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Chubb gets hit with $500,000 in punitive damages

It was exactly 10 years ago this weekend that a fire destroyed the luxury house belonging to Bridgette Sagl on Doulton Dr. in Mississauga.

When Chubb Insurance refused to pay her claim, she took the company to court.

After a delay of more than nine years, a 22-day trial took place this year, and the court's decision was finally handed down in September. Not only did Chubb have to pay the owner's full claim of more than $4.5 million plus interest and legal costs, but the company also was hit with punitive damages of $500,000 for its "malicious, oppressive and high-handed" conduct in refusing to pay the claim.

On the night of the fire in December 1997, the house was empty. The live-in housekeeper had been given the evening off, the dog was left in the yard, some of the windows were left open and the owner was out for dinner. The mortgages, utilities and taxes were in arrears, and Sagl had accumulated huge legal bills following contested divorce proceedings.

The house contained Sagl's huge art collection consisting of hundreds of paintings all of which were destroyed and dozens of pieces of expensive jewellery. The house was insured for $630,000, the contents for $600,000, the jewellery for $1 million and the art for $2 million.

At trial before Mr. Justice Blenus Wright of the Ontario Superior Court, Chubb alleged that the fire had been deliberately set, and that the house was "staged" in preparation for the fire to occur.

Witnesses from the Office of the Fire Marshall and the insurance company testified that in their opinion the fire was "incendiary," and originated in as many as four locations.

The owner's independent expert testified that in his opinion the fire originated in a basement storage area and that a possible cause was the placement of two six-foot-tall torchiere lamps close to each other in the basement. Those lamps contain halogen bulbs and give off considerable heat.

After hearing the experts, Wright wrote in his decision: "There is not a shred of evidence that the fire was deliberately set `on her (Sagl's) behalf or at her direction.'

"I do not believe that the plaintiff is capable of having her home, with all her possessions, torched by someone just to obtain insurance proceeds. It just does not make sense in the circumstances of this case."

Throughout the years of litigation, Chubb alleged that Sagl concealed or misrepresented material facts that she should have disclosed when applying for insurance. The judge tossed out that allegation.

Chubb also maintained that Sagl's claims for her artwork and the contents of the house were "replete with fraudulent claims and false statements." Wright dismissed those allegations as well.

In the end, the judge wrote that Chubb had "tunnel vision" in prejudging the cause of the fire and that it failed to prove that Sagl was in any way implicated in the alleged arson.

Chubb, the judge wrote, breached its duty of good faith in alleging that the owner had committed fraud in her claim under the policy. As a result, he awarded Sagl $500,000 in punitive damages in addition to her full losses under the policy.

Chubb Insurance has filed an appeal of the decision.

Wright also penned this excellent advice to homeowners:

"Once a fire destroys possessions, it is difficult to determine true value of the possessions without proper documentation, which hopefully has not been consumed in the fire.

``Persons with possessions of above-average value ought to be aware that they need to keep purchase invoices and take photographs and get up-to-date appraisals, all of which need to be kept in a fireproof place. Unfortunately, most people neglect to prepare proper documentation. They procrastinate, doubting that their possessions will ever be destroyed."

I echo Justice Wright's advice. Be insured, keep records and photos off site, and be prepared to document the value of what you own.

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Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Limited

2007 CanLII 36644 (ON S.C.)

PDF Format

Date: 2007-09-04

Docket: 98-CV-160150

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Reflex Record (noteup and cited decisions)

Noteup

[Search for decisions citing this decision]

Decisions cited

- Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (S.C.C.) [1995] 2 S.C.R. 1130 (1995), 24 O.R. (3d) 865 (1995), 126 D.L.R. (4th) 129 (1995), 30 C.R.R. (2d) 189 (1995), 84 O.A.C. 1
- Whiten v. Pilot Insurance Co., 2002 SCC 18 (CanLII) [2002] 1 S.C.R. 595 (2002), 58 O.R. (3d) 480 (2002), 209 D.L.R. (4th) 257 (2002), 20 B.L.R. (3d) 165 (2002), 156 O.A.C. 201

COURT FILE NO.: 98-CV-160150

DATE: 20070904

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
BRIDGETTE SAGL	)	*Barry A. Percival* for the plaintiff
	)	
Plaintiff	)	*Barry A. Papazian* and *Mikel Pearce* for Cosburn, Griffiths & Brandham Insurance
	)	
	)	*Sheila McKinlay* and *Iain Peck* for Chubb Insurance Company of Canada
- and -	)	
	)	*Mark O Donnell* and *Chris Stribopoulos* for Eamonn Kinsella and G.C. Carley & Co. Limited
COSBURN, GRIFFITHS & BRANDHAM INSURANCE BROKERS LIMITED and	)	
CHUBB INSURANCE COMPANY OF CANADA AND EAMONN KINSELLA and G.C. CARLEY & CO. LIMITED	))))))	**HEARD:** April 4, 5, 10, 12, 13, 16-20, 23-27 and 30; May 1-4, 7 and 8, 2007
Defendants		

BLENUS WRIGHT J.:

[1] On December 16, 1997, at around 9:00 p.m., the plaintiff s home at 2415 Doulton Drive in Mississauga was destroyed by fire.

[2] Chubb Insurance Company of Canada (Chubb) refused to pay for the plaintiff s losses. Chubb alleges arson, maintaining that the fire was deliberately set by a person or persons acting on behalf of and pursuant to the direction of the plaintiff.

[3] With respect to Chubb s policy of insurance, Chubb alleges that the policy was void because the plaintiff intentionally concealed or misrepresented material facts relating to the policy before and after the loss.

[4] The plaintiff s claim is against the defendant insurer and two defendant insurance brokers, Cosburn, Griffiths & Brandham Insurance (Cosburn), and Eamonn Kinsella (Kinsella) and G.C. Carley & Co. Limited (Carley). Cosburn was the agent for Chubb. Kinsella was an employee of the sub-agent Carley, which was the plaintiff s agent.

[5] The action is for damages for breach of the insurance contract and damages for negligence against the defendants Carley and Kinsella for failure to ensure the placing of a mortgage endorsement. The plaintiff also claims punitive damages.

[6] The plaintiff claims to be entitled to the amount of insurance coverage as set out in the Binder of Insurance issued by Cosburn on September 30, 1997.

BACKGROUND INFORMATION

[7] The plaintiff and Rudy Sagl commenced living together in 1979. In 1980, they moved to a large 113-acre estate property north of Milton, called the Rockwood Estate, a house of 16,000 square feet filled with furniture, artwork and sculptures.

[8] In the 1980s the Sagls developed Belltronics, a company which manufactured electronic components.

[9] In 1984, son Ryan was born and Bridgette and Rudy married.

[10] In 1985, they purchased a large home in Jamestown, Barbados.

[11] Belltronics had a 39,000 square foot manufacturing plant in Mississauga, with other plants in Buffalo and France, and distribution centres in Germany and Holland. By 1991, the business had expanded, the head office moved to Covington, Georgia, with a 110,000 square foot office building and plant.

[12] The Sagls had a penthouse apartment in Germany and an apartment in Italy. They purchased a Georgia mansion with 10,000 square feet of living space.

[13] Money was available to fund a lavish lifestyle. Bridgette was able to satisfy her penchant for collecting furniture, paintings, sculptures, figurines, china and glassware, jewellery and clothes.

[14] Two events burst the bubble. Rudy had an affair with Bridgette s sister, which destroyed the marriage. At first, Rudy was prepared to look after Bridgette financially but the recession in the late 80s into the 90s took its toll on Belltronics $100 million annual sales.

[15] The matrimonial proceedings were acrimonious. In December 1993, an interim support order was made requiring Rudy to pay $25,000 per month. The trial commenced in June 1997, with judgment released on July 11, 1997.

[16] The reasons for judgment of Justice Macdonald provided the plaintiff with a substantial past and future monthly support award, and a lump sum payment of $4 million, to

be payable over time, on a quarterly basis. The matter of the equalization entitlement, past support obligation, and costs were reserved for further argument and decision.

[17] The plaintiff received correspondence from her matrimonial lawyer, dated July 17, 1997, that provided a draft judgment and contained a prediction that her husband owed the plaintiff in excess of $7 million by way of an equalization payment.

[18] The plaintiff is an enigma. She does not manage her financial affairs well, due perhaps to her previous lifestyle when there was an abundance of money and her husband handled the finances. After the marriage breakup, the plaintiff never came to the realization that she was responsible for paying the bills and required to live within a budget.

[19] The plaintiff has a fetish for collecting, particularly paintings. In a normal situation, when there is no more wall space in a house to properly display paintings, the occupants quit purchasing more paintings. The opposite was true for the plaintiff who continued to purchase paintings, filling storage areas and closets with paintings, prints and frames stacked on top of each other.

THE ISSUES

[20] There are nine issues to be decided:

1. Was the fire deliberately set on behalf of the plaintiff?

2. What was the insurance coverage at the time of the fire?

3. Did the plaintiff intentionally conceal or misrepresent any material fact relating to the policy before the fire?

4. Did the plaintiff intentionally conceal or misrepresent any material fact relating to the policy after the fire?

5. Is this a case for an award of punitive damages?

6. Is this a case for relief from forfeiture?

7. What is the liability, if any, of the insurance brokers?

8. Is the plaintiff owed additional living expenses?

9. Who is responsible for paying storage costs?

Counsel have provided written submissions.

1. Was the fire deliberately set on behalf of the plaintiff?

[21] Chubb submits that the plaintiff had both opportunity and motive to have the house set on fire. With respect to opportunity, counsel for Chubb states:

The fire of December 16, 1997 could not have been set without the plaintiff Sagl s involvement. The house was secure when the fire was discovered (i.e., with all doors locked) and the plaintiff and her daughter had the only keys. The alarm system was functional (except for 2 or 3 sensors) and had been activated by the plaintiff Sagl upon her departure that evening: no intrusion was recorded by the monitoring company after Ms. Sagl left. To gain entry to the house in these circumstances, the arsonist must have been equipped with both a key and the alarm code, and those could only have been supplied by Ms. Sagl.

[22] There is a question whether the alarm system was functional and alarmed the night of the fire. The plaintiff had problems with the alarm system on numerous occasions prior to the fire and made complaints to the alarm company. I am unable to find, on a balance of probabilities, that the alarm system was alarmed and working when the plaintiff left the house. There is just as much support on the evidence that the alarm was alarmed and working or not working but that no one entered the house after the plaintiff left.

[23] Chubb submits that the house had been staged in preparation for the fire to occur that night by reason of the maid having the night off, son Ryan staying at a friend s house, the dog being left outside and, the plaintiff going out for dinner with her companion.

[24] The maid was given the night off. Son Ryan did sleep over at a friend s house. It was the end of term. Ryan and his friend had attended a dinner at Appleby College and then were dropped off by the plaintiff at the friend s grandmother s to spend the night. I see nothing sinister in these arrangements.

[25] The plaintiff planned that she and her date would return after dinner to the plaintiff s home to spend the night together in privacy, which did not happen often.

[26] With respect to the dog being left outside, had the plaintiff planned the fire event, she would have taken the dog to her daughter s house next door knowing that he would not be safe with the house on fire and fire trucks, hoses and firefighters on the property.

[27] This brings up the possible danger a fire might have with the daughter, son-in-law and grandchild living next door about 25 feet away from a raging fire. The plaintiff owned the house at 2399 Doulton Drive.

[28] As well, it is just before Christmas. The Christmas tree and the house were decorated for one of the most memorable times of the year. Why would anyone choose to have someone set fire to his or her house at the Christmas season?

[29] Counsel for Chubb further states: With respect to the condition of the house itself, numerous windows on both floors had been left open, some fully and some a few inches . This is a classic sign of the work of an arsonist, seeking to adequately ventilate the house to promote the spread of the fire. I will deal with the open window issue when I discuss the facts of the fire.

[30] With respect to the plaintiff s motive to have someone set fire to her house, Chubb contends that the plaintiff was in dire financial straights and would benefit substantially by recovering the insurance proceeds as the result of a fire.

[31] Chubb refers to the mortgages, utilities and taxes in default on both 2399 and 2415 Doulton Drive, the $500,000 owed to Howard Winick on his loan, and, $300,000 owed in legal fees.

[32] Counsel for the plaintiff refers to the plaintiff s assets at the time of the fire: jewellery and fine arts, equity in 2415 Doulton Drive of $650,000 and in 2399 Doulton Drive of $300,000 and the contents of 2415 Doulton Drive. He refers to Ellen Macdonald J. s judgment of July 11, 1997, awarding the plaintiff a lump sum support payment of $4 million. He also refers to a July 17, 1997, letter from the plaintiff s matrimonial lawyer predicting an equalization payment to the plaintiff of $7 million. I question the predicted equalization payment since Justice Macdonald indicated in her July 11 reasons that the plaintiff would not receive an equalization payment. I believe the question of an equalization payment to the plaintiff was to be an issue raised on any appeal of Justice Macdonald s decision.

[33] With respect to Justice Macdonald s decision, counsel for Chubb submits:

Although her divorce trial in July of 1997 had produced a large judgment in her favour for support (both lump sum payment for arrears and ongoing monthly payments), there was no prospect of any monies being paid to Ms. Sagl by her ex-husband in the foreseeable future.

[34] That pessimistic view by Chubb s counsel was not Justice Macdonald s view. In her July 11 decision, Justice Macdonald said at paragraph 71:

I have, despite Mr. Sagl s efforts to convince me otherwise, concluded that with the application of his demonstrated business acumen, he is likely to emerge from the receivership, with the capacity to rebuild his financial resources and to provide for his family which includes Mrs. Sagl.

[35] In her December 16, 1997, decision, Justice Macdonald concluded at paragraph 14:

I have no doubt that if Mr. Sagl s true income and capital were known, he could meet the entire obligation to Mrs. Sagl and Ryan

[36] Counsel for the plaintiff lists the following facts and circumstances which he submits fortifies the plaintiff s lack of motive:

Quite apart from her own worldly possessions in the house, both her long time maid and 13-year-old son had personal possessions that would be destroyed by any fire;

All her creditors, including Shibley Righton, Howard Winnick, Lang Michener, and the two mortgage companies, were all waiting patiently for the matrimonial issues to be finalized and the two properties on Doulton Drive to be sold;

She was waiting for the further Reasons for Judgment of Justice Macdonald, which Reasons she did not receive until December 18th, 1997, two days after the fire;

She left unsecured in a partially opened safe, at 2415 Doulton Drive over 121 items of jewellery which were retrieved by the Police, after the fire, which jewellery could have been destroyed in any fire;

[37] I am not persuaded by Chubb s submission on opportunity and motive that the plaintiff would benefit by having someone set fire to her house.

THE FIRE OF DECEMBER 16, 1997

[38] During the morning and afternoon of that day, the plaintiff and her sister were working in the basement making Christmas table decorative pieces.

[39] Ryan went to school that morning and returned at lunchtime with a school friend, Daniel Snow. The boys played in the games room that afternoon. In the late afternoon, the plaintiff s sister drove the two boys to Appleby College for a school dinner, and returned briefly to 2415 Doulton Drive. The plaintiff s sister left at about 5:30 p.m.

[40] The live-in housekeeper/maid, Slava Mazur, worked within the house that day. Because she had worked on the Sunday, her normal day off, it was agreed that Slava could have Wednesday, December 17, off. Slava s daughter arrived at about 5:30 p.m., and picked up her mother and took her to the daughter s home nearby. Slava was to stay overnight with her daughter, and spend her day off at her daughter s home in Oakville.

[41] The plan had been made by the plaintiff to allow Ryan to stay overnight in Toronto at the condominium of the grandmother of Daniel Snow. The plaintiff had arranged for Justice Flaherty to pick her up at 7:30 p.m. and then drive to Appleby College to pick up the two boys. Thereafter, their plan was to take the two 13-year-old boys to Toronto, leave them at the condominium of Snow s grandmother, have dinner at a restaurant, and thereafter return to 2415 Doulton Drive. Thereafter Justice Flaherty would stay overnight with the plaintiff, knowing that her son and the maid would be absent.

[42] Justice Flaherty did arrive at 7:30 p.m. on December 16, 1997, and the plaintiff left 2415 Doulton Drive, with Justice Flaherty, in his vehicle, shortly thereafter.

[43] Before doing so, Justice Flaherty checked the locks on the other doors of the house. The plaintiff attempted to set the security system, but it protested, as it had done on numerous occasions in the past. She locked the front door as she exited the building. The plaintiff s dog remained outside because neither the plaintiff nor Justice Flaherty could persuade the dog to return to the house. The dog went outside when it became excited, while the overnight bags of the two boys were being placed in the vehicle of Justice Flaherty.

[44] The plaintiff freely admitted that it was normal for a number of windows in the house to be partially open because she smoked cigarettes, and she was having repeated hot flashes during menopause. The outdoor temperature during the day reached a high of 9 degrees Celsius.

[45] Not all of the windows were partially left open. None of the casement windows were open more than 2 to 4 on the evening of the fire as confirmed by the evidence of Edward Taylor, Constable Rice and the various firefighters who attended to fight the fire later that evening as reflected in their statements.

[46] In any event, the plaintiff and Justice Flaherty dropped off Ryan and his friend in Toronto, and had dinner at Angellini s Restaurant on Jarvis Street. They drove back to 2415 Doulton Drive, and arrived at 11:00 p.m. to find the fire in progress.

[47] The plaintiff submits that I should find that the cause of the fire was undetermined . The plaintiff s submission is supported by the expert opinion of Dennis Merkley who believes that the fire originated in one area in the basement recreation/storage room.

[48] Chubb submits that the fire was incendiary and that a fire was set in three separate locations: 1) in the basement recreation/storage room; 2) in the maid s quarters in the basement; and 3) in the northwest bedroom on the second floor. Expert Robert De Berardis supports Chubb s position.

[49] The fire at 2415 Doulton Drive was first suspected at 9:35 p.m. and was first reported by neighbour Edward Taylor in a 911 call at 9:53 p.m. Taylor testified at trial that he noticed no flames, but only heavy smoke at the rear of 2415 Doulton before the arrival of the firefighters.

[50] When the firefighters arrived at 10:01 p.m., Taylor went with them to the rear of 2415 Doulton. He noticed one window in the second storey, partially open. He noticed no flames in the windows of the second storey of the house. He saw through the rear patio door a pulsating red glow which appeared to be coming from the basement area.

[51] The first firefighters led by Chief McCarthy used an axe to break through the patio doors. Three of the firefighters advanced into the sunroom and family room of the home. They advanced on their hands and knees and reached a point 12 to 15 feet inside the patio door when they discovered the floor was no longer present. They suspected a flashover, which did occur according to the Fire Incident Report. The firefighters retreated through the patio doors and chose to fight the fire from outside the house a defensive mode .

[52] Fire Inspector McNeil arrived at the scene at approximately 12:45 a.m. After interviews with some of the firefighters and the plaintiff, Inspector McNeil decided to communicate with the Office of the Fire Marshall. Inspector McNeil records some Points of Interest which he relayed to the Office of the Fire Marshall (OFM), which were:

1. Owner and her date were out to dinner at a restaurant but could not recall the name of the restaurant;

2. Owner s 13-year-old son was staying overnight in Toronto at a friend s house. This fire was on a Tuesday night;

3. The maid was given the night and next day off, which was not her regular day off;

4. All the windows were open to varying degrees. The owner claimed the windows were open because it was a warm day. I believe the daytime temperature was 6 degrees Celsius;

5. Firefighters reported an exceptionally advanced fire on arrival and more than usual difficulty in bringing the fire under control;

6. The owner claimed that she had lit the fireplace before going out in the evening, even though it was a warm day;

7. The owner claimed the burglar alarm system was not working, and that the company was to come and fix it, but had not done so;

8. The dog had been left out when the owner and her date had gone to dinner.

[53] This appraisal of the situation by Fire Inspector McNeil was entirely negative and pointed suspicion at the plaintiff in the occurrence of the fire. It started a series of events thereafter, with each event building on each other feeding the perception and belief that the fire was incendiary and that the plaintiff had been complicit in the setting of the fire at 2415 Doulton Drive.

[54] Fire Inspector McNeil communicated with the OFM by telephone and left a message for Inspector Noseworthy at or before 4:00 a.m. when McNeil left the fire scene. McNeil was also aware that the Peel Regional Police were investigating the suspicious fire that evening.

[55] McNeil did not communicate with the OFM because of the High Dollar nature of the fire, but because of the suspicious circumstances, and his view of the likely incendiary nature of the fire.

[56] OFM investigated the cause of the fire. I find that the OFM s investigation was flawed from the beginning. The day after the fire, Acting Superintendent Noseworthy called Bruce Marcellus and advised him that Marcellus was to be the lead investigator. Unfortunately, Noseworthy told Marcellus that the fire was incendiary . That statement clouds the investigation. If an Acting Superintendent has already decided that the fire is incendiary, how can the investigation proceed on an impartial basis?

[57] In his testimony, I find that Marcellus failed to keep an open mind until he completed his investigation. For example, he stated that all the windows on the first and second floors were intentionally left open which would assist in the ventilation of the fire. According to Marcellus some windows on the main floor were wide open. Marcellus did not consider that he viewed the windows open the day after the fire and that it was likely the firemen opened the windows to spray water inside. The best evidence is that some windows were cracked open because the plaintiff and her sister had been smoking throughout the house and the maid had cracked open the windows. The maid testified that it was not unusual for the windows in the house to be left open.

[58] In any event, the open windows did not aid the ventilation of the fire. The smouldering fire did not erupt into flames until the rear patio doors were broken open by the firemen.

[59] Marcellus said that the only person he consulted during the investigation was his assistant Ian McNeil. During McNeil s testimony he became testy. Counsel for the plaintiff began a question: I see by your attitude but, before he could finish the question, McNeil said, I have no attitude . I find that McNeil presented his evidence in a biased fashion.

[60] The investigative mind set of Marcellus is revealed in his handwritten reports. On the evening of December 17, 1997, he reports, an arson was expected, residence windows were all open, 2 were fully open, when police and fire arrived found residence main floor fully involved in a free-burning fire, front door was open and key was in the lock . He lists Facts as to Motive :

1. Suspicious circumstances - $200,000.00 owing law clerk told to delay attendance at house until December 17, 1997;

2. Owner had maid work Sunday regular day off;

3. 13-year-old staying with friend;

4. Furniture moving 3 4 weeks before;

5. Owner planning to put house up for sale house beside presently for sale;

6. Dog out;

7. Windows and door left open;

8. When owner spoken to at 2:00 a.m. Judge insisted on being present.

[61] In his typed report, he commented:

- The fire was incendiary in origin (arson)

- Multiple areas of origin were located

bedroom on second floor at west side

basement in area of northeast corner

basement in centre area of structure

The OFM canine attended twice and each time showed hits or positive indications in the three areas.

The fact that the floor collapsed totally in two areas would likely indicate that an accelerant (possibly fuel oil or kerosene) was used to assist with igniting

No signs of forced entry according to the firefighters.

[62] Fifty-one pages of handwritten witness statements completed by the various firefighters before they left the fire scene on the morning of December 17 were at no time ever considered by Fire Inspector McNeil, OFM investigator Bruce Marcellus or the Chubb Engineer De Berardis.

[63] These statements confirm that the fire in the building originated in the basement, and nowhere else. Page 2 of the Fire Incident Report confirms that the level of origin was basement below ground level .

[64] Peel Police constable Rice was on the scene at 10:00 p.m. He went to the west end of the house and noticed no flames whatsoever from the office study window on the ground floor or the window on the 2nd floor, which was the southwest bedroom window. All he saw was smoke coming from the partially opened casement window for the office study room on the main floor.

[65] Chief McDougall provided an opinion that the fire at 2415 Doulton Drive had originated at least one hour before the arrival of the firefighters. Both Dennis Merkley and the Chubb engineer De Berardis agreed that that estimation was accurate.

[66] The chronological dispatch notes in the Fire Incident Report records, for the first time, the spread of flames to the second floor of the house at 11:30 p.m.

[67] NFPA 921 makes it clear that the first persons on the scene are able to provide the most important evidence as to the origin or source of the fire during a fire investigation. The investigators failed to interview those individuals.

[68] It is unfortunate that no one from the OFM spoke to the plaintiff to determine what items of furniture were in the basement recreation room that could have caused the fire. There were two Torchiere lamps in close proximity to each other in the basement. A Torchiere lamp is a floor lamp about six feet tall with a halogen bulb which exudes considerable heat, and these lamps are known to have caused fires. It appears that on the day of the fire one of the lamps was moved closer to the other Torchiere lamp. The plaintiff and her sister were working in the basement making Christmas centre pieces. They needed more space to set up a table so one of the Torchiere lamps was moved closer to the other lamp. Marcellus was not aware of Torchiere lamps or their hazard. Ed Marinoff, OFM s electrical engineer, was aware of the hazard of Torchiere lamps. If the presence of Torchiere lamps in the basement had been known, they may have been discovered amidst the rubble and tested to determine if the lamps switches were on at the time of the fire.

[69] I find that too much attention was given to a sniffer dog brought to the scene by a dog handler, Dave Marcelus, now deceased. Apparently, the dog indicated four separate hits: two in the basement, one near a sofa on the main floor and one in the northwest second floor bedroom.

[70] One of the alleged hits concerns me. The fire had burned a large hole through the basement ceiling and into the floor above on the main floor. One of the dog s hits occurred when the dog was standing at the edge of a hole on the main floor indicating the presence of an accelerant in the basement.

[71] What baffles me is that samples taken from the carpet in the basement where a fire is supposed to have been ignited showed no evidence of an accelerant when tested by two different labs.

[72] No expert dog handler was called to give evidence as to the training of the dog that made the hits, how a dog distinguishes between different substances and how viable and successful are sniffer dogs in discovering accelerants. No reliance can be made in this case on the alleged four hits by the dog as far as determining the cause of this fire.

[73] Dennis Merkley, Fire Investigator, provided correspondence dated January 27, 2006, confirming his discussion with David Marcellus, the OFM Canine Handler, who confirmed that, unless corroborative scientific evidence to verify the indications is received from the Centre of Forensic Sciences, the indications are meaningless.

[74] Both Kirk and NFPA 921 warn of the danger of interpreting canine indications as being conclusive of the use of fire accelerants, in the absence of positive laboratory confirmation.

[75] The Report from the Centre of Forensic Science dated May 19, 1998, concluded: no volatile petroleum product or other ignitable liquid was identified in 14 of the 15 samples provided. The other sample was from the liquid in a gasoline can in the garage.

[76] Merkley had an impressive background in fire investigation. Before he left the Office of the Fire Marshall in 1994, he worked for 15 years as a Chief Fire Investigator, 3 years as the Supervisor of a Region of other Fire Investigators, and 3 years as the Head of Training at the Office of the Fire Marshall, for all fire Investigations in Ontario.

[77] De Berardis had a very limited background and experience in fire investigation. Battiston and Scorpio, his assistants, had even less expertise in this field. The three engineers had backgrounds in civil and structural engineering but not in fire investigation.

[78] I prefer the evidence of Merkley because his evidence is logical and makes common sense.

[79] The main difference in their theories is: Merkley believes there was a single fire origin in the basement which spread to the rest of the house; De Berardis believes that there were three separate fire origins which did not converge and that Merkley s single fire source would not have moved quickly enough to cause the amount of damage in the second floor west bedroom where De Berardis believes was the third place where a fire started.

[80] I start with the fire source in the basement recreation room because there is some common ground between De Berardis and Merkley. Both agree that the basement fire originated around the centre of the room, that the consumption pattern was upward and outward in a circular pattern. It was the largest hole, which totally consumed the floor above. The fire appears to have been high and both experts note that some of the ceiling tiles were missing from the suspended ceiling prior to the fire. As De Berardis noted, because of the missing ceiling tiles the fire entered into the joists.

[81] There was no evidence of the height of the basement ceiling. In the photograph showing the two Torchiere lamps, they appear to be fairly close to the suspended ceiling.

[82] We know that the fire must have been smouldering for some time, at least an hour, before the firemen arrived, crawled in through the rear patio doors and discovered that the smouldering fire had already made a large hole in the floor but there were no flames which erupted until ventilation was gained through the smashed patio doors.

[83] What puzzles me is how someone could ignite a fire on the basement floor, which would have sufficient heat over a sufficient length of time to cause the ceiling and floor above to smoulder and burn without flames until it consumed the ceiling and the above floor, leaving a large hole. I cannot conceive of a fire being set which would cause that result.

[84] It is unfathomable that there was a fuel source sufficient to cause a vertical fire to provide sufficient heat to cause the ceiling and floor above to smoulder for an hour or more until the ceiling and floor collapsed into the basement. How could that type of fire cause that result? Usually, a fire will initially burn vertically until whatever material is burning is used up and then the fire spreads horizontally to other flammable material.

[85] What caused a smouldering fire to burn through the ceiling and main floor was extreme localized heat over a fairly long period of time. In my view, it is not just coincidence that there were two Torchiere lamps on the basement floor in proximity to where the ceiling and floor were totally consumed without flames.

[86] There are problems with De Berardis other two points of fire origin. He speculates that a second fire was ignited in the kitchen of the maid s quarters in the northwest corner. He does not know the source of the fire but he says it originated on top of the kitchen counter. Kitchen countertops are usually made of Arborite or similar hard finishes. I have difficulty understanding how a successful fire could be started on the top of a kitchen counter.

[87] According to De Berardis his third point of fire origin was the second floor southwest bedroom, and possibly a fourth fire origin in the bedroom storage area. There was alleged to be a pour pattern near the northwest corner of the room. For whatever reason, he believes that the ignition of this fire at the area of the pour pattern did not take but that a fire in the area was started in the south storage area off the bedroom.

[88] If there indeed was a pour pattern in the northwest corner of the bedroom and a fire was not ignited, I find it difficult to accept that lab reports on samples taken from the bedroom show no evidence of an accelerant.

[89] Counsel for the plaintiff referred to parts of the cross-examination of De Berardis, and included the following comments in his written submissions:

He did not know the source of the ignition in the southwest second floor bedroom. In any event, that area ignited, and then self-extinguished. That opinion was not contained in his report. Alternatively, that area never ignited or did not take off .

The fourth area of the fire origin was in the storage area off the second floor bedroom. It was both possible and definite and distinct . That opinion was not contained in his report.

Mr. Battiston never reported an area of fire origin in the attic area storage area in his sketch SK4 of the building or in his field notes.

In his evidence at trial, De Berardis erroneously referred to a pour pattern noted by OFM Marcellus in his narrative video as leading around the bed into the attic storage area.

De Berardis testified that he believed that the half door to the attic storage area was open at the time of the fire, and relied on Battiston s diagram SK4.

The door itself was totally consumed by fire. Notwithstanding that fact, De Berardis testified that he was able to tell the door was open by the hinges he observed in photograph 27 of Tab 5 and reported that in the report of December 1999 at page 8. De Berardis made no mention of such hinges in his own field notes or his report, but says that the fact that the door was open is of somewhat significance .

In his first preliminary report of January 8th, 1998 only three areas of origin were reported, and burn patterns were observed in a second storey bedroom area which are consistent when accelerants are used This clearly indicates that the fire, at all three points of origin, occurred relatively simultaneously, and the materials were exposed to a similar fire duration time .

Despite the contents of the Fire Incident Report, the statements of Chief McDougall and Firefighters Stevenson and Quirt, De Berardis concluded at page 38 of his report, that it was clearly evident that the second storey west bedroom area and south attic area were fully involved in the fire at the time the Mississauga Fire Department personnel arrived at the scene .

The various witness statements of the firefighters in Exhibit 64 were reviewed by De Berardis during cross-examination. He agreed that none of the statements refer to any fire on the second floor, other than the fact that smoke was coming out of the eaves. He further agreed that all of the statements refer to a fire that originated in the basement.

Even after reviewing the evidence of Edward Taylor, the first person to discover the fire, and the witness statements of the various firefighters, De Berardis was unprepared to alter his opinion that the fire in the southwest bedroom area and south attic area was fully involved when fire personnel first arrived on the scene.

[90] I also have difficulty visualizing someone setting four separate fires. That person has to enter the home and go to the second floor and set one fire which fails and then set a fire in the storage area, and then go to the basement and set two more fires, or vice versa, and exit the house as quickly as possible without being seen.

[91] A fire set in the basement would be difficult to see from the outside. But a fire set in the second floor bedroom would be seen through the windows for anyone passing by. De Berardis theory does not make sense to me.

[92] In cross-examination De Berardis departed from the contents of his report and contended that, Dark smoke and soot from the fire blackened the upper windows and prevented persons outside the house from seeing flames in the second floor of the building.

[93] I do not accept Robert De Berardis opinion that the fire was incendiary from three or four separate locations.

[94] I accept Merkley s opinion that this fire originated in the basement recreation storage area and the cause was undetermined .

[95] Merkley agreed that the Torchiere lamps were a possible cause of the fire. I cannot make a finding that the Torchiere lamps were the cause of the fire due to the lack of investigation of the lamps to determine if the switches were on at the time of the fire. I do, however, have a strong suspicion that the fire was caused by the Torchiere lamps. That, to me, seems to be a reasonable conclusion on the evidence and the only conclusion which makes any sense.

[96] Both Chubb and the police conducted exhaustive investigations as to anyone who may have set the house on fire. They came up empty.

[97] The burden of proof in alleging criminal activity in a civil action is somewhere between the ordinary proof on a balance of probabilities and proof beyond a reasonable doubt. Proof requires a high degree of probability. Chubb has failed to prove that the fire was deliberately set. (See: *Brad-Jay Investments Ltd. v. Szijjarto*, [2005] O.J. No. 4353; Aff d. C.A. [2006] O.J. No. 5078; leave to appeal denied [2007] S.C.C.A. No. 92)

[98] Even if the fire was deliberately set there is not a shred of evidence that the fire was deliberately set, on her behalf or at her direction . I do not believe that the plaintiff is capable of having her home, with all her possessions torched by someone just to obtain insurance proceeds. It just does not make sense in the circumstances of this case.

[99] Chubb failed to comprehend the answer to the question, Why would the plaintiff torch her possessions?

[100] The plaintiff has spent a lifetime collecting; namely, furniture, paintings, other fine art, china and glassware and jewellery. At age 13 she purchased her first painting. She inherited a couple hundred pieces of art from her grandfather. Every inch of wall space at 2415 Doulton Drive was adorned with paintings. Who is it that continues to purchase paintings and frames when there is no more display space? Who is it that purchases hundreds of paintings of the same artist? Who is it that stores numerous paintings and frames on top of each other in the basement recreation room and storage closets throughout the house? The answer: someone who loves art and is obsessed with collecting art.

[101] Who is it that has dozens of pieces of expensive jewellery? Who is it that has multiple sets of china and glassware? The answer: someone who just loves to surround herself with objets d art .

[102] Counsel for Chubb cross-examined the plaintiff on why she would allow mortgages to go into default rather than selling some of her collections to pay the mortgages. That suggestion has merit, but the plaintiff did not want to part with her collections.

[103] The plaintiff heard of a hot tip in the stock market. She borrowed $350,000 at 24% interest to invest and lost it all. Why not sell some possessions instead of running up a debt which costs interest at 24%? But, the plaintiff, obsessed with her collections, was not about to relinquish any of her lifetime endeavours.

[104] What Chubb failed to understand was the plaintiff s obsession with and attachment to her collections. Bridgette was betrayed by her husband and her sister. Her marriage was destroyed. Her lavish lifestyle funded by Belltronics was gone. She had Ryan but he had his own life to live. What Bridgette had left was her collections which she had spent years collecting along with the memories of collecting all of it.

[105] What would the plaintiff gain by torching her possessions? Insurance money could never replace her collections. If she was interested only in money she could have sold her collections. I find that she would not destroy her collections by having her house set on fire.

[106] Chubb has failed to prove even on a balance of probabilities that the plaintiff was involved in any way in the fire which destroyed her home and contents.

[107] I find that the weight of the evidence does not point to arson as the cause of the fire. Even if the fire was arson, the weight of the evidence does not point to the plaintiff as being, in any way, involved in the arson. I find the cause of the fire to be undetermined .

2. What was the insurance coverage at the time of the fire?

[108] I preface my comments on this issue by noting the problems of communication between the parties in this case, and in particular, the lack of confirmation in writing of matters discussed verbally.

[109] Problems of communication plague society. Those communication problems are compounded when the important business of underwriting insurance is faced with a convoluted process as occurred in this case.

[110] Kinsella, an employee of Carley, was the sub-broker. He was the only person who communicated directly with the plaintiff. Kinsella communicated with the broker Cosburn, which was the agent of Chubb. Kinsella s contacts at Cosburn were John Fountain and Bob Connell. Their contacts at Chubb were Hannah Springer and Darlene Leggett. Kinsella had no direct contact with Chubb.

[111] The lack of direct communication between the parties and the lack of documentation of verbal discussions resulted in problems which will be discussed below.

[112] The binder of Insurance provided the following coverage:

Dwelling	$ 630,000.00
Personal Property (contents)	600,000.00
Scheduled Article Jewellery	1,000,000.00
Fine Arts	2,000,000.00

[113] The Binder of Insurance is a contract of insurance. Any changes to the coverage of insurance under a binder of insurance must be agreed to in writing by the insured. An insurer cannot unilaterally change the coverage of insurance without the written consent of the insured.

[114] In *Inn. Cor International Ltd. v. American Home Assurance Co. et al.* (1974), 2 O.R. (2d) 64, the Court of Appeal held that a binder was in fact a document which bound the insurance company. At page 3 of that decision the court stated, It was not open to the insurer to unilaterally change the commitment that had been made. Such a change could only be made with the consent of the plaintiff.

[115] The applicable section of the *Insurance Act* is section 124, which reads:

124. (1) All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued and, unless so set out, no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary.

Exception

(2) Subsection (1) does not apply to an alteration or modification of the contract agreed upon in writing by the insurer and the insured after the issue of the policy.

[116] Counsel for the plaintiff submits:

Section 124(1) and (2) of the *Insurance Act* applies. As a consequence, in the absence of the Plaintiff agreeing in writing, no additional terms of the contract or condition, stipulation, warranty of proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured .

[117] In response, counsel for Chubb states:

Section 124 of the Ontario statute is not relevant to the case at hand: it applies to modifications of coverage after a policy has been issued, not to the situation of a temporary binder of coverage.

[118] Cosburn submits that section 124, only applies post-issuance of policy and has no application to the pre-policy stage and in addition, this provision does not apply to a fire policy.

[119] Carley disagrees with Cosburn, stating:

Contrary to the written submissions of CG&B, the Chubb Masterpiece homeowners policy of insurance would not in law be considered a fire policy pursuant to the *Insurance Act*.

[120] In reply, counsel for the plaintiff submits:

The Masterpiece homeowner s policy of insurance was not a fire policy within the meaning of the *Insurance Act*. It provided more than mere coverage for the peril of fire, and the peril of fire was incidental to the coverage.

[121] It is my view that section 124 applies to a binder of coverage because that makes both common and business sense. Otherwise, a binder of coverage does not mean what it states as to the coverage if an insurer can unilaterally amend the coverage without the consent in writing of the insured.

[122] Subsequent to the issue of the Binder of Insurance, problems arose with the coverage for Jewellery and the coverage for Fine Arts.

[123] With respect to jewellery, the Binder of Insurance provides for Scheduled Articles . A list of 74 items of jewellery was prepared. The plaintiff was interested in reducing the premium that she was to pay for her insurance coverage. Kinsella discussed with her the possibility of keeping some of the jewellery in a bank vault which would reduce the premium. Kinsella and the plaintiff had a meeting at which, beside each item on the list of jewellery, was written either Home or Bank .

[124] Kinsella testified that there was a mutual agreement on what items of jewellery would be in vault or out of vault . The plaintiff testified that she never agreed to any such allocation.

[125] However, Bob Connell of Cosburn sent a letter to Chubb dated November 5, 1997, attaching the list of 74 items of jewellery and adding five additional items, #75 to #79, of jewellery which he stated, are also kept in vault . I do not know where he obtained that information nor do I see any agreement in writing by the plaintiff that the additional five items of jewellery would be kept in the bank.

[126] Then an issue arose with loose jewellery stones. Bob Connell sent a fax to Kinsella on December 10, 1997, stating:

Further to our recent telephone conversation Chubb has faxed me a list of the loose stones that cannot be covered under the jewelry schedule. On your original list of jewelry these are items #11, 16, 25, 40, 43, 44, 56, 58, 59, & 67.

[127] On the list of jewellery items, the loose stones are indicated as being at Home . By fax dated December 11, 1997, Kinsella sent the plaintiff a copy of Connell s fax and stated, Please store loose stones in your bank vault. I see no agreement by the plaintiff to store loose stones in the bank, nor do I see any understanding in writing between the parties as to what was to happen if the plaintiff took some jewellery out of the bank and kept it at home or vice versa.

[128] Carley s submissions set out the problem encountered with the loose stones issue when there is a lack of proper documentation:

On December 11, 1997, CG&B forwarded correspondence to Carley, (incorrectly dated December 20, 1997) advising it that Chubb was at that time taking the position that it would not insure the loose stones listed on the Plaintiff s list of jewellery (Exhibit 5, Tab 52) and asked Mr. Kinsella to notify the Plaintiff of such. The fact that the loose stones would not be covered by Chubb was not disclosed by CG&B to Carley when the discussions relating to coverage were held prior to October 1, 1997. In fact, there was never any indication to Carley prior to December 11, 1997 that the loose stones would not be covered. Such communication occurred only six days prior to the fire loss and in excess of two months following the binding of the insurance by CG&B on behalf of Chubb on October 1, 1997. Accordingly, Mr. Kinsella was put in a difficult position by CG&B, of again having to inform the Plaintiff that the coverages that she believed she had were attempting to be altered by CG&B/Chubb.

Mr. Kinsella s evidence was that he informed the Plaintiff on December 11, 1997 that CG&B/Chubb had now advised that the loose stones would not be covered. There is a handwritten note to that effect at Exhibit 5, tab 52, which states Advised Insured Dec 11/97 By Phone . As the fire occurred on December 16, 1997, the Plaintiff only had 5 days to make other arrangements for her loose stones as a result of the late notice by CG&B/Chubb that the loose stones would not be covered.

Mr. Connell admitted during his cross-examination that he did not send to Carley or to the Plaintiff any formal insurance documentation setting out the change in the coverage in relation to the loose stones. Given that the Plaintiff secured insurance on the basis that her loose stones would be covered, it is submitted that it would have been appropriate for formal insurance documentation to be forwarded by CG&B to the Plaintiff setting out the proposed change in the coverage, rather than asking Mr. Kinsella to convey such to the Plaintiff.

[129] There was no compliance with section 124 of the *Insurance Act* to have the plaintiff agree in writing to any change in the jewellery coverage. Therefore, at the time of the fire, the plaintiff had blanket coverage of $1,000.000 on jewellery.

[130] With respect to the issue of coverage for Fine Art, there was initial blanket coverage for $2,000,000 on Fine Art. No schedules were contemplated in the wording of the Binder, and Blanket Fine Arts was utilized in the policy of insurance, eventually issued by the defendant Chubb.

[131] On October 23, 1997, Darlene Leggett of Chubb spoke to Bob Connell of Cosburn and told him that the Fine Art was to be on a Blanket Value of $2,000,000 but a maximum of $2,500 for any one item .

[132] Connell spoke to Kinsella on the same day and asked him to correspond with the plaintiff in writing to confirm that sub-limit of $2,500. The defendant Kinsella then corresponded with the plaintiff on November 5, 1997, and advised her of that sub-limit but advised, contrary to Connell s conversation that the sub-limit of $2,500 would apply unless an appraisal is sent to the insurer.

[133] The evidence at trial indicated that all Chubb was seeking was an itemized list of the Fine Art collection to be covered under the blanket Fine Art coverage, not appraisals.

[134] At no time was the plaintiff requested to sign a consent in writing to this variation in coverage, and she did not consent. Therefore, at the time of the fire, the plaintiff had blanket coverage of $2,000,000 on Fine Art.

[135] In its submissions, Carley points out the problem with the $2,500 amount resulting from the lack of proper confirmation in writing of verbal discussions. Counsel for Carley comments:

There was a discrepancy in the evidence given by Mr. Connell and Mr. Kinsella on the $2,500.00 amount. Mr. Connell gave evidence that the limit was $2,500.00 regardless of the value of the artwork that was covered. Mr. Kinsella gave evidence that he was told by Mr. Connell that the $2,500.00 per item would apply until the Plaintiff secured an appraisal that set out the value of the artwork i.e.: if the appraisal indicated that the value of a specific piece of art was $10,000.00, then the sub-limit of $2,500.00 would not apply as that item would be insured for the full value of $10,000.00. Mr. Connell admitted that he received a copy of Mr. Kinsella s letter of November 5, 1997. That letter, specifically says that the sub-limit is $2,500.00, unless an appraisal is sent to the insurers. Mr. Connell never informed Mr. Kinsella that such was incorrect, or not in accordance with their discussion. Accordingly, Mr. Connell permitted Mr. Kinsella to believe and to represent to the Plaintiff that the sub-limit of $2,500.00 would not apply to an item of artwork that was appraised at more than such amount.

3. Did the plaintiff intentionally conceal or misrepresent any material fact relating to the policy before the fire?

[136] The policy of insurance in this case contained the following express condition:

Concealment or fraud

This policy is void if you or any covered person has intentionally concealed or misrepresented any material fact relating to this policy before or after a loss.

[137] Since the insurance policy was not issued prior to the fire, the plaintiff had no knowledge of the above express condition. Prior to the issuance of the Binder of Insurance, the plaintiff was not advised of this express condition. How could the plaintiff intentionally conceal or misrepresent something of which she had no knowledge?

[138] Only an insurer knows what it considers a material fact in relation to a risk it is assuming. How does an insured know what a material fact is unless so advised by the insurer? I am incensed that an insurer can hide behind this express condition without advising an insured of what the insurer considers to be a material fact .

[139] In *Chenier et al. v. Madill* (1974), 2 O.R. (2d) 361, Galligan J. held, in the absence of knowledge of the materiality to the insurer of the circumstances, there can be no fraud in the omission to communicate them.

[140] At the time the plaintiff sought this insurance coverage from Chubb, Chubb did not require an insured to complete an application form. However, Cosburn sent the plaintiff an application form which was not a Chubb form. The plaintiff signed the incomplete form and returned it to Cosburn. I note that neither Chubb nor Cosburn ever followed up with the plaintiff to have her fully complete the application that she signed.

[141] I cannot believe that the business of insurance was conducted in such a nonchalant fashion. Presumably, Chubb has improved its underwriting practices over the past ten years.

[142] Throughout this litigation Chubb has alleged that the plaintiff concealed or misrepresented material facts when she requested the insurance coverage set out in the Binder of Insurance. The specifics of the allegations have changed from time to time and the emphasis on particular allegations has changed. However, I will deal with what seems to be the three main material fact allegations, which the plaintiff concealed or misrepresented, which if known by Chubb, would have caused such concern to Chubb that it would have declined coverages.

1. Husband Rudy Sagl was a joint owner of 2415 Doulton Drive.

[143] Rudy Sagl signed a Direction dated July 15, 1997, releasing all and any interest that he may have had in the 2415 Doulton Drive property to the plaintiff.

2. There was a first mortgage on 2415 Doulton Drive in favour of MRS Trust which was in default and MRS Trust was pursuing an action for judgment on the mortgage debt and for possession.

[144] The plaintiff consented to judgment on the basis that 2415 Doulton Drive was for sale and the plaintiff was also expecting to receive money from her July 1997 family law judgment. It appears that MRS Trust was prepared to await either the sale of the house or its judgment paid by the plaintiff.

[145] Furthermore, as a matter of an underwriting issue, Connell of Cosburn indicated that he had never had a situation where an applicant s mortgage was in default and he could not answer whether a mortgage in default would make any difference to a front line underwriter.

3. The plaintiff was not wealthy but was in financial distress.

[146] Chubb and Cosburn both gave evidence at trial that the Chubb VIP program that Chubb had initiated was directed at wealthy clients. Chubb s underwriting witness, Darlene Leggett, testified that all that was necessary to qualify to be insured under the Chubb VIP program was that the insured owned real estate valued at a minimum of $400,000. Leggett also indicated that if the insured had a $200,000 mortgage on such a home, the insured would qualify under this program. With those criteria most homeowners in the GTA would qualify to be insured under Chubb s VIP program, including the plaintiff.

[147] If, as in this case, it was a material fact as to the names of the titled owners of the property, that information could have been elicited on a proper application form.

[148] If, as in this case, it was a material fact as to whether the property was mortgaged and the status of any mortgages, that information could have been gained from a proper application form.

[149] Similarly, if it is a material fact to an insurer to know the financial viability of a potential insured, that information could be obtained easily by the appropriate questions on an application form.

[150] A proper application form should contain a warning with reference to the above express condition. The application should be signed by a potential insured in the presence of a broker witness who has reviewed the application form information with the applicant who has been advised of the material facts of the insurer and told about the consequences of concealing or misrepresenting any material fact.

[151] I agree that an insurer expects an applicant for insurance to act in the utmost good faith in seeking insurance coverage. But, fairness requires that an insurer also act in the utmost good faith. It is my view that an insurer cannot rely on the above express condition unless the applicant for insurance is advised of what the insurer considers to be material facts, and the consequences of concealment and misrepresentation. Chubb failed to act in the utmost good faith toward the plaintiff at the time she requested insurance coverage.

[152] I find that the plaintiff did not intentionally conceal or misrepresent any material facts in relation to the insurance coverage requested prior to the fire.

4. Did the plaintiff intentionally conceal or misrepresent any material fact relating to the policy after the fire?

[153] Under this issue I intend to deal with the four items of insurance coverage as set out in the Binder of Insurance and determine what loss the plaintiff incurred as a result of the fire.

1. Dwelling coverage - $630,000

[154] The plaintiff claims replacement cost of $802,308.45. Chubb, in its written submissions does not dispute the replacement cost; therefore, if judgment goes in favour of the plaintiff, that replacement cost amount will be part of the judgment.

2. Personal Property (Contents) coverage - $600,000

[155] Chubb takes the position that the plaintiff s claims for Contents and Fine Art are fraudulent. Counsel for Chubb submits: The plaintiff Sagl s Artwork and Contents sections in her proof of loss are replete with fraudulent claims and false statements.

[156] As I understand Chubb s position, it does not deny that the plaintiff lost contents and fine art as a result of the fire. But, Chubb maintains that the plaintiff has exaggerated the value of the lost contents and fine art to the point of intentionally misrepresenting the value of what was lost and, therefore, the plaintiff s claims are fraudulent.

[157] If Chubb proves that any part of the plaintiff s claim is fraudulent, the law states that a fraudulent claim by an insured results in no recovery by the insured under the applicable insurance policy.

[158] The question is: Is the plaintiff s proof of loss fraudulent or, is this a difference of opinions on the value of the Contents and Fine Art?

[159] Once a fire destroys possessions it is difficult to determine true value of the possessions without proper documentation which hopefully has not been consumed in the fire. Persons with possessions of above average value ought to be aware that they need to keep purchase invoices and take photographs and get up-to-date appraisals, all of which need to be kept in a fireproof place. Unfortunately, most people neglect to prepare proper documentation. They procrastinate doubting that their possessions will ever be destroyed.

[160] Now, back to the Contents coverage of $600,000. Kevin Watson of National Fire Adjusters sat down with the plaintiff and, from her memory, Watson compiled a room-by-room inventory of contents. His inventory contains 563 items with an estimated value of $1,788,393.23 plus cost of acquisition of $143,871.46, plus PST and GST of $269,758.98, for a

total contents loss of $2,212,023.67.

[161] Watson was impressed with the large quantity of high quality items. It was his opinion that the amount of contents insurance coverage would not cover the loss; She was greatly underinsured. Watson said that his opinion was confirmed by the photographs taken prior to the fire.

[162] In the fall of 1997, the plaintiff and her daughter began the process of identifying the contents and fine art. Exhibit 2 is a series of 115 photographs showing the interior of 2415 Doulton Drive with its contents and fine art.

[163] Kinsella had visited 2415 on a number of occasions. He described the furnishings as, lavish, over-powering, loaded with artwork.

[164] Lawyer Janet Vanderburgh s impression of 2415: lavishly furnished, crammed with artwork and furniture, it was lovely and well-maintained.

[165] The plaintiff s companion, a Provincial Court judge, was frequently inside 2415. His description:

It was like a museum far more cluttered, all antiques and reproductions oil paintings on every square inch of wall dishes to serve 30/40 people, statues, lamps, glass ware. The downstairs storage area was full of paintings, nooks and crannies and crawl spaces were packed with framed and unframed oil paintings. $600,000 would not begin to cover the loss. She had an extensive wardrobe including five fur coats.

[166] Stephen Sweeting, Chubb s expert, commented on only three items from Watson s inventory. According to Sweeting a piece of furniture cannot be designated an antique unless it is over 100 years old. Of the hundreds of antique shops across Ontario, it would be rare to find furniture for sale which is over 100 years old.

[167] Sweeting comments on inventory item 400, a solid wooden hand-carved office desk with a claimed value of $30,000. It was Sweeting s opinion that the desk was a poorly constructed, commercial quality decorator piece which he appraised at $3,500 replacement cost.

[168] Item number 376 is a player piano with a claimed value of $18,500. The player piano is described as being approximately 50 years old with 150 rolls of music. Sweeting found records of auction sales of player pianos and put the replacement value at $800. I find it difficult to accept that a 50-year-old player piano with 150 rolls of music can be purchased today for $800.

[169] The third item which Sweeting challenges is item 335, a 12-piece solid wood hand carved dining room suite with a claimed value of $45,000. According to Sweeting s inspection of the damaged dining room suite, it was a relatively basic set, lacking the quality of carving and type of wood as would justify a value at the high end of such pieces. Sweeting estimated a replacement cost of $12,000.

[170] Cantu Interiors, in a document dated May 19, 1999 prepared for the plaintiff, provided prices for sixteen items of furniture. I presume that Cantu was asked to provide the prices for furniture similar to the furniture at 2415. One of the items on the Cantu list is, Baroque Dining Room, China Table 6 side, 2 arm-chairs , at a price of $45,000.

[171] Sweeting conceded that there could easily be an honest difference of opinion relating to replacement cost between the insured and the insurer.

[172] Although the plaintiff produced little documentation such as purchase invoices and appraisals to support her contents claim, I found the May 10, 1999, letter and list of items from Frank Frankfurter of the World of Antiques helpful in determining the value of the contents claim.

[173] The whole of Frankfurter s letter is:

To Whom It May Concern

I the undersigned Frank Frankfurter the former owner of The World of Antiques Art and Antiques Gallery hereby state and declare that Mrs. Bridget Sagl of 3287 Shelburne Place, Oakville, L6L 5V7 has been steady and a continuous customer of The World of Antiques since 1971 until 1993-94 when I closed.

I have inventory notes and general notes going back to the seventies and notes of sold items. Mrs. Sagl purchased large quantity of art and antiques by herself and many times she came with Mr. R. Sagl and they purchased together. Most of the time Mrs. Sagl made selection and decision.

Hereby I make a list of the items that she purchased and occasionally together with her husband.

I know that Mrs. Sagl had a number of valuable Meissen and Dresden porcelain. She is and was a serious collector with very good taste.

Yours truly,

[Signature]

Frank F. Frankfurter

[174] I have totalled all of the items listed as purchased by the plaintiff from World of Antiques. The total is $306,500. Of that amount, there are 22 paintings costing $45,550 which, when subtracted from the total, results in contents purchased from this one source of $260,950. For the purpose of the fine art claim, the average cost of the 22 paintings was $2,070.

[175] Counsel for the plaintiff points out that Chubb s investigator, Kerry Eaton, interviewed Frankfurter to confirm the authenticity of his documentation. I do not recall any evidence of Eaton which challenged the information provided by Frankfurter. In fact, Eaton testified that Frankfurter confirmed the plaintiff s purchases.

[176] I have no hesitation in finding that the plaintiff s submission is correct; at the time of the fire, the value of the contents of 2415 exceeded the binder coverage of $600,000. Chubb s position that the plaintiff s contents claim is fraudulent is just plain wrong.

[177] Counsel for the plaintiff, in his reply submissions, raises a new issue concerning the amount for loss of contents. Counsel submits that by reason of the terminology of the Masterpiece policy, the plaintiff is entitled to the identical amount for loss of contents as the replacement cost of the dwelling of $802,308.45. He relies on the following policy provision:

If a change in the amount of coverage for your house is made, including the application of extended replacement cost, the amount of coverage for contents will be adjusted proportionately.

[178] I do not agree with counsel s interpretation of that provision. The coverage for dwelling pursuant to the binder was $630,000. There was no change made in the amount of coverage for the house; therefore, the above provision has no application.

[179] If judgment goes in favour of the plaintiff, her $600,000 contents claim will be part of that judgment.

3. Scheduled Articles of Jewellery - $1,000,000

[180] The plaintiff s claim for lost jewellery is $923,450 plus PST and GST, which exceeds the binder coverage of $1,000,000.

[181] Chubb provided no evidence at trial to rebut the evidence of the plaintiff relating to her loss of jewellery as a result of the fire. In its written submissions, Chubb does not respond to the amount of the jewellery claim. Although I have reservations as to the amount of the jewellery claim, in the absence of an adequate response from Chubb, I find the loss of jewellery to be $1,000,000.

[182] Chubb appears to be relying heavily on its position that the plaintiff has submitted fraudulent claims. Chubb s counsel states: This section of her claim is vitiated by her proven fraud in connection with the claims for Art and Contents.

[183] If there is judgment for the plaintiff, the amount of $1,000,000 will be part of the judgment.

4. Fine Arts - $2,000,000

[184] What is known, from the photographs in Exhibit 2, is that there was a substantial amount of framed and unframed works of art in 2415. The photographing of the basement works of art had only just begun and there are no photographs of the artwork stored in the second floor closets. The photographs are not of much assistance without a full description of the individual artwork.

[185] What is not known, and cannot be determined, is the true value of all of the fine art at the time of the fire. I have had the most difficulty with this part of the case. I will attempt to gather the evidence relating to the fine art claim and then decide whether the plaintiff has submitted a fraudulent claim by intentionally concealing or misrepresenting a material fact relating to the fine art claim.

[186] In 1995, the plaintiff wanted to borrow money and use her fine art collection as collateral. She contacted Mr. Sweeting, who visited 2415 and viewed some of the collection for the purpose of preparing a proposal for valuation of her fine art collection. No actual valuation took place because the plaintiff borrowed money with some jewellery as collateral.

[187] After Sweeting visited 2415, he wrote the plaintiff a letter dated May 4, 1995. In part the letter reads:

We confirm here our understanding of this assignment to be the appraisal of sixty (60) properties selected by you, including paintings, sculpture and decorative art. The purpose of the appraisal will be to estimate current market value.

The intended use of this appraisal report is to provide a financial advisory for collateral and security purposes.

As some of the properties examined last week may not be of the calibre (and value) required for your purposes, you may wish to consider allowing us, as professional valuators, to guide you on the selection of items to be appraised.

[188] Sweeting, in his notes, thought the value would be $750,000 to $1,000,000. I do not know the extent of his inspection of the plaintiff s fine art collection. Does Sweeting s rough value estimate refer to only 60 items? Sweeting did not view all of the plaintiff s fine art collection. He testified that he did not see the artwork in the second floor storage areas.

[189] In the plaintiff s matrimonial case, Justice Ellen Macdonald wrestled with the value of the Sagls artwork. The following paragraphs are from the judgment of July 11, 1997:

26. Mr. and Mrs. Sagl were both very interested in the accumulation of art work in the form of paintings, prints, figurines, and other objets d art . If the value of the art collection were to be assessed by reference to the number of pieces, it would be very large. However, neither of Mr. and Mrs. Sagl appeared to have been concerned about the authenticity of some of the pieces purchased by them. Mr. Sagl stated that he never conducted any research of the background of any of the pieces of art purchased by him over the years. The homes of Mr. and Mrs. Sagl contain a great deal of art work which is both on display and in storage in various rooms of their houses. I was told that some of the art work has been pledged by Mr. Sagl to his creditors. Mr. Sagl was unable or unwilling to categorize the art into that which is owned by him and that which is owned by BEL. On many occasions when the art was purchased, it was paid for by cheques written on the BEL company account. Mr. Sagl aspired to open a private gallery displaying his collection.

Neither Mr. nor Mrs. Sagl put information before the court with respect to the value of the art collection which was helpful. Mrs. Sagl called as a witness a person, who at one time owned an art boutique in Italy which was, at one time, frequented by Mr. and Mrs. Sagl. Apparently, the purpose of his testimony was to estimate for the court the approximate amount spent by Mr. and Mrs. Sagl during the period of his association with them. His evidence was completely unreliable. He, too, was a dishonest witness. I was greatly surprised that a person of his apparent background would be called to the court to testify on these important issues. It became clear that this person participated in at least one scheme to defraud Mr. and Mrs. Sagl with respect to the value of certain art work that was purchased through him.

Similarly, invoices, other pieces of paper , and appraisals of art in written form were presented to the court suggesting that certain pieces, the authenticity of which is not certain, are valued at between U.S. $8 million to U.S. $10 million. At one point in 1990, Mr. and Mrs. Sagl represented that their entire collection was worth $100,000,000. I was not told whether this was in U.S. or Canadian dollars. It later became apparent during the trial that these valuations were entirely without foundation and were prepared for the express purpose of grossly inflating the value of the collection. It is apparent that, contrary to the order of Mr. Justice Walsh, Mr. Sagl arranged to have removed from the Sagl Estate a substantial number of paintings. These were transported to his home in Georgia, apparently after elaborate arrangements designed to ensure that the rented trucks would arrive at the Sagl Estate late at night so as to be undetected by Mrs. Sagl. Mr. Sagl gave instructions that the packing of the art work was to be done so as to preclude or minimize the chances of detection when passing through customs at the Canadian/U.S. border.

The Value of the Art Work

30. I have no reliable information on this issue. The wife s net family property statement suggests a valuation date value of $5,000,000. The husband suggests $750,000. I have decided to place a value for purposes of calculating the net family property at $1,000,000 and to attribute $500,000 to each of them. This may appear to be rough justice but I have *no* reliable information on this issue. The documents provided to me are unreliable and contrived.

[190] At some point in Chubb s underwriting process, Cosburn advised Chubb that the fine art consisted of 250 items, the largest worth $50,000.

[191] It is almost impossible to valuate a fine art collection that has been basically totally destroyed without access to purchase invoices and appraisals.

[192] Even with existing pieces of fine art, who knows their true value? For example, there are individual paintings which have sold for millions of dollars. But, are those paintings worth the price? The price is in the mind and eyes of the beholder!

[193] In this case Darragh Elliott prepared a 613-page report attempting to place a value on 2,580 items which he valued at $9,720,980.

[194] Elliott has some experience in art appraisals and appears to have a general knowledge of artists and paintings. He acknowledged the great difficulty of trying to evaluate a fine art collection destroyed by a fire.

[195] Elliott sat down with the plaintiff over many hours to establish, as best as possible, a list of her fine art collection. They had the photographs in Exhibit 2 which were taken in the months before the fire and other photographs produced in March of 1999 according to Elliott s report. I have some difficulty comprehending how the plaintiff could remember 2,580 items, especially those that were not on display at 2415 but were in storage areas.

[196] Once the list of items was prepared it was a mammoth research task to come up with replacement values. Elliott referred to auction results, the Art Sales Index, Art Reference Books, Gordon s Paint Price Annual and Lawrence s Dealer Print Prices Annual.

[197] In the preface to his report, Elliott sets out Conditions of Valuation as follows:

While the writer has endeavored to list and describe correctly, the following item(s), a guarantee is not made of the correctness of the listings, or other descriptions of the physical condition, size, importance, authenticity, attribution, provenance, exhibitors, literature, historical relevance, and no statement made within this appraisal/valuation shall be deemed such a warranty.

[198] With respect to determining replacement cost, Elliott s report states:

The replacement, and (if applicable) restoration costs shown, are solely the opinion(s) of Maynard Elliott Inc., as of: March 31, 1999 and are based upon the replacement value for the item(s) described on the attached addendum pages, at the highest realistic price from a major art gallery, organization, or individual, located within a major Canadian, United States, or European center, to that of a similar and like subject, similar and like mannerism, similar and like medium, similar and like size, similar and like ability of execution, in a similar and like condition and approximate age for valuation purposes.

The replacement value in relation to fine art and artifacts is further defined as being: the substitution for another being of a similar and like nature, size, subject, age, mannerism, medium and ability of execution.

[199] Elliott used a chart from the Art Sales index showing the trend in prices for works sold at Canadian art auctions between 1981 and 1998. Elliott claims that the chart supports an increase in value of 80% from 1994 to 1998. Counsel for Chubb says, The application of that chart to his appraisal values is completely without foundation. Counsel notes, with respect to the value of Barrowman s works of art, that the use of the chart explains the huge jump in Elliott s appraised values from the earlier appraisal of them which he provided to the plaintiff in 1992.

[200] Is the use of the chart a matter of interpretation, or, an intentional misrepresentation of a material fact?

[201] In her written submissions, Chubb s counsel makes persuasive submissions to support allegations of fraud. Counsel comments on the plaintiff s lack of testimony to describe her art collection:

Although Ms. Sagl maintains that she owned highly valuable pieces and that the collection of art had been a passionate interest of hers for many years, she has only ever testified in generalities with respect to her art collection . In her testimony at trial, she completely failed to exhibit knowledge of its components, their provenance and their worth, such as any genuine art enthusiast would display. For example, Ms. Sagl testified that several valuable Old Masters works of art had been passed to her by her grandfather: she could not identify a single one of them in her book of photographs or in the Elliott appraisal report. Ms. Sagl claims to have acquired a great deal of art through auctions: not a single record from an auction house has ever been produced, nor any particulars of such purchases.

[202] Chubb s counsel singles out the Rodin bronze as the clearest instance of the plaintiff s fraud. Counsel states:

The plaintiff Sagl s claim of $600,000 U.S. (when the proof was submitted, approx. $900,000 Can.) for a Rodin bronze, L Eternel Printemps, allegedly destroyed in the fire, is one of the clearest instances of fraud in her proof of loss and of the fact that Mr. Elliott was entirely unscrupulous in terms of what he was prepared to put into his appraisal report. Not one photograph of such a sculpture, the single most valuable piece in her collection has ever been produced by Ms. Sagl. It does not appear in the series of photographs she took of the artwork in her house prior to the fire, although numerous other sculptures of far less value and renown are depicted. Ms. Sagl testified she kept it in the back of her basement storage room. There is no evidence that she ever mentioned it or showed it to anyone, including Sweeting and Yeomans of Appraisal Associates when they reviewed her collection in 1995. She certainly did not disclose its existence to the Court in the course of her divorce action. The only evidence of its existence, apart from Ms. Sagl s word, is found in the World of Antiques list of items allegedly purchased from that store. On that list, it is described only as a limited edition (36) bronze casting. There is no identification of the foundry where it was made not the year of its creation, nor any other information that would confirm true provenance for the piece. There is no evidence to warrant any more substantial a value being assigned to it than is reflected by the price Ms. Sagl apparently paid for it: $6,500. Nevertheless, Mr. Elliott (who himself, never saw the sculpture) support an appraised value for it of **$600,000 US,** and that is what Ms. Sagl claimed for it in her sworn proof of loss. The appraised value is entirely disingenuous on the part of Mr. Elliott, and a gross and deliberate exaggeration by Ms. Sagl of her claim. There is good reason to conclude that no such sculpture was even in her house on Doulton Drive when the fire occurred. If it was in her possession, it should appear in her photographs. If she had it in 1995, as she claims, she would have shown it to Sweeting and Yeomans (or Elliott) in the course of their earlier dealings with her art collection.

[203] Chubb alleges that the plaintiff s fine art claim is fraudulent. Presumably, that means that the plaintiff, intentionally concealed or misrepresented a material fact, in relation to her fine art claim.

[204] I am not sure what a material fact would be in relation to the fine art claim. I suggest if the plaintiff represented that a particular painting was done by a famous artist but was actually done by an amateur, that would be an intentional misrepresentation.

[205] Here, Chubb s main concern appears to be allegations of inflated values. But, the value given to a particular item of fine art depends on the methodology used and the value determined is a matter of opinion.

[206] My problem is, that Chubb, for whatever reason, chose not to have Sweeting review Elliott s report and prepare a rebuttal report. I have no basis upon which to find that Elliott s methodology is either flawed or fraudulent. Elliott s report may be flawed but that does not make his estimate of the value of the fine art fraudulent.

[207] Originally, when Kinsella was preparing quotes for the plaintiff s insurance coverage, the fine art coverage was $1.5 million. When the binder was issued the fine art coverage jumped to $2 million.

[208] $1.5 million of fine art, over and above contents, in a dwelling is a substantial request for coverage. An additional $.5 million request for coverage is a substantial increase. Chubb did not seem at all concerned. In fact, Chubb never, in the 11 weeks from the time the binder was issued to the time of the fire, performed an inspection to determine if the amount of the coverage requested was reasonable.

[209] I do have some experience of insurance coverage on antique and classic cars, all of which have been purchased for less than $150,000. When I purchase such a car, my insurer will bind coverage. However, within a limited period of time I must provide the insurer with a reputable appraisal and photographs. The appraisal must be updated every five years. This practice makes common sense and good business practice. If a loss occurs, it is unlikely that litigation will be required to resolve a claim. I fault Chubb for its poor business practices.

[210] On the question of whether the plaintiff has committed fraud, Chubb relies heavily on the case of *Alavie v. Chubb Insurance Co. of Canada*, [2005] O.J. 776 (C.A.). In that case there was theft of personal property from the plaintiff s residence. Total claim was $950,000, which included $50,000 said by the plaintiff to relate to the theft of eight pieces of her own artwork.

[211] In attempting to substantiate the value of the stolen artwork, the plaintiff provided false invoices that purported to relate to past sales of similar artwork to independent third party purchasers. The name and other identifying features of the purchasers were deleted from the invoices. In fact, the invoices were falsified and concerned monies received from a third party for purposes unconnected to the sale of the plaintiff s artwork. The plaintiff admitted that the invoices and her prior representations concerning their validity were false.

[212] The *Alavie* case involved the plaintiff providing intentionally falsified documents. There is no evidence in the Sagl case that the plaintiff has intentionally put forward false evidence.

[213] The plaintiff, to the best of her knowledge and memory, prepared a list of her fine art lost or damaged in the fire. The plaintiff retained Elliott to prepare a replacement cost estimate for the lost items. Elliott utilized a certain methodology to come to his values which he does not warrant as being true or accurate. Chubb presented no expert report to refute Elliott s methodology or conclusions.

[214] In *Chenier et al. v. Madill* (1974), 2 O.R. (2d) 361, Galligan J. stated:

one of the essential ingredients of fraud, whatever its definition, is a heinous state of mind involving the willful act of depriving another of what is justly his. The words of Lord Esher, M.R., in Le Lievre and Dennes v. Gould, [1893] 1 Q.B. 491 at p. 498, are germane: A charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shewn that he had a wicked mind.

[215] In *McQueen v. Economical Mutual Insurance Co.*, [1996] O.J. No. 4555, Benotto J. stated at paragraph 12: The cases have held that a false representation is fraudulent if made knowingly, without belief in its truth or recklessly without care whether it is true or false.

[216] I find that Chubb has failed to prove that the plaintiff intentionally concealed or misrepresented a material fact relating to the policy after the fire.

[217] The methodology used by Elliott estimates the value of fine art at over $9 million. Plaintiff s counsel submits that if the $2,500 limit on each item of fine art was applicable, the plaintiff s loss would be over $4 million.

[218] I previously referred to the average price of $2,070 for the 22 paintings purchased by the plaintiff from the World of Antiques. Even using that average price, the value of the plaintiff s fine art would exceed $4 million.

[219] I simply note that the plaintiff, at the time she purchased the contents and fine art, had access to lots of money. She was in the habit of purchasing expensive things.

[220] I find that the plaintiff s fine art loss as a result of the fire exceeded the insurance coverage of $2 million. That amount will be part of the judgment.

5. Is this a case for an award of punitive damages?

[221] In *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (S.C.C.), [1995] 2 S.C.R. 1130, at para. 196, the court enunciated the test for punitive damages:

Punitive damages are awarded against a defendant in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court s sense of decency.

[222] In *Whiten v. Pilot Insurance Company*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595, at para. 67, the court said:

Punitive damages ought to be available whenever the conduct of the defendant is such as to merit condemnation by the court.

[223] *Whiten* also states that though an independent actionable wrong is required, a breach of the contractual duty of good faith is to be considered independent of and in addition to the breach of the contractual duty to pay the loss, and will thus suffice.

[224] To determine whether an award of punitive damages is appropriate there appears to be a two-step analysis. The first step is to determine whether there was bad faith, and the second step is to determine whether the bad faith was sufficiently egregious to warrant punitive damages.

[225] The bind coverage totalled $4,230,000, which included $1 million for jewellery and $2 million for fine art. To me the jewellery coverage and fine art coverage were exceptional for a private residence. Yet, Chubb failed to inspect the residence to determine whether that amount of coverage was appropriate. Having failed to determine the appropriate coverage, Chubb now maintains that the plaintiff s claims are fraudulent. In my view, Chubb has breached its duty of good faith.

[226] The day after the fire, Chubb prejudged the cause of the fire as arson in which the plaintiff was implicated. The plaintiff was denied additional living expenses as a result of Chubb s hasty conclusion that the plaintiff was responsible for the fire.

[227] Although Chubb was supported in its allegations of arson by OFM and the police, Chubb ought to have looked more closely at the arson evidence. I have found that the OFM evidence was flawed. Chubb s failure to impartially scrutinize the evidence was a breach of the duty of good faith.

[228] In *Kogan v. Chubb Insurance Co. of Canada*, [2001] O.J. No. 1697, in which Chubb alleged arson, Forget J. found that Chubb failed to prove arson. At para. 61, Forget J. stated:

61. Where the insurer and/or adjuster acts unreasonably by effectively presupposing arson as the cause of the fire and taking steps to fortify this conclusion rather that objectively assessing the evidence in order to draw a reasonable conclusion therefrom, the label of bad faith will be justified and punitive damages should be awarded.

[229] At para. 67, Forget J. concluded:

67. I find that the conduct of the insurer and its adjuster to be reprehensible, callous and highhanded because of the prejudging of the matter thereby breaching the duty of good faith owed to their insured.

[230] In the end, Chubb has failed to prove that the plaintiff was in any way implicated in the alleged arson.

[231] In my view, Chubb had tunnel vision and failed to consider the evidence in an impartial and common sense way. There was no direct evidence implicating the plaintiff in any way with the fire. Chubb knew the high standard of proof required to support its allegations of criminal activity by the plaintiff, and without any proof Chubb persisted in persecuting the plaintiff with false allegations.

[232] It is a serious matter to allege that a plaintiff has committed a criminal offence without putting forth any direct evidence to prove the allegation. That is a breach of the duty and good faith and is reprehensible conduct.

[233] Chubb continued its reprehensible conduct when it alleged that the plaintiff misrepresented and/or concealed material facts relevant to the risk that Chubb was assuming. I have already found that because of Chubb s poor underwriting procedures it breached its duty of good faith to the plaintiff. Chubb failed to have the plaintiff complete a proper application form which should have set out in question form the information which Chubb considered to be material facts upon which it would determine whether to grant coverage.

[234] It is a breach of the duty of good faith by an insurer to allege misrepresentation and concealment against an insured, when an insured has no opportunity to know or provide the facts which an insurer considers material to the risk it is assuming.

[235] Chubb even went further in its breach of duty of good faith in alleging that the plaintiff has committed fraud in her proof of loss for contents and fine art. I have already found that the plaintiff was likely underinsured for contents.

[236] With respect to the fine art, Chubb has failed to provide proof that the plaintiff s fine art claim is fraudulent. In fact, Chubb failed to provide an expert opinion challenging the methodology used by Elliott to come to his estimate of the value of fine art items.

[237] Almost ten years have passed since the fire. I find that Chubb s conduct has been malicious, oppressive and high-handed and merits the condemnation of the Court.

[238] In the *Kogan* case the award for punitive damages was $100,000. Counsel for the plaintiff submits that Chubb did not learn from the *Kogan* case.

[239] In the circumstances of this case over the ten years, I find that an award of $500,000 is not unreasonable. Therefore, the judgment will include an amount of $500,000 for punitive damages.

6. Is this a case for relief from forfeiture?

[240] Section 129 of the *Insurance Act* provides:

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.

[241] In *Chung v. British Columbia Insurance Co.*, [1996] B.C.J. No. 659, the court found that an insurer has a duty to investigate the property being insured with respect to the adequacy of the coverage. The plaintiffs operated a dental laboratory and also owned certain residential properties which they sought to have insured.

[242] An electrical fire destroyed one of these residential properties. Following this, a claims adjuster from the defendant British Columbia Insurance Corporation (BCIC) inspected the property and discovered that it was a rental property with two different tenants residing therein, and that it had been part of an ongoing agricultural operation. Neither of these facts had been taken into account when issuing the policy. A higher coverage level should have been purchased given the uses to which the property had been put and as such BCIC informed the plaintiffs that their policy was void due to a misrepresentation of the material risk.

[243] At trial the insurance agent was shown not to have a recollection of which properties were insured or of any of the relevant facts relating to these properties. Chung, the plaintiff, was found by Justice Boyd to be a relative neophyte in matters of insurance and this factored into his holding that Park, the agent, failed to discharge his duty to investigate and to ensure that there was adequate coverage. Justice Boyd found as a matter of fact that, Chung relied on Park to see that he was provided with all necessary insurance coverage. The evidence indicated that Park never reviewed the insurance application with the plaintiffs to ensure that the details were correct; he never visited the property in question and he never inquired about farming operations.

[244] Park s failure to come anywhere near close to discharging his duty to the Chungs to use a reasonable degree of care and skill in obtaining adequate insurance coverage for the Chungs led the BC Supreme Court to award them the cash value of the destroyed building.

[245] As in the *Chung* case, the plaintiff in this case, is a relative neophyte in matters of insurance . Chubb never inspected the plaintiff s property nor did it question the amounts of coverage requested. Chubb never reviewed the insurance application with the plaintiff to ensure that the details were correct.

[246] Chubb provided the coverage requested by the plaintiff and, with respect to the fine art coverage charged a premium commensurate for $2 million coverage. Chubb contracted to provide $2 million coverage and required the plaintiff to pay the premium for that amount of coverage. Chubb now ought not to be able to deny the plaintiff the amount of coverage paid for, especially when Chubb failed to determine the appropriate amount of coverage for fine art before the contract was concluded.

[247] If there has been imperfect compliance as to the proof of loss given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss , I order relief against the forfeiture or avoidance.

7. What is the liability, if any, of the insurance brokers?

[248] The plaintiff s written submissions contain the following two paragraphs with respect to the brokers potential liability:

In the event that the Plaintiff is not entitled to recover damages from the Defendant Chubb as a result of the failure to disclose the existence of mortgages on both Doulton Drive properties, then the Plaintiff should recover the damages referred to above as against the Defendants Kinsella and G.C. Carley, save and except the suggested award for punitive damages.

In the event that this Court should find that there was some negligent act or omission on the part of the Defendant Kinsella, that prevents recovery of the Plaintiff against the Defendants Chubb and Cosburn, that the Plaintiff is entitled to recover the amount of those non-recoverable items from the Defendants Kinsella and G.C. Carley.

[249] There is no evidence as to any damage suffered by the plaintiff as the result of insurance coverage not containing a mortgage endorsement.

[250] There is no evidence to support a finding of negligence against Eamonn Kinsella or G.C. Carley & Co. Limited. The action is dismissed as against those parties.

[251] The cross-claim against Cosburn, Griffiths & Brandham Insurance is dismissed.

[252] Cosburn relies on the law which states: An agent when contracting on behalf of a disclosed principal does not undertake any personal liability. The action against Cosburn, Griffiths & Brandham Insurance is dismissed.

8. Is the plaintiff owed additional living expenses?

[253] Immediately after the fire the plaintiff lived with her daughter at 2399 Doulton Drive. There was no evidence presented by the plaintiff of any additional living expenses actually incurred by her as a result of the fire. This part of the plaintiff s claim is dismissed.

9. Who is responsible for paying storage costs?

[254] Chubb retained Service Master to deal with the contents of the house after the fire. Service Master transported damaged contents to A & O Warehouse where they were available for inspection by the parties.

[255] A & O issued an invoice in the amount of $132,046.02 addressed to the plaintiff. Plaintiff s counsel, in written submissions, refers to the account as outstanding and, the plaintiff seeks recovery of that amount. I do not know whether the invoice has in fact been paid.

[256] In the circumstances of this case, Chubb is responsible for the payment of the invoice from A & O, plus any interest if the invoice has not been paid.

conclusion

[257] The action is dismissed as against Cosburn, Griffiths & Brandham Insurance Brokers and Eamonn Kinsella and G.C. Carley & co. Limited, with costs.

[258] The cross-claim of Eamonn Kinsella and G.C. Carley & Co. Limited against Cosburn, Griffiths & Brandham Insurance Brokers Limited is dismissed.

[259] There will be judgment for the plaintiff against Chubb Insurance Company of Canada in the amount of $5,034,354.47:

Dwelling	$ 802,308.45
Contents	600,000.00
Jewellery	1,000,000.00
Fine Art	2,000,000.00
Punitive Damages	500,000.00
A & O Warehouse	132,046.02

plus interest, plus costs.

[260] If the parties are unable to agree on costs they may provide me with written submissions by September 30, as to who pays costs to whom, at what level and, the amounts.

[261] I urge counsel to agree on reasonable amounts for costs. If the parties are too far apart on the amounts, I will likely order that the costs be assessed.

Blenus Wright J.

Released: September 4, 2007

cc

COURT FILE NO.: 98-CV-160150

DATE: 20070904

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BRIDGETTE SAGL

Plaintiff

- and -

COSBURN, GRIFFITHS & BRANDHAM INSURANCE BROKERS LIMITED and

CHUBB INSURANCE COMPANY OF CANADA AND EAMON KINSELLA and G.C. CARLEY & CO. LIMITED

Defendants

REASONS FOR JUDGMENT

BLENUS WRIGHT J.

Released: September 4, 2007