

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *O'Brien v. Security National Insurance Company*, 2023 NSSC 376

**Date:** 20231123  
**Docket:** 486726  
**Registry:** Halifax

**Between:**

Sarah O'Brien and David O'Brien

Applicants

and

Security National Insurance Company, a body corporate,  
TD Insurance Direct Agency Inc., a body corporate

Respondents

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**DECISION ON APPLICATION**

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**Judge:** The Honourable Justice Ann E. Smith

**Heard:** June 27 and 28, 2023, in Halifax, Nova Scotia

**Counsel:** Ian Dunbar and Liza Myers, for the Applicants  
Daniel MacKenzie and Calvin DeWolfe, for the Respondents

**By the Court:**

**Introduction**

[1] This Application is about whether Sarah O’Brien and Dr. David O’Brien are entitled to damages flowing from the decision of their home insurer, Security National Insurance Company (“Security National”), to deny their claim for water damage to their property. The case is also about whether the representative for TD Insurance Direct Agency Inc. (“TD Insurance” or “TD”) was negligent when she placed coverage on the residence.

**Background**

[2] The O’Briens are residents of Halifax, Nova Scotia. Sarah O’Brien is a teacher with the Halifax Regional Centre for Education and David O’Brien is an orthopaedic surgeon with the Nova Scotia Health Authority. In 2018, the O’Briens had lived in their home at 6721 Oakland Road, Halifax, for more than ten years.

[3] In September 2018, the O’Briens noticed that their neighbours directly across the street at 6262 Oakland Road had listed their house for sale (the “Property”). The O’Briens had been inside the Property several times, and had always admired it. The

Property, which was more than a century old, had been well maintained, retaining many of the original finishes.

[4] The O'Briens approached the neighbours and expressed their interest in purchasing the Property. Following some negotiation, they made a successful offer to purchase the Property on October 11, 2018. The closing date was November 30, 2018.

[5] The O'Briens were aware that they had to place home insurance on the Property prior to the closing. Their existing home and cottage were insured under a policy issued by Security National (the "Policy"). The Policy provided comprehensive coverage, including coverage for water damage.

[6] On November 27, 2018, Sarah O'Brien called TD Insurance to add the Property to the existing Policy. Ms. O'Brien spoke with TD's telephone representative, May Ebotoke. During the call, which lasted nearly an hour, Ms. Ebotoke placed Ms. O'Brien on hold to seek advice from more senior TD team members.

[7] Before the call ended, Ms. O'Brien received a copy of the Policy by e-mail, and satisfied herself that the Property had been added as an insured location. The Property purchase closed as planned on November 30, 2018.

[8] On January 1, 2019, at approximately 3:15 pm, Dr. O'Brien discovered significant water damage at the Property. The O'Briens immediately called TD Insurance to report the damage. On January 4, 2019, the O'Briens were informed by Security National that the Policy did not provide coverage for the water damage. In a denial letter of January 7, 2019, Security National stated:

Your policy does not cover water damage to your property when vacant.

We refer you to the Perils Excluded Section of you [*sic*] policy which states:

26 Water Damage

direct or indirect caused by:

F. Occurring while the building is under construction or **vacant**, even if permission for the construction or vacancy [*sic*] has been given by **us**.

[9] "Vacant" is defined under the Policy as follows:

**Vacant** refers to the circumstances where, regardless of the presence of furnishings:

1. all occupants have moved out with no intention of returning and no new occupant has taken up residence; or
2. in the case of a newly constructed house, no occupant has yet taken up residence.

[10] The O'Briens have filed this Application alleging that the loss is covered under the Policy because the Property was not "vacant" at the time of the water damage. They claim in the alternative that if coverage for water damage is excluded in the circumstances, the lack of coverage is attributable to Ms. Ebotoke's negligent performance of her responsibilities as a telephone agent for TD Insurance. The O'Briens say that if Ms. Ebotoke had given them the appropriate information about

the policy exclusions, they would have taken the necessary steps to ensure that they had full coverage over the Property.

[11] The Respondents maintain that the Property was “vacant” at the time of the loss, and that water damage that occurs while the insured property is vacant is excluded from coverage under the Policy. In response to the allegations of negligence, the Respondents say that at the time Ms. O’Brien purchased coverage for the Property, she explicitly represented that the Applicants would be occupying the Property after purchasing it. As a result, Ms. Ebotoke had no obligation to explain a vacancy exclusion which would not have applied based on the information provided by Ms. O’Brien.

[12] The parties have agreed that damages can be quantified at \$225,145.71, exclusive of prejudgment interest, costs, and disbursements.

### **Issues**

[13] There are two issues on this Application:

1. Was the Property “vacant” as defined in the Policy at the time of the loss?
2. If the Property was “vacant”, are the Respondents liable to the Applicants for failing to properly place coverage and communicate information material to

their coverage, whether as a matter of negligence or as a breach of the implied warranties contained in the *Consumer Protection Act*, S.N.S. 1989, c. 92?

### **The Evidence**

[14] The Applicants filed two affidavits of Sarah O'Brien – an initial affidavit sworn on November 1, 2019, and a response affidavit sworn on February 26, 2020. They also filed two affidavits of Dr. David O'Brien – an initial affidavit sworn on November 1, 2019, and a response affidavit sworn on February 26, 2020.

[15] The Respondents filed an affidavit of May Ebotoke, Contact Centre Representative with TD Insurance, sworn on February 5, 2020, and an affidavit of Matthew Pike, Senior Specialist, Complex Claims with Security National, sworn on January 29, 2020.

[16] All the affiants were cross-examined. The Applicants tendered three exhibits during Ms. Ebotoke's cross-examination.

[17] Before summarizing the evidence of each witness, I will review the transcript of the underwriting call between Sarah O'Brien and May Ebotoke, which was attached as an exhibit to each of their affidavits.

### **The Call**

[18] On November 27, 2018, Ms. O'Brien called TD Insurance to have the Property added to the existing Policy. The call began with Ms. O'Brien advising Ms. Ebotoke of the purchase of the Property:

**MS. O'BRIEN:** I'm just calling because we have home insurance with you guys ...

**MS. EBOTOKE:** Uh-huh.

**MS. O'BRIEN:** ... and we've just purchased another home.

**MS. EBOTOKE:** Oh nice, congrats.

**MS. O'BRIEN:** We hav- ... we haven't sold this home but we purchased another home, we close on Friday.

[19] Ms. Ebotoke asked Ms. O'Brien about her plans for the two homes:

**MS. EBOTOKE:** So you're ... are you going to eventually sell this place at 6271 Oakland Road?

**MS. O'BRIEN:** We are. Yes, we're going to sell this one and ...

**MS. EBOTOKE:** And when are you planning on moving in?

**MS. O'BRIEN:** Right now we're not going to move in ...

**MS. EBOTOKE:** Uh-huh.

**MS. O'BRIEN:** Right away.

**MS. EBOTOKE:** Uh-huh.

**MS. O'BRIEN:** It's actually just across the street.

**MS. EBOTOKE:** Oh.

**MS. O'BRIEN:** Yeah, is it better if one of us stays there, like how does that affect ... I mean we can just walk across the street every day.

**MS. EBOTOKE:** It's just because I'm trying to figure out if we're going to need the ... like a vacant ... like a vacant home.

**MS. O'BRIEN:** Okay. Well it's not really vacant because we'll go over every day.

**MS. EBOTOKE:** Uh-huh.

**MS. O'BRIEN:** Because we're going to renovate.

**MS. EBOTOKE:** Okay.

**MS. O'BRIEN:** So it won't really be vacant in the sense that noone will be in it. Someone will be in it every day.

[20] In response to this information, Ms. Ebotoke placed Ms. O'Brien on hold while she sought an internal consultation from TD Insurance's Central Resource Team ("CRT"). Ms. Ebotoke had the following exchange with a CRT representative named "Donald" while Ms. O'Brien waited on hold:

**DONALD:** All right, what's going on?

**MS. EBOTOKE:** And they ... so I'm speaking with Sarah and she said that they bought a new house.

**DONALD:** Uh-huh.

**MS. EBOTOKE:** And they ... they're closing on Friday.

**DONALD:** Okay.

**MS. EBOTOKE:** So I said you're adding it a second location? She's like yes because we haven't sold this one yet. So I was like, so when are you planning on moving in?

**DONALD:** Uh-huh.

**MS. EBOTOKE:** And her answer was, I'm not sure yet because we're going to be renovating. So I was like, so how long, you know, like what are you trying to do there exactly because it's right across the street. Like I see it and I can walk to it every day.

**DONALD:** Okay.

**MS. EBOTOKE:** And then she's like, asks us why. I said because I'm kind of tempted to ... I told her I'm kind of tempted if it's ... how long is it going to be vacant for. And if we need to apply for like, you know, the vacant permit or renovation or you know?

**DONALD:** Sure.

**MS. EBOTOKE:** Because she was like, okay. I said let me consult, I'll be back. I have no idea how to tackle this one.

**DONALD:** Okay, so ...

**MS. EBOTOKE:** So she asked would it be better for ...

**DONALD:** Uh-huh.

**MS. EBOTOKE:** ... one of us to stay there. She's like we literally will be there every day because it's right across the street.

**DONALD:** Okay. So, you know, to live in a house, it has to ... I mean, first of all, it has to be legal to live in it. For like a new construction you have to have your occupancy permit and stuff but that wouldn't be the case here.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** You ... you know, it's got to be furnished and someone's got to actually like occupy it, live there, you know, have their stuff there ...

**MS. EBOTOKE:** Uh-huh.

**DONALD:** ... whatever. Even just a couple of days a week is fine.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** But here's the thing, if a house is vacant and they're paying for a homeowner place ...

**MS. EBOTOKE:** Uh-huh.

**DONALD:** ... let's say ... let's say they ... they lie to us and they say, Yeah, I'll be there all the time ...

**MS. EBOTOKE:** Uh-huh.

**DONALD:** ... and then we set them up with oil spill coverage, right?

**MS. EBOTOKE:** Uh-huh.

**DONALD:** But that would be an exclusion for a vacant property and then an oil spill happens and then we show up and there's no furniture there, there's no nothing there, obviously noone's living there.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** We would deny the claim and they would have paid us a bunch of money for nothing.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** Yeah. So that's the main thing is that ...

**MS. EBOTOKE:** Exactly.

**DONALD:** ... you know, it should ... a vacant ... putting it as a vacant property prevents them from paying for things that they don't need. Now of course we charge a vacancy permit

because a vacant house is, you know, more risky than a regular house.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** So we charge more money for it. But ... I, you know, I think you're generally, you know, in a good zone thinking you should get all of your details together before you call us.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** You know, to ... the homeowner. I see they have two houses already. Is this going to be location three?

**MS. EBOTOKE:** She said she's selling the 6271 ... she's selling that.

...

**DONALD:** So, yeah, I mean it would be nice to figure out what they want to do with it. If, though, they're not going to move into it within the first 60 days, for sure, you should put a vacancy permit on it.

**MS. EBOTOKE:** My concern is that she says they're renovating.

**DONALD:** Okay, did you ...

**MS. EBOTOKE:** So if they're renovating, what procedure would I foll- ... because that's where I'm stuck right now at what procedure

...

[21] Donald explained that Ms. Ebotoke's next steps in the quoting process depended on whether the intended renovations were "major" or "minor". A "major" renovation, according to TD, is one where the total value of the renovation is more than 20 percent of the home's value, or the total cost of the renovation is more than \$50,000. Donald said there were three possible options for renovations: 1) minor renovation; 2) major renovation – customer is living in home; or 3) major renovation – customer is not living in home. Ms. Ebotoke thanked Donald and returned to Ms. O'Brien. The following exchange then occurred:

**MS. EBOTOKE:** Thank you so much for your patience there.

**MS. O'BRIEN:** No problem.

**MS. EBOTOKE:** All right, so I got it all figured out now. Now I have a few questions for you on my end.

**MS. O'BRIEN:** Okay.

**MS. EBOTOKE:** Now you have both 6271 Oakland and 337 Kings Road, right?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** So this would be the third location we're adding until you sell one of them.

**MS. O'BRIEN:** Yes. No, well we're not selling the Kings Road, it's a cabin.

**MS. EBOTOKE:** It will be 6271, right?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** Perfect, okay. So let's get that going here and let's add that location first. And then how many ... how much renovations are you going to be doing like how ... Is it like more than 20 percent of the value of the home?

**MS. O'BRIEN:** Probably.

**MS. EBOTOKE:** Okay. And you said you're moving in on Friday the 30<sup>th</sup> or you're closing ...

**MS. O'BRIEN:** Yeah, well on the 1<sup>st</sup>.

**MS. EBOTOKE:** ... on the 30<sup>th</sup>?

**MS. O'BRIEN:** We close on the 30<sup>th</sup>.

**MS. EBOTOKE:** On the 30<sup>th</sup>. So do you want your policy to be active as of the 30<sup>th</sup>?

**MS. O'BRIEN:** I think yeah, definitely.

**MS. EBOTOKE:** Okay, so let's ...

**MS. O'BRIEN:** Because I'm pretty sure we sign over the papers then, so it will become ours.

**MS. EBOTOKE:** Okay, perfect.

...

**MS. EBOTOKE:** Okay. So how soon after are you going to move in after your closing date?

**MS. O'BRIEN:** My husband's going to on Saturday.

**MS. EBOTOKE:** Oh okay. So are you going to, like, move your furniture and stuff over?

**MS. O'BRIEN:** Yeah, like a bed and stuff like that.

**MS. EBOTOKE:** Okay perfect. And are you going to be the owner of the property and all the contents, you and your husband?

**MS. O'BRIEN:** Yes.

...

**MS. EBOTOKE:** And it's going to be occupied by you guys, right?

**MS. O'BRIEN:** Yeah.

**MS. EBOTOKE:** Not renting it or anything?

**MS. O'BRIEN:** No.

...

**MS. EBOTOKE:** ... So how ... how long, excuse me, how long do you know ... do you think that the renovations are going to take?

**MS. O'BRIEN:** We don't really know for sure. I can't answer that, I'm sorry. Should we just like make up a number?

**MS. EBOTOKE:** No, I'm just trying to determine if it's going to go under ma- ... minor renovations or major renovations. Now is the cost more ... the cost for it is going to be more than 50,000?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** Okay. Okay. So let's do a few a questions here to determine the house ... It's single-family home?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** Okay. And it's detached?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** Okay. And are you going to be living in that home during the renovations or not?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** Yeah, you will be?

**MS. O'BRIEN:** I think so, yeah, that's my husband's plan.

**MS. EBOTOKE:** Okay. I'm just trying to see here why it's giving me that error for. Do you mind if I just place you on a quick hold?

**MS. O'BRIEN:** No, not at all.

[22] After placing Ms. O'Brien on hold, Ms. Ebotoke connected with a CRT representative named Dave:

**DAVE:** All right. What can I do for you today?

**MS. EBOTOKE:** So this client is adding a third location.

**DAVE:** Okay.

**MS. EBOTOKE:** She's trying to sell her first location.

**DAVE:** Okay.

**MS. EBOTOKE:** And now this is where I'm torn in between.

**DAVE:** Okay.

**MS. EBOTOKE:** I was doing the quoting process ...

**DAVE:** Okay.

**MS. EBOTOKE:** ... but she said her husband is ... they're closing on Friday.

**DAVE:** Okay.

**MS. EBOTOKE:** Her husband is moving in on Saturday.

**DAVE:** Okay.

**MS. EBOTOKE:** And ...

**DAVE:** Sorry, they're closing when?

**MS. EBOTOKE:** Friday, the 30<sup>th</sup>.

**DAVE:** On the new house, on the 30<sup>th</sup>, okay.

**MS. EBOTOKE:** Yeah, and her husband is moving in there on Saturday.

**DAVE:** 31<sup>st</sup>, okay.

**MS. EBOTOKE:** And that house is going to be renovated. That sparked my interest right away. I said, How long is it going to be renovated for, how much is the cost, you know?

**DAVE:** Okay, yeah, all good questions to ask, yeah.

**MS. EBOTOKE:** So, she said it's going to be more than 20 percent of the cost of her house.

**DAVE:** Okay.

**MS. EBOTOKE:** And it's going to cost more than 50,000.

**DAVE:** Okay.

**MS. EBOTOKE:** But now I'm trying to follow the procedure for the ... in eSpace "building under construction or renovation".

**DAVE:** Okay.

**MS. EBOTOKE:** And then under "major renovations", "customer is living in home during renovation or construction".

...

**DAVE:** Well, I think I'll set it up ... I'm just going to get caught up with you here first. Building under construction or renovation so ...

**MS. EBOTOKE:** Uh-huh.

**DAVE:** ... so he's actually ... so they're ... so he ... they're moving in all their furniture ... so number one, May, I'd be asking, who's doing the renovations. Is it the ... it's probably not the husband because he's a doctor but ...

**MS. EBOTOKE:** No, but she says she's literally across the street and he's going to be there, sleeping there and moving a bed in there for him and whatever. But ... like she's being extremely ...

**DAVE:** Okay.

**MS. EBOTOKE:** ... to be honest, extremely vague. Everything I ... I don't know, I may be, I don't know, probably, possibly, I'm ... well I need an answer. Is it ...

**DAVE:** Okay.

**MS. EBOTOKE:** ... a "yes" or a "no".

**DAVE:** Okay, so I'm going to take you a step back again though.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** So they're buying a house.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** (Inaudible) it's going to be fully furnished.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** That's what you need to ask ...

**MS. EBOTOKE:** Uh-huh.

**DAVE:** With the guy or is it just a bed.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** So you said it's ... what did you just say it being across the street? It's across the street from their current home?

**MS. EBOTOKE:** (Inaudible). Exactly.

**DAVE:** Yeah, so no, so he ... he's ... he may have a bed there. I would imagine that it's not furnished.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** Okay.

**MS. EBOTOKE:** Especially where it's major renovations like ...

**DAVE:** So then right ... so realistically this is what a lot of people say, yeah, he's going to ... they ... they get, you know, they think that just because they're going to be there every day means that they're living there and that's ... that's not living there. Living there is living there.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** So you got your TV, you take your groceries there, you're doing your laundry there, all this good ...

**MS. EBOTOKE:** Uh-huh.

**DAVE:** ... actually a fully furnished house is living there.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** But just taking a bed, you know, and being there well, you know, overnight, it would still be considered not occupied. So it would be a home, though, you would follow the ... "building under construction major renovation" process.

**MS. EBOTOKE:** Not living there though, is that right?

**DAVE:** Not living there so it'd be like the \$500 charge.

**MS. EBOTOKE:** Okay. And I have to do that 2B thing. And now do I finish the R ...

**DAVE:** Yeah, now you still need to ask the questions just to confirm. Just a bed is not living there.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** If that's all it is, then you ... if it's just a bed and he'll be there every, you know, sleeping there every night ...

**MS. EBOTOKE:** Because to be honest I already had this argument almost with her because I asked and had said, Are you guys going to move everything in there? Well, it's across the street. Because she won't answer me. I said, Well, I understand but are you guys going to move in there? Well my husband is. I said, Are you guys going to put furniture in there? Well a bed. I said ...

**DAVE:** Yeah, okay ...

**MS. EBOTOKE:** ... no, no, like ...

**DAVE:** ... yeah, so ...

**MS. EBOTOKE:** ... furniture, furniture but she just won't answer me.

**DAVE:** So that's not living there then.

**MS. EBOTOKE:** No.

**DAVE:** Then you follow the "not living in the ..." process.

**MS. EBOTOKE:** Yeah. So my question is, I started with the quoting process, I stopped it halfway through because ...

**DAVE:** Uh-huh.

**MS. EBOTOKE:** ... I can't really go past in general contents in your home, Do you own any items that would require extra coverage? Because she's not really having anything in there.

**DAVE:** Right, so the answer would be no.

[23] Following additional discussion about the quoting process for major renovations, Ms. Ebotoke returned to Ms. O'Brien:

**MS. EBOTOKE:** The only thing that is kind of getting us held back is that renovation side of things. We need to figure out ...

**MS. O'BRIEN:** We don't know when we're going to start the renovations so don't even like ... you can just take that out of there. We're going to live in the house for now so ...

**MS. EBOTOKE:** Okay.

**MS. O'BRIEN:** ... when we start the renovations we can talk to you guys about it. It's not even on like our radar right now, like it's an eventual thing. So ...

**MS. EBOTOKE:** Oh, it is ...

**MS. O'BRIEN:** ... you had just asked me so I, you know, we might not even do it but ...

**MS. EBOTOKE:** Uh-huh ...

**MS. O'BRIEN:** ... that would be my hope is that we're going to do that but totally ...

**MS. EBOTOKE:** (Inaudible) ...

**MS. O'BRIEN:** ... but yeah.

**MS. EBOTOKE:** Okay, so ...

**MS. O'BRIEN:** My husband just texted me and he said, No major renovations in the next while.

**MS. EBOTOKE:** No, okay, fair enough.

**MS. O'BRIEN:** So ...

**MS. EBOTOKE:** Fair enough. And the total living area space, not including your basement, is how much?

**MS. O'BRIEN:** I think they said it was 34.

...

**MS. EBOTOKE:** Perfect. All right. And additional to general contents in your home, do you own any items that require extra coverage such as jewelry, artwork, wine collection, or bicycles?

**MS. O'BRIEN:** No.

...

**MS. EBOTOKE:** And are you renting any part of your home?

**MS. O'BRIEN:** No.

[24] After Ms. Ebotoke completed entering the information necessary to obtain the quote, she stated:

**MS. EBOTOKE:** No? Please inform us of any changes that happen in the future like leaving your home vacant, finishing the basement, adding any detached structures or doing any renovations.

[25] Ms. O'Brien agreed to the premium of \$768 per year to insure the Property. Before ending the call, Ms. Ebotoke sent the revised Policy to Ms. O'Brien by e-mail.

Sarah O'Brien

[26] In her affidavit, Sarah O'Brien stated that when she called TD Insurance on November 27, 2018, her intention was to have the Property added to their existing Policy, and to determine whether their future plans for the Property would impact their insurance coverage. She stated at paragraphs 14-17 of her affidavit:

14. I asked several questions during my call with Ms. Ebotoke in an attempt to ascertain how our future plans for the Property could affect our insurance coverage. I advised her first that we would be renovating the Property before moving in. I asked her whether the Property could be checked daily, or if it would need to be lived in.
15. Despite our extensive discussion, at no point during the call did Ms. Ebotoke identify any vacancy clause in the Policy, or advise me on how it could impact coverage.
16. Although I specifically communicated to Ms. Ebotoke that our plans for the Property were uncertain, Ms. Ebotoke did not advise that our future use of the Property could have significant coverage implications or even result in us losing our coverage over the Property if our plans changed with respect to the use of the Property.
17. When my call with Ms. Ebotoke ended, I believed that we had full insurance coverage on the Property. Based on my discussion with Ms. Ebotoke, I believed that it would not present any difficulty if David or I regularly visited the Property to check on it for a brief period after closing.

[27] Ms. O'Brien said the Property closed as planned on November 30, 2018. On December 1, 2018, she and her husband moved a sofa and some other items into the Property.

[28] According to Ms. O'Brien, starting December 2, 2018, she or her husband attended the Property almost daily to check on it, take measurements, discuss their plans for renovations, and otherwise make plans for their eventual move into the

Property. She also often took their puppy to the Property to run around inside and outside, and the O'Briens hid their children's Christmas presents there as well. Ms. O'Brien said her husband frequently took his computer to the Property to do medical dictations, as it was quieter there than in their home with the children.

[29] Throughout December 2018, the O'Briens set the Property's thermostat at 13 degrees Celsius to ensure that the pipes did not freeze. Ms. O'Brien said they had always set their existing home at this temperature whenever they went away, without issue.

[30] Ms. O'Brien said the Property was heated by oil furnace, and that the O'Briens had the oil tank filled on December 20, 2018, to ensure that the Property would continue to be heated.

[31] Ms. O'Brien stated at paragraph 26 of her affidavit:

26. During this period of time, David and I discussed whether we would live in the Property, renovate it, or rent it, in both the short and long term.

[32] On December 7, 2018, the O'Briens posted an online ad on Kijiji to gauge interest in rental of the Property. On December 31, 2018, a potential tenant responded to the online ad. The O'Briens, along with their puppy, attended the Property later that day to prepare it for a viewing. They observed no issues.

[33] Ms. O'Brien's evidence was that on January 1, 2019, at approximately 3:15 pm, Dr. O'Brien visited the Property. He came outside as she was walking up the walkway to the Property. He told her that something was wrong, due to some sort of water leakage. Dr. O'Brien said there was water all throughout the main and upper living areas, and water pooled in the basement.

[34] At this point, Ms. O'Brien said, they both realized something was terribly wrong. Dr. O'Brien turned off the water in the basement and they both ran home to get towels and buckets. When they got back with the supplies, they realized it was too big of a job for towels. Dr. O'Brien turned off the electricity and they both ran back home to call TD Insurance.

[35] Ms. O'Brien reported the water damage via telephone call to TD Insurance, because she intended to make a claim for loss under the Policy. TD told her that First General Services ("FGS") would attend the Property immediately. While Ms. O'Brien was on the phone with TD Insurance, Dr. O'Brien was going back and forth between their home and the Property to assess the damage and make sure the water had stopped. He also got on the phone with TD during the call.

[36] On the evening of January 1, 2019, FGS attended the Property. Ms. O'Brien met with Matthew Pike of TD Insurance and FGS the following day. Ms. O'Brien

said Mr. Pike informed her that TD was investigating whether or not the loss was covered under the Policy. He told her that he was 99% sure that it would be covered, and said FGS would take steps to dry the structure and prevent further damage. At that point, Ms. O'Brien advised Mr. Pike that she was unsure if they wanted to pay for FGS without first knowing whether they had coverage from TD Insurance. After consulting Dr. O'Brien by telephone, and relying on Mr. Pike's suggestion that coverage would likely be approved, Ms. O'Brien agreed to allow TD and FGS to begin remediation of the Property. FGS set up dryers.

[37] Ms. O'Brien said she learned from speaking with FGS and Mr. Pike that the pipes had frozen and then burst, which caused water to leak from the hot water boiler radiators on both the upper and main levels of the Property.

[38] Ms. O'Brien stated that, to her surprise, on January 4, 2019, Mr. Pike called her and advised that the Policy did not provide coverage for water damage at the Property. On January 16, 2019, Mr. Pike emailed a copy of TD Insurance's written denial to Dr. O'Brien, with a copy to Ms. O'Brien. Mr. Pike also confirmed in his email that TD would only pay FGS for the dates leading up to TD's decision to deny coverage (January 1, 2019 to January 4, 2019).

[39] In her response affidavit, Ms. O'Brien stated that at no point during her call to place coverage on the Property did Ms. Ebotoke advise her that her understanding of "vacant" was incorrect or otherwise mistaken. She further stated:

11. At the time of my call with Ms. Ebotoke, 6271 Oakland Road was insured as our primary residence. I also told Ms. Ebotoke that we were not intending to sell it right away.

12. Despite the fact that TD knew we were attempting to insure two homes as primary residences, Ms. Ebotoke did not ask me what we intended to do with 6721 Oakland Road. Specifically, she did not mention that our policy would only cover one home at a time and would consider the other one to be vacant.

...

14. I do not agree with Mr. Pike's evidence that the Property was "vacant". After closing, David and I spent a lot of time at the Property. At the Property, we planned our renovations, listened to music, streamed shows, and checked on the Property in general. It was right across the street. It was not vacant.

[40] On cross-examination, Ms. O'Brien testified that the O'Briens were not considering renting the Property at the time she spoke with Ms. Ebotoke. Their plan was to move into the Property as soon as they sold their existing home. About a week or so after closing, with their existing home still not selling, they began to consider renting the Property to tenants for a short term. They placed the ad on Kijiji and, in the interim, they continued to use the Property for various purposes: as "an extension" of Dr. O'Brien's home office; as a place to go during viewings of their existing home; as a hiding spot for Christmas presents; and so on. Ms. O'Brien repeatedly emphasized that although their intention for the Property remained uncertain, they were "using" the Property almost every day, in one way or another.

[41] When Ms. O'Brien was asked if she knew, at the time she spoke with Ms. Ebotoke, whether an insurance policy for a vacant home would be more expensive than one for an occupied home, Ms. O'Brien said she did not know either way, and that she "honestly didn't think about that at the time."

[42] Ms. O'Brien was asked several questions about the following exchange with Ms. Ebotoke during the November 27, 2018 call:

**MS. EBOTOKE:** Okay. So how soon after are you going to move in after your closing date?

**MS. O'BRIEN:** My husband's going to on Saturday.

**MS. EBOTOKE:** Oh okay. So are you going to, like, move your furniture and stuff over?

**MS. O'BRIEN:** Yeah, like a bed and stuff like that.

[Emphasis added]

[43] Ms. O'Brien agreed that the transcript was accurate. She testified that when she said, "My husband's going to on Saturday", she meant that her husband was going to move a bed and other stuff into the Property on Saturday, not that he was going to "move in" or "live there." When it was put to her that they did not, in fact, move a bed in, Ms. O'Brien agreed. She testified that they had an extra bed available, but on the day after the call, the woman who sold them the Property asked if they wanted a couch that would not fit into her moving van. The O'Briens said "sure", and moved the couch back into the house. Ms. O'Brien said moving the sofa back in was a lot easier than moving one of the beds over to the Property, and it would

still give Dr. O'Brien a place to do work and lay down while he was dictating. She added that they had also moved some rugs, pillows, blankets, a lamp, and some toilet paper into the Property.

[44] Ms. O'Brien was taken through Mr. Pike's summary of the "statement" he obtained from her during their meeting on January 2, 2019, and was asked to confirm or deny the accuracy of each piece of information. Mr. Pike's summary was as follows:

Met with insured Sarah O'Brien and secured statement earlier today. She and her husband and their family reside and [sic] 6271 Oakland Rd. They have have [sic] done so since they built there [sic] home in 2008. The [sic] purchased the house at 6262 Oakland Rd with a closing of November 30, 2018. The previous owner left the house at this time. The insured has not yet taken up residence in the house. They have listed their house at 6271 Okland Rd. The intention was to move into to [sic] 6262 after Christmas once 6271 sold or if it took some time for 6271 to sell they would rent 6262. They actually had been contacted by a potential tenant in late December 2018. They were last in the house on December 31, 2018. There was no signs of an issue. They were checking as the prospective tenant was interested in seeing the house. The last time they were in the house prior to the 31<sup>st</sup> was December 27 as friend of Sarah wanted to visit and see the new house. The house is heated by oil fired boiler. They do not have oil at 6271, they called Discount Fuels and had the tank filled on December 20. The heat was set at 13 degress [sic] C. This is the same temperature that they leave 6271 when they are away from the house. 6271 Oakland is a modern build and 6262 is approximately 100 years old. Unknown what upgrades may have been done with regards to insulation. They had not moved any furniture into the house. Non waiver was secured.

[45] Ms. O'Brien disagreed with the sentence, "The insured has not yet taken up residence in the house", stating, "We were using the house every day." She also said the sentence, "The last time they were in the house prior to the 31<sup>st</sup> was December 27 as friend of Sarah wanted to visit and see the new house" was only true with

respect to her, and not Dr. O'Brien. She said her husband had been in the Property every day during that period doing work.

[46] The final sentence Ms. O'Brien disagreed with was, "They had not moved any furniture into the house." She reiterated that they had moved a couch into the house, along with some rugs. Ms. O'Brien further testified that on the day before Mr. Pike arrived, they had moved almost everything out of the house except the couch, which had been soaked with water and was too heavy to carry.

#### Dr. David O'Brien

[47] Dr. David O'Brien's affidavit evidence mirrored that of his wife in most areas. Dr. O'Brien stated that the previous owners of the Property listed it for sale in September 2018. The O'Briens liked the idea of purchasing a more historic home while continuing to live in the same neighbourhood. They purchased the Property through a private sale on October 11, 2018, with a closing date of November 30, 2018.

[48] Dr. O'Brien said he and his wife knew that the Property needed some renovations before they moved in. He stated that they had no real timeline or moving date in mind, but that they definitely planned to stay in their existing home for the

immediate future. They considered either selling their existing home or renting it out once they were ready to relocate to the Property, but that was also undecided.

[49] Dr. O'Brien said he did not personally participate in the call with TD Insurance on November 27, 2018, but Ms. O'Brien texted him throughout the conversation. In that text conversation, they agreed that renovations would not start right away, but would remain an eventual plan for the future. After the call, Ms. O'Brien told him that the Property had been successfully added as another location under the existing Policy. He confirmed this himself when he reviewed the Policy.

[50] On December 1, 2018, the day after the closing, Dr. O'Brien and his wife moved a sofa and some furnishings into the Property. He said that once they took possession, one of them would go to the Property almost every day to check on it. He echoed his wife's evidence that they would go to the Property to take measurements and talk about renovations; that they hid the Christmas presents there; and that Ms. O'Brien would take the puppy over to run around inside and outside for exercise. Dr. O'Brien said he used the Property as a place to do some work, especially medical dictations. He stated in his affidavit, "I frequently took my laptop over there for this purpose, as the wifi from our Home was accessible at the Property."

[51] Dr. O'Brien stated that leading up to Christmas 2018, he and his wife decided to hold off on moving for the time being and discussed the possibility of renting the Property to tenants in the interim. They posted an online ad on Kijiji on December 7, 2018. On December 31, 2018, they received a response from someone who wanted to view the Property. Dr. O'Brien and Ms. O'Brien attended the Property together later that day to prepare it for a viewing. There were no issues observed at that time.

[52] Dr. O'Brien's evidence about what happened the following afternoon is consistent with that of his wife. He went to the Property on January 1, 2019, at approximately 3:15 p.m. As soon as he entered the Property, he realized that something was wrong. He saw water pooled across the main floor. He walked through the house and saw that there was water all throughout the main and upper living areas, and water pooled in the basement. Dr. O'Brien left the Property and met Ms. O'Brien out front as she walked toward the house with the puppy. They went into the Property together and he showed her the water. He shut off the water in the basement, and they both went home to get towels. They went back to the Property but realized there was too much water for them to clean up themselves. Dr. O'Brien turned off the electricity, and they returned home to call TD Insurance to advise them of the water damage.

[53] While Ms. O'Brien was on the phone, Dr. O'Brien went back to the Property a few times to make sure that water was not continuing to leak into the Property. He said he also spoke to TD Insurance himself at one point during the call, and he was told that FGS would be sent to the Property.

[54] Dr. O'Brien said FGS arrived that night and he met with them. He walked through the Property with the FGS representative to assess the initial damage. They left the Property with the water still turned off, and Dr. O'Brien suggested that they also leave the power off.

[55] Dr. O'Brien stated that Ms. O'Brien met with Matthew Pike from TD Insurance the next day. FGS also attended the meeting. Dr. O'Brien was at work, but his wife called him during the meeting to advise that TD had not committed to covering the damage. She told him that Mr. Pike thought it was unlikely that coverage would be denied, but that it was a possibility.

[56] The O'Briens decided to proceed with the remediation. FGS set up dryers to mitigate the damage. Mr. Pike and FGS told the O'Briens that the pipes had frozen and burst, causing the hot water radiators to leak into the Property.

[57] Dr. O'Brien said that on January 4, 2019, Ms. O'Brien told him that she had had a telephone call with Mr. Pike, and he said that water damage at the Property

was not covered by the Policy. Dr. O'Brien received a copy of TD Insurance's written denial by email from Mr. Pike on January 16, 2019. Although the letter was dated January 7, 2019, he had not received a copy prior to the date of Mr. Pike's email. In the email, Mr. Pike also confirmed that TD would only pay the costs for FGS between January 1 and January 4, 2019.

[58] Dr. O'Brien stated that on January 31, 2019, he received a call from Ms. Ebotoke at TD Insurance. She left a message and asked him to return her call. He called her back the next day. Ms. Ebotoke told him the purpose of the call was to follow up on questions she should have asked when the coverage was first approved. She asked him a number of questions about the Property. Dr. O'Brien said he told her that he was upset due to the flood and TD's coverage decision. She said she was surprised that coverage had been denied, as she believed that a house is not deemed to be vacant until at least 45 days after coverage is placed.

[59] On cross-examination, Dr. O'Brien testified that when his wife called TD Insurance on November 27, 2018 and spoke with Ms. Ebotoke, he was in the operating room in Hants Community Hospital. Ms. O'Brien texted him a few questions during the call, and he responded between cases. He emphasized that it was not a typical back and forth text conversation – he simply fired off responses to his wife's texts when he could find time between patients.

[60] Dr. O'Brien confirmed that he texted Ms. O'Brien to say that no major renovations would be occurring at the Property for a little while. He added that purchasing the Property was a "major stressor" in their lives. They were carrying two mortgages and decided not to do anything right away, but they knew they had to make some plans.

[61] Dr. O'Brien was asked about the following portion of the call transcript:

**MS. EBOTOKE:** Okay. So how soon after are you going to move in after your closing date?

**MS. O'BRIEN:** My husband's going to on Saturday.

**MS. EBOTOKE:** Oh okay. So are you going to, like, move your furniture and stuff over?

**MS. O'BRIEN:** Yeah, like a bed and stuff like that.

[Emphasis added]

[62] Dr. O'Brien explained that it was never their intention that he would move into the Property on his own. They had discussed that they were going to use the Property as an extension of their existing house, like a "man shed" or a "garage kind of thing." He testified that he never said he was going to sleep and live in the Property. Cross-examination continued as follows:

**MR. DEWOLFE:** So again, Dr. O'Brien, I understand that there was a further exchange. And to be fair to the transcript, Ms. O'Brien does say that you're moving a bed and stuff like that. But previous to that, she responds and says you're going to move in on Saturday. Again, then, at paragraph 25 of your affidavit, you said you decided to hold off on moving. So it's a fairly

simple question, sir. Something has changed since the call with Ms. Ebotoke, do you agree?

**DR. O'BRIEN:** Uh, the change in the way I remember, and the way I read as well, is that we're sweating it hard about whether we can sell the house and that we're going to change tactics to maybe put it up to see January 1, can we rent this or not? Remember...

**MR. DEWOLFE:** That's fine, sir ...

**DR. O'BRIEN:** ... we don't know if there's a rent...

**MR. DEWOLFE:** That's responsive, that's fine. So is it fair to say that, y'know, about a month after the phone call your wife had with Ms. Ebotoke, in December 2018, you were undecided about your use of the property?

**DR. O'BRIEN:** Um, with respect to us living there or renovating it, or all of the above, because that's what it is. It's all of the above. Um, so, I think we had no idea right from the get go, again, because, when opportunity comes to go, you go. And our initial thought was, let's get this house sold, it's not selling, so if we can't... like... if, if, someone comes to us and says we're going to buy your house and we're gonna, like sometimes you want to close and wait for the summer to go, blah blah blah, and sometimes you want to go right at it. And y'know, are we going to go right into this house? Like, yeah, we need out, we can't carry multi-million dollar homes, we cannot afford this. And so absolutely, things are evolving based on, holy cow this is costing a lot of money to us. So absolutely, in the beginning, can we sell our house, can we get there, let's give 'er a go. It's starting to look bleak, we're going into winter. All this, you know, everyone talks about real estate markets and spring selling, holy cow. We're having to carry mortgages. So absolutely, it's a swirling turmoil in our home, and I'm the one who looks a lot at the books on numbers, definitely things are changing.

[63] Dr. O'Brien testified that he had very little experience procuring insurance. He could not recall if he had ever made a phone call to place home or auto insurance, as his wife typically made the calls. So while he had had conversations with Ms.

O'Brien about the need to obtain insurance coverage in the past, he could not recall ever making the phone call himself.

[64] Dr. O'Brien confirmed that he had no conversations with Matthew Pike, other than through email. He could not confirm or deny whether his wife made any of the statements attributed to her by Mr. Pike during their conversation on January 2, 2019.

#### May Ebotoke

[65] May Ebotoke is a former Contact Centre Representative with TD Insurance. She graduated from Mount Saint Vincent University in Halifax in 2014 with a Bachelor of Arts in Strategic Human Resources Management.

[66] Ms. Ebotoke began her career in the insurance industry in the summer of 2018, when she worked for two months with Manulife in its Group Benefits division. She started working for TD Insurance on August 17, 2018. At that time, her role was called Insurance Analyst or Insurance Advisor. Once hired, she spent six to eight weeks undergoing training before taking her first calls from customers in early November 2018.

[67] In her affidavit, Ms. Ebotoke outlined the responsibilities of her role with TD Insurance:

5. In this role, one of my responsibilities is to answer incoming calls from existing or prospective TD Insurance customers.
6. As a Contact Centre Representative at TD Insurance, I conduct all quoting and binding of insurance policies subject to my granted authority and in accordance with TD Insurance's internal policies and guidelines, including the TD Homeowner Underwriting Quoting Procedure, the TD Homeowner Underwriting Binding Procedure and the TD Underwriting Manual.
- ...
9. Pursuant to TD Insurance's quoting procedure for homeowners policies, I am required to determine whether a property is going to be vacant or undergoing renovations in order to place the appropriate coverage and any applicable endorsements or permits.

[68] With respect to the call with Ms. O'Brien, Ms. Ebotoke said it lasted 47 minutes and 18 seconds. She attached an audio recording of the call and a transcript as exhibits to her affidavit.

[69] Ms. Ebotoke stated that Ms. O'Brien initially advised her that she and her husband were not planning on moving into the Property "right now." Instead, their intention was to do renovations and visit the Property on a daily basis. Based on that information, Ms. Ebotoke placed her on hold and sought an internal consultation from TD Insurance's CRT to confirm whether the intended use of the Property would require a vacancy permit or a renovation permit. After this consultation, Ms. Ebotoke spoke with Ms. O'Brien again to clarify their plans for the Property. At that time, Ms. O'Brien advised that her husband was going to move into the Property immediately following the closing date. Ms. Ebotoke cited the following portion of the call:

**MS. EBOTOKE:** Okay. So how soon after are you going to move in after your closing date?

**MS. O'BRIEN:** My husband's going to on Saturday.

**MS. EBOTOKE:** Oh okay. So are you going to, like, move your furniture and stuff over?

**MS. O'BRIEN:** Yeah, like a bed and stuff like that.

[Emphasis added]

[70] Ms. Ebotoke indicated that in accordance with the quoting procedure, she also asked Ms. O'Brien if she and her family would be the occupants of the Property, and whether they would be renting the Property. Ms. O'Brien confirmed that they would be occupying the Property and would not be renting it out. Ms. Ebotoke then asked Ms. O'Brien if they would be living in the Property during the renovations, and she confirmed that that was her husband's plan. At that point, Ms. Ebotoke said, she placed Ms. O'Brien on hold again to consult internally with a member of the CRT as to the correct way to complete the quoting process in light of the information provided. She spoke with a CRT representative who confirmed that the policy would need to reflect if the Property was going to be vacant or undergoing renovations. When she returned to the call, Ms. O'Brien informed Ms. Ebotoke that she and her husband did not have any immediate plans to undertake any major renovations to the Property and that they were "going to live in the house for now."

[71] Ms. Ebotoke said that based Ms. O'Brien's statement that she and her husband would be living in the home and that no renovations would be taking place at that

time, she determined that it was not necessary to further pursue a vacancy or renovation permit for the Property. Accordingly, she proceeded to place coverage for the Property as an owner-occupied dwelling.

[72] While on the phone with Ms. O'Brien, Ms. Ebotoke emailed her a Brokerage Coversheet and a Residential Binder Letter confirming that coverage was in place on the Property. Prior to concluding the call, she asked Ms. O'Brien to please inform TD Insurance of any further changes regarding the Property, including leaving the home vacant or undertaking renovations. She indicated that she had no further communication with either of the O'Briens regarding any change to their actual or intended use of the Property prior to the date of loss. Ms. Ebotoke also said she reviewed TD Insurance's customer service system and did not identify any record of either of the O'Briens advising TD of a change in use or status of the Property between the placement of coverage and the date of loss.

[73] Ms. Ebotoke stated that in accordance with TD Insurance's practice, a copy of the Policy was generated and sent to the O'Briens by mail on November 27, 2018.

[74] Ms. Ebotoke added that on February 7, 2019, she called Dr. David O'Brien for the purpose of completing an additional questionnaire that was required due to the Property being older than 75 years old. She attached an audio recording of the

call as an exhibit to her affidavit. The questionnaire was not related to the reported loss or denial of coverage, and was a standard requirement in the placement of coverage for homes of that age. Ms. Ebotoke said Dr. O'Brien advised her during the call about the water damage loss at the Property and inquired about the basis for the denial. In response, Ms. Ebotoke reviewed the claims notes on file and explained that the denial was made on the basis that the Property was found to be vacant, and coverage for water escape was excluded during any period of vacancy. I note that Ms. Ebotoke's evidence as to the date of the call with Dr. O'Brien differs from his evidence, but this minor discrepancy is irrelevant to the issues on this Application.

[75] On cross-examination, Ms. Ebotoke confirmed that her call with Ms. O'Brien took place during Ms. Ebotoke's first month of taking calls from customers. She agreed that she did not disclose this information to Ms. O'Brien, but denied that there is any obligation to do so. She further agreed that part of her job with TD Insurance was to answer questions from existing and prospective customers about their coverage, and to make recommendations if the customers are uncertain as to the best coverage option in their situation.

[76] Ms. Ebotoke agreed that while speaking to a customer, she would be using her computer screen to look up and enter information. She agreed that the CRT is basically a helpline that she could call if she needed assistance while on a call with

a customer, and that, in some cases, she would connect the customer with the CRT directly. Ms. Ebotoke said there was no need to do that in Ms. O'Brien's case.

[77] Ms. Ebotoke was shown a copy of TD Insurance's Homeowner Quoting Procedure, which was entered as an exhibit. She agreed that the procedure consists of a series of steps, some of which included boxes which she would be required to "click" before proceeding to the next step. Ms. Ebotoke agreed that she followed the Homeowner Quoting Procedure during her call with Ms. O'Brien. The first set of steps required Ms. Ebotoke to obtain sufficient information from Ms. O'Brien to access her file with TD Insurance and verify her identity. Once she had accessed Ms. O'Brien's file and verified her identity, Ms. Ebotoke proceeded to steps 8 and 9:

8. Ask customer what date they will take ownership of the property?
9. Ask customer what date will they be moving into the new property?
  - If less than 60 days between the closing and move-in date, tell customer
    - Exclusions during the vacancy: water damage, glass breakage. Vandalism (and theft in QC). Tell customer these exclusions will not be applicable as soon as they occupy the new home. Notepad customer was advised of exclusions.
    - If the delay changes to over 60 days, customer has to inform us since building will be considered vacant and will require a vacancy permit
  - If more than 60 days between the closing and move-in date, follow Vacant Property procedure for adding the vacancy permit after Quoting has been completed.
  - If applicable, refer to UW manual and Vacant Property or Building Under Construction or Renovation.

[Emphasis added]

[78] Ms. Ebotoke confirmed that Ms. O'Brien initially told her that the Property was across the street from their current home; that the O'Briens were selling their current home; that they were not going to move into the Property right away; that they would be doing renovations; and that the Property would not really be vacant because they would go over there every day. Ms. Ebotoke agreed that, based on this information, she did not know whether to follow the quoting procedure for Vacant Property or Building Under Construction or Renovation. Ms. Ebotoke then called CRT and was connected with Donald. During the conversation, Donald responded to Ms. O'Brien's question to Ms. Ebotoke about whether it would be better for one of them to stay at the Property:

**MS. EBOTOKE:** So she asked would it be better for ...

**DONALD:** Uh-huh.

**MS. EBOTOKE:** ... one of us to stay there. She's like we literally will be there every day because it's right across the street.

**DONALD:** Okay. So, you know, to live in a house, it has to ... I mean, first of all, it has to be legal to live in it. For like a new construction you have to have your occupancy permit and stuff but that wouldn't be the case here.

**MS. EBOTOKE:** Uh-huh.

**DONALD:** You ... you know, it's got to be furnished and someone's got to actually like occupy it, live there, you know, have their stuff there ...

**MS. EBOTOKE:** Uh-huh.

**DONALD:** ... whatever. Even just a couple of days a week is fine.

**MS. EBOTOKE:** Uh-huh.

[Emphasis added]

[79] Ms. Ebotoke agreed that when she returned to Ms. O'Brien, she did not convey to her anything that Donald had told her about vacancy. She said the information was irrelevant at that time, because they had not gotten to that discussion yet. She said she needed to ask clarification questions to determine whether they needed to have the vacancy discussion, renovation discussion, or building under construction discussion. She agreed that she was effectively restarting the quoting process with Ms. O'Brien.

[80] Ms. Ebotoke agreed that Ms. O'Brien had given her the closing date of Friday, November 30<sup>th</sup>, which was responsive to step number 8 of the Homeowner Quoting Procedure. The following exchange then took place:

**MR. DUNBAR:** And then you move on, and you get the address of the new location. Top of page 18. And then at line 17 through 22, you say to Sarah, "How soon after are you going to move in after your closing date?"

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** Okay. And Sarah tells you, her husband's gonna move a bed and stuff like that in on Saturday.

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** And so, Saturday is the day *after* the closing, right?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** So in other words, if the insurance is active on the 30<sup>th</sup>, there's going to be at least 24 hours, or, at least, whatever period of time between the Friday closing and the Saturday moving in, where the property is, according to TD and the position it's taken in this litigation, vacant, right?

**MS. EBOTOKE:** I'm not an adjuster, so I would assume...

- MR. DUNBAR:** But it's a period of time less than 60 days, right?
- MS. EBOTOKE:** Yes.
- MR. DUNBAR:** And so, according to your procedure, that is a period of time which you should have said "Hey, even if just for that one day, you're not covered for water damage."
- MS. EBOTOKE:** Yes.
- MR. DUNBAR:** And, in fact, the other part of the document we were looking at, as far as your procedures are concerned, says that, um, you would tell the customer these exclusions will not be applicable as soon as they occupy the new home.
- MS. EBOTOKE:** Yes.
- MR. DUNBAR:** But you didn't ever have a discussion with Sarah about exclusions that would or wouldn't apply when they occupy the new home, right?
- MS. EBOTOKE:** Right, because it was clearly stated and made very clear that it will *not* be vacant, by Ms. O'Brien.
- COURT:** I'm sorry, you, you have to speak up a little bit.
- MS. EBOTOKE:** Oh, sorry.
- COURT:** I didn't hear that answer. You said, "It was clearly stated ..."
- MS. EBOTOKE:** By Ms. O'Brien that the property will not be vacant.
- MR. DUNBAR:** You mean because she'd be visiting there every day?
- MS. EBOTOKE:** No, she said it would not be vacant. Those were her words.
- MR. DUNBAR:** Okay, do you wanna ... Let's go back. Do you mean the passage that we already looked at?
- MS. EBOTOKE:** Yes.
- MR. DUNBAR:** Okay, sure. So that's at page 5, line 20. So you'll see Sarah says, "Okay. Well it's not really vacant because we'll go over every day." And then she said, "So it won't really be vacant in the sense that no one will be in it. Someone will be in it every day." So is that what you're referring to?
- MS. EBOTOKE:** Exactly.
- MR. DUNBAR:** Okay. And so based on that, you were satisfied that the property wouldn't be vacant so you didn't need to have that discussion with her?
- MS. EBOTOKE:** Exactly.

**MR. DUNBAR:** So, because you don't have that discussion, you don't have a discussion with Sarah about the water damage exclusion will only apply until you occupy the new home? That discussion's never happened?

**MS. EBOTOKE:** No.

[81] Applicants' counsel then took Ms. Ebotoke to her second call to CRT, when she was connected with Dave. Counsel pointed out that Ms. Ebotoke had told Dave, "No, but she says she's literally across the street and he's going to be there, *sleeping there* and moving a bed in there for him and whatever", when "sleeping there" had never been mentioned by Ms. O'Brien. She responded, "Moving there to me is moving there. As in he's sleeping there." She agreed, however, that the words "sleeping there" were never used by Ms. O'Brien, and that she had *assumed* that Ms. O'Brien meant that Dr. O'Brien would be sleeping at the Property. Ms. Ebotoke agreed that she never discussed it with Ms. O'Brien. She also agreed that, notwithstanding her comment to Dave that Ms. O'Brien was being "extremely vague", she never told Ms. O'Brien, "You need to make up your mind what you're going to do with this property and call us back", or words to that effect. Cross-examination continued:

**MR. DUNBAR:** And ... you don't ... But you don't tell Sarah, at any point, that any of this information is going to affect her insurance coverage, right?

**MS. EBOTOKE:** No.

**MR. DUNBAR:** So although you're telling Dave, no problem, that she's very vague, "possibly, I don't know, probably, possibly", you didn't tell her, "Hey, this is material information to your coverage", right?

**MS EBOTOKE:** Mmhmm. You're right.

[82] Mr. Dunbar then read out the following portion of Ms. Ebotoke's conversation with Dave:

**DAVE:** Okay, so I'm going to take you a step back again though.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** So they're buying a house.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** (Inaudible) it's going to be fully furnished.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** That's what you need to ask ...

**MS. EBOTOKE:** Uh-huh.

**DAVE:** With the guy or is it just a bed.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** So you said it's ... what did you just say it being across the street? It's across the street from their current home?

**MS. EBOTOKE:** (Inaudible). Exactly.

**DAVE:** Yeah, so no, so he ... he's ... he may have a bed there. I would imagine that it's not furnished.

**MS. EBOTOKE:** Uh-huh.

**DAVE:** Okay.

**MS. EBOTOKE:** Especially where it's major renovations like ...

**DAVE:** So then right ... so realistically this is what a lot of people say, yeah, he's going to ... they ... they get, you know, they think that just because they're going to be there every day means that they're living there and that's ... that's not living there. Living there is living there.

**MS. EBOTOKE:** Uh-huh.

[Emphasis added]

[83] Before continuing, Mr. Dunbar asked, “Now, just pausing there, you agree with me that’s *exactly* what Sarah O’Brien told you, at the outset, was the reason the property wouldn’t be vacant, right?” Ms. Ebotoke agreed. Cross-examination continued:

**MR. DUNBAR:** Okay. And so Dave goes on to say, “So you got your TV, you take your groceries there, you’re doing your laundry there, all this good ...” And Dave says, “... actually a fully furnished house is living there.”

**MS. EBOTOKE:** Exactly.

**MR. DUNBAR:** So, back to what TD says about furnishings not mattering, I guess Dave is saying on this call to you that a fully furnished house to him is living there.

**MS. EBOTOKE:** That’s exactly what I said, too. To you.

**MR. DUNBAR:** Okay. And Dave says, “But just taking a bed, you know, and being there well, you know, overnight, it would still be considered not occupied.” That’s what he says.

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** Alright. So, effectively, what Dave has told you is that a lot of people think that living in a property is being there every day.

**MS. EBOTOKE:** Okay.

**MR. DUNBAR:** That’s what he says, right? Sorry, do you agree with me that that’s what he says in that paragraph, starting at 4? He says, “... that’s what a lot of people say ... they think that just because they’re going to be there every day means that they’re living there”?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** That’s what he says, okay. So a lot of people think that, and that’s not living there, right?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** And, just flipping ahead then, to when you go back on the phone with Ms. O’Brien, at page 36. And this is where, y’know, the renovations, are they going to renovate, are they

not going to renovate, that's material to you because it changes the form you've gotta deal with, right? On your end?

**MS. EBOTOKE:** The whole procedure, yes.

**MR. DUNBAR:** The procedure. And so, you say that so much at line 2, "The only thing that is kind of getting us held back is that renovation side of things." And then Ms. O'Brien says, "We don't know when we're going to start the renovations so don't even like ... you can just take that out of there. We're going to live in the house for now so ... when we start the renovations we can talk to you guys about it. It's not even on like our radar right now, like it's an eventual thing." So she's saying the very thing that Dave has just told you people are... misapprehend... living in the property, right? She says "we're going to live in the house for now."

**MS. EBOTOKE:** Yeah, so they're living there.

**MR. DUNBAR:** And Dave just had told you that a lot of people think living in the house means visiting there every day, right?

**MS. EBOTOKE:** But she didn't say that in that statement. She said, "We will be living there right now."

**MR. DUNBAR:** Okay. Suffice to say, you didn't go back to Ms. O'Brien and say, "Dave just told me ... what does living there mean to you? What do you think living there is?"

**MS. EBOTOKE:** So I have to question every client who asks ... says that we're living there, what does that mean to you?

**MR. DUNBAR:** Well no. I'm suggesting you didn't have any conversation with her about what it meant.

**MS. EBOTOKE:** There was no reason to ask that question of what it meant to her.

**MR. DUNBAR:** Okay. And there was no reason to follow up and say, "Just so you know, living there isn't even going to be sleeping there with a bed, according to us"?

**MS. EBOTOKE:** It's like me saying to someone, "Just so you know, because you have a car, you can tow something behind it, too." There is no need to have that conversation if she clearly stated to me that they're living there, and they will let us know if anything changes.

**MR. DUNBAR:** Okay, but that hasn't happened. Anything changing is down the road, that hadn't happened at this point.

- MS. EBOTOKE:** Exactly.
- MR. DUNBAR:** Okay. So, at this point in time, you've been told Sarah thinks visiting there every day means the property's not vacant. Right? We've been over that.
- MS. EBOTOKE:** What do you mean?
- MR. DUNBAR:** That's what she said to you ... she said that, we can go back to the transcript but she ...
- MS. EBOTOKE:** No no, restate your question, I don't understand your question.
- MR. DUNBAR:** I'm just making sure we're on the same page. Sarah has told you that the property won't be vacant because she's going to visit there every day, right?
- MS. EBOTOKE:** Yes.
- MR. DUNBAR:** And she said her husband is going to move a bed and stuff like that in.
- MS. EBOTOKE:** Yes.
- MR. DUNBAR:** She never told you, "We're going to have a fully furnished house."
- MS. EBOTOKE:** No, but then she said, "We're going to renovate." So that completely changed the whole topic altogether, and the procedure altogether.
- MR. DUNBAR:** I recognize it's in your ques ... but if you could just answer that one question. She didn't tell you that they were going to move all their furniture into the house, right?
- MS. EBOTOKE:** Not before Dave, no.
- ...
- MR. DUNBAR:** And so you didn't go back to her and say, "You've gotta move all your furniture in, according to Dave"?
- MS. EBOTOKE:** No.
- MR. DUNBAR:** And Dave has just told you a bed and staying there overnight is not enough. And that's the other thing that you'd discussed with Sarah about her plans. And you didn't go back to her and say, "That's not enough either", right?
- MS. EBOTOKE:** Okay. Yes.

[84] Mr. Dunbar then reviewed the following portion of the transcript:

- DAVE:** Yeah, now you still need to ask the questions just to confirm. Just a bed is not living there.
- MS. EBOTOKE:** Uh-huh.
- DAVE:** If that's all it is, then you ... if it's just a bed and he'll be there every, you know, sleeping there every night ...
- MS. EBOTOKE:** Because to be honest I already had this argument almost with her because I asked and had said, Are you guys going to move everything in there? Well, it's across the street. Because she won't answer me. I said, Well, I understand but are you guys going to move in there? Well my husband is. I said, Are you guys going to put furniture in there? Well a bed. I said ...

[85] Ms. Ebotoke agreed that she never actually asked, “Are you guys going to move everything in there?” When asked whether the transcript showed any question that Ms. O’Brien refused to answer, she replied, “Not directly.” Mr. Dunbar pointed out that Dave said, based on the information Ms. Ebotoke had given him about the husband moving in and the bed, “That’s not living there then.” When it was put to her that she never went back and shared that information with Ms. O’Brien, Ms. Ebotoke agreed.

[86] It was suggested to Ms. Ebotoke that Ms. O’Brien’s answers to her questions – her “vagueness” – was consistent with her not knowing what she and her husband planned to do with the Property. Ms. Ebotoke initially disagreed, but changed her response to “yes” after she was referred to her discovery evidence on the point. She agreed that she did not tell Ms. O’Brien, at any point, that her coverage could be

affected by her plans for the Property, nor did she tell her that it was important who sleeps in the Property and how often.

[87] Ms. Ebotoke confirmed that she told Ms. O'Brien to advise them of any future changes, including leaving the home vacant, on a single occasion during the call. She agreed that she did not tell Ms. O'Brien what "vacant" meant, or that she was wrong when she said the Property would not be vacant because she would be visiting it every day.

[88] Ms. Ebotoke was then taken to item number 70 on the Homeowner Quoting Procedure, which states:

For customer moving to new location, verify the occupancy of current location; if not already discussed.

[89] Ms. Ebotoke said she did not need to ask Ms. O'Brien about the occupancy of the current location because Ms. O'Brien had already told her that she would be occupying the existing home while they attempted to sell it, and Dr. O'Brien would be moving into the Property.

[90] Applicants' counsel provided Ms. Ebotoke with a copy of TD Insurance's Underwriting Manual, which refers to both "vacant" and "unoccupied" residences. Ms. Ebotoke explained that the two terms are different, and that the difference relates to the insured's intent. She provided the example that if she left her home to go to

Florida for six months, but intended to come back, the property would be unoccupied, not vacant. She said, “Vacancy is leaving and not intending to come back.”

[91] Near the end of Ms. Ebotoke’s cross-examination, Applicants’ counsel played a portion of the recording of her telephone conversation with Dr. O’Brien that occurred several weeks after the loss. In it, Ms. Ebotoke explained to Dr. O’Brien that coverage for almost every peril is excluded when a property is vacant. The only perils covered are lightning, fire, and explosion. When it was put to her that she did not have any conversation with Ms. O’Brien about the vacancy exclusions, Ms. Ebotoke agreed. Ms. Ebotoke’s cross-examination concluded as follows:

**MR. DUNBAR:** Now, as of the date of your discovery, Ms. Ebotoke, my understanding was that you had changed your process?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** And so you stayed ... to give the court some context, you stayed in your role with TD and were still in that role as of the date of your discovery in September 2020?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** But recognizing you’d been in it for almost two years, at that point in time.

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** Now what you told me is, you then, at least as of September 2020, asked customers, “Would the home be unoccupied for any period of time?”

**MS. EBOTOKE:** That’s our new policy question.

- MR. DUNBAR:** Okay. And you told me at discovery that that was something you had learned from doing your job for a longer period of time?
- MS. EBOTOKE:** Yes, but also it became part of our ... like the steps that we have now, that would be part of the question.
- MR. DUNBAR:** And in fact ... exactly. You say “now”, but you’re no longer with TD right?”
- MS. EBOTOKE:** No, but my brother still is, so ... (laughs)
- MR. DUNBAR:** And so you told me that TD had in fact modified the procedure to start asking that question?
- MS. EBOTOKE:** Yes.

Matthew Pike

[92] Matthew Pike is a Senior Specialist, Complex Claims with Security National, which is part of TD Insurance. He has been in that position since 2014. Mr. Pike has worked for TD Insurance in some capacity since 1999.

[93] In his affidavit, Mr. Pike explained that he is responsible for handling and adjusting property damage claims arising from policies underwritten by TD Insurance, within his granted authority.

[94] Mr. Pike was assigned to investigate a loss reported by Ms. O’Brien on January 1, 2019, regarding water damage that occurred at her insured property at 6262 Oakland Road. At the time of Mr. Pike’s assignment, FGS had been dispatched

to the Property on an emergency basis to mitigate the loss, which included providing temporary heat to the Property.

[95] Mr. Pike attended the Property on January 2, 2019, to conduct an initial site visit. He took numerous photographs, which he attached as an exhibit to his affidavit.

Mr. Pike stated:

9. As demonstrated in the photographs, I observed the Property to be completely devoid of any furnishing or personal effects that would be necessary for occupancy of the Property, save one sofa in the living room.
10. Specifically, there was no other furniture anywhere in the Property, no clothing, no personal items in any of the bathrooms, on television or any other appliances, no items in the kitchen drawers or shelves, and the fridge was completely empty and cleaned out, as was the dishwasher and the garbage bins.

[96] During his site visit, Mr. Pike was advised by representatives of FGS that water inside the cast iron radiators which heated the home had frozen, causing water to escape from the radiator system. Every radiator on the Property's second level had ruptured, as well as at least three radiators on the main level. The water damage was present throughout all three levels of the Property.

[97] Mr. Pike said he met with Sarah O'Brien and obtained a statement from her with respect to the circumstances surrounding the loss. He attached a summary of the information obtained from Ms. O'Brien as an exhibit to his affidavit. He said he explained to Ms. O'Brien that TD Insurance's investigation of the claim did not constitute a waiver of its right to ultimately deny coverage. Ms. O'Brien agreed to

sign the non-waiver agreement, which was also attached as an exhibit to Mr. Pike's affidavit.

[98] Based on his observations of the Property and the information provided by Ms. O'Brien, Mr. Pike determined that the Property was vacant at the time of the loss pursuant to the definition of vacancy in the Policy. He said the Policy excludes coverage for water damage occurring while the building is under construction or vacant, even if permission for construction or vacancy has been granted by TD Insurance. Accordingly, he said, he determined that there was no coverage available under the Policy for the water damage that occurred at the Property.

[99] On January 4, 2019, Mr. Pike called his supervisor, Kevin Law, Group Manager for Complex Claims, Eastern Canada at Security National to discuss the claim. He relayed the results of his investigation and coverage analysis to Mr. Law, and Mr. Law agreed that coverage for the loss was not available. Immediately following this conversation, Mr. Pike called Ms. O'Brien to advise that coverage would be denied for the claim. He explained to her that their review of the matter confirmed that coverage was placed based on the information she provided. He further explained that since the Property was vacant there was no coverage available for water damage, and noted that this would be the case whether or not a vacancy

permit was in place. Mr. Pike advised Ms. O'Brien that a letter would be forthcoming confirming the denial of coverage in writing.

[100] On January 7, 2019, Mr. Pike sent a letter to the O'Briens via registered mail confirming the denial of coverage. On January 15, 2019, he received an email from Dr. O'Brien requesting clarification on the status of the claim and the continuation of FGS's remediation work at the Property. Mr. Pike responded by email on January 16, 2019, and attached a copy of the denial letter that had been sent by registered mail. He advised Dr. O'Brien that the letter reiterated the coverage denial decision that had been previously communicated to Ms. O'Brien on January 4, 2019. With respect to the remediation services, he confirmed that TD Insurance would cover the cost of the work completed from the initial assignment on January 1, 2019 to January 4, 2019, when Ms. O'Brien was advised of the denial of coverage.

[101] On cross-examination, Mr. Pike confirmed that it was his decision to deny coverage. After being taken to the definition of "vacant" in the Policy, Mr. Pike was asked about the words, "regardless of the presence of furnishings":

**MR. DUNBAR:** So you'll see looking at that definition, the first line says "Vacant refers to the circumstance where, regardless of the presence of furnishings" ... So just stopping there, is it TD's position that it does not matter what is in the house?

**MR. PIKE:** That's what it says, yes. Regardless of the presence of furnishings.

**MR. DUNBAR:** So you could have a fully furnished house, and it's still vacant?

**MR. PIKE:** If you've left, yes.

**MR. DUNBAR:** So in other words, you're not looking at that at all. Doesn't matter if it's a couch, a bed, a desk – it's not important to you?

**MR. PIKE:** No, it's not.

**MR. DUNBAR:** So when... if you look at paragraphs 9 and 10 of your affidavit, you'd agree with me that you're looking, you're talking about furnishings, personal effects, other furniture, that's what those paragraphs are talking about? In those paragraphs? That's what you observed.

**MR. PIKE:** That is correct, yes.

[102] Mr. Pike agreed that the phrase “taken up residence” (part of the definition of “vacant) is not defined in the Policy. He confirmed that there is nothing in writing, internal to TD Insurance, that assists in determining the meaning of the phrase, and that nothing was given to the O'Briens to advise them of how TD interprets it.

[103] Mr. Pike testified that he relies on his own judgment in determining what taking up residence is, and that his judgment is based on his work experience in the insurance industry and his knowledge of claims handling. He agreed that, as far as he was aware, neither of the O'Briens had similar claims handling or insurance experience.

[104] Applicants' counsel directed Mr. Pike to a transcript of his discovery evidence concerning how he determines whether a person has “taken up residence” in a Property. That evidence was as follows:

- Q.** So how, then, do you decide if someone has taken up residence or not?
- A.** If there's evidence that they actually live there, they sleep there, they cook there. They go to work, and they come home and stay there all night, and they get up and they go to work the next working would be – then you're taking up residence.

I mean, simply coming and sitting there and working for a couple hours is not taking up residence. Pre-COVID, I would go to a coffee shop and do work there but I certainly didn't take up residence there.

[105] Mr. Pike testified that he still has the same understanding of “taking up residence.” He agreed that TD Insurance does not tell insureds that information.

[106] Mr. Pike was then asked about things he does not consider material to whether a house is or is not vacant:

**MR. DUNBAR:** You don't consider whether the insureds check on the house, at all?

**MR. PIKE:** In terms of it being vacant? No.

**MR. DUNBAR:** Doesn't matter to you at all?

**MR. PIKE:** No.

**MR. DUNBAR:** You don't consider whether the house was being visited by the insureds. That's not something you consider?

**MR. PIKE:** No.

**MR. DUNBAR:** You don't consider whether the heat's on?

**MR. PIKE:** No.

**MR. DUNBAR:** You don't consider whether the property owners might live nearby?

**MR. PIKE:** No, that's not a factor we consider.

**MR. DUNBAR:** Or across the street, as the O'Briens did?

**MR. PIKE:** No.

[107] Mr. Pike was referred to the following portion of the transcript of the phone call between Ms. O'Brien and Ms. Ebotoke:

**MS. O'BRIEN:** Okay. Well it's not really vacant because we'll go over every day.

**MS. EBOTOKE:** Uh-huh.

**MS. O'BRIEN:** Because we're going to renovate.

**MS. EBOTOKE:** Okay.

**MS. O'BRIEN:** So it won't really be vacant in sense that noone will be in it. Someone will be in it every day.

[108] Mr. Pike agreed that Ms. O'Brien's explanation for why the Property would not be vacant was "completely wrong", and not consistent with how TD Insurance interprets the definition of vacancy in handling claims.

[109] After Mr. Pike confirmed that he had listened to the recording of the phone call between Ms. O'Brien and Ms. Ebotoke, the following exchange took place:

**MR. DUNBAR:** And you'd agree with me that what happens on that call is Ms. Ebotoke is told several times by your CRT individuals what vacancy means or does not mean, right?

**MR. PIKE:** Yes.

**MR. DUNBAR:** And you'd also agree based on the same review that that information doesn't make its way to Ms. O'Brien?

**MR. PIKE:** It did not, because when she came back on the call the house wasn't going to be vacant. So I don't think you'd give somebody advice on a situation that you're just told isn't going to happen.

**MR. DUNBAR:** That's your interpretation. But the reality of the situation is, the advice makes its way to Ms. Ebotoke and doesn't make its way to Ms. O'Brien, and why that is is really a question for Ms. Ebotoke, which we've already been over.

**MR. PIKE:** Yes.

## Credibility

[110] Each Affiant was cross-examined on their affidavit. Each was a credible witness. None was caught in an untruth. The Court also has no reason to question the reliability of each witness's evidence.

[111] I will now move on to consider the principles of interpretation applicable to insurance policies, and whether the Property was "vacant" as defined in the Policy.

### **Was the Property "vacant" as defined in the Policy?**

#### Principles of policy interpretation

[112] The Policy provides coverage for "all risks of direct physical loss or damage to the property described subject to the exclusions and conditions in this form." In denying coverage to the O'Briens, the Respondents relied on Policy exclusion 26(F), under the "Perils Excluded" section of the Policy:

26. Water damage

direct or indirect caused by:

...

F. Occurring while the building is under construction or **vacant**, even if permission for the construction of vacancy has been given by **us**.

[113] As noted earlier, the term "vacant" is defined in the Policy as follows:

**Vacant** refers to the circumstances where, regardless of the presence of furnishings:

1. all occupants have moved out with no intention of returning and no new occupant has taken up residence; or

2. in the case of a newly constructed house, no occupant has yet taken up residence.

[Emphasis added]

[114] There is no dispute that the prior owners of the Property moved out with no intention of returning when the O’Briens purchased the Property from them. Whether the Property was “vacant” will therefore turn on whether the O’Briens had “taken up residence” at the time of the loss.

[115] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, the Supreme Court of Canada summarized the interpretive principles applicable to insurance policies:

[49] The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in *Progressive Homes*. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole: para. 22, citing *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71.

[50] Where, however, the policy’s language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. See *Progressive Homes*, at para. 23, citing *Scalera*, at para. 71; *Gibbens*, at paras. 26-27; and *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 900-902.

[51] Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer: *Progressive Homes*, at para. 24, citing *Scalera*, at para. 70; *Gibbens*, at para. 25; and *Consolidated-Bathurst*, at pp. 899-901. *Progressive Homes* provides that a

corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.

[52] It is also important to bear in mind this Court's guidance in *Progressive Homes* on the "generally advisable" order in which to interpret insurance policies (para. 28). Although that case involved commercial general liability policies and not builders' risk policies, the two types of policies share a similar alternating structure: they set out the type of coverage followed by specific exclusions, with some exclusions containing exceptions. As such, the insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage. The parties in these appeals have conceded that this particular onus has been met: trial judge's reasons, at para. 9. The onus then shifts to the insurer to establish that one of the exclusions to coverage applies. If the insurer is successful at this stage, the onus then shifts back to the insured to prove that an exception to the exclusion applies: see *Progressive Homes*, at paras. 26-29 and 51. Contrary to the Court of Appeal's statement at para. 26 of its reasons that the exclusion and exception in this case must be interpreted "symbiotically", I see no reason to depart from the generally accepted order of interpretation in analyzing the Policy and the Exclusion Clause.

[116] *Ledcor* involved the interpretation of an exclusion clause in a standard form builders' risk insurance policy. In determining that the appropriate standard of review for the interpretation of a standard form contract is correctness, the majority, per Wagner J. (as he then was), noted that the factual matrix, which plays a critical role in the interpretation of many contracts, is less relevant for standard form contracts:

[28] While a proper understanding of the factual matrix is crucial to the interpretation of many contracts, it is often less relevant for standard form contracts, because "the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition": MacDonald, at para. 33. Standard form contracts are particularly common in the insurance industry, as Professor Barbara Billingsley observed in *General Principles of Canadian Insurance Law* (2nd ed. 2014), at p. 56:

As part of its business considerations and in advance of meeting with any particular client, an insurance company decides the terms and conditions under which it is willing to provide insurance coverage for certain common

types of risk. This means that, in most situations, an insurance company does not negotiate the detailed terms of insurance coverage with individual customers. Instead, before entering into any insurance agreements, an insurer typically drafts a series of pre-fabricated contracts outlining the terms upon which particular kinds of coverage will be provided. These contracts are known as “standard form policies”. The insurer then provides the appropriate standard form policy to clients purchasing insurance coverage.

[29] Parties to an insurance contract may negotiate over matters like the cost of premiums, but the actual conditions of the insurance coverage are generally determined by the standard form contract: *Billingsley*, at p. 58.

[117] Justice Wagner clarified that some elements of the surrounding circumstances of a standard form contract should be considered, but those elements are generally not specific to the particular parties:

[30] My colleague Justice Cromwell accepts that, for standard form contracts, there are usually no relevant surrounding circumstances relating to negotiation (para. 106). However, he observes that other elements of the surrounding circumstances — such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates — have a role in the interpretation process.

[31] I agree that factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract. However, those considerations are generally not “inherently fact specific”: *Sattva*, at para. 55. Rather, they will usually be the same for everyone who may be a party to a particular standard form contract. This underscores the need for standard form contracts to be interpreted consistently, a point to which I will return below.

[118] The majority elaborated on the particular importance of consistency in the interpretation of standard form contracts:

[38] For the interpretation of many contracts, precedents interpreting similar contractual language may be of some persuasive value. However, it is the intentions of the particular parties, as reflected in the particular contractual wording at issue and informed by the surrounding circumstances of the contract, that predominate, and “[i]f that intention differs from precedent, the intention will govern and the

precedent will not be followed”: G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 129-30; see also *Tenneco Canada Inc. v. British Columbia Hydro and Power Authority*, 1999 BCCA 415, 126 B.C.A.C. 9, at para. 43.

[39] These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are “highly specialized contracts that are sold widely to customers without negotiation of terms”: *MacDonald*, at para. 37. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers: *Monk*, at para. 23. In others, a standard form agreement may be common throughout an entire industry: *Precision Plating*, at para. 28. Either way, the interpretation of the standard form contract could affect many people, because “precedent is more likely to be controlling” in the interpretation of such contracts: Hall, at p. 131. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — “ensuring the consistency of the law” (*Sattva*, at para. 51) — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.

[40] Indeed, consistency is particularly important in the interpretation of standard form insurance contracts. In *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 27, Binnie J. recognized that “‘courts will normally be reluctant to depart from [authoritative] judicial precedent interpreting the policy in a particular way’ . . . where the issue arises subsequently in a similar context, and where the policies are similarly framed”, because both insurance companies and customers benefit from “[c]ertainty and predictability”. And where an insurance policy is ambiguous, courts “strive to ensure that similar insurance policies are construed consistently”: *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 23.

[Emphasis added]

[119] These are the principles that I must apply in determining the meaning of “taken up residence” in the definition of “vacant”.

### Positions of the parties

[120] As mentioned, the Policy does not provide a definition for “taken up residence.” The Applicants say that absent a defined meaning, the phrase is

necessarily ambiguous. They say it is largely a subjective question as to exactly what an individual must do to “take up residence”, and whether the steps taken are sufficient to meet the necessary threshold. The Applicants note that even the Respondents’ own employees cannot agree on what is necessary for a person to have “taken up residence” – Mr. Pike, Donald, Dave and Ms. Ebotoke all explained it somewhat differently.

[121] The Applicants submit that the ambiguity can be resolved through the application of the general rules of contract construction. They say these rules support an interpretation that a property owner will have “taken up residence” for the purposes of a residential home insurance policy where that person has used the property in a manner and to a degree which signifies to the outside world that the property is under their dominion.

[122] The Applicants rely heavily on *Mattock v. Saskatchewan Mutual Insurance Co.*, 2006 SKQB 308, where the court considered the meaning of the phrase “taken up residence.” In *Mattock*, the plaintiff arranged for insurance on a rental property effective November 15, 2002. On December 31, 2002, the existing tenants moved out of the house. In January 2003, the plaintiff found a new tenant. The plaintiff and the tenant agreed that the tenant would pay \$350 rent per month and be responsible for utilities, and that he would have to place utilities in his own name before gaining

access to the house. It was further agreed that the tenant would paint the interior of the house, and this would constitute his rent for the days remaining in January.

[123] The utilities were placed in the tenant's name on January 23, 2003. He gained access and began painting the interior of the house on the same day. The next day, in the course of a routine check on the house, the plaintiff discovered water leaking from the kitchen into the basement. The plaintiff immediately pumped the water out and placed a heater in the basement to assist in the drying process. He contacted his insurance broker and, on the advice of his broker, refrained at that time from presenting a claim.

[124] In March 2003, the tenant began to experience difficulty with mould, and moved out of the house. The plaintiff then filed a claim with his insurer for the resulting damage. The insurer denied coverage on the basis that the property had been vacant at the time of the loss, and water damage was not covered while the insured property was under construction or vacant. The issue for the court was whether the property was "vacant" on January 24, 2002.

[125] The court began its analysis by pointing out that the definition of "vacant" contained in the insurance policy in effect prior to when the damage occurred to the Plaintiff's property defined a dwelling or unit as vacant "when it is not being used

by anyone as their usual place of residence, whether or not it contains furniture.”

The insurance policy in effect at the time of the plaintiff’s loss, however, contained a slightly different definition:

"Vacant" refers to circumstances where, regardless of the presence of furnishings, all occupants have moved out with no intention of returning and no new occupant has taken up residence; or, in the case of a newly constructed dwelling, no occupant has yet taken up residence.

[Emphasis added]

[126] In concluding that the tenant had taken up residence, Justice Krueger reasoned:

[13] *Black's Law Dictionary (Sixth Edition)* states:

The terms "resident" and "residence" have no precise legal meaning; sometimes they mean domicile plus physical presence; sometimes they mean domicile; and sometimes they mean something less than domicile.

*The Dictionary of Canadian Law* at page 918 defines "residence" as "the chief or habitual place of abode of a person". The plain dictionary meaning is the place where one actually lives or has his home; house where one's home is; a dwelling house.

[14] The defendant's position is that the words "taken up residence" contemplates a completed act of becoming a resident. Marcel Tyler Duquette had not moved a significant portion of his belongings into the house. He did not spend a night there. The painting was not yet complete. The plaintiff argued that Marcel Tyler Duquette was renting the house, he was in control of it. The plaintiff was not free to rent the house to anyone else or to himself occupy it.

[15] I am satisfied that a person can have more than one residence. In this age of jet travel people tend to maintain residences in several different places, even in different countries. They come and go frequently and for various lengths of time. Residency cannot be understood to be either permanent or all inclusive.

[16] The mere intention to reside at an address does not constitute either residency or occupancy. See *Hirst v. Commercial Union Assurance Co. of Canada*, 1979 CarswellBC 486, 70 B.C.L.R. (2d) 361 (B.C. C.A.). It is not the material risk, but rather the wording of the policy and in particular the definition of "vacant" where one is used that governs. See *Wright v. Capri Insurance Services Ltd.*, *supra*.

[17] The change in the definition of "vacant" from the policy in place prior to the loss and the one in effect at the time of the loss removes the requirement that the house or unit be the usual place of residence. The change permits more than one place of residence and does not require a primary place of residence. What is required by the policy in effect at the time of the loss is that residency has been taken up. In my view, that is less onerous than establishing a usual place of residence even in the absence of furniture. Taking up residence is used in its broadest sense.

[18] By its definition, sleeping and eating in a house are not required in order to have taken up residence. Furnishings are not necessary. Not all residences have house delivery of mail. Cell phones sometimes replace phones installed in the residence. I am of the view that Marcel Tyler Duquette had not yet abandoned any other residence he may have had, but he had taken up residence in the house rented from the plaintiff. To hold otherwise would require full-time day-to-day living in the house. In other words, establishing a "usual place of residence".

[19] Taking up residence in order to avoid a vacancy as defined in the insurance policy requires more than mere possession, but less than establishing a usual place of residence. **At some stage after occupying the house and before starting to actually live there, the occupant must take up residence.** otherwise, it is by definition vacant. I am of the view that acquiring paint and starting to paint the interior of the house was an act signifying that residence had been taken up. In the same way that laying new carpets, remodelling, installing doors or windows before moving furnishings into a house demonstrates that residence has been taken up, so too does painting the interior. It matters not whether the occupant is the owner or a tenant. It matters only that the occupant has taken up residence.

### **Conclusion**

[20] The interpretation of the policy and the intent reflected in the change of the definition of the word "vacant" suggest a particular meaning of "taken up residence". The tenant maintained control over and directed the activity in the house from and after January 23, 2003. By doing so he took up residence within the meaning of the insurance policy in place at the time of the loss. The house was not vacant. The plaintiff is entitled to coverage under the policy. Either party may refer this matter back to me for further directions or order if necessary.

[Emphasis added]

[127] The Applicants submit that, as in *Mattock*, "taken up residence" should be interpreted "in its broadest sense." They say they maintained control over and directed the activity in the Property by spending time there almost daily, and that this amounted to having "taken up residence."

[128] The Respondents submit that the phrase “taken up residence” is clear and unambiguous. They say Canadian courts have previously commented, in respect of similar policy language, that a property must serve as a “customary place of abode” to change from vacant to occupied. The Respondents say the evidence overwhelmingly confirms that the Applicants had not “taken up residence” in the Property.

[129] The Respondents rely primarily on *Maracle Estate v. Bay of Quinte Mutual Insurance Co.*, 2010 ONSC 5217, and *Nejim v. Intact Insurance Co.*, 2016 ONSC 5852. In *Maracle*, the insured’s family sued for indemnity for water damage to her property that occurred between January 1, 2005 and March 11, 2005. Unknown to the insurer, when the 83-year-old insured renewed her insurance policy in July 2004, she was no longer residing at the property and had moved into a nursing home. The policy excluded coverage for any loss or damage occurring after the dwelling had been vacant for more than 30 consecutive days. “Vacant” was defined as meaning that the occupants had moved out with no intent to return.

[130] The insured’s family argued that the house was never vacant because the insured had intended, before her death in January 2007, to eventually return home. They said there were regular overnights and day visits at all material times.

Electricity and other utilities remained connected, and the house continued to hold many of the insured's personal effects and furnishings.

[131] Justice Leroy said the following about the definition of vacant, and the rationale for the policy exclusion:

[53] In insurance vernacular the word vacant, standing alone and undefined in the policy contract is distinguishable from the word unoccupied by reference to contents. A property is not vacant until it is unoccupied and the contents have been removed. The instant policy specifically modifies the default characterization by defining the word vacant to mean the occupants have moved out with no intent to return. A dwelling is also vacant when the occupants move out and before any new occupants move in - policy cover page.

...

[56] The thrust of the exclusion is that when no one lives or resides (and I use these terms as equivalent for the purposes of these circumstances, recognizing that lives encompasses a larger group than those who reside in a dwelling) in a dwelling the risk of loss or at least the cost of a loss is significantly increased. Accidents happen with or without occupancy. Mitigation is eviscerated in a vacant dwelling. The instant circumstances are illustrative. A broken water line would cause a flood. Early discovery and response controls the loss. The commercially reasonable expectation of the parties to the contract is that the insured has coverage for water release while she lives or resides in the home and not when she does not live in the home. That is exactly what the policy states.

[Emphasis added]

[132] The court rejected the notion that the insured was capable of forming an intention to return to the property at the material times. In concluding that the property was vacant at the time of the loss, Leroy J. stated:

[67] The definition in this policy has been considered in other courts - *Zimmerman v. Royal & Sunalliance Insurance Company*, 2007 CanLII 37900 - Mr. Justice Matheson citing the BCCA in *Price v. Zurich Insurance Co.*, [2003] B.C.J. No. 243 - "The phrase "moved out with no intent to return" connotes permanence. The

phrase does not apply to an occupier who moves out of premises temporarily with the intent to return to live there. That is not to say that a former occupant might not return for transitory purposes. The premises would be regarded as vacant within the meaning of the policy if the occupant moved out with no intent to return "as an occupant". Further, in some cases the occupant may have moved out with no intent to return without taking all of her possessions or furnishings as occurred here. The third sentence of the definition reinforces the definition in the first sentence by making it manifestly clear that the premises are vacant where the occupant has moved out with no intent to return and before a new occupant has moved in. The presence of furnishings may make it more difficult for the insurer to prove that the insured moved out without intention to return but the fact of furnishings remaining does not mean necessarily that the insured intends to return to occupy the premises."

[68] And for a dwelling house to be in a state of occupation there must be the presence of human beings as their customary place of abode, not absolutely and interruptedly continuous, but that must be the place of the usual return and habitual stoppage - Lambert v. Wawanesa Mutual fire Insurance Co., [1945] O.R. 105 (ONCA) [1945] 1 D.L.R. 694.

[69] Occasional visits do not change the status of the home from being vacant to occupied - Wright v. Canadian Northern Shield Insurance Company, 2005 BCCA 599 (CanLii). Sporadic visits do not manifest any intent to exercise dominion over the house.

[70] I have applied these principles in this decision. The word vacant should be interpreted not only by reference to the question whether at the time of loss the house was unoccupied, connected to the power grid or contained household goods, but in light of all the surrounding circumstances, particularly the actions and intentions of the insured, to determine whether the premises were vacant.

[Emphasis added]

[133] In *Nejim*, the Nejims and their children lived at the insured property for 15 years, during which time they maintained a standard residential home owner's policy. In fall 2013, they decided to move out of the house and rent it out. The last member of the family moved out of the home in mid-December to join the rest of the family in their new residence. On December 18, 2013, the insurer issued a rental dwelling policy on the property. Although the Nejims had a tenancy lined up for the beginning of January 2014, the arrangement fell through. On January 7, 2014, the

home suffered severe water damage as a result of a frozen pipe that had burst. The insurer refused coverage on the basis that the property was vacant at the time of the loss. The rental dwelling policy defined “vacant” as follows:

[15] The policy defines the term "vacant":

Vacant refers to the circumstances where, regardless of the presence furnishings, all occupants have moved out with no intention of returning and no new occupant has taken up residence...

[134] The court noted that there was no dispute that from mid-December until the date of the damage, no one was living in the home, or even periodically spending the night. The Nejims argued, however, that while they were not living in the home, they still regularly attended at the property and made arrangements for friendly neighbours to check in on it. There was evidence from a neighbour that she checked on the property approximately 8 to 10 times from December 15, 2013 to January 7, 2014. The Nejims argued that their efforts to check on the property, or have others do it on their behalf, amounted to occupancy. The insurer argued that the vacancy exclusion applied because no one was living in the home.

[135] In upholding the denial of coverage, George J. stated:

[29] Interpretation of an insurance policy is to occur in two steps. First, I must ask whether the loss falls under the policy? In our case there is no dispute. It does.

[30] Second, I must determine whether an exclusion clause applies? On these facts, the better question to ask is, whether the home was vacant? Again, there is no factual dispute. It's a question of whether these, essentially agreed upon facts, trigger the exclusion clause?

[31] The answer is yes. The home was vacant. To periodically "check in" on the place does not amount to occupancy. I reject the idea that there is any ambiguity on this point.

[32] The clause in question is clear. This is significant as it eliminates the application of the doctrine of *contra preferentum*, which is only to be applied where there is ambiguity or confusion. In other words, to interpret against he who drafted a contract does not over-ride easy to understand contractual language. In fact, this policy seems to specifically anticipate situations such as this, as clause 17(ix) excludes coverage even if permission for construction or vacancy is granted. Vacancy operates as an absolute bar to coverage.

[33] The applicable principles are explained by the Supreme Court in *Progressive Homes Ltd. v. Lombard General Insurance Canada*, 2010 SCC 33. When interpreting insurance contracts I am to focus first and foremost on the language. Understanding that clear contractual language trumps all else, ensuring consistency across the industry is also a consideration. I am to accept that while coverage must be construed broadly, exclusionary clauses are to be interpreted narrowly. There are other guiding principles, but the overarching direction is that rules of construction should be employed in a way that resolves ambiguity, not create it.

[34] A similar fact-set was present in *Wu v. Gore Mutual Insurance Co.*, 2009 CarswellOnt 7577 (S.C.J.), where the court was considering an exclusion clause in identical form. In holding the residence was no one's habitual abode, Nolan J. wrote at para. 87:

In the case before me, while the Wu's did not have the utilities shut off to the home after Ms. Ouellette and Mr. Steptoe moved out on August 5, 2006, there was no one "occupying" the property. While the Wu's attended the home on a regular basis, no one slept or cooked there and it was no one's "habitual abode" for more than 30 days. Thus, I find that the property was vacant for more than 30 consecutive days. It may be that Mr. Wu did not appreciate that the home became vacant in accordance with the definition in the policy when the last tenants moved out...Nevertheless, on all of the evidence, I find that as of the date of the fire, October 10, 2006, 1613 St. Clair was vacant for more than 30 consecutive days. It was no tenant's habitual abode and the Wu's had no intention of moving in themselves. Indeed, the new tenant was not going to move in until November 1, 2006.

[35] As already indicated, I similarly find that there is vacancy. I further find that the applicants had no intention to move back in. They were going to ultimately find tenants, or sell.

[36] In *Maracle Estate v. Bay of Quinte Mutual Insurance Co.*, 2010 ONSC 5217, Leroy J. speaks of how vacancy might contemplate not just that the place be unoccupied, but that all contents be removed. This is important, because it highlights in our case the policy's specific definition of vacancy, which is different. In other words, reasonable people can disagree on what vacancy means from a

practical perspective, including a view that every object would have to be out; but not in this case, with this policy language. It speaks very clearly to there being no occupants, and to there being no intention to return. The respondent's specific intention was to, in offering coverage, modify what some may see as the default definition of vacancy. This must have been understood by the applicants, and if they did not, they ought to have.

[37] On a plain reading of the applicant's affidavits, and more clearly upon a review of their evidence on examination for discovery, there is an inarguable element of permanence. They were not returning. No reasonable person could come to this conclusion. There was some prospect of future tenant occupancy, but this was uncertain at best. Indeed, an expected January tenancy had already fallen through.

[38] I further find that the occasional visits detailed in the materials, both by the applicants and neighbours, did not change the home's vacant status. It did not establish occupancy, nor did it demonstrate an intention to return.

[39] The vacancy exclusion applies.

[136] The Respondents say the Applicants had not taken up residence at the Property because it was not a “customary place of abode” at the date of loss, and that their visits to the Property, even if frequent, did not change the Property from vacant to occupied at the time of the loss.

### Analysis

[137] The Property is insured under Policy as an owner-occupied dwelling. On the first page of the Policy, under the heading “A Guide to Your Policy”, it states:

#### SECTION I – Property Insurance

This section describes the insurance on your dwelling, detached private structures and personal property. ...

[138] The definitions section on page 1 defines “Dwelling” as follows:

**Dwelling** means the building described on the Declarations Page wholly or partially occupied by **you** as a private residence.

[139] The word “you” or “your” is defined as referring to “the Insured” (page 2).

[140] Under the heading “Insured Perils” on page 5, the Policy states that it provides coverage for “all risks of direct physical loss or damage to the property described subject to the exclusions and conditions in this form.” There is no dispute that the water damage to the Property is an insured peril under the Policy unless the Respondents establish that an exclusion applies.

[141] In denying coverage to the O’Briens, the Respondents relied on Policy exclusion 26(F), under the “Perils Excluded” section of the Policy:

26. Water damage

direct or indirect caused by:

...

F. Occurring while the building is under construction or **vacant**, even if permission for the construction of vacancy has been given by **us**.

[142] As noted earlier, the term “vacant” is defined in the Policy at page 2 as follows:

**Vacant** refers to the circumstances where, regardless of the presence of furnishings:

1. all occupants have moved out with no intention of returning and no new occupant has taken up residence; or
2. in the case of a newly constructed house, no occupant has yet taken up residence.

The word “occupant” is not defined in the Policy.

[143] As alluded to in *Maracle*, the phrase “regardless of the presence of furnishings” modifies the common understanding of a “vacant” property, which is one that is both “unoccupied” and empty of furnishings. Said differently, the definition makes clear that a furnished house can be vacant under the Policy so long as all occupants have moved out with no intention of returning. The presence or absence of furnishings, without more, is not dispositive of vacancy.

[144] The first step in the interpretive process is to determine whether the plain language of the definition, read in the context of the Policy as a whole, is ambiguous. In my view, when the phrase “taken up residence” is considered in context, its meaning is not ambiguous.

[145] Unlike the policies considered in the authorities cited by the parties, which insured rental properties, the O’Briens’ Policy insured several owner-occupied dwellings. The word “dwelling” is defined in the Policy as a building described on the Declarations page which is occupied (wholly or partially) by the insured “as a private residence.” A “residence” is a home; a place where someone lives. To occupy a property as a private residence is to live there. Accordingly, an insured has “taken up residence” at a property once they have begun to live there. This interpretation is consistent with the definition cited by the Applicants from the Merriam-Webster dictionary (online), which defines “take up residence” as an idiom meaning “to

establish a home.” Similarly, the Oxford Languages dictionary (online) defines “take up residence” as to “start living in a particular place.”

[146] Although many people will only have one residence at a time, there is nothing within the language of the Policy which prevents an insured from having multiple residences. In this case, the Policy insured three separate dwellings – the Property, 6271 Oakland Road, and the cottage. The same definition of “vacant” applied to all three. It follows that “taking up residence” in a property does not require evidence of continuous, full-time, day-to-day living. Put differently, a person can be found to have “taken up residence” at a dwelling without evidence that they were living there on a full-time basis, eating and sleeping there every night at the time of the loss.

[147] Even where an insured has a single residence, the Policy does not require that they spend every day or night there in order to maintain coverage. For example, under the Policy exclusions, if an insured has been away from their residence for more than 7 consecutive days, water damage within a heated building due to freezing is not covered unless the insured has taken one of several precautions, including “arranging for a competent person to enter your dwelling every 7 days while you were away to ensure that heating was being maintained”, or “shut off the water supply and drained all the pipes and appliances”, or “connected your plumbing and

heating system to a monitored alarm station providing 24-hour basic service” (page 7, item 26(A.), (2)). Under the terms of the Policy, then, an insured can be away from their residence temporarily for up to 7 consecutive days and still maintain coverage without taking any additional precautions. This further supports an interpretation of “taken up residence” that does not require the O’Briens to prove that one of them lived in the Property on a full-time basis, 7 days per week, from November 30, 2018, to January 1, 2019.

[148] Whether an insured has “taken up residence” will depend on all the circumstances, including the intention of the insured. Each case must be decided on its own facts, and no single factor is determinative. However, some common indicia that an insured has begun occupying a property as a private residence, as contemplated by the Policy, include the presence of furnishings; personal effects like clothing and jewelry; toiletries; sheets and towels; dishes; small household appliances; electronics; clothing; and food. In the case of a primary residence, living in a property also necessarily means regularly spending time there, including sleeping there.

[149] Even if I am wrong and the phrase “taken up residence”, when considered in the context of the Policy as a whole, is ambiguous, I would reach the same

conclusion as to its meaning after considering the general principles of contract interpretation. As Wagner J. noted at paragraph 50 in *Ledcor*:

These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies.

[150] With respect to the reasonable expectations of the parties, the Applicants rely on Wagner J.’s discussion of the purpose of builder’s risk policies in *Ledcor*. The Applicants say many of the following comments apply equally to residential home insurance policies:

[67] “The raison d’être of insurance is coverage”: D. Boivin, *Insurance Law* (2nd ed. 2015), at p. 288. The purpose of builders’ risk policies in particular is to offer broad coverage, which benefits both insureds and insurers:

Urbanization and industrialization in the past 100 years have made the concept of an insurance policy covering all conceivable risks advantageous to both insureds and their insurers. The insured benefits from the extensive nature and scope of the coverage, and insurers benefit from the economies of managing and marketing a policy which, in terms of its scope, has certainty. For these reasons, the “all risk policy,” which creates a special type of coverage extending to many risks not customarily covered under other types of insurance policies, is attractive to both the insurance industry and consumers.

(E. A. Dolden, “All Risk and Builders’ Risk Policies: Emerging Trends” (1990-91), 2 C.I.L.R. 341, at pp. 341-42)

[68] This Court stated in *Commonwealth Construction Co. v. Imperial Oil Ltd.*, [1978] 1 S.C.R. 317, that the purpose of builders’ risk policies is to provide certainty and stability by granting coverage that reduces the need for private law litigation. The Court also recognized the complexity of industrial life and large-scale construction projects that involve many different individual contractors:

As already noted, the multi-peril policy under consideration is called . . . a course of construction insurance. In England, it is usually called a “Contractors’ all risks insurance” and in the United States, it is referred to as “Builders’ risk policy”. Whatever its label, its function is to provide to the owner the promise that the contractors will have the funds to rebuild in case of loss and to the contractors the protection against the crippling cost of starting afresh in such an event, the whole without resort to litigation in case of negligence by anyone connected with the construction, a risk accepted by the insurers at the outset. This purpose recognizes the importance of keeping to a minimum the difficulties that are bound to be created by the large number of participants in a major construction project, the complexity of which needs no demonstration. It also recognizes the realities of industrial life. [p. 328]

[69] Although such policies are said to insure against all risks, this description is not entirely accurate. As a general rule, insurance offers protection only for fortuitous contingent risk: *Progressive Homes*, at para. 45. Moreover, builders’ risk policies contain various exclusions, meaning indemnity is precluded in many circumstances of fortuitous loss: Dolden, at pp. 342-44.

[70] Despite these qualifiers, builders’ risk construction policies are the norm, if not a requirement, on construction sites in Canada. In purchasing these policies, “contractors believe indemnity will be available in the event of an accident or damage on the construction site arising as a result of a party’s carelessness or negligent acts”, which are the most common source of loss on construction sites: Dolden, at pp. 345-46. ...

[151] It is not controversial that home insurance policies, like builder’s risk policies, are intended to offer broad coverage; that home insurance is a requirement for most lenders; and that homeowners expect that indemnity will be available in the event of unexpected damage to their property. That said, I agree with the court in *Maracle* that the reasonable expectation of the parties to a home insurance policy “is that the insured has coverage for water release while she lives or resides in the home and not when she does not live in the home” (para. 56).

[152] To the extent that the O'Briens had any confusion about how to avoid triggering the vacancy exclusion, it arose not from the phrase "taken up residence", but from the odd fact that the Property was across the street from their current home, allowing them to regularly visit and keep an eye on it without actually moving in. While of obvious importance to the O'Briens, the definition of "vacant" was not drafted with this particular circumstance in mind. The definition is in a standard form contract. Its interpretation should be consistent with the reasonable expectations of the parties to any home insurance policy, not those of the parties to a home insurance policy where the newly acquired property happens to be across the street from the insureds' existing home.

[153] The next rule is that the interpretation should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted. As Justice Wagner explained in *Ledcor*:

[78] In discussing the interpretation of insurance policies in *Consolidated-Bathurst*, at pp. 901-2, Estey J. stressed the need to avoid interpretations that would bring about unrealistic results or results that the parties would not have contemplated in the commercial atmosphere in which they sold or purchased the policy. The interpretation should respect the intentions of the parties and "their objective in entering into the commercial transaction in the first place", as well as "promot[e] a sensible commercial result" (p. 901). See also *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 62, where this Court restated the importance of commercial reality, albeit in a different context. Interpreting the Exclusion Clause to preclude from coverage only the cost of

redoing the faulty work aligns with commercial reality and leads to realistic and sensible results, given both the purpose underlying builders' risk policies and their spreading of risk on construction projects.

[154] In this case, the Applicants urge the Court to adopt an interpretation of “taken up residence” like the one adopted in *Mattock*. In that case, which involved a rental property, Krueger J. stated:

[19] Taking up residence in order to avoid a vacancy as defined in the insurance policy requires more than mere possession, but less than establishing a usual place of residence. At some stage after occupying the house and before starting to actually live there, the occupant must take up residence, otherwise, it is by definition vacant. I am of the view that acquiring paint and starting to paint the interior of the house was an act signifying that residence had been taken up. In the same way that laying new carpets, remodelling, installing doors or windows before moving furnishings into a house demonstrates that residence has been taken up, so too does painting the interior ...

[Emphasis added]

[155] According to *Mattock*, then, “taking up residence” occurs after the insured occupies the property, but before they start to actually live in it. In *Mattock*, the tenant did move into the house as planned, despite the water damage. It was only after the tenant moved out several months later that the plaintiff filed a claim for the water damage. This is the context in which the court held that “taking up residence” is the stage between occupying a property and starting to live there. When the interpretation of “taking up residence” in *Mattock* is applied outside this narrow context, however, it gives rise to unrealistic results.

[156] Applying *Mattock* to the typical homeowner's insurance policy, once an insured has taken possession of the house, hooked up utilities, and painted some walls (or laid carpets, remodelled, or installed doors or windows), they have "taken up residence" and the home can never again be described as "vacant" without evidence that the insured has abandoned it with no intent to return. With this condition fulfilled, the insured is entitled to coverage for all the perils which would otherwise be excluded, regardless of when – or even if – the insured actually moves into the property. If the insured decides not to move in for a further two weeks, or six months, the insurer would be unable to rely on the vacancy exclusion to deny coverage for a loss which occurs before anyone has moved into the property. In other words, notwithstanding the material difference in risk to the insurer, an insured who has not yet moved in, but who has "taken up residence", would be entitled to the same coverage as one who is actually living in their property. This result would not have been contemplated by the parties when they executed a policy intended to insure owner-occupied dwellings.

[157] I appreciate that although the Applicants rely heavily on *Mattock*, their claim to have "taken up residence" is not based on a single act like painting the walls or installing doors or windows. Instead, they argue that their regular use of the Property over a four-week period amounted to "taking up residence." Their evidence is that

they used the Property on an almost daily basis for a variety of purposes, including as an extension of Dr. O'Brien's home office. As I pointed out during the hearing, however, the Applicants' evidence was quite vague as to how much time they actually spent there, and when. Leaving that aside, the Applicants' proposed interpretation of "taking up residence" is no less problematic than the one adopted in *Mattock*. If using the Property for an hour or two on an almost daily basis was sufficient for the O'Briens to have "taken up residence", it follows that they would be entitled to the same coverage under the Policy whether they eventually moved into the Property or merely continued to use it as an extension to Dr. O'Briens' office, despite the significant difference in risk to the insurer. This is not a realistic result.

[158] The last rule which bears on the interpretation of the Policy is that it should be consistent with the interpretations of similar insurance policies. The parties were unable to locate any decisions other than *Mattock* where the phrase "taken up residence" was considered. The Applicants rely on the need for consistent interpretations as support for adopting a definition of "taken up residence" like the one articulated in that case.

[159] Respectfully, the court in *Mattock* interpreted "taken up residence" in a manner that arguably, did justice in the circumstances of that case, which differ

considerably from the circumstances here. *Mattock* involved an insurance policy for a rental property, while the Policy in this case insured several owner-occupied dwellings. In the case of a rental property, the insured cannot necessarily control how quickly a tenant moves in, such that any gaps in occupation are avoided. As Krueger J. noted in *Mattock*:

10 Although the reported cases do not assist in deciding when a dwelling is vacant, they do provide some guidance. The intention of the owner in the case of rental property is important. Here the plaintiff intended to turn the house over to the tenant as soon as the utilities were placed in his name. The owner's inspection on January 24, 2003, was to ascertain whether possession of the house had been taken by the tenant.

[Emphasis added]

[160] The insured in *Mattock* did everything he could reasonably have been expected to do to avoid a denial of coverage, and the tenant moved into the house as soon as he finished painting it. Moreover, in *Wright v. Capri Insurance Services Ltd.*, 2004 BCSC 265, a decision cited by the court in *Mattock*, Barrow J. observed at paragraph 75:

In my view, a gap in the occupation of premises by tenants is part of the risk insured against in a policy of insurance on rental premises.

[161] While consistency in the interpretation of insurance policies is important, and the court in *Mattock* was interpreting an identical definition of “vacant”, I find that *Mattock* is distinguishable and I decline to follow it.

[162] In summary, I find that both the plain language of the definition of “vacant”, read in the context of the policy as a whole, and the general principles of contractual interpretation, support the same construction: to have “taken up residence”, the insured must have started to live in the home.

[163] The evidence is clear that neither of the O’Briens were living at the Property on either a full time or a part time basis at the time of the loss. As Dr. O’Brien testified, it was never their intention that he would live in the Property and sleep there while they waited for their existing home to sell. Although the O’Briens spent time in the Property, treating it as an extension of their existing home – a “man shed” or a “garage kind of thing” – they did not live there. They lived in their home at 6271 Oakland Road. The Property was vacant, and coverage for the water damage is excluded under the Policy.

[164] I will now consider whether the Respondents are liable to the Applicants for their loss in negligence and breach of contract.

### **Negligence and breach of contract**

[165] The Applicants submit that their lack of coverage for the water damage, and their resulting loss, were caused by Ms. Ebotoke’s negligent performance of her responsibilities as a telephone insurance agent for TD Insurance. They say that if

Ms. Ebotoke had given them the appropriate information about the exclusions, they would have taken the necessary steps to ensure that they had full coverage over the Property.

[166] The Applicants say Ms. Ebotoke was negligent and did not provide her services as an insurance agent in a skilful, efficient and competent manner by:

- 1) Failing to advise Ms. O’Brien of the vacancy and water damage exclusions which would apply to the Property until the family moved in, contrary to her own quoting and underwriting guidelines;
- 2) Failing to answer the question presented by Ms. O’Brien and correct her mistaken statements regarding coverage; and,
- 3) Failing to properly conduct fact-finding and assessment specific to the O’Briens plans to “live in the property”.

[167] The Applicants further submit that TD Insurance’s negligence also amounts to a breach of contract pursuant to the operation of s. 26(5) of the *Consumer Protection Act*, which implies into every consumer sale of services a condition, on the part of the seller, that the services sold shall be performed in a skilful, efficient and competent manner.

[168] The Respondents deny that Ms. Ebotoke was negligent. They deny that she had an obligation in the circumstances to provide a more explicit explanation of what constituted vacancy and the implications of the O'Briens proposed use of the Property. The Respondents submit that Ms. O'Brien "made clear, unqualified representations to Ms. Ebotoke that she and her husband would be 'moving in' within days, and that the Property would be 'occupied'" (Respondents' brief). The Respondents say Ms. O'Brien, as the insured, had a duty to provide accurate information to an insurance agent, and that Ms. Ebotoke was entitled to rely on the information Ms. O'Brien gave her without further inquiry.

[169] The Respondents submit that this is not a case where a customer relied on the expertise of a broker in entering into an inappropriate policy. They say the Applicants were provided with a policy of insurance that was directly responsive to the information Ms. O'Brien provided to Ms. Ebotoke. Moreover, they submit that the Applicants induced Ms. Ebotoke to rely on *their* express statement that the Property would be occupied.

[170] Finally, the Respondents argue that even if Ms. Ebotoke was negligent, the Applicants cannot prove causation.

[171] There is no real dispute between the parties on the law. They agree that Ms. Ebotoke, in her role with TD Insurance, owed a duty of care to the O'Briens and other potential or existing clients who contacted TD with questions about their coverage or to obtain additional coverage (*Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 171). They agree that the standard of care required her to make sufficient inquiries of the customer in procuring coverage, make recommendations and give advice, and, based on the information provided, to explain potential gaps in coverage (*Fletcher*, at para. 55; *Fine's Flowers Ltd. v. General Accident Assurance Co.*, (1977), 17 O.R. (2d) 529 (Ont. C.A.), *Sotiropoulos v. Bernard Freedman Insurance Ltd.*, 1982 CarswellNB 259 (N.B. Q.B.)). The parties also agree that the standard of care applicable to Ms. Ebotoke as a telephone insurance agent for a private insurer is likely not as onerous as that which applies to a private insurance broker who sits down with a client, performs an in-depth assessment of their specific circumstances, and recommends products to suit all their insurance needs.

[172] The court considered the standard of care applicable to a telephone insurance agent in *Kadaja v. C.A.A. Insurance Co. (Ontario)*, 1995 CarswellOnt 446 (Ont. Sup. Ct. (Gen. Div.)). In that case, the plaintiff purchased a new vehicle and telephoned his insurer, C.A.A., to obtain "full" insurance coverage. The plaintiff was

subsequently involved in a serious car accident and was hospitalized. While in the hospital, he learned that C.A.A. claimed that he was not covered for collision/comprehensive damage. He filed an action against C.A.A. for damages for his losses which he said were attributable to the defendant's negligence. The court succinctly summarized the law as follows:

31 In *Fletcher v. Manitoba Public Insurance Corp.*, *supra*, it was held that the elements required to found an action in negligence were present in the relationship between an insurer and an insured. It was clear in *Fletcher* that the plaintiff was not aware of the availability of underinsured motorist coverage, and that the insurer did not bring it to his attention.

32 On the question of reliance, the court held (at p. 651) that it could be assumed that customers rely on information that insurers provide them on additional coverage and the nature of protection it provides.

33 The scope of the duty on private insurers was stated by Wilson J. in *Fletcher* at p. 655:

... it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.

34 In contrast, the court said that the duty of public insurers goes no further than that of a "duty to inform customers of the available range of coverage" [p. 655]. The C.A.A. is neither a government insurer nor an agent of a private insurance company. It could be called a sort of hybrid of the two types — on the one hand, it operates in an institutional setting, whose employees are sales and clerical people rather than specialists in risk assessment. On the other, it is entirely appropriate for the public to expect at least some degree of individualized insurance advice since buying insurance can be confusing and companies such as CAA ought to know that their customers do not have the benefit of the advice of an agent or broker.

35 In discussing the duty of public insurers, the Supreme Court of Canada put it this way, at p. 655:

Selling insurance is not, as the respondent suggests, like selling groceries, and the law should not treat them alike. The purchase of insurance is predicated on decisions made about assessing and bearing risks. Members of the public need to have all relevant information available to them in an explicit and readily comprehensible manner if they are to make intelligent decisions about how much risk they are prepared to bear.

36 The court elaborated on the public insurer's duty, at p. 660:

The insurer's duty is to provide *sufficient timely, clear and accurate* information to its customers about the various options so that they can make informed choices about what level of risk beyond that required by law they want to insure themselves against. [emphasis mine]

...

38 With respect to advising of a gap in coverage, Wilson J. also cited (p. 654) with approval the finding by the Ontario High Court, and confirmed on appeal, in *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.* (1983), 1 C.C.L.I. 34. That case held that an agent to whom the customer has adequately described the nature of his business will be liable for an uninsured loss unless the agent has pointed out the gaps in coverage to the customer and advised him or her how to protect against them.

39 This standard of care may be somewhat elevated from what can be expected of an institutional insurer that deals directly with the public. It seems to me that it would be reasonable to rely on a C.A.A. employee to provide unsolicited advice about the availability of collision/comprehensive coverage, as in *Fletcher*, and in addition, to advise about its appropriateness in the plaintiff's circumstances, i.e., new car, new policy. Indeed, the witness for the defendant readily admitted that she would normally recommend same in such circumstances even if the customer did not request it. This is not as high a duty as that imposed in the *Keller* case or on private insurance agents in *Fletcher*, where the insurer must tailor each package to the customer's highly individualized needs, but it satisfies the *Fletcher* requirement that the advice be something more than a mere recitation of the names of the coverage available. The advice must be *sufficiently timely, clear and accurate*. ...

[Emphasis added]

[173] The court held as follows at paragraphs 63 and 88:

As regards the relationship between the insured and the insurer, while it obviously was not a close one, one had nonetheless been established. The nature of the relationship is primarily attributable to the defendant. The processing of insurance claims by a variety of persons and by telephone notwithstanding, the defendant

should have been sufficiently aware, at that time, of the plaintiff's particular needs and his reliance on them to provide him with "full" insurance. If they did not see it that way, they should have informed the plaintiff promptly and clearly.

...

Neither this employee nor anyone else, except for the partially blank box on the certificate, informed the plaintiff about the nature of the coverage. They did not do all that could be expected of them considering their relationship with the customer. The customer did not decline to take collision/comprehensive. He specifically asked for "full" insurance, and a quote was given and the matter was left there. He thought he had a "done deal". C.A.A. acted negligently. ...

[174] As noted earlier, Ms. Ebotoke described some of the responsibilities of her role with TD Insurance in her affidavit:

5. In this role, one of my responsibilities is to answer incoming calls from existing or prospective TD Insurance customers.
  6. As a Contact Centre Representative at TD Insurance, I conduct all quoting and binding of insurance policies subject to my granted authority and in accordance with TD Insurance's internal policies and guidelines, including the TD Homeowner Underwriting Quoting Procedure, the TD Homeowner Underwriting Binding Procedure and the TD Underwriting Manual.
- ...
9. Pursuant to TD Insurance's quoting procedure for homeowners policies, I am required to determine whether a property is going to be vacant or undergoing renovations in order to place the appropriate coverage and any applicable endorsements or permits.

[Emphasis added]

[175] On cross-examination, Ms. Ebotoke acknowledged that part of her job was to answer questions from potential and existing clients of TD Insurance about coverage. She agreed that if a customer was uncertain as to what to do, she would guide them and recommend what she considered to be the best option for their situation.

[176] The most important piece of evidence on the issue of whether Ms. Ebotoke was negligent – or whether Ms. O’Brien was the author of her own misfortune – is the transcript of the call on November 27, 2018. Having carefully reviewed it, I find that Ms. Ebotoke failed to adhere to TD Insurance’s own internal procedures and also breached the standard of care required of a telephone insurance agent.

[177] When Ms. Ebotoke answered Ms. O’Brien’s call to TD Insurance, she was confronted with an unusual set of facts. Ms. O’Brien and her husband’s existing home was already insured with TD, and they had just purchased another. They hadn’t sold their existing home yet, and the new home was scheduled to close three days later, on Friday, November 30. What made the situation unusual was that the O’Briens’ new home was located directly across the street from their existing home.

[178] Following TD Insurance’s Homeowner Quoting Procedure, Ms. Ebotoke asked Ms. O’Brien when they would be moving into the Property. If there would be fewer than 60 days between the closing and the move-in date, Ms. Ebotoke was required to tell Ms. O’Brien about exclusions which applied during the vacancy, including water damage, and to tell her that these exclusions would not be applicable as soon as the O’Briens occupied the new home. If there would be more than 60 days, Ms. Ebotoke was required to follow the Vacant Property Procedure and obtain a vacancy permit. Ms. O’Brien’s answer, however, did not fall neatly into either of

the two options. She told Ms. Ebotoke that they were not going to move in right away. Ms. O'Brien then disclosed that the new home was "just across the street", and asked, "Yeah, is it better if one of us stays there, like how does that affect ... I mean we can just walk across the street every day."

[179] Without acknowledging Ms. O'Brien's question, Ms. Ebotoke said she was "trying to figure out if we're going to need the .. like a vacant ... like a vacant home."

Ms. O'Brien responded:

**MS. O'BRIEN:** Okay. Well it's not really vacant because we'll go over every day.

**MS. EBOTOKE:** Uh-huh.

**MS. O'BRIEN:** Because we're going to renovate.

**MS. EBOTOKE:** Okay.

**MS. O'BRIEN:** So it won't really be vacant in the sense that noone will be in it. Someone will be in it every day.

[180] As Mr. Pike confirmed on cross-examination, Ms. O'Brien's understanding of vacancy, as conveyed to Ms. Ebotoke, was "completely wrong", and "not in any way consistent with how TD interprets the issue of vacancy in claims." Ms. Ebotoke did not correct Ms. O'Brien's understanding of vacancy before putting her on hold to contact CRT.

[181] During Ms. Ebotoke's conversation with Donald, she explained that Ms. O'Brien was uncertain about when they were going to move in to the Property

because they planned to renovate. She told him that the Property was right across the street from the O'Briens' existing home, that Ms. O'Brien had asked whether it would be better for one of them to stay there, and that they would literally be there every day because it is right across the street. Donald advised Ms. Ebotoke that the Property would have to be furnished, and that "someone's got to actually like occupy it, live there, you know, have their stuff there." He added that "[e]ven a couple of days a week is fine."

[182] Ms. Ebotoke then brought up the renovations, and Donald explained that she needed to determine whether the renovation would be "major" or "minor." If "major", Ms. Ebotoke would need to proceed under either "customer living in home" or "customer not living in home."

[183] When Ms. Ebotoke returned to Ms. O'Brien, she asked whether the renovations would cost more than 20 percent of the value of the home. Ms. O'Brien responded, "Probably." Ms. Ebotoke interpreted this response as a "yes." She then confirmed with Ms. O'Brien that the closing was Friday, November 30, and that she wanted the Policy to be active as of that date. Ms. Ebotoke then asked Ms. O'Brien how soon after the closing date they were going to move in:

**MS. EBOTOKE:** Okay. So how soon after are you going to move in after your closing date?

**MS. O'BRIEN:** My husband's going to on Saturday.

**MS. EBOTOKE:** Oh okay. So are you going to, like, move your furniture and stuff over?

**MS. O'BRIEN:** Yeah, like a bed and stuff like that.

[184] Based on Ms. O'Brien's response, Ms. Ebotoke should have recognized that no one would be occupying the Property between the closing on Friday and Dr. O'Brien moving in on Saturday. In other words, depending on the timing of the two events, there would be at least several hours, and at most over 24 hours, between the closing and the customer moving into the home. According to the TD Insurance Homeowner Quoting Procedure, Ms. Ebotoke was required to inform Ms. O'Brien that the Property would not be covered for water damage, glass breakage or vandalism during the vacancy, and that these exclusions would cease to apply once they occupied the new home. Ms. Ebotoke conceded this point on cross-examination:

**MR. DUNBAR:** And then you move on, and you get the address of the new location. Top of page 18. And then at line 17 through 22, you say to Sarah, "How soon after are you going to move in after your closing date?"

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** Okay. And Sarah tells you, her husband's gonna move a bed and stuff like that in on Saturday.

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** And so, Saturday is the day *after* the closing, right?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** So in other words, if the insurance is active on the 30th, there's going to be at least 24 hours, or, at least, whatever

period of time between the Friday closing and the Saturday moving in, where the property is, according to TD and the position it's taken in this litigation, vacant, right?

**MS. EBOTOKE:** I'm not an adjuster, so I would assume...

**MR. DUNBAR:** But it's a period of time less than 60 days, right?

**MS. EBOTOKE:** Yes.

**MR. DUNBAR:** And so, according to your procedure, that is a period of time which you should have said "Hey, even if just for that one day, you're not covered for water damage."

**MS. EBOTOKE:** Yes.

[Emphasis added]

[185] Ms. Ebotoke did not tell Ms. O'Brien about the vacancy exclusions as required by the Homeowner Quoting Procedure. This was her first breach of the standard of care.

[186] After confirming that the Property was going to be occupied by the O'Briens rather than rented, Ms. Ebotoke returned to ascertaining whether the renovations qualified as minor or major. She asked whether the renovations would cost more than \$50,000, and Ms. O'Brien replied, "Yes." As Donald explained, for major renovations, there are two options – "customer living in home" or "customer not living in home." To determine which process to follow, Ms. Ebotoke asked:

**MS. EBOTOKE:** Okay. And are you going to be living in that home during the renovations or not?

**MS. O'BRIEN:** Yes.

**MS. EBOTOKE:** Yeah, you will be?

**MS. O'BRIEN:** I think so, yeah, that's my husband's plan.

[187] Ms. Ebotoke then told Ms. O'Brien that she needed to put her on hold because she was getting an error on her screen. Ms. Ebotoke called CRT for assistance and was connected with Dave. She explained that Ms. O'Brien was adding a third location to her Policy, that she was trying to sell the first location, that the new house was closing on Friday, and that her husband was "moving in on Saturday." Ms. Ebotoke also told Dave that the renovation would be more than 20 percent of the cost of the house and would cost more than \$50,000, so she was attempting to follow the procedure for "major renovation – customer is living in home during renovation or construction." She added that the new home was "literally across the street" and that "he's going to be there, sleeping there and moving a bed in there for him and whatever."

[188] After absorbing this information, Dave told Ms. Ebotoke that he needed to take her back a step in the process. In other words, they needed to revisit the "customer is living in home" portion of the process. He advised that she needed to ask Ms. O'Brien whether the home was going to be fully furnished or whether there would just be a bed. He said that since the new home was across the street from the O'Briens' current home, he "would imagine that it's not furnished." Dave then explained that "a lot of people" believe that just because they are going to be at a property every day, it means they are living there, but that, according to TD, being

at a property every day is not living there. Dave told Ms. Ebotoke that if the O'Briens were just putting a bed in the Property for Dr. O'Brien to sleep on every night, the home would still be considered unoccupied, and she would need to follow the process for "major renovation – customer is not living in home." He then reiterated that she still needed to ask the questions just to confirm whether the O'Briens' plan was in fact to only furnish the Property with a bed and for Dr. O'Brien to sleep there every night.

[189] When Ms. Ebotoke returned to the call, Ms. O'Brien advised:

**MS. O'BRIEN:** We don't know when we're going to start the renovations so don't even like ... you can just take that out of there. We're going to live in the house for now so ...

[Emphasis added]

[190] Without asking any clarifying questions whatsoever, Ms. Ebotoke proceeded to place coverage for the Property as an owner-occupied dwelling. This was the second breach of the standard of care.

[191] Up to this point in the conversation, any information provided by Ms. O'Brien to Ms. Ebotoke regarding anyone "moving in" or occupying the house was given while Ms. O'Brien was under the mistaken impression that she and her husband would be doing major renovations to the Property. As Ms. Ebotoke pointed out

during her cross-examination, the issue of renovations changes the quoting procedure entirely.

[192] For the first time since the call began, Ms. O'Brien removed renovations from the equation and told Ms. Ebotoke that, "We're going to live in the house for now." What did Ms. O'Brien mean by this statement? Did she mean that Dr. O'Brien was going to sleep on a bed in the otherwise empty house every night, as Ms. Ebotoke had reported to Dave immediately prior to returning to the call? If so, Ms. Ebotoke knew from Dave that this would not be enough to satisfy TD that Dr. O'Brien was living in the Property. Ms. Ebotoke would therefore have been required to advise Ms. O'Brien of the vacancy exclusions, and determine how she wished to proceed based on this new information. On the other hand, if Ms. O'Brien meant something entirely different by "*We're* going to live in the house for now", such as that she and her husband were both going to live in the Property, Ms. Ebotoke would have been required to confirm the occupancy of the existing home in order to ensure that it would not be left vacant.

[193] Whatever Ms. O'Brien meant, it was Ms. Ebotoke's responsibility to find out, so that she could properly advise her on coverage. As she stated in her own affidavit, "I am required to determine whether a property is going to be vacant or undergoing renovations in order to place the appropriate coverage and any applicable

endorsements or permits.” Ms. Etoboke’s failure to clarify whether the Property or the existing home would be vacant under the Policy and to properly advise Ms. O’Brien on the vacancy exclusions was negligent.

[194] There is some irony in the Respondents’ assertion that Ms. O’Brien “made *clear, unqualified representations* to Ms. Ebotoke that *she and her husband* would be ‘moving in’ within days, and that the Property would be ‘occupied’”. Ms. Ebotoke’s affidavit contained a similar statement at paragraph 17:

17. Based on the information provided by Ms. O’Brien that she and her husband would be living in the home and that no renovations would be taking place at this time, I determined it was not necessary to further pursue a vacancy or renovation permit for this Property. Accordingly, I proceeded to place coverage on the Property as an owner-occupied dwelling.

[Emphasis added]

[195] Ms. Ebotoke was quite clear on cross-examination, however, that she understood from the information provided by Ms. O’Brien that Ms. O’Brien would be living in the existing home at 6271 Oakland Road, while Dr. O’Brien would be living in the Property. This discrepancy only reinforces the conclusion that Ms. O’Brien’s representations were not clear and unqualified, and that Ms. Ebotoke had an obligation to ask further questions to determine what Ms. O’Brien meant when she said, “We’re going to live in the house for now.”

[196] The Respondents argue that even if the Applicants prove that Ms. Ebotoke breached the standard of care, they cannot establish causation. The Respondents cite *Clements v. Clements*, 2012 SCC 32, where the Supreme Court of Canada stated:

[6] On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) caused the injury. That link is causation.

...

[8] The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[197] While it is impossible to know for certain exactly what would have happened if Ms. Ebotoke properly advised Ms. O'Brien with respect to the vacancy exclusion, causation is determined on a balance of probabilities, based on the "but for" test. Certainty is not required.

[198] Based on all the evidence, I find that it is more likely than not that but for Ms. Ebotoke's negligence, the O'Briens would have taken the necessary steps to ensure that they had full coverage over the Property at the time of the loss. They would not have left the Property vacant.

[199] I am satisfied that if Ms. Ebotoke had explained to Ms. O’Brien – either at the time of the first breach of the standard of care or the second – that TD Insurance would consider the Property to be vacant unless she or Dr. O’Brien were living in it, and that exclusions of coverage would apply, the O’Briens would have asked questions, with a goal of ensuring that the Property was fully insured during any period of vacancy, i.e. that it would not be vacant in the eyes of TD Insurance. If I am wrong about the first breach and causation in the sense that there was no loss during the relevant period of time, I find that the second breach of the standard of care lead directly to the loss at issue.

[200] I find that the O’Briens would have taken such action, including, because Ms. O’Brien raised the possibility of one of them staying at the Property during the phone call with Ms. Ebotoke. Ms. OBrien said, “...is it better if one of us stays there, like how does that affect...I mean we can just walk across the street every day.”

[201] Having found that the Respondents were negligent and that this negligence caused the Applicants’ loss, there is no need to consider whether the same conduct amounted to a breach of the implied warranties contained in the *Consumer Protection Act*.

**Conclusion**

[202] The Application is granted. The Applicants are entitled to judgment against the Respondents in the amount of \$225,145.71, plus pre-judgment interest, costs, and disbursements. If counsel cannot agree on costs or pre-judgment interest, I will receive written submissions on same within thirty (30) calendar days of this decision.

Smith, J.