COURT OF APPEAL FOR ONTARIO

CITATION: Lalani Properties International Inc. v. Intact Insurance Company, 2024 ONCA 583
DATE: 20240724
DOCKET: COA-23-CV-0189 & COA-23-CV-0050

Rouleau, Sossin and Dawe JJ.A.

COA-23-CV-0189

BETWEEN

Lalani Properties International Inc. and 2160943 Ontario Limited

Plaintiffs (Appellants)

and

Intact Insurance Company

Defendants (Respondent)

COA-23-CV-0050

AND BETWEEN

2160943 Ontario Limited

Plaintiff
(Respondent/ Appellant by way of cross-appeal/
Respondent by way of cross-appeal)

and

Intact Insurance Company* and D.M. Edwards Insurance Group Ltd. and The CG&B Group Inc.**

Defendants
(Appellant*/Respondent by way of cross-appeal*)
(Respondents**/ Appellants by way of cross-appeal**)

Robert L. Love, Erin VanderVeer and Robert Stefanelli, for Lalani Properties International Inc. and 2160943 Ontario Limited

Anthony J. Bedard and Jacob R.W. Damstra, for Intact Insurance Company

Barry B. Papazian and Michael Krygier-Baum for D.M. Edwards Insurance Group Ltd. and the CG&B Group Inc.

Heard: March 11, 2024

On appeal from the judgment of Justice Susan Vella of the Superior Court of Justice, dated December 7, 2022, with amended reasons for judgment dated December 22, 2022, reported at 2022 ONSC 6883.

Dawe J.A.:

[1] For more than a hundred years, the old Empress Hotel building stood at the corner of Yonge and Gould Streets in Toronto. In April 2010, part of its north exterior wall collapsed, forcing the building's tenants to move out. Nine months later, in January 2011, the now-vacant building was burned down by an arsonist.

[2] The owner's insurer denied coverage for both events, and the owner sued. The trial judge ruled in favour of the insurer in relation to the wall collapse, and in favour of the owner in relation to the fire. The net result was that she awarded the owner nearly $6 million in damages.

[3] Both sides now appeal from this judgment. There are also multiple cross-appeals, some involving the owner's insurance broker. All of the cross-appeals are contingent on one or the other of the main appeals succeeding.

[4] For the following reasons, I would dismiss both main appeals. This makes it unnecessary for me to address any of the cross-appeals.

A. THE PARTIES AND THE PROCEDURAL HISTORY

[5] At the time of the wall collapse and subsequent fire, the Empress Hotel building was owned by the Lalani family, who purchased the building in or around 1986, and the land on which it sat in 1996. They initially held title through a corporation called Lalani Properties International Inc., but later transferred title to a numbered holding company, 2160943 Ontario Limited. For simplicity, I will refer to both corporations collectively as “Lalani”.

[6] Since 1999, the building had been insured by the Intact Insurance Company (“Intact”). Lalani purchased this insurance coverage through its insurance broker, which was originally named D.M. Edwards Insurance Group Ltd. and was later replaced by a successor company called the CG&B Group Inc. I will refer to both companies collectively as “CG&B”.

[7] Lalani brought separate actions against Intact in relation to the wall collapse and the fire. Both Lalani family corporations were named as plaintiffs in the action relating to the wall collapse, but only 2160943 Ontario Limited was named as a plaintiff in the action relating to the fire. In the fire loss action, Lalani also sued its insurance broker, CG&B, for negligence, in the event that it was unsuccessful in recovering from Intact.

[8] The trial judge found that Intact was not liable under the policy to pay for losses arising from the wall collapse. Lalani appeals against the trial judge's judgment on this issue (COA-23-CV-0189). I will refer to this as "the wall collapse appeal".

[9] The trial judge also found that Intact was liable under the policy to pay for the losses caused by the fire. Intact appeals against this aspect of the trial judge's decision (COA-23-CV-0050). I will refer to this as "the fire appeal".

[10] Because the trial judge found Intact liable in relation to the fire damage losses, she dismissed Lalani's negligence claim against CG&B. However, she held in the alternative that if Intact had not been found liable in relation to the fire, Lalani's negligence action against CG&B would have succeeded. The trial judge also held that if she had found Intact liable for the wall collapse, contrary to her actual conclusion, this would have increased the damages Lalani would have been entitled to receive for business interruption loss arising from the subsequent fire.

[11] These alternative findings give rise to a series of cross-appeals in the fire appeal, all of which are contingent on one or the other of the main appeals being successful:

i) Lalani cross-appeals against Intact in the fire appeal, seeking to have the damages it was awarded for business interruption loss increased. This cross-appeal is contingent on Lalani succeeding in the wall collapse appeal;

ii) Lalani cross-appeals against CG&B in the fire appeal, seeking judgment against CG&B for the fire loss damages that are presently payable by Intact. This cross-appeal is contingent on Intact succeeding in the fire appeal on the issue of its liability, such that the damages award against Intact relating to the fire is set aside in its entirety;

iii) CG&B cross-appeals in the fire appeal, seeking to reverse the trial judge's conditional finding that it would have been liable in negligence if Intact had not been found liable for the fire losses under to the insurance policy. This cross-appeal is also contingent on Intact succeeding on the issue of its liability in the fire appeal.

[12] We heard all the appeals and cross-appeals together and reserved our decision.

B. THE WALL COLLAPSE APPEAL (COA-23-CV-0189)

[13] The central issue in the wall collapse appeal is whether the trial judge erred by concluding that the damages Lalani suffered as a result of the wall collapse fell outside the scope of the risks that were covered by its insurance policy with Intact.

[14] Lalani's argument on appeal focuses on challenging the trial judge's conclusion that it had not met its burden of establishing that the wall collapse was a "fortuitous event" that was covered by the policy.

(1) Factual background

(1) The building

[15] The Empress Hotel, which was later renamed the Edison Hotel, and which I will refer to as "the building", was a three-storey brick heritage building located at 335 Yonge Street, on the southeast corner of the Gould Street intersection.

[16] Different parts of the building were constructed at different times, using different construction methods. The north wall, which faced Gould Street, was a double-wythe load bearing clay brick and mortar wall. A “double-wythe” brick wall has two rows of brick columns built side by side, creating a double brick depth. The northern wall, which was built in 1899, was built using “clip bonds”: connecting metal pieces that were placed between the two rows of bricks at approximately two-foot intervals. The function of these clip bonds was to enable the two layers of brick to mutually support one another.

[17] Historically, clip bonds were used in brick walls for aesthetic reasons because they are not visible from the external side of the wall. However, in 1915, the City of Toronto (“the City”) banned the use of clip bonds in the construction of future buildings. That ban is still in place today.

[18] The north wall of the building was the only exterior wall that was built using clip bonds. The other exterior walls were built later, in 1910, and used a different method of binding the two layers of brick together.

[19] In the mid-1970s, the building’s main floor was converted to retail spaces. These renovations included adding steel columns, beams and bracing and underpinning the foundation walls.

(2) The wall collapse

[20] On April 16, 2010, part of the northern wall of the building, approximately 12 feet high and 25 feet wide, suddenly collapsed onto the sidewalk below, without any obvious external precipitating event. Only the first two stories of the wall collapsed, leaving the third storey wall directly over the collapsed portion still in place. However, this presented obvious safety concerns, so the intact third storey portion of the wall directly over the collapsed section was later demolished, leaving the brick walls to each side still standing.

[21] After the wall collapse, the building's tenants were also forced to vacate their rented premises. The City issued orders requiring the building to remain vacant and requiring Lalani to hire a professional engineer to assess its structural stability. Lalani's engineers recommended that the rest of the building be demolished. Lalani's insurer, Intact, also retained its own engineers to conduct their own structural assessment.

[22] In July 2010, the City gave notice of its intention to have the building designated a heritage building the *Ontario Heritage Act*, R.S.O. 1990, c. O.18. This cast doubt on whether Lalani would be permitted to demolish the rest of the building. In response, Lalani hired an architectural expert to provide an opinion about whether the building could be rebuilt and restored. Lalani's expert wrote a report expressing the view that rebuilding would be feasible. However, before any

final decision was reached about what would be done with the building, it was burned down by an arsonist in January 2011.

(3) Opinion evidence regarding the cause of the wall collapse

[23] The parties called three expert witnesses to give evidence about the wall collapse, two of whom offered opinions about its probable causes.

[24] Lalani's first expert, Chris Borgal, was qualified as an expert in heritage architecture. He gave evidence about how the clip bond system works, and about how failures of the clip bonds can weaken a wall to the point where it suddenly collapses. As the trial judge summarized in her reasons:

> Mr. Borgal explained that the function of clip bonds used in the construction of the collapsed wall is to enhance the ability of the bricks to hold the upper loads of the brick wall. If some of the clip bonds snap, then that weakens the structure putting more pressure on the remaining clip bonds. That weakening and resultant pressure can then cause more clip bonds to snap further weakening the brick wall system and so on until the remaining clip bonds can no longer support the brick wall causing the sudden collapse. With the progressive snapping of the clip bonds, the double thickness wythes, or pilasters, are unable to hold the wall up.

However, Mr. Borgal did not offer any opinion about what had caused the clip bonds to fail in this case.

[25] Lalani's primary theory was that the wall had collapsed because of vibrations from two nearby construction projects in the previous decade, referred to at trial as

"the Metropolis project" and the "Murray demolition" project.[1] Lalani's theory was that these vibrations had either weakened the clip bonds, or disturbed sediment under the wall, causing the wall to shift and putting additional strain on the clip bonds. This theory was based on testimony from Paul Zucchi, who was the engineer Lalani had retained to inspect the building shortly after the wall collapse, and who testified both as a participant expert and a litigation expert.

[26] The trial judge rejected Lalani's theory, explaining:

> [T]he critical problem with Mr. Zucchi's evidence is that he did not turn his mind to what the likely causes of the wall collapse were. More particularly, he did not consider whether the alleged vibrations likely caused or contributed to the wall collapse either during the course of his investigation, or in forming his opinion as a r. 53 expert. Rather, he opined that the vibrations may have caused or contributed to the wall collapse. This is not sufficient to discharge Lalani's initial burden of proof. [Emphasis in original.]

[27] The trial judge noted further:

> In any event, Mr. Zucchi did not provide a substantive analysis justifying his theory. He did not provide any data regarding the level and/or duration of vibration that would be required to cause this wall to collapse suddenly. He did not know of any complaints or violations in relation to neighbouring buildings regarding the level and/or duration of vibrations from either of these projects, including from Lalani. His theory was entirely speculative.

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[1] The Metropolis project, which was carried out between 2003 and 2008, involved the demolition of the building directly to the south on Yonge Street and the construction of a new large complex. The Murray Demolition project involved the demolition of the building directly across Gould Street. It began in 2009 and was still in progress at the time of the wall collapse in April 2010.

[28] For its part, Intact relied primarily on evidence from the engineer who it had retained to inspect the building after the wall collapse, Terrence Holder, who testified as a participant expert. As the trial judge stated:

> The essence of Mr. Holder's testimony was that as the result of water seeping into the bricks and mortar and through the broken sealant adhesive around the windows down into the bricks, the water would freeze and then thaw causing larger and larger cracks to occur over the course of years which weakens the structure. The weakening process reached a critical state causing the wall to collapse suddenly.

[29] The trial judge rejected Lalani's vibration theory and substantially accepted Mr. Holder's opinion that the wall had weakened because of water seepage.

[30] Significantly in relation to Lalani's appeal, Mr. Holder also suggested in his report and trial testimony that a contributing cause of the wall collapse could have been the structural renovations that were carried out in the mid-1970s. The trial judge stated:

> Mr. Holder confirmed under cross examination that one of the possible causes of the wall collapse was the 1973/1974 renovations that resulted in structural changes on the main floor. However no evidence as to whether and, if so, how the renovations were negligent.
>
> …
>
> Mr. Holder maintained his opinion that the likely causes of the wall collapse had to do with the structural changes that were conducted on the main floor in 1973/74 coupled with the ongoing deterioration caused the masonry brick wall to collapse, however.

[31] As I will discuss, Lalani's main argument in its appeal is that the trial judge failed to give proper weight to this aspect of Mr. Holder's evidence.

(2) Lalani's insurance coverage with Intact

[32] At the date of the wall collapse, Lalani had property insurance from Intact, purchased through its broker, CG&B. Intact had been insuring the building since 1999, and over this time had arranged for a number of inspections.

[33] The insurance policy that was in effect in April 2010 was an "all perils" policy that insured against "all risks of direct physical loss of or damage to the insured" unless they were expressly excluded. The relevant exclusions were as follows:

> **6.B. EXCLUDED PERILS**
>
> This form does not insure against loss or damage caused directly or indirectly:
>
> …
>
> (c) (i) by seepage, leakage or influx of water derived from natural sources through basement walls, doors, windows or other openings, foundations, basement floors, sidewalks or sidewalk lights, unless concurrently and directly caused by a peril not otherwise excluded in this form;
>
> …
>
> (iii) by the entrance of rain, sleet or snow through doors, windows, skylights or other similar wall or roof openings, unless through an aperture concurrently and directly caused by a peril not otherwise excluded in this form;
>
> …
>
> (e)(ii) by changes in or extremes of temperature, heating or freezing;

…

(o) by settling, expansion, contraction, moving, shifting or cracking. This exclusion does not apply to loss or damage caused directly and concurrently by a peril not otherwise excluded in this form;

…

D. OTHER EXCLUDED LOSSES:

This form does not insure:

(a) (i) wear and tear;

(ii) rust or corrosion;

(iii) gradual deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself.

This exclusion (a) does not apply to loss or damage caused directly by a resultant peril not otherwise excluded in this form;

(3) The trial judge's reasons

[34] The trial judge began her analysis by noting that it was Lalani's burden to demonstrate that the collapse of the wall fell within the initial scope of coverage, at which point it would become Intact's burden to show that it fell within one of the exclusions. The trial judge cited the proposition that "[i]t is implicit in an 'all perils' policy that acts that are not expressly excluded from coverage must be fortuitous in order to fall within the initial grant of coverage." She relied on the Supreme Court of Canada's definition of "fortuitous" in *C.C.R. Fishing Ltd. v. British Reserve Insurance Co.*, [1990] 1 S.C.R. 814, at p. 822, to conclude that:

> Therefore Lalani must first establish that the wall collapse would not have happened but for the occurrence of an unexpected intervening act such as "negligence, or

> adverse or unusual conditions without which the loss would not have occurred".
>
> Put another way, if upon looking at all of the events giving rise to the wall collapse, the loss would not have occurred without an act or event that was not expected to occur *in the ordinary course of things*, then it is considered to be a fortuitous loss. [Emphasis in original; citations omitted.]

[35] The trial judge accepted Mr. Holder's opinion that the probable cause of the collapse was the failure of the clip bonds due to water seepage. She rejected Mr. Zucchi's alternative suggestion that the wall had been weakened by vibrations from nearby construction sites. The trial judge explained:

> The initial burden of proof is on Lalani to demonstrate that a proximate cause of the wall collapse falls within the initial grant of coverage. To do so, Lalani had to prove that a proximate cause was a fortuitous event, which in turn, required Lalani to establish what proximate cause it was relying on. Lalani maintained that it was vibrations from the nearby construction projects that caused, or were a proximate cause of, the wall collapse.
>
> The threshold on Lalani was low.
>
> However, I was not persuaded by Mr. Zucchi's last-minute statement that a proximate cause of the wall collapse was likely the vibrations caused by the Metropolis project and/or the Murray Demolition. Mr. Zucchi's opinion in this respect was unreliable, as it was not supported by any objective evidence, and he did not express this opinion in either of his reports.

[36] The trial judge concluded:

> Lalani have not persuaded me on a balance of probabilities that a proximate cause of the wall collapse was a fortuitous event. While vibrations arising from the two nearby construction projects would have constituted

> a fortuitous event, I was not persuaded on the evidence that vibrations were, in fact, a proximate cause of the wall collapse. The evidence offered by Lalani was woefully inadequate for the reasons stated.
>
> Therefore, the claims with respect to coverage under the Policy relating to the wall collapse are dismissed.
>
> In the alternative, in the event that the wall collapse was a fortuitous event, I accept Mr. Holder's opinion that the wall collapse was caused by an excluded peril; namely the spalling of mortar caused by the freeze and thaw cycle he described. As such, these events are captured by sections (c)(i) and (c)(ii) under Part B – Excluded Perils.

[37] The trial judge also noted that if she had accepted Lalani's theory that the vibrations from the nearby construction projects was a proximate cause of the wall collapse, this would not have been an excluded peril. However, she emphasized that she was not satisfied that the vibrations were a proximate cause of the collapse.

(4) Lalani's grounds of appeal

[38] Lalani does not challenge the trial judge's rejection of its main theory at trial that the vibrations from nearby construction projects were a proximate cause of the wall collapse. Instead, Lalani argues on appeal that the trial judge failed to properly consider the evidence of Intact's engineering expert, Mr. Holder, that the renovations performed in the mid-1970s may have contributed to the building collapse. Lalani contends that if the trial judge had properly considered the 1970s renovations as a contributing cause, she would have concluded that the wall

collapse was a “fortuitous” event, and that it was not captured by any of the excluded perils in the policy, such that that Intact would be liable to pay for Lalani’s losses resulting from the wall collapse.

[39] Lalani argues further that the trial judge erred by seemingly discounting the significance of the 1973/74 renovations on the grounds that there was no evidence that the renovation work was performed negligently. In her reasons, the trial judge stated:

> There was no evidence of negligence with respect to any aspect of the renovations and Lalani did not press this theory in its closing arguments. Mr. Zucchi did not opine that the renovations were a proximate cause of the wall collapse.

[40] Lalani argues that “negligence, while indicative of fortuity, is not a requirement to demonstrate fortuity”, and that the 1973/74 renovations should thus be treated as a fortuitous and proximate cause of the wall collapse, whether or not they were carried out negligently. Alternatively, Lalani argues that the trial judge should have relied on Mr. Holder’s opinion that the 1970s renovations were “not properly executed” to conclude that negligence had been established.

[41] Lalani also challenges the trial judge’s alternative conclusion that even if the wall collapse was a fortuitous event, it was captured by exclusions under the policy. This ground of appeal will only become a live issue if Lalani succeeds on its primary ground and establishes that the trial judge erred by finding that Lalani had not met its threshold burden of establishing that the wall collapse was a fortuitous event.

(5) Analysis

[42] For the following reasons, I would not give effect to Lalani's main ground of appeal, and would uphold the trial judge's conclusion that the wall collapse was not a fortuitous event that fell within the scope of the insurance policy. This makes it unnecessary for me to address the trial judge's alternative conclusion that the losses resulting from the wall collapse would in any event have been excluded under the policy.

(1) Standard of review

[43] Lalani argues that since it alleges that the trial judge misapplied or failed to properly apply the legal test of fortuity, the trial judge's decision is reviewable on a standard of correctness. Intact disagrees, contending that the trial judge's conclusions about the cause of the wall collapse were findings of fact to which appellate deference applies.

[44] I agree with Intact that "[t]he trial judge's weighing of the expert evidence attracts appellate deference": *Calin v. Calin*, 2021 ONCA 558, at para. 35; see also *Hacopian-Armen Estate v. Mahmoud*, 2021 ONCA 545, at paras. 66-73. However, some of the specific arguments advanced by both sides could be characterized as raising extricable questions of law. For instance, Lalani argues that the trial judge erred in law by treating negligence as a necessary precondition for a finding of fortuity, contrary to the Supreme Court of Canada's holding in *C.C.R. Fishing.* For

its part, Intact argues that even if the 1973/74 renovations did contribute to the wall collapse, Intact is not liable because an all perils policy "does not provide coverage for events which predated the insurer going on risk": *Ottawa-Carleton Standard Condominium Corporation 687 v. ING Novex Insurance Company of Canada*, 2009 ONCA 904, 99 O.R. (3d) 789, at para. 22.

(2) The trial judge did not err by not treating the 1973/74 renovations as a contributing cause of the wall collapse

[45] I am not persuaded that the trial judge made a reversible error by not specifically addressing whether the 1973/74 renovations constituted a fortuitous event that contributed to the wall collapsing in April 2010.

[46] Mr. Holder stated in his report that the 1973/74 renovations had "caused the masonry brick wall to collapse". However, neither in his report nor in his testimony did he provide any real support or explanation for that statement. In his report, he described the 1973/74 renovations in the following terms:

> In 1973-1974, structural strengthening was performed within the building, which involved the addition of steel columns and beams and bracings. This included underpinning of the foundation walls in order to extend the service life of the historic structure.

[47] His report concluded:

> [I]t is our opinion that the structural changes that were conducted on the main floor level in 1973/74 coupled with the ongoing deterioration, caused the masonry brick wall to collapse.

[48] At trial, Intact's counsel took Mr. Holder through his report, including his analysis and findings. Mr. Holder acknowledged that when he prepared his report, he was unaware that the north wall had been built using clip bonds, and had mistakenly assumed that it had been constructed in the same fashion as the building's other outer walls, which had been built later and which used a different method of reinforcement. At trial, by which time he was aware that the wall had in fact been built using clip bonds, Mr. Holder did not outline any mechanism by which the renovations carried out in 1973/74 could have damaged or weakened either the bricks or the clip bonds, thereby contributing to the wall's eventual collapse.

[49] In the course of his trial testimony, Mr. Holder explained the mechanism by which the water and moisture infiltration had caused the weakening and ultimate failure of the wall. After being taken to the third paragraph of the analysis section of his report – the paragraph dealing with the 1973/74 renovations – Mr. Holder agreed with Intact's summary of his position as basically saying that steel columns were installed to extend the service life of the building, and that he quarrelled with some aspects of the installation. Lalani did not pursue this issue in cross-examination and did not elicit any evidence as to how the renovation could, as provided in *C.C.R. Fishing*, constitute an unexpected intervening act such as "negligence or adverse or unusual conditions", without which the loss would not have occurred: *C.C.R. Fishing,* at p. 825.

[50] I acknowledge that the trial judge's reasons do not expressly state that she was rejecting Mr. Holder's opinion that the 1973/74 renovations were a contributing cause of the wall collapse. However, when those reasons are read in the context of the evidence at trial, it becomes apparent that she found it unnecessary to make any findings about this aspect of Mr. Holder's evidence.

[51] The trial judge correctly summarised the relevant jurisprudence. She explained that, although the threshold was low, Lalani bore the initial burden of proof to demonstrate that a proximate cause of the wall collapse was a fortuitous event. She concluded that Lalani had not persuaded her on a balance of probabilities that a proximate cause of the wall collapse was a fortuitous event. She went on to address and reject Lalani's central position, as advanced by its expert, that vibrations caused by two nearby construction projects had caused the wall collapse and constituted a fortuitous event. As for the argument that the 1973/74 renovations constituted a fortuitous event and was a contributing cause of the collapse, the trial judge rejected the suggestion that the renovation had been negligently carried out, a finding for which she is owed deference.

[52] The trial judge, having correctly instructed herself on the law as established by *C.C.R. Fishing,* was clearly aware that a finding of fortuity does not necessarily require a finding of negligence. However, nothing in the evidence provided a basis for finding that the renovations carried out more than 35 years prior to the wall's collapse constituted "adverse or unusual conditions without which the loss would

not have occurred": *C.C.R. Fishing,* at p. 822. Although it would have been preferable for the trial judge to have made a specific finding in that regard, I do not view her failure to do so as constituting a reversible error in the context of the record as a whole.

[53] Even if I were to find that the approach the trial judge took to Mr. Holder's evidence reflects an error of law, the remedy Lalani seeks on its appeal is not a new trial, but a declaration that Intact is liable under the policy for Lalani's losses resulting from the wall collapse. Since it was Lalani's burden to establish that the wall collapse was a fortuitous event, in order to make such a declaration we would have to affirmatively find that Mr. Holder's evidence supported this conclusion, which was not a finding of fact made by the trial judge.

[54] Section 134(4)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, authorizes this court "in a proper case" to "draw inferences of fact from the evidence". In my view, on the evidence presented at trial, the most that can be said about the 1973/74 renovations is that they may have "contributed" to the wall collapse only in the sense that they failed to stop the collapse from happening. Mr. Holder did not give evidence that there was anything about the renovations, which were apparently meant to reinforce and strengthen the building, that actually made the wall more likely to collapse, or to collapse sooner than it would otherwise have done.

[55] While there can be multiple proximate causes of an event, Mr. Holder's evidence did not support the conclusion that the 1973/74 renovations weakened the wall in some way that contributed to its collapse more than 35 years later. The fact that he reached his conclusion that the 1973/74 renovations "caused the masonry brick wall to collapse" before he learned that the wall had been built using clip bonds badly undermines any weight that could properly be given to this aspect of his opinion.

[56] Importantly, Lalani's counsel made no attempt to develop the theory that the 1973/74 renovations were a contributing cause of the wall collapse during Mr. Holder's testimony and did not ask him any questions about this aspect of his report. I agree with Lalani that its counsel were not obliged to challenge the aspects of the report that Mr. Holder had adopted during his examination-in-chief on which Lalani sought to rely. However, one of the objectives of cross-examination is "to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted": *R. v. Laverty (No. 2)* (1979), 47 C.C.C. (2d) 60 (Ont. C.A.), at p. 63, quoting from *Cross on Evidence*, 4th ed. (1974), at p. 226. In the case at bar, Lalani passed up the opportunity to develop the alternative theory that the wall collapse had somehow been caused by the 1973/74 renovations through cross-examination of the opposing party's expert, and instead chose to rely almost entirely on its own

expert's theory that the wall had collapsed because of vibrations from the nearby demolition and construction projects.

[57] Accordingly, even if I were to conclude that the trial judge's approach to Mr. Holder's evidence was tainted by an error of law on her part, such that her conclusions would be reviewable on a standard of correctness, I am satisfied that she was correct to place no weight on Mr. Holder's opinion that the 1973/74 renovations were a contributing cause of the wall collapse.

[58] I would therefore uphold the trial judge's finding that Lalani had not met its threshold burden of establishing that the wall collapse fell within the scope of the risks insured by Intact. This makes it unnecessary for me to consider or address Lalani's challenge to the trial judge's alternative conclusion that the wall collapse damage was captured by certain exclusions, or address Lalani's argument that the trial judge should have found that the 1973/74 renovations were done negligently. It is also unnecessary for me to address Intact's argument that damage resulting from the 1973/74 renovations would have fallen outside the scope of the "all perils" policy in this case in any event, on the basis that the 1973/74 work was done many years before Intact first came on risk in 1999.

[59] In the result, I would dismiss Lalani's appeal relating to the wall collapse. This makes it unnecessary to address Lalani's cross-appeal in the fire appeal, which is contingent on it succeeding in the wall collapse appeal.

C. THE FIRE APPEAL (COA-23-CV-0050)

[60] Intact appeals from the trial judge's determination that it is liable for Lalani's losses resulting from the January 2011 fire.

[61] The trial judge's finding of liability was based on two main findings. First, she found that Intact's attempt to modify the terms of the policy in the fall of 2010 to exclude losses caused by vandalism and malicious acts, including arson, was invalid because it did not obtain Lalani's written agreement, contrary to the requirements of the *Insurance Act,* R.S.O. 1990, c. I.8. As a result, she concluded that the insurance policy that was in effect at the time of the fire was the renewal policy that Lalani had entered into in June 2010, which did not have an exclusion for losses resulting from arson.

[62] Second, the trial judge concluded that Intact was estopped from relying on a term in the June 2010 renewal policy that excluded losses if the building was vacant for more than 30 days, because Intact knew when it issued the renewal policy that the building had already been vacant since the wall collapse more than 30 days earlier, and also knew that the building would remain vacant for the foreseeable future, until it was either torn down or the wall was rebuilt.

[63] Intact appeals against both of these findings. It also contends that the trial judge erred by awarding Lalani $875,374.50 for business interruption losses,

arguing that on the evidence in this case no award should have been made under this particular head of damages.

(1) Factual background

(1) The renewal policy issued in June 2010

[64] Since Intact first went on risk in 1999, it had issued a series of annual policies that had been renewed from year to year, sometimes with relatively minor changes. The policy that was in effect when the wall collapsed on April 16, 2010, had a term that excluded loss or damage to "property … which, to the knowledge of the Insured, are vacant, unoccupied or shut down for more than 30 consecutive days". It did not have any exception for vandalism or malicious acts, including fires that were set deliberately.

[65] After the wall collapsed, Lalani's tenants were forced to vacate the building, and from that point onwards it remained unoccupied.

[66] The policy that was in force at the time of the wall collapse was due to expire on June 17, 2010. In early June, some six weeks after the wall collapse, Lalani's insurance broker, Sharon Mitchell, sent Lalani renewal documentation from Intact. The renewal policy had increased property coverage and liability limits, and a correspondingly higher premium, but was otherwise unchanged from the existing policy. It included the previous exemption that excluded coverage if the building was vacant "for more than 30 consecutive days". Like its predecessors, the

renewal policy insured the building against fire loss, and did not have any exception for arson.

[67] When Intact issued the June 2010 renewal policy, it knew that the property had already been vacant for more than 30 days as a result of the wall collapse. Intact also knew that the building would almost certainly have to remain vacant for the foreseeable future, until it was either torn down or the collapsed wall was rebuilt.

(2) Intact's amendments to the renewal policy

[68] The June 2010 renewal policy stated that it would be in effect for one year. However, it also contained provisions that allowed the parties to terminate the policy early, on notice. The main policy permitted Intact to terminate the policy on 5 days notice "if personally delivered" but required Intact to give 30 days notice if the notice of termination was delivered by registered mail. However, an endorsement extended the notice period to 60 days, "[e]xcept for … a written notice of termination personally delivered to the insured". The net result was that Intact had the option to terminate the policy either on 5 days' notice to Lalani, if it gave personal service of the notice of termination, or else on 60 days' notice, if it served the notice of termination by some other method.

[69] Through the summer of 2010, Lalani and Intact both expected that Lalani would eventually have the building demolished. This had been Lalani's engineering

expert's recommendation, and in July 2010 Lalani applied for a demolition permit. However, later that month the City took steps to have the building declared a heritage building, which prevented Lalani from proceeding with its demolition plans.

[70] In October 2010, Intact began to express reservations about continuing to insure the building in its vacant and damaged state. On October 14, 2010, the Intact underwriter with carriage of the file, Seray Zurnacioglu, emailed Ms. Mitchell to advise that Intact was "accommodating the risk and the client in regards to vacancy situation as no changes have been implemented pertaining to that as of yet". However, Ms. Zurnacioglu added that:

> If no resolution has been determined by Jan 1, 2011 the terms of coverage, pricing etc. will need to be addressed in regards to the property – i.e. vacancy permit, restriction of certain coverages etc. or the possibility that the account may be moved to Niche.

[71] A few weeks later, Intact advised Lalani's broker that it had decided to move up the January 2011 deadline. On October 26, 2010, Ms. Zurnacioglu sent Ms. Mitchell a further email stating that "[a]t this point we feel that Intact is no longer the market to cover the building in it's [*sic*] current status", but that it would "allow 60 days time for you to find an appropriate market". Over the next two days they exchanged further emails in which Ms. Mitchell asked for more time, which Ms. Zurnacioglu ultimately said was not possible. In an email sent on

October 28, 2010, she advised Ms. Mitchell that Intact would not extend coverage "beyond 60 days", adding:

> In the meantime, currently there actually is no propery [*sic*] coverage per our property wordings as the building has been sitting vacant for more than 30 days which is the allowable time. What we can do is amend the cover to wreckage value, remove package extensions and flood/quake/sewer and add the vacancy permit.

[72] Ms. Mitchell proceeded to email Noori Lalani ("Noori"), who was the family member responsible for arranging insurance coverage for the building, stating: "We need to add a Wreckage value endorsement & Vacancy Permit to your current policy with Intact". She explained that she was trying to find a new insurer for the building "as Intact wants off risk within 60 days". The next morning, she sent Noori a further email stating: "[i]f you can declare a value today, I will advise Intact so that the changes can be done to your policy".

[73] Late the following afternoon (Friday, October 29, 2010), Ms. Zurnacioglu sent an email to Ms. Mitchell confirming that she would "hold coverage on the building over the weekend of Oct 29-Mon Nov 1st", subject to making various amendments to the policy, including adding a "Vacancy Permit" and a "Wreckage value Endorsement". On Monday, November 1, 2010, Ms. Mitchell emailed Ms. Zurnacioglu and asked her to "please amend the policy". She also advised Ms. Zurnacioglu that she had "received an email late Friday that he wanted to keep the limit the same and he understands that it is the material cost of the building as

it stands now". Neither Ms. Mitchell, CG&B, or Noori Lalani were able to locate this email.

[74] Intact issued the amendments the next day, November 2, 2010. Although the amendments purported to cover the remaining term of the policy (i.e., until June 17, 2011) the Vacancy Permit Endorsement stated it would be in effect only until "January 4, 2010" [*sic*]. The parties agreed at trial that the reference to 2010 was an error, and that the end date was meant to be January 4, 2011. The Endorsement stated further that coverage for various perils was excluded "during the period of vacancy", including "vandalism or malicious acts". On November 3, 2010, Intact issued a 60-day policy cancellation notice advising Lalani that its policy would be cancelled as of January 7, 2011.

[75] On November 9, 2010, Noori Lalani's nephew, Al Lalani Jr., emailed Lalani's counsel to obtain legal advice about insurance coverage issues. He exchanged further emails with counsel about these issues a week later, on November 16- 17, 2010. Lalani has asserted privilege over the advice it received.

[76] Over the next few days, Ms. Mitchell exchanged a number of emails with Noori Lalani about obtaining replacement coverage, and with Ms. Zurnacioglu in which she said she was having difficulty finding an insurer who was willing to go on risk, and asked if Intact would reconsider its decision to cancel the policy.

(3) The December 10, 2010 meeting between CG&B and the Lalanis

[77] On December 10, 2010, more than a month after Intact amended the policy, Ms. Mitchell and another CG&B broker, Mark Sampson, arranged to meet Noori and two other members of the Lalani family at the Sheraton Hotel. The meeting had two main purposes: to brief the Lalanis on D.M. Edwards Insurance Group Ltd.'s recent merger with CG&B, and to discuss the changes Intact had made to the building's insurance policy. As the trial judge noted in her reasons: "Intact was not informed of this meeting, did not request this meeting, and no one from Intact attended at this meeting."

[78] During the meeting Ms. Mitchell and Mr. Sampson reviewed the Vacancy Permit Endorsement with Noori. He wrote some notes on the copy he was shown, which the trial judge noted essentially verified that certain conditions in the endorsement were being met. Noori also initialled the copy at the bottom of the page, beside a sentence that read: "Except as otherwise provided in this endorsement all terms and conditions of the Policy remain unchanged".

[79] After the meeting, CG&B kept the initialed copy of the Vacancy Permit Endorsement in its files. It did not provide a copy to Intact.

(4) The January 3, 2011 fire

[80] On the night of January 3, 2011, just hours before the Vacancy Permit Endorsement was scheduled to expire at 12:01 a.m. on the morning of

January 4, 2011, an arsonist set a fire that destroyed the building. The arsonist was later apprehended and convicted, and it is common ground that the timing of the fire was merely coincidental.

(2) The trial judge's reasons for judgment

[81] Intact's first argument at trial was that the fire damage was not covered by the insurance policy because the Vacancy Permit Endorsement that Intact had added to the policy on November 2, 2010, excluded losses caused by "vandalism or malicious acts". There was no dispute that the fire that destroyed the building, which was deliberately set by an arsonist, qualified as vandalism or a malicious act.

[82] Lalani's responding argument was that the November 2, 2010 amendments were invalid because Lalani had not agreed to them in writing, as required by s. 124(1) and (2) of the *Insurance Act,* which provide:

> 124 (1) All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued, and, unless so set out, no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary.
>
> (2) Subsection (1) does not apply to an alteration or modification of the contract agreed upon in writing by the insurer and the insured after the issue of the policy. [Emphasis added.]

[83] In response to this argument by Lalani, Intact contended that when Noori Lalani initialed the Vacancy Permit Endorsement on December 10, 2010, he had agreed in writing to the amendments on behalf of Lalani.

[84] The trial judge found in favour of Lalani on these issues. She did not accept that Noori's initialling of the Vacancy Permit Endorsement met the requirements of s. 124(2), for two main reasons. First, Edmund Staines, who had been Intact's manager of commercial lines underwriting and was its "only fact witness on the insurance coverage issues", admitted that when the Vacancy Permit Endorsement was added to the policy, Intact did not think that it needed Lalani's consent to the amendment, because it viewed the change as "increasing coverage, not reducing it, given the vacant state of the building and the applicability of the vacancy exclusion" in the June 2010 renewal policy;

[85] Second, the trial judge found that Intact had no knowledge of the December 10, 2010 Sheraton Hotel meeting between the Lalanis and CG&B's representatives, never received a copy of the initialed endorsement from CG&B, and only learned of this document's existence during the litigation.

[86] The trial judge concluded:

> Intact's attempt to rely on Noori's initialed Vacancy Permit endorsement, presented to him by CG&B at the Sheraton Hotel meeting, but not required or requested by Intact, is a poor attempt to construct consent after the fact. Simply put, Intact took the position at the time of the amended Renewal Policy that it did not require Lalani's

> consent and accordingly did not seek it. The evidence is consistent from all of the witnesses that Intact unilaterally made these changes to the Renewal Policy.

[87] In the alternative, the trial judge held that any agreement by Noori was invalidated by the fact that he had placed his initials beside a sentence in the Vacancy Permit Endorsement stating that "[e]xcept as otherwise provided in this endorsement all terms and conditions of the Policy remain unchanged". This was untrue, because Intact had purported to make other changes to the policy at the same time. The trial judge concluded:

> Accordingly, even if the initialed Vacancy Permit was a consent in fact by Lalani to the limited coverage and conditions for coverage of the vacant Building effective November 1, 2010 to January 4, 2011, it was not an informed consent and therefore not a valid consent in law.
>
> Overall, I find that the amendments to the Renewal Policy were unilaterally imposed by Intact and were not agreed to in writing by the insured, Lalani. This includes the Vacancy Permit endorsement initialed by Noori. As such, the purported amendments to the Renewal Policy violate s. 124 of the *Insurance Act* and as a consequence are of no force or effect. This means that the malicious acts exclusion, wreckage endorsement, and Vacancy Permit endorsement cannot be relied upon by Intact, since those purported amendments are not valid at law.

[88] Having found that the November 2, 2010, amendments were invalid and ineffective, the trial judge proceeded with her analysis on the basis that when the building burned down in January 2011, the unamended June 2010 renewal policy was still in force.

[89] Intact's second argument was that on this scenario it was still not liable for the fire loss, because the vacancy exclusion clause in the June 2010 renewal policy excluded coverage if the building was vacant for more than 30 consecutive days. It was undisputed that when the building burned down in January 2011, it had been continuously vacant for more than eight months, ever since the wall collapse in April 2010.

[90] The trial judge held that Intact was estopped from relying on the vacancy exclusion because it had led Lalani to believe that it would not rely on this exclusion when it issued the June 2010 renewal policy, knowing that the building had already been vacant for more than 30 consecutive days because of the wall collapse, and would have to remain vacant for an extended period of time until it was either torn down or repaired. The trial judge found:

> Lalani understood that Intact did not intend to rely on that exclusion as that scenario would have meant that Lalani was effectively paying a premium for coverage for the Building that was already the subject of an excluded peril. This made no sense to Lalani, particularly given its longstanding relationship with Intact.

Since the June 2010 renewal policy otherwise covered losses due to arson, the trial judge found that Intact was liable for Lalani's losses arising from the January 2011 fire, which she calculated as totaling $5,841,536.06, plus pre-judgment interest.

(3) Analysis

[91] Intact challenges both prongs of the trial judge's reasons. First, Intact argues that she erred by finding that Intact's November 2, 2010 amendments to the policy were invalid because of s. 124 of the *Insurance Act*. Second, in the alternative, Intact argues that even if the unamended June 2010 renewal policy was still in force when the building burned down, as the trial judge found, she made a further error by finding that Intact was estopped from relying on the vacancy exclusion. Success on either argument would lead to the conclusion that Intact is not liable for the fire loss.

[92] I find it convenient to address Intact's arguments on the estoppel issue first, before turning to its arguments that the trial judge made a further error by finding that the November 2, 2010 amendments to the policy were inoperative because of s. 124 of the *Insurance Act*.

(1) The standard of review

[93] The applicable standard of review is well-settled. The trial judge's findings of fact are entitled to appellate deference, and we may only interfere with her factual conclusions if we find that she made palpable and overriding errors. Her conclusions on questions of law are reviewed on a correctness standard. Her findings on questions of mixed fact and law must generally be reviewed for palpable and overriding error, in the absence of an extricable legal error or a

question of more general application: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10, 23, 36.

(2) Did the trial judge err by finding that Intact was estopped from relying on the vacancy exclusion in the June 2010 renewal policy?

[94] The trial judge found that Intact was estopped from relying on the vacancy exclusion in the June 2010 renewal policy, based on Intact having renewed Lalani's policy, and accepted Lalani's payment of the annual premium, even though it knew that the building had already been vacant for more than 30 consecutive days because of the wall collapse, and knew that it would remain vacant for the foreseeable future.

[95] Intact does not challenge the trial judge's conclusion that it was estopped from enforcing the vacancy exclusion when it agreed to renew the policy in June 2010. However, it argues that the trial judge erred in law by analysing the estoppel issue on the basis of the doctrine of estoppel by representation rather than promissory estoppel. According to Intact, this legal error led the trial judge to fail to properly consider Intact's ability to retract its promise when circumstances changed in the fall of 2010.

[96] Although the trial judge did conduct her analysis by applying the doctrine of estoppel by representation, I agree with Intact that her factual findings are better characterized as leading to the conclusion that Intact was estopped by the doctrine

of promissory estoppel. This is an extricable legal issue that is reviewable on a standard of correctness.

[97] As Professor Bruce MacDougall explains in his text on the law of estoppel (Bruce MacDougall. *Estoppel*, 2nd ed. (Toronto: LexisNexis, 2019), at §5.32), these two forms of estoppel have "a close kinship", but also have some important differences. Most notably, estoppel by representation arises when a party makes a representation about some existing fact, whereas promissory estoppel arises when a party makes a representation about its own future intentions. As Professor MacDougall explains at §§5.34-5.35:

> Promissory estoppel has a fundamental difference from estoppel by representation in that the latter estoppel is used by the representee to hold the representor to the validity of what is a false statement. Promissory estoppel does not hold the promisor to the "truth" or "falsehood" of the promise or assurance; such a judgment of the veracity contents of the statement (promise or assurance) is unusual in promissory estoppel because it is unnecessary. Rather, the promisor is simply held to the promise or assurance given.
>
> Estoppel by representation is often referred to as a "rule of evidence". … Because estoppel by representation is about a statement of fact(s), its evidentiary nature is more obvious and the evidentiary characterization is more defensible. It is more difficult to characterize promissory estoppel in that way, as it is not about facts but the obligations that exist between the parties.

[98] In this case, Intact's expressed or implied assertions about its intention to not enforce the vacancy exclusion clause in the June 2010 renewal policy are

better viewed as promises about its own future conduct, rather than representations about some material fact.

[99] Promissory estoppel is also a better fit here for a second reason. As Professor MacDougall notes at §4.493 and §5.329, "[t]he effect of estoppel by representation is permanent", whereas with promissory estoppel:

> The promisor will be held to the promise or assurance until the promisee is given reasonable notice that the promisor intends to revert to the rights and legal stipulations that apply without the effect of the estoppel.

In this case, it would not have made sense to treat Intact's implied promise not to enforce the vacancy exclusion clause as "permanent", since the June 2010 renewal policy expressly permitted Intact to terminate the policy before the end of the full one year term, as long as it gave Lalani proper notice – either 5 days or 60 days – and returned a proportional share of the premium Lalani had paid. Lalani did not argue that Intact was estopped from invoking the contractual termination clause, even though the practical effect of Intact terminating the policy ahead of term, with proper notice, was indistinguishable from Intact retracting its implied promise not to enforce the vacancy exclusion clause.

[100] However, the trial judge's error in treating this case as involving estoppel by representation rather than promissory estoppel did not affect the validity of her ultimate conclusion that Intact was estopped from relying on the vacancy

exclusion, based on her underlying findings of fact, which are entitled to appellate deference.

[101] As Moldaver and Brown JJ. observed in their majority reasons in *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, 163 O.R. (3d) 398, at para. 16:

> In the insurance context, estoppel arises most commonly where an insurer, having initially taken steps consistent with coverage, then denies coverage because of the insured's breach of a policy term or its ineligibility for insurance in the first place. To prevent the insurer from denying coverage, the insured will attempt to show that the insurer is estopped from changing its coverage position based on its prior words or conduct.

[102] As Sopinka J. explained in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at p. 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[103] Intact takes no issue with the trial judge's findings that "Intact made a positive representation to Lalani that it was insuring a vacant property at the time of renewal and therefore would not assert any vacancy exclusion", and that "Intact made this representation with the intention that Lalani would act on it". These

findings of fact satisfy the first two requirements of the legal test for establishing promissory estoppel.

[104] Rather, Intact's argument on appeal is that the trial judge erred by concluding that "it would be unfair and inequitable to allow Intact to resile from its representation." In essence, Intact contends that because the trial judge mischaracterized the nature of the estoppel at issue, she failed to properly consider the changes in circumstance in the fall of 2010 that led Intact to revisit its willingness to continue insuring the vacant building, and caused it to ultimately give notice that it would be terminating coverage and changing the terms of its coverage in the meantime.

[105] I agree with Intact that by October 2010 the situation the parties were dealing with had materially changed in some important respects. For the first few months after the wall collapsed in April 2010, Lalani had assumed that the building would probably end up being torn down, and Intact may well have shared this belief. However, after the City began taking steps in July 2010 to have the building declared a heritage structure, it eventually became clear to Intact that the building would probably remain vacant and in an unrepaired state for some considerable time. I accept that it was not inherently inequitable for Intact to decide in October 2010 that it no longer wanted to remain on risk for the full term of the renewal policy (that is, until June 2011). It was also not inequitable for Intact to

exercise its contractual right to terminate the policy early, which both parties had agreed to when the policy had been renewed.

[106] After having undertaken in June 2010 that it would continue insuring what Intact knew was a vacant building, the doctrine of promissory estoppel barred Intact from simply abandoning Lalani and withdrawing its promise not to enforce the vacancy exclusion – which in the circumstances would have been the equivalent of terminating coverage – without giving Lalani reasonable notice of its change of position. However, this is effectively what Intact did when it gave Lalani notice on November 2, 2010 that it was exercising its contractual option to terminate coverage on 60 days' notice.

[107] Although the trial judge incorrectly framed the estoppel issue in this case as one of estoppel by representation, she did not make the further error of treating Intact's commitment to insuring the vacant building as irrevocable. Rather, she expressly found that Intact had two options. First, it could have told Lalani in June 2010, before agreeing to renew the policy, "that it was relying on the vacancy exclusion, but that it would accommodate Lalani by issuing a Vacancy Permit". Second, once Intact failed to take this first option and chose to renew the policy, she concluded that:

> Intact's remedy … was to issue a notice of cancellation in light of its reassessment of the risk in terms of material change of circumstances under the Renewal Policy. Intact did issue a notice of cancellation but provided 60

> days' notice rather than the minimum period of five days allowed by the Renewal Policy. It did this with its eyes wide open to the circumstances.

[108] In short, despite her reliance on the doctrine of estoppel by representation, the trial judge nevertheless expressly found that Intact could still exercise its contractual right to terminate the contract ahead of term on proper notice, as it ultimately did. The practical effect of Intact doing this was the same as if it had rescinded its promise to insure the vacant building by giving Lalani reasonable notice of its change of position, as it could have done under the doctrine of promissory estoppel.

[109] In these circumstances, I am not persuaded that the trial judge's reliance on the wrong branch of the law of estoppel undermined the validity of her ultimate conclusion that Intact was estopped from relying on the vacancy exclusion up to the point that its notice of early termination of the policy took effect.

[110] For these reasons, I do not agree with Intact that the trial judge "failed to consider the required element of the legal test for promissory estoppel, whether the suspensory effect of the promissory estoppel was terminated on reasonable notice to [Lalani]", nor do I agree that the trial judge "failed to consider" the changes in circumstance that caused Intact to reassess its position in October 2010. Her reasons reveal that she properly considered and addressed both of these matters.

[111] I appreciate that the policy also gave Intact the right to terminate coverage on only five days' notice, if it "personally delivered" this notice to Lalani. However,

it is unnecessary to decide whether 5 days' notice by Intact would have qualified as "reasonable notice" for the purposes of the doctrine of promissory estoppel, because Intact chose to instead give Lalani 60 days' notice of its intention to terminate the policy.

[112] It is also unnecessary to address Lalani's argument that Intact would have been estopped from withdrawing its promise even on as much as 60 days' notice, in view of the difficulty Lalani faced finding alternative insurance coverage at an affordable price. As matters played out, Intact ultimately gave Lalani notice that it would be terminating coverage effective January 7, 2011, but the building then burned down a few days earlier. The question of whether Intact would have been liable if the building had burned down after January 7, 2011 accordingly does not arise.

(3) Did the trial judge err in finding that the November 2, 2010 policy amendments were invalid?

[113] As I have already noted, when Intact exercised its contractual option to terminate the insurance policy on 60 days' notice in early November 2010, it also purported to amend the scope of coverage that would remain in effect during this time by adding the Vacancy Permit Endorsement, as well as making other changes to the policy that reduced Intact's risk.

[114] The trial judge concluded that s. 124 of the *Insurance Act* prevented Intact from making these changes without Lalani's written agreement, and found further that Lalani never did agree in writing to these amendments. As a result, the trial judge found that the amendments – which, among other things, created an exemption for losses caused by arson – were legally inoperative. As a consequence, she found that when the building burned down on January 3, 2011, the unamended June 2010 renewal policy was still effect. Since the trial judge also found that Intact was estopped from relying on the vacancy exclusion in the June 2010 renewal policy, as discussed above, the net result was that she concluded that Intact was liable for the fire losses.

[115] Intact makes two main arguments against the trial judge's conclusion that the amendments it made to Lalani's policy on November 2, 2010 were inoperative. First, Intact argues that the trial judge erred by assuming that the addition of the Vacancy Permit Endorsement engaged s. 124 of the *Insurance Act*, and accordingly required Lalani's consent in writing. Second, in the alternative, Intact argues that the trial judge erred by not finding that Lalani consented in writing to the amendment. Both of these findings can be characterized as ones of mixed fact and law.

(1) Did the trial judge err in treating s. 124 of the *Insurance Act* as engaged?

[116] Section 124(1) of the *Insurance Act* only applies to policy amendments that operate "to the prejudice of the insured". According to Intact, because the June 2010 renewal policy excluded coverage if the building remained vacant for more than 30 consecutive days, the overall effect of adding the Vacancy Permit Endorsement was not prejudicial to Lalani, even though the Vacancy Permit Endorsement also narrowed the scope of coverage by adding an exclusion for vandalism that had not been in the renewal policy. In essence, Intact contends that the amendments worked to Lalani's advantage because they gave Lalani coverage for the building that it would not have had under the June 2010 renewal policy, as a result of the vacancy exclusion term in that policy. If this is correct, Intact would not have needed to obtain Lalani's written consent to make the amendments.

[117] This argument assumes that the trial judge's finding that Intact was estopped from relying on the vacancy exclusion term can properly be ignored in the s. 124 *Insurance Act* analysis. I do not agree that this is the correct approach. The trial judge's conclusion that Intact was estopped from relying on the vacancy exclusion term was not merely a remedy that she imposed after the fact, but flowed from her factual findings that Intact had made an implied promise that it would not rely on the vacancy exclusion, that it intended for Lalani to accept and act on this promise, and that Lalani did rely on this promise. In my view, the question of whether Intact's

addition of the Vacancy Permit to the policy operated to Lalani's advantage or disadvantage must be assessed in the context that was created by Intact's own actions, as found by the trial judge, and the legal consequences that flow from these findings.

[118] In the particular circumstances here, I do not agree with Intact that adding the Vacancy Permit Endorsement benefited Lalani. The trial judge concluded that Intact's own actions barred it from enforcing the vacancy exclusion in the June 2010 renewal policy. As a result, adding the Vacancy Permit Endorsement to the policy did not improve Lalani's situation by giving it at least some coverage for 60 days, when it previously had no coverage. Rather, Lalani went from having more extensive coverage to more limited coverage that, among other things, excluded arson losses. This change benefitted Intact by reducing its risk, and correspondingly prejudiced Lalani by reducing its coverage.

[119] Intact's second argument, which is closely related, is that even if the Vacancy Permit endorsement did reduce the scope of Lalani's insurance coverage, this change was nevertheless beneficial and not prejudicial to Lalani, because the alternative would have been for Intact to exercise its contractual right to terminate the policy on only five days' notice, which would have left Lalani with no coverage at all after the five days expired.

[120] Counsel for Intact argues that the exchange of emails between Ms. Zurnacioglu of Intact and Ms. Mitchell of CG&B between October 26 and November 2, 2010 should be understood as:

> Intact stipulating the terms upon which its prepared to give 60 days' notice in lieu of the 5 days. It has two options: its leaning towards the 60 days, and its stipulating "Here are the terms upon which we will continue to [under]write it for that 60 days".

[121] The problem with this argument is that Intact never sought to terminate the policy with only five days' notice to Lalani. Moreover, Intact never overtly threatened that it would terminate the policy with only five days' notice if Lalani did not agree to the addition of the Vacancy Permit Endorsement. To the contrary, Intact never sought Lalani's agreement to the amendments, because, on the trial judge's findings, Intact believed it simply could add the Vacancy Permit Endorsement and other amendments unilaterally, and therefore did not need Lalani's consent. The trial judge's findings on this point are entitled to appellate deference.

[122] I appreciate that if Intact had sought to obtain Lalani's consent to the amendments, it might have been in a strong negotiating position. Intact did have the contractual option of terminating coverage on only five days' notice, and CG&B was having difficulty finding another insurer who would assume the risk of insuring a partially collapsed and vacant building for an affordable price. However, Intact never tried to use this leverage to obtain Lalani's agreement to the amendments,

presumably because, as the trial judge found, Intact did not believe Lalani's agreement was necessary. I do not agree that Ms. Zurnacioglu's comments in some of her emails that Intact was "accommodating" its client by agreeing to continue coverage for 60 days with its proposed amendments can be understood as carrying an implied threat that Intact would cancel coverage sooner, on only 5 days' notice, if Lalani did not cooperate.

[123] In these circumstances, I am not persuaded that the trial judge erred by treating the addition of the Vacancy Permit Endorsement on November 2, 2010, as engaging s. 124 of the *Insurance Act*, having regard to her factual findings, none of which are tainted by any palpable and overriding error. It follows that I also do not agree that it was an error for the trial judge to decide the question of the validity of this amendment to the policy as turning on whether Lalani consented to it in writing, as required by s. 124 of the *Insurance Act*.

(2) Did the trial judge err by finding that Lalani did not consent to the amendment?

[124] Intact's second main argument is that the trial judge erred by not finding that Lalani did consent in writing to the addition of the Vacancy Permit Endorsement. This argument has two alternative but interrelated branches.

[125] First, Intact argues that the trial judge erred by not finding that CG&B had the authority to consent in writing on Lalani's behalf to changes to the policy, and that CG&B, acting as Lalani's agent, did consent to the changes that Intact

proposed at the end of October and early November 2010. Intact places particular reliance on the email exchange between Ms. Mitchell of CG&B and Ms. Zurnacioglu of Intact that included a November 1, 2010 email in which Ms. Mitchell asked Ms. Zurnacioglu to "[p]lease amend the policy".

[126] Second, in the alternative, Intact argues that the trial judge erred by not finding that Noori Lalani gave valid consent in writing to at least the Vacancy Permit Endorsement when he initialled a copy of this document during his December 10, 2010 meeting with the CG&B brokers at the Sheraton Hotel. Intact argues that, at the very least, Noori was at this point ratifying the consent that Intact says was previously given by CG&B, on Lalani's behalf.

[127] Since both of these arguments amount to challenges to the trial judge's findings of fact, it is Intact's burden to show that her findings were tainted by palpable and overriding error.

[128] The problem Intact faces with both of these arguments is the trial judge found as fact that neither Intact nor CG&B believed at the time that Intact needed Lalani's consent to make the amendments. As the trial judge noted:

> Mr. Staines [Intact's witness] … confirmed that, with respect to all of the amendments it made to the Renewal Policy, effective November 2, 2010, [Intact] did not require Lalani's consent to those changes, nor did Intact need anything from Lalani with respect to the Vacancy Permit it issued under the amended Renewal Policy.

The trial judge noted further that Ms. Mitchell, who was the CG&B employee in charge of Lalani's file, also "assumed, at the time of the amended Renewal Policy, that Intact had the right to do this without consent of the insured, Lalani".[2] These were findings of fact the trial judge was entitled to make on the evidence before her.

[129] Accordingly, even if I were to accept that there can be circumstances in which an insurance broker can give valid consent in writing to an amendment for the purposes of s. 124 of the *Insurance Act* by acting as the insured's agent, the trial judge found that this was not what happened here. Rather, Intact did not believe it needed either Lalani or CG&B's consent to amend the terms of the policy, and Ms. Mitchell, who shared this belief, likewise did not imagine herself to be consenting to the amendments on Lalani's behalf. Her comment in her November 1, 2010 email asking Ms. Zurnacioglu to "[p]lease amend the policy" must be read in this context.

[130] I am also not persuaded that the trial judge erred by not placing more weight than she did on the evidence that Lalani sought legal advice about the amendments, and on Noori Lalani's evidence that he "consented to the vacancy part" when he met with the CG&B brokers on December 10, 2010, and initialled a

[2] Ms. Mitchell died before trial, but her evidence in her examination for discovery was read into the trial record.

copy of the Vacancy Permit. Since the trial judge found that CG&B never sent the initialled copy of the document to Intact, and that Intact remained unaware of its existence until it learned about it during the litigation, she did not make any palpable and overriding error by concluding that Intact could not rely on this document as satisfying the requirement of s. 124(2) of the *Insurance Act* that the addition of the Vacancy Permit be "agreed upon in writing" by Lalani. Moreover, Noori Lalani cannot properly be taken as having retroactively ratified an agreement in writing that was made a month earlier by Ms. Mitchell, as Lalani's agent, since on the trial judge's findings neither Ms. Mitchell nor Ms. Zurnacioglu believed at the time that this was what Ms. Mitchell had been doing. It was open to the trial judge to conclude as she did that Intact's argument was "a poor attempt to construct consent after the fact".

[131] It is also worth noting that Intact has not addressed the trial judge's alternative finding that any consent that Noori Lalani did express by initialling the Vacancy Permit Endorsement would have been invalid in any case, because the sentence of the Vacancy Permit that he initialled, which represented that the Vacancy Permit stood alone and that "all other terms and conditions of the Policy remain unchanged", was untrue. In reality, Intact had also unilaterally made a series of further amendments to the policy, all of which reduced Intact's risk and reduced the scope of Lalani's coverage for the final 60 days of the policy. As Lalani notes in its factum, these amendments:

> [I]nclud[ed] reducing the coverage to only the wreckage value, removing extensions of coverage that Lalani had paid extra to originally include such as water damage, theft, flood, earthquake, and sewer damage, and adding exclusions for malicious acts and vandalism. Importantly, Intact relies on the addition of these exclusions to deny coverage for the fire.

[132] While Intact argues that each of the amendments must be considered separately, and that Noori Lalani could properly agree to some in writing without agreeing to others, the problem Intact faces is that the document Noori initialled expressly stated, inaccurately, that there would be no other amendments. The trial judge concluded that this vitiated any consent that Noori might otherwise be taken to have given to the Vacancy Permit. Intact has not squarely addressed this latter finding by the trial judge.

(4) Did the trial judge err by awarding damages for business interruption loss?

[133] Intact also argues that the trial judge erred by awarding Lalani damages for business interruption losses caused by the fire, which she calculated as "6.5 months times $134,673 for a total [of] $875,374.50". Intact takes no issue with the $134,673 per month figure, but contends that there was no evidence to support the 6.5 month figure relied on by the trial judge.

[134] The trial judge arrived at 6.5 months by accepting Al Lalani Jr.'s estimate that if the building had not burned down, as of January 2011 it would have taken a further 5.5 months to restore the collapsed wall to a state where the building's

tenants could have moved back in and resume paying rent. Since the insurance policy required Intact to reimburse Lalani for up to 12 months of business interruption losses, the trial judge subtracted the 5.5 months of losses attributable to the wall collapse, which she found was an uninsured peril, to conclude that 6.5 months of Lalani's business interruption losses were attributable to the fire.

[135] Intact takes issue with the admissibility and reliability of Lalani's evidence about how quickly the building could have been rebuilt if it had not burned down, contending that Al Lalani Jr. had no relevant expertise to support his opinion, and that his estimate was little better than a guess that was based in part on overly optimistic assumptions about how quickly the necessary permits could be obtained and the rebuilding work completed.

[136] There is some force to Intact's criticism of Lalani's evidence about how quickly the building could realistically have been restored for reoccupation. However, the problem Intact faces on appeal is that it did not advance these objections at trial, nor did it take issue with the admissibility or weight that could properly be given to Al Lalani Jr.'s evidence about this issue. Rather, Intact's trial counsel took the position that "the best evidence is that [the building] would have been made occupancy ready in 5.5 months". The trial judge expressly relied on Intact's concession on this issue, stating:

> I agree with Intact that the best evidence before me as to the estimated length for repair of the wall and making the

> Building occupancy ready is 5.5 months calculated from the meeting with the City that was to have occurred on January 10, 2011, but for the fire, consistent with Al Jr.'s testimony. [Emphasis added.]

[137] In these circumstances, I am not persuaded that the trial judge's reliance on the 5.5 month figure agreed to by Intact at trial reveals any palpable and overriding error that would permit us to interfere with her damages calculation.

(4) Disposition

[138] In the result, I would dismiss Intact's appeal relating to its liability for damages resulting from the fire. This makes it unnecessary to address Lalani and CG&B's cross-appeals against each other, both of which are contingent on Intact succeeding in the fire appeal. As previously noted, I would also dismiss Lalani's cross-appeal against Intact in the fire appeal seeking increased business interruption loss damages from Intact, which was contingent on Lalani succeeding on the wall collapse appeal.

[139] The parties have reached a partial agreement on partial indemnity costs of the appeals and cross-appeals. On the wall collapse appeal, where Intact is the successful party, they agree that Intact should receive $20,000 all inclusive, payable by Lalani. On the fire appeal, where Lalani has been the successful party, the parties agree that Lalani is entitled to $25,000 all inclusive, payable by Intact. The parties have also agreed that CG&B is entitled to receive $15,000 all inclusive.

However, Intact and Lalani have not agreed about whether these costs should be paid by Intact or Lalani. Each takes the position that the other should pay.

[140] In my view, CG&B's costs should be paid by Intact. Although in one sense Lalani can be said to have brought CG&B into the fire appeal by cross-appealing to obtain damages against CG&B in the event that Intact's appeal was successful, this was a readily foreseeable consequence of Intact's decision to appeal. Indeed, CG&B anticipatorily cross-appealed against the trial judge's conditional finding that it had been negligent, even before Lalani brought its own cross-appeal seeking damages against CG&B.

[141] More fundamentally, the trial judge's conditional finding of negligence against CG&B was based on the premise that, if Noori Lalani were found to have consented in writing to the Vacancy Permit by initialling the copy given to him by CG&B at the Sheraton Hotel meeting – which was contrary to her actual finding – CG&B was negligent by not advising him not to consent to the amendment. However, the trial judge rejected the further argument that CG&B had negligently consented to the amendment on Lalani's behalf, finding that there was "no evidence that supports the contention that CG&B conveyed consent on behalf of Lalani to the purported amendments, including the Vacancy Permit Endorsement."

[142] As I have discussed, Intact argued on the fire appeal that the trial judge erred by finding that CG&B did not consent to the amendments on Lalani's behalf, and

argued in the alternative that she erred by finding that Noori Lalani's act of initialling the Vacancy Permit Endorsement did not constitute consent in writing for the purposes of s. 124 of the *Insurance Act*. Since the conclusion that CG&B was liable in negligence depended on at least one of these findings being reversed, and since Intact was unsuccessful on both issues, it is in my view appropriate to treat both Lalani and CG&B as entirely successful parties on the fire appeal, and to treat Intact as the entirely unsuccessful party.

[143] The net result is that I would order that Intact pay $5,000 in costs to Lalani ($25,000 for the fire appeal, offset by the $20,000 payable to Intact by Lalani on the wall collapse appeal), and $15,000 in costs to CG&B, both figures all inclusive.

Released: July 24, 2024 "P.R."

"J. Dawe J.A."
"I agree. Paul Rouleau J.A."
"I agree. Sossin J.A."