Case Name:

Brandiferri v. Wawanesa Mutual Insurance Co.

Between
Salvatore Brandiferri and Linda Brandiferri, and
The Wawanesa Mutual Insurance Company and Strone Construction

[2012] O.J. No. 2869

2012 ONSC 2206

[2012] I.L.R. I-5303

Court File No. 60185/01

Ontario Superior Court of Justice

P. Lauwers J.

Heard: May 24-25, May 30 to June 3, June 6-8, 14-15, 23-24, 2011.
Judgment: June 22, 2012.

(220 paras.)

Insurance law -- Actions -- By insured against insurer -- Property coverage -- Defences -- Fraud -- Actions by plaintiffs against construction company and insurer for damages arising from house fire allowed, in part -- Plaintiffs awarded $108,257 to return home to pre-fire condition and punitive damages of $100,000 against insurer -- Garage and its contents were destroyed and smoke penetrated house -- Insurer counterclaimed for $600,000 against plaintiffs, alleging that they had acted fraudulently in making claim -- Plaintiffs did not commit fraud in preparing and filing proofs of loss -- Fraud allegation was high-stakes litigation strategy designed to intimidate plaintiffs -- As insurer was a repeat offender, it had to be punished significantly.

Insurance law -- Property insurance -- Household or homeowner's policies -- Actions by plaintiffs against construction company and insurer for damages arising from house fire allowed, in part -- Plaintiffs awarded $108,257 to return home to pre-fire condition and punitive damages of $100,000 against insurer -- Garage and its contents were destroyed and smoke penetrated house -- Insurer counterclaimed for $600,000 against plaintiffs, alleging that they had acted fraudulently in making claim -- Plaintiffs did not commit fraud in preparing and filing proofs of loss -- Fraud allegation was high-stakes litigation strategy designed to intimidate plaintiffs -- As insurer was a repeat offender, it had to be punished significantly.

Construction law -- Liability -- Of contractors and subcontractors -- Duties -- Duty to owner -- Damages -- Cost of completion -- Actions by plaintiffs against construction company and insurer for damages arising from house fire allowed, in

part -- Plaintiffs awarded $108,257 to return home to pre-fire condition and punitive damages of $100,000 against insurer -- Garage and its contents were destroyed and smoke penetrated house -- Insurer counterclaimed for $600,000 against plaintiffs, alleging that they had acted fraudulently in making claim -- Construction company liable for deficient remedial construction work -- No reason to require plaintiffs to settle for less than adequate reconstruction.

Damages -- Types of damages -- Exemplary or punitive damages -- Punishment and deterrence -- Actions by plaintiffs against construction company and insurer for damages arising from house fire allowed, in part -- Plaintiffs awarded $108,257 to return home to pre-fire condition and punitive damages of $100,000 against insurer -- Garage and its contents were destroyed and smoke penetrated house -- Insurer counterclaimed for $600,000 against plaintiffs, alleging that they had acted fraudulently in making claim -- Plaintiffs did not commit fraud in preparing and filing proofs of loss -- Fraud allegation was high-stakes litigation strategy designed to intimidate plaintiffs -- As insurer was a repeat offender, it had to be punished significantly.

Actions by the Brandiferris against Strone Construction and the insurer, Wawanesa Insurance, for damages arising from a fire at their home on August 8, 2000. The garage and its contents were destroyed and smoke penetrated the house. In the first action, the plaintiffs claimed that Strone Construction was liable for the deficient remedial construction work on their house. In the second action, the plaintiffs claimed that the insurer was responsible for Strone's poor work. They also claimed for the loss of personal property and for additional living expenses that they incurred. The plaintiffs' homeowners' insurance policy provided them with coverage for the house, personal property, and additional living expenses. The policy provided guaranteed replacement cost coverage for the house and the contents. The policy had a single inclusive limit of $564,000. The insurer claimed that it paid the following amounts: building $377,755, contents $46,660, and additional living expenses $54,613, for a total of $479,029. The plaintiffs sought additional payments under each of these heads, and punitive damages. The fire was in the attached garage at the front of the house. There was no apparent fire damage to the interior of the house but there was extensive smoke damage. In order to remove the stench of smoke, the contaminated material had to be replaced. Some surfaces were painted over using a fixative after being cleaned. The smoke damage turned out to be much more extensive than anyone understood at the outset. The insurer arranged for two contractors to attend at the house to provide estimates for the costs of repair. The plaintiffs were out of the house from the date of the fire until February 27, 2005. Strone conceded that the repairs to the house were not completed and that there were deficiencies. The insurer admitted that as of the time Strone stopped working on the project, the house was nowhere near its pre-fire condition. The insurer counterclaimed for $600,000 against the plaintiffs, alleging that they had acted fraudulently in making their claim.

HELD: Actions allowed, in part. The plaintiffs were awarded $108,257 to return the home to the condition it was in before the fire, and punitive damages of $100,000 against the insurer. There was no reason to require the plaintiffs to settle for less than adequate reconstruction. The plaintiffs were entitled to compensation to allow them to re-build the house to the original standard. The insurer did not formally elect to rebuild under statutory condition 13 to avoid the risk of a costly re-build of the home. Once it became clear that the reconstruction effort would not reach a happy end, the insurer backed away after making a final payment to Strone, and left the plaintiffs and Strone to their own devices. The insurer built itself a middle position in which it controlled the cash flow and also controlled the reconstruction. The contract to do the reconstruction was with Strone and not with the insurer. However, the insurer was the plaintiffs' agent for the purpose of paying Strone. Despite the plaintiffs' express instruction not to make the final payment, the insurer did so, breached its obligation as agent for the plaintiffs in

respect of that payment, and improperly expended $149,542 of the plaintiffs' money. These were funds that would otherwise have been available to the plaintiffs to remediate Strone's work. In the event that the plaintiffs were unable to make full recovery from Strone for any amount owing by Strone, the insurer was obliged to make up any deficiency in Strone's payment up to the amount of $149,542. Any amounts paid would not be new money and would not count against the insurance policy's single inclusive limit. The plaintiffs had a duty to mitigate their damages in relation to additional living expenses. The insurer was liable for additional living expenses but its liability for rent, ongoing expenses for both the house and the plaintiffs' rental property, storage expenses, and any other related charges accordingly ended on March 30, 2002. The plaintiffs did not commit fraud in preparing and filing the first or subsequent proofs of loss, even though they sought to maximize their recovery. The fraud allegation was late breaking and was only made after the action was started in the statement of defence and counterclaim. This was a high-stakes litigation strategy designed to intimidate the plaintiffs. As the insurer was a repeat offender, it had to be punished significantly.

Statutes, Regulations and Rules Cited:

Insurance Act R.S.O 1990, c. I.8, s. 128, s. 131

Ontario Rules of Civil Procedure, Rule 53.03

Counsel:

A. Kwinter/J. Singer, for the Plaintiffs.

B. Jenkins, for the Defendant Strone Construction.

M. Forget/A. Dix, for the Defendant Wawanesa Mutual Insurance Company.

REASONS FOR DECISION

1 **P. LAUWERS J.:**-- On August 8, 2000, there was a fire at the plaintiffs' home at 34 Granite Street, in Woodbridge, Ontario. The garage and its contents were destroyed and smoke penetrated the house. In one action the plaintiffs claim that Strone Construction is liable for the deficient remedial construction work on their house; in the other action the plaintiffs claim that their insurer, the Wawanesa Mutual Insurance Company is responsible for Strone's poor work. They also claim for the loss of personal property and for additional living expenses ("ALE") that they incurred. The actions were tried together without a jury.

2 The plaintiffs' homeowners' insurance policy with Wawanesa provided them with coverage for the house, personal property, and additional living expenses. The policy provided "guaranteed replacement cost" coverage for the house and the contents. The policy had a "single inclusive limit" of $564,000.00. Wawanesa asserts that it paid the following amounts: building $377,755.57, contents $46,660.85, and ALE $54,613.00 for a total of $479,029.42. The plaintiffs seek additional payments under each of these heads, and punitive damages.

3 The onus is on the plaintiffs to establish their loss: *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Limited*, [2009] O.J. No. 1879, 2009 ONCA 388 at para 75. For the reasons that follow, I hold that the plaintiffs have met this onus and are entitled to judgment under all of these heads, but not in the amounts claimed.

Background facts

4 The Brandiferri residence was in excellent condition. The fire was in the attached garage at the front of the house. The dynamic of a fire is that super heated air expands and moves from the location of the fire. It travels through the accessible open spaces in the building, carrying along with it soot and other products of combustion that are deposited on the surfaces where the smoke flows. There was no apparent fire damage to the interior of the house but there was extensive smoke damage. In order to remove the stink of smoke the contaminated material must be replaced. Some surfaces can be painted over using a fixative after being cleaned. The smoke damage turned out to be much more extensive than the Brandiferris, Wawanesa, or Strone understood at the outset.

5 Wawanesa appointed an experienced employee, Al Benzie, as adjuster. He arranged for Bachly Construction to attend on the scene and secure the site. Urban Clean, a Bachly-related company, arrived and removed the "soft" furniture, the clothing and the linens. Some of the soft furniture was cleaned and returned to the Brandiferris. The clothing and linens were sent by Urban Clean to Crest Cleaners for cleaning. This material was later destroyed in a fire at Crest Cleaners in December 2002.

6 Strone removed the "hard" furniture in the house, cleaned it and stored it in a warehouse. It was returned the week before the trial and some of it was damaged. Strone retained it until then, at least in part, because the Brandiferris did not pay warehousing fees after Wawanesa stopped paying them.

7 As is its custom, Wawanesa arranged for two contractors to attend at the house to provide estimates for the costs of repair. They were "insurance restorators," which is a specialized restoration service for fire damage. Both had the status of "preferred contractors" with Wawanesa.

8 Bachly Construction provided an initial estimate to carry out the repairs for $44,778.00 on August 15, 2000, and a revised estimate of $68,814.59 on Tuesday, September 12, 2000.

9 Strone Construction provided an estimate of $82,328.18 on September 11, 2000. Mr. Brandiferri selected Strone Construction as the contractor because its estimator Tony Diceglie spoke Italian. Strone provided a revised estimate on January 9, 2001, in the amount of $249,431.11, about three times larger than its original estimate. On June 7, 2001, Strone provided another revised estimate of $352,454.13. The trajectory of the estimates shows that there was much more damage to the house than anyone originally thought.

10 The Brandiferris were out of the house from the date of the fire until February 27, 2005. Occupancy was prevented in part by various orders to comply issued by the City of Vaughan, which ultimately inspected the house, lifted the orders to comply, and issued an occupancy permit on February 24-25, 2005.

11 The facts in this case oblige the court to determine the following issues:

1. Is the absence of an appraisal under the *Insurance Act* R.S.O 1990, c.I.8, as amended, fatal to the plaintiffs' claim?
2. Are the plaintiffs entitled to compensation because the house was not completely or acceptably restored?
3. Are the plaintiffs entitled to compensation for additional living expenses?
4. Are the plaintiffs entitled to compensation for missing, damaged or destroyed items of personal property?

5. Did the plaintiffs commit fraud in completing the proofs of loss?
6. Should the plaintiffs receive punitive damages?

Issue 1: Is the Absence of an Appraisal Fatal to the Plaintiffs' Claim?

12 Wawanesa takes the position that an appraisal under section 128 of the *Insurance Act* is a condition precedent to an action on an insurance policy:

> **128.** (1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.
>
> Appraisers, appointment
>
> (2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire.
>
> Appraisers, duties
>
> (3) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any two determines the matters.

13 Wawanesa submits that the requirement for an appraisal has not been waived in accordance with section 131 of the *Insurance Act*. Mr. Forget submits: "that as the Brandiferris have brought this action without determining the amount at issue by way of appraisal, there cannot [be] recovery under [the] policy." This, Mr. Forget asserts, is the effect of Statutory Condition 11, which provides:

> In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefore is made in writing and until after proof of loss has been delivered.

14 Mr. Forget submits that, by including Statutory Condition 11 in the insurance contract, the parties agreed:

> ... to give effect to a process to encourage a quick settlement of the loss and to facilitate the use of the expertise of an appraiser. The parties agree before there can be a recovery under the contract whether the right to recover on the contract is disputed or not, and independently of all other questions to have the value of the insured property or properties saved or amount of loss determined by an appraisal.

15 Wawanesa relies on *Saskatchewan Government Insurance v. Nipawin (Town)*, [1999] I.L.R. 1-3651 (B.C.C.A.), *Seed v. ING Halifax Insurance*, [2002] O.J. No. 1976 (S.C.J.), and *Greer v. Co-operators General Insurance Co.*, [1999] O.J. No. 3118 (S.C.J.) at para. 8.

16 On June 5, 2001, Mr. Benzie had a conversation with the broker. Mr Benzie raised the prospect of an appraisal as Wawanesa's "likely option." Shortly afterwards Wawanesa made an all-in offer to the Brandiferris communicated by the broker. On July 3, 2001, the broker called Mr. Benzie and advised him that the Brandiferris had rejected the offer and Mr. Benzie noted that he responded: "O.K., We will go the appraisal route."

17 On July 5, 2001, Alistair Riswick notified Mr. Benzie that he had been retained by the Brandiferris to pursue the claim. On July 13, 2001, Mr. Benzie wrote to Mr. Riswick and indicated that if matters could not be resolved Wawanesa wanted "to have the entire matter to Appraisal, as provided for under The Insurance Act (sic)."

18 Mr. Riswick confirmed agreement with the process of appraisal by fax letter dated August 23, 2001. On August 29, 2001, he advised Mr. Benzie that the Brandiferris had appointed Ron Koerth of Walters Forensic Engineering to be their appraiser.

19 Mr. Joel Kuchar assumed carriage of the file from Mr. Riswick and advised Mr. Benzie by letter dated October 17, 2001, that in his view the issues were largely about the quality of the reconstruction. He stated, "In the circumstances, I am concerned that proceeding by way of Appraisal at this point might not be the best way to address the issue of quality repair work, as opposed to value." He invited further discussions but they were fruitless.

20 The action then proceeded in the way of ordinary civil litigation and the Brandiferris passed the Trial Record on October 23, 2003.

21 On March 23, 2004, after his discovery examination of Mr. Phin, Mr. Kuchar wrote to Mr. Forget and proposed an appraisal: "This dispute now once again appears to have been reduced to one of valuation of loss, and an appraisal would now once again appear to be the most sensible way of proceeding." He proposed postponing the examination for discovery of the plaintiffs so that the appraisal process could resume.

22 Mr. Forget responded by letter dated March 24, 2004, insisting that the plaintiffs' discoveries proceed, and said: "In any event, it [Wawanesa] takes the position that your client is not entitled [to] an appraisal." Mr. Kuchar wrote back on April 19, 2004, requesting re-consideration, without success.

23 In light of the correspondence I find it to be plain that Wawanesa, through its counsel Mr. Forget, waived its right to insist on an appraisal, in writing, and therefore cannot now insist that it is a condition precedent to the plaintiffs' right to recovery in this action.

Issue 2: The House

24 The plaintiffs seek $178,093.74 in compensation from Wawanesa and from Strone for the fact that the house was not completely or acceptably restored. They say this is what it would cost to put things right, relying on an estimate prepared by Chris Jones of ProCare Restoration.

As per ProCare estimate of April 2004 $172,189.62

For basement ceramic tile	$ 19,850.05
Total	$152,339.57
As per Strone Estimate for driveway interlock	$ 25,754.17
Total	$178,093.74

25 The Brandiferris also seek to recover for the cost of installation of a heat recovery ventilator system and some amounts for partial remediation carried out by ProCare. I address those claims below.

26 The factual question is whether the home was completely and acceptably repaired. The legal question is which of Wawanesa or Strone are responsible for any incompleteness or deficiencies in the quality of the work done. I address the factual question first.

Was the Brandiferri Home Completely and Acceptably Repaired?

27 Strone concedes that the repairs to the house were not completed and that there were deficiencies. Mr. Jenkins made the following submissions on Strone's behalf:

> Stone has never taken the position in this lawsuit that either: (a), it finished the job or (b), that the work was satisfactory. That's never been the position. The only issue is what's the value of the work to be finished and whether all or a portion of the brick work has to be replaced.

28 Mr. Phin is a claims manager with Wawanesa Insurance. He was Mr. Benzie's superior and occasionally substituted for him in the adjustment of the Brandiferri claim - Mr. Benzie is long retired and did not testify. In cross-examination Mr. Phin admitted that: "as of the time that Strone stopped working on this project, this house was nowhere near its pre-fire condition."

29 Wawanesa blames Mr. Brandiferri for the unfortunate outcome, at least in part, because he was unreasonable; Mr. Phin complained that "he was standing behind them at every step of the way, and he was constantly asking for more, more and more things to be addressed." Wawanesa submits that:

> ... the Brandiferris were involved in every step of the repair. They met with sub-trades; they monitored the work; they criticized the work; they stopped the work; they demanded more work; they demanded the removal of Tony on the project; they demanded and agreed to extras; they had other contractors do some of the work; they kicked Strone off the site and authorized them to return; and they even directed Wawanesa not to pay Strone in January 2001 ...

These factual assertions are all true.

30 In cross-examination, however, Mr. Phin acknowledged the legitimacy of many

of Mr. Brandiferri's complaints. He testified, for example:

> Q. And if somebody is covering smoky insulation, and the homeowner believes that if it's covered, it's going to still smell from smoke, is he entitled to yell and scream and call Mr. Benzie or the adjuster?
> A. Of - of course he is.

31 In my view it was entirely appropriate for the Brandiferris to monitor the work, and, where it was incomplete, to demand more work; it was entirely appropriate for them to demand the correction of deficient work. For the most part it was Mr. Brandiferri's doggedness that identified areas of the house that needed remediation, which led to the much higher estimates from Strone that Wawanesa covered. In general terms Mr. Benzie, Wawanesa's adjuster, was sympathetic to the Brandiferris and approved the changes to Strone's scope of work as necessary, although he eventually balked, especially regarding repairs that he saw as extras.

32 The adjuster's notes are replete with notes on disputes with the Brandiferris about certain items such as window replacement, whether the entire roof should be re-shingled or only the part that was burnt, whether cabinets needed to be replaced, and so on. On a number of occasions Mr. Benzie gave in to the Brandiferris and on other occasions he did not. I see this as typical of the to-and-fro that would occur in any reconstruction project.

The Brickwork

33 A major element of the deficiency is the brickwork, which Mr. Phin admitted in cross-examination was deficient:

> Q. That's something that doesn't quite put the house back?
> A. It's a cosmetic disaster, yes ...
> Q. And you wouldn't want to patch that job, would you?
> A. No ..., it should be done properly.

34 The brickwork was done by Medi Group Incorporated as a subcontractor to Strone. According to the engineering report prepared by Michael Picco of Picco Engineering, Medi Group Incorporated did not install the parging below the brick line on the foundation, but this assertion is mistaken, since the parging is identified in a Wawanesa deficiency list dated March 20, 2001.

35 The most comprehensive critique of the brickwork is found in the engineering report prepared for Strone by Barry P. Kozluk, a professional engineer with Rochon Engineering. His report, dated December 6, 2001, noted that the brick veneer on the entire dwelling was removed and replaced over the winter of 2000-2001. This report notes that the parging was done in conjunction with reinstallation of the brick veneer. Mr. Kozluk's report noted "numerous deficiencies":

1. Excessive thickness in both horizontal and vertical mortar joints in the southwest quoin of the garage, along the garage west elevation, along the west elevation of the main dwelling adjacent to the garage, in the soldier course above the first floor windows along the west and north elevations and on the north elevation on either side of the patio door;
2. The mortar joints at the second level elevation along the east side of the dwelling, adjacent to the northeast corner, were not raked out to produce consistent concave joints that matched the remaining mortar joints along this elevation;
3. The southeast quoin of the attached garage was not constructed

square;

4. A lightened colour in the mortar joints existed in the vicinity of the southeast quoin on the mail dwelling, along the west elevation of the dwelling and along the north elevation of the dwelling;
5. Missing weep holes at the brick ledge along the east elevation and overtop of the basement windows in various locations;
6. Covered up weep holes along the north elevation where an abutting brick pacing stone walkway was installed at the exterior grade level;
7. The parging on the exterior face of the foundation walls was applied overtop of the bottom course of brick veneer on all elevations, as well as, the cement parging was installed up to 15 mm thick which eliminated the required brick overhang along the brick ledge; and,
8. Mortar deposits on the face of the brick veneer along the east elevation of the garage, isolated locations along the east elevation of the main dwelling, along the west elevation of the garage and main dwelling and along the north elevation, as well as, mortar stains on the precast windowsills.

36 Mr. Kozluk noted that weep holes were missing and it was not clear if flashings were present underneath. He was of the opinion that the original flashings were not properly installed since they did not extend out to the face of the brick veneer, but this was also true of the adjacent dwellings built by the same builder. Mr. Kozluk was critical of the parging because it acts as a dam along the underside of the brick veneer. He also noted that the brick pavers at the exterior grade level and along the north elevation were above the bottom course of the brick veneer, as a result of which the weep holes, flashing and the brick ledge had been covered, which prevents the moisture behind the brick veneer from dissipating.

37 Mr. Kozluk recommended isolated repair or reconstruction of sections of the brick veneer. He recommended that the southwest quoin of the garage be reconstructed, the west elevation of the garage, and the west elevation of the main dwelling next to the garage, the north elevation on both sides of the patio door and in the southeast quoin of the garage. The mortar joints lacked appropriate pigment and should be routed out and repointed. In addition, there ought to be cleaning of the remaining brickwork and the removal of the parging. Mr. Kozluk took the position that a total removal and reinstallation of the brick veneer was not required in order to rectify the deficiencies.

38 Mr. Kozluk's recommendations and report were accepted by Picco Engineering on behalf of Medi Group Incorporated, whose employees did the brickwork. Mr. Picco agreed that repairs could be done without the need to re-brick the entire house.

39 Strone accepted Mr. Kozluk's report, and in its letter of November 15, 2001 to Wawanesa, indicated that the remedial work should be done after the winter of 2002. The work was never done.

40 Dan Walters of Construction Control Inc. prepared a report for Mr. Brandiferri dated October 5, 2001. His report contains photographs of the deficiencies in the brick work. He took the position that the deficiencies could only be properly corrected by replacing the brickwork.

41 Ron W. Koerth is a professional engineer working with Walters Forensic Engineering. He authored a report dated September 28, 2001, for the Brandiferris, and observed:

> The exterior brick veneer work was of very poor workmanship, with mortar joints that varied from 1/8 in. to nearly 1 in., joint lines

> at the front entrance (highly visible) that varied out of level up to 1/2 in. over 48 in., efflorescence, and other visible defects. During a re-attendance for the collection of an air sample we performed an invasive examination of the brick and determined that there were more serious deficiencies pertaining to the inadequate installation of through-wall flashings as well as an improper application of a parge coat to the foundation walls above grade.

42 Mr. Koerth took the position that the brick deficiencies could not be adequately rectified without completely removing and replacing the exterior brick walls.

43 Pina Naccarato, the Brandiferris' daughter, gave evidence, which I accept, that there is now routinely water in the basement after a rain and that did not happen before the fire.

44 Robert McEwen is a professional engineer retained by Strone. In his report dated September 14, 2010, he noted:

> There was evidence of water penetration into the basement, damaging walls and the basement kitchen cupboards.
>
> I could find no structural defects resulting from the fire in 2000, and noted that water damage to the building components had occurred after repairs had been made. The water damage could be the result of improper wall flashing installed when the brick veneer was replaced and could also be due to deterioration of the perimeter foundation drain. Either condition could allow water to penetrate into the basement.

45 In argument for Strone, Mr. Jenkins notes that the plaintiffs are not claiming for water damage but instead are using the fact of water penetration as a rationale for replacing all of the brick veneer on the house. Proving that the brick veneer was installed negligently leading to water in the basement would require destructive investigation to get to the bottom of the flashing issue, but the plaintiffs did not do it. The evidence of the engineers sets out a number of possible reasons for water in the basement including parging, pavers covering the brick veneer at the back of the house, and grading at the back of the house in violation of the *Ontario Building Code*. Mr. Jenkins asserts that the evidence does not permit the court to conclude that the faulty brickwork is the cause of water damage. He submits that the plaintiffs have not proven the claim.

46 Mr. Jenkins submits, as recommended by Rochon Engineering, that the most reasonable thing to do in the circumstances would be to replace the bricks at the front and the back of the house but not on the sides. I assume that this submission is based on the notion that only the front and the back of the house are visible and the problems with the brickwork are purely cosmetic.

47 An estimate for replacing the brickwork was prepared by Chris Jones of ProCare Restoration and is included in his April 2004 estimate. To replace the brickwork and parging, and to do the associated work would cost about $48,000.00.

48 The defendants urge the court to require only limited reconstruction of the brickwork. I see, however, no compelling reason to require the Brandiferris to settle for less than adequate reconstruction. The Brandiferris are entitled to compensation to allow them to re-build the house to the original standard. As Mr. Phin conceded: "it should be done properly." The evidence of Mr. Jones on the cost was not contested. I see no reason to deduct part or all of the cost from the ProCare estimate.

49 The precise cause for the water in the basement has not been determined conclusively. The engineering evidence is somewhat mixed. Perhaps only destructive testing would reveal the truth. On balance, however, because of the timing of the basement flooding and in the absence of any other compelling plausible explanation, there is sufficient engineering opinion to surmise that something the installation of the brickwork and parging has caused the home to be susceptible to basement flooding. That said, this prospect did not drive me to the conclusion that the brickwork and parging ought to be remedied, but simply points to a possible beneficial side effect of that repair.

The Rest of the House

50 Mr. Jenkins argued for Strone that the benchmark report in terms of other deficiencies was the Construction Control report written by Dan Walters. It notes on the first page that "the repair work was substantially complete at the time of our inspection." This same thought appears in the report of Ron Koerth of Walters Forensic Engineering, which notes at page 2: "At the time of our attendance [August 19, 2001] the house was essentially complete except for the main level kitchen, which was not present, and minor finishing details." Further, the Fisher Environmental report of October 23, 2003, noted that: "The property with the exception of electrical outlet installation, washer and fan installation, and baseboard finishing, appears to be in near completion form ..."

51 Strone accepts the statement of deficiencies in the Construction Control report and quarrels only with the observations about the brickwork noted above. Mr. Jenkins submits that the report is very detailed and is backed up by photographs and Mr. Walters' evidence for Construction Control; its detail makes it reliable since it noted, for example, such picayune details as a nail pop and a crooked light switch.

52 Mr. Jenkins was prepared to accept the accuracy of the cost figures in the ProCare estimate of April 20, 2004, for the items it addressed but submits that any items identified by Mr. Jones in the ProCare estimate that are not in the Construction Control report should not be considered by the court. He gave two reasons for this submission. First, Mr. Jones deferred to the Construction Control report in his evidence. Second, Mr. Jones was not a properly qualified expert under rule 53.03 of the *Rules of Civil Procedure* so that any additional information he provided that went beyond the scope of the Construction Control report was not properly admissible; I decided this issue to the contrary in my ruling at 2011 ONSC 3464, [2011] O.J. No 2724. Accordingly, I advised Mr. Jenkins that I wanted to hear from him on a detailed review of the ProCare report to determine what, if anything else, ought to be recognized by the court as either incomplete or deficient.

53 Mr. Jenkins attacked a number of items in the ProCare Restoration estimate. First, he argued that ProCare's estimates to refinish parquet floors in various rooms and closets were not corroborated by the Construction Control report and therefore should be ignored. The references are:

Page 3 $1,548.92

Page 3 $1,775.83

Page 4 $1,930.10

Page 5 $1,029.38

Page 13 $ 473.16

Page 14 $ 322.76

Total $7,080.15

54 I see no reason to reject to Mr. Jones's evidence that these floors should be properly refinished. I therefore decline to deduct this amount from the ProCare estimate.

55 At a number of points in the estimate, ProCare notes that the Strone estimate had numbers for retiling floors, but this work was not done. In Mr. Jones's opinion it was not necessary. I accept Mr. Jones' opinion. I therefore dismiss the plaintiffs' request for compensation for this item. The related figures are:

Page 16 $ 3,350.00

Page 17 $ 10,278.37

Page 17 $ 804.11

Page 18 $ 1,476.72

Page 19 $ 1,143.17

Page 20 $ 445.36

Page 21 $ 1,932.98

Page 21 $ 419.34

Total $ 19,856.05

56 Mr. Jenkins argues that a number of items ought to be deducted as not appropriately part of the repair:

Page 2	$645.00 for the intercom system hook-up and replacement.
Pages 3, 6 and 9	$985.26 for chandeliers in Strone's possession

	at $328.42 each.
Page 23	$280.00 for additional gravel on the flat roof.
Page 4	$2,362.99 to install fireplace and damper but there had not been one before
Page 22	$625.30 to install a fire-rated door from the house to the garage.
Page 25	$4,500.00 to install a heat recovery ventilator.

57 I agree with Mr. Jenkins that the chandeliers should be deducted. Though I recognize that Strone added some gravel to the roof, I accept Mr. Jones' opinion that more was needed so I decline to deduct anything for this. I agree that the fire-rated door is an extra. To avoid double counting I deduct the amount reserved in the original ProCare estimate for the heat recovery ventilator unit. Accordingly, this creates a deduction on these miscellaneous items of $6,110.56. I address the fireplace issue below.

58 The heat recovery ventilator was not included in the Strone estimate. But, as noted below, Strone did not fully remediate the fire damage behind the drywall in the living room. There were also a number of chemical smells. Accordingly, I find that the remedial work done by ProCare and referred to in its invoice of November 23, 2004, was reasonable and is properly compensable, including the heat recovery ventilator. It consisted of the following:

Deodorize using ozone	$1,500.00
To supply and install HRV unit	$4,500.00
To supply and install new thermostat	$ 150.00
Total	$6,150.00

59 ProCare did work to render the house habitable and eligible for an occupancy permit under an estimate dated February 24, 2005. It is also plain that the Brandiferris asked for extras which are not properly part of Strone's deficiencies. These include:

The supply and installation of seven valance fixtures	$1,128.54
The installation of a wire and microwave	$ 455.00

Work related to the installation of a gas fireplace	$5,127.00
Page 9 Offset to remove fireplace and replace the drywall as per Strone estimate	$1,050.00
Page 15, ProCare	
To supply and install exhaust fan and re-wire the vent including drywall repair.	$ 554.72

The net adjustment is $6,215.26.

60 Mr. Jenkins submits that the glass tub shower doors, caulking, and large wall mirrors in two bathrooms were not appropriately charged since these items do not appear in Strone's estimate. It was pointed out, however, that the drywall in these rooms needed to be replaced because of the smoke smell after Strone had left the site. I find that these items are properly part of the work that Strone should have done, for which Wawanesa should have paid.

61 The Brandiferris seek $25,754.17 to replace the driveway brickwork that was stained in the fire. I decline to order this as an element of compensation since Mr. Jones made provision in his estimate for chemical cleaning of the driveway and there is no evidence that a chemical wash would not work.

62 Pulling the various numbers together, I find that the following calculation sets out the additional amount needed to put the Brandiferri home in the condition that it was in before the fire:

ProCare estimate of April 20, 2004	$134,104.06
Deduct amounts reserved for tile floors	$ 19,856.05
Deduct miscellaneous items	$ 6,110.56
Deduct work done under estimate of February 25, 2005	$ 28,339.88
Add cost on November, 2004 ProCare invoice	$ 6,150.00

Add cost to complete finishing work identified in McEwen & Associates report		$ 4,267.25
Total	$ 90,214.82	
Overhead at 10 per cent		$ 9,021.48
Profit at 10 per cent		$ 9,021.48
Total	$108,257.78	

Appropriate taxes must be added.

The Allocation of Legal Responsibility for the House Repairs

63 The plaintiffs seek to make both Strone and Wawanesa liable. The legal issue is whether Wawanesa is liable to the plaintiffs for deficiencies in the completeness or acceptability of the house repairs carried out by Strone. This depends on Wawanesa's status throughout the repair process.

64 There are a few ways to construe Wawanesa's status. The first is that Wawanesa elected under statutory condition 13 to repair the house using Strone; the plaintiffs adopt this position, which would impose responsibility for the incompleteness and deficiencies in Strone's work on Wawanesa. The second is that the Brandiferris hired Strone as their contractor, with Wawanesa paying the costs under the insurance policy; this is Wawanesa's position, which would leave Wawanesa responsible for repairs left incomplete, but Strone responsible for deficiencies. The third is some hybrid of the two others; this is effectively the plaintiffs' alternative argument based largely on Wawanesa's failure to adequately police Strone's work. These alternatives are discussed below.

Did Wawanesa Elect to Repair the Brandiferri House?

65 Statutory Condition 13 provides:

> (1) The Insurer, instead of making payment, may repair, rebuild or replace a property damaged or lost, giving written notice of its intent to do so within thirty days after receipt of the Proof of Loss
> (2) In that event the Insurer shall commence to repair, rebuild, or replace the property within forty-five days after receipt of the proofs of loss and shall thereafter proceed with all due diligence to the completion thereof. (emphasis added)

66 It is common ground that Wawanesa did not provide such written notice to the Brandiferris. Mr. Kwinter relies on various authorities for the proposition that formal compliance with the rules of election is not always required for the court to find that the insurer has made the election. In *Dorset v. Royal Insurance*, [1999] NWTJ No. 130, the court refused to grant summary judgment in favour of an insurance company in the same position as Wawanesa where the work was controlled by an

external adjuster hired by the insurance company.

67 In *Northwest Electric Company Limited and Rosen v. Switzerland General Insurance Company, et al.*, [1976] 6 W.W.R. 446, [1976] S.J. No. 301 (Q.B.), the court noted that the actions of an insurer can constitute an election by the insurer to repair (para. 26, at page 455). This election can occur before the proofs of loss are received (para. 29, at page 456). Disbery J. noted that once the insurer elects to repair, it must do so completely, whatever the cost (para 31, at page 456); this is the insurance company's "gamble."

68 Wawanesa takes the position on building coverage that: "if the insured repairs or replaces the damaged property on the same location with buildings of same occupancy constructed with materials of similar quality within a reasonable time after the damage, then he or she will be entitled to the cost of the repair or replacement (whichever is less) without deduction for depreciation." Wawanesa says that since the Brandiferris decided to rebuild the house, they were entitled under the policy to recover the cost of repairing the premises with materials of similar kind and quality. Wawanesa asserts that: "the contract for repair of the premises is between the Brandiferris and Strone and Wawanesa cannot be held liable for any breach of that contract."

69 Mr. Forget relied on a number of authorities for the proposition that there is no contract between the insurance company and the contractor who repairs the house. Instead, he argued that the contractual relationship is between the plaintiffs and Strone and that Wawanesa is a stranger to their contract and is not responsible for any deficiencies.

70 In *Bowen v. Guardian Insurance Company*, [1992] B.C.J. No. 901 (S.C.), the plaintiff argued that the deficient repairs were undertaken by the insurer. The court found that the restoration firms were retained by the plaintiffs' daughter as their agent. The adjuster appointed by the insurance company who was an independent contractor gave evidence that he did not retain contractors on behalf of the insurer or the insureds but only proposed names that were familiar to him which the insureds accepted. Melvin J. found that "As the contractual arrangement is between the plaintiffs and those contractors, in my view, the plaintiff(s) can have no claim against the defendant for the alleged inferior quality of workmanship." Melvin J. went on to find that the insurance company remained responsible for certain incomplete limits of repair. He also added that the plaintiffs were obliged to actually replace the items in order to take advantage of the replacement costs endorsement.

71 In *N. & H. Contracting Ltd. v. Royal Insurance Company*, [1993] B.C.J. No. 45 (C.A.), the insured sued the insurer for the costs of repairing deficiencies in the contractor's work. The contractor testified that its contract was with the insurer and not the insured. The trial judge accepted this evidence but the Court of Appeal reversed, holding at para. 58 that the trial judge misapprehended the evidence: "There was no reason for the insurer entering into a contractual relationship with a contractor of the kind found by the trial judge." The Court of Appeal found that the insurance company had not exercised the option to replace set out in statutory condition 13 (para. 34). The court held that the contract was between the contractor and the insured and that the insurer's obligation was to pay for the repair. The court rejected the fact that the insurer's cheque was made jointly payable to the owner and the contractor against the owner's delivery of an interim proof of loss as establishing that there was a contractual arrangement directly between the insurer and the contractor.

72 In *Gebhard Hoelzler Construction Ltd. v. Seidler*, [2006] B.C.J. No. 1090 (S.C.), appeal dismissed, [2008] B.C.J. No. 283 (C.A.), the plaintiff contractor sued the defendant building owner for payment under a construction contract following a fire. The trial judge followed *N. & H. Contracting Limited v. Gordon* in

concluding that the adjuster retained the contractor on behalf of the building owner and not on behalf of the insurer. The trial judge noted at para. 23:

> However, that practical accommodation does not change the fundamental nature of the insurance contract. The insurer had no obligation under the policy to directly undertake repairs to the building or to directly enter into a contract with a contractor. Nor is there anything in the policy that gave the insurer power to impose its choice of contractor on the defendants.

73 The Court of Appeal dismissed the appeal finding that there was sufficient evidence about the building owner's participation and acquiescence to conclude that: "The defendants impliedly consented to the adjuster hiring the plaintiff as a contractor to affect the specified work. The insured could not have made this decision on the owner's behalf without the owner's consent. The insurer's only duty was to pay the indemnity due under the policy" (para. 22). At paras. 23 and 24, the court said:

> **23** As well as giving implied authority and consent to BCAC to act as its agent in contracting with the plaintiff, the defendants also exercised effective control over the contract between themselves and the plaintiff. The evidence discloses that one or more of the defendants were on site from time to time to monitor the plaintiff's work while it was effecting the repairs. The defendants gave instructions, criticized the work done, and authorized extra work not contained in the specifications. When they were not satisfied with the work, the defendants effectively stopped payment on the second cheque for $50,000 by refusing to endorse it. Ultimately, the defendants terminated the contract when the defendant Ingobert Seidler telephoned the plaintiff to advise that the defendant did not want anyone from the plaintiff company in their building (trial judge's reasons para. 8).
>
> **24** Neither the insurer nor the adjuster could have overridden the owners' decision to terminate. To repeat, the insurer's only obligation was to indemnify its insured. The adjuster could neither authorize nor approve anything not agreed to by the owner.

The Facts Related to the Contractual Status of Wawanesa and Strone

74 As noted, Wawanesa arranged for two insurance restoration contractors to attend at the house and provide estimates for repairing the house. The Brandiferris chose Strone. They could have picked Bachly or another contractor of their own choosing.

75 Mr. Phin testified that in all of his years at Wawanesa, the company has never elected to proceed under statutory condition 13. He testified that Wawanesa proceeded under the terms of the insurance contract, which provide:

> If you repair or replace the damaged or destroyed building(s) on the same location, with building(s) of the same occupancy constructed with materials of similar quality within a reasonable time after the damage, you may choose as the basis of loss settlement either (A) or (B) below; otherwise, settlement will be as in (B).

76 Clause (A) was to pay the "cost of repairs or replacement." The policy had a guaranteed replacement cost-coverage, which insures the dwelling to 100 per cent of its replacement cost and permits the repair of the building "constructed with

material of similar quality."

77 Mr. Phin explained the dynamic in the contractual language. The insured selects the contractor of his choice and enters into a contract with it. Mr. Phin expected but was not sure that a copy of each estimate or "scope of work" was given to the Brandiferris when they were prepared. I am satisfied that the first Strone estimate was provided to the Brandiferris before the work began but they did not receive copies of the other two when they were delivered to Wawanesa.

78 Mr. Phin asserts that the contract between Stone and the Brandiferris consists of the authorization for Strone to proceed and the scope of work prepared by Strone and provided to Wawanesa. Mr. Kwinter ridiculed this position, pointing out that a number of important elements including the cost of the repairs and the timing are not addressed.

79 In my view the customer authorization dated September 20, 2000, is sufficient to form a contract between Strone and the Brandiferris. I note that the language does contemplate the involvement of Wawanesa:

> I, Salvatore Branbiferri (sic), authorize Strone Construction to proceed with the necessary restoration services to my damaged dwelling and/or contents and understand and agree that the cost of repairs and/or cleaning is to be approved by my adjuster. I hereby authorize and direct my insurers to pay the insurance proceeds directly to Strone Construction and this shall by my insurers' sole authority for so doing. I hereby agree to pay Strone Construction the sum of $0 (waived by Insurance Adjuster applied towards content loss), which represents the deductible portion required by my insurance coverage.
>
> Should I require work which is not covered under my insurance policy, I agree to enter into a separate agreement with Strone Construction and agree not to direct trades to complete such work without an authorization.

80 As noted, Mr. Benzie was sympathetic to the Brandiferris and approved the changes to Strone's scope of work as necessary. Mr. Kwinter submits that the important point to note is that Strone would not do work without Mr. Benzie's prior approval. He was a frequent visitor to the house and often performed a mediation function between the Brandiferris and Strone.

81 Mr. Phin was adamant that there is no contract between Wawanesa and Strone. At the same time, he admitted that "Wawanesa controlled all the cheque payments here" (page 104), noting that this was because of a written "direction to make payment to Strone" signed by Mr. Brandiferri.

82 Mr. Phin acknowledged that Wawanesa had agreed to pay for and did pay for a building permit to be taken out by Strone as recommended by the engineer. The adjuster therefore knew that a building permit was required. In cross-examination Mr. Phin said:

> Q. And isn't part of monitoring the site to make sure that the requisite building permit has been obtained by whoever's doing it, as part of your monitoring duties?
> A. I think in - in - in better practice, yes.
> Q. And it should have been done here, shouldn't it?
> A. Yes.

83 Mr. Phin admitted that Wawanesa would only "make a payment when they believed that certain work was done and done right." He testified:

> Q. All right. And you'll agree with me that it was Wawanesa's obligation in controlling the payments, and not making payment until proper inspections had been done to insure, before they made all the payments that they made, that the house was restored to its pre-fire condition. Is that a fair statement?
>
> A. Yes.

84 Wawanesa made a final payment to Strone on October 1, 2001 of $149,542.01. Mr. Phin conceded that when he authorized the final payment there was still work to be done, something that he only found out after the cheque had been sent. He takes the position, however, that Wawanesa is not responsible for any deficiencies (page 110), which were "between Strone and them to sort out."

85 Mr. Phin admitted that Mr. Benzie should have done a final inspection before the cheque was issued by Wawanesa. In cross-examination he said:

> Q. Well, now that you've found that you cut the cheque and Strone hasn't corrected their mistakes, do you recognize Wawanesa's obligation to having made that error in paying them?
>
> A. Yes.

86 Mr. Phin admitted that: "there's an instruction right in Mr. Benzie's notes not to pay ... And that was ignored." He admitted that he was: "pretty surprised to see all those deficiencies listed ... And - and to - and to find out that the work that the - the actual work itself, hadn't been completed, actually, we were very upset ... we'd been taken advantage of." Mr. Phin admitted that he never wrote an objecting letter to Strone about what happened nor did Wawanesa take third-party action against Strone.

Discussion

87 As noted, there are three possible findings the court can make. The first is to find that Wawanesa elected to reconstruct the house under statutory condition 13. The second is to find that the Brandiferris elected to rebuild the house, which would impose on Wawanesa the obligation to pay in accordance with the policy. The third is a hybrid of the other two.

88 The insurer's risk or "gamble," to use the word of Disbery J. in *Northwest Electric Company Limited*, is that if it elects to rebuild then it must do so completely, whatever the cost. Wawanesa did not formally elect to rebuild under statutory condition 13 precisely to avoid that risk. Once it became clear that the reconstruction effort would not reach a happy end Wawanesa backed away after making a final payment to Strone, and left the Brandiferris and Strone to their own devices.

89 Wawanesa has built itself a middle position in which it controls the cash flow and *de facto* also controls the reconstruction, as is shown by Mr. Benzie's extensive involvement even on a day-to-day basis and by Strone's refusal to work without his authorization. I find that Wawanesa's actions and its degree of control were not sufficient, however, to amount to an election under statutory condition 13. I find that, as the plaintiffs allege in their statement of claim against Strone, the contract to do the reconstruction was with Strone. It was not with Wawanesa.

90 That said, in my view Wawanesa was the Brandiferris's agent for the purpose

of paying Strone. The Brandiferris withdrew their authorization for Wawanesa to make the final payment to Strone. In its Statement of Law, Wawanesa makes a critical admission: the Brandiferris "even directed Wawanesa not to pay Strone in January 2001 suggesting in their minds they had the control to stop the payment, which Wawanesa concedes they did."

91 Despite the Brandifferis' express instruction not to make the final payment, Wawanesa did so, breached its obligation as agent for the Brandiferris in respect of that payment, and improperly expended $149,542.01 of the Brandiferris' money. These are funds that would otherwise have been available to the Brandiferris to remediate Strone's work. In my view the situation is analogous to the payment by an owner in the face of a construction lien and must have the same result as matter of equity. I hold that in the event that the Brandiferris are unable to make full recovery from Strone for any amount owing by Strone under this decision, Wawanesa is obliged to make up any deficiency in Strone's payment up to the amount of $149,542.01. Any amounts paid would not be new money and would not count against the insurance policy's single inclusive limit.

92 I have found that the cost of bringing the house back into the condition it was in before the fire, which is the Brandiferris' entitlement under the insurance policy, is $ 108,257.78. I recognize that some of the elements may be more in the nature of incomplete repairs than deficiencies; if work is to be done for which Strone was not compensated, it is properly the responsibility of Wawanesa under the insurance policy. The difficulty is that by co-operating in the defence of the two actions, neither Strone nor Wawanesa assisted the court by identifying repairs that would fall into the category of deficiencies and those that would fall into the category of incompleteness. I find them to be severally liable for their respective shares of the additional cost of remediation. In the event that they are unable to sort out those respective shares within 30 days of the date of this decision, I will hear further evidence and argument.

Issue 3: Additional Living Expenses

93 The Wawanesa policy provided coverage for additional living expenses:

> **Additional Living Expense:** If an Insured Peril makes your dwelling unfit for occupancy we insure any necessary increase in living expenses, including moving expenses incurred by you, so that your household can maintain its normal standard of living. Payment shall be for the reasonable time required to repair or rebuild your dwelling or, if you permanently relocate, the reasonable time required for your household to settle elsewhere.

94 Wawanesa submitted that the coverage indemnifies the insured for any "necessary" increase in living expenses "incurred" while the dwelling is not fit for occupancy. It takes the position that ALE coverage is only for the "reasonable time required to repair the dwelling".

95 The Brandiferris left the house on the day of the fire and moved into Ms. Naccarato's home. Her brother Fabio went to live at the Dodge Suites Hotel. The Brandiferris left Ms. Naccarato's house in September 2001 and moved into a rental property at 102 Comoq Avenue, Woodbridge. They moved from that rental house back into the property in February 2004.

96 The Brandiferris make the following claim for more payments on account of additional living expenses from August 8, 2000, until February 2004; they also make the same claim for compensation from Strone for its delay:

> $18,068.90 outstanding amount paid by plaintiffs to Travelodge for

Fabio.

$68,400.00 total rent incurred for 102 Comoq from September of 2001 to February of 2004.

$9,074.94 total hydro and gas difference for maintaining two homes.

$3,258.15 Mini-Warehouse storage charges.

$4,500.00 paid to Urban Clean for the return of contents of home.

Total $103,301.99

97 Wawanesa says that it spent $56,692.56 on ALE. Mr. Benzie terminated payments for ALE at the end of August or September 2001, with hotel bills paid through to October 1, 2001, on the basis that the Brandiferris could have been back in the house by then (the evidence is not entirely clear on the termination date for payments selected by Mr. Benzie). Mr. Benzie also appeared to be of the view, according to his letter to the Brandiferris' lawyer dated September 20, 2001, that ALE had been paid to the policy limits, which Wawanesa now concedes was not the case in view of the policy's single inclusive limit.

98 Mr. Forget argued that the work required to complete the dwelling, render it habitable, and comply with the Orders to Comply so that an occupancy permit could be obtained, was relatively modest; the Brandiferris were obliged by the general duty to mitigate to attend to these repairs within a reasonable time. Strone submitted that the house could have been sufficiently remediated to permit occupancy by ordinary people well before the date on which the Brandiferris returned. The fact that they have been living in the house since returning without complaint shows that there are no ongoing difficulties and that the Brandiferris could have moved back into the house much sooner.

99 Ms. Naccarato testified that the Brandiferris were advised by Mr. Kuchar, their lawyer at the time, that Wawanesa and Strone had the responsibility to complete the construction of the house and that the Brandiferris had no obligation to do so. It was not until Messrs. Singer and Kwinter came on the scene that the Brandiferris set about getting the house ready to occupy again.

100 When would it have been reasonable for the Brandiferris to have returned to the house?

101 Ms. Naccarato complained to the Building Standards Department of the City of Vaughan about the property on August 20, 2001. This led to an inspection. An Order to Comply was issued on August 29, 2001.

102 Strone's last day on the job was about November 15, 2001. Mr. Benzie's notes record a conversation with Neil Blinco, Chief Executive Officer of Strone Construction on December 6, 2001. Mr. Blinco said that the deficiencies mentioned in his letter to Wawanesa on November 15, 2001, had all been repaired with the exception of the brick work which should wait until the spring. The notes report another conversation with Mr. Blinco on December 11, 2001. Thereafter the notes largely deal with legal matters.

103 Another Order to Comply was issued on July 18, 2002, and a third on August 19, 2002. On September 23, 2002, Strone wrote to the City of Vaughan stating: "This letter will service (sic) to confirm that Strone has restored this residence back to its existing condition prior to the fire using materials and/or components to retain the existing character." On September 27, 2002, the City of Vaughan issued a

building permit. On October 1, 2003, the City of Vaughan inspected the property and issued another Order to Comply. Strone sent a letter on October 6, 2003, and an engineering report to the City.

104 In order to get back into the house, the Brandiferris retained ProCare to complete the necessary work to make the house habitable, to comply with the Orders to Comply issued by the City of Vaughan, and to obtain the necessary occupancy permit. The work by ProCare took about six weeks, starting on January 21, 2004, and ending February 27, 2004. The City inspected the house on February 24 and 25, 2005, lifted the Orders to Comply and issued an occupancy permit.

105 Mr. Jenkins submitted that the Brandiferris' delay in moving back into the house was unreasonable. Mr. Brandiferri said in discovery that they did not move back earlier because of the persistent smell of smoke.

106 The smoke issue was addressed in the evidence of David Fisher, whom I qualified as an expert witness to give evidence on environmental concerns relating to the remediation of fire damage to the plaintiffs' home in my ruling at 2011 ONSC 3200, [2011] O.J. No. 2723. Mr. Fisher provided four reports. In his first report dated October 23, 2003, he noted that "a faint smoke smell is still present." He added that:

> After spending one and half-hour at the house I experienced dry throat, which persisted for two hours after vacating the premises. People prone to allergies should not reside in the house in the present state, due to the omni-present paint odours and smoke.

107 Mr. Fisher took the view, in assessing the air testing results in the Walters Forensic Engineering report of September 28, 2001, that "the general air quality inside the subject house is unacceptable." He recommended that a significant course of ventilation be undertaken.

108 In the Walters Forensic Engineering report, Mr. Koerth concluded that:

> The tabulated data does not contain any of the chemical compounds normally found in atmospheres containing "smoke" or fire damage odours. Fires involving wood and plastic materials produce chemical compounds known as aldehydes and styrenes, neither of which has been found in the gas sample that was analyzed.

109 Mr Koerth then reviewed the results of the tests in detail and concluded:

> None of the detected compounds are present to a sufficient concentration to be considered a health hazard, although many of these compounds, in the concentrations noted, could be bothersome to sensitive individuals and produce headaches and nausea.

110 Mr. Koerth gave the opinion that the compounds "should be expected to decrease in intensity with increased ventilation and time." He added that, because of:

> ... the discomfort for sensitive individuals living in the house ... these concentrations should be significantly reduced before the house is occupied. This could be done through passive ventilation (opening windows) but would take more time than active ventilation, which can be performed through the installation of a permanent HRV (heat recovery ventilator) unit ... given the apparent high usage of solvent-laced products to remediate the smoke damage and the failure

> to-date of passive ventilation to reduce the concentration of these chemicals, the installation of an HRV system may be a practical consideration in this case.

111 In his report dated December 13, 2004, Mr. Fisher noted that he had carried out testing and stated: "In conclusion we consider the house free of detectable hydro carbon. Further, no indication of mould contamination was detected."

112 In his report dated September 14, 2005, Mr. Fisher carried out some drywall cut-outs:

> Inspection in the dining room ceiling revealed that some of the wood joists that were painted over badly charred joists. The wood preservative and sealer did not fulfill their intended purpose. Smoke has penetrated into the wood fibres and samples of wood chips show raw smoke and soot still impregnated on wood. The I-beam has been painted over without removal of black soot from the fire. In the electrical panel a black stain is still present, indicating smoke damage.

113 In his report dated October 13, 2010, Mr. Fisher commented on the test results assessed in report done by Air Quality Engineering Inc. for Strone. The author of that report, Tonu Petersoo was not called as a witness. Mr. Fisher noted: "The report from Air Quality Engineering was that many chemicals are indeed fire related and not from gasoline, diesel and other related fuels and solvents. In particular, the turpene family of chemicals are products of wood tars and benzo-related chemical in our products of incineration of household materials." He concluded: "We have not visited the house for a considerable period of time and if after all this time the listed compounds are still present in the house, then there is a very strong suspicion that this house needs significantly more systemic remediation or ultimately a complete demolition."

Discussion

114 I find that the Brandiferris did have a duty to mitigate their damages in relation to additional living expenses. Little if anything appears to have happened with the house after December 11, 2001, in terms of further repairs by Strone. Mr. Benzie met with Mr. Kuchar, who represented the Brandiferris at the time, on December 18, 2001. There was a stand-off with the Brandiferris that crystallized, in my view, when Mr. Kuchar reported to them in late December since it was then plain that Wawanesa was not prepared to fund more work but only to settle. Had the Brandiferris responded on a timely basis to this development, they would have contacted the City of Vaughan by the end of December 2001 for a further inspection and then they would have had the work completed.

115 The evidence satisfies me that there was a smoke problem in the house that was eventually remediated by repairs and by the installation of the heat recovery ventilator unit to capture residual odours. I do not find that the Brandiferris were unusually susceptible to such odours. Nor do I find, however, that the odours justify the additional delays in returning to the house.

116 I find that it would be fair and reasonable, in determining the date by which the Brandiferris ought to have been able to return to the house, to give them another notional twelve weeks to get an estimate, to complete the paperwork and to have the work done on the house; this would bring the reasonable occupancy date to March 30, 2002. That is the last day on which Wawanesa would accordingly be responsible for further payments of ALE. The damages figure for ALE must be calculated on that basis.

117 Wawanesa complained that the Brandiferris received too much money for additional living expenses. Wawanesa noted that it paid $4,000.00 a month for eight months to the Brandiferris while they were living in the Naccarato house. Ms. Naccarato admitted that she did not charge her parents rent so that this money went to them entirely. She testified, however, that Mr. Benzie was fully aware of the arrangement. There is no evidence to contradict her since Mr. Benzie did not testify. Wawanesa has not established that these payments were made in response to a fraudulent claim. I find that Wawanesa is not entitled to any offset for the money paid to the Brandiferris while they were living in Ms. Naccarato's house.

118 Wawanesa is liable for ALE but its liability for rent, ongoing expenses for both the house and the Comoq Avenue rental, storage expenses, and any other related charges accordingly ends on March 30, 2002. If the parties cannot agree on the number, I may be spoken to.

Issue 4: Personal Property

119 The plaintiffs claim compensation for certain items of personal property that were irreparably damaged by the fire. The insurance policy provided the following coverage:

> We will pay for all other personal property on an Actual Cash Value basis unless the Declarations indicate otherwise.
>
> If the Declarations indicate that REPLACEMENT COST ON CONTENTS is included:
>
> a. We will pay for all other personal property on the basis of Replacement Cost; and
>
> "REPLACEMENT COST" means the lower of:
>
> 1) the cost of repairing the property with material of similar kind and quality; or
> 2) the cost of new articles of similar kind, quality and usefulness; on the date of the loss or damage, without any deduction for depreciation.
>
> If you choose to settle the loss on an Actual Cash Value basis and then decide, within 180 days after the date of loss, to replace any destroyed or stolen property, you can make an additional claim for the difference between the Actual Cash Value and Replacement Cost basis.
>
> "ACTUAL CASH VALUE" will take into account such things as replacement cost less depreciation. In determining depreciation we will consider the condition of the article immediately before damage, its resale value and its normal life expectancy.

120 There are four general categories of personal property: the contents of the garage, the clothing and other cloth items like sheets, table cloths and so on that could be laundered or dry cleaned, the soft furniture such as couches and carpets, and the hard furniture such as tables and chairs, cabinets, dishware and so on.

121 Mr. Phin explained that the typical process, which was followed in this case, is that the adjuster appointed by Wawanesa immediately arranges for the site

to be secured and first steps to be taken to salvage goods. As noted above, Mr. Benzie dispatched Bachly Construction and a company related to it called Urban Clean, to the Brandiferri house. Urban Clean removed the clothing from the house and sent it to Crest Cleaners to be cleaned. It retained the soft furniture and carpets to clean. Wawanesa had Strone remove the hard furniture and goods from the house for restoration and repair.

The Contents of the Garage

122 On November 20, 2000, Ms. Naccarato sent a schedule of loss to Mr. Benzie that included a list of the items that were in the garage when it burned. Mr. Benzie responded by letter dated December 6, 2000, enclosing a cheque for $10,000.00 as "interim payment toward the submission." He raised questions about a number of the items including the value on a bicycle of $2,185.00 and advised that there is a limit on bicycles in the amount of $500.00 under the policy. He also noted that there was a claim for automobile parts in the amount of about $2,618.00 and the policy limited recovery to $1,000.00. Mr. Benzie asked whether the tools were used for business purposes. Mr. Benzie also observed that: "a number of the replacement cost amounts for various of the items on the list appear to indicate values that are higher than such items generally available at retailers". He pointed out that some of the items lacked sufficient detail in the description to be able "to confirm an accurate evaluation."

123 Ms. Naccarato responded by letter dated January 7, 2001, and explained why there were so many tools in the garage. Her brother Fabio had been studying to become a licensed mechanic and her father had been an iron worker with tools of his own. She noted that: "The prices of the tools were determined by a trade catalogue but if you feel that these prices were too high then please use your own judgment in determining their fair value."

124 Wawanesa adjusted the claim for the contents of the garage. On February 12, 2001, Wawanesa paid $6,000.00 on this particular claim and $1,822.73 for a washer and dryer. The Brandiferris' are not "disputing that in this action" and are not seeking more funds for the contents of the garage.

The Goods at Crest Cleaners

125 Ms. Naccarato testified that Mr. Benzie presented three items of clothing from Crest Cleaners to her parents who refused to take them because of their odour. Ms. Naccarato testified that there was "a chemical smell" on the items and that she would not have worn them herself. Mr. Benzie's note is that on November 1, 2001, he spoke with Ms. Naccarato to set up an attendance at Crest Cleaners for her parents to examine the clothing. The Brandiferris inspected the bottom of two racks of their clothing and rejected all of it because of the unpleasant odour.

126 Ms. Naccarato assembled the revised Schedule of Loss for clothing in 2004 or 2005 by valuing the items on the inventory list provided by Crest Cleaners. Ms. Naccarato explained that she valued the items of clothing according to their nature. Items that were likely bought at Sears were valued using Sears' figures. Items that were bought at expensive Italian shops were valued by looking at comparable items on the internet, particularly American sites including Neiman Marcus. The back-up material was voluminous and was provided to Wawanesa. Ms. Naccarato was completely transparent about her information sources.

127 The amount claimed on the revised Schedule of Loss for Crest Cleaners was $79,876.62, mostly for clothing but there were some household materials on the list. Ms. Naccarato derived that number by going through the schedule of clothing from Crest, and depreciating the total by 30 per cent to arrive at the actual cash value. This was explained by Ms. Naccarato as having been recommended by the public

adjuster Steven Kay, who was experienced in the area, as the standard way of approaching the calculation. Mr. Kay could not be found to give evidence. Wawanesa offered no contrary evidence.

128 Ms. Naccarato was cross-examined at length on the claim related to the clothing and other items sent by Urban Clean to Crest Cleaners. To summarize her evidence, she admitted that her parents shopped at the Bay and Sears and similar outlets for their everyday clothing. However, they also attended a number of social events, particularly weddings, for which her mother had special dresses. These were purchased at Italian specialty shops and were typically used only once. Her father had good Italian suits for those events, also purchased from Italian speciality shops. Included in the more luxurious clothing were Ms. Naccarato's own wedding dress, and some very good coats including leather jackets owned by her brothers.

129 On the list provided by Crest, seventeen were items identified as "fancy dresses." Correspondence from Crest clarified that the word "fancy" meant, as Mr. Forget explained: "It usually pertains to an article that had something more than ordinary. For example, it may have a fancy lace, some beadwork, special trim that may require special attention during the cleaning process."

130 Mr. Forget's typical cross-examination pattern in respect of a particular item of expensive clothing was to seize upon a description in the back-up material provided by Ms. Naccarato and then to challenge both the make of the item and its cost. For example, he asked:

> Q. Do you agree that your mother did not have a Marquesa dress for $1,080.00?
>
> A. No, but she had something that had beadwork coming down with sequins, which she wore.

131 Elsewhere, the following exchange occurred:

> Q. Do you agree that your mother did not - a Valentino coat - a Valentino $1,800.00 coat? [sic]
>
> A. She did not have - may - she may not have had a Valentino coat, but she did have a very good quality cashmere coat, which is expensive to replace. (page 316)

132 Concerning her father, the following exchange occurred:

> Q. You agree that your father did not have an Armani suit? Are you taking - is your - do you agree with that?
>
> A. There was an Italian suit that he purchased and I asked him how - because they were both sitting with me - we were going through the pictures trying - I'm not looking. I was just basically trying to prepare this my father goes something similar to that, thinking George Armani, thinking quality, thinking good quality material.
>
> Q. And, so your answer to that is - did your father own an Armani suit? Yes or no? Or did he just have a blue suit?
>
> A. He had - I, I - Hugo Boss, one hundred per cent he had. My father says, at one time, a Muscotta (ph), one time an Armani. He was giving me several but what he clearly said was that he did have a suit from Italy and he would wear it from time to time. It's no longer there.

133 In cross-examination, Mr. Phin admitted using Urban Clean as a "preferred vendor". He agreed with the statement that: "Wawanesa arranged, as part of its clean-up and removal, for all items to be taken out of the Brandiferri home, correct?" The following exchange occurred:

Q. And since Wawanesa arranges for the goods to be removed, I take it that Wawanesa also is responsible for bringing them back?
A. Yes.
Q. All right. And as far as the clothing is concerned, that never came back, right?
A. That's what I understand now, yes.

134 As it turned out, the Brandiferri clothing was destroyed in a fire at Crest Cleaners in December 2002. Mr. Benzie was told but he did not tell the Brandiferris. Mr. Phin agreed that the Brandiferris "need to be informed by somebody." The following exchange occurred:

Q. Who would that somebody be? Wouldn't it be Wawanesa?
A. Well, it certainly could have been, yes.
Q. So did Wawanesa drop the ball in not telling them?
A. Yes.

Wawanesa did not advise the Brandiferris that the clothing at Crest Cleaners was gone until 2005.

The Goods at Urban Clean

135 The Brandiferris make two sets of claims in respect of goods removed by Urban Clean that were not sent on to Crest Cleaners. They claim $18,262.89 actual cash value of items destroyed and not replaced to-date, including $6,490.45 for carpets. The Brandiferris also claim the replacement cost of items destroyed and replaced in the amount of $10,908.42, of which $1,616.70 represents carpets.

136 The methodology used by Ms. Naccarato to identify and value the items taken by Urban Clean was similar to the method she had used for Crest Cleaners and Strone.

137 Wawanesa did not present any evidence of value for any of the items claimed by the Brandiferris. Wawanesa's trial strategy appeared to be to cast doubt on some of the figures without offering alternative evidence.

138 The only amount seriously challenged by Wawanesa was the amount claimed for carpets. The evidence is that 26 carpets were sent out to be cleaned and only 23 were returned by Urban Clean. The position of the Brandiferris appears to be that all 23 of the carpets returned were smoke damaged and continued to harbour a smoke odour. These were items that Mr. Benzie instructed Urban Clean to be cleaned, fringed, ozoned, wrapped, and returned when the house was finished.

139 Gary Snodden's evidence for Urban Clean was that the carpets were acceptable and had been cleaned to the best of Urban Clean's ability. The invoice from Urban Clean dated October 16, 2000, however, bears the following note: "Due to heavy smoke damage on floors, the insured may not accept all rugs." In evidence Mr. Snodden confined this observation about heavy smoke damage to the carpets on the basement floors but he was not able to identify which carpets were involved. In cross-examination, Mr. Snodden said that he had cordial relations with the Brandiferris and that they did accept some goods returned by Urban Clean and rejected other goods as unsuitable. No inference can be drawn that the Brandiferris were simply being unreasonable.

140 I therefore find on the balance of probabilities that the plaintiffs are entitled to the damages sought in respect of Urban Clean.

141 The Brandiferris received bills from Urban Clean for the storage after July

2001, a date picked by Mr. Benzie on the basis, according to Mr. Phin: "That he was no longer going to allow for the cost of the storage of the items that should have been returned to the home ... because he believed that there was no reason why they couldn't be returned to the home." The evidence is that Urban Clean required the Brandiferris to pay $4,500.00 in back-storage charges before returning the goods to them. This is because Wawanesa stopped paying storage charges after about a year, starting in August 2001.

The Goods at Strone

142 As noted, Strone took a number of items of furniture from the house, stored them in its warehouse for a number of years and returned them just before the trial.

143 The Brandiferris make two sets of claims in respect of the goods removed by Strone. They claim $33,536.69 for items that were destroyed, which they replaced; the valuation was carried out by Ms. Naccarato in the same way as the valuation of the other goods. The Brandiferris claim $51,981.85 to repair or replace items that were damaged by Strone. They also claim moving costs of $2,201.66.

144 Along with its Scott Schedule, Strone filed a Statement of Position which provided:

> Subsequent to the release of the goods just prior to trial, the Brandiferris advanced a claim that Strone damaged some of the goods stored at the Strone storage facility, a claim that had not previously been advanced. Since quantifying the claim, the Brandiferris have not allowed Strone access to the goods for which they allege damage for the purpose of valuation. As a result, in order to respond to this new claim Strone requests that a process for determination of what goods were damaged and the value of those goods be implemented by this court and that the results of that process be forwarded to Your Honour for incorporation in your reasons.

145 With respect to the hard furniture and contents, Mr. Phin admitted that: "Wawanesa arranged ... for a lot of the personal items of the Brandiferris, the contents, to be taken to Strone Construction's warehouse." Wawanesa paid for cleaning and storage. The following exchange occurred:

> Q. And, I take it, that if Wawanesa arranged for those to be taken to Strone's warehouse, you would also arrange for them to be returned?
>
> A. Yes.

Discussion

146 Wawanesa's position on its liability is set out in its Statement of Law:

> The Brandiferris are entitled to the lesser of the cost of repairing or replacing the personal property damaged in the fire. They are not entitled to benefits if the personal property is not damaged or can be cleaned. They are entitled to payment under Replacement Cost Coverage only if they replace the contents rendered unsalvageable - meaning not successfully cleaned. If they do not replace that property, their coverage is limited to the actual cash value of the items.
>
> The onus is on the Brandiferris to establish that they are entitled to more. Other than the items contained in the garage, 3 rugs and 2 couches, the contents were undamaged or successfully cleaned.

> The Brandiferris have led no evidence to show that they are entitled to further benefits under the contents coverage. As an example, they were paid $10,000.00 as an advance after receiving the Schedule of Loss listing the destroyed items in the fire. There is no evidence that any of those items have been replaced, and therefore the recovery for those items would be limited to the actual cash value. The Brandiferris have led no evidence on the actual cash value of those items or any items to show the money paid for the replacement of the unsalvageable contents was insufficient.

147 Mr. Kwinter argues that Wawanesa should not be permitted to rely on the provisions of the insurance contract to reduce damages payable for personal property if the property has not been replaced by the insured. He points out that even though the Brandiferris had financial resources they had financial responsibilities as well, including the payment of experts' fees, legal costs and repair costs. Indeed, they still owe ProCare money for its remedial work. Moreover, he notes that the Brandiferris were facing a $600,000.00 counterclaim by Wawanesa that was only withdrawn on the eve of trial. It is therefore no surprise, he argues, that they did not go out and replace all the clothing and the other items that they lost.

148 I accept Mr. Kwinter's point that a form of equitable estoppel should operate where it is the actions of the insurance company that have in large part compromised the ability of an insured to take normal action to replace personal property after a fire. I note that a number of the more expensive items claimed are fancy dresses purchased by Mrs. Brandiferri for celebrations such as weddings, which were generally used only once and then stored. One of the dresses, for example, was Pina Naccarato's wedding dress. None of these dresses was likely to be replaced by the Brandiferris so that actual cash value would appear to be the most appropriate value for these items. It appears that the actual cash value is the basis for the revised schedules of loss, given the depreciation allowance built in.

149 In respect of the personalty I find that Wawanesa assumed the position of bailee and the Brandiferris were bailors. In removing the Brandiferris' personal possessions from their home, Bachly, Urban Clean and Strone were sub-bailees of Wawanesa. Crest Cleaners was in turn a sub-bailee of Urban Clean. When the purpose for the bailment was ended, it was Wawanesa's obligation as bailor to have the goods returned directly to the Brandiferris. It was not open to Wawanesa to simply abandon the goods to Urban Clean, to Crest Cleaner or to Strone. It was not open to Wawanesa to force the Brandiferris to pay the charges levied by Wawanesa's contractors. It was not open to Wawanesa to unilaterally alter the terms of the bailment.

150 I hold that Wawanesa must compensate the Brandiferris pursuant to the insurance contract for the items lost in Crest Cleaner's fire. In the interests of finality, and as a matter of rough justice, I accept the valuation put on the items by Ms. Naccarato but reduce the calculated value by an additional ten percent to account for any possible over-estimation.

151 I hold that Wawanesa must compensate the Brandiferris for the items sent to Urban Clean whose return was rejected by them. Again, I accept Ms. Naccarato's valuation as reasonable and likewise reduce the calculated value by an additional ten percent. I further find that Wawanesa must compensate the Brandiferris for the amount of $4,500.00 that they paid to recover their goods from Urban Clean and any moving costs.

152 I hold that Wawanesa must compensate the Brandiferris for the items that were sent to Strone that were not properly restored or were damaged over the years. The goods still exist. I do not consider the visits that Strone permitted the Brandiferris to make to their premises, described by the Strone witnesses, to have

provided them with an adequate opportunity to evaluate the goods. Strone's return of the goods to the Brandiferris on the eve of trial effectively made it impossible for them to properly evaluate the goods for trial purposes. I do not want to foreclose Wawanesa's ability to challenge the necessity for the Brandiferris to replace some of the items in the Strone warehouse, nor do I have the degree of confidence in the valuation of the costs to replace or repair items damaged at Strone that I have in relation to the Crest Cleaners' goods. I direct Wawanesa and the Brandiferris to proceed with an appraisal under the *Insurance Act* with respect to the goods delivered by Strone.

153 In directing an appraisal I rely on the decision of Shaughnessy J. in *Greer v. Co-operators General Insurance Co.* He observed at para. 10 that "The mechanism of appraisal and dispute resolution under s. 148 and s. 128 of the Insurance Act is an efficient and cost saving measure available to the parties to effectively resolve their dispute." I also agree with his comments at para. 8 that the existence of the statutory appraisal mechanism: "... evidences a legislative intention that the determination of the disputed value of the loss must be resolved by appraisal before there can be any recovery on the contract. This necessarily implies a continued availability of the appraisal process despite the commencement of any action." In my view, an appraisal does provide a useful mechanism for the determination of the damages relating to the goods held by Strone for Wawanesa. This is the appropriate and feasible remedy in this instance.

154 I further find that Wawanesa is responsible for any charges levied by Strone for its restoration and storage of the goods, and the moving costs for their return of $2,201.66.

Does Strone have a Set-Off Defence?

155 Strone argues that it has a defence of set-off against anything owing to the Brandiferris for construction deficiencies. The set-off relates to unpaid storage charges incurred by the Brandiferris for storage after October 3, 2001, when Wawanesa stopped paying the fees and before Strone returned the goods just before trial. Mr. Jenkins notes that this is a defence so that if Strone is not found to be liable to the Brandiferris, no set off occurs; Strone has not counterclaimed for storage fees.

156 What would the amount of any set-off be?

157 Mr. Singer requested Strone to return the goods in a letter to Mr. Jenkins on June 11, 2007:

> I understand my clients have attended on a couple of occasions to review the items that are remaining at Strone's warehouse. Unfortunately due to time restraints put on them by Strone they were unable to see all items and determine what they considered salvageable and not.
>
> They would like to have all items returned to their home in order to have a better understanding of what items are in fact salvageable and are not.

Mr. Singer added that electrical items, mattresses, dried flower arrangements, *et cetera* should not be returned. He concluded: "Additionally, they would ask that the hardware furniture and oil paintings be cleaned and restored to their pre-fire condition."

158 The Strone invoice to Wawanesa dated September 27, 2001, indicated that the storage fee was $180.00 per month. It seems to me to be completely unreasonable to

permit Strone to charge storage costs after June 11, 2007, when the goods could have been returned.

159 The month of October 2001 is the earliest date on which the Brandiferris might be liable for storage charges. Deeming Strone to have returned the goods by mid-June 2007 works out to 69.5 months at $180.00 per month or a maximum set off of $12,510.00.

160 Strone's submission raises the ticklish subject of whether it had a contract with the Brandiferris. Strone's Statement of Defence stated that the contract was between Strone and Wawanesa. Strone's witnesses asserted that the contract was between the Brandiferris and Strone. Mr. Jenkins was more circumspect in argument and danced around the issue, eventually submitting that there was a contract since Strone would have sued the Brandiferris for the construction costs if Wawanesa had not paid them. That permitted him to argue that the equitable defence of set off applies, citing *PCL Constructors Westcoast Inc. v. Norex Civil Contractors Inc.*, 2009 BCSC 95, [2009] B.C.J. No. 142 at para. 49:

> The law of equitable setoff was discussed in *Holt v. Telford*, [1987] 2 S.C.R. 193. The judgment sets out a number of points regarding the nature of both legal and equitable setoff, but relevant to this case, the Court held that equitable setoff applies when the mutual obligations in question arise out of the same contract, and setoff is available whether the claimed setoff is liquidated or not: *Holt* at 207. The reason for this is simple: when there is a close relationship between dealings giving rise to mutual claims, equity will not permit one of them to be insisted upon without taking the other into account: *Holt* at 213.

161 The "customer authorization" signed by the Brandiferris on September 20, 2000, and addressed to Strone is both ambiguous and laconic in terms of normal contractual provisions. It does, however, provide: "I, Salvatore Branbiferri (sic), authorize Strone Construction to proceed with the necessary restoration services to my damaged dwelling and/or contents ... (emphasis added)."

162 In my view, however, the contractual relationship between Strone and the Brandiferris was limited to the reconstruction of the house. Although the standard-form language of the customer authorization may seem broad enough to capture the goods, I find that it was Wawanesa, according to Mr. Phin, that directed Strone to remove the goods and not the Brandiferris. There is accordingly no contract between the Brandiferris and Strone with respect to the goods; their arrangement lacks the feature described in P.C.L. Constructors: "the mutual obligations in question arise out of the same contract." I therefore find that Strone does not have a defence of set-off against the Brandiferris for unpaid storage charges.

Issue 4: Fraud and the Proofs of Loss

163 Wawanesa takes the position that the Brandiferris' claim must fail on the basis of fraud. In its Statement of Law, Wawanesa states:

> The Proof of Loss sworn by Mr. and Mrs. Brandiferri on August 31, 2001 is replete with false statements. By swearing the Proof of Loss, the Brandiferris swore that the items listed were destroyed in the fire. Those statements were false. The Brandiferris, who secured the estimates to support the claim, knew those statements were false. There was neither honest belief, nor inadvertence nor innocent mistake. They were not claiming these items in the context of an honest claim for indemnity but rather in an attempt to secure the maximum payout from the policy and turn this fire as a source of

gain.

164 Wawanesa relies on Statutory Conditions 6 and 12, which provide:

> 6 (1) Upon the occurrence of any loss of or damage to the insured property, the insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10, and 11,
>
> b) deliver as soon as practical to the insurer a proof of loss verified by statutory declaration,
>
> (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,
>
> 12. The loss is payable within sixty days after the completion of the proof of loss, unless the contract provides for a shorter period.

165 Wawanesa also relies on Statutory Condition 7, which provides:

> 7. Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration.

166 Mr. Phin testified in chief that a proof of loss is typically executed "when the claim is finished ... when all of the costs are known, and ... the total value of the loss has been established."

167 Mr. Phin testified in cross-examination that the "main basis" for the fraud claim was with respect to the first proof of loss: "that items were overvalued, and that he was claiming, and primarily, the issue at the time was the fact that he was claiming for all of the furniture which we knew wasn't - wasn't damaged by the fire." It was his view that by means of the proof of loss, the Brandiferris: "were claiming for full replacement costs of the furniture that had been cleaned and stored."

The Facts Related to Fraud

168 The Brandiferris filed three proofs of loss with schedules of loss prepared by Ms. Naccarato.

The First Proof of Loss

169 Wawanesa has focussed on the first formal proof of loss dated August 31, 2011. It claimed the following amounts:

Building	$362,454.13
Furniture and furnishings	$154,682.86

Accommodations	$ 76,000.00
Clothing, shoes and miscellaneous	$ 30,000.00
Total	$623,137.99

170 Ms. Naccarato prepared the schedule of loss. She had never done one before and got no instructions on how to fill it out. When it was completed she gave it to the Brandiferris' lawyer, Mr. Kuchar.

171 Ms. Naccarato simply put everything in the house on the list. It had all been taken away. She did not know which items on the list were damaged when she filled it out. Mr. Kwinter asked her:

> Q. Okay. So, why did you list everything, in this list, both damaged or items that you didn't know were damaged? Could you explain that to the court?
> A. Because at the time, that's what I thought a proof of loss was because they removed everything not knowing what was coming back. First of all, I had no furniture to go through. So I was just going through a list and I was putting amounts.
> Q. Were you claiming for anything that wasn't lost or damaged?
> A. No.
> Q. Were you in any way trying to mislead the insurance company?
> A. Not at all.

172 The number for damage to the building in the proof of loss was taken from Strone's estimate.

173 As described above, Ms. Naccarato got the number for the contents by taking the list received from Urban Clean and Strone and going to a furniture shop and matching up items with things of similar kind and quality. This led to the number $154,683.86.

174 The clothing number was a placeholder. Ms. Naccarato inserted the figure of $30,000.00, and the attached "Schedule of Loss" simply said "TBA". She said: "I just assumed 30,000.00". At the time she did not have the list of the items that were at Crest Cleaners.

175 Mr. Kwinter argued that Ms. Naccarato, who put together the proofs of loss, did so systematically but not correctly, and certainly not fraudulently.

176 Mr. Phin testified that when he reviewed the first proof of loss he had the impression that: "It was inaccurate ... fraudulent." His basic complaint was: "That the values that they were claiming here made no sense whatsoever, essentially claiming everything in the house in the proof of loss." This included furniture and furnishings that had been "cleaned and stored."

177 Mr. Phin conceded in cross examination that the insurance company may deal differently with "interim proofs of loss" but he testified that he saw the first proof of loss as a final proof of loss. Mr. Phin was aware that Ms. Naccarato put together supporting and detailed schedules.

178 In fire losses the real opportunity for fraud occurs where the goods have been consumed by fire and are not available to check. This was, however, a case where everything was available for inspection. Mr. Phin said: "I don't know if we were actually misled."

179 Mr. Phin testified that in situations where the insurance company has received a proof of loss that is not properly completed, or to which the company has an objection, it is "customary to reject the proof of loss." In this case there was no rejection letter. Mr. Phin admitted that Wawanesa never wrote back for clarification and never formally rejected the proof of loss. He admitted that he "never made a note anywhere to Mr. Benzie, to your supervisor, to anybody, that there's a fraudulent claim here." He admitted that the first time the word "fraud" was in the counterclaim that Wawanesa made against the Brandiferris.

Subsequent Proofs and Schedules of Loss

180 The second proof of loss was dated November 15, 2004, and claimed building costs in the amount of $172,189.62. This was the amount that was estimated by ProCare to be necessary restore the house.

181 The third proof of loss was dated November 22, 2004, and combined a claim for contents of $51,591.61 and additional living expenses of $103,237.34 for a total of $154,828.95.

182 As described above, Ms. Naccarato assembled a "Summary of Reports" setting out the costs related to items that were never returned, additional living expenses, the installation of windows, the ProCare estimate in order to move back into the home and invoices, and finally, professional reports and opinions. She prepared the document sometime in 2004 or 2005 but is not sure of the date. At that time nothing had been returned by Strone Construction.

Discussion

183 The parties agree that Wawanesa bears the burden of proof of fraud.

184 Mr. Kwinter proffered the authority by B. Billingsley, *General Principles of Canadian Insurance Law* (1st edition Canada: LexisNexis 2008) at pages 195-197. Relying on *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154 at 161, the author asserts that a "higher degree of probability" is required. In my view *Hanes v. Wawanesa* was effectively overruled by the Supreme Court of Canada in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, per Rothstein J. at paras. 26-49, particularly at paragraph 40, where he said:

> Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.

185 I find that the applicable standard of proof of fraud to be met by Wawanesa is on the balance of probabilities.

186 The law is that if the claimant makes an "intentionally false claim" the claim should be dismissed: *Daver v. Chubb Insurance Co. of Canada*, [1996] O.J. No. 3164 (C.A.) at para. 3-4. A false statement will violate statutory condition 7 if it is made knowingly, without belief in its truth, or recklessly without caring whether

it is true or not: *Voloudakis v. Allstate Insurance Co. of Canada,* [1998] O.J. No. 354 (Gen. Div.) at para. 65, 68-9. The intention to mislead can be inferred from even a small or proportionally small breach: *Fotinos v. Pitts Insurance Co.,* [1981] O.J. No. 224 (H.C.) at paras. 14-15, *Montini Foods Ltd. (Trustee of) v. General Accident Insurance Co. of Canada,* [1997] O.J. No. 1333 (Gen. Div.) pages 13-15.

187 I am not persuaded on the evidence that the Brandiferris committed fraud in preparing and filing the first or subsequent proofs of loss, even though they did seek to maximize their recovery. There are a number of reasons that lead me to this conclusion.

188 First, the law in Ontario is that it is not automatically fraud for a plaintiff to put in a claim that might be seen as exaggerated. Mr. Forget relies on the decision in *Holland v. Marsh & McLennan Ltd.*, [1978] N.S.J. No. 652 (S.C.) where the claimant was suggested to be creating "an opening for negotiations." As the court noted at para 12: "To start negotiations from a false premise is as serious as to advance a claim which is spurious." The Ontario law, however, is more tolerant, within limits, of this natural human tendency of claimants to seek to maximize their recovery and to exaggerate.

189 One of the issues confronted by the Ontario Court of Appeal in *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Company,* [2006] O.J. No. 1508, 267 D.L.R. (4th) 690, was fraud in proof of loss statements. The proof of loss filed claimed $1.2 million, but the statutory appraisal process resulted in a figure for the building of about $200,000.00. The insurance company argued that the greater amount was claimed even though the plaintiff knew that it was too high. The testimony of the public adjuster who had filed the claim was that:

> The amount claimed was simply an opening salvo in negotiating how much the respondents would receive under the policy. According to Watson, this was a relatively standard practice for him when he was acting for insured parties in negotiations with insurance companies (para. 94).

190 Borins J.A. noted the evidence of the public adjuster:

> ... that he did not at any time intend to mislead, deceive, or defraud the appellant. Rather, he was simply acting on behalf of his client in an effort to secure payment under the policy. (para. 95)

191 Borins J.A. then turned to the law and made the following observations:

> **97** The appellant's ability to succeed on this ground of appeal rests on the proposition that where the insured makes a statement in the Proof of Loss form that he or she knows to be false, this results in a breach of Statutory Condition 7 and the claim is vitiated. On this argument, it is no answer to say that the insured never intended to mislead the insurer. Unfortunately for the appellant, that is not the law.
>
> **98** As a general statement of law, fraud requires some form of intention to mislead or deceive: see *Gregory v. Jolley* (2001), 201 D.L.R. (4th) 729 at para. 15 (Ont. C.A.), application for leave to appeal dismissed, [2001] S.C.C.A. No. 460. This requirement applies to the Proof of Loss forms and Statutory Condition 7.

192 Borins J. noted: "that the jury accepted Watson's evidence that the proof of loss, although a statutory declaration made under oath, was used simply an opening

salvo in the negotiation process" (para. 101). He did not disturb that jury conclusion. In relying on *Credit Foncier v. Halifax Insurance Company* (1985), 67 N.S.R. (2d) 142 (C.A.), the Ontario Court of Appeal approved the statement of Morrison J.A. at page 152:

> I am compelled to say, however, that in a case such as this where a claim made by Proof of Loss is excessive, that there must be strong evidence to support any finding of fraud. I doubt that there are many Proofs of Loss filed in insurance claims that are exactly accurate. *Some leeway must be made in allowing for puffery or establishing a negotiating position.* When it is determined that the claimant is indeed indulging only in puffery or in attempting to establish a negotiating position fraud should not be imputed to the claimant. As pointed out in the *Short v. Guardian Insurance* case, [1984] N.S.J. No. 74, *supra*, the burden on the insurance company to establish fraud is a heavy one and *great care should be taken by the court before finding any claimant guilty of fraud as a result of the contents of the Proof of Loss form alone* [emphasis added by Borins J.A.]

193 The idea that it is open to the parties to negotiate is implicit in the Court of Appeal's review of the facts in *Plester v. Wawanesa Mutual Insurance Company*, [2006] O.J. No. 2139, 269 D.L.R. (4th) 624, where Armstrong J.A. said at paragraph 97:

> I do not regard the proposal to settle the claim at fifty percent as evidence of bad faith on the part of the appellant [insurance company]. As Reinhardt's unchallenged testimony indicated, he was simply doing what he regularly does in his position as a claims adjuster.

194 In *Rodriguez v. Allstate Insurance Company*, [1994] O.J. No. 1686 (S.C.J.), Chapnik J. accepted the reasonableness of the approach of a public adjuster to estimate costs of repair. She noted at paragraph 46: "Since the NFA approach generally meets the test of reasonableness, each item claimed should be accepted by the court in the absence of palpable or overriding error."

195 Second, the manner in which the claim related to the items in the garage was processed set up a reasonable *modus operandi* between the Brandiferris and Wawanesa. The value of at least one item claim, being the bicycle, was clearly exaggerated. Wawanesa nonetheless processed the claim within the limits of the policy while drawing the issue of exaggeration to Ms Naccarato's attention. She had simply advanced the number given to her by her brother.

196 Third, the schedules of loss were prepared in circumstances of complete transparency. By this I mean that apart from the items that were destroyed in the garage, the items that were removed from the building were available for inspection. This was not like a typical and paradigmatic fire loss case in which the plaintiff claims recovery for items that were not actually in the fire where the insurer has no way of knowing the truth because everything was destroyed. Ms. Naccarato knew and expected that the claims would be checked by Wawanesa. At the time that Ms. Naccarato prepared the revised Schedule of Loss, for example, she did not know that the clothing had been burnt in the Crest fire. There was no reason for her to think that the revised Schedule of Loss for clothing she assembled would not be checked by Wawanesa as the garage claim had been checked. This makes any imputation of fraud to her inherently implausible.

197 Mr. Forget cross-examined Ms. Naccarato vigorously and at length. She struck me as an intelligent and well-spoken woman. She was candid in her evidence. She was able to explain what she did and why. Her explanations were plausible, sensible and

reasonable. She was undoubtedly looking to maximize her parents' recovery from what she and they saw as a devastating blow. That said, she did not balk at Mr. Benzie's decision on the garage contents and I have no doubt would have similarly been reasonable in responding to challenges on the valuations of the goods that she provided had Mr. Benzie chosen to make them. She evinced an honest belief in the fairness of the valuation methodology she adopted and the evidence she presented, and in Wawanesa's ability to make a reasonable response. There was nothing in Mr. Forget's pressing cross-examination of Ms. Naccarato that led me to form the impression that she engaged in any fraud in relation to the claim.

198 Fourth, Mr. Forget submits that the Brandiferris were lying in claiming that items held by Strone were "destroyed," since they knew that those goods still existed. This is an absurd submission since at the time the proofs of loss were completed, Wawanesa also knew that the goods were still being held by Strone. The live issue was whether the goods are salvageable. This is still a live issue. An item need not be consumed by fire to have been rendered unsalvageable by smoke damage, and that may include hard goods.

199 Finally, I find the late-breaking allegation of fraud to be opportunistic. The fact that it first came up in the Statement of Defence and not in the active adjustment of the claim by Wawanesa suggests that it is more a product of legal strategy than factual reality. This was effectively acknowledged by Mr. Forget in argument.

200 Mr. Forget notes that if the court finds fraud, then the court still would have discretion under section 129 of the Insurance Act to grant relief from forfeiture of the policy. Section 129 provides:

> **129.** Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

201 I consider relief from forfeiture in the event that I am found to be mistaken in my decision that the Brandiferris did not commit fraud.

202 Mr. Forget submits that the court should not grant the plaintiff's relief from forfeiture in these circumstances. He relies on *Campbell v. Waterloo Mutual Insurance Company*, [1983] O.J. No. 910 (McDermid Co.Ct.J). The plaintiffs sued for the contents of their home which was damaged by fire, but neglected to provide a proof of loss within the time required by statutory condition number 12. The trial judge found the plaintiffs responsible for setting the fire, but commented that even if their only fault had been late delivery of the proof of loss, he would not have granted relief from forfeiture, noting at paras. 148-149:

> In this regard, it is interesting to note that s. 103 provides some relief where there has been "imperfect compliance". In this case there has been total non-compliance as opposed to imperfect compliance and in my opinion, the section, therefore, does not apply to give any relief whatsoever to the plaintiffs.
>
> However, if I am wrong in this interpretation, it is still my opinion that no relief should be granted. Over 3 1/2 years have expired since the loss occurred and no one knows where many of the damaged items

> are at this time or, indeed, what actually happened to them. In my opinion, the Campbells failed to act within a reasonable time to retrieve their furniture from their home before the mortgagee sold it. They had sufficient time to make arrangements to move the furniture from their home and to store it elsewhere. In this regard, by failing to act to retrieve their property within a reasonable time, they did not move to mitigate their damages. The insurer is not now in a position, even if proof of loss forms were delivered, to view all the various items claimed to have been lost or damaged and to assess the nature and extent of the loss or even to determine so simple a matter as whether an item has been destroyed beyond repair or is capable of being repaired. Although Mr. Rowell took photos to assist him, in my opinion, these are not sufficient to give the insurer the ability to assess adequately the nature and extent of the loss claimed. In addition, the insurer's right to salvage is lost. In these ways, Waterloo Mutual is severely prejudiced.

203 In this case, by contrast, Wawanesa was at all relevant times able: "to view all the various items claimed to have been lost or damaged and to assess the nature and extent of the loss or even to determine so simple a matter as whether an item has been destroyed beyond repair or is capable of being repaired." Mr. Forget did not point to, and would have been unable to point to any prejudice to Wawanesa. I would not hesitate to grant relief from forfeiture to the Brandiferris if that were necessary.

Issue 5: Punitive Damages

204 It is trite law that an insurer owes an insured a duty of utmost good faith in investigating, assessing and attempting to resolve claims: *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*, [2000] O.J. No. 866, 184 D.L.R. (4th) 687 (C.A.). The court recognized at para. 28 that the insurer must proceed with reasonable promptness because the insured "having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim." At paragraph 29, O'Connor J.A. noted:

> 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.

The court went on to hold that a breach of the duty to act in good faith gives rise to a separate cause of action distinct from the obligation to pay proceeds under the policy (paras. 32-33).

205 In this case the plaintiffs submit that Wawanesa's misconduct was egregious. It first made the fraud allegation in the Statement of Defence and Counterclaim. Further, the counterclaim in the amount of $600,000.00 "put a gun to the head" of the Brandiferris by threatening them with "financial ruin." The abandonment of the counterclaim just before trial underlines the abuse. Mr. Kwinter argues that if Wawanesa, as "a repeat offender," is allowed to get away with what it did here, then it undermines "the heart of insurance coverage." There was not a reasonable

possibility of proving fraud in this case. It was, he asserts, a concocted defence.

206 Mr. Kwinter buttresses this claim by submitting that Wawanesa breached its duty of good faith by making the final payment to Strone despite the Brandiferris' instruction. He asserts that this exemplifies the cosiness between Strone and Wawanesa, which is further illustrated by the fact that there is no ligation between Strone and Wawanesa. He also points to Wawanesa's failure to advise the Brandiferris of the Crest Cleaners fire until three years after it occurred,

207 The plaintiffs rely on the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595. In that case the insurer alleged arson although there was no air of reality to it. The Court upheld a jury award in the amount of $1 million, although it noted that the amount was higher than the court would have awarded. Binnie J. laid out the basic principles behind an award of punitive damages at paragraph 94 of the decision. Picking up some expressions in that decision, Mr. Kwinter argues that Wawanesa has engaged in "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." He highlights the "relative vulnerability of the plaintiff." Mr. Kwinter submits that the "objectives of retribution, deterrence and denunciation" apply to serious insurer misconduct.

208 Mr. Kwinter notes that in *Plester v. Wawanesa*, [2006] O.J. No. 2139 (C.A.), another case in which the insurer alleged arson, the Court of Appeal upheld the jury award in the amount of $350,000.00 against insurance liability of about $400,000.00 and but reduce aggravated damages from $175,000.00 to $50,000.00. The Court of Appeal nonetheless found the amount of punitive damages to be higher than it would have awarded. Based on the outcome of *Plester*, Mr. Kwinter describes Wawanesa is a "repeat offender".

209 Mr. Kwinter submits that an award of punitive damages in the amount of $350,000.00 plus aggravated damages in the amount of $50,000.00 would be appropriate and are necessary to get Wawanesa's attention and secure its reform.

210 Mr. Forget argues that this is not a case for punitive damages: "It has been conceded by several parties to the action, including Salvatore Brandiferri, Vince Naccarato, Pina Naccarato and Tony Diceglie, that Mr. Benzie acted fairly and promptly in the circumstances. Tony Diceglie went even further stating Wawanesa was too generous in circumstances providing additional scopes of damages and agreeing to replace items which were clearly not damaged by any smoke." Mr. Forget submits that Wawanesa's conduct must be seen as a whole and that it does not meet the standard required by the cases: "It is submitted that in the face of the Brandiferris breaching their duty of good faith, Wawanesa acted fairly and promptly in responding to the claim and the Brandiferris have failed to show otherwise."

Discussion

211 Mr. Forget's argument does not address the gravamen of Mr. Kwinter's complaint about Wawanesa's high-handed litigation strategy, which Mr. Forget did not attempt to justify.

212 Part of an insurer's duty of utmost good faith in investigating, assessing and attempting to resolve claims must attach to the insurer's litigation strategy against the insured when the claim is disputed. This does not mean, as O'Connor J.A. noted in *702535 Ontario Inc.*, that the duty of good faith forces an insurer to be correct in making a decision to dispute a claim (at para. 30), and see *Fidler v. Sunlife Assurance Co. of Canada*, [2006] 2 S.C.R. 3 at paras 63, 71. But the insurer may not abuse its financial power, knowing that the insured, "having suffered a loss, will frequently be under financial pressure to settle a claim as soon as possible" (*702535 Ontario Inc.*, at para. 28).

213 The fraud allegation was late breaking and was only made after the action was started in the Statement of Defence and Counterclaim. I find this to have been a high-stakes litigation strategy designed to intimidate the Brandiferris. I do not accept Mr. Phin's evidence that he concluded early that the claim was fraudulent. Nothing in Wawanesa's written record or the conduct of its personnel corroborates that assertion. His self-serving evidence on that issue, in the context of all of the information available to all of the participants and their pattern of conduct in adjusting the claims including the garage claim, simply does not bear scrutiny.

214 I accept that Wawanesa is a repeat offender and ought to be punished significantly. That said, punitive damages ought to be proportional. I fix punitive damages in the amount of $100,000.00 to be paid by Wawanesa to the Brandiferris.

215 I now consider the plaintiffs' claim for aggravated damages. In *Fidler* the Supreme Court refers to a category of contracts in which damages for mental distress or breach might be awarded as a foreseeable consequence of a breach. That case concerned a disability policy, but it seems to me that a homeowner's insurance policy falls into the category of the "peace of mind" class of contract to which the Court adverts.

216 At paragraphs 51-53 the Court speaks of damages for mental distress in a contractual setting as an instance of "aggravated damages." The Court notes, however, that evidence is required:

> **47** This does not obviate the requirement that a plaintiff prove his or her loss. The court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. These questions require sensitivity to the particular facts of each case.

217 The plaintiffs led no evidence of mental distress on which to base such compensation. I decline to grant such "aggravated damages" on nothing more than an inference of mental distress. In this instance only I accept Mr. Forget's submission that an adverse inference should be drawn from the fact that the Brandiferris did not testify.

218 In *Fidler* the Court also criticizes the use of the label "aggravated damages" in relation to "peace of mind" contracts as "unnecessary and, indeed, a source of possible confusion" (para. 53). The conceptual basis for aggravated damages outside of the "peace of mind" contract cases is unclear, but it seems to me that such damages are best addressed within the conceptual framework of punitive damages, which I have already assessed. I therefore decline to award aggravated damages of a punitive nature.

219 Judgment accordingly. If the parties cannot agree on the calculation of the numbers they may contact the trial co-ordinator in Newmarket for an appointment to settle them.

220 The plaintiffs have been successful and are entitled to costs. If these cannot be agreed between the parties, I will accept written submissions on a 10-day turnaround basis starting with the plaintiffs and ending with the plaintiffs' reply submissions.

P. LAUWERS J.

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Print Request: Current Document: 3
Time Of Request: Thursday, January 03, 2013 13:23:00