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Bob Aaron bob@aaron.ca

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Document your possessions in the event insurance claim is necessary

A court case that went all the way to the Supreme Court of Canada highlights the importance of homeowners keeping accurate records of their possessions in the event an insurance claim becomes necessary.

Back in 1997, a fire destroyed the luxury house of Bridgette Sagl on Doulton Dr. in Mississauga.

The house was empty on the night of the fire. It was the housekeeper's night off. The dog was left in the yard, some of the windows were left open and the owner was out for dinner. At the time, the mortgages, utilities and taxes were in arrears, and Sagl had accumulated large legal bills following contested divorce proceedings.

The house contained Sagl's huge art collection consisting of hundreds of paintings and sculptures, 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.

Chubb insurance refused to pay Sagl's claim, and alleged that the house was "staged" in preparation for the fire.

After a delay of more than nine years, a 22-day trial took place in 2007. Chubb was ordered to pay the owner's full claim of more than $4.5 million plus interest and legal costs. It was also hit with punitive damages of $500,000 for its "malicious, oppressive and high-handed" conduct in refusing to pay the claim.

Witnesses from the Office of the Fire Marshal 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, possibly from the halogen bulbs in two tall lamps.

After hearing the experts, Justice Blenus 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."

In the end, the judge decided 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 took the case to the Ontario Court of Appeal, and in 2009, that court set aside the trial decision and ordered a new trial restricted solely to the issue of the owner's proof of the amount of her loss.

Sagl applied to the Supreme Court of Canada for leave to appeal the appeal court's decision, and in January 2010, her application was dismissed.

A new trial was held over the course of 15 days in May and June of this year. Last month, the court ruled that Sagl had proved the full value of her art collection and was entitled to recover the $2 million for which it was insured, but reversed the award of $500,000 in punitive damages. Sagl was awarded full costs for both trials.

The words of Wright in the first trial provide 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 Wright's advice. Maintain enough insurance, keep records and photos off site, and be prepared to document the value of what you own.

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Bob Aaron is a Toronto real estate lawyer. He can be reached by email at bob@aaron.ca, phone 416-364-9366 or fax 416-364-3818. Visit the Toronto Star column archives at www.aaron.ca/columns for articles on this and other topics or his main webpage at www.aaron.ca

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Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Limited, 2007 CanLII 36644 (ON SC)

Date:	2007-09-04
Docket:	98-CV-160150
URL:	http://canlii.ca/s/vpxe
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COURT FILE NO.: 98-CV-160150
DATE: 20070904

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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BRIDGETTE SAGL Plaintiff - and - COSBURN, GRIFFITHS & BRANDHAM INSURANCE BROKERS LIMITED and CHUBB INSURANCE COMPANY OF CANADA AND EAMONN KINSELLA and G.C. CARLEY & CO. LIMITED Defendants	))))))))))))))))	*Barry A. Percival* for the plaintiff *Barry A. Papazian* and *Mikel Pearce* for Cosburn, Griffiths & Brandham Insurance *Sheila McKinlay* and *Iain Peck* for Chubb Insurance Company of Canada *Mark O'Donnell* and *Chris Stribopoulos*for 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

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.

<u>1. Was the fire deliberately set on behalf of the plaintiff?</u>

[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 <u>after</u> 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 <u>vice versa</u>.

[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 (SCC), [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.

<u>6. Is this a case for relief from forfeiture?</u>

[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

Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 388 (CanLII)

Date:	2009-05-08
Docket:	C47778
Parallel citations:	249 OAC 234
URL:	http://canlii.ca/s/10r35
Citation:	Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 388 (CanLII), <http://canlii.ca/s/10r35> retrieved on 2011-10-16

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CITATION: Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 388
DATE: 20090508
DOCKET: C47778

COURT OF APPEAL FOR ONTARIO

Lang, Juriansz and Epstein JJ.A.

BETWEEN

Bridgette Sagl

Plaintiff (Respondent)

and

Cosburn, Griffiths & Brandham Insurance Brokers Limited,
Chubb Insurance Company of Canada, Eamonn Kinsella and
G.C. Carley & Co. Limited

Defendants (Appellant)

Peter H. Griffin and Jamie J.W. Spotswood, for the appellant

Barry A. Percival, Q.C., for the respondent

Heard: November 24, 2008

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice dated September 4, 2007, with reasons reported at (2007), 54 C.C.L.I. (4th) 236.

Epstein J.A.:

I. OVERVIEW

[1] On December 16, 1997, the home of the respondent, Bridgette Sagl, was destroyed by fire. In this action she claimed against her insurer, the appellant, Chubb Insurance Company of Canada, among others, for the losses she sustained in the conflagration. Chubb defended the claim by denying coverage on the basis that the fire was the result of arson in which Sagl participated and that she had intentionally made material misrepresentations to Chubb, both in her initial application for coverage and in presenting her claim under the policy.

[2] After a twenty-two day trial, the trial judge gave lengthy reasons in which he rejected all three defences. The trial judge was not satisfied that Chubb had demonstrated that the fire was incendiary in origin or, if so, that Sagl had any involvement in it. He further held that Chubb failed to prove that Sagl made any intentional material misrepresentations in her dealings with Chubb. The trial judge therefore awarded Sagl damages in the amount of $4,534,354.47 plus $500,000 in punitive damages, as well as substantial indemnity costs. Chubb was also ordered to pay the costs of the defendant, Cosburn, Griffiths & Brandham Insurance Brokers Limited (Cosburn) on a partial indemnity basis.

[3] In this appeal Chubb challenges the trial judge's failure to find that it had established intentional material misrepresentation in the application for coverage and in the proof of loss, his application of s. 124 of the *Insurance Act*, R.S.O. 1990, c. I.8, to the binder of insurance in place at the time of the fire, the award of punitive damages, and the costs awards.

[4] I would allow the appeal and order a new trial by reason of errors made in the trial judge's analysis of Sagl's proof of loss. I would limit the new trial to the issue of Sagl's loss, specifically whether she is able to prove her loss in relation to her fine arts collection, and whether the policy is void due to intentional misrepresentation in the proof of loss. The new trial would include, if appropriate, a consideration of the application of s. 129 of the *Insurance Act.*

II. FACTS

[5] In 1979, Sagl began living with Rudy Sagl. They married in 1984. Rudy Sagl was a successful businessman and the Sagls enjoyed a lavish lifestyle. Sagl collected art, furniture, jewelry, and glassware throughout her lifetime. Every inch of wall space in her home was adorned with art, and many more pieces were stored throughout the house.

(1) Sagl's financial circumstances in the fall of 1997

[6] In the early 1990s, the marriage ended and lengthy acrimonious litigation ensued. By judgment dated July 11, 1997, E. Macdonald J. ordered Rudy Sagl to pay his wife a lump sum of $4 million, payable on a quarterly basis, plus significant on-going support.

[7] At the time when Sagl applied for insurance coverage with Chubb, she owned two adjoining homes on Doulton Drive in Mississauga, Ontario. She and her teenage son lived in 2415 Doulton Drive and her daughter lived next door at 2399 Doulton Drive. Following the release of E. Macdonald J.'s judgment in July 1997, Sagl engaged an insurance sub-broker, Eamonn Kinsella of G.C. Carley

& Co. Limited, to obtain insurance for the two houses and contents, including her artwork and jewelry.

[8] Kinsella presented Sagl to Chubb as a wealthy individual. He told Chubb's agent that Sagl would soon be receiving a substantial divorce settlement. Furthermore, Kinsella testified that he had visited Sagl on a number of occasions and knew that her home contained lavish and over-powering furnishings as well as an extraordinary number of pieces of art.

[9] However, the evidence relevant to Sagl's financial situation disclosed that when Sagl applied for insurance with Chubb, she was experiencing certain financial difficulties.

[10] She was in default on three mortgages with respect to the two Doulton Drive properties. Although a prospective purchaser had submitted conditional offers for the purchase of both properties, the conditions subsequently expired on November 20, 1997.

[11] In addition, Sagl owed substantial amounts to the Canada Revenue Agency, law firms and friends. In the fall of 1997, when she applied to Chubb for insurance coverage, Sagl's debts, excluding the mortgages, totalled over $1 million.

[12] Further, at the time Sagl applied for insurance from Chubb, there was some ambiguity as to whether Rudy Sagl remained registered on title as a joint owner of 2415 Doulton Drive. In addition, due to Rudy Sagl's tax arrears of over $1 million, the Canada Revenue Agency had filed an execution against 2415, which precluded Sagl from dealing with the property. Sagl knew of this additional problem as evidenced by her letter dated August 6, 1997, in which she asked the Canada Revenue Agency to lift the execution stating that she "must secure refinancing very quickly to avoid being evicted and facing legal proceedings against the house".

[13] Kinsella was not aware of this information, did not ask Sagl questions relating to these issues, and hence did not provide any of this information to Chubb's agent.

(2) The parties' interaction between the time when Chubb provided coverage and the fire

[14] On September 30, 1997, by the execution of a binder of insurance, Chubb, through Cosburn, placed homeowner's insurance on both properties and their contents through what Chubb referred to as its VIP program. The binder provided coverage on 2415 Doulton Drive for the dwelling ($630,000), contents ($600,000), fine arts ($2,000,000) and scheduled jewelry items ($1,000,000). The estimated annual premium was initially over $20,000. The binder indicated that it was prepared for convenience only and was subject to the terms and conditions of Chubb's then standard policy.

[15] Chubb pursued neither the completion of a detailed application for insurance nor an inspection of the properties, the contents, the jewelry or the fine art collections during the eleven weeks between the date the binder was issued and the fire. Nonetheless, there was extensive communication between the parties. Kinsella, who was the only person who had direct contact with Sagl, communicated with John Fountain and Bob Connell of Cosburn. This contact primarily centred on Sagl's efforts to reduce her premiums and Kinsella's suggestion that she store some items of jewelry in a bank vault. Kinsella testified that he and Sagl reached an agreement on which items of jewelry would be kept at the bank, but Sagl gave evidence that she never agreed to any such allocation. The contact also included Connell's requesting that Sagl sign an application form, and Kinsella's informing Sagl that Chubb intended to impose a $2,500 sublimit on each piece of art unless Chubb received an appraisal.

(3) The fire

[16] On Tuesday, December 16, 1997, Sagl's home at 2415 Doulton Drive was destroyed by fire. Her other home at 2399 Doulton Drive was untouched by the conflagration.

[17] On the night of the fire, no one was home. Sagl was out for dinner with a friend. Her son was staying overnight with a schoolmate. The live-in maid had spent the night away. The dog had been left outside.

[18] An investigator from the Office of the Fire Marshall conducted an investigation of the scene and concluded that the fire was incendiary in origin. His conclusion was supported by his supervisor. Constable Andrew Pennington of the Peel Regional Police notified the Criminal Investigation Bureau of the possibility of arson, given his "suspicions due to the nature of the information" he received. An investigation concerning the circumstances surrounding the fire ensued.

(4) The proof of loss

[19] Sagl prepared and delivered a one-page interim proof of loss dated January 5, 1998. In it she claimed the $600,000 limit of the contents coverage under the binder and a total loss valued at $1,255,000 plus jewelry and fine arts losses to be ascertained.

[20] The policy of insurance was issued on January 13, 1998.

[21] Chubb wrote a letter to Sagl dated June 8, 1998, in which it expressed its concern that Sagl had failed to disclose "important facts" to Chubb including that Rudy Sagl was registered as a joint owner of 2415, that there was a first mortgage registered on the property which was in default, that the mortgagee was pursuing an action against Sagl for judgment on the mortgage debt and for possession of 2415, that there was a mortgage on 2399 which was also in default, and that the mortgagee had obtained a judgment for possession, subject to a temporary stay. In the letter, Chubb stated that it was "not in a position at this time to make a responsible determination as to whether the policy is void for misrepresentation and/or non-disclosure", but proposed to review the matters with Sagl in the course of her on-going examination under oath. Chubb also gave notice in the letter that it was cancelling the policy.

[22] Sagl commenced this action by statement of claim issued on December 8, 1998. She then submitted a proof of loss dated June 3, 1999, in which she claimed losses totalling $13,828,777.62. Her total coverage was $4,230,000.

[23] In its amended statement of defence dated July 31, 2001, Chubb defended primarily on the basis of arson and fraud.

III. REASONS OF THE TRIAL JUDGE

[24] The trial judge started his analysis with a brief review of the family history, noting the lavish lifestyle and Sagl's passion for collecting, particularly paintings.

(1) The arson defence

[25] He then proceeded to deal with Chubb's arson defence, a defence he rejected on the basis that he did not accept Chubb's submissions that Sagl had opportunity and motive to have someone set fire to her home. He also preferred Sagl's expert evidence as to the cause of the fire to that upon which Chubb relied. Further, after reviewing Sagl's explanation for Chubb's various concerns, he found nothing sinister in the circumstances surrounding the fire.

[26] Chubb retained Robert De Berardis of De Berardis Associates Incorporated to conduct a forensic investigation into the cause of

the fire. In his report, he concluded that the fire was incendiary in nature; his investigation showed multiple areas of fire origin, distinct and separate from each other.

[27] Sagl's expert, Dennis Merkley, did not share this view. He expressed concern about the lack of scientific evidence of any use of an accelerant. On the basis of the available evidence, Merkley concluded that the fire had a single source that started in the basement and spread to the rest of the house.

[28] As between the expert opinions of Merkley and De Berardis, the trial judge preferred Merkley's conclusions based on his more extensive experience and the fact that, according to the trial judge at para. 78, his evidence was "logical and [made] common sense." The trial judge ultimately, at para. 94, accepted Merkley's opinion that the cause of the fire was "undetermined". At para. 107, he went further and found that even if the fire was deliberately set, the "weight of the evidence" did not point to Sagl's being involved.

(2) The coverage

[29] The trial judge next dealt with the nature of the insurance coverage at the time of the fire. After identifying the specific coverage provided in the binder, he turned to the discussions between Kinsella and Sagl after the binder had been issued. He held that to the extent anything was agreed upon, nothing was reduced to writing and signed by Sagl. Accordingly, the trial judge, relying on s. 124 of the *Insurance Act,* concluded that none of the discussions subsequent to the execution of the binder affected the extent of the coverage Chubb was obligated to provide under the terms of the binder.

(3) Intentional misrepresentation prior to the fire

[30] The trial judge began this part of his analysis by noting, at para. 136, that the binder was subject to the following provision contained in the policy of insurance:

> **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.

[31] He then turned to the issue, at paras. 137-141, of whether Sagl intentionally concealed or misrepresented any material fact prior to the loss, beginning with an expression of concern regarding Chubb's business practices:

> 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 (Ont. H.C.), 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.

[32] The trial judge, at para. 142, proceeded to examine the three main material fact allegations upon which Chubb relied in support of its material misrepresentation defence and which, Chubb alleged, "if known by Chubb, would have caused such concern to Chubb that it would have declined coverages."

[33] The first was that Rudy Sagl was a joint owner of the property. In this respect, the trial judge noted the direction Rudy Sagl had signed in which he purported to release his interest in the property.

[34] The trial judge next addressed the proceedings commenced by MRS Trust in relation to its mortgage on the property. He observed that Sagl had consented to judgment on the basis that the property was for sale and further that she was expecting to receive money from Rudy Sagl pursuant to the judgment of E. Macdonald J.

[35] Finally, the trial judge dealt with Chubb's claim that Sagl misrepresented herself as a wealthy individual when, in fact, she was in dire financial straights. He commented on the fact that the Chubb VIP program was available to anyone who owned real estate valued at more than $400,000 even if there were a $200,000 mortgage on the property.

[36] The trial judge's problem with Chubb's position with respect to this aspect of its defence rested on Chubb's inability to demonstrate that these issues were material to its consideration and ultimate assumption of the risk. In concluding that prior to the fire Sagl did not intentionally conceal or misrepresent any facts material to the risk, he set out his view of Chubb's obligation to communicate issues of materiality with an insured or potential insured at paras. 147-152:

> 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) Intentional misrepresentation in the proof of loss

[37] The trial judge next dealt with Chubb's defence that after the fire Sagl intentionally concealed or misrepresented material facts in her proof of loss. Chubb took the position that Sagl's proof of loss for contents and fine art was replete with fraudulent claims and false statements. The trial judge analyzed this issue by asking himself whether the proof of loss was fraudulent or whether the evidence disclosed merely a difference of opinion as to value, particularly in relation to the contents and fine art claim.

[38] The first contentious issue the trial judge analyzed was the claim for loss or damage to the contents of Sagl's home. He accepted the evidence upon which Sagl relied, largely an inventory prepared by Kevin Watson of National Fire Adjusters that was based on Sagl's recollection of 563 items in her home. From this inventory, Watson valued the contents at over $2,000,000. The trial judge accepted this valuation, concluding that the value of the contents of 2415 exceeded the binder coverage of $600,000.

[39] Turning to the claim for loss of jewelry, the trial judge noted that Sagl's claim was for $923,450 plus PST and GST, an amount that exceeded the binder coverage of $1,000,000. The trial judge expressed reservations about the amount of the jewelry claim but in the absence of an adequate response from Chubb to Sagl's jewelry claim, he found that Sagl had established a loss of $1,000,000.

[40] The trial judge examined Sagl's fine art claim in considerable detail, acknowledging the evidence of the large extent of Sagl's collection. He noted Sagl had made earlier attempts to value the fine art collection. In 1995, Sagl had wanted to borrow money against her large collection of framed and unframed pieces of art and an art expert, Stephen Sweeting, whom Chubb later retained as its expert in this action, had viewed some of the collection for valuation purposes, but not the art work on the second floor. The trial judge observed that Sweeting had arrived at a value of $750,000 to $1,000,000, although the extent to which Sweeting inspected the fine art collection was unclear, as was the question whether Sweeting's estimate applied only to the sixty items selected by Sagl for appraisal at that time.

[41] He also noted, at para. 189, that in the matrimonial trial, E. Macdonald J. "wrestled with the value of the Sagls' artwork", and set out a number of paragraphs from her July 1997 judgment, concluding with the following:

> 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. [Emphasis in original.]

[42] The trial judge next reviewed the evidence of Sagl's expert, Darragh Elliott, who prepared an extensive report on Sagl's behalf in which he assessed the total value of Sagl's fine art destroyed in the fire. Sagl, with the benefit of Sweeting's appraisal and an incomplete set of photographs, identified to Elliott each of the 2,580 items in her collection. From this inventory, Elliott valued the loss of Sagl's fine art collection at $9,720,980.

[43] The trial judge then considered and rejected Chubb's submissions in support of its allegations that the Elliott report overstated Sagl's loss in relation to the fine art collection. As the "clearest" example, Chubb argued that both the existence and the US$600,000 value attached to a Rodin bronze figure, L'Eternel Printemps, were particularly implausible. Chubb noted that, according to Sagl, the sculpture was kept in the back of the basement storage room, and there was no photograph of it. Chubb argued there was no evidence Sagl had ever mentioned it or showed it to anyone, including Sweeting when he did his appraisal in 1995, and that it was not disclosed in the matrimonial law suit. The only evidence of its existence was in the World of Antiques list of items Sagl allegedly purchased from that store. On the list it is described as a "limited edition (36) bronze casting" for which Sagl had paid $6,500.[1]

[44] At para. 204, the trial judge stated: "I am not sure what a 'material fact' would be in relation to the fine art claim." He went on to characterize Chubb's main argument as being one of inflated values. He expressed scepticism of Elliott's evaluation, but said that his "problem" was that Chubb did not have its expert, Sweeting, review and rebut Elliott's report and held, at para. 206, that he therefore had "no basis upon which to find that Elliott's methodology is either flawed or fraudulent. In the same paragraph, he went on to say, "Elliott's report may be flawed but that does not make his estimate of the value of the fine art fraudulent." After faulting Chubb for poor business practices in not insisting on appraisals, particularly in view of the extent of the coverage, the trial judge found that Chubb had failed to prove that Sagl intentionally concealed or misrepresented a material fact in relation to the art collection and again, made note of the fact that Sagl was underinsured: this aspect of her loss exceeded the insurance coverage of $2 million.

(5) Punitive damages

[45] The trial judge then turned to Sagl's claim for punitive damages. He observed that while the jewelry coverage and fine art coverage provided for in the binder were "exceptional", Chubb had failed to inspect the residence to determine whether the amount of coverage was appropriate. Furthermore, Chubb had failed to prove that Sagl was implicated in the alleged arson or that she had misrepresented or concealed any material facts relevant to the risk it was assuming. He explained his conclusion that Sagl was entitled to punitive damages in the amount of $500,000 at paras. 231-237:

> 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 [of] 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.

(6) Relief from Forfeiture and Costs

[46] The trial judge next dealt with the issue of relief from forfeiture. He found at para. 245 that Sagl was a "relative neophyte in matters of insurance". Given that Chubb did not inspect the property or question the amount of coverage requested, the trial judge found if there had been imperfect compliance as to the proof of loss or any other matter with respect to the loss, he would order relief from forfeiture.

[47] The trial judge then dismissed Sagl's claims against Kinsella, G.C. Carley & Co. Limited and Cosburn as well as the cross-claim against Cosburn. He also dismissed the portion of Sagl's claim for living expenses, but ordered Chubb to pay Sagl's unpaid storage invoice.

[48] In a subsequent endorsement as to costs, the trial judge ordered Chubb to pay Sagl's costs on a substantial indemnity basis due to the fact that Chubb failed to prove the allegations of arson and fraud. He ordered Chubb to pay Cosburn's costs, reasoning that Chubb, at the outset, ought to have assumed Cosburn's defence, but relieved Chubb of having to pay interest on Sagl's storage invoice.

IV. ISSUES

[49] Chubb raises the following issues:

1. Did the trial judge err in concluding that the coverage was not void due to material misrepresentations Sagl made in her application for binder coverage?
2. Did the trial judge err in his conclusion that s. 124 of the *Insurance Act* applied to the binder?
3. Did the trial judge err in his analysis of Chubb's defence that coverage should be denied based on intentional misrepresentation in the proof of loss claim?
4. Did the trial judge err in awarding punitive damages?
5. Did the trial judge err in his costs awards with respect to ordering Chubb to pay Sagl's costs on a substantial indemnity basis or in ordering Chubb to pay Cosburn's costs?

V. STATUTORY PROVISIONS

[50] The relevant legislation is as follows:

> **s. 1 of the *Insurance Act*, R.S.O. 1990, c. I.8**
>
> 1. In this Act, except where inconsistent with the definition sections of any Part,
>
> …
>
> "contract" means a contract of insurance, and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement;
>
> **s. 124 of the *Insurance Act*, R.S.O. 1990, c. I.8**
>
> 124. (1) All the terms and conditions of the contract of insurance shall be set out in full in the policy or by writing securely attached to it when issued, and, unless so set out, no term of the contract or condition, stipulation, warranty or proviso modifying or impairing its effect is valid or admissible in evidence to the prejudice of the insured or beneficiary.
>
> (2) Subsection (1) does not apply to an alteration or modification of the contract agreed upon in writing by the insurer and the insured after the issue of the policy.

…

(4) The proposal or application of the insured shall not as against the insured be deemed a part of or be considered with the contract of insurance except in so far as the court determines that it contains a material misrepresentation by which the insurer was induced to enter into the contract.

(5) No contract of insurance shall contain or have endorsed upon it, or be made subject to, any term, condition, stipulation, warranty or proviso providing that such contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the insurer, unless such term, condition, stipulation, warranty or proviso is and is expressed to be limited to cases in which such statement is material to the contract, and no contract shall be avoided by reason of the inaccuracy of any such statement unless it is material to the contract.

(6) The question of materiality in a contract of insurance is a question of fact for the jury, or for the court if there is no jury, and no admission, term, condition, stipulation, warranty or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto, has any force or validity.

s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8

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

VI. ANALYSIS

(1) Intentional material misrepresentations in the application

[51] The starting point in the analysis of this ground of appeal attracts no debate. The relationship between an insurer and an insured is contractual in nature. But contracts of insurance are no ordinary contracts; special rules apply. Chief among these is the doctrine of *uberrima fides* that holds the parties to a standard of utmost good faith in their dealings with each other. It places a heavy burden on applicants for insurance coverage to provide full disclosure to the insurance company of all information relevant to the nature and extent of the risk that the insurer is being asked to assume: *Coronation Insurance Co. v. Taku Air Transport Ltd.*, 1991 CanLII 16 (SCC), [1991] 3 S.C.R. 622, at p. 636. A fact is relevant or material if it would influence a prudent insurer in deciding whether to issue the policy or in determining the amount of the premium: *Mutual Life Insurance Co. v. Ontario Metal Products Co. Ltd.*, [1925] 1 D.L.R. 583 (P.C.), at p. 588; *Gauvremont v. Prudential Insurance Co. of America*, [1941] S.C.R. 139, at p. 160; *Fidelity & Casualty Co. of New York v. General Structures Inc.* ,1976 CanLII 213 (SCC), [1977] 2 S.C.R. 1098, at p. 1110. Whether a misrepresentation or non-disclosure is material is a matter of fact to be determined by the trier of fact: see s. 124(6) of the *Insurance Act*, and *Mutual Life* at p. 588. However, there is a subjective element to the test as well. The non-disclosure or misrepresentation must have induced the insurer to enter into the contract: see s. 124(4) of the*Insurance Act*; see also *Taylor v. London Assurance Corp.* , 1935 CanLII 2 (SCC), [1935] S.C.R. 422, at p. 429.

[52] The duty to disclose all material facts applies even in the absence of questions from the insurer, although the absence of questions may be evidence that the insurer does not consider a fact to be material: *Gregory v. Jolley* 2001 CanLII 4324 (ON CA), (2001), 54 O.R. (3d) 481 (C.A.), at paras. 31-32 and 37, and *W.H. Stuart Mutuals Ltd. v. London Guarantee Insurance Co.* (2004), 16 C.C.L.I. (4th) 192 (Ont. C.A.), at para. 11, leave to appeal refused, [2005] 1 S.C.R. xvii. The consequence of non-disclosure or misrepresentation of a material fact by the insured is that the insurer is entitled to void the insurance contract *ab initio*: see *Lloyd's London, Non-Marine Underwriters v. National Armoured Ltd.*, 1996 CanLII 8104 (ON SC), (1996) 142 D.L.R. (4th) 506 (Ont. Gen. Div.), affirmed by [2000] I.L.R. I-3751 (Ont. C.A.).

[53] The key issue in this case is materiality. While Chubb argues that the trial judge effectively relieved Sagl of her utmost good faith obligation to disclose facts within her knowledge material to the risk being assumed and reversed the onus of proving material fact disclosure, in actuality Chubb is challenging the trial judge's finding of fact that the information at issue was not material to Chubb. The real inquiry is therefore the legitimacy of that finding.

[54] I would not give effect to this ground of appeal. The trial judge's finding that the facts upon which Chubb relied were not material to its decision to provide insurance coverage to Sagl was supported by the evidence and should not be interfered with by this court.

[55] Chubb argues that the record contains evidence supporting the conclusion that Sagl, during her dealings with Kinsella in applying for insurance, failed to disclose that (i) she was not the sole owner of 2415 Doulton Drive; (ii) there were several mortgages on the property that were in default; and (iii) rather than being wealthy, she was in financial distress. Chubb goes on to say that the evidence of Chubb's witnesses demonstrated that this undisclosed information would have been relevant to its decision whether to insure Sagl's home, contents, jewelry, and artwork, largely because of the concern that the insurance policy could be used as a way for Sagl to escape from her precarious financial position; that is, the undisclosed information was relevant to whether Sagl was a moral hazard.

[56] Sagl denies that she was in serious financial distress at that time, and points out that Chubb assumed the risk without asking for information about the issues upon which it now relies to void the policy. Regarding Sagl's financial status, Hannah Springer of Chubb testified that she was informed by John Fountain of Cosburn that Sagl was independently wealthy, and would be receiving a substantial matrimonial settlement. After Chubb issued the binder, Kinsella filled in an application form on Sagl's behalf. Sagl signed it. Kinsella provided it to Connell of Cosburn.

[57] The questions on the minimal form elicited information about Sagl's name and address; the dates during which the policy would be effective; the date on which Kinsella had seen the property; the length of time for which Kinsella had known Sagl; the fact that he had done business with her before; the fact that the residence was a detached, primary occupancy, brick veneer dwelling; and the fact that there

had been no losses or claims within the past five years. The "loss payee" section was left blank. In addition, the form did not contain any questions regarding ownership of the property, or ask specific questions about mortgages, or mortgage default, or whether the applicant had any other debts.

[58] Sagl's point is that from the time Chubb issued the binder until the date of the fire, some eleven weeks, Chubb agreed to provide Sagl with extensive coverage without having any information other than the limited amount contained in the application form and that communicated to Springer by Fountain.

[59] As previously mentioned in para. 52, while the applicant has a duty to disclose all material facts, an insurer's conduct may be relevant to the analysis of whether a particular fact is material. An insurer's failure to ask a question may be evidence that the particular insurer does not consider the issue to be material, even if, objectively, the information would have been regarded as relevant by a prudent insurer: see *Great Northern Insurance Co. v. Whitney* (1918), 57 S.C.R. 543; see also *Fordorchuk v. Car & General Ins. Corp. Ltd.*, [1931] 3 D.L.R. 387 (Alta. S.C.), at p. 390, citing *Newsholme Bros. v. Road Transport and General Insurance Co.*, [1929] 2 K.B. 356, where, at p. 363, the court stated that insurance companies "run the risk of the contention that matters they do not ask questions about are not material, for, if they were, they would ask questions about them." An insurer who accepts the risk without requiring an answer to a question asked, for example by not pursuing an unanswered question in an application form, has been found to have waived the question: see *Hamzeh v. Safeco Insurance Company of America* (1988), 32 C.C.L.I. 83 (Alta. Q.B.).

[60] A recent decision by this court has confirmed the principles expressed in those cases. In *Gregory v. Jolley*,[2] at para. 37, this court cited Craig Brown and Julio Menezes, *Insurance Law in Canada*, looseleaf (Toronto: Thomson Carswell, 2002) with approval:

> The significance of the insurer not insisting upon a written application, in my view, is similar to the failure of an insurer to ask a question on the application. As Brown points out, at p. 5-4, the insurer's failure to inquire may provide evidence that the insurer does not consider the information relevant.

[61] Here, Chubb insured Sagl's home and property for a considerable amount and for a considerable period of time without making any inquiries about ownership of the property, the status of mortgages, or the existence of other debts, and in the face of an incomplete application form obtained only after the binder was issued. Chubb now purports to rely on its lack of knowledge of these matters in support of its position that the binder is void due to non-disclosure.

[62] I agree with the trial judge that it runs contrary to the good faith obligation that the insurer owes to the insured for the insurer to agree to insure a risk, whether at the binder stage or at the time the policy is issued, when it knows or should know that there is information relevant to the risk that it does not have and that it did not even inquire into or that is incomplete, and then to raise the lack of information as a defence to a claim under the policy.

[63] Through his reasons, the trial judge implicitly put the following question to Chubb: if it regarded these facts as material, why did it not ask about them? Given that that question was left unanswered by the evidence, it was open to the trial judge to draw the inference that the undisclosed matters upon which Chubb now relies to void the coverage provided by the binder were not material to its decision to issue the binder and assume a sizable risk.

[64] I note that the trial judge, at paras. 150-151, goes further and states that the insurer must advise the applicant not only of what it considers to be material to the risk, but also of the consequences of concealment or misrepresentation. I am not to be taken as agreeing with that statement of the law. However, it is unnecessary to consider it given my conclusion on the issue of materiality.

[65] Chubb had to satisfy the trial judge, on the evidence, that the information Sagl allegedly intentionally misrepresented or withheld was material to its assumption of the risk. This, it did not do. I would therefore not give effect to this ground of appeal.

(2) Does s. 124 of the *Insurance Act* apply to the binder?

[66] Before examining Sagl's proof of loss, it is necessary to consider whether s. 124 of the *Insurance Act* applies to the binder, since the answer to this question will determine the extent of Sagl's coverage.

[67] Chubb contends that the extent of coverage initially provided by the binder was subsequently reduced as a result of certain agreements reached in discussions between Kinsella and Sagl with the objective of reducing Sagl's premiums. Sagl's response to this position focuses on s. 124 of the *Insurance Act*. She points out that none of these discussions, even those that may have resulted in some form of agreement between her and Kinsella that would have reduced Chubb's exposure to this claim, were reduced to writing and signed by her. Sagl argues that Chubb is precluded from relying on any orally agreed-upon modifications by reason of the application of s. 124 of the Act.

[68] It is common ground that the purpose of this section is to protect an insured from unilateral changes to an insurance policy.

[69] Chubb argues that the trial judge erred in applying s. 124 of the Act to a binder of insurance, as opposed to an issued policy. Essentially, Chubb argues that although changes to formal polices of insurance must be agreed upon in writing, it is entitled to rely on oral changes made to a binder prior to the issuance of the formal policy, as binders are often created instantaneously in circumstances where only the outline of a contract is discussed and the contract is therefore subject to change.

[70] I cannot accept this position. In my view, it is clear from the language and the definitions in the *Insurance Act* that s. 124 applies to binders. Thus, changes to the binder of insurance must be agreed upon in writing in order to be enforceable and Chubb should not be entitled to rely on any oral changes made to the binder prior to the issuance of the formal policy.

[71] Chubb's position is in conflict with the clear language of the *Insurance Act*. It is apparent that s. 124 applies to binders of insurance, commonly referred to as "interim receipts". Section 1 of the Act defines a "contract" as a contract of insurance, including "a policy, certificate, *interim receipt*, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement" (emphasis added). Since a "contract of insurance" is explicitly defined as including binders, it is clear that the writing requirement applies to binders.

[72] This view is supported by a review of other provisions in the Act. Had it been intended that the writing requirement would apply only after the issuance of a formal policy of insurance, the drafters of the legislation would have made that intention plain, as they did in other parts of the Act. For example, in Part IV – Fire Insurance, s. 148 requires that certain statutory conditions be printed in every policy of fire insurance. Subsection (2) explicitly provides that the term "policy" "does not include interim receipts or binders." A similar obligation to include statutory conditions in every policy of automobile insurance is imposed by s. 234 under Part VI – Automobile Insurance. Again, subsection (4) of s. 234 explicitly states that, under this section, "policy" "does not include an interim receipt or binder." Chubb's argument that binders are excluded from the writing requirements under s. 124 would require this court to

read similar language into the statute.

[73] For these reasons, I would reject this ground of appeal.

(3) The insured's proof of loss

[74] In regard to this ground of appeal, the inquiry focuses on the trial judge's analysis of Chubb's position that Sagl should be denied recovery because she either did not prove her claim, or she overstated it.

[75] In order to recover for a loss, the onus is on the insured to establish, on a balance of probabilities, that the loss occurred and the amount of the loss. The onus does not shift to the insurer merely because the insurer raises the defence of fraud: *Shakur v. Pilot Insurance Co*. reflex, (1990), 74 O.R. (2d) 673 (Ont. C.A.), at p. 681.

[76] It is common ground that in the preparation of the proof of loss, an insured owes a duty to the insurer of honesty and accuracy. Indeed, the policy in this case, reproduced above at para. 30, expressly states that the policy is void if the insured "intentionally concealed or misrepresented any material fact relating to this policy before or after a loss." Once fraud is established, no matter the amount, the entire claim under the proof of loss is forfeited: *Britton v. Royal Insurance* (1866), 4 F&F 905 at p. 909; *Alavie v. Chubb Insurance Co. of Canada* 2005 CanLII 5331 (ON CA), (2005), 195 O.A.C. 7 (C.A.), at para. 5; *Dimario v. Royal Insurance Canada*, reflex, (1987) 26 O.A.C. 370 (Ont. Div. Ct.), at para. 7. This rule follows from the general principle that a contract of insurance is one of utmost good faith: see *Insurance Law in Canada* at p. 9-16.

[77] Chubb submits that the trial judge erred in two respects in his analysis of its proof of loss defence. First, the trial judge mistakenly relied on the fact that Sagl was underinsured. Second, Sagl's credibility was the foundation of her proof of loss and the reasons are deficient in that they do not indicate how the trial judge resolved the serious challenges to her credibility. This issue was pivotal to the assessment of both whether Sagl fulfilled her obligation to establish the amount of her loss and Chubb's defence of intentional overstatement of the amount.

[78] I will first deal with Chubb's argument that the trial judge erred by taking into consideration that Sagl was underinsured in concluding that she established her loss, and did not overstate its value. The trial judge observes that Sagl's claim exceeds the amount of coverage in the following passages:

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

[79] Counsel for Chubb argues that these references should be interpreted as reflecting the trial judge's view that some degree of overstatement, even if fraudulent, would not serve to vitiate the policy, as long as the actual loss exceeded the coverage. In other words, only if the trial judge were to find that Sagl intentionally overstated her claim and that Chubb's actual exposure fell below the policy limits, would such overstatement be of concern.

[80] Assuming Chubb's interpretation of the trial judge's reasoning is correct, it is clear that fraud in connection with any part of the claim will void the entire policy, and the fact that the insured may be underinsured has no relevance: *Swan Hills Emporium & Lumber Co. Ltd. v. Royal General Insurance Co. of Canada* reflex, (1977), 2 Alta. L.R. (2d) 1 (Alta. C.A.), at pp. 12-13; *Maple Leaf Milling Co. v. Colonial Assurance Co.* (1917), 36 D.L.R. 202 (Man. C.A.), at p. 203.

[81] However, even if the trial judge's reasoning in this respect was flawed, he separately considered whether Chubb had established that Sagl intentionally overvalued the amount of her loss. The trial judge rejected Chubb's position on this issue at paras. 212-213:

> 212. 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.

[82] These two paragraphs form the basis of the second part of Chubb's argument that the trial judge erred in his analysis of Sagl's proof of loss, as implicit in them is the trial judge's conclusion that Sagl's evidence in support of her proof of loss was both credible and reliable.

[83] Chubb submits that the trial judge erred by not dealing with the challenges to Sagl's credibility. An understanding of the significance of this issue depends on the answers to three questions. Was Sagl's credibility relevant to the trial judge's consideration of her proof of loss? If this question is answered in the affirmative, did the trial judge explicitly or implicitly adequately address the challenges to her credibility? If this second question is answered in the negative, what are the consequences for the purposes of this

appeal?

[84] As to the first point, there can be no doubt that Sagl's credibility was intertwined with every major aspect of the decision; the proof of loss was no exception. It follows that in order to consider Sagl's obligation to prove her loss and Chubb's argument that she intentionally misrepresented the amount of the loss in relation to the value of the contents of the home and her fine art collection, the trial judge had to address the challenges to her credibility. And those challenges were significant. For example:

i. Sagl admitted under oath to the trial judge that she had lied under oath in an earlier proceeding when she had a motive to do so. She admitted to having given false testimony in her matrimonial trial concerning the value of her property. That is, it was in her interest to devalue her property in order to obtain a larger equalization payment from Rudy Sagl, and she perjured herself in pursuit of that goal.

ii. Although Sagl maintained that she owned highly valuable pieces and that collecting art had been a passionate interest of hers for many years, she was only able to testify in generalities about her art collection. In her testimony at trial, she failed to demonstrate knowledge of the components of her collection, their provenance or their worth. She claimed she had received several "Old Masters" from her grandfather, but could not identify a single one of them in Elliott's report. [3]

iii. Sagl put forward Darragh Elliott, her expert on the value of her fine art claim, not only to Chubb, but also to the court. In both his report and his testimony, Elliott emphasized that he merely appraised, but did not authenticate, Sagl's artwork. He conducted all of his appraisals on the assumption that each piece of art was authentic, or in other words, on the assumption that it was precisely what Sagl claimed it was. At trial, there were serious issues regarding Elliott's credentials, expertise, methodology and objectivity.[4]

iv. Some of the art work destroyed in the fire included hundreds of paintings by Ruth von Bismark, which were the subject of a previous lawsuit between von Bismark and Sagl.[5] At the trial in that proceeding, the plaintiff, von Bismark, filed Elliott's appraisal report from this action, and sought to rely on it as evidence of the value of her paintings. In that trial, it was in Sagl's interests to devalue the von Bismark paintings as she was being sued for their value. Accordingly, Elliott and Sagl resiled from the values Elliott had assigned to the von Bismark paintings in Sagl's proof of loss. They then, of course, supported them again in the trial of this action. This discrepancy gave rise to further concerns about the credibility of both Elliott and Sagl.

[85] The last two items of particular concern in terms of the credibility of Sagl's evidence upon which she relied to establish her loss pertains to her preparedness to ask Chubb and the court to rely on Elliott's valuation of her fine art claim. The duties and responsibilities of experts are set out in *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd. (The "Ikarian Reefer")*, [1993] 2 Lloyd's Rep 68 (Q.B.), at pp. 81-82, and were substantially endorsed by the Court of Appeal at [1995] 1 Lloyd's Rep 455, at p. 496. The first two duties listed, which are the most relevant in this context, are as follows:

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation…; [and,]
>
> 2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise…. An expert in the High Court should never assume the role of an advocate.

[86] As previously mentioned, Elliott's expert report was essential and formed approximately two hundred pages of Sagl's approximately four hundred page proof of loss. Sagl solemnly declared under oath that the proof of loss was true and presented it to Chubb in support of her position that her total loss for the artwork was in excess of $9,000,000. However, the trial judge failed to explain why he accepted the values Sagl, through Elliott, attributed to the art work, despite the problems with their evidence.

[87] It cannot be said that these challenges to the evidence relied upon by Sagl related only to trivial details. First, Sagl's proof of loss depended on the overall credibility and reliability of the list of items she provided to Elliott. Second, there were legitimate concerns about Sagl's willingness to put forward Elliott as a credible, reliable and objective expert to support the values she submitted to Chubb and then to assist the court in its difficult task of assessing whether she had proved the amount of her loss and, separately, whether Chubb had made out a case of intentional overstatement.

[88] Against this background, it was incumbent upon the trial judge to explain, even in succinct terms, how he resolved the challenges to the credibility and reliability of the evidence upon which Sagl relied in support of the amount of her loss, particularly in the light of his own concern expressed at para. 195, where he states: "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."

[89] I now turn to the next question, namely, whether the trial judge in fact considered these challenges.

[90] I start with the observation that the trial judge did not explicitly analyze Sagl's credibility, or the reliability of her evidence. In fact, the word "credibility" cannot be found anywhere in the 261 paragraphs of the reasons for judgment.

[91] But that is not the end of the inquiry. Case law makes it clear that a trial judge's reasons should not be viewed on a stand-alone basis. What is necessary is an examination as to whether the reasons, considered in the context of the entire record, show that the trial judge has "seized the substance of the matter": *R. v. R.E.M.* 2008 SCC 51 (CanLII), (2008), 235 C.C.C. (3d) 290 (S.C.C.), at para. 43. In my view, the analysis must continue, therefore, into whether the record demonstrates that the trial judge implicitly and adequately dealt with the challenges to Sagl's evidence.

[92] Considering Sagl's evidence alone, I have been unable to find anything in the record that indicates that the trial judge explicitly or implicitly considered the challenges to Sagl's credibility and found her to have been credible in setting out her claim for losses associated with the contents of the property and with her jewelry. There are, however, two sentences in the portion of the reasons dealing with her claim for loss to her fine art collections that may suggest that the trial judge accepted Sagl as a credible witness. I refer to para. 212, where the trial judge states: "There is no evidence in the Sagl case that the plaintiff has intentionally put forward false evidence." Similarly, at para. 213 he states: "The plaintiff, to the best of her knowledge and memory, prepared a list of her fine art lost or damaged in the fire."

[93] These sentences may go no further than saying that Sagl acted in good faith in putting together the inventory of fine art. However, they may go further and indicate that the trial judge believed the accuracy and reliability of the list. Either way, there is a problem.

[94] It is not apparent *why* the trial judge considered Sagl's evidence, including her reliance on Elliott, worthy of belief. Whether the trial judge was obliged to explain this depends upon whether, without addressing this issue, his reasons were adequate.

[95] The Supreme Court of Canada explained the meaning of adequacy of reasons in the criminal context in *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869. Recently, that court affirmed the framework for assessing whether the trial judge's reasons are so inadequate that they warrant appellate intervention in *R.E.M.* and in *R. v. H.S.B* 2008 SCC 52 (CanLII), (2008), 235 C.C.C. (3d) 312 (S.C.C.), and in the civil context, in *F.H. v. McDougall* 2008 SCC 53 (CanLII), (2008), 297 D.L.R (4th) 193 (S.C.C.).[6] The adequacy of a trial judge's reasons must be judged according to whether they achieve their intended purposes. As explained in *F.H. v. McDougall*, at para. 98, a trial judge's reasons serve the following main functions:

(i) to justify and explain the result;

(ii) to tell the losing party why he or she lost;

(iii) to provide for informed consideration of the grounds of appeal; and

(iv) to satisfy the public that justice has been done.

[96] Reasons also help to ensure fair and accurate decision making by focusing the judge's attention on the key issues and helping to ensure that important points of law or fact are not overlooked: see *R.E.M.* at para. 12.

[97] As the Supreme Court of Canada stated in *H.S.B*, at para. 8: "The task for the appellate court is simply to ensure that, read in the context of the entire record, the trial judge's reasons demonstrate that he or she was alive to and resolved the central issues before the court." An appellate court "is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": see *F.H. v. McDougall* at para. 99, quoting *Sheppard* at para. 26.

[98] As I have said, Sagl's proof of loss was grounded on the reliability and credibility of her evidence. *R. v. Dinardo* 2008 SCC 24 (CanLII), (2008), 231 C.C.C. (3d) 177 (S.C.C.), at para. 26, established that,

> [w]here a case turns largely on determinations of credibility, the sufficiency of the reasons should be considered in light of the deference afforded to trial judges on credibility findings. Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal. Nevertheless, a failure to sufficiently articulate how credibility concerns were resolved may constitute reversible error.

See *R. v. Braich*, 2002 SCC 27 (CanLII), [2002] 1 S.C.R. 903, at para. 23. See also *Canadian Broadcasting Corp. Pension Plan (Trustee of) v. BF Realty Holdings Ltd.* 2002 CanLII 44954 (ON CA), (2002), 214 D.L.R. (4th) 121 (Ont. C.A.), at para. 64; *Waxman et al. v. Waxman et al.* 2004 CanLII 39040 (ON CA), (2004), 186 O.A.C. 201 (Ont. C.A.), at para. 307.

[99] In my view, the trial judge fell into error by failing to explain how he reconciled the obvious problems associated with Sagl's credibility and reliability, especially given the challenges to the authenticity, contents and values of the inventory she provided to Elliott and with her willingness to ask the trial judge to accept Elliott and his report as supporting her claim that the value of her art collection lost in the fire was in excess of $9,000,000. As noted in *Sheppard*, at para. 46, where "the path taken by the trial judge through confused or conflicting evidence is not at all apparent,…the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal".

[100] This is the situation here; the unarticulated basis of the trial judge's conclusions, if any, concerning Sagl's reliability, credibility, and her willingness to put forward a proof of loss that depended on Elliott, is certainly not apparent from the record. Therefore, the basis of the trial judge's acceptance of her evidence supporting the amount of her loss cannot be ascertained. In short, the trial judge's reasons fail to satisfy the second purpose articulated in *F.H. v. McDougall*; that is, they fail to explain *why* the trial judge accepted Sagl's evidence as to her loss in the light of the myriad problems with her credibility and reliability. This amounts to reversible error, and in my view, taken alone is a sufficient reason to order a new trial.

[101] Another aspect of the trial judge's analysis of Chubb's fraudulent proof of claim defence requires comment. The trial judge appears to have analyzed Chubb's defence in respect to the proof of loss on the basis that it was required to call expert evidence that Sagl overvalued her loss:

> 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. [Emphasis added.]

[102] The trial judge erred in curtailing his analysis of Sagl's proof of loss for the reason that Chubb did not call expert evidence to refute Elliott's valuation of Sagl's fine art collection, and in concluding that therefore he had "no basis" upon which to find that Elliott's valuation was flawed. I say this for three reasons.

[103] The most significant is that the conclusion demonstrates that the trial judge's reasoning missed an essential step in the analysis of Sagl's evidence in relation to her loss. Before turning to whether Chubb had proved that Elliott's valuation was flawed, the trial judge first had to satisfy himself that Sagl had proved, on balance, that her evidence in support of her loss was credible and reliable. In ignoring this step the trial judge effectively relieved Sagl of her burden to establish the existence and the amount of her loss, as discussed above at para. 75.

[104] Second, there is no legal requirement to call expert evidence. If a trier of fact is able to form a conclusion without help, then an expert opinion is unnecessary: *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, at p. 24; *R. v. Parrott*, 2001 SCC 3 (CanLII), [2001] 1 S.C.R. 178, at para. 53.

[105] The trial judge was required to critically examine the evidence in support of Sagl's loss in relation to her art, even without the assistance of an expert. And he had much to examine. There was the improbability of Sagl's own evidence about her art, aptly illustrated by her claim to have been able to remember 2,580 paintings in her home, most of which were stored away in closets, and by her claim to have had a US$600,000 Rodin sculpture, for which she paid an experienced art dealer $6,500, hidden in her basement, that no one had ever seen and that she had not previously disclosed to anyone. Then there was the fact that Elliott's independence was plagued by serious and obvious issues, as previously mentioned.

[106] Third, placing this much importance on expert evidence promotes a "contest of experts", which the Supreme Court of Canada

discouraged in *R. v. Mohan* at p. 24. More recently, the Honourable Coulter A. Osborne expressed similar concerns with the "merry-go-round" created by the "battle of competing experts" at p. 71 of his report, *Civil Justice Reform Project: Summary of Findings and Recommendations*(November 2007).

[107] I feel obliged to comment on one further aspect of the trial judge's analysis of this aspect of Chubb's defence, namely, his treatment of Chubb's argument that Sagl inflated the value of her art work and contents. In order to vitiate a policy for fraud, the insured must have made a wilfully false statement in relation to something material to the proof of either the existence or extent of the loss, which would include intentionally inflated values.

[108] The trial judge commented as follows, at paras. 204-205, when considering Chubb's defence that Sagl had overstated the value of her art collection:

> 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.

[109] Earlier, at para. 192, the trial judge expressed the difficulty he had in determining whether Sagl had inflated the value of her art collection:

> 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!

[110] The trial judge appears to be of the view that the value of art cannot be inflated as it is in the eye of the beholder. This is incorrect. With appropriate evidence, it clearly is possible to assign a fair market value to art. It was incumbent on the trial judge to consider and fairly assess all of the evidence in relation to the valuation of the art collections in order to decide whether Sagl established the amount of her loss.

[111] It follows that, in my view, there were a number of problems associated with the trial judge's analysis of Sagl's claim for loss resulting from the fire. However, the fundamental reason why I would allow the appeal and order a new trial on that issue is that the trial judge did not articulate how he resolved credibility concerns, specifically how he found Sagl's evidence in support of the loss to her fine art collections worthy of belief, in order for him to determine whether Sagl had proved her claim. This constitutes reversible error.

(4) Relief from Forfeiture

[112] At para. 247 of his reasons, the trial judge held that "[i]f there had 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…'", he would order relief against forfeiture pursuant to s. 129 of the *Insurance Act*.

[113] I have difficulty with the trial judge's treatment of this issue, for two reasons.

[114] First, the trial judge erred in relying on *Chung v. British Columbia Insurance Co.* (1996), 36 C.C.L.I. (2d) 158 (B.C. Sup. Ct.), in respect of this issue, as it is not on point. That case dealt with the duties owed by an insured's agent to the insured. It addressed neither British Columbia's equivalent of s. 129, nor the factors to be considered when determining whether to grant relief from forfeiture.

[115] Second, based on the evidence adduced at trial, relief from forfeiture was not in issue. The divide between the parties in respect of the proof of loss had nothing to do with whether Sagl's claim suffered from "imperfect compliance". Rather it was whether Sagl had proved her loss and whether that loss was intentionally overstated.

(5) Punitive Damages

[116] In view of the fact that I would order a new trial, it is neither necessary nor appropriate to deal with Chubb's arguments concerning punitive damages. Accordingly, I express no view on this issue.

VII. DISPOSITION

[117] For these reasons, I would allow the appeal, set aside the judgment below and order a new trial restricted solely to the issue of Sagl's proof of loss, specifically whether she is able to prove her loss in relation to her fine arts collection, and whether the policy is void due to intentional misrepresentation in the proof of loss. If appropriate, the new trial would include a consideration of the application of s. 129 of the*Insurance Act.*

[118] Chubb shall make written submissions on the costs of the trial and of the appeal within twenty days of the release of these reasons. Sagl shall deliver responding submissions within ten days thereafter.

RELEASED:
"MAY -8 2009" "G.J. Epstein J.A."
"SEL" "I agree, S.E. Lang J.A."
"I agree, R. G. Juriansz J.A."

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[1] The record does not disclose the date on which Sagl purchased the figure for $6,500.
[2] Although *Gregory v. Jolley* concerned disability insurance, I do not think that this court's comments should be, or were intended to be, restricted to the disability context.
[3] The trial judge did acknowledge Chubb's argument in this respect, at para. 201.
[4] I note that counsel for Chubb argued at trial, after vigorous cross-examination, that Elliott should not be qualified as an expert in the field of art appraisal and valuation. The trial judge, however, allowed Elliott to give opinion evidence.
[5] *von Bismark v. Sagl*, [2000] O.J. No. 2757; this decision was substantially upheld by this court at 2002 CanLII 41605 (ON CA), (2002), 158 O.A.C. 326.
[6] While this discussion of the adequacy of reasons cites a number of criminal cases, in *F.H. v. McDougall*, a civil case, the Supreme Court of Canada quotes freely from criminal cases, including *Sheppard*, *Walker*, and *R.E.M.*

Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 638 (CanLII)

Date:	2009-09-03
Docket:	C47778
URL:	http://canlii.ca/s/11vjr
Citation:	Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 638 (CanLII), <http://canlii.ca/s/11vjr> retrieved on 2011-10-16
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Reflex Record:	Related decisions, legislation cited and decisions cited

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CITATION: Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 638
DATE: 20090903
DOCKET: C47778

COURT OF APPEAL FOR ONTARIO

Lang, Juriansz and Epstein JJ.A.

BETWEEN

Bridgette Sagl

Plaintiff (Respondent)

and

Cosburn, Griffiths & Brandham Insurance Brokers Limited, Chubb Insurance Company of Canada, Eamonn Kinsella and G.C. Carley & Co. Limited

Defendants (Appellant)

Peter H. Griffin and Jamie J.W. Spotswood, for the appellant

Barry A. Percival, Q.C., for the respondent

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice dated September 4, 2007, with reasons reported at (2007), 54 C.C.L.I. (4th) 236.

ADDENDUM AND COSTS ENDORSEMENT

Epstein J.A.:

I. Supplementary Issues

[1] In reasons released May 8, 2009, the appeal by Chubb Insurance Company of Canada was allowed, the judgment below set aside and a new trial was ordered "restricted solely to the issue of the respondent, Bridgette Sagl's, proof of loss, specifically whether she is able to prove her loss in relation to her fine arts collection, and whether the insurance policy is void due to intentional misrepresentation in the proof of loss". Further, if appropriate, the new trial would include a consideration of the application of s. 129 of the *Insurance Act of Ontario*.

[2] The parties were invited to make written submissions as to costs. Counsel for Sagl and Chubb responded by making submissions regarding costs and the scope of the new trial.

[3] In my view, the reasons are clear that as far as Sagl's proof of loss is concerned, the new trial will be restricted to Sagl's proof of loss in relation to her fine arts collection. This restriction applies both to whether Sagl is able to prove her loss in relation to her fine arts collection and whether the policy is void due to her intentional misrepresentation in the proof of loss as it relates to the fine arts collection.

[4] The punitive damage award made by the trial judge in the first trial has been set aside. The trial judge presiding over the second trial is entitled to consider Sagl's claim for punitive damages based on the findings of fact made in the second trial and the relevant findings of fact made by the trial judge in the first trial that have not been reversed by this court.

[5] As the reasons indicate, the trial judge is entitled to consider the application of s. 129 of the *Insurance Act* as may be appropriate.

[6] The trial judge presiding over the second trial will be entitled to rule on the costs of the first trial and the second trial, with one exception. That exception is the cost order made by the trial judge who presided over the first trial regarding the costs of Cosburn, Griffiths, & Brandham Insurance Brokers Limited ("CG&B"). The trial judge ordered Chubb to pay CG&B's costs on a partial indemnity basis. CG&B was specifically not brought into the appeal. The trial judge's costs award in its favour stands.

II. Costs of the Appeal

[7] On a partial indemnity scale, Chubb seeks a total of $108,657.38. Sagl submits she is entitled to her costs in the amount of $91,808.92; alternatively, that there be no order as to costs due to divided success. I do not accept that Sagl is entitled to costs. While Chubb was not successful on every issue, and only abandoned its appeal regarding arson in its factum, it was successful in obtaining an order for a new trial. In these circumstances, Chubb is entitled to costs.

[8] This appeal was argued over the course of a better part of a day. It involved the review of evidence following a lengthy trial and complex legal issues. Sagl's claim is large. Taking into account the result and the reasonable expectations of the parties, I would fix Chubb's costs in this court on a partial indemnity scale in the amount of $50,000, inclusive of its disbursements of approximately $23,000 and Goods and Services Tax.

"G. Epstein J.A."

"I agree S.E. Lang J.A."

"I agree R.G. Juriansz J.A."

Bridgette Sagl v. Chubb Insurance Company of Canada, 2010 CanLII 3392 (SCC)

Date:	2010-01-28
Docket:	33261
URL:	http://canlii.ca/s/138tb
Citation:	Bridgette Sagl v. Chubb Insurance Company of Canada, 2010 CanLII 3392 (SCC), <http://canlii.ca/s/138tb> retrieved on 2011-10-16
Share:	Tweet 0 Share
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Reflex Record:	Related decisions, legislation cited and decisions cited

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No. 33261

January 28, 2010	Le 28 janvier 2010
Coram: McLachlin C.J. and Abella and Rothstein JJ.	Coram : La juge en chef McLachlin et les juges Abella et Rothstein
BETWEEN: Bridgette Sagl Applicant ‑ and ‑ Chubb Insurance Company of Canada Respondent	**ENTRE :** Bridgette Sagl Demanderesse ‑ et ‑ Chubb Insurance Company of Canada Intimée
JUDGMENT The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C47778, 2009 ONCA 388 (CanLII), 2009 ONCA 388, dated May 8, 2009, is dismissed with costs.	JUGEMENT La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Ontario, numéro C47778, 2009 ONCA 388 (CanLII), 2009 ONCA 388, daté du 8 mai 2009, est rejetée avec dépens.

J.S.C.C.

Sagl v. Chubb Insurance Company of Canada, 2011 ONSC 5233 (CanLII)

Date:	2011-09-08
Docket:	98-CV-160150
URL:	http://canlii.ca/s/6lajv

Citation:	Sagl v. Chubb Insurance Company of Canada, 2011 ONSC 5233 (CanLII), <http://canlii.ca/s/6lajv> retrieved on 2011-10-16
Share:	Tweet 0 Share
Print:	PDF Format
Noteup:	Search for decisions citing this decision
Reflex Record:	Related decisions, legislation cited and decisions cited

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CITATION: Sagl v. Chubb Insurance Company of Canada, 2011 ONSC 5233
COURT FILE NO.: 98-CV-160150
DATE: 20110908

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	))	
BRIDGETTE SAGL Plaintiff	)))))))	*Barry A. Percival, Q.C. & G.D. Bodnaryk*, for the Plaintiff
– **and** – CHUBB INSURANCE COMPANY OF CANADA, COSBURN, GRIFFITHS AND BRANDHAM INSURANCE BROKERS LIMITED, EMON KINSELLA AND G.C. CARLEY & CO. LIMITED Defendants	))))))	*Peter H. Griffin & J. Spotswood*, for the Defendant, Chubb Insurance Company of Canada
	)	
	)	
	))	**HEARD:** May 24, 25, 26, 27, 30, 31, & June 1, 2, 3, 6, 7, 8, 9, 14 & 15, 2011.

MARROCCO J.:

[1] This trial occurred because the Ontario Court of Appeal directed a new trial 2009 ONCA 388 (CanLII), (2009 ONCA 388) after the defendant, Chubb Insurance Company of Canada, succeeded, in part, on its appeal from a decision of the Honourable Justice B. Wright ([2007] O.J. No. 3311 (S.C.)). At the conclusion of the new trial, I reserved my decision.

[2] The plaintiff's claims against Cosburn, Griffiths and Brandham Insurance Brokers Limited, Emon Kinsella and G.C. Carley & Co. Limited were conclusively resolved in the earlier proceedings. The remaining parties before me are Bridgette Sagl and Chubb Insurance Company of Canada.

The Context

[3] The plaintiff, Bridgette Sagl, and her former husband, Rudy Sagl, began a romantic relationship in the fall of 1979. She was thirty-three and he was fifty-one. They married in 1984 approximately three weeks after the birth of their son. Their marriage ended, for all practical purposes, in February 1992 when the plaintiff determined that her husband was having an affair.

[4] Rudy and Bridgette Sagl accumulated substantial wealth during their marriage. Rudy Sagl was the Chairman and Chief Executive Officer of Beltronics Ltd., which manufactured police radar detection equipment. According to Justice E. Macdonald, in her July 11, 1997 decision in *Sagl v. Sagl*, [1997] O.J. No. 2837 (Ont. Ct. (Gen. Div.)), during the years Mr. and Ms. Sagl were together, Beltronics Ltd. became a large multi-national company enjoying annual sales of more than $100 million in its highest years of performance.

[5] After deciding to end their marriage, Mr. and Ms. Sagl decided to sell the family home, known as "The Sagl Estate", and live separate and apart.

[6] The Sagl Estate was located on 113 acres in Rockwood, Ontario, which is north and west of Toronto. The sales brochure describing the property was made an exhibit during the trial. The main home on the property comprised approximately 14,000 square feet. There was an indoor swimming pool, five bedrooms, eight bathrooms and nine fireplaces. The property was listed for US$6,800,000.

[7] Ms. Sagl testified that she had been collecting art since she was a teenager. Her grandfather collected art and she continued the practice. I accept her evidence in this regard.

[8] Bridgette and Rudy Sagl collected art while they were married. The evidence established that they owned a gallery in Oakville, Ontario known as the International Gallery of Masters. Justice Macdonald refers to this art collection in the matrimonial proceedings. Justice Macdonald estimated the value of the joint collection at one million dollars because she could not obtain reliable evidence in this regard from either Mr. or Ms. Sagl.

[9] Justice Macdonald divided the joint art collection equally between Mr. and Ms. Sagl. Within her judgment, Justice Macdonald states, in a note concerning the Sagl Estate art collection, that, "Ms. Sagl has in her possession many pieces which were removed by her from the Sagl Estate".

[10] Consistent with their agreement to sell the Sagl Estate, Mr. Sagl purchased a new home for the plaintiff at 2399 Doulton Drive. In August 1992, shortly before the plaintiff completely moved in to that home, a fire caused major damage to 2399 Doulton Drive. Artwork was damaged in this fire. Valuations of this artwork were obtained and an insurance claim resulting from this fire was settled. Artwork from some of the same artists was damaged in the fire that resulted in these proceedings. The 1992 valuations were received in evidence at this trial.

[11] In order to settle her 1992 insurance claim, Ms. Sagl hired an art appraisal expert, Maynard Elliott, who provided Ms. Sagl's insurer with appraisals of the artworks destroyed or damaged in the 1992 fire. In 1997, when the fire that resulted in these proceedings occurred, Ms. Sagl again hired Mr. Elliott to appraise the replacement cost of the artworks destroyed in the fire. Mr. Elliott authored an Appraisal Report, which Ms. Sagl attached to her Final Proof of Loss claim. Mr. Elliott's Appraisal Report figures significantly in the proceedings before me.

[12] Immediately after the fire at 2399 Doulton Drive, Mr. Sagl purchased the home next-door at 2415 Doulton Drive and Ms. Sagl and their son moved into that home. The home at 2399 Doulton Drive was eventually repaired and Ms. Sagl, who had title to the property, rented it to her daughter (from a previous marriage), her son-in-law and their child.

[13] Emon Kinsella is an insurance broker. He testified in the proceedings before me. Mr. Kinsella has been an insurance broker for twenty-seven years and he sold Ms. Sagl the insurance policy upon which her claim in this trial is based. He met Ms. Sagl in 1993 because his girlfriend was acquainted with her. Prior to the 1997 fire, he had been at Bridgette Sagl's home approximately a dozen times for parties, barbecues and dinners.

[14] I accept Mr. Kinsella's evidence.

[15] Mr. Kinsella testified that Ms. Sagl lived on one of the most exclusive streets in Mississauga. He said everything in the house appeared to him to be "first-class". He described the home as "stunning". He said the house was filled with artworks and that no wall was left unfurnished. He testified that there was a storage area in the basement which was "jammed with art". Artwork was stacked on the floor and in every nook and cranny – statues as well as paintings.

[16] Mr. Kinsella indicated that, in 1995, Ms. Sagl asked him about insurance coverage. She wanted house and car insurance. Mr. Kinsella contacted the Economic Mutual Insurance Company, which inspected Ms. Sagl's home. A document entitled, "High Value Summary", prepared for that company was made an exhibit. Mr. Kinsella testified that the statements in the High Value Summary were accurate. Significantly, on page 2 of this summary, it says, "please be advised that the insured has considerable quantities of art objects throughout the building such as bronze statues, sculptures, numerous paintings and hand-woven Persian carpets. Also there are numerous articles of antique furniture as well as a large storage room in the basement full of paintings, antique furniture and objects of art".

[17] Mr. Kinsella indicated that he had never personally been on the second floor of Ms. Sagl's home. Other evidence established to my satisfaction that there was a storage area above the second floor of 2415 Doulton Drive, which extended across the entire length of the house and which was also filled with paintings and other objects of art.

[18] Mr. Kinsella indicated that he had discussions with Ms. Sagl about insuring her jewelry for $1.5 million and her artwork for $2 million. He testified that she had appraisals for her jewelry, but no appraisals on her art. Mr. Kinsella testified that he had the impression Ms. Sagl knew very little about insurance. Mr. Kinsella testified that he obtained two quotes from prospective insurers – one from the Royal Insurance Company; and the other from the Chubb Insurance Company of Canada. Ms. Sagl selected Chubb.

[19] Mr. Kinsella contacted the brokerage firm of Cosburn and Griffiths, who were authorized representatives of the Chubb Insurance Company of Canada. They provided a Binder of Insurance on behalf of Chubb, effective October 1, 1997, without inspecting the property. The actual policy of insurance was not issued until after the fire.

[20] The Binder of Insurance provided, among other things, that scheduled articles of jewelry were insured to a limit of $1 million and that Ms. Sagl's "Fine Arts" were insured to a limit of $2 million. Ms. Sagl's Proof of Loss claim valued her jewelry at $1,061,000 approximately. There has never been any dispute about the value of the jewelry. Thus, it is beyond question that Ms. Sagl was a person who possessed approximately $1 million worth of jewelry. There is, of course, a dispute about the value of her Fine Art collection destroyed in the fire on December 16, 1997.

[21] Mr. Kinsella instructed Ms. Sagl to take photographs of her artwork and keep them in a safe place. With her daughter's help, Ms. Sagl began taking these photographs. Ms. Sagl and her daughter had not completed taking the photographs when the fire occurred. The photos she took were not destroyed in the fire because they were on her daughter's computer at 2399 Doulton Drive. Those photos were entered into evidence and took up 115 pages of Exhibit "1A". Mr. Kinsella testified that these photos accurately reflected what he saw in the fall of 1997 at Ms. Sagl's home at 2415 Doulton Drive.

[22] On the night of the fire, Ms. Sagl was picked up at her home around 7:00 p.m. by her boyfriend at the time – Judge Roderick Flaherty of the Ontario Court of Justice. They went to pick up her son, who was at an "End of Term" dinner at his school, and then drove her son and a friend to the friend's grandparents. The two boys were going to spend the night and do some Christmas shopping the next day. The grandparents lived near the Eaton Center in Toronto.

[23] After dropping her son off, Ms. Sagl and Judge Flaherty went out for dinner. After dinner, they returned to Ms. Sagl's home on Doulton Drive and found it in flames. They went to 2399 Doulton Drive, while the firefighters tried to put out the fire.

[24] The fire that caused this litigation occurred at 2415 Doulton Drive on December 16, 1997. The house essentially burned down. The main floor collapsed into the basement.

[25] Judge Flaherty testified in this trial. I accept his evidence without qualification. Judge Flaherty testified that he was concerned that evening when he found out from Ms. Sagl that she did not have an insurance policy. He testified that Mr. Kinsella appeared at 2399 Doulton while the fire was raging and assured him, Ms. Sagl and everyone else that there was insurance coverage. Judge Flaherty also testified that Ms. Sagl was so upset by the fire that the family doctor had to come to 2399 Doulton Drive and give her a sedative.

[26] The Chubb policy of insurance provided blanket Fine Arts replacement cost coverage to a limit of $2 million.

[27] From the outset, Ms. Sagl had difficulties with Chubb, so she hired National Fire Adjustment Company Inc. to act as her adjuster. National Fire Adjustment Company Inc. advised Chubb, by letter, dated December 22, 1997, that they were acting on behalf of Ms. Sagl in connection with the fire. National Fire Adjustment Company Inc. is a public adjuster. The adjusters working for them are licenced to represent the public with respect to any kind of insurance loss. National Fire Adjustment Company Inc. has been in business since 1922.

[28] Chubb refused to pay any portion of the claim, alleging that the fire was really arson. Justice Wright found that there was no arson proved and Chubb ultimately abandoned its appeal of this portion of His Honour's decision.

[29] Chubb also refused to pay because it alleged that the plaintiff intentionally concealed or mis-represented material facts relating to the policy, before and after the loss.

[30] In allowing Chubb's appeal, the Court of Appeal ordered a new trial directed, in part, to whether the policy of insurance was void due to intentional mis-representations by Ms. Sagl in her proof of loss as it related to her Fine Arts collection.

[31] Prior to considering that question, however, the Court of Appeal directed that I consider whether Ms. Sagl was able to prove her loss in relation to her Fine Arts collection.

Relief from forfeiture

[32] The Court of Appeal also ordered a new trial directed to consideration of the application of s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8, if Ms. Sagl sought relief from forfeiture. In this regard, the plaintiff conceded that, if she intentionally mis-represented the extent of her loss, s. 129 was not available to her.

Punitive damages

[33] Finally, the Court of Appeal ordered that the plaintiff's punitive damage claim be determined upon the findings of fact at this trial and any relevant findings of fact made by Justice Wright that it did not reverse.

Was Ms. Sagl able to prove her loss in relation to her Fine Arts collection?

[34] It has been judicially determined that Chubb failed to prove arson.

[35] There is credible evidence, independent of Ms. Sagl, which confirms her home was "jammed" with art and completely destroyed by a fire on December 16, 1997.

[36] Ms. Sagl filed Interim and Final Fire Proofs of Loss with Chubb.

[37] The Interim Fire Proof of Loss form was declared before Judge Flaherty on January 5, 1998, and submitted to Chubb Insurance Company of Canada on January 7, 1998. The letter submitting this Interim Fire Proof of Loss form was made an exhibit. It contains a typographical error with respect to its date. National Fire Adjustment Company Inc. prepared this form for Ms. Sagl and forwarded it to Chubb on her behalf. Ms. Sagl indicated on this form that the amount claimed under her policy with respect to her Fine Arts had not yet been ascertained.

[38] The Final Fire Proof of Loss form was declared before Judge Flaherty on June 3, 1999. This Proof of Loss form attached the Appraisal Report of Maynard Elliott in connection with Ms. Sagl's Fine Arts claim. He had appraised Ms. Sagl's Fine Arts collection at her request. I qualified Mr. Elliott as an expert art appraiser.

[39] Mr. Elliott's Appraisal Report is dated April 30, 1999. While there was some confusion surrounding the pagination in the Report, I think it is fair to say that the Report and supporting material comprise approximately 600 pages. The Appraisal Report was commenced in early 1998 and concluded March 31, 1999. In his invoice, Mr. Elliott says that his report covers approximately 2,580 items. In this regard, it should be remembered some of the artworks were Prints. Mr. Elliott prepared a Supplementary Report, dated October 18, 2010.

[40] Mr. Elliott expressed the opinion that the replacement value of the loss suffered by Ms. Sagl in respect of art and objects of art as a result of the fire of December 16, 1997 was C$9,720,980. This is an appropriate place to observe that, where the currency is known, I have stated it.

[41] Mr. Elliott made it quite clear that he was not purporting to authenticate Ms. Sagl's Fine Arts collection. Mr. Elliott testified that he was not competent to authenticate works of art. Ms. Sagl, for her part, testified that, if she bought something as an original, she told Mr. Elliott it was an original and, if she bought something as a reproduction, she told him it was a reproduction. In this regard, Mr. Elliott's appraisal of Ms. Sagl's Fine Art is based upon the accuracy of what he was told by Ms. Sagl and, accordingly, a decision has to be made concerning the acceptance or rejection of all or part of Ms. Sagl's evidence.

[42] In preparation for this trial, Mr. Percival retained Mr. Daniel Buck Soules. Mr. Soules has extensive experience appraising Fine Arts. He began working with antiques in 1971 and from 1999 to 2009 he has appeared on the PBS television show "Antiques Roadshow" appraising antiques of all descriptions. He also operates Daniel Buck Auctions and Appraisals, which specializes in appraising Fine Arts, Personal Property and Antiques.

[43] I qualified Mr. Soules as an expert art appraiser.

[44] Mr. Soules testified that he had never met or communicated with Ms. Sagl and that he had no interest in the items reviewed or the outcome of this trial. Mr. Soules provided a written review of the Fine Arts' portion of the Elliott Appraisal Report and randomly appraised nine works of art that had also been appraised by Mr. Elliott. Mr. Soules endorsed the comparable sales methodology used by Mr. Elliott. Mr. Soules' valuations of the nine works of art tended to confirm Mr. Elliott's appraisal of those same pieces.

[45] Mr. Soules also responded to a written criticism of his opinion by Mr. Stephen Sweeting, the Chubb art expert. Mr. Soules indicated that, while he would not appraise a work as authentic if he had any doubt about that fact, he would otherwise accept what his client told him about a work that had been destroyed.

[46] I found Mr. Soules to be a reliable witness and I have no reservations about his evidence.

[47] Mr. Sweeting, the Chubb art expert, provided a written review of both Mr. Elliott's Appraisal Report and Mr. Soules' Report. Mr. Sweeting is a full-time personal property appraiser. He is a member of the American Society of Appraisers. He is also an Accredited Senior Appraiser specializing in Fine Art. In 2009, he became a member of the Royal Institution of Chartered Surveyors. Currently, Mr. Sweeting operates his own business and was doing so at least prior to 1995.

[48] I qualified Mr. Sweeting as an art appraisal expert and permitted him to give opinions concerning the value of the Fine Arts contained in Ms. Sagl's Proof of Loss and Mr. Elliott's methodology.

[49] Mr. Sweeting was never asked, despite being retained immediately after the fire, to attempt to appraise Ms. Sagl's art collection. He was never asked to interview Ms. Sagl about her art collection. Chubb inserted a term in its insurance policy which permitted it to examine Ms. Sagl under oath. Chubb did this repeatedly, asking Ms. Sagl thousands of questions. Mr. Sweeting was not asked to submit any questions or otherwise participate in these examinations.

The credibility of Ms. Sagl, Mr. Elliott and Mr. Sweeting

[50] Ms. Sagl has been criticized in other decisions of this court. For example, in *von Bismark v. Sagl*, [2000] O.J. No. 2757 (S.C.) (varied on other grounds, 2002 CanLII 41605 (ON CA), (2002) 158 O.A.C. 326), Justice Eberhard stated, at para. 15, that Ms. Sagl "appears to be completely dishonest." In her decision in *Sagl v. Sagl*, Justice Macdonald said, at para. 5, that "both Mr. and Ms. Sagl tailored their evidence but Mr. Sagl was particularly dishonest and evasive". Justice Macdonald also found that Ms. Sagl's financial disclosure was incomplete and untruthful (at para. 9).

[51] On cross-examination in this proceeding, Ms. Sagl was shown a mortgage registered against 2415 Doulton Drive and she claimed that the signature on the document purporting to be hers was forged. It turned out that this mortgage was the subject of litigation and that Ms. Sagl's Statement of Defence in that litigation did not plead that her signature was a forgery.

[52] It is also true that Ms. Sagl did not include in her Final Proof of Loss claim a number of items which would have increased the size of her claim. Ms. Sagl failed to include a Fabergé egg, a painting by John Constable, a painting signed by Vuillard and a painting signed by Cézanne. The paintings were seen by Mr. Sweeting and his assistant, Ms. Yeomans, in April, 1995 when they visited the plaintiff's home at 2415 Doulton Drive on a completely unrelated matter and recorded by them in notes they made at the time. Ms. Sagl did not have these notes when she filed her Final Proof of Loss in 1999.

[53] Ms. Sagl testified that the artworks observed by Mr. Sweeting and Ms. Yeomans in 1995 were still in her home on the night of the fire. Ms. Sagl testified that she simply forgot to include the paintings in her claim. While it seems improbable that someone would forget having an authentic Cézanne painting, if Ms. Sagl's motive was to intentionally submit a falsely-inflated Proof of Loss, one would have expected the Fabergé egg and the Cézanne, Constable and Vuillard paintings to be included in it.

[54] It is clear that one has to approach Ms. Sagl's evidence with caution. One has to look at the extent to which Ms. Sagl's evidence concerning these items is confirmed by other evidence. It is not helpful to make a blanket statement concerning her credibility. Rather, one has to look at the different items appraised by Mr. Elliott to determine the extent to which Ms. Sagl's evidence affects that appraisal. Ms. Sagl's evidence on non-contentious matters can be accepted.

[55] Where Ms. Sagl's evidence is offered to prove that an item was lost in the fire, I also have to consider whether her evidence is sufficiently believable to prove that fact. In this regard as well, it seems to me that a blanket statement concerning Ms. Sagl's credibility is not helpful. Rather, one has to look at the extent to which Ms. Sagl's evidence is confirmed by other evidence.

[56] Mr. Elliott's evidence also creates difficulties. Ms. Sagl was not in a position to pay Mr. Elliott for his report. Rudy Sagl never provided the support ordered by Justice Macdonald. He also never made the equalization payment ordered by Justice Macdonald. Chubb refused to make any advance payments to Ms. Sagl because it suspected arson and because it maintained that her Proof of Loss claim intentionally mis-represented the value of her Fine Arts collection. Nevertheless, Ms. Sagl has agreed to pay Mr. Elliott $400,000, which she will not be able to do if she fails in this lawsuit. In addition, Mr. Elliott is charging Ms. Sagl interest at the rate of 2% per month from the date of his invoice, which is March 31, 1999.

[57] Moreover, Ms. Sagl was unable to remain at 2399 Doulton Drive because she could not pay the mortgage, so she moved into Mr. Elliott's home, where she lived with her son and Mr. Elliott for fifty-seven months from August 1, 1998 to February 28, 2003. Ms. Sagl owes Mr. Elliott $285,000 in rent and $65,000 for utilities. Interest accrues at the rate of 2% per month. Ms. Sagl, during this period, was personally involved with Judge Flaherty. I am satisfied that Ms. Sagl was not personally involved with Mr. Elliott.

[58] Mr. Elliott's stake in this litigation is significant. There was no attempt to hide these financial arrangements, but they have to be taken into account when assessing the weight to be given to Mr. Elliott's testimony.

[59] Mr. Kerry Eaton, a senior adjuster working for Chubb on this matter, testified that he spoke to Mr. Elliott on January 12, 1998, shortly after the fire and that Mr. Elliott told him in that conversation that 95% of Ms. Sagl's artworks were reproductions. Mr. Elliott denied the conversation. I accept Mr. Eaton's evidence. I am satisfied that Mr. Elliott did have this conversation with Mr. Eaton and I draw two conclusions from it. First, Mr. Elliott was trying to ingratiate himself with Chubb and work for them because he had difficulty getting paid by Ms. Sagl for his Appraisal Report in connection with the 1992 fire; second, in Mr. Elliott's opinion, some of Ms. Sagl's artworks were original. This evidence is also relevant to Mr. Elliott's credibility generally.

Mr. Elliott's evidence generally

[60] When I consider this evidence, including Mr. Elliott statement to Mr. Eaton, I come to the conclusion that Mr. Elliott's evidence must be viewed with caution; however, it should not be generally accepted or rejected. It seems to me that it is fairer to look at the individual items appraised by Mr. Elliott and determine, when the totality of the evidence is considered, whether Mr. Elliott's values for those items are reasonable, and then to decide whether his report and the other evidence results in Ms. Sagl proving the Fine Arts' portion of her Proof of Loss claim.

Conceptual difficulties with Mr. Elliott's report

[61] Mr. Elliott's definition of replacement value differs from the American Society of Appraisers' definition of that term. Mr. Elliott defines replacement value as the highest realistic price required to replace an item. Mr. Sweeting pointed out that the American Society of Appraisers defines replacement value as the "price…required to replace a property with another of similar age, quality, origin, appearance and condition…". Accordingly, when considering Mr. Elliott's opinion concerning the replacement values, one has to remember that Mr. Elliott tried to describe the highest realistic price from a major gallery for replacing Ms. Sagl's Fine Art.

[62] Ms. Sagl's insurance policy does not use the term "replacement value"; it uses the term "replacement cost", but does not define it. Case law has defined "replacement cost" in the insurance context as the lower of the cost to repair or the cost to replace without deduction for depreciation (see: *Barke v. Economic Mutual Insurance Company*, 1999 ABCA 230 (CanLII), 1999 ABCA 230 (C.A.), at para. 21).

[63] In his Appraisal Report, Mr. Elliott uses the term "replacement value". Mr. Soules and Mr. Sweeting did the same. Mr. Elliott testified that "replacement value" is the appraisal industry's term which corresponds to the insurance industry's term "replacement cost"**.**

[64] When dealing with the reports of Mr. Elliott, Mr. Soules and Mr. Sweeting, I have interpreted their reference to "replacement value" as a reference to the same concept referred to by the insurance industry term "replacement cost".

[65] Mr. Elliott testified that the replacement value of an artwork was double its fair market value. He testified that this was a general rule of thumb used by art appraisers. His evidence in this regard was not contradicted. Mr. Elliott also testified that he frequently, but not always, used this rule of thumb in preparation of his Appraisal Report. While I understand that Mr. Elliott used this general rule of thumb when preparing his report, I decline to mechanically apply this rule of thumb when assessing the reasonableness of Mr. Elliott's opinion concerning the replacement value of individual pieces of Ms. Sagl's Fine Arts' collection.

Methodology

[66] Mr. Sweeting, the Chubb art expert, agreed that the comparison or comparable sales methodology which Mr. Elliott purported to use in preparing his Appraisal Report was the proper methodology to use in an Appraisal Report in this case. Mr. Sweeting's complaint in this regard with respect to Mr. Elliott was that Mr. Elliott sometimes used this method and other times did not.

[67] When considering the weight to be attached to Mr. Elliott's report, I have concluded that he identified the proper method to use in preparing his Appraisal Report.

Mr. Sweeting's evidence

[68] Coincidentally, there was some history between Mr. Sweeting and Ms. Sagl just as there was some history between Ms. Sagl and Mr. Elliott.

[69] Mr. Sweeting stated that, in 1995, he was referred to Ms. Sagl by a former employer and, as a result, he went to visit her at her home in April of that year. Ms. Sagl wanted certain artwork appraised because she intended to use the artwork as security for a loan. Mr. Sweeting and his assistant, Ms. Yeomans, went to Ms. Sagl's home for an interview. During the interview, they looked at some of her artwork. Ms. Sagl did not hire Mr. Sweeting to do the appraisal.

[70] This is perhaps an appropriate place to make two observations about Mr. Sweeting's evidence.

[71] First, as part of the evidence in this case, the court received the notes of Janet Mackie, which were made in the days immediately following the fire. Ms. Mackie was Chubb's General Adjuster for Ms. Sagl's claim. In her notes, dated December 22, 1997, Ms. Mackie says that Mr. Sweeting, whom Chubb had already retained, told her that he was approached in 1995 to do an appraisal for Ms. Sagl for the purposes of bridge financing. Ms. Mackie records in her notes that she was told by Mr. Sweeting that Ms. Sagl wanted the values of her artwork increased over what Mr. Sweeting felt the art was worth. Mr. Sweeting testified that he did not recall saying that to Ms. Mackie. He also agreed that Ms. Sagl said no such thing to him. In addition, Ms. Mackie made a note, on December 23, 1997, that Mr. Sweeting told her that he and Ms. Yeomans found some appraisals provided by Ms. Sagl in 1995 to be questionable. Mr. Sweeting indicated that the note was incorrect and that Ms. Sagl never provided him or Ms. Yeomans with appraisals in 1995.

[72] Second, Mr. Eaton, who for many years was a senior Chubb adjuster, testified as to the reason that he questioned the amount or value of Ms. Sagl's artwork from the time of the fire. When Mr. Sweeting was cataloging the artwork at the scene of the fire in December 1997, immediately after Mr. Sweeting had been hired by Chubb, he told Mr. Eaton that none of the individual artwork was worth more than $50 or $100. Mr. Eaton said he was shocked by the statement. Mr. Sweeting denied making the remark. He said he may have been referring to some of the pieces, but not all of them because some pieces he saw were clearly worth more than $50 or $100.

[73] I am not prepared to say that I accept Ms. Mackie's notes in the face of Mr. Sweeting's evidence. Ms. Mackie was not called as a witness. However, I do accept the evidence of Mr. Eaton. He was an investigator or adjuster for Chubb at the relevant time. He was a police officer before he joined Chubb. He would have no reason to imagine and every reason to remember a conversation with Mr. Sweeting of the kind he related.

[74] I am satisfied that Mr. Sweeting had a view of this matter right from the beginning, prior to having made a proper inquiry.

[75] Mr. Sweeting's evidence must be viewed with caution; however, his testimony should not, on this account, be completely rejected.

The appraisal of specific items of Fine Arts

The Rodin sculpture-L'Eternel Printemps-Eternal Spring

[76] Mr. Elliott appraised the replacement value for this piece at US$600,000.

[77] Ms. Sagl had proof that she had purchased this item from Mr. Frank Frankfurter, who operated a business known as the World of Antiques. Ms. Sagl, whose evidence I accept in this regard, testified that she contacted Mr. Frankfurter after the fire and asked him if he could produce for her any records which would help her substantiate her Proof of Loss. Mr. Frankfurter delivered three suitcases full of documents, which Ms. Sagl turned over to Mr. Elliott. In addition, Mr. Frankfurter provided a letter, dated May 10, 1999, which listed items purchased by Ms. Sagl between 1971 and 1994. This letter was included in Mr. Elliott's Appraisal Report. One of the items referred to in Mr. Frankfurter's letter is the Rodin sculpture, known in English as the Eternal Spring. Mr. Frankfurter's letter states that the sculpture was sold to Ms. Sagl for $6,500 in 1980. A review of the sales described in the letter reveals that the Rodin sculpture was the second most expensive item purchased by Ms. Sagl from Mr. Frankfurter.

[78] Mr. Frankfurter was not called as a witness. Ms. Sagl testified that he suffers from Alzheimer's disease. Her evidence in this regard was not challenged. I accept Ms. Sagl's evidence. I am satisfied that Mr. Frankfurter was not available to testify because he suffers from Alzheimer's disease.

[79] During the cross-examination of Mr. Eaton, counsel for Ms. Sagl learned for the first time that there was a memo of an interview that Mr. Eaton and another Chubb employee, Mr. Phillips, had with Mr. Frankfurter. This memo (the "Phillips memo"), which had been prepared by Mr. Phillips, had never been produced prior to Mr. Eaton's disclosure that it existed. Subsequent to Mr. Eaton's disclosure of the existence of the memo, I ordered its production. Counsel for the plaintiff read the memo and then continued his cross-examination of Mr. Eaton. The memo was filed as Exhibit 43. Mr. Phillips was not called as a witness in this proceeding.

[80] There had been disclosure of the fact that Chubb had interviewed Mr. Frankfurter; it was the Phillips memo of the interview that had never previously been disclosed.

[81] No explanation for the failure to disclose the existence of this memo was offered.

[82] Mr. Eaton testified that the Phillips memo was accurate. The Phillips memo is significant.

[83] The memo is dated July 16, 1999. Some perspective is required concerning this date. Mr. Elliott's report is dated April 30, 1999; Mr. Frankfurter's letter listing the items purchased by Ms. Sagl is dated May 10, 1999. The Final Proof of Loss was declared before Judge Flaherty on June 3, 1999. Obviously, Chubb was following up on the Final Proof of Loss and sent two of its adjusters to interview Mr. Frankfurter.

[84] The Phillips memo states, in part, "I found Mr. Frankfurter to be very forthright and honest through all discussions and would describe him as a gentleman." The Phillips memo also described Mr. Frankfurter as co-operative. The Phillips memo indicated that Mr. Frankfurter lived in a "high-end apartment/condominium". The memo indicated that the apartment was furnished with antiques and pieces of art that were very expensive. In this regard, Mr.

Eaton indicated that he was not able to value antiques and, therefore, could not confirm this particular statement in the Phillips memo. Mr. Eaton did agree that the apartment or condominium appeared to be very well-furnished.

[85] Mr. Frankfurter's letter of May 10, 1999, described the Rodin sculpture as "Limited Edition (36) Bronze Casting". Interestingly, the Phillips memo, which is eleven pages long, makes only a passing reference to the sculpture. There does not appear to have been any questions put to Mr. Frankfurter at this interview about the second most valuable piece of artwork that he ever sold to Ms. Sagl. Page 10 of the memo confirms that there was to be a subsequent interview with Mr. Frankfurter on the Tuesday following July 16, 1999. Mr. Eaton stated that he did not attend the follow-up interview and could not verify that it had taken place. Mr. Eaton testified that he could not locate any memo of this follow-up interview. He testified that he could not locate any other memos of interviews with Mr. Frankfurter. There is no evidence concerning subsequent interviews.

[86] Mr. Eaton testified that he had difficulty remembering the interview with Mr. Frankfurter and, for that reason, had searched for and found the Phillips memo immediately prior to testifying. Accordingly, I am not convinced that he would have remembered a discussion about the sculpture, if for some reason it was not recorded in the Phillips memo.

[87] While I have no difficulty with Mr. Eaton's evidence, I also do not believe for one moment that Chubb did not, at some point, ask Mr. Frankfurter about the Rodin sculpture.

[88] The conclusion I draw is that Chubb never obtained any evidence from Mr. Frankfurter or his records to suggest that Ms. Sagl's Rodin sculpture was not authentic, because no such evidence existed.

[89] The Court of Appeal commented, in paragraph 105 of its judgment, that no one had ever seen the Rodin sculpture. In this proceeding, Judge Flaherty, Emon Kinsella and Ms. Sagl's daughter testified that they had seen the sculpture. Judge Flaherty said it was in the basement. In addition, the evidence disclosed that there was reference to the Rodin sculpture in an answer to an undertaking, given by Ms. Sagl, through her counsel, at her examination in 2000, well before the 2007 decision of the Court of Appeal.

[90] Mr. Elliott relied on what he considered comparable sales from the Art Sales Index database. One was for a limited edition Eternal Spring bronze work by Rodin, which sold for $270,000 in 1992; and the second was a bronze Eternal Spring by Rodin, which sold for $390,000 in 1996. Mr. Elliott testified that $390,000 was what he called the "hammer price". Mr. Elliott testified that one has to add a buyer's premium of approximately 20% and the appropriate sales taxes to the auction or hammer price in order to arrive at the market price, which must then be adjusted upward because the items were insured for their replacement value or cost. Mr. Elliott indicated that it was through that exercise that he ultimately arrived at a price of US$600,000.

[91] Mr. Elliott testified that the description, "Limited Edition" with the number 36, likely meant that the sculpture was the 36th casting of that particular edition. The two comparable sales were limited edition pieces that had been cast by Barbedienne, who was a caster approved by Rodin. There is no indication in the description in Mr. Frankfurter's letter that this was a Barbedienne edition bronze. Mr. Elliott said that Ms. Sagl had assured him that there was a foundry mark on the piece; however, there is no description of this mark in Mr. Elliott's report.

[92] Mr. Sweeting, the Chubb art expert, pointed out that there were no photographs or further provenance on this piece. He also testified that he found no reference to an Eternal Spring sculpture numbered 36 in the literature.

[93] Mr. Sweeting criticized Mr. Soules for his failure to consider provenance when appraising this piece as part of his attempt to verify Mr. Elliott's work. I attach no weight to this criticism because Chubb had access to Mr. Frankfurter shortly after Mr. Elliott delivered his report. If there was a genuine issue about which limited edition Mr. Frankfurter was referring to or who cast the edition, that information was readily obtainable by Chubb.

[94] While there was no burden on Chubb to make inquiries of Mr. Frankfurter, the inference I draw from the fact that Chubb interviewed Mr. Frankfurter at least once and never offered any evidence that the Rodin sculpture was not authentic is that such evidence did not exist.

[95] Mr. Sweeting also suggested that he could not understand why a "savvy Toronto antiques dealer" would sell a desirable Rodin bronze for C$6,500 in 1980. The obvious person to answer this question was Mr. Frankfurter. If Chubb asked him this question during an interview, its notes in that regard appear to have been lost. It is not difficult to speculate in this regard. Mr. Sweeting did not comment on the fact that Mr. Frankfurter, in his May 10, 1999 letter, stated that Ms. Sagl has been a steady customer since 1971. I attach no weight to Mr. Sweeting's speculation in this regard.

[96] Mr. Sweeting testified that, when he was at Ms. Sagl's home in April 1995, he did not see this bronze. He said he was shown other bronzes. I attach no weight to this observation. Mr. Sweeting was attempting to suggest by this observation that Ms. Sagl did not have this piece in 1995 because it was not shown to him. At least three witnesses, all of whom were quite believable, testified that they saw this bronze sculpture in Ms. Sagl's home.

[97] Mr. Sweeting suggested, in his evidence, that it would have been more sensible for Ms. Sagl, in 1995, to show him more valuable pieces to reduce the number of pieces that needed to be appraised. Mr. Sweeting was attempting to suggest that it would, therefore, have been logical for Ms. Sagl to show him the Rodin sculpture. This reasoning makes no sense to me. When Mr. Sweeting went to Ms. Sagl's home in 1995, it was to appraise art pieces that she intended to post as security for a loan. It seems more sensible to me that Ms. Sagl would want to post lesser pieces as security.

[98] Mr. Sweeting testified that he supervised the sorting of the artwork at the fire site and that he found a number of bronzes which were whole and intact, but which had lost their patination. He said that there was no trace of the Eternal Spring. Mr. Sweeting also testified that he went to the A&O Warehouse, which was a place where Chubb removed portions of Ms. Sagl's Fine Arts collection after the fire, and did not find this sculpture. This evidence was offered presumably to suggest that Rodin's Eternal Spring was not at 2415 Doulton Drive on the night of the fire.

[99] I reject Mr. Sweeting's speculation in this regard. Judge Flaherty described the scene of the fire at 6:00 a.m. in the morning after the fire. He testified that the entire main floor had collapsed into the basement. He described it as a big smoldering pile of rubble. After 2415 Doulton Drive had been turned back over to Ms. Sagl approximately two weeks after the fire, Judge Flaherty testified that there was a huge heap of frozen debris in the centre of the house. He testified that whatever supports had been put in place to permit access were removed with the result that it was impossible to search through the debris because it was not safe. Virtually every witness who attended at the scene of the fire testified that it was unsafe to enter what remained of Ms. Sagl's home. It is not difficult to believe that Mr. Sweeting would not have seen the Eternal Spring if it was buried in that debris.

[100] In addition, the parties filed as an exhibit a brief of documents passing between Chubb and National Fire Adjustment Company Inc., who were acting as adjusters for Ms. Sagl. In that correspondence, there is a letter, dated December 22, 1997, to Chubb, advising that Ms. Sagl will not consent to the removal of contents from the fire scene until National Fire Adjustment Company Inc.'s appraisers have an opportunity to inspect, photograph and inventory those contents. Chubb responded on December 23, 1997, and stated that any contents which had been removed from the house were removed to give access to the Fire Marshal and were being stored on the property. On January 2, 1998, National Fire Adjustment Company Inc. again wrote to Chubb and, in part, advised that

a bin filled with items had been removed from the property and requested a detailed inventory of all items removed. Chubb responded on January 5, 1998, and advised "building debris" was removed to permit the Fire Marshal to have access to the property. No inventory was provided. It is clear that something was removed from the property without being photographed or inventoried. It is impossible to say what it was.

[101] Under the circumstances, Mr. Sweeting's speculation that the Rodin sculpture was not on the property is not helpful.

[102] Mr. Soules offered and explained his opinion concerning the replacement value of the Rodin sculpture and suggested a value of US$490,000.

[103] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed a Rodin sculpture which was lost in the fire of December 16, 1997, and that the replacement cost for insurance purposes for this sculpture was between US$490,000 and US$600,000 at the time of the fire.

The paintings of James Barrowman

[104] In order to understand Mr. Elliott's valuation of these paintings, some context is necessary. As I indicated earlier, Ms. Sagl's home at 2399 Doulton Drive was the subject of a fire in August 1992. It was at this time that she met Mr. Elliott, whom she hired to assist her with the valuations. The claim was resolved without litigation. The insurance company retained appraisers and Ms. Sagl did the same. Eventually, both sides agreed on the extent of Ms. Sagl's loss and her 1992 fire claim was settled.

[105] Fifty-eight (58) paintings of James Barrowman were lost and damaged in that fire. Mr. Elliott appraised those paintings in 1994 and used the mean average of those appraised values when appraising the value of the Barrowman paintings lost in the 1997 fire. Mr. Elliott applied a percentage increase in value to cover the period 1992 to 1997 and then arrived at the current average replacement value for the Barrowman paintings. Mr. Elliott indicated, in his report, that the Barrowman paintings increased by about 80% from the 1994 to 1998.

[106] According to Ms. Sagl, in this fire 900 works of James Barrowman were lost.

[107] Mr. Elliott appraised the replacement value of the 900 James Barrowman paintings at C$1,049,166.97. Mr. Elliott appraised the average replacement cost of the frames and mats at $350 each. Only 300 of the paintings were framed according to Ms. Sagl, with the result that the replacement cost of the frames was C$105,000.

[108] Accordingly, it seems that Mr. Elliott appraised the value of the Barrowman paintings lost in this fire at approximately $900,000; in other words, the average value of each painting is approximately $1,000.

[109] At the time of the 1992 fire, the Barrowman paintings were appraised by persons other than Mr. Elliott. Those appraisals were made exhibits in this trial. There was no suggestion in the evidence that any of these other appraisers were connected to Mr. Elliott in any way. The Odon Wagner Gallery, which was located on Davenport Road in Toronto, stated, in its October 1992 report, that the original value of the damaged Barrowman paintings ranged from $100-$500. The Odon Wagner Gallery addressed its appraisal to the adjuster adjusting the claim for Ms. Sagl's insurer. The Restorart Inc. Gallery, which was located on Morrow Avenue in Toronto, stated in its appraisal, dated January 13, 1993, that the average value of the Barrowman paintings "would range between $800 and $1200". The Restorart Inc. Gallery addressed its appraisal to Ms. Sagl. Fine Art Designs Art Consultants and Restorers, which was located in Virginia, stated in its appraisal of September 3, 1992, that the average value of the Barrowman paintings that were beyond repair was $1,200 each. Fine Art Designs addressed its appraisal to the adjuster adjusting the claim for Ms. Sagl's insurer.

[110] I recognize that the appraisals by the Odon Wagner Gallery, Restorart Inc. Gallery and Fine Art Designs are fair market value appraisals rather than replacement value or replacement cost appraisals. However, the evidence suggested that replacement value or replacement cost exceeds fair market value.

[111] Mr. Sweeting suggested that the Odon Wagner reference to "original value" was a reference to the replacement value of the Barrowman paintings. I see no reason to make such an assumption and I decline to do so. In my view, the reference to original value means what it says, namely, the original price of the painting.

[112] Mr. Sweeting had a number of criticisms of the Barrowman portion of Mr. Elliott's report.

[113] Mr. Sweeting criticized the 1992 appraisals because they do not provide comparable values or any level of analysis. I discount this criticism because the 1992 fire loss was settled based on these values. I see no reason to second-guess them in 2011.

[114] As indicated earlier, Ms. Sagl was, at the request of Mr. Kinsella, in the process of photographing her entire art collection when the December 16, 1997, fire occurred. Some of her photographs were photographs of the Barrowman paintings. Mr. Sweeting commented that these photographs reveal that Ms. Sagl's collection of Barrowman artworks was not of uniform quality and that some of the works may have been working studies. It is difficult to place a value on this criticism and Mr. Sweeting did not attempt to do so.

[115] Mr. Sweeting agreed that the Canadian art auction market index showed a dramatic increase in sale prices from 1993 to 1998. However, he objected to including Mr. Barrowman in that increase because Mr. Barrowman's paintings had not traded at auction. I am not persuaded that Mr. Elliott's reference to the auction market index to measure changes in the Canadian art market between 1994 and 1998 resulted in an unreasonable increase in the value of the Barrowman paintings. Mr. Sweeting provided a reference from a minor auction house, which listed one Barrowman oil on board painting for $700-$900. He also recorded a listing of a 16" x 20" Barrowman for $500 and a larger painting that was listed for $1,500. Mr. Sweeting was unable to say whether any of these offerings or listings resulted in sales.

[116] Mr. Sweeting criticized Mr. Elliott because Mr. Elliott based his 1998 valuation on his earlier appraisal report. This is only partially correct. There were, as I indicated, other valuations of Barrowman's works after the 1992 fire and Mr. Elliott appears to have considered all of them when he arrived at his 1998 valuation. The 1992 values and the auction listings referred to by Mr. Sweeting are not significantly at odds with Mr. Elliott's valuation.

[117] Mr. Sweeting indicated that a buyer looking to purchase 900 works of an artist would expect a discount. I reject this suggestion. Ms. Sagl had already collected the Barrowman paintings. Ms. Sagl indicated to Mr. Elliott that she intended to acquire, if possible, all the works of James Barrowman. Ms. Sagl had a similar intention with respect to the works of Vincent Francis, Madeline Francis and Ruth von Bismark. It was her intention to market them in a way which would, over time, result in higher values for their works, thereby increasing the value of Ms. Sagl's inventory of their paintings. Mr. Sweeting, as indicated earlier, was retained at the time of the fire. He provided a status report, dated April 1, 1998, to Ms. Sheila McKinlay, who was counsel for Chubb at the first trial before Justice Wright. In his status report, Mr. Sweeting remarked that, while searching through the remnants of the artworks at the site, "we continuously had the impression we were sorting through inventory rather than a personal art collection". In this regard, I also observe that the fact that Ms. Sagl had Barrowman working studies, if this was, in fact, the case, it is consistent with the idea that Ms. Sagl was trying to collect all the works of Mr. Barrowman and

other artists and then strategically sell some of their works and thereby increase the value of her inventory.

[118] In short, there is no reason to assume that Ms. Sagl would sell the paintings in a way that required her to offer a discount to the buyer. In my view, the concept of a bulk discount is misplaced.

[119] Finally, Mr. Sweeting questions Ms. Sagl's assertion that she lost 900 Barrowman paintings. He bases his suspicion on the fact that he only found 137 Barrowman artworks himself, although he suspects there were others that he could not identify. I reject his speculation in this regard. The notes of Jane Ballah-Mackie, the General Adjuster for Chubb, were filed as an exhibit. I referred to them earlier. Her file note of December 23, 1997, refers to a meeting she had with Mr. Sweeting and his associate, Ms. Yeomans, during which she records that they advised her that they attended at Ms. Sagl's residence on Doulton Drive in April 1995 because Ms. Sagl was thinking of hiring them to appraise Fine Arts, which she was intending to post as collateral for a loan. Ms. Mackie records Mr. Sweeting as saying "the house was jammed with properties". Mr. Sweeting, on cross-examination, doubted that he used the phrase "jammed with properties", but agreed the house was filled with artworks. Mr. Kinsella and Judge Flaherty gave similar evidence. Justice Macdonald, in her decision resolving the family law issues between Mr. and Ms. Sagl, stated that "Ms. Sagl has in her possession many pieces which were removed by her from the Sagl estate". The Sagl estate (14,000 square feet) was far larger than Ms. Sagl's home on Doulton Drive and, therefore, I have no difficulty in understanding why Ms. Sagl's home would be "jammed with properties".

[120] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed 900 works authored by James Barrowman and that those works were lost in the fire of December 16, 1997. I am satisfied that the replacement cost of the Barrowman paintings for insurance purposes at the time of the fire was C$900,000. In addition, I am satisfied that 300 of these works were framed and that the replacement cost for insurance purposes of the frames destroyed in the fire was the value ascribed to those frames by Mr. Elliott, namely C$105,000.

The paintings of Vincent Francis

[121] Mr. Elliott appraised 76 paintings by Vincent Francis, 43 unframed paintings and 995 lithographs. Mr. Elliott offered the opinion that the total replacement value for the 76 paintings was C$572,342. He opined that the 43 unframed paintings had a replacement value of C$286,662.19. He placed the total replacement value for the lithographs at US$149,250, for an average price of US$150. Finally, it was his opinion that the replacement value of the frames was C$26,650. Thus, the total replacement value for the Vincent Francis artworks was, in Mr. Elliott's opinion, slightly in excess of C$886,000.

[122] Mr. Elliott testified that he attempted to establish a benchmark value for the Vincent Francis paintings and he set out in his Appraisal Report the ten artists whom he used for this purpose.

[123] Mr. Elliott also relied upon certificates of authenticity from a company called Masters International Art Consultants. These certified that the painting to which they referred is an original work of art by Vincent Francis.

[124] Paintings by Vincent Francis were damaged in the 1992 fire. Restorart Inc. appraised Vincent Francis prints at between $200 and $300 each. Fine Art Designs appraised four Vincent Francis oils on Academy board or canvas board at $5200 each. It appraised Vincent Francis prints at $350 each.

[125] Mr. Elliott was cross-examined concerning the values he placed on some of the 76 paintings. He pointed out that certain paintings can be the same size but can take longer to paint. He described it as "a call by the artist and himself". There was nothing in his report which explained this process. I attach some, but not a great deal of, significance to this fact because, in essence, attaching or appraising value is a judgment call by the appraiser based on comparable sales and increases in the art auction market rather than a precise calculation.

[126] Mr. Elliott offered the opinion that the 76 paintings had a total replacement value of C$572,342 in 1998. It does not require an expert to see that the average per painting is approximately $7,500. Fine Art Designs appraised the Francis oils at $5,200 each in 1992. The Fine Art Designs Appraisal Report was directed to the insurance adjuster for the insurance company adjusting the loss resulting from the 1992 fire; it was not directed to Ms. Sagl. Mr. Elliott's average price for the 995 lithographs is $150, which is less than the 1992 Fine Art Designs and the Restorart Inc. appraised values for Francis prints.

[127] Mr. Elliott attempted to justify his appraisal by establishing a benchmark value which was based on artists whose paintings sold publicly and by reference to the previous appraisals on the earlier claim. This aspect of Mr. Elliott's process, in my view, was less reliable. While the artists he chose may have had a similar style and mannerism to Mr. Francis, they appear to me to be in quite a different category. Some were quite famous; others were essentially unknown to Mr. Elliott, although their style and mannerism was similar, in his opinion, to Mr. Francis.

[128] As part of his report, Mr. Elliott included the Canadian Art Auction Market graph for the years 1981 to 1999 that is published by Art Sales Index Ltd. This graph shows a significant increase in art auction market prices between 1992 and 1998.

[129] Mr. Elliott also considered the detail in the individual painting and the time it would take to paint it. He then purported to adjust the value to the date of his report. To the extent that this process can be called a calculation, Mr. Elliott did not have his notes. During the years that this matter has been outstanding, Mr. Elliott experienced financial difficulties and lost his home. During the course of moving, he lost his notes. Mr. Elliott did not attempt to re-create his calculations prior to this trial or prior to the previous trial before Justice Wright. The absence of notes makes this aspect of Mr. Elliott's work less reliable. Fortunately, the previous appraisals were available and they provided, in my view, confirmatory evidence for Mr. Elliott's valuation, generally, and the artworks of Mr. Francis, in particular.

[130] It was suggested that the previous appraisals are not reliable because the manner in which the previous appraisers arrived at their values is not disclosed in their reports. This observation is correct, but at the same time, these appraisals were provided quite independently of the events which brought this matter to my court and relied upon previously by Ms. Sagl and the insurance company with whom she was insured in 1992. In my view, this provides some assurance that these values can be relied upon in this proceeding.

[131] As indicated earlier, Mr. Elliott stated that Ms. Sagl had indicated to him that she was establishing an inventory of the works of certain artists, including Vincent Francis, and then strategically selling works of those artists for the purpose of increasing the value of her paintings and, therefore, the value of her inventory. Ms. Sagl testified that she had been collecting the paintings of Vincent Francis for years and, at one point, had made a bulk purchase of his paintings. I received in evidence two invitations sent out by the International Gallery of Masters, which was a gallery owned by Rudy and Bridgette Sagl. One of these invitations invited the recipient to an opening of the exhibition of paintings by Vincent Francis. The invitations do not confirm the inventory, but they do confirm an attempt, in 1991, by Bridgette and Rudy Sagl to show and perhaps market the paintings of Vincent Francis. Finally, Justice Eberhard found, in *Bismark v. Sagl, supra*, that Ms. Sagl was attempting to obtain all of the paintings of Ms. von Bismark and keep them for herself rather than vigorously market them.

[132] Mr. Sweeting, as indicated earlier, was retained at the time of the fire. He provided a Status Report, dated April 1, 1998, to Ms. Sheila McKinlay, who had been retained as counsel for Chubb in this matter. Mr. Sweeting indicated that, at the site of the fire, he found at least fifteen paintings belonging to Vincent

Francis. He described these paintings as Landscapes. He described the quality as ranging from good to very good. He described Mr. Francis as an artist of regional reputation who studied under Hortense Gordon. Mr. Francis was a charter member of the Contemporary Artists of Hamilton and exhibited, according to Mr. Sweeting, at the Royal Canadian Academy and the Art Gallery of Hamilton.

[133] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed artwork authored by Vincent Francis in the quantity described by Mr. Elliott in his Appraisal Report. I am satisfied that these paintings were lost in the fire of December 16, 1997, and that the replacement costs of this artwork for insurance purposes are the replacement values assigned by Mr. Elliott.

The paintings of Ruth von Bismark

[134] Mr. Elliott indicated that there were 300 paintings by Ruth von Bismark. He offered the opinion that their current replacement value was C$207,750, including frames. The average price was C$660.

[135] Paintings by Ruth von Bismark were damaged in the 1992 fire and so her work had been appraised previously.

[136] The Ogden Wagner Gallery makes no reference to Ruth von Bismark in its October 1992 Appraisal Report. Their report references an artist described as RB but, in the absence of any other evidence, it is impossible for me to conclude that this reference is to Ruth von Bismark. The same is true for Restorart Inc.

[137] Fine Art Designs appraised 42 oils on canvas by Ruth von Bismark at $2,000 each. It appraised 2 watercolors at $700 each. Mr. Elliott, in his 1994 Appraisal Report, offered the opinion that the fair market value of paintings by Ms. von Bismark ranged from $100-$400.

[138] Fine Art Designs records that Ruth von Bismark exhibited her works in Hamburg, Baden-Baden, the Fulden Academy of Munich, in Mozambique and in South Africa. Mr. Sweeting provided a Status Report to Chubb, dated April 1, 1998. In this report, he referred to Ruth von Bismark as a German Canadian artist. He described her as technically and artistically of poor to fair quality and as an artist who has never sold paintings at major or second-tier Canadian auctions.

[139] Mr. Elliott says he used major artists who painted in a similar style and mannerism to Ruth von Bismark as his comparables. Mr. Elliott testified that he used the lower comparisons that he found because the comparable artists were shown in major galleries and Ruth von Bismark was not. Mr. Elliott testified that he was not suggesting that Ms. von Bismark's work was of the same quality as these artists or that she had the same reputation. He testified that, for that reason, he chose the lowest price for which those artists had sold paintings.

[140] Mr. Sweeting offered no opinion concerning the replacement value of the paintings of Ms. von Bismark.

[141] Ms. Sagl's dealings with Ruth von Bismark were the subject of court proceedings before Justice Eberhard, to which I referred earlier. Justice Eberhard found that Ms. Sagl, contrary to her agreement with Ruth von Bismark, was hoarding Ms. von Bismark's paintings. Justice Eberhard found that Ms. Sagl was "despicable" for hoarding Ms. von Bismark's paintings while representing to her that she was trying to sell them (at para. 20). The Court of Appeal upheld Justice Eberhard's decision on this point.

[142] Justice Eberhard's finding in this regard is consistent with Mr. Elliott's suggestion that Ms. Sagl told him that she intended to acquire virtually all of the paintings of Barrowman, Madeline Francis, Vincent Francis and Ruth von Bismark and then strategically sell them to increase the value of her inventory.

[143] Justice Eberhard also found that Ms. von Bismark delivered 420 paintings to Ms. Sagl between 1992 and 1995, which exceeds the 300 paintings claimed by Ms. Sagl in her Final Proof of Loss.

[144] It was suggested, during argument, that Ms. Sagl had no insurable interest in the von Bismark paintings. According to Justice Eberhard, the contract between Bridgette Sagl and Ruth von Bismark obliged Ms. Sagl to be responsible for the paintings in her possession and maintain adequate insurance for those paintings while they were in her possession. This obligation implies that Ms. Sagl would be prejudiced by the destruction of the paintings. I am satisfied, therefore, that Ms. Sagl had an insurable interest in the von Bismark paintings (see: *Kosmopoulos v. Constitution Insurance Co.*, 1987 CanLII 75 (SCC), [1987] 1 S.C.R. 2, at p. 30).

[145] I also note that Justice Eberhard found that any money paid by Chubb for the von Bismark paintings was impressed with a trust in favour of Ms. von Bismark.

[146] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed artwork authored by Ruth von Bismark that was lost in the fire of December 16, 1997, and that the replacement cost for insurance purposes for this artwork is the replacement value assigned to it by Mr. Elliott, namely C$207,750 including stretchers and frames.

The paintings of Madeline Francis

[147] Mr. Elliott appraised the replacement value of 21 paintings by Madeline Francis at C$79,800. He appraised the replacement value of an additional 28 unframed paintings at C$86,345. He appraised the replacement value of the frames at C$7,350. Mr. Elliot appraised the total replacement value for the Madeline Francis' works at C$173,495.

[148] Mr. Elliott pointed out that Ms. Sagl was a major collector of the works of Madeline Francis and, at one time, owned most of her works. Mr. Elliott looked for comparable artists and took a mean average of the values of those comparable artists to develop a benchmark value for the paintings of Madeline Francis and then purported to adjust that value to the date of his Appraisal Report.

[149] Mr. Sweeting indicated, in his Status Report of April 1, 1998, that he had found at least four paintings of Madeline Francis at the site of the fire. He described these paintings as Landscapes of fair to good quality.

[150] Mr. Sweeting described Madeline Francis as an artist of regional reputation in the Hamilton area, who studied under Hortense Gordon and who taught at the Hamilton Art Gallery.

[151] Mr. Elliott used four artists as comparables for Madeline Francis. Mr. Elliott said that these painters had a similar style and mannerism to Madeline Francis and that is why he chose them. The first was John Sloan. Mr. Elliott knew virtually nothing about John Sloan. The second was Arthur Lismer, who was a member of the Group of Seven. Madeline Francis did not have a profile similar to Mr. Lismer. Mr. Elliott testified that he used Mr. Lismer because Ms. Francis had some exposure to him as a student. The third was Henry Smith. Mr. Elliott could not remember who Henry Smith was. Mr. Elliott said he could

not remember the details of every individual artist referred to in his report. The fourth was Frank Johnson, who was another Group of Seven painter.

[152] No paintings by Madeline Francis were appraised at the time of the 1992 fire.

[153] I am satisfied that Ms. Sagl possessed artwork authored by Madeline Francis which was lost in the fire of December 16, 1997. I am not satisfied that Ms. Sagl has proven the replacement cost for insurance purposes of the Madeline Francis paintings.

The Guido Rossi sculpture

[154] This piece is a bronze Joan of Arc 64 inches in height. Mr. Elliott appraised the replacement value of this piece at US$44,000. It is a signed piece and it rested on a Marble base. The replacement value of the base is US$1,000.

[155] Mr. Elliott used three comparables: a 21-inch marble torso of a partially-clothed woman authored by Guido Rossi which sold for US$1,027; a bronze sculpture that was a copy and authored "after Rossi" of a semi-naked woman tied to an Ionic column, which sold for US$1,248; the third was authored by Emmanuele Villanis and sold for US$2,433.

[156] Mr. Elliott stated that he arrived at the value of this piece based on the fact that it was an original, it was larger than the comparables and it was a famous subject, namely Joan of Arc. Because Mr. Elliott did not have his notes, he could not be precise about his calculations.

[157] In his status report of April 1, 1998, Mr. Sweeting comments on the fact that he saw very few pieces of high quality at the scene of the fire and then states "the exceptions might include several bronze sculptures". Later on in this letter, when specifically addressing bronzes and other statuary, Mr. Sweeting makes the following comment: "several good-quality bronzes are included in the collection. These include works by Chiparus, Moreau, Villanis, Rossi and a number of unsigned pieces. Works by these artists trade frequently at international level auctions and through sculpture dealers."

[158] Mr. Sweeting also indicated that he found this bronze at the A&O Warehouse and that it had been damaged by someone trying to clean it. The fact that this bronze was found at the warehouse confirms that Ms. Sagl possessed an original Rossi. It was suggested to Mr. Elliott that he had tried to clean the sculpture. Mr. Elliott denied it and no evidence to this effect was offered. I am not satisfied that Mr. Elliott damaged the sculpture.

[159] Mr. Sweeting did not attempt to appraise the replacement value of this piece.

[160] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed this sculpture authored by Guido Rossi, that it was damaged in the fire of December 16, 1997, and that the replacement cost for insurance purposes for this artwork is the replacement value assigned to it by Mr. Elliott, namely, US$44,000. Mr. Elliott's appraisal of the replacement cost of the base was not contentious.

The Betrothal by Andrea del Sarto

[161] Mr. Elliott appraised the current replacement value of this painting at US$300,000. He appraised the frame at US$6,900. Ms. Sagl had either a photograph of this painting or a photocopy of a photograph of this painting, which she gave to Mr. Elliott. A photocopy was included with Mr. Elliott's report. Mr. Elliott comments that the painting appears to be in excellent condition. He further comments that there is a barely-discernible signature on the painting. Mr. Elliott testified that he had seen the painting at Ms. Sagl's home when he was there in 1994. Mr. Elliott could not describe the signature. In this regard, it was pointed out, on cross-examination, that del Sarto signed with a symbol rather than a conventional written signature.

[162] The comparable work chosen by Mr. Elliott was the famous del Sarto painting "Adoration of the Magi", which sold for $360,000 in 1997.

[163] Mr. Soules also appraised this piece. Mr. Soules offered and explained the opinion that the current replacement value, including the frame, was US$425,000. Mr. Soules found many results on the Art Sales Index for del Sarto, which included the School of del Sarto, Studio of del Sarto, Attributed to del Sarto and the Circle of del Sarto. It was Mr. Soules' opinion that Mr. Elliott may have undervalued this painting.

[164] Mr. Sweeting, in his evidence, testified that he was not shown this painting when he visited Ms. Sagl's home in 1995. Mr. Sweeting testified that he could not understand how the painting would be in excellent condition given that it would be several hundred years old.

[165] Mr. Sweeting was critical of Mr. Elliott for proceeding on the assumption that the artwork was an original del Sarto. He described Mr. Elliott's assumption as most unusual. He testified that, when an appraiser is dealing with high-value works, the appraiser has a responsibility to check out those works. Mr. Sweeting pointed out this particular painting is not identified or referred to in writings about del Sarto. He suggested that the appraiser must make certain that high-value pieces are authentic.

[166] The Uniform Standards of Professional Appraisal Practice 2008-2009 Edition were made an exhibit in these proceedings. The 2008-2009 Edition does not suggest that an appraiser should take steps to authenticate the pieces that he is appraising. Mr. Soules testified that appraisers were not in the business of authenticating works. This would seem to me to be especially true in circumstances where the works have been destroyed by fire and, therefore, cannot be examined.

[167] I am satisfied that Mr. Elliott was not required to authenticate this piece before appraising it. I am also satisfied that Mr. Elliott's appraised value is reasonable, if the piece was an authentic painting by Andrea del Sarto.

[168] At this point, some further context is necessary. As indicated earlier, the evidence established that Mr. and Ms. Sagl operated a gallery in Oakville known as the "International Gallery of Masters". Two invitations for exhibitions at that gallery were introduced into evidence in this proceeding. These invitations were to exhibitions of the works of Vincent Francis, Madeline Francis, James Barrowman and Sin Sin. The openings of these exhibitions, as described in the invitations, were occurring in April and June 1991. On the invitations, Mr. and Ms. Sagl list "Other Masters in Our Portfolio". Andrea del Sarto is not listed.

[169] I am not satisfied that Ms. Sagl has proved that an original painting, entitled "The Betrothal", authored by Andrea del Sarto, was destroyed in the fire which occurred on December 16, 1997. Because the 1991 invitations, after the listing of "Other Masters in Our Portfolio" contain the phrase "and more", my decision is that the destruction of an original del Sarto has not been proven. I am not satisfied that Ms. Sagl intentionally misrepresented this fact.

Democritus and Protagoras by Salvatore de la Rosa

[170] Mr. Elliott appraised the current replacement value of this painting at US$125,000. Mr. Elliott attached, as an exhibit to his report, an appraisal from a company called Masters International, dated February 1987, which appraised the painting at $75,000. Mr. Elliott's report contains a photocopy of the photograph of the painting, which appears to be signed.

[171] I attach very little weight to the Masters International Certificates, not only in respect of this painting, but generally. The evidence suggested that the person who carried on business as Masters International, Fernando Atoarmeu, stole items of jewelry from Ms. Sagl.

[172] I think it is reasonable for Mr. Elliott to have reference to appraisals by other persons; the extent to which he relied upon them may affect the weight to be given to his appraisal of a particular piece.

[173] Mr. Elliott used the Art Sales Index to find what he thought were comparable sales. He found one in 1990, but it was a much larger painting and he discounted that value when trying to appraise Ms. Sagl's painting. After applying the discount, Mr. Elliott increased the price because, in his view, based on auction market graphs in the Art Sales Index publication, art auction prices generally were on the rise between 1994 and 1998. Mr. Elliott was not able to be precise about his discounts and increases because he no longer had his calculations. The graphs disclose 1990 to be the height of the auction market between 1990 and 1998 and, therefore, Mr. Elliott's decision to increase the 1990 listing is illogical.

[174] Mr. Soules, as part of his review, appraised this painting and offered the opinion that the replacement value for it was US$95,000.

[175] The invitations to the openings at the gallery operated by Mr. and Ms. Sagl, the International Gallery of Masters in Oakville, referred to Salvatore de la Rosa under the heading "Other Masters in Our Portfolio".

[176] The evidence disclosed that Mr. Sagl never paid any of the $4 million in support ordered by Justice Macdonald. Rather than pay any support, he left the jurisdiction and now lives in Georgia. It is always possible that Mr. Sagl took the de la Rosa painting; however, there is no evidence to suggest this occurred.

[177] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed this painting, authored by Salvatore de la Rosa, that it was destroyed in the fire of December 16, 1997, and that the replacement cost for insurance purposes is the replacement value for this artwork suggested by Mr. Soules, namely US$95,000.

The painting "Royalty and courtiers in landscape" by Jean Antoine Watteau

[178] Mr. Elliott appraised the current replacement value of this painting at US$50,000 and he assessed the replacement value of the frame at US$3,000. He was in possession of a Masters International appraisal, dated July 1987, which appraised the painting at $32,000 without specifying Canadian or US currency. He was also in possession of a photocopy of a photograph of this painting. He found what he believed to be comparable sales of Watteau paintings and used these as the basis for his appraisal. However, once again, Mr. Elliott adjusted upwards from the 1990 value which appears to be inconsistent with the auction market graphs. Because Mr. Elliott was no longer in possession of his notes, he was unable to explain his calculations. Mr. Elliott indicated that the signature on the lower right of the photocopy of the photograph was not discernible.

[179] Mr. Soules, in his Review of Mr. Elliott's Appraisal Report, provided an opinion relating to this piece. Mr. Soules utilized additional sources that were available to him in 2010 when he prepared his Review, but not available to Mr. Elliott in 1998. Mr. Soules appraised this painting at US$95,000, including the frame.

[180] Both Mr. Elliott and Mr. Soules appraised this painting on the assumption that it was an authentic painting by Jean Antoine Watteau.

[181] Mr. Sweeting commented that the photocopy of the photograph was not of a sufficient quality to permit one to consider the painting in detail. Mr. Sweeting was critical of Mr. Elliott's choice of comparables. However, he did agree that full level Watteau attributions sold between US$55,000 and US$1,242,000.

[182] Fundamentally, however, Mr. Sweeting was of the opinion that this was not a genuine Watteau painting. He went through the Catalogue Raisonné for Jean Antoine Watteau and found nothing similar. He observed that lower level attributions, that is, paintings that could be described as Circle of Watteau or Manner of Watteau, sold for between US$7,500 and US$15,000. Mr. Sweeting was of the view that, because this piece was not listed in the Catalogue Raisonné of Watteau paintings, it could not be appraised as an authentic Watteau and, therefore, was worth considerably less than US$50,000.

[183] The 1991 invitations to the openings hosted by the International Gallery of Masters, listed "Other Masters in Our Portfolio". Under its 18th century list of Masters, it names Antoine Watteau.

[184] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed this painting authored by Jean Antoine Watteau, that it was destroyed in the fire of December 16, 1997, and that the replacement cost for this artwork for insurance purposes is US$95,000.

The floral still life painting by Adelheid Dietrich

[185] Mr. Elliott offered the opinion that the replacement value of this piece was US$100,000. Mr. Elliott had a certificate of appraisal from Masters International, dated June 1989, that appraised this painting at $10,500. Mr. Elliott had a photocopy of a photograph of this painting. Mr. Elliott indicated that the signature on the photocopy was indiscernible. He described it as a large and rare work for this artist.

[186] Mr. Soules offered and explained his opinion that the replacement value of this painting was US$110,000. Mr. Soules offered an observation that applied not only to this painting, but to appraisals generally, which I accept. This observation was that, if you are required to purchase a piece from a gallery, you will have to pay the gallery mark-up because the gallery will want to make a profit on the sale and this mark-up should to be included when appraising replacement cost or replacement value.

[187] Mr. Sweeting did not offer an opinion with respect to this painting.

[188] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed this painting authored by Adelheid Dietrich, that it was destroyed in the fire of December 16, 1997, and that the replacement cost for insurance purposes for this artwork is US$110,000.

The Barbara Wood lithograph prints

[189] Ms. Sagl told Mr. Elliott that she had 60 lithographs prints of this artist. Mr. Elliott appraised the replacement value of these prints at US$132,287; he appraised the replacement value of the frames at $17,250. Mr. Elliott found from his research that Barbara Wood was listed on a database entitled, "Lawrence Dealer Prints Prices". These were offers rather than sales. The listing indicates that all of the offers have a sale date of January 1, 1996, which I interpret to be

the offering date. Mr. Elliott also indicated that he knew Barbara Wood and that he was familiar with her work.

[190] Mr. Sweeting did not comment on the Barbara Wood lithograph prints and neither did Mr. Soules.

[191] According to Mr. Elliott, the average replacement value for the prints is $2,200. The average offering price in January 1996 was $1,500. Mr. Elliott could not explain the difference. His reference was to a January 1, 1996 offering price. Presumably, on January 1, 1996, one could have accepted the offer and purchased the prints. The auction market graphs contained in Mr. Elliott's Appraisal Report do not suggest a 50% increase in values between 1996 and 1998.

[192] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl's possessed 60 lithograph prints authored by Barbara Wood, that they were destroyed in the fire of December 16, 1997, and that the replacement cost for insurance purposes for this artwork is US$1,500 per print, for a total of US$90,000.

The 1994 collection from Dr. Mercuri

[193] Mr. Elliott offered the opinion that the current replacement value for this collection was US$560,000. Ms. Sagl had provided Mr. Elliott with evidence that she purchased this collection from Dr. G.A. Mercuri in February 1994. Attached to Mr. Elliott's report was a photocopy of a fax from Dr. Mercuri, written in Italian, apparently offering the collection for US$120,000. Mr. Elliott said that very often when you purchase art through a private sale, it is because the seller wants a quick sale and, therefore, you can acquire the art at a lower price. Mr. Elliott indicated that a 20% premium should be applied to the price. He also indicated more than once in his evidence that, in his view, the replacement value would be approximately double the fair market value. Mr. Elliott also relied upon auction market graphs to justify an increase in value from 1994 to 1998.

[194] Ms. Sagl testified that Dr. Mercuri was an art dealer from Greece from whom she and Rudy Sagl had purchased art from time to time. On cross-examination, Ms. Sagl was pointed to the portion of the decision of Justice Macdonald, dated July 11, 1997, in which Justice Macdonald referred to an unnamed person who "at one time owned an art boutique in Italy which was, at one time, frequented by Mr. and Ms. Sagl". Justice Macdonald then observed that this witness was dishonest and had previously participated in a scheme to defraud Mr. and Ms. Sagl. Ms. Sagl testified that Justice Macdonald was referring to Dr. Mercuri. Ms. Sagl indicated that Justice Macdonald confused Dr. Mercuri with someone else who tried to defraud them. Ms. Sagl testified that she brought this error to the attention of her lawyers when Her Honour's reasons were released, but that she was told by her lawyers that the error was not important.

[195] The auction market graphs do not justify a more than 400% increase in the value of these paintings. The Canadian index doubles; the Swiss art auction market graph showed a decline; the Italian market graph showed a 2/3 increase; the German market was stable; the French art auction market graph was stable; the Dutch market graph increased by 37.5%; the Danish market increased by approximately 50%; the Belgian market increased slightly.

[196] Mr. Soules did not offer an opinion concerning the value of this collection and neither did Mr. Sweeting.

[197] A great deal of emphasis is placed upon the fact that Ms. Sagl paid US$120,000 for this collection. Ms. Sagl testified that Dr. Mercuri always liked to be paid in cash. This is regrettable because no proof of payment is possible, although proof of the withdrawal from a bank account of this amount of money might have been possible at some point. I am satisfied that this purchase price formed the basis for all of Mr. Elliott's calculations, although Mr. Elliott's precise calculations were not available. There was no evidence offered to substantiate the payment of US$120,000 for this collection.

[198] I am satisfied that Ms. Sagl possessed this collection of paintings and that it was destroyed in the fire of December 16, 1997. I am not satisfied that the replacement cost for insurance purposes for this piece has been established.

The Italian and Greek reproductions from Dr. Mercuri

[199] According to Mr. Elliott, there were 40 reproductions of famous paintings signed by contemporary Italian or Greek artists. Supporting documentation provided by Ms. Sagl consisted of a fax from Dr. Mercuri, dated February 4, 1994. This fax does not indicate the subject of the reproductions. Mr. Elliott said that the style and mannerism of the reproductions were similar to the original works, although the basis for this statement was not clear to me.

[200] Mr. Elliott offered the opinion that the current average replacement value for each painting was US$8,000. The total current replacement value was US$320,000.

[201] According to Mr. Elliott, there was a representation in the February 4, 1994 fax concerning the size and value of the works. Apparently, Dr. Mercuri was coming to Canada and would have photographs of these works with him.

[202] As indicated earlier, Mr. Elliott indicated that a private sale usually meant that the owner was trying to sell the reproductions quickly. Mr. Elliott interpreted the faxes to mean that Dr. Mercuri was going to buy the paintings and then re-sell them to Ms. Sagl and Mr. Elliott believed, under those circumstances, Ms. Sagl would be acquiring the works at a considerable discount. Mr. Elliott indicated that the price of the frames and price of fine art doubled between 1994 and 1998. He referred to an article to support this statement and included the article in his report. The article does not support Mr. Elliott's statement that prices for fine art doubled between 1994 and 1998.

[203] Mr. Soules did not offer an opinion concerning these reproductions; neither did Mr. Sweeting.

[204] I am satisfied that Ms. Sagl possessed Italian and Greek reproductions and that they were destroyed in the fire of December 16, 1997. I am not satisfied that the replacement cost for insurance purposes for these reproductions has been established.

7 reproduction paintings & 16 original paintings from Dr. Mercuri

[205] Mr. Elliott offers the opinion that the current replacement value for these artworks is C$113,600. Ms. Sagl provided Mr. Elliott with a fax over the letterhead of the International Trade Company, dated simply February 1994. This fax is signed by "Giovanni" and appears to be the partial signature of Dr. Mercuri. Mr. Elliott indicated that this February 1994 fax, which was in Italian, stated that these works were collectively worth US$56,800. The fax offers these pieces for $42,600. Mr. Elliott testified that there was a reference in the fax, which was written in Italian and which was translated by Mr. Elliott in his testimony, to photographs and so he assumed that there were photographs of these pieces. Mr. Elliott also attached what purports to be a receipt, dated August 1996, indicating that $17,000 cash was paid for these pieces.

[206] Mr. Elliott indicated that he doubled US$56,800, which was Dr. Mercuri's assessment of the true market value of these paintings in 1994, to get the replacement value in 1998. Dr. Mercuri did not testify in these proceeding.

[207] Mr. Soules did not offer an opinion concerning this collection and neither did Mr. Sweeting.

[208] I am not prepared to accept the fax from Dr. Mercuri alone as a basis for the market value of these paintings in 1994. Mr. Elliott was entitled to rely on Dr. Mercuri's assessment in coming to his opinion; however, I am not bound to accept it as satisfactory proof of the fair market value of these paintings in 1994.

[209] I am satisfied that Ms. Sagl possessed these seven reproduction paintings and sixteen original paintings and that they were destroyed in the fire of December 16, 1997. I am not satisfied that the replacement cost for insurance purposes for these pieces has been established.

The Dal Torrione sculpture

[210] Mr. Elliott had seen this piece. It was in the living room at 2415 Doulton Drive and it was about six-feet high. It was the sculpture of a woman; it was on a Rosewood pedestal base. In Mr. Elliott's opinion, it was made out of Carrara Marble. Mr. Elliott testified that Ms. Sagl told him that this was a Dal Torrione sculpture and that it was seventy-two inches high. Based on a reference in Davenport's, he concluded that Dal Torrione was a 19th-century sculptor who worked in marble. Mr. Elliott testified that, in addition, he had felt the sculpture when he was in Ms. Sagl's home in connection with the 1992 fire and formed the conclusion, after feeling the sculpture, that it was marble. There was a photograph of this sculpture in one of the 115 photographs taken by Ms. Sagl in her attempt to inventory her Fine Arts collection. Mr. Elliott was aware that there were pieces of the sculpture in the A&O Warehouse. Mr. Elliott attended at the warehouse on two occasions before issuing his report, but was unable, for one reason or another, to see this sculpture or any of the other Fine Art remains from the fire.

[211] Mr. Elliott knew that Mr. Sweeting had formed the opinion that the sculpture was made out of plaster. Mr. Elliott disagreed with Mr. Sweeting. In Mr. Elliott's opinion, if the sculpture were cast, then it would be either hollow or solid. It could not have, as Mr. Sweeting said it did, a hollow body and a solid head. In addition, Mr. Sweeting found no mesh, which, in Mr. Elliott's opinion, would be necessary if the sculpture were made out of plaster.

[212] Ms. Sagl testified that she bought the piece as a marble statue and believed it was a marble statue. She testified that she was not an expert in marble, but from her experience, marble was cool to the touch and this statue was cool to the touch. She said that her son, when he was younger, would put his head on the statue to cool off on a hot day.

[213] Mr. Elliott offered the opinion that the current replacement value of the sculpture was US$118,500 and that the current replacement value of the base was US$1,500.

[214] Mr. Elliott referred to what he believed were comparable sales: one from the Art Sales Index was a two-foot high Carrara Marble sculpture by Dal Torrione which sold for US$3,861; the other was in Davenport's Listing and referred to a sixteen-inch Dal Torrione figure which sold for US$800. Mr. Elliott commented that the comparables were much smaller. Mr. Elliott testified that he based his appraisal on the smaller works and the fact that Dal Torrione was a marble sculptor.

[215] Mr. Elliott could not explain precisely what calculations he made because he did not have his notes and he had not attempted to re-do his calculations after he lost his notes. Mr. Elliott could only indicate that the piece owned by Ms. Sagl was considerably larger than the comparables.

[216] Mr. Soules did not offer an opinion concerning the replacement value of this piece.

[217] Mr. Sweeting went to the A&O Warehouse and found a remnant of this sculpture. It was his opinion that the sculpture was hollow and made of plaster with a solid head. It also appeared to him that the sculpture had been molded rather than carved. On cross-examination, Mr. Sweeting indicated that the pieces of the sculpture that he examined at the A&O Warehouse could have been marble pieces. He said, if the pieces were marble, they were re-constituted marble and not Carrara Marble.

[218] Mr. Sweeting was able to determine that the author was not the 19th-century sculptor referred to by Mr. Elliott but, rather, a living modern Italian sculptor with the same last name. Mr. Sweeting found recent trades in the secondary market for the 20th-century Dal Torrione; these trades were in 2009 and 2010 and do not support a replacement value of US$118,500. It was Mr. Sweeting's opinion that the 2009 and 2010 prices were the same as the 1998 replacement value of this piece. One of the comparables chosen by Mr. Sweeting was the same work as the statue destroyed the fire. This piece sold for approximately $2,800.

[219] I am satisfied that the sculpture which Ms. Sagl had in her home was authored by the 20th-century living Dal Torrione. I am satisfied that its replacement cost for insurance purposes is $2,800.

[220] I decline to infer that Ms. Sagl's entire Final Proof of Loss contains an intentionally-false representation as far as this sculpture is concerned. The circumstances surrounding the acquisition of this piece by Ms. Sagl were not the subject of evidence. I am satisfied that Mr. Elliott stated that the sculpture was made out of Carrara Marble because the comparable sales to which he referred stated that the 19th-century Dal Torrione worked in Carrara Marble and the piece which Mr. Sweeting examined may have been a marble piece; albeit, re-constituted marble. Finally, the trades in the secondary market that led Mr. Sweeting to the 20th-century Dal Torrione occurred in 2009 and 2010, more than ten years after Mr. Elliott authored his report.

The artworks at the A&O Warehouse

[221] These items were the contents of Ms. Sagl's home at 2415 Doulton Drive, which had been removed to the warehouse after the fire. Mr. Elliott offered the opinion that the replacement value of the items was US$250,000.

[222] Mr. Elliott was cross-examined based on an answer to an undertaking provided by counsel for Ms. Sagl. The answer related to a question or a demand that Mr. Elliott produce notes and photos from his attendances at the A&O Warehouse and an undertaking to do so. The answer to the undertaking advises that Mr. Elliott has no notes. The answer goes on to say that, when Mr. Elliott attended at the warehouse for the first time, the two Chubb appraisers were present and Mr. Elliott was unable to make an inspection. The answer continues that Mr. Elliott attended a second time, but was not shown any items because they had been put away by the persons controlling the warehouse. Finally, the answer advises that Mr. Elliott went to the warehouse a third time, at which time he was shown items that he had not seen previously. The answer to the undertaking advises that, at the time of his third visit, Mr. Elliott had already prepared and submitted his Appraisal Report. Finally, the answer advises that because Mr. Elliott's Appraisal Report contained an allowance for miscellaneous items, no amendment to the report was made.

[223] As a result of this answer, it was suggested to Mr. Elliott that he had attached a value of $250,000 to miscellaneous items sight unseen. Mr. Elliott disputed this suggestion, but could not explain the discrepancy between his assertion that he would not appraise the value of items sight unseen and the answer to the undertaking.

[224] Mr. Sweeting expressed no opinion on the value of the Fine Art remnants at the A&O Warehouse.

[225] I am not satisfied that this portion of Ms. Sagl's Proof of Loss as a result of the fire of December 16, 1997 has been proven.

Italian school 17th-century painting

[226] Mr. Elliott indicated, in his Appraisal Report, that this was an unsigned work and that, if it had been authenticated, the value would have been much higher. It is a painting of a religious scene. Mr. Elliott had a photocopy of a photograph of this painting. Mr. Elliott relied upon what he claimed was a comparable 1992 sale that was disclosed in the Art Sales Index. This was a painting of Jesus and the Altar Chalice and it sold at auction for US$23,545.

[227] Mr. Elliott offered the opinion that the replacement value of this painting was US$135,000 and that the replacement value for the frame was US$5,000.

[228] Mr. Soules did not comment on this painting and neither did Mr. Sweeting.

[229] On cross-examination, Mr. Elliott agreed that the art auction market index graphs that he was relying upon show that the market actually went down between 1992 and 1998 and so, therefore, price increases in the market provided no basis for increasing the comparable sale price. Mr. Elliott indicated that the comparable sale was a slightly smaller painting. He also stated auction sales are wholesale values. Mr. Elliott suggested that a buyer's premium of approximately 20% and applicable sales taxes had to be added to the auction price. He then offered the opinion that the resulting value represented the fair market value of the artwork which then had to be doubled to achieve the replacement value of the piece.

[230] Mr. Sweeting did not comment on Mr. Elliott's practice of doubling the fair market value of the artwork to achieve the replacement value of the artwork. Specifically, Mr. Sweeting did not suggest that Mr. Elliott had no basis for his assertion that doubling fair market value to achieve replacement value was a rough rule of thumb used by many appraisers. Mr. Sweeting did agree, during cross-examination, that a buyer's premium of between 15% and 20% should be added to the auction price along with all appropriate taxes.

[231] Mr. Soules indicated that, if the replacement item is being purchased from a gallery, then the gallery profit has to be added to the auction price. He agreed that all applicable taxes, shipping and insurance costs should also be added to the auction price. Mr. Soules indicated that, if the replacement piece was being purchased at auction, an appropriate buyer's premium, which he estimated to be between 15% and 25%, plus all applicable taxes and insurance, should be added to the auction price.

[232] When I consider the evidence and the circumstances to which I have previously referred, I am satisfied that Ms. Sagl possessed a 17th-century religious painting and that it was destroyed in the fire of December 16, 1997. I am not prepared to accept Mr. Elliott's appraisal of the replacement cost for insurance purposes of this piece; I am satisfied that he has over-valued it. Accordingly, the replacement cost for insurance purposes of this piece has not been proven.

Two paintings by William Wallace Riddel obtained from Dr. Mercuri

[233] Mr. Elliott referred to these as two authenticated paintings purchased in February 1994 for $10,000 each. Mr. Elliott offered the opinion that the replacement value for these two paintings was US$40,000. Mr. Elliott's report contains some research on Mr. Riddel. His research revealed that William Wallace Riddel was listed in Benezit. Mr. Elliott referred to a fax from the Kroton Travel Agency signed by "Giovanni", whom I infer is Dr. Mercuri. This fax offers for sale two authenticated paintings by "W. H. Riddel" for $10,000 each.

[234] Mr. Elliott increased the $10,000 offering price to account for the increase in the value of Fine Arts between 1994 and 1998.

[235] I am satisfied that Ms. Sagl possessed two paintings by William Wallace Riddel and that they were destroyed in the fire of December 16, 1997. There is, however, no evidence to confirm the purchase price of these paintings. The February 1994 fax offers the paintings for sale; there is no evidence of the payment of the purchase price because Dr. Mercuri apparently did business in cash.

[236] I am not satisfied that this portion of Ms. Sagl's proof of loss as a result of the fire of December 16, 1997, has been proven.

An Odalisque by Theodore Ralli

[237] Mr. Elliott had a photocopy of a photograph of this painting. Mr. Elliott indicated, in his report, that this painting was signed by Theodore Ralli. There was one comparable transaction for $31,364 in 1995. Mr. Ralli is also mentioned in Benezit. Mr. Elliott also took into account the fact that Ms. Sagl's painting was larger. Mr. Elliott could not be precise about the increase in value assigned as a result of the increase in size and the increase in value assigned to the passage of time. He did indicate that there was no hard and fast rule to the effect that a painting's value increased according to its size. Mr. Elliott offered the opinion that the current replacement value at the date of his report was US$80,000 and that the current replacement value for the frame was US$7,500.

[238] As part of his review of the Fine Arts portion of the Appraisal Report of Mr. Elliott, Mr. Soules offered and explained an opinion concerning the replacement value of this painting. In his opinion, the replacement value for this painting was US$90,000.

[239] Mr. Sweeting did not comment on this painting.

[240] I am satisfied that Ms. Sagl possessed an Odalisque by Theodore Ralli and that it was destroyed in the fire of December 16, 1997. I am satisfied that the replacement cost for insurance purposes is the replacement value suggested by Mr. Elliott, namely, US$80,000. I am satisfied that the replacement cost for insurance purposes of the frame is the replacement value suggested by Mr. Elliott.

One of a matching pair of a woman with two candlesticks by R. Moller

[241] Mr. Elliott indicated that the replacement value was C$40,000. Mr. Elliott indicated that he reduced his appraisal because one of the matching pair was missing. Mr. Elliott indicated that Mr. Moller was an artist who created porcelain works of art. Mr. Elliott reproduced, in his report, a Masters International appraisal of this porcelain figure, dated April 1989, which appraised the piece at C$30,000. In addition, there was a photocopy of a photograph of this piece in Mr. Elliott's report. It was pointed out, on cross-examination, that the Masters International document was one page, with no accompanying explanation of the appraised value. Mr. Elliott said that, at that time, there were reputable dealers who did their appraisals in the same way. Mr. Elliott indicated that he accepted the Masters International appraisal and then increased the Masters International figure by factor of five to reflect the increase in art values between 1989 and 1998. Mr. Elliott could not remember what index he used and, as I have indicated earlier in these reasons, he did not have his notes.

[242] Mr. Sweeting indicated that a number of Mr. Moller's works have sold at auction at prices ranging from US$374-US$1,467.

[243] I am satisfied that Ms. Sagl possessed this candlestick and that it was destroyed in the fire of December 16, 1997. I am not satisfied that the replacement cost for insurance purposes is the replacement value assigned to this piece by Mr. Elliott. I am not satisfied that this portion of Ms. Sagl's Proof of Loss, as a result of the fire of December 16, 1997, has been proven.

The Dresden candlesticks

[244] Mr. Elliott offered an opinion concerning the replacement value of a pair of three- candle Dresden candlesticks. There was a photocopy of a photograph of these candlesticks. There was also, according to Mr. Elliott, a Masters International 1989 appraisal, which placed a value of C$60,000 on these candlesticks. Mr. Elliott, in his report, indicates that he has misplaced the Masters International appraisal. Mr. Elliott offers the opinion that the current replacement value of these candlesticks is C$115,200.

[245] Mr. Soules offered no opinion concerning this piece.

[246] Mr. Sweeting indicated that he and Ms. Yeomans saw Meissen or Dresden candlesticks when they attended at Ms. Sagl's home in April 1995. Mr. Sweeting believes that these candlesticks were 19th-century candlesticks rather than 18th-century candlesticks. He concedes that, on one occasion, 18th-century candlesticks traded for more than C$100,000. He also concedes that 18th-century candelabra traded for between C$15,000 and C$40,000. 19th-century candelabra have, according to Mr. Sweeting, traded for considerably less.

[247] I am satisfied that Ms. Sagl possessed these candlesticks and that they were destroyed in the fire of December 16, 1997. I am not satisfied that the replacement cost for insurance purposes is the replacement value assigned to this piece by Mr. Elliott. I am not satisfied that this portion of Ms. Sagl's proof of loss, as a result of the fire of December 16, 1997, has been proven.

The Meissen antique porcelain Woman with Fruit Basket

[248] Mr. Sweeting referred, in his evidence, to a piece which Mr. Elliott referred to, in his Appraisal Report, as a Meissen Antique Porcelain Woman with Fruit Basket. Mr. Elliott offered the opinion, in his written report, which was attached to Ms. Sagl's Final Proof of Loss claim, that the current replacement value for this piece was C$65,000. Apparently, Mr. Elliott had a photocopy of a photograph of this piece. I have no recollection of Mr. Elliott being asked about this piece. Mr. Elliott's report contains a Masters International certificate valuing this piece at $53,000.

[249] Mr. Sweeting testified that he thought that he and Ms. Yeomans had seen this piece when they were at Ms. Sagl's home in 1995. Apparently, at that time, Ms. Yeomans was of the view that it was worth $900, although Ms. Yeomans did not appraise the piece. It should be remembered that, when Mr. Sweeting and Ms. Yeomans were in Ms. Sagl's home in 1995, they were being interviewed by her because she was thinking of retaining them. Ultimately, Ms. Sagl did not retain them and, therefore, they did not appraise any of her Fine Arts collection. It was Mr. Sweeting's view that Mr. Elliott's opinion of the replacement value was not supportable because it appeared to be based solely on the Masters International certificate.

[250] As indicated earlier, I place very little weight on Masters International certificates. I am satisfied that Ms. Sagl possessed this porcelain piece and that it was destroyed in the fire of December 16, 1997. I am not satisfied that the replacement cost for insurance purposes of this piece has been proven.

The Chippendale Roundtable

[251] Mr. Elliott offered the opinion that the replacement value of this table was US$35,000. Mr. Elliott relied on Miller's International Antiques Price Guide. They valued a Chippendale table at between $12,000 and $15,000. Mr. Elliott had a Masters International invoice which appeared to represent a sale of this piece in 1992 to the International Gallery of Masters, although the word "restore" is written on the document. On the invoice was a reference to a Chippendale Roundtable and beside the reference was the amount of $425. Mr. Elliott interpreted this invoice as an indication that the International Gallery of Masters had purchased the table from someone who did not appreciate the value of what they were selling. Mr. Elliott said that, based on his experience, Ms. Sagl would not have a $425 table in her house.

[252] Mr. Elliott indicated that US$35,000 was an auction price, plus buyer's premium and appropriate taxes adjusted upwards, because he was setting the replacement value of the piece. He agreed that there was nothing in his report that explained his calculation.

[253] I note that Ms. Sagl claimed in the contents portion of her Proof of Loss many antique pieces, including an antique curio cabinet having a replacement cost of $20,000. Justice Wright accepted the contents portion of Ms. Sagl's Proof of Loss claim in the trial he conducted and his decision in that regard was not overturned on appeal.

[254] Mr. Sweeting did not offer any comments about the Chippendale table and neither did Mr. Soules.

[255] I am satisfied that Ms. Sagl possessed a Chippendale Roundtable and that it was destroyed in the fire of December 16, 1997. I am satisfied that the replacement cost for insurance purposes is the replacement value assigned to this piece by Mr. Elliott, namely, US$35,000.

Ms. Sagl's library

[256] Mr. Elliott indicated that the library was nine-feet high and forty-two feet long. Mr. Elliott stated that there were twelve sections, seven shelves per section and forty books per shelf. He appraised the value of the library on the basis that there were 3,360 books. Mr. Elliott's supporting documentation consisted of the names of three bookstores. I infer from Mr. Elliott's evidence that he has seen Ms. Sagl's library.

[257] Mr. Elliott offered the opinion that the replacement value of the library was C$386,400 for an average of C$115 per book.

[258] During cross-examination, counsel referred Mr. Elliott to page 47 of the 115 pages of photographs, which Ms. Sagl had taken when she was attempting to prepare an inventory of her Fine Arts collection. The photo shows two shelves with possibly a third shelf around a corner. The photo does not show anything close to 3,360 books. Mr. Elliott indicated that the photograph did not remotely disclose the extent of the basement library. Mr. Elliott testified that Ms. Sagl had her own reference library to support her art purchases. Ms. Sagl indicated that the photograph showed part of her library; Ms. Sagl did not otherwise testify about the extent of her library.

[259] The library was also included in the contents portion of the Final Proof of Loss. There, it is referred to as "art and antique books-reference guides, dictionaries and coffee table books".

[260] The photograph, at page 47, is entitled, "Basement Library". The photograph clearly shows more than the basement library. However, the title was put on the photograph by Ms. Sagl and, presumably, reflects the essence of what the photograph was intended to capture.

[261] I am satisfied that Ms. Sagl had a library in the basement of her home at 2415 Doulton Drive. I am satisfied that the books which were contained in the library were destroyed in the fire of December 16, 1997. When I consider all of the evidence concerning this aspect of the Proof of Loss claim, I am not satisfied that the replacement cost for insurance purposes is the replacement value which Mr. Elliott has assigned to the library.

Willem Kool, Auguste Moreau & Emmanuele Villanis

[262] Mr. Elliott offered an opinion concerning the replacement value of one painting by Willem Kool (US$33,000) and one bronze sculpture by each of Auguste Moreau (US$20,000) and Emmanuele Villanis (US$7,000). Mr. Elliott could not explain his calculations because, as indicated earlier, he no longer had possession of his notes and had not re-created them. A photocopy of a photograph of the Kool painting is contained in Mr. Elliott's Appraisal Report.

[263] As part of his review of Mr. Elliott's work, Mr. Soules offered and explained an opinion concerning the replacement value of these pieces. In all three cases, Mr. Soules arrived at values which are consistent with, but not the same as, the values arrived at by Mr. Elliott ($27,000, $24,000 and $10,000, respectively).

[264] Mr. Sweeting did not comment on any of these paintings.

[265] I referred earlier to the invitations from the International Gallery of Masters. Those two invitations list under "Other Masters in Our Portfolio", "17th-Century" and "W. Kool". I have already referred to the fact that Mr. Sweeting, in his status report of April 1, 1998, indicated that he saw several good-quality bronzes at the A&O Warehouse. Mr. Sweeting specifically refers in that status report to bronzes by Auguste Moreau and Emmanuele Villanis.

[266] I am satisfied that Ms. Sagl possessed one painting by W. Kool, one bronze sculpture by Auguste Moreau and one bronze sculpture by Emmanuele Villanis and that these art objects were destroyed in the fire on December 16, 1997. I am satisfied that the replacement costs for insurance purposes of these three objects of art are the replacement values assigned to them by Mr. Elliott.

Other paintings

[267] It is also appropriate, at this point, to note that Mr. Elliott's Appraisal Report identified 2,580 works of Fine Art of approximately 100 artists. Counsel did not refer to each work individually; counsel did not refer to each artist specifically. To do so would have unreasonably prolonged this trial.

[268] Accordingly, it would not be appropriate for me to assume that Mr. Elliott's appraisals of the replacement value of the works of those artists to whom no one referred were accepted. Rather, I have simply taken the view that there was nothing about Mr. Elliott's appraisal of the replacement value of the works of those artists that counsel thought noteworthy.

Conclusion

[269] When I consider Mr. Elliott's appraisal of each of the works and objects of art to which I have referred, including those appraisals which were proven and those appraisals which were not proven, Mr. Soules' and Mr. Sweeting's opinions and evidence, and the extent to which Ms. Sagl's evidence that she possessed these works of art and objects of art and that they were in her house when it burned down, has been confirmed by other evidence, I come to the conclusion that Ms. Sagl has proven that her loss as a result of the fire that occurred on December 16, 1997, exceeded the $2 million policy limit contained in the Chubb insurance policy.

Is the policy of insurance void due to intentional misrepresentation by the Respondent in her proof of Loss as it relates to the Fine Arts collection?

[270] This is the precise question which I was directed to answer by the Court of Appeal in its order, dated May 8, 2009.

[271] In approaching this question, I bear in mind that Chubb has the obligation to prove an intentional mis-representation on a balance of probabilities (see:*F.H. v. McDougall*, [2008] S.C.J. No. 54).

[272] In approaching this question, I also bear in mind that Ms. Sagl was able to list and substantiate the value of items of jewelry to the extent of approximately $1 million before Chubb issued its insurance policy.

[273] I also bear in mind that, in her Financial Statement, sworn December 17, 1993, in connection with the family law proceedings before Justice Macdonald, Ms. Sagl claimed that her art collection was worth $10 million and that Mr. Elliott's assessment of the replacement value of her Fine Arts collection did not exceed $10 million. I also recognize that the family law Financial Statement was sworn with a view to the Net Family Property calculation and it was in Ms. Sagl's interest to value her collection at the highest possible value.

[274] I have also considered that Ms. Sagl had the assistance of National Fire Adjustment Company Inc. when she filed her Interim and Final Proofs of Loss. National Fire Adjustment Company Inc. is a public adjuster. The adjusters working for them are licenced to represent the public with respect to any kind of insurance loss. National Fire Adjustment Company Inc. has been in business since 1922. I am satisfied that Mr. Croth and Mr. Watson, of National Fire Adjustment Company Inc., were experienced adjusters.

[275] Ms. Sagl also had the assistance of Judge Flaherty. Judge Flaherty testified that he was personally involved in a serious relationship with Ms. Sagl at the time of the fire and that their relationship continued for years after. Judge Flaherty assisted Ms. Sagl in retaining counsel in this matter and in the family law proceedings against her former husband. Judge Flaherty commissioned Ms. Sagl's signature on both the Interim and Final Proofs of Loss. Judge Flaherty stated that he knew that the total insurance coverage was $4 million and Mr. Elliott, whose evidence in this regard I accept, testified that Judge Flaherty made him aware of the Fine Art limit in the Chubb policy.

[276] As a result, I am satisfied that Ms. Sagl knew, when she filed her Final Proof of Loss, that Chubb's coverage of her Fine Art loss was limited to $2 million.

[277] Ms. Sagl testified that she was urged by Mr. Croth, Mr. Watson and Judge Flaherty to be as accurate as possible about her Fine Arts collection. Judge Flaherty gave similar evidence. I accept Ms. Sagl's evidence in that regard. I have already indicated that I accept Judge Flaherty's evidence without qualification.

[278] I am satisfied that Ms. Sagl knew when she filed the Final Proof of Loss that exaggerating her claim beyond the sum of $2 million would not only be of little assistance, but also pose a considerable risk to her; namely, that her policy of insurance would be void. In other words, Ms. Sagl had no motive to

exaggerate the Fine Arts' portion of her Proof of Loss beyond $2 million.

[279] After considering the evidence as it relates to the Fine Arts' portion of Ms. Sagl's Final Proof of Loss claim, including those parts of her claim which I have found were not proven and after reflecting on the considerations that I have set out in this portion of the reasons, I am not satisfied that Ms. Sagl's insurance policy is void due to an intentional mis-representation by her in her Proof of Loss as it relates to her Fine Arts' collection.

Is Ms. Sagl entitled to punitive damages?

[280] Because the Court of Appeal set aside the punitive damage award made by Justice Wright and directed me to re-consider the question of punitive damages, I do not feel that I can rely on the findings and conclusions of Justice Wright that resulted in His Honour ordering punitive damages. If I accept Justice Wright's findings and conclusions in that regard, I will inevitably come to the same conclusion that His Honour did.

[281] Chubb thought that the December 16, 1997 fire at 2415 Doulton Drive was arson. Chubb's belief in this regard was reasonable; it originated from information provided to Chubb by the Ontario Fire Marshal.

[282] Chubb was entitled to take steps to protect itself from someone whom it reasonably believed was a renegade insured.

[283] Chubb was mistaken in the sense that it could not prove arson and it knew this when it abandoned the arson portion of its appeal of Justice Wright's decision.

[284] Care must be taken to avoid hindsight determinations when considering whether to order punitive damages. Such an analysis would simply make Chubb liable for punitive damages because a belief that it reasonably held turned out to be wrong.

[285] Chubb also believed that the plaintiff intentionally inflated the Fine Arts' portion of her Final Proof of Loss. Its belief in this regard was influenced by Mr. Sweeting's comments to Mr. Eaton in December 1997 at the site of the fire. It was reasonable for Chubb to retain an art expert; it was reasonable for Chubb to pay attention to Mr. Sweeting's observation. There is no suggestion in the evidence that Mr. Eaton attempted to get Mr. Sweeting to say that Ms. Sagl's art was worth very little.

[286] Chubb's belief in this regard was also influenced by Mr. Elliott's efforts to get retained by Chubb. Mr. Elliott told Mr. Eaton that 95% of Ms. Sagl's artworks were reproductions. Earlier, I focused on this comment as an indication that Mr. Elliott, even when he was trying to ingratiate himself with Chubb, was not prepared to say that Ms. Sagl did not own original works of art. However, I recognize that it would also be reasonable for Mr. Eaton to conclude, based on Mr. Elliott's statement, that a significant portion of Ms. Sagl's Fine Arts were reproductions. There is no suggestion that Mr. Eaton attempted to get Mr. Elliott to make this statement.

[287] Thus, it was not unreasonable for Chubb to challenge Mr. Elliott's report, which suggested that Ms. Sagl's Fine Arts' collection was worth $9.7 million.

[288] Chubb failed to advance funds to Ms. Sagl. Given that it reasonably believed the fire was deliberately set by Ms. Sagl and that her Final Proof of Loss contained material mis-representations, which would make her insurance policy void, I do not find Chubb's conduct in this regard so "malicious, oppressive and high-handed" that it "offends the court's sense of decency" (see: *Whitten v. Pilot Insurance*, 2002 SCC 18 (CanLII), 2002 SCC 18, at para. 36).

[289] I make the same observation with respect to Chubb's decision to report its insured to the Crime Prevention Bureau, although Chubb must also ensure that the Crime Prevention Bureau has been informed that arson was never proven.

[290] Chubb's practices with respect to the acceptance of this risk deserve to be criticized. In the eleven weeks between issuance of the Binder of Insurance and the date of the fire, Chubb never attended at 2415 Doulton Drive to inspect Ms. Sagl's Fine Arts collection.

[291] One only has to contrast the jewelry claim and the Fine Arts claim to see that Chubb's practices caused some of the problems in this case. The jewelry was insured as scheduled articles; there has been virtually no controversy about the value of the jewelry. Chubb resisted Ms. Sagl's jewelry claim, apparently on the basis that she made material mis-representations concerning her Contents and Fine Arts in her Proof of Loss. Because Chubb is a sophisticated legal person, it knows that a fire can destroy all records and make proof of a genuine loss very difficult for an insured to document after the fact. However, punitive damages should not be awarded to emphasize the court's criticisms of Chubb's underwriting practices.

[292] The manner in which 2415 Doulton Drive was dealt with after the fire also deserves to be criticized. Items were removed from the site without Ms. Sagl's consent. A detailed inventory of the items removed should have been provided to Ms. Sagl. It was not sufficient for Chubb to state, without any confirmation, that only "debris" was removed from the site. When Ms. Sagl was given access to the site, the temporary wooden stairs and support for what was left of 2415 Doulton Drive were removed with the result that virtually everyone who testified said it was unsafe to enter the burned-out premises. This does not seem to me to be a satisfactory reason for ordering punitive damages because, ultimately, this type of conduct disadvantaged Chubb in this proceeding. Specifically, it was impossible to conclude that a piece of Fine Art, like the Rodin sculpture, which Ms. Sagl said was lost in the fire, was not in the house on the night of the fire because the very real possibility existed that it was buried in the unsafe rubble or carted away with the so-called debris.

[293] Chubb abused its right to examine Ms. Sagl under oath, pursuant to the terms of its policy. Chubb inserted a right to examine Ms. Sagl in the policy which it issued to her; the policy was issued after the fire. Pursuant to this term in the policy, Ms. Sagl was examined nine times and asked a total of 6,233 questions – the overwhelming majority of which dealt with the circumstances of the fire and not the particulars of her loss. Even though I agree that Chubb abused its right to examine Ms. Sagl, this does not seem to me to be an appropriate basis for awarding punitive damages because Ms. Sagl had the benefit of legal advice and knew how to protest the repeated questioning.

[294] Chubb did not disclose the July 16, 1999 memorandum of its interview with Frank Frankfurter. Chubb knew, as a result of that interview, that its own investigators thought that Mr. Frankfurter was "very forthright and honest" and a "gentleman". The memo reveals more, however. It tells Chubb something about Mr. Frankfurter's background. The memo reveals that Mr. Frankfurter, prior to going into the importing business, worked as an auctioneer for the Sheriff's office in Ontario. The memo reveals that Mr. Frankfurter was responsible for importing Sharp radios and televisions into Canada and pioneered bringing amplifiers and tuners into Canada. It also reveals that, in 1970, Mr. Frankfurter started importing antiques and arts from Europe, more specifically from Hungary, by the container load. The memo indicates that Mr. Frankfurter told Chubb's investigators that he imported hundreds of oil paintings from Europe and, in particular, Hungary. He showed them a photo album which contained many photos of paintings which he imported. He also told Chubb's investigators that some of the photos that he had in his photo collection may have been sold to Ms. Sagl.

[295] The memo also tells Chubb about Mr. Frankfurter's business relationship with Ms. Sagl. Mr. Frankfurter advised Chubb's investigators that he knew both Ms. Sagl and her husband very well. Mr. Frankfurter advised Chubb's investigators that Ms. Sagl paid either in cash or by cheque. Mr. Frankfurter also disclosed that Ms. Sagl purchased icons from a Russian immigrant and that he, Mr. Frankfurter, had appraised those icons before Ms. Sagl purchased them.

Mr. Frankfurter described Ms. Sagl as very businesslike; he told Chubb's investigators that she made the decisions concerning which items would be purchased. Mr. Frankfurter confirmed that Ms. Sagl called him and asked for his help after the fire.

[296] Mr. Frankfurter indicated that he no longer had any invoices from his business, but that he did have journals of inventory which listed all the items purchased and who the purchasers were. Apparently, Mr. Frankfurter used a code to keep the information confidential. Mr. Frankfurter provided Chubb's investigators with the names of other customers. Mr. Frankfurter indicated that his records would permit him to determine which items were purchased by Ms. Sagl and which items were purchased by both Mr. and Ms. Sagl.

[297] The memo told Chubb about Mr. Frankfurter's impression of Ms. Sagl's art collection. Mr. Frankfurter indicated that he had been at the Sagl Estate in Rockwood. He described it as a museum full of valuable bronze statues, furniture and paintings, of which many had been purchased from him, but many more purchased from other suppliers.

[298] Finally, the memo discloses that a further meeting between Chubb and Mr. Frankfurter was arranged for a few days after July 16, 1999. No memo of this second meeting has ever been produced. Mr. Eaton testified that he did not attend the second meeting and could not confirm that it took place. No evidence was offered to suggest that further meetings with Mr. Frankfurter were, for some reason, unable to take place. If there were further meetings, memos of those meetings have not been produced.

[299] Mr. Sweeting agreed, during his cross-examination, that, in 1997, Chubb was a leader in insuring high-end artwork, and that it remains one today. Chubb is a sophisticated legal person. It is no stranger to the litigation process. Chubb knows that documents in its possession may have to be produced and, therefore, it knows that it must take steps to preserve those documents. It is not acceptable for the Phillips memo to be disclosed for the first time in these proceedings, thirteen years after the commencement of litigation and long after Chubb had provided documentary production.

[300] In addition and quite apart from Chubb's obligation to preserve and produce relevant documents, Chubb is obliged to conduct itself before this court in a manner consistent with its understanding of the facts. At the previous trial before Justice Wright, in closing submissions, counsel for Chubb, who was not counsel in the proceeding before me, stated, in written submissions, "the only other identified individual source of the plaintiff's artwork was Frank Frankfurter of the World of Antiques. Ms. Sagl testified that he could not be produced as a witness because he suffers from Alzheimer's, but she did present a list he allegedly prepared for her post-fire describing items she purchased from his store". Chubb had no basis for asserting that the list was "allegedly prepared". It knew for a fact that Mr. Frankfurter prepared the list because it interviewed him and verified that he sent the letter. I do not suggest for a moment that counsel for Chubb at the first trial would have made this submission if counsel knew about the Phillips memo. Chubb, however, knew about the memo.

[301] Counsel for Chubb, in her closing submissions, referred to the Rodin sculpture as "one of the clearest instances of fraud in her Proof of Loss". Counsel made the submission that "not one photograph of such a sculpture, the single most valuable piece in her collection has ever been produced by Ms. Sagl". Chubb knew from its own investigations that Mr. Frankfurter confirmed that he had sold the Rodin sculpture to Ms. Sagl. Strangely, the July 16, 1999, memo contains virtually no discussion of the piece.

[302] In the same paragraph, again referring to the Rodin sculpture, counsel for Chubb makes the statement "…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". It is clear from the Phillips memo that Chubb was satisfied that Ms. Sagl had purchased the Rodin sculpture from Mr. Frankfurter.

[303] Finally, again referring to the Rodin sculpture, Chubb complains in its closing submissions to Justice Wright that "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: $6500". Chubb may have known all of these things, but we do not know because Chubb cannot find any other memos of interviews with Mr. Frankfurter and did not offer evidence to prove that no further interviews took place. I do not believe that Chubb failed to discuss with Mr. Frankfurter the second most expensive item that he ever sold to Ms. Sagl.

[304] Counsel for Chubb pointed out that the fact of the interview, if not its contents, was disclosed. This is an unsatisfactory answer. The detail in the Phillips memo is important for understanding the truth of the matter. Aspersions had been cast with some justification on other persons with whom Ms. Sagl had dealings: Fernando Atoarmeu, who was the person behind Masters International appraisals, had been a domestic employee of Ms. Sagl's and had absconded with art and jewelry belonging to her. Justice Macdonald, although the reference was disputed by Ms. Sagl, stated that Mr. Mercuri, an antique dealer from whom Ms. Sagl purchased antiques on more than one occasion, was a fraud. It was also important to know that a further meeting was scheduled with Mr. Frankfurter.

[305] Many of the facts contained in the Phillips memo were not admissible through Ms. Sagl; however, the memo was not subject to the same limitations. It was, arguably, a business record of Chubb or a principled exception to the hearsay rule.

[306] I concluded that the fairest way to deal with this in the context of this proceeding was to give very little weight to Chubb's complaint that very little is known about the Rodin sculpture. I have come to the conclusion that Chubb either deliberately refrained from making inquiries of Mr. Frankfurter concerning the sculpture or that, if it did make those inquiries, it failed to disclose the information it received. This conclusion had a significant effect on my conclusions concerning Ms. Sagl's proof of her loss as it relates to the Rodin sculpture. I am not satisfied that, in the circumstances of this case, there is any further deterrent value in imposing adverse consequences on Chubb a second time in the form of punitive damages.

Miscellaneous

[307] In *von Bismark v. Sagl*, *supra*, Justice Eberhard ordered that Ms. Sagl hold any insurance proceeds from the December 1997 fire, in respect of paintings created by Ms. von Bismark, in trust for Ms. von Bismark, with Ms. von Bismark having priority over Ms. Sagl for the amount of the judgment ($85,500) plus interest. The Court of Appeal clarified this order to the effect that Ms. von Bismark is "entitled to priority with respect to insurance proceeds directly related to the loss of the paintings" and added that, if Chubb does not clearly specify what portion of the insurance proceeds are related to the paintings, that Ms. von Bismark could apply for a determination of this issue (at para. 11).

[308] Pursuant to the above order, I order that Chubb shall ensure that the monetary portion of this judgment that is attributable to the von Bismark paintings is paid to the legal representative of Ms. von Bismark's estate or paid into court on notice to Ms. von Bismark's legal representative. The portion of proceeds relating to the von Bismark paintings should not be paid to Ms. Sagl directly.

Costs

[309] Substantial indemnity costs at the first trial and substantial indemnity costs at this trial are awarded to the plaintiff and are payable forthwith. If the parties cannot agree on the quantum of the substantial indemnity costs, brief written submissions in that regard may be made.

MARROCCO J.

Released: 20110908

CITATION: Sagl v. Chubb Insurance Company of Canada, 2011 ONSC 5233
COURT FILE NO.: 98-CV-160150
DATE: 20110908

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BRIDGETTE SAGL

Plaintiff

– and –

CHUBB INSURANCE COMPANY OF CANADA, COSBURN, GRIFFITHS AND BRANDHAM INSURANCE BROKERS LIMITED, EMON KINSELLA AND G.C. CARLEY & CO. LIMITED

Defendants

JUDGMENT

MARROCCO J.

Released: 20110908

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