Bhasin* at para. 55). While an insurer does not have to treat the insured's interests as paramount in the same way as a fiduciary must, an insurer is obligated in the claims-handling process to be even-handed by giving equal consideration to the interests of the insured as to its own interests (see *Usanovic v Penncorp Life Insurance Company (La Capitale Financial Security Insurance Company)*, 2017 ONCA 395 at para. 27). Practically, for an insurer, even-handedness in the claims-handling process means that an insured is not an adversary; the insured is entitled to correct information, a fair interpretation of the policy, a timely and balanced assessment of the claim based on its objective merits, and prompt and full payment of a valid claim.

[24] In *702535 Ontario Inc*, O'Connor JA (as he then was) discussed an insurer's duty to promptly and fairly administer a claim in the following way (at paras 28-29):

> The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment.
>
> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy. This duty of fairness, however, does not require that

> an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[25] Given the complexities that often arise in assessing an insurance claim, an insurer is permitted to fairly debate the claim, and its amount, provided it acts reasonably (see Roderick Winsor, *Good Faith in Canadian Insurance Law* (Toronto: Thomson Reuters, 2017) at 5-17 to 5-19; and Gordon G Hilliker, *Insurance Bad Faith*, 2nd ed (LexisNexis, 2009) at 68). In order to establish a breach of an insurer's duty of good faith, more must be shown than simply that errors occurred in the claims-handling process. Also, just because an insurer is ultimately wrong does not mean that it acted in bad faith. A successful action requires proof that there was no reasonable basis in law or fact to deny benefits and that the defendant knew or ought to have known that to be the case. Tell-tale signs of bad faith by an insurer are when the handling of the claim was "overwhelmingly inadequate" or there was an "introduction of improper considerations into the claims process" (*Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para. 71; and *Industrial Alliance Insurance and Financial Services Inc v Brine*, 2015 NSCA 104 at para. 69, leave to appeal to SCC refused, 36809 (12 May 2016)).

[26] While an insurer is not required to accept any settlement within a policy's limits, the duty of good faith requires it to take reasonable steps to protect an insured's interests in settling the claim on objectively reasonable terms. Accordingly, where an insurer unfairly attempts to lowball a settlement from an insured, it is not acting even-handedly; rather, it is acting in bad faith because it is placing its own interests over those of its insured (see Hilliker at p 70; *Fernandes v Penncorp Life Insurance Company*, 2014 ONCA 615 at paras 70, 83; and *Zurich Life Insurance Company Limited v Branco*, 2015 SKCA 71 at para. 183, leave to appeal to SCC refused, 36696 (21 April 2016)). As was explained in *702535 Ontario Inc*, an insurer cannot use its economic advantage or the insured's economic weakness to obtain a favourable settlement (see also *Bhasin* at para. 65).

[27] While the plaintiffs in this case hired their own expert, SRGM, to assist them, more commonly, an insured is at a technical disadvantage in the claims-handling process and, accordingly, an insurer must avoid the temptation to take advantage of its preferential position as to the valuation of a claim in the process of settling it. The reasonable expectation of an insured making a valid claim is that an insurer will be diligent, fair and refrain from unjustified conduct that has the effect of denying or delaying the benefits of the insurance contract (see *Bhasin* at para. 65).

[28] In summary, an insurer unfairly engaging in the practice of lowballing would not be performing its contractual duties "honestly and

> reasonably", but would be acting "capriciously or arbitrarily" (*Bhasin* at para. 63).

[7] Linde asked me to consider those factors as outlined in the case law.

[8] Counsel provided a number of cases on bad faith in support of their positions. I find the circumstances of this case will determine if Linde succeeds in her claim that Max acted in bad faith.

The Circumstances

[9] In order to address whether Max acted in bad faith, I shall review the circumstances of the claims management process. I find the facts presented in evidence are as follows:

- a fire occurred in Linde's home on December 8, 2019;
- on December 9, 2019, Linde, accompanied by two friends, met Friesen of Centra, at Linde's home. Two representatives from Corner 2 Corner Cleaning & Restoration ("C2C") were inspecting the site;
- by December 30, 2019, Max obtained an Origin and Cause Report stating the cause of the fire was an insured loss;
- Max obtained an opinion of value from Steve Hildebrand, a local realtor operating in the geographic area where the loss occurred. Hildebrand opined the Adjusted Cost Value ("ACV") was $170,000 for land and buildings, with $45,000 attributed to the land value, for a net ACV of $125,000;

- Linde arranged for new accommodations, and Max advised her the monthly rental would be covered as part of her claim;
- although Linde was critical of the size of the new accommodations, it was Linde who chose the accommodations;
- approval for the boarding of her pets was approved;
- replacement of Linde's and her children's clothing would be covered;
- Max hired C2C to assist Linde to prepare an inventory of the personal property claim, although the inventory is the sole responsibility of the insured;
- Max did not forward the required proof of loss forms to Linde within the 60 days from the date of loss as set out in the policy. This form was not provided until April 1, 2020;
- on February 3, 2020, C2C provided Max with an estimate for the total cost to repair the fire damage, including GST, as $238,501.20 (the estimate was misdated as February 3, 2019);
- in the month of March 2020, Linde sought out building replacement quotes from various contractors, but at this time she did not seek out repair quotes as she was of the opinion any attempt to "smoke seal" any repaired structural components could never be satisfactory;
- in April 2020, Max instructed Crosier, Kilgour & Partners Ltd. ("Crosier Kilgour") to assess the nature of the structural damage suffered in the fire;

- on May 14, 2020, Crosier Kilgour issued its report advising repairs could be properly undertaken based on their visual review of the exposed areas of the structure, subject to the caveat if any additional structural damage is observed during the course of demolition work or during the repairs, they could be contacted to provide further assessments and recommendations;
- by May 2020, Linde was frustrated by the entire claims management process and hired Ken Munroe ("Munroe") to represent her interests;
- Linde provided an estimate of her contents loss by June 2020. Centra expressed concerns that some of the numbers appeared to be inflated;
- Centra hired Rob Hales ("Hales") of Keystone Assessment Service to reassess the value of the large items it expressed concern about, resulting in an increase of the ACV of the contents to $153,404.38, which was paid to Linde;
- COVID-19 caused many businesses to close or severely restrict the hours of operation, or impose capacity limits. Linde's ability to obtain values was therefore impacted. Also, some of the furniture was antique furniture left to Linde by her grandmother, which could not be valued in the usual course;
- on July 13, 2020, Max received a repair estimate from Minnett Homes for $249,235, which was approved as the new repair cost. Minnett

withdrew its bid and the repair estimate reverted to the quote from C2C;

- a meeting occurred on July 17, 2020, with Ken Munroe, the Harval Homes representative, Linde and her friend. The meeting ended on poor terms;
- by August 2020, Max paid $125,000, being the ACV applicable, and confirmed it would pay up to $248,581.20 including taxes if Linde chose to repair or replace the home on the location where the fire occurred;
- Max also advised Linde the C2C quote included contents removal, but Linde was free to hire her own contractor and could remove her personal contents as an insured claim;
- Max also advised Linde when it paid the $125,000, it would only pay an additional five months of Additional Living Expenses (ALE) as she had not made any decision to repair or replace;
- on October 13, 2020, Linde's counsel served a demand on the insurer that an appraisal process be undertaken under s. 121 of the ***Act***;
- there were disagreements on the neutral representative and value, and this process was not completed until the fall 2021, when the Umpire, Ken Craig ("Craig"), issued two reports:

- the first report is dated May 19, 2021 (Exhibit 1, Application Record Book 8 of 8, Tab 166), dealing with the valuation of Linde's building;
- the second report was forwarded by e-mail on October 18, 2021, dealing with Linde's personal contents and ALE claims;

- in June 2021, Linde purchased a different home located on a different site.

ANALYSIS

Bad Faith

[10] Linde submits the elements of bad faith she relies on are as follows:

- the initial meeting post-fire was too brief so she did not understand the nature of her coverage. Friesen's behaviour included an inappropriate comment that she should consider taking a "big fat cheque", leaving her confused;
- Linde remained confused throughout the process, including knowing nothing about her coverage; she was not provided with photographs of her damaged contents; and, was told by a representative of C2C she could not see the photographs, which was denied by C2C's representative, Tanya Heppner ("Tanya"), during her testimony;
- Max failed to provide the required "Proof of Loss" form within 60 days of the notice of loss;

- Linde was not informed by Friesen of the repair and rebuild quotes he received prior to the end of March 2020;
- Friesen advised Linde he would not provide the quotes as Linde was intending to use her own contractor and believed providing the quotes would tend to "hurt the bid process";
- Linde maintained Friesen never provided the scope of loss Max relied on throughout the process, nor the "Guaranteed Replacement Cost";
- Munroe set up a meeting on July 14, 2020, together with an Agenda for the meeting, which ended badly with Linde alleging Friesen called her "a greedy bitch" and that, "she just wanted to build a new house" (Document No. 61, para. 25);
- the accusation by Friesen, Linde's submitted contents claim response alerted Linde to be concerned the impact of fraud could vitiate her claim;
- by limiting Linde's claim to $248,581.20, the amount of the repair quotation, Max failed to honour the Guaranteed Replacement Cost provision in the policy;
- Max failed to consider Linde's concerns if "smoke sealing" was used in the repair of her home as well as the impact 30,000 gallons of water poured onto the fire would have on her home;
- Max's failure to "pack out" Linde's contents;

- Max's depreciation calculation on contents was far in excess of industry standard, including depreciating food in the home at the time of the fire;
- by ignoring Craig's report and failing to agree to implement, it is an egregious breach of the duty of good faith;
- Max's use of s. 123(3) of the ***Act*** in an attempt to defeat Linde's claim is bad faith.

[11] Linde's argument is multifaceted, but at its core began when Friesen allegedly made comments she found objectionable. It is clear to me there were times Friesen and Linde were speaking "at" each other, but not "to" each other. Concerns began on December 9, 2019 with Linde hearing Max would write her a "big fat cheque", and by July 14, 2020 called her "a greedy bitch". I accept Linde believed she heard "big fat cheque" on December 9, 2019. I infer from Friesen's evidence, if he spoke those words, there was never any intent to settle the claim on December 9, 2019. I accept Friesen's evidence that until the cause of the fire was known, coverage was undetermined. It was after December 30, 2019 Friesen was in a position to offer Linde any compensation. No evidence was offered by Linde that Friesen ever offered to write "a big fat cheque" after the initial meeting. I infer from the absence of similar words being spoken by Friesen or anyone else on behalf of Max after December 9, 2019, the words were never spoken in the first place. I do accept Friesen may have referenced Linde's option to accept a "global settlement", which Linde interpreted to mean a "big fat cheque". Linde was under

many personal stressors on the day after the fire. I accept she believes she heard the words, but I find Friesen did not actually say those words.

[12] There is also a disagreement whether Friesen called Linde "a greedy bitch" on July 14, 2020, which he denied and I accept his evidence. He testified if he used these words he would lose his job. Other independent witnesses, excluding Linde's friend, denied hearing the words, and I do not accept Linde's evidence.

[13] I find, based on the evidence I do accept, Friesen's claim management to be as follows:

- by December 30, 2019, Friesen received information determining the cause of the fire, determined this was a covered loss, determined the amount of Linde's outstanding mortgage, and obtained an appraisal of value establishing the ACV of her property to be $125,000.
- by February 3, 2020, Friesen reported to Max on four separate occasions outlining the progress of the claim. These included:
    - Linde, on her own initiative, found alternate accommodation at a cost of $1,500 per month;
    - Authorized a payment of $300 per month for pet care;
    - Engaged a company to board up the structure, which is not in dispute;
    - C2C was preparing a quote for the repair of the property;

- photographs were taken of the structure and contents;
- received a quote from C2C for the repair of the dwelling;
- by February 7, 2020, Linde received a contents listing from Max, prepared by C2C, of the contents found in her home. Statutory Condition 6(1) of the ***Act*** states the insured is responsible for preparing the proof of loss for contents. Max agreed, at its expense, to have C2C gratuitously prepare the initial contents listing. The list was approximately 80 pages in length.
- by February 25, 2020, Linde met with Max representatives advising the inventory list prepared by C2C was incomplete. Although instructed not to enter the home due to its unsafe condition unless a representative of C2C was present, she did so and was able to further complete the inventory list;
- by the end of March 2020, Linde obtained quotes from various contractors for rebuilding her house. In April 2020, Max retained Crosier Kilgour to prepare a structural engineer's report opining whether Linde's home could be repaired. On May 14, 2020, the report identified that the home could be repaired. (Trial Ex. No. 1, Application Record, Volume 1 of 8, at Tab 25, as well as Trial Ex. No. 4; Cross-Examination Binder of Nicole Linde, at Tab MAX-04388, as well as Trial Ex. No.

16; Direct Examination Documents of Doug Friesen, at Tab MAX-04388)

- by August 2020, Max paid Linde $125,000, of which $103,000 was applied to her mortgage, leaving her a net amount of $22,000. Max also paid Linde $103,000 representing the ACV of Linde's contents. After Linde requested Max to reconsider its position, Rob Hales was retained, resulting in an increase of an additional $50,000 offered to Linde for her contents, which was eventually paid. Hales testified there were additional items disclosed on the Schedule of Loss, furniture was reappraised as it learned some of the furniture was antique, and Linde replaced items lost in the fire subsequent to the initial list.

[14] While I do find there were delays in the settlement process, they may be explained by the COVID-19 pandemic, the inability for typical valuation methods such as attending in person to retailers, and Linde being unable, at the beginning, to prepare a content list. The delay does not amount to bad faith. In fact, the reverse is true. Max went above and beyond what it was required to do under the policy. These additional steps, such as initiating C2C to prepare a contents list and to hire Hales as contents appraiser, demonstrates Max actively assisted Linde throughout.

[15] One of Linde's complaints was Max did not instruct C2C to pack out the personal contents to a storage facility so her personal contents could be identified. I acknowledge packing out is one method, but, in this case, I accept Tanya's evidence C2C representatives isolated Linde's personal contents on a room-by-room basis, effectively documenting the items which were recognizable, but there were many personal contents where the fire made identification impossible whether packed out or not. I accept Craig's position, the Umpire appointed under s. 121 of the ***Act***, packing out often occurs in these circumstances, but an insured is entitled to make decisions in the course of settling the claim. I do accept the evidence of Friesen and Hales, the method chosen by C2C, gratuitously acting on Linde's behalf, was not deficient. As will be discussed later, Craig's opinion is outside his role of an independent Umpire.

[16] A disagreement on how the personal contents were identified is insufficient to demonstrate bad faith. The fact the personal contents list contained 120 pages, not 80 pages as originally prepared by C2C, is not indicative of bad faith. Linde remained in the best position to identify the items in her home. She was able to identify the contents when she attended at her residence. I find Linde being unable to review the photographs taken by third parties irrelevant to the bad faith allegations.

[17] I find, throughout, Max moved Linde's claim forward. Within approximately eight months, Max paid Linde the ACV required under her policy if she failed to repair or replace her home. Max clearly communicated it would pay her additional

amounts to a maximum of $248,581.20 if she repaired or rebuilt her home at the same location.

[18] I find even though Friesen failed to provide Linde with a Schedule of Loss until April 1, 2020, exceeding the 60 day limit as set out in s. 126 of the ***Act***, this is not indicative of bad faith.

[19] Friesen, once in receipt of Linde's contents list with suggested quantities and values, expressed concerns. The letter did not accuse Linde of fraudulent behaviour, only alerted her to the fact if her numbers were not supported there could be consequences.

[20] In response to those concerns, Max hired an independent appraiser, Hales, who initially expressed the same concerns. In response to these concerns, Linde provided further information to support some of her contents were antiques, including an antique piano, and entitled to receive additional payments.

[21] The contents list was prepared by C2C even though the policy which includes Statutory Condition 6(1) requires the insured to prepare the contents list and submit it to the insurer. It is understandable an insured may be under stressors, making it impossible to prepare a contents list. The fact that Max gratuitously retained C2C to compile the list with Linde's agreement does not equate to error. The opposite is true. Max acted in good faith by doing so.

[22] In one respect, I find Max was deficient in its administration of Linde's claim. When Max determined the fire was an insured loss, it was obligated to retire Linde's mortgage at the earliest possible date. The earliest possible date for Max to retire

Linde's mortgage payout was December 30, 2019. By that date, the cause of the fire had been determined and coverage confirmed. However, for reasons unknown, Linde's mortgage was not retired until August 2020, approximately eight months later.

[23] Max's suggestion the delay did not impact Linde is inaccurate. Interest continued to accrue on her mortgage. She continued to make her monthly mortgage payment. Linde was negatively impacted by Max and Friesen's decisions. I find this was an error when considering all the circumstances of the claim handling process does not rise to the level of bad faith. This error is significant and Linde shall be compensated for the inexcusable delay as she continued to pay interest on the mortgage, calculated at Linde's interest rate as set out in her mortgage from December 31, 2019.

[24] Linde's loss at all times was within the limits of her broad form policy (Exhibit No. 4, Tab NL-001), which provided her with Guaranteed Replacement Cost in the event of loss. The applicable provisions as to her building claim are found on p. 10 of her policy, which reads:

> **Dwelling Building and Detached Private Structures**
>
> If "You" repair or replace the damaged or destroyed building on the same location, with a building of the same occupancy contracted with materials of similar quality within a reasonable time after the damage, "you" may choose as the basis of loss settlement either (A) or (B) below, otherwise, settlement will be as in (B).
>
> (A) The cost of repairs or replacement (whichever is less) without deduction for depreciation, in which case "we will pay the proportion that the applicable amount of insurance bears to 80% of the replacement cost of the damaged

> building at the date of damage, but not exceeding the actual cost incurred.
>
> (B) The Actual Cash Value of the damage at the date of occurrence.
>
> **Guaranteed Replacement Cost – Dwelling Building**
>
> If this coverage is shown on the Declaration Page, "you" may choose as the basis of loss settlement for the Building(s) designation with coverage of either (A) or (B) below, otherwise settlement will be as in (B).
>
> (A) "We" will pay the full cost of repairs or replacement even if it exceed the amount of insurance stated on the Declaration Page for the Dwelling Building.
>
> (B) If "You" decide not to repair or replace, "We" will pay the Actual Cost Value of the damage to the Dwelling Building up to the application amount of insurance stated on the Declaration Page.

[25] The language entitles Max to either repair or replace. If an insured does not "repair" or "replace" on the same property, recovery is limited to the ACV, which Max paid in August 2020.

[26] Linde submitted Max's failure to consider rebuilding Linde's home is evidence of bad faith. This argument fails as Max is required to follow the terms of Linde's policy. The applicable words are "or" and "lesser". Max, in its sole discretion, could consider Linde's home repairable. Crosier Kilgour's engineer's report, which is the only evidence before the court, concluded repair was a viable option. The report confirmed the fire was limited in scope such that a small portion of one wall could be repaired maintaining structural integrity. Although Linde complained about the report, she failed to offer any other alternative.

[27] Linde's suggestion, failure to consider replacement of her home, is inaccurate. Once Max was in possession of the Crosier Kilgour report of May 14, 2020, it acted upon the information available, the home could be repaired. The policy clearly stated so.

[28] The Guaranteed Replacement Cost wording does not mean Max was obligated to "replace". Max could choose to repair and, in this case, was the "lesser" of the "repair or replace". The benefit Guaranteed Replacement Cost insurance provides to an insured is depreciation of the insured asset is not considered in arriving at the total loss.

[29] Linde's suggestion she was not aware of her policy wording, including what Guaranteed Replacement Cost meant, is inaccurate. Linde's written directions to Castleton Construction in an e-mail forwarded to it reads (Trial Ex. No. 1; Application Record, Volume 6 of 8, at Tab 93 (p 6 of 12), as well as Trial Ex. No. 4; Cross-Examination Binder of Nicole Line, at Tab Application Record 93):

> Like I mentioned these quotes are in the 330 - 370 area. I would need yours to be close to those just to make sure I get a good settlement amount from insurance so I'm not putting in my own money into building my new house. Looking over your quote and I just had a few que[s]tions, my friend has had really, really bad luck with building/prices, so I just don't want to be in the same boat as her.

I find her words "… I'm not putting in my own money into building my new house" confirms she perfectly understood the meaning of her policy.

[30] Linde also understood what Max would consider in settling her claim. In an e-mail dated April 2, 2020 forwarded to Jon Goertzen of Frontier Construction at

4:15 p.m. (Trial Ex. No. 1; Application Record, Volume 6 of 8, at Tab 100), Linde's comments, "insurance sucks … I have been told by fire investigator, structural engineer, and a building inspector (I hired), have all told me it's a total tear down". She went on to advise her garage was a total rebuild.

[31] I find Linde was not a neophyte that Max took advantage of, as counsel's argument implies. As of April 2, 2020, she was not told by the fire inspector, a building inspector, or a structural engineer anything which she alleged to Jon Goertzen of Frontier Construction. The evidence is no one told her the garage was a total tear down. Linde is entitled to advocate for her position. She was also entitled to decide to rebuild her home on the same location and even increase the fit and finishes of that home. This was her choice alone to make. What was not her choice was to require Max to pay anything beyond the $248,581.20 repair cost.

[32] If Linde retained a structural engineer who provided a report to the contrary, or retained an expert in smoke sealing, or a physician who described Linde or her children's medical condition where exposure to any level of smoke would impact them medically, the outcome may be different.

[33] I acknowledge Linde's fears of smoke and the potential presence of mould were genuine to her, but absent medical evidence to support her position, what I am left with is speculation.

[34] Linde's evidence of her financial impecuniosity prevented her from obtaining independent reports. She also averred she purchased a home in June 2021 because her finances prevented her from rebuilding her home. The evidence

before me is the insurer, with the exception of paying out Linde's mortgage in a timely manner, advanced monies to her as required under the policy.

[35] Max paid her the ACV value of her home, as was required by the terms of the policy if she did not rebuild or replace her home. Max maintained at the time she received the ACV, she would receive further payment to a maximum of $248,581.20, being the C2C repair estimate.

[36] There is no evidence Max's motivation was anything other than it was required to do under the policy.

[37] I find no evidence there were any lowball offers submitted to Linde. Suggestions that Max retained only one expert, such as C2C as its sole source for the repair to the dwelling, is not supported by the evidence. The evidence is Max hired C2C on at least 150 other occasions to repair or replace dwellings lost by fire. At least 15 of the claims utilized smoke sealing. Linde failed to call a single witness testifying C2C's repair work was deficient. Linde presented innuendo about C2C's abilities, but no evidence. Linde's community in question is relatively small. I infer from the absence of witnesses to support Linde's position about people telling her C2C performed substandard work, or her assumption it was only a painting company, or whether C2C could perform the repair at the stated price as of May 16, 2020, are pure speculation.

[38] I find Linde's concerns about mould, the livability of her wood basement home after 30,000 gallons of water was poured to extinguish the fire, the smells that may remain in her home after smoke sealing and structural issues were real

to her. However, there is no evidence before the court supporting her position these could not be remediated. The evidence, contrary to her position, is all of Linde's concerns were remediable upon repairs being undertaken.

[39] Examining all the factors which could amount to bad faith, as outlined by Mainella J.A. in ***Intact***, and the Supreme Court of Canada in ***Fidler***, I find Max did not act in bad faith. My decision was not even a close call. The law is clear an insurer is entitled to process claims as best it sees fit. All I am able to find, based on the evidence, is there was a miscommunication issue between Friesen and Linde. However, as previously stated, Linde's position on lack of communication, as mentioned earlier, is not supported by the evidence. Linde's concerns about what may happen once the work was commenced are also unfounded. We will never know what may have occurred because Linde did not act.

[40] In ***Fidler***, the test is whether the insurer was "overwhelmingly inadequate" in the claims management process. I find Linde's arguments, at best, in its simplest terms, were that Max failed to pay out her mortgage in a timely manner, the communication between her and Friesen was inadequate, and the claim took too long to resolve. In the circumstances, I have described herein there is no evidence that Max's claim management was overwhelmingly inadequate.

[41] Therefore, Linde's claim Max acted in bad faith is dismissed on a balance of probabilities.

Is Linde Entitled to Any Compensation?

[42] I will now turn to whether Linde is entitled to any compensation from Max. To date, Linde has made no efforts to either rebuild or repair her home. She purchased another home in the same community. Linde testified on a number of occasions her desire to remain in her home community motivated her decision to rent a small apartment and why she purchased the home she did.

[43] It is a condition of Linde's insurance policy she is only entitled to the ACV of her home if she fails to rebuild or replace her home on the same property. As of August 19, 2020, Max forwarded $125,000, being the ACV of her home, but advised if she rebuilt or repaired, she would receive additional funds up to $248,581.20 of the C2C repair quote. The $248,581.20 was the amount of the C2C quote to repair after the structural engineer's report was received.

[44] Although Linde expressed concerns about the initial valuation report of her home prior to the fire in the amount of $170,000, she never obtained a valuation report of her own contesting the valuation.

[45] Linde's counsel argued the fact Max's builder of choice was C2C, and relying solely on C2C without obtaining any other quotations, does not rise to the level of bad faith. C2C is a local builder who hired local sub-trades. It is impossible to evaluate Linde's claims about C2C based on speculation. Although multiple bids may be beneficial, Max's history with C2C is substantial. Linde did not introduce any evidence this was improper in a small geographic area she resides where knowledge of deficient work is easily communicated.

[46] I find Linde to be credible in her evidence. She truly believed her testimony to be true. However, although credible, her evidence is not reliable due to the speculation identified herein.

The Insurance Act

[47] Linde argues as she and Max participated in the dispute resolution process as set out in s. 121 of the ***Act***, the insurer is bound by the decision of the Umpire. (See: ***SGI Canada v. Marostica***, 2022 MBQB 35; ***204-218 Princess Street Inc. v. Victor Insurance Managers Inc., et al***, 2022 MBQB 136.)

[48] The insurer argues the ordinary language of s. 123(3) of the ***Act*** does not preclude a court from determining an issue arising under a contract, including value. (See: ***Vincent et al v. Red River Mutual***, 2021 MBCA 53, citing ***Terroco Industries Ltd. v. The Sovereign General Insurance Company***, 2007 ABCA 149 and *Insurance Law in Canada* (Toronto: Carswell, 2002) vol 1 (loose-leaf updated 2014, release 1), ch 10 at pp. 10-23).)

[49] Linde submits the Umpire was engaged under s. 121 of the ***Act***, and the Umpire's decision rendered is binding on me for all purposes. I disagree. Section 123(3) reads:

> Despite any provision of this Act and any provision or statutory or other condition of a contract, the failure to have an appraisal made, or the fact that an appraisal is being made or has been made, does not preclude a court from determining, in an action brought for that purpose, an issue arising under a contract, including the determination of the value of the property insured or the value of any loss or damage to such property.

[50] Although an Umpire was engaged under s. 121 of the ***Act***, the Umpire's role is to determine value. The Umpire is not in a position to rewrite the terms of the policy or to extend coverage in areas where coverage is unavailable. The opinion is limited to value. The role of the Umpire is limited to choosing one of the two positions presented to him by Linde and Max. Whichever position he chooses is the value which governs the claim, but s. 123(3) grants a court jurisdiction to determine, "*in an action brought for that purpose, an issue arising under a contract, including the determination of the value of the property insured or the value of any loss or damage to such property*" (emphasis added). There is no ambiguity to the words chosen by the Legislature.

[51] The cases provided by counsel in support of its positions taken under the ***Act*** generally fall into two categories. First, is whether an insurer can resist the valuation process under s. 121. They cannot. Second, the other cases submitted are about the impact of limitation periods if the only step taken by an insured is to initiate the appraisal process under s. 121 of the ***Act***. This is not the case before me.

Umpire's Report

[52] Turning to the building claim, Craig's report provided three options, two of them for rebuilding Linde's home. The only repair quote considered by Craig was one he obtained from Winnipeg Painting and Decorating. By involving a third party, he exceeded his authority. Statutory Condition 7 describes the Umpire role as, "If they (the parties appointed appraisers) fail to agree, they must submit their

differences to the Umpire, and the written determination of any two of them determines the matters".

[53] There is no role for the Umpire to conduct his own investigation, or to seek a valuation opinion from someone other than what is offered by the two appraisers. Once he chose, his decision on "valuation" was final.

[54] Craig's report effectively concluded Linde's home could only be rebuilt. Again, Craig exceeded his authority as his comments were on value, not whether "repair" or "replace", as defined by the contract, was applicable.

[55] The "repair or replace" provision of Linde's contract is what is determinative. Having found Linde's home could be repaired, the decision of the Umpire on rebuilding is not applicable to these facts.

[56] I do not agree with Linde's position, as s. 123 of the ***Act*** was not pled and, therefore, Max cannot rely on it. I find s. 123 is not a defence to Linde's claim, but only directions to the court, and its overall jurisdiction is not impacted when s. 121 of the ***Act*** is engaged.

[57] As to Linde's building claim, because she did not decide to repair or replace her home on the same property **within a reasonable time after the damage**, her entitlement under the policy is limited to the ACV in the amount of $125,000 as stated in the policy.

[58] Personal contents valuation is governed by provisions found at p. 11 of the policy. In summary, the insured has an option of replacing the personal property covered under the policy. There are a number of exceptions to the policy, including

antiques and fine art, as well as articles for which their age or history substantially contributes to their value, such as memorabilia, souvenirs and collector items, when the ACV will apply. If the insured fails to replace the items, the ACV will apply. Even if an insured also has the option of electing to receive the ACV of the personal contents, but within 180 days from date of loss replaces items, there is entitlement to "an additional claim for the difference between the actual cash value (ACV) and replacement cost basis". Replacement cost for personal contents is described as the lesser of repair or replace as previously outlined herein.

[59] Craig's decision applied GST and PST to the value of the items, he reduced the amount of depreciation applicable by 20 percent and $14,528.10 for so called "contingencies". He also determined the gross value of the claim was $305,090.07 and, after applying the monies already received by Linde, found the net amount to be $201,282.37.

[60] I find there are three errors in Craig's valuation under s. 121 of the ***Act***, which I am not bound to by applying s. 123(3) of the ***Act***. First, Max previously paid $156,614.20 for Linde's personal contents claim. Second, neither the policy, nor any case law referred to by counsel, permits a claim for contingencies. Third, GST and PST reimbursement is not mentioned in the policy.

[61] I find, after applying the total amount paid by Max prior to the Umpire's decision, the net payable is $148,475.87, not 4201,282.37.

[62] I reject the inclusion of a "contingency allowance". Craig had no authority to arbitrarily add this item. Effectively, Craig added to the values proposed by the

insurer and the insured representatives, which is outside the scope of s. 121 of the ***Act***. Also, the policy does not refer to contingencies.

[63] I also reject the inclusion of GST and PST in the calculation for the personal contents Linde chose not to replace. Craig's commentary about what other insurers may allow is irrelevant. The wording of the policy does not reference taxes. However, an insured will be compensated for the total cost of the personal contents replaced to return the insured to the condition they were in prior to the loss.

[64] For some of her personal contents, Linde chose to receive the depreciated value, and by doing so she didn't pay GST and PST. Taxes collected by the appropriate levels of government are irrelevant when items are not purchased. There is not a purchase and sale where these taxes would be reimbursable, as was done when as in this case, Linde replaced some of her personal contents. I do not accept Craig's position that "some insurers" compensate for the GST and PST as being applicable in this case. The wording of the policy is what governs. Craig exceeded his authority to unilaterally include GST and PST; neither tax shall be included in the amounts awarded.

[65] I find Craig's decision on the value of the personal contents after correcting the mathematical error contained therein, together with the elimination of contingencies and tax allowance, is correct. In all other aspects, his decision was a choice between the submissions of the representatives of Linde and Max. I find it was well within Max's authority, for the purpose of valuation, to reduce the

depreciation allowance by 20 percent, which was in dispute. I am not prepared to eliminate the entirety of Craig's decision as I possess residual authority under s. 123(3) of the ***Act*** to decide value.

[66] Turning to the ALE claim, Craig authorized an additional $17,325.00. Craig's decision was "while these amounts are not supported by invoices, they are not unreasonable". I disagree. Compensation under the policy is based on invoices, unless the insurer waived the requirement invoices were to be provided. If a waiver is not obtained, recovery is not permitted. The record reflects Max never waived any requirements for ALE after terminating benefits. I find Craig's decision to award an additional ALE payment in the amount of $17,325.00 is similar to his allowing contingencies in the personal contents claim. Once again, he exceeded his jurisdiction as the policy wording requires any waiver to be in writing. I find that by failing to submit invoices to Craig, Linde did not comply with the wording of her policy and ss. 123(1) and (2) of the ***Act*** is applicable and Craig exceeded his authority as Umpire and by applying s. 123(3) of the ***Act***, there is no compensation permissible for ALE.

[67] During the exchange of written arguments, I requested counsel to provide their respective position on whether Linde choosing to purchase a new home could be considered as her replacing her home. After due consideration, the wording of the policy is very specific and is not applicable on these fact circumstances.

DAMAGES

[68] I also determined Max committed an error by delaying the repayment of Linde's existing mortgage debt. By delaying the repayment from December 30, 2019 to August 2020, Linde suffered loss by continuing to pay her mortgage. I am satisfied the interest for the period in question is properly payable to Linde. The parties shall, within 30 days of receipt of this order, calculate the proper amounts, and shall include this amount in the court judgment. If the parties disagree on the calculation, they shall book an appointment in the usual manner.

[69] Linde is awarded $148,475.87, being the amounts in Craig's decision for personal contents, subject to the adjustments made by me.

[70] All damages shall be subject to pre- and post-judgment interest at the applicable statutory rate.

[71] Max was successful in defending Linde's claim it acted in bad faith, but Linde was successful in the payment of additional compensation for her personal contents as outlined in her policy. If counsel cannot agree on costs, they shall file a brief outlining each of their positions on costs within 30 days of this decision. I will determine, in my unfettered discretion, whether oral submissions are required.

_____ J.

SCHEDULE "A"

THE INSURANCE ACT, C.C.S.M. c. I40

Definition
121(1)
In this section, **"representative"** means a dispute resolution representative appointed under subs. (5).

When section applies
121(2)
This section applies to disputes between an insurer and an insured about a matter that under Statutory Condition 11 set out in Schedule B or another condition of the contract must be determined using the dispute resolution process set out in this section.

Non-application to hail insurance
121(3)
This section does not apply to a contract of hail insurance.

Insured or insurer may demand dispute resolution
121(4)
By a demand in writing after proof of loss has been delivered to the insurer, either the insured or the insurer may demand the other's participation in a dispute resolution process.

Appointment of dispute resolution representatives and umpire
121(5)
Within seven days after receiving or giving a demand under subs. (4), the insured and the insurer must each appoint a dispute resolution representative, and within 15 days after their appointment, the two representatives must appoint an umpire.

Who may not be a representative or umpire
121(6)
A person may not be appointed as a representative or umpire if the person is
(a) the insured or the insurer; or
(b) an employee of the insured or the insurer.

How disputes are to be resolved
121(7)
The representatives must determine the matters in dispute by agreement. If they fail to agree, they must submit their differences to the umpire, and the written determination of any two of them determines the matters.

Costs
121(8)
Each party to the dispute resolution process must pay the representative appointed by that party and must bear equally the expense of the dispute resolution process and the umpire.

Appointment by judge
121(9)
If
(a) a party to a dispute resolution process fails to appoint a representative in accordance with subs. (5); or
(b) a representative fails or refuses to act or is incapable of acting and the party that appointed that representative has not appointed another representative within seven days after the failure, refusal or incapacity;
on application of the insurer or the insured on two days' notice to the other, the court may appoint a representative.

Costs awarded by court
121(10)
On an application under subs. (9), the court may award costs on a solicitor and client basis against the person whose representative is appointed by the court, whether or not that person appeared on the application.

Application to superintendent to appoint umpire
121(11)
Either representative may apply to the superintendent for the appointment of an umpire if
(a) the representatives fail to appoint an umpire in accordance with subs. (5); or
(b) the umpire fails or refuses to act or is incapable of acting.

Names and credentials of proposed umpires
121(12)
An application under subs. (11) must contain the names and credentials of three persons who the applicant believes are capable of performing the functions of the umpire.

Notice of intention to apply
121(13)
Before making an application under subs. (11), the applicant must give notice in writing to the other representative of the intention to make the application. The notice must contain the names and credentials the applicant is submitting to the superintendent under subs. (12).

Application must include copy of notice
121(14)
An application under subs. (11) must be accompanied by a copy of the notice under subs. (13) and must state the date on which the notice was given to the other representative.

Umpire nominations by other representative
121(15)
Within 15 days after receiving a notice under subs. (13), the other representative may give the superintendent and the applicant the names and credentials of three persons who the representative believes are capable of performing the functions of the umpire.

Appointment of umpire by superintendent
121(16)
The superintendent must appoint an umpire from the names submitted under subs. (12) or (15) as soon as practicable after the earlier of the following occurs:
(a) the superintendent receives names and credentials under subs. (15);
(b) the period for providing names and credentials under that subs. expires.

Rules of procedural fairness apply to umpire
121(17)
An umpire is bound by the rules of procedural fairness in carrying out the umpire's functions under this section.

When insured's compliance with a contract requirement may be waived
123(1)
The obligation of an insured to comply with a requirement under a contract is excused to the extent that
(a) the insurer has given notice in writing that the insured's compliance with the requirement is excused in whole or in part, subject to the terms specified in the notice, if any; or

(b) the insurer's conduct reasonably causes the insured to believe that the insured's compliance with the requirement is excused in whole or in part, and the insured acts on that belief to the insured's detriment.

When a term or condition is not deemed to have been waived
123(2)
Neither the insurer nor the insured is deemed to have waived any term or condition of a contract by reason only of
(a) the insurer's or insured's participation in a dispute resolution process under section 121;
(b) the delivery and completion of a proof of loss; or
(c) the investigation or adjustment of any claim under the contract.

Court may proceed in absence of appraisal
123(3)
Despite any provision of this Act and any provision or statutory or other condition of a contract, the failure to have an appraisal made, or the fact that an appraisal is being made or has been made, does not preclude a court from determining, in an action brought for that purpose, an issue arising under a contract, including the determination of the value of the property insured or the value of any loss or damage to such property.