COURT OF APPEAL FOR ONTARIO

CITATION: Truong v. Jeweler's Mutual Insurance Company, 2024 ONCA 734
DATE: 20241007
DOCKET: COA-23-CV-0850

Zarnett, Monahan and Pomerance JJ.A.

BETWEEN

Dung Truong and Thuan Nguyen

Plaintiffs (Respondents)

and

Jeweler's Mutual Insurance Company

Defendant (Appellant)

Joyce Tam and Natasha O'Toole, for the appellant

William Wolfe, for the respondents

Heard: September 10, 2024

On appeal from the judgment of Justice Peter Daley of the Superior Court of Justice, dated July 5, 2023, with reasons reported at 2023 ONSC 4006.

Zarnett J.A.:

OVERVIEW

[1] In 2014 the appellant, Jeweler's Mutual Insurance Company ("Jeweler's Mutual"), issued a policy of insurance (the "Policy") to the respondents, Mr. Truong and Ms. Nguyen. The Policy insured six pieces of jewellery against various risks,

including theft. The value attributed to the jewellery in the Policy, based on appraisals supplied by the respondents at the time of the Policy, was $502,100.

[2] In May 2015, the respondents filed a proof of loss with Jeweler's Mutual seeking payment of $502,100 because the jewellery was stolen while they were travelling in Vietnam. Jeweler's Mutual requested information from the respondents, conducted interviews and questioned them under oath about when and where they acquired the jewellery. It then did not pay anything on account of the claimed loss.

[3] The respondents commenced an action. Although it did not allege that the respondents made any misrepresentation in obtaining the Policy, Jeweler's Mutual took the position, through to the end of trial, that the respondents had to prove they ever actually owned the jewellery and that they failed to do so.

[4] The trial judge found in favour of the respondents and awarded them $502,100 as compensatory damages for the loss of the jewellery. He also awarded a further $45,000 as punitive damages. He was of the view that the respondents never should have been put to the proof of their pre-Policy ownership of the jewellery because Jeweler's Mutual accepted the respondents' ownership when it issued the Policy – a policy it admitted had not been the result of any material misrepresentation. By not paying, and defending, on the basis that once there was a loss the respondents had to prove pre-Policy ownership, Jeweler's Mutual

attempted to impose an obligation on the respondents that would not have been reasonably expected by an insured and arrogated unto itself an un-bargained for right, in bad faith.

[5] Jeweler's Mutual does not challenge, on appeal, the trial judge's findings that the respondents owned the jewellery and that it was stolen from them as they alleged. It asserts, however, that there was no legal basis for an award of punitive damages, and that the compensatory damages were assessed on an incorrect principle.

[6] For the reasons that follow, I would dismiss the appeal.

[7] The trial judge did not err in awarding punitive damages. Whether an insurer's handling of a claim amounts to bad faith depends, in each case, on the facts. Deference is owed to such a finding absent legal error. In my view, no such error has been shown. It was open to the trial judge to find that Jeweler's Mutual had accepted that the respondents owned the jewellery when it issued the Policy and that Jeweler's Mutual acted in bad faith by investigating the claim, refusing to pay and defending the action through trial, on the basis that the respondents' pre-Policy ownership of the jewellery remained in question.

[8] There was also no reversible error in the trial judge's calculation of compensatory damages in the sum of $502,100 to reflect the loss payable under the Policy. Although the trial judge was in error to say, at one place in his reasons,

that Jeweler's Mutual was not permitted to rely on provisions of the Policy that specified what would be paid in the event of a loss, the error was of no moment. The trial judge calculated the loss on the basis of the appraised values of the jewellery reflecting its replacement cost, which was one of the bases the Policy prescribed for settlement of a loss. Jeweler's Mutual led no evidence that the other basis in the Policy, actual cash value, was less than the appraised values, and the evidence it points to on appeal does not justify that conclusion.

BACKGROUND

(1) The Jewellery, the Application and the Policy

[9] The jewellery includes three rings, a pair of earrings, a pendant, and a bangle, all made with gold and diamonds.

[10] The respondents decided to purchase insurance in anticipation of the risk of theft when travelling in Vietnam. They submitted an online application to Jeweler's Mutual initially for one of the diamond rings, with an appraisal certificate attached.

[11] The application form asked whether there had been previous applications for, cancellations of or denial of insurance, criminal convictions, or previous losses or theft of jewellery. The respondents answered no to each question. The application form required a description of the jewellery, information about who wears it and how often, and a statement of its replacement value, all of which were provided. The respondents advised the ring was worn daily by the respondent

Ms. Nguyen, and that its replacement value was $205,000 (as shown on the appraisal certificate). The application form required disclosure of whether the jewellery is stored in a safe and whether the insured's residence is in a gated community or has an alarm system – the answers to these questions were no in each case. The application form asked about the frequency of travel and safeguards for the jewellery while travelling. The respondents answered that there were one to three overnight trips per year, including overseas travel, and the jewellery is "with insured at all times".

[12] The application form required the respondents to acknowledge that the application was for an "insurance policy to repair or replace my jewellery" and that they acknowledge the "fraud warning" which appeared as part of the application form. The fraud warning stated that the Policy would be void if the property was falsely described to the prejudice of the insurer, or if any information that was material to the risk to be undertaken was misrepresented or fraudulently omitted.

[13] Jeweler's Mutual did not request evidence of ownership or insurable interest apart from the respondents' attestation in the online application. It issued the Policy in August 2014 without making any further inquiry of the respondents. In September 2014, the parties added the other five pieces of jewellery to the Policy, with the respondents providing further appraisal certificates for the additional items. The Policy as updated describes the six items in a schedule. It states the total value of the insured jewellery to be $502,100, the total of the appraisals.

[14] The Policy contained a proof of loss provision. In the case of a loss, the respondents were to provide "a signed, sworn, proof of loss" containing the following information:

> a. the date, time, place, and details of the loss;
>
> b. other insurance or service agreements that may cover the loss;
>
> c. "your" interest and the interest of all others in the "covered property" involved in the loss, including all liens and encumbrances;
>
> d. changes in the title of the "covered property" during the policy period; and
>
> e. an inventory of "your" lost and damaged "covered property". This must show in detail the quantity, description, cost, and actual cash value of the "covered property", and the amount of the loss. Copies of all bills, receipts, and related documents that substantiate the inventory must be attached.

[15] The Policy also contained loss settlement provisions that detailed what would be paid in the event of a loss. They stated:

> "**Insurable Interest** – "We" do not cover more than "your" insurable interest in the "covered property".
>
> **Our Loss Settlement Options** – "We" may at "our" option:
>
> a. repair, replace, or rebuild the "covered property"; or
>
> b. settle based on the actual cash value of the "covered property" at the time of loss.
>
> "We" may take all or part of the damaged "covered property" at the agreed or appraised value. "Covered

> property" that "we" have paid for or replaced will become "our" property.

(2) The Theft and the Investigation of the Claim

[16] After arriving in Vietnam, the respondent Ms. Nguyen carried the jewellery in her purse. On the evening of March 7, 2015, when the respondents were walking along a street in Can Tho City, two people on a motorcycle snatched Ms. Nguyen's purse and sped off.

[17] After returning to Canada, the respondents submitted a proof of loss, on Jeweler's Mutual's prescribed form. The proof of loss claimed the amount of $502,100 and described when the theft occurred. It provided no additional detail to the pre-printed statement: "[a]t the time of the loss the interest of your insured in the property described therein was: …". But it did not amend the statement: "[n]o other person or persons had any interest therein or encumbrance thereon…" and it described the loss payee as the respondent Truong. It also included the prescribed statement that the claim was not an attempt to deceive Jeweler's Mutual. It did not include any receipts for the purchase of the jewellery.

[18] Jeweler's Mutual's adjuster conducted an investigation. He sought authorization, which the respondents granted, to investigate their information with Canadian customs, local foreign exchange firms, and the relevant jewellery appraisers. He interviewed the respondents and had Mr. Truong take him to the jewellery stores in the Chinatown area of Toronto, asking him to confirm where the

jewellery was purchased. According to the adjuster's trial testimony, the purpose of visiting the jewellery stores in Chinatown was to "clarify, from the retailers, that they, in fact, sold him the pieces of jewellery."

[19] The respondents also attended under-oath examinations in January 2016 pursuant to the terms of the Policy. During the under-oath examinations, Jeweler's Mutual's representative again asked the respondents where they purchased the jewellery and requested undertakings for the purpose of "resolving the gaps in the insured's lack of ability to establish ownership of the articles."

[20] After the investigation and examinations, Jeweler's Mutual did not pay anything on account of the loss or issue a formal denial of coverage letter.

(3) The Action

[21] The respondents commenced an action, claiming payment for the loss of the jewellery and punitive damages.

[22] In its statement of defence, Jeweler's Mutual plead that "[t]he Policy was issued on the basis that the [respondents] had an insurable interest in the scheduled jewelry articles." The defence did not allege that the respondents made any misrepresentation as to their ownership of or insurable interest in the jewellery when they applied for the Policy or when it was amended to include additional items.

[23] During examination for discovery, Jeweler's Mutual's representative confirmed it was not alleging any material misrepresentation in the respondents' application for the Policy.

[24] At trial, Jeweler's Mutual continued to challenge the respondents' pre-Policy ownership of the jewellery. In opening submissions, Jeweler's Mutual's counsel (not Ms. Tam or Ms. O'Toole) explained that the evidence he anticipated the trial judge would hear did not show the respondents were "dispossessed of [their] articles". He added that [a]ppraisals don't show ownership" because "[a]nybody can bring anything to get appraised" and "[p]hotographs don't show ownership … [a]nybody could take a photograph of them wearing anything". He referred to the lack of "any documentary proof of ownership".

[25] During cross-examination, Jeweler's Mutual's counsel on multiple occasions highlighted the fact that the respondents could provide no receipts or bills of sale, and alleged inconsistencies between the respondents' trial testimony and their under-oath examinations with respect to where and how they acquired the jewellery. The cross-examination was not limited to questioning what the respondents had paid for the jewellery, but extended to challenging whether the respondents had purchased the jewellery at all.

(4) Trial Judge's Reasons for Judgment

[26] After reviewing certain principles of interpretation applicable to insurance contracts, including the mutual duty of utmost good faith, the trial judge determined that the Policy did not require the respondents, when submitting a claim, to prove that they owned the jewellery at the time of the Policy. He noted that the text of the Policy's proof of loss provision does not explicitly require proof of ownership; the parties entered into the Policy on the basis that the respondents owned and had an insurable interest in the jewellery when coverage was granted and Jeweler's Mutual had not required further evidence of ownership before granting coverage. He held that in such circumstances it did not comport with the reasonable expectations of the parties or good commercial sense to read in such a requirement at the time of loss. He observed that Jeweler's Mutual's interpretation would completely exclude coverage whenever, at the time of loss, documentary evidence of ownership was unavailable, resulting in "phantom insurance". He also noted that in its statement of defence Jeweler's Mutual had conceded that the respondents had an insurable interest at the time of Policy issuance.

[27] While proof of pre-Policy ownership was unnecessary, the trial judge went on to hold that the respondents had satisfied the burden of proving ownership. The respondents had acquired the jewellery in ways not conducive to easy proof of ownership. Two of the rings were gifts from Mr. Truong's mother when he and Ms. Nguyen got married in 1997. They purchased the other pieces from jewellery

shops in Toronto through a combination of cash and trading-in of other pieces of jewellery. They did not pay HST on or obtain a receipt from these transactions.

[28] While confirmation from the jewellery stores about these transactions was lacking and the respondents' testimony was, at times, inconsistent, the trial judge did not disbelieve their testimony. He inferred that the jewellery stores were reluctant to respond to inquiries about cash transactions and trade-ups due to potential taxation and legal ramifications. Further, he observed that although a poor historian, Mr. Truong gave a reasonable and believable account of events. Any confusion and gaps in Ms. Nguyen's testimony were attributable to her lack of direct involvement in the transactions and the fact that she spoke limited English. The trial judge concluded that their ownership of the jewellery was sufficiently corroborated by photos depicting Ms. Nguyen on many occasions wearing jewellery that the appraisers testified closely resembled what they appraised.

[29] The trial judge also found that the theft did occur, as the respondents alleged.

[30] The trial judge was aware that the mere denial of a claim that ultimately succeeds does not in itself constitute bad faith. He found, however, that this was not a case where an insurer acted on a possibly reasonable interpretation; instead, he considered that Jeweler's Mutual "put forward a purposeful and most unreasonable and unfair defence based on its completely untenable interpretation

of the contract of insurance in an attempt to impose un-bargained for obligations upon the [respondents]."

[31] The trial judge pointed out that the Policy was a standard form contract with a power imbalance and also a "peace of mind" contract. He acknowledged that punitive damages are reserved for a "marked departure from ordinary standards of decency" or "wrongful acts…so malicious and outrageous that they are deserving of punishment on their own."[1] He considered Jeweler's Mutual's conduct, in imposing post-loss requirements on an insured that would not have been reasonably expected at the time of the Policy, to have been "nefarious", "deceptive" and "entirely misleading", thus amounting to bad faith and warranting an award of punitive damages. He held that deterrence, punishment, and denunciation must be paramount because Jeweler's Mutual deals with a consumer market. He concluded that $45,000 in punitive damages was proportional to the overall award of damages to the respondents.

[32] The trial judge held that the respondents were entitled to the recorded value of each piece of jewellery as stated in the appraisals and Policy Declarations, totaling $502,100. He stated that he was applying the measure of compensatory damages for breach of contract of putting the respondents in the position that they

[1] Citing *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, and *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362.

would have been had the breach not occurred. He held that Jeweler's Mutual's breach of contract disentitled it from exercising the options under the Policy's loss settlement provisions. His explanation for this was brief: the respondents were purchasing peace of mind, and to "restore them to their position had the loss not occurred" required compensation at the appraised values.

ANALYSIS

(1) The Trial Judge Did Not Err in His Award of Punitive Damages

(i) Jeweler's Mutual's Position

[33] Jeweler's Mutual argues that the trial judge's award of punitive damages was flawed. It submits the applicable standard of review is correctness, because the award was based on a legal error in interpreting the Policy. That error was to consider its questioning of the respondents' pre-Policy Ownership, and its defence of their claim on that basis, as conduct that resulted from a "completely untenable interpretation of the contract of insurance in an attempt to impose un-bargained for obligations upon the [respondents]."

[34] Jeweler's Mutual relies on the general proposition that it is a condition precedent to recovery that the insured has an insurable interest, because the validity of the contract of insurance depends on it: *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2; *Assaad v. Economical Insurance Group* (2002), 59 O.R. (3d) 641 (C.A.). It argues that an insurable interest can change after the

grant of coverage and therefore an insurer is always justified in inquiring about the nature and extent of the insurable interest at the time of the claimed loss.

[35] Jeweler's Mutual goes on to argue that the Policy justified it questioning the respondents' insurable interest and defending their action on the basis that it had to be proven. It points to the proof of loss provision (excerpted earlier) under which the information required includes an inventory of the lost property along with "copies of all bills, receipts, and related documents that substantiate the inventory" (emphasis added). And it points to the Additional Duties provision of the Policy, which obliges a claimant to produce all records and documents relating to the value, loss, and cost of "covered property" as Jeweler's Mutual may "reasonably request". Referencing the trial judge's acknowledgment that the respondents' evidence at trial on their insurable interest was "at times confusing and contradictory", it submits that it could not be bad faith for Jeweler's Mutual to doubt their claim.

[36] Jeweler's Mutual also contends that its admission that the Policy was premised on the respondents' having an insurable interest and its confirmation that they had made no misrepresentation in obtaining the Policy are simply not germane.

(ii) Discussion

[37] In *Fidler v. Sun Life Assurance Co. of Canada,* 2006 SCC 30, [2006] 2 S.C.R. 3, the Supreme Court explained that a decision as to whether an insurer acted in bad faith rendering it liable for punitive damages is a contextual one, revolving around the facts of the particular case: at para. 72. The question in each case is whether the denial of insurance coverage was the result of the overwhelmingly inadequate handling of the claim or the introduction of improper considerations into the claims process: at para. 71. At para. 63 the court stated:

> In *Whiten*, this Court set out the principles that govern the award of punitive damages and affirmed that in breach of contract cases, in addition to the requirement that the conduct constitute a marked departure from ordinary standards of decency, it must be independently actionable. Where the breach in question is a denial of insurance benefits, a breach by the insurer of the contractual duty to act in good faith will meet this requirement. The threshold issue that arises, therefore, is whether the appellant breached not only its contractual obligation to pay the long-term disability benefit, but also the independent contractual obligation to deal with the respondent's claim in good faith. On this threshold issue, the legal standard to which Sun Life and other insurers are held is correctly described by O'Connor J.A. in *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29:
>
> > The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a

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

[38] Jeweler's Mutual's submission that an insured must have an insurable interest in the property at the time of the loss is correct. But it does not follow that in the context of this case Jeweler's Mutual was engaged in good faith handling of the claim in refusing payment, up to the end of trial, on the basis that the respondents did not prove pre-Policy ownership. It is one thing to question whether an insured who owned property at the time of the Policy thereafter disposed of or encumbered it before the alleged loss occurred, affecting the existence or extent of their insurable interest at the time of the loss. It is quite another to challenge whether the insured ever owned the property at the time it obtained the Policy.

[39] In this case, there is no suggestion with any air of reality to it that the respondents had disposed of or encumbered the jewellery at some point between the issuance of the Policy and the theft. This was not the focus of Jeweler's

Mutual's investigation, its questioning of the respondents, or its challenge to the credibility of their claim at trial. Rather, the focus was the alleged absence of proof that the respondents ever owned the jewellery.

[40] Nor do I agree that the trial judge was bound to consider Jeweler's Mutual's conduct to arise from a reasonable interpretation of the Policy because its proof of loss provisions contemplated substantiation of the inventory of the property lost, or because of its right under the Policy to require additional information. The question was not how those provisions operate in theory, but whether Jeweler's Mutual's conduct was justified by a reasonable interpretation of them given the factual context of this case. The requirement for substantiation did not specify any consequence if a particular form of substantiation was unavailable, and the right to additional information was limited by the terms of the Policy to information that Jeweler's Mutual might "reasonably require".

[41] The particular factual constellation in this case was that Jeweler's Mutual accepted that the respondents had obtained the Policy without making any misrepresentation. I do not accept the argument that the application for insurance was agnostic on the question of whether the jewellery the respondents were seeking to insure was theirs. The application referred to it as "my jewelry", and the information the respondents were asked to provide about it (who wears it, how is the respondents' residence safeguarded, what precautions are taken when travelling) was all consistent with their ownership of the jewellery. The application

confirmed that the respondents had not withheld any facts that would be material to the risk. It would undoubtedly have been material to the risk the insurer was being asked to undertake if the respondents were seeking to insure jewellery in which they had no interest. They would have made a material misrepresentation if they did not own the jewellery and applied to insure it as “my jewelry”.

[42] It follows that it was open to the trial judge to find that Jeweler’s Mutual, by accepting that there had been no misrepresentation, had accepted when it issued the Policy that the respondents owned the jewellery at the time. It was also open to him to interpret the terms of the Policy as not requiring substantiation of an already accepted matter – pre-Policy ownership – and to consider demands for further information and documentation to prove pre-Policy ownership to go beyond information that it could “reasonably require”.

[43] I also do not accept Jeweler’s Mutual’s characterization of how it handled the claim as simply asking questions. The trial judge properly characterized Jeweler’s Mutual’s conduct as being premised on an unjustifiable interpretation of the Policy that persisted through trial. Before litigation, Jeweler’s Mutual responded to the claim by questioning the respondents, and requiring them to point out where they purchased the jewellery and to provide substantiation. Its defence through to the end of trial challenged the respondents’ honesty about whether they ever owned the jewellery. I agree with the respondents that Jeweler’s Mutual, while not directly alleging misrepresentation, implicitly suggested that the respondents had

sought to insure and claim for jewellery they never owned, an assertion which is suggestive of fraud.

[44] The trial judge's conclusion as to whether Jeweler's Mutual breached its duty of good faith in the way it dealt with the respondents' claim was drawn from "a thorough review of the relevant evidence" about how the claim was handled and the basis on which it was defended. Absent legal error (which is not present) or palpable or overriding error of fact (which is not argued) his finding of bad faith is entitled to deference: *Fidler*, at paras. 73-75.

[45] Accordingly, I reject this ground of appeal.

(2) The Trial Judge Did Not Err in His Award of Compensatory Damages

[46] A trial judge's assessment of damages attracts considerable deference. It will not be interfered with absent an error of principle or law, a misapprehension of evidence, a showing that there was no evidence on which the trial judge could have reached his or her conclusion, a failure to consider relevant factors or consideration of irrelevant factors, or a palpably incorrect or wholly erroneous assessment of damages: *SFC Litigation Trust v. Chan*, 2019 ONCA 525, 147 O.R. (3d) 145, at para. 112, leave to appeal refused, [2019] S.C.C.A. No. 314, citing *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 80; and *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4th) 509, at para. 41.

[47] Jeweler's Mutual submits that compensatory damages should be calculated so as to put a plaintiff in the position they would have been in had the breach not occurred, but that in doing so the terms of the contract cannot be ignored. It submits that the trial judge erred when he found that Jeweler's Mutual could not rely on terms of the Policy that stipulate what would be paid in the event of a loss and instead valued the loss in accordance with the appraisals submitted at the time of the Policy.

[48] Although it acknowledges that the appraisals reflected the replacement value of the items, and this was one of the payment options under the Policy, it argues that another option was to pay the "actual cash value" of the jewellery. While that term is not defined in the Policy, Jeweler's Mutual submits it has an equivalent meaning to market value.

[49] I agree with Jeweler's Mutual that in assessing damages for breach of contract, where there are several ways in which the contract may be performed, damages are to be assessed on the basis of the mode of performance that would have been the least costly for the defendant: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at paras. 11 and 20. See also *SS&C Technologies Canada Corp. v. The Bank of New York Mellon Corporation*, 2024 ONCA 675, at paras. 131-34.

[50] The loss settlement provisions of the Policy contemplated payment of replacement value or actual cash value as modes of performance by Jeweler's Mutual in the case of loss. The trial judge's articulation of the measure of damages could only have led to an erroneous result if actual cash value was the less costly alternative, that is, if actual cash value was less than replacement value. The appraisals in this case reflect replacement value.[2]

[51] Jeweler's Mutual did not plead in its statement of defence that actual cash value should be the basis of the calculation of the respondents' damages, nor did it lead any evidence at trial of the actual cash value, at least in those terms. That distinguishes this case from *Lieberman v. Federation Insurance Company of Canada*, 2004 BCSC 572, 12 C.C.L.I. (4th) 265, where the court awarded an amount equal to the actual cash value of a ring, as opposed to its higher replacement value. There the court had evidence of both values: see para. 18.

[52] Jeweler's Mutual points, on appeal, to evidence from which it submits we could discern actual cash value, and fix it at an amount less than replacement value. It fairly concedes that it did not present these calculations to the trial judge. However, even if we were to consider the argument at this stage, the evidence does not support the conclusion we are asked to draw.

[2] Five of the six certificates of appraisal use the exact term "Replacement Value" and the other uses the close proxy "Retail Replacement".

[53] For example, Jeweler's Mutual points to references in the evidence about wholesale prices, but it conceded in argument that actual cash value was not the same as a wholesale price. It points to evidence that the purchase amounts reported by Mr. Truong of the four non-inherited pieces of jewellery were, on average, 14% lower than the appraised values for those items. But the purchases described by Mr. Truong occurred years before the appraisals and therefore the purchase prices would not necessarily reflect actual cash value at the time of the loss.

[54] Finally, Jeweler's Mutual points to evidence of the appraisers who testified that while major retailers would charge prices in accordance with the appraised values, individual jewellery stores may charge less in some circumstances. The evidence of one of the appraisers (Mr. Stern) was that while a major retailer would probably sell for more than the appraised amount, lower prices might be available "if you have a friend or something in the business". The other appraiser (Mr. Ho) confirmed that major retailers sell at "full" price and that discounts may be available at individual stores (in unquantified amounts) depending on who they were selling to or what was being sold.

[55] The evidence of Mr. Stern does not assist Jeweler's Mutual. Market value, or fair market value (to which actual cash value equates[3]), is defined as "the price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction" (see *Black's Law Dictionary*, at p. 1871). Prices that are hypothetically available in non-arm's length transactions (from a "friend… in the business") are not market transactions. Similarly, Mr. Ho's evidence of potential discounts in unquantified amounts contingent on what is sold and to whom is far too speculative to support the conclusion about actual cash value that Jeweler's Mutual asks us to draw. Indeed, the evidence that major retailers would sell at the appraised values – if not higher – undercuts the argument that actual cash value was lower than the appraised values the trial judge used.

[56] In order to succeed on this ground of appeal, Jeweler's Mutual must satisfy us that any error in the trial judge's articulation of the measure of damages had an effect on the outcome. I am not satisfied that the evidence shows that there was any effect on the outcome flowing from the trial judge's use of appraised values, regardless of his statement about the measure of damages. I would therefore reject this ground of appeal.

[3] See Bryan A. Garner, ed., *Black's Law Dictionary*, 12th ed. (Saint Paul: Thomson Reuters, 2024), at p. 1871.

CONCLUSION

[57] I would dismiss the appeal.

[58] In accordance with the agreement of the parties, I would award costs to the respondents in the amount of $15,000 inclusive of disbursements and applicable taxes.

Released: October 7, 2024 “B.Z.”

“B. Zarnett J.A.”
“I agree. P.J. Monahan J.A.”
“I agree. R. Pomerance J.A.”