FILE NO. CI 12-01-79281

THE QUEEN'S BENCH
GENERAL DIVISION
WINNIPEG CENTRE

BETWEEN:

3746292 MANITOBA LTD., CITYSCAPE RESIDENCE CORPORATION, and VINCENZO BARRASSO

plaintiffs

- and -

INTACT INSURANCE COMPANY, and ZURICH INSURANCE COMPANY LTD., and MKA CANADA, INC.

defendants

AND BETWEEN:

3746292 MANITOBA LTD., CITYSCAPE RESIDENCE CORPORATION, and VINCENZO BARRASSO

plaintiffs

- and -

INTACT INSURANCE COMPANY, and ZURICH INSURANCE COMPANY LTD., and UNIVERSITY OF MANITOBA,

defendants

ENDORSEMENT SHEET

SITTING DATE: September 12, 2016 **JUDGE:** DEWAR J.

COUNSEL:

For the plaintiffs:	Wayne M. Onchulenko
For the defendant Intact Insurance Company:	Michael G. Finlayson ✓
For the defendant MKA Canada, Inc.:	Charles A. Sherbo

ENDORSEMENT

[1] Prior to hearing a summary judgment motion by MKA Canada, Inc. ("MKA") and Intact Insurance Company ("Intact"), I was presented with a motion by MKA to expunge paragraphs 24, 25, 38, 39, 43, 48, 63, 67, 68 and 73 of the affidavit of Sylvie Bolduc sworn September 1, 2016.

[2] This action includes allegations that Mr. Milliner of MKA acted in bad faith when he dealt with Ms. Bolduc of Les Enterprises de Renovations S.R.G.M. Inc. ("SRGM"). In her affidavit, she referred to certain instances which she suspects demonstrate bad faith. In my view, even though such statements may touch upon being argumentative, she, as a participant in those dealings, is entitled to say what she feels about how she was being treated. Whether there is any basis for her suspicion is of course up to the summary judgment judge or the trial judge. Therefore, I will not order any changes to paragraphs 25, 38, 39, 48, the first two sentences of paragraph 67, and paragraphs 68 and 73.

[3] I make no change to paragraph 24. The impugned sentence (the second sentence), although argumentative, is self-evident. There is no prejudice to either of the defendants in leaving it in.

[4] As to paragraph 43, the words, "Even hardware stores only primarily use imperial quantities," shall be expunged, there being no groundwork laid to provide this statement.

[5] As to paragraph 63, the applicant complains about the lack of the words, "I do verily believe," after reference is made to an oral statement provided by a non-party. The lack of those words is not the major concern in this paragraph. This is a summary judgment motion. Unless there is good reason, the amount of hearsay about contentious matters in an affidavit filed in such a motion should be limited. Mr. Payne should have sworn the affidavit, or there should have been some explanation as to why he would or could not. Under the circumstances, I am giving little weight to the statements that are found in paragraph 63 of the affidavit.

[6] As to paragraph 67, the last sentence is to be expunged, since it is clearly beyond Ms. Bolduc's personal knowledge.

[7] This endorsement represents my decision on the motion to expunge. Since the motion was made at the same time as the motion for summary judgment, I see no need to make any separate order of costs.

DATE: November 7, 2016 **JUDGE** _____
DEWAR J.

Copies of this Endorsement Sheet have been sent to counsel/parties on the 7th day of November, 2016.

Date: 20161107
Docket: CI 12-01-79281
Indexed as: 3746292 Manitoba Ltd. et al v.
Intact Insurance Company et al
Cited as: 2016 MBQB 210
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

3746292 MANITOBA LTD., CITYSCAPE RESIDENCE CORPORATION, AND VINCENZO BARRASSO	)	Appearances:
plaintiffs,	)	Wayne M. Onchulenko for the plaintiffs
- and -	)	
	)	Michael G. Finlayson for the defendant Intact Insurance Company
INTACT INSURANCE COMPANY, and ZURICH INSURANCE COMPANY LTD., and MKA CANADA, INC.	)	
defendants.	)	Charles A. Sherbo for the defendant MKA Canada, Inc.
AND BETWEEN:	)	
3746292 MANITOBA LTD., CITYSCAPE RESIDENCE CORPORATION, and VINCENZO BARRASSO	)	
plaintiffs,	)	
- and -	)	JUDGMENT DELIVERED: November 7, 2016
INTACT INSURANCE COMPANY, and ZURICH INSURANCE COMPANY LTD., and UNIVERSITY OF MANITOBA,	)	
defendants.	)	

DEWAR J.

INTRODUCTION

[1] This judgment deals with two motions for summary judgment. In this

action, after reaching a settlement with an insurer under a fire loss policy, the plaintiffs have claimed against the insurer alleging breach of the insured's duty of good faith. The plaintiffs also claim against a consultant employed to assist the insurer in assessing the fire loss sustained by the plaintiffs. This latter claim raises the interesting question whether the consultant owes any duty to the plaintiffs who are adverse in interest to the insurer.

[2] The insurer moves for summary judgment as does the consultant.

FACTS

[3] The plaintiff 3746292 Manitoba Ltd. ("3746292") is the owner of land upon which is situated a mixed commercial and multiunit residential complex commonly known as Place Promenade (the "Property"). The land was leased by 3746292 to the plaintiff Cityscape Residence Corporation ("Cityscape"). A portion of the complex was leased by Cityscape to The University of Manitoba.

[4] The defendant Intact Insurance Company ("Intact") provided a policy of insurance (the "Policy") to "Cityscape Residence Corporation o/a 3746292 Manitoba Ltd." which was in effect for the period October 10, 2009 to October 10, 2010. The policy limit was $28,668,000. The Policy contained a co-insurance clause which specified that the Policy limit was required to be at least 90% of the value of the Property.

[5] On August 24, 2010, a fire occurred at the Property, and the plaintiffs made a claim against Intact under the Policy.

[6] Intact retained Mr. Ian Alexander at ClaimsPro Inc. ("ClaimsPro"), an independent adjusting firm, to adjust the plaintiffs' loss. MKA Canada Inc. ("MKA") was retained to provide assistance to Ian Alexander in the adjustment of the loss. MKA is a construction consulting firm and was expected to provide advice in respect of the scope and costs of required repairs.

[7] Cityscape retained Les Entreprises de Renovations S.R.G.M. Inc. ("SRGM") to act as its consultant in respect of the loss, including the provision of assistance in advancing its claim against Intact under the Policy.

[8] There were significant differences that arose between MKA and SRGM as to the estimated costs of repairing the damage. There were also significant differences in the replacement cost valuations of the property as it stood prior to the fire, which differences made the application of the co-insurance clause more difficult. Settlement of the claim was finally effected on February 27, 2012 in the following amounts:

Building/contents	$1,100,000.00
Professional fees and o/s rent	307,837.00
Total	$1,407,837.00
Less advance payments	593,412.72
Net balance to be paid	$ 814,424.28

[9] The proof of loss upon which the settlement was based contained the following clause:

> In consideration of such payment the Insurer is discharged forever from all further claims by reason of the said loss or damage. All rights to

> recovery from any other person are hereby transferred to the Insurer which is authorized to bring action in the Insured's name to enforce such rights. All right title and interest in any salvage is hereby assigned to the Insurer.

[10] Notwithstanding having signed the proof of loss which contained the release, in August 2012, the plaintiffs issued two statements of claim. Firstly, on August 17, 2012, the plaintiffs sued Intact under the Policy and the University of Manitoba under the lease, claiming compensation for damage to that portion of the Property that at the time of the fire had been occupied by the University of Manitoba under the lease with Cityscape. On August 22, 2012, the plaintiffs sued Intact and MKA claiming monies under the Policy and in addition, claiming that the defendant Intact had breached its duty of good faith and fair dealing to the plaintiffs in the performance of its obligations under the Policy and its administration of the plaintiffs' claim. For some reason, the plaintiffs named Zurich Insurance Company Ltd. as a co-insurer, but have since discontinued against Zurich leaving Intact as the sole insurer. The pleading with associated particulars (without reference to Zurich) contained these paragraphs:

> 13 The plaintiffs say and allege that it is an implied term of the Intact ... Policy that the defendant[s], Intact Insurance Company ..., owed a duty of good faith and fair dealing to the plaintiffs in the performance of its obligations pursuant to the Intact ... policy and in its administration of the plaintiff's claim, including:
>
> > a) a duty to complete an objective appraisal of all relevant evidence concerning the plaintiff's claim;
> >
> > b) a duty to respond to the plaintiff's claim in a fair and objective manner rather than in a manner which assumed the plaintiffs were adverse in interest;

c) a duty to retain competent, appropriately qualified and unbiased construction experts to advise the defendants with respect to the plaintiff's claim;

d) a duty to provide its construction experts with all relevant information concerning the plaintiff's claim;

e) a duty to pay the plaintiffs the amounts due and owing under the Intact ... Policy in a timely manner.

The plaintiff further states that the above duties arise concurrently in tort.

14 At all material times the defendants and/or its agents, by virtue of the relationship between insured and insurer, owed the plaintiffs a duty of care to refrain from doing or omitting to do any action which it could reasonably foresee would cause harm to the plaintiffs.

Particulars: The allegations contained in paragraph 14 of the Statement of Claim do not refer to MKA Canada, Inc. This paragraph refers to the duty owed by an insurer to an insured. MKA was not an insurer under the policy of insurance referred to in paragraph 8 and 9 of the Statement of Claim.

. . .

21 The plaintiffs plead that the fire damage and resulting damages fall within the coverage in the Intact ... Policy and that as a result of the defendants' failure to honor their obligations under the policy in a timely manner, the plaintiffs and the plaintiff's property are continuing to suffer further damages/losses that have not yet been determined.

22 The defendants knew or ought to have known that the failure to resolve the plaintiff's claim within a reasonable period of time would result in additional economic loss, financial loss and damage to the plaintiffs.

23 The plaintiff says that the defendants refused to negotiate in good faith with them, or at all which cause them to incur additional legal fees and disbursements. The total amounts are not known at this time as the matter is ongoing in nature.

Particulars: The allegations contained in paragraph 23 of the Statement of Claim refer to all of the Defendants, including MKA Canada, Inc. The allegations in this paragraph refer to the involvement of MKA Canada, Inc., in negotiations. Initially, there was no direct dealings between the Plaintiffs and its agents and MKA Canada, Inc. At a later time, when the negotiations were in progress, the Plaintiffs and its agents dealt directly with MKA Canada, Inc., with the full knowledge and direction from the Defendant, Intact Insurance Company.

> 24 Further and in the alternative, the plaintiffs say that the defendant, MKA Canada and/or its agents breached the duty of care to refrain from doing or omitting to do any action which it could reasonably be foreseen would harm the plaintiffs by improperly reporting to Intact Insurance Company ... when the defendant, MKA Canada knew or ought to have known this was not true or had reckless disregard as to the truth or falsity of the information, as a consequence of which the plaintiffs have suffered damages in an amount to be proven at trial.
>
> Particulars: The allegations contained in paragraph 24 of the Statement of Claim as to the Defendant, MKA Canada, Inc., improperly reporting to Intact Insurance Company, and which was not true, include the following:
>
> a. The method of valuing the replacement costs, and the conclusions arising therefrom;
> b. The actual replacement costs for damage to the building;
> c. The extent of the damage to the building;
> d. The need to replace various items.
>
> 25 The plaintiffs say and allege that the defendants have breached the terms of the Intact ... policy and the duty of good faith and fair dealing, by not making the payment in a timely fashion, without just cause ....
>
> Particulars: The allegations contained in paragraph 25 of the Statement of Claim refers to all Defendants and includes the Defendant, MKA Canada, Inc. The plaintiffs acknowledge that MKA Canada, Inc. was not an insurer, and no payment would be made directly by MKA Canada, Inc. under the policy of insurance. However, due to the reliance of the Defendant, Intact Insurance Company on MKA Canada, Inc. to assess the value of the loss, the delay by MKA Canada, Inc. in preparing a final report was a major factor in causing any payment to be made in a timely fashion. Furthermore, by virtue of the delegation of responsibilities, either explicitly or impliedly, by Intact Insurance Company to MKA Canada, Inc., MKA Canada, Inc. owed a duty of good faith and fair dealing to the Plaintiffs.

[11] By virtue of an order pronounced on January 23, 2014, the two actions commenced by the plaintiffs in August 2012 were consolidated. Counsel appearing before me reported that The University of Manitoba takes no position on these motions.

[12] Intact and MKA have defended the action. Documentary and oral discoveries have been completed. MKA and Intact now move for summary judgment of the claim against them.

[13] MKA submits that there is no genuine issue for trial against it on the basis that it owes no duty to the plaintiffs and therefore no cause of action is available in law against it.

[14] Intact argues that when it settled with the plaintiffs in February 2016, the plaintiffs released it from any further claims arising from the loss and therefore, the actions instituted in August 2012 against it, being contrary to that release, are not sustainable. Intact further argues that if one takes a good hard look at the facts of this case, there really is no genuine issue of bad faith and, coupled with the fact of the release, the claim should be summarily dismissed.

THE LAW

[15] In 2014, the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, urged participants in the civil justice system of Canada to adopt a shift in culture "in order to create an environment promoting timely and affordable access to the civil justice system" (para. 2). The thrust of the decision is that the process of conventional litigation is often time consuming, the accompanying expense is disproportionate to the amount involved and that courts should try to find new ways to resolve cases fairly and efficiently so that access to justice can be enhanced. The moving parties in the two motions

before me argue that the *Hryniak* case permits me to summarily dismiss the plaintiffs' claim against them.

[16] The plaintiffs argue that nothing significant to this case has been changed by the *Hryniak* decision. The plaintiffs rely upon para. 71 in the case of *Lenko v. Manitoba*, 2016 MBCA 52, namely:

> 71 *Hryniak* did not, however, change the test to be applied on a motion for summary judgment in Manitoba. The test remains whether the claim or defence raises a genuine issue for trial (r 20.03(1)). If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather, the motion should be dismissed and the matter should proceed to trial. The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial. This difference must be kept in mind when applying *Hryniak* to a motion for summary judgment under the Manitoba rules.
>
> [emphasis added]

[17] I do not interpret the *Lenko* decision as saying that the *Hryniak* case has changed nothing in motions for summary judgment. In my opinion, *Hryniak* has changed the application of the test for summary judgment. It is a question of degree. What the *Hryniak* case emphasizes is that courts should look more closely at the materials before them in order to assess whether a conventional trial is required. If the case can fairly be decided on the materials laid before the judge on a summary judgment motion, the judge should not be constrained from doing so. All that the Court of Appeal in the *Lenko* case did was illustrate that oftentimes, it is difficult when faced with a real credibility issue, to decide the case on affidavits.

[18] However, there is one sentence in para. 71 which I fear is too broad, given the rules of this court. The Court of Appeal wrote, "If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather the motion should be dismissed and the matter proceed to trial."

[19] With the greatest of respect, that statement disregards Rules 20.03(3) and 20.03(4):

> Only genuine issue is question of law
>
> 20.03(3) Where the judge is satisfied that the only genuine issue is a question of law, the judge may determine the question and grant judgment accordingly.
>
> Trial on affidavit evidence
>
> 20.03(4) Where the judge decides there is a genuine issue with respect to a claim or defence, the judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless
>
> (a) the judge is unable on the whole of the evidence before the court on the motion to find the facts necessary to decide the questions of fact or law; or
>
> (b) it would be unjust to decide the issues on the motion.

[20] These rules were never commented upon by the Court of Appeal in *Lenko*, nor were they the subject of attention in *Homestead Properties (Canada) Ltd. v. Sekhri et al*, 2007 MBCA 61, 214 Man.R. (2d) 148, the case upon which *Lenko* was based.

[21] In my judgment, the *Hryniak* case directs a judge in this jurisdiction to take one further step while or after he/she determines that a genuine issue exists. That further step involves a determination as to whether a reliable decision can still be made on the genuine issue on the basis of the information then before the court. In *Lenko*, the Court concluded that on the facts of that

case, it would be unfair to decide a serious credibility issue on the summary judgment motion materials then before the Court. That is all. There may be circumstances in which the notions of proportionality and access to justice might drive a court to conclude that it would be fair to decide the case at the summary judgment stage, although clearly in the *Lenko* case, the Court of Appeal felt that a trial was necessary.

[22] Therefore, one question for the court in this case is whether the claims made by the plaintiffs against both defendants can and should be resolved on the basis of the materials before this court

The MKA Motion

[23] The issue in this motion is simply stated – did MKA owe any duty of care to the plaintiffs? The challenge to the court is whether the facts are clear enough on this motion to answer this question without the necessity of a trial.

[24] Evidence on the issue is found in the affidavits of Joseph (Barry) Milliner sworn September 4, 2015, January 20, 2016 and June 16, 2016, the affidavits of Sylvie Bolduc sworn September 1, 2016 (as adjusted by the expungements referred to in an endorsement issued concurrently with these reasons), the affidavit of Ian Alexander sworn June 22, 2016, and the affidavit of Brenda Marinelli sworn February 10, 2016. That evidence permits me to make the following findings:

a) MKA was retained to provide assistance in valuing the loss sustained by the plaintiffs. It provided its reports to ClaimsPro. It

prepared a Conceptual Replacement Cost Estimate for the purpose of calculating the effect of the co-insurance clause. It prepared a replacement cost estimate with a depreciation factor, again for purposes of the co-insurance clause. It prepared bid scopes and repair cost estimate reports. Each of these reports were furnished to ClaimsPro and were used by ClaimsPro in the adjustment of the loss and the negotiation of the settlement.

b) SRGM provided an estimate of repair costs to the plaintiffs for use by the plaintiffs in negotiating settlement of their claim.

c) At no time did the plaintiffs/SRGM purport to rely on the opinions or estimates prepared by MKA. This is found at questions 582 to 590 and 602 to 610 of the examination for discovery of Sylvie Bolduc and at questions 85 to 93, 119 to 122, and 136 to 142 of the examination for discovery of Vincenzo Barrasso. The bottom line of these excerpts is that the plaintiffs understood that Intact was taking advice from Ian Alexander and indirectly MKA while the plaintiffs were taking advice from SRGM.

d) SRGM complained about the way in which MKA did its job, but notwithstanding, prepared its own estimates upon which the plaintiffs could negotiate a settlement.

e) MKA invoiced ClaimsPro in respect of the work which it did.

f) Although there were meetings in which Mr. Milliner of MKA discussed his estimates with Ms. Bolduc of SRGM, he was never authorized to negotiate a settlement, and in fact never did so. The offers extended by Intact to the plaintiffs were made either by ClaimsPro or Intact.

[25] MKA argues that there is nothing in this relationship which triggers a duty to the plaintiffs. The only duties of MKA are to Intact and/or ClaimsPro to provide a reasonable standard of work to compile information which can be used by Intact and/or ClaimsPro in their negotiations of the fire loss.

[26] MKA supports this argument with the case of *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, 256 D.L.R. (4th) 674. In that case, the plaintiffs had sustained a fire loss to their home. Their insurer retained an independent adjusting firm who in turn retained an investigator to investigate the cause of the fire. The investigator provided certain reports which contributed to the insurer's denial of the claim alleging arson. The plaintiffs successfully sued their insurer under the policy, but were unsuccessful in obtaining damages for bad faith, including damages for inconvenience and mental distress, aggravated damages, punitive or exemplary damages, and solicitor and client costs. The plaintiffs therefore sued the investigator in a subsequent action for negligence in respect of the investigation performed by it and the preparation of its reports. The investigator defended on the basis that it did not owe any duty to the plaintiffs.

[27] Cromwell, J.A. (as he then was) decided that there was no duty owed by the investigating company to the plaintiffs. In coming to his conclusion, he utilized the two-step process outlined in the case of *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L. (Eng.) and Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2 as described at para. 30 in the case of *Cooper v. Hobart*, [2001] 3 S.C.R. 537:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> [emphasis in original]

[28] Cromwell J.A. concluded that although a *prima facie* duty of care arose from the first step of the analysis, it was negated for policy reasons when the second step was addressed. The policy reasons were twofold, namely:

a) The plaintiffs were not without a remedy – they had a contractual remedy on the policy, which remedy included, in a proper case, a claim for aggravated and punitive damages.

b) Imposing the proposed duty would distort the legal relationships among the insurer, the insured and the investigators and could potentially undermine the ability of the insured and the insurer to properly deal with insurance claims.

[29] I see no significant difference in the case before me from the fact situation that was set out before Cromwell J.A. in the *Elliott* case. I acknowledge there to be some confusion in the evidence in the case before me as to who actually initially retained MKA. The affidavits of Mr. Milliner say that MKA was retained by the defendant Intact in September 2010. He goes on to depose that MKA reported to Intact through ClaimsPro, and that it was ClaimsPro who provided MKA with instruction and to whom MKA reported. Ms. Bolduc of SRGM deposes that MKA was retained by ClaimsPro. The ambiguity that arises surrounds the involvement, if any, of Intact in the retention of MKA. There was no ambiguity in the relationship found in the *Elliott* case - there the investigator was clearly retained by the adjuster.

[30] Does the ambiguity in this aspect of the evidence require a trial to sort the matter out? In my view, it does not. When he outlined his policy considerations in *Elliot*, Cromwell J.A. did not make special mention of the fact that the investigator was one step removed from the adjuster. The policy considerations utilized by him would be the same whether the investigator (in this case MKA) was hired by the insurer (Intact) or by the adjuster (ClaimsPro). In either case, MKA's ultimate function was to provide advice for the purpose of assisting the

insurer or its adjuster in defending the claim, and the concerns expressed by Cromwell J.A. about persons with that function having duties to two masters who were in at least semi-adversarial positions would apply.

[31] It was argued by counsel for the plaintiffs that the law is unclear. He cited cases in which, contrary to comments made in the *Elliott* case, adjusters have been found on occasion to owe a duty to insureds. I do not consider this to be a significant obstacle in this case. The evidence is clear that MKA was not acting as an adjuster. The evidence is clear that whatever the initial retainer, MKA provided its reports through ClaimsPro, took instruction from ClaimsPro and invoiced ClaimsPro. Viewed in the worst light, this is a case which deals with allegations similar to "negligent investigation and reporting", the misconduct alleged in *Elliott*. Utilizing the same policy considerations outlined by Cromwell J.A. in the *Elliott* case, there is no logical basis for fettering the duty of care owed by MKA to Intact/ClaimsPro with a duty to the plaintiffs.

[32] Counsel for Cityscape argued that there have been few, if any, appellate cases which have adopted the *Elliott* approach to a case like this, and therefore, the law is not so clear that summary judgment should issue. I prefer the alternate approach, given that our common law system retains some remnants of *stare decisis*. Has it been rejected by other appellate courts? The answer is no. The closest to that concept is the case of *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, a case dealing with private investigators, but even there, the Ontario Court of Appeal did not rule that *Elliott* was wrongly decided

when applied to an investigator in an insurance case. I am unaware of any decision in this jurisdiction which expressly or implicitly disavows the policy considerations set out in *Elliott*.

[33] Furthermore, in the event that the law is unclear, Rule 20.03 (3) reads:

> Where the judge is satisfied that the only genuine issue is a question of law, the judge may determine the question and grant judgment accordingly.

[34] Even if there exists a question of mixed law and fact, a judge is entitled to decide the issue on a motion for summary judgment where the material facts can be ascertained from a good hard look at the motion materials. In this case they can be ascertained. Although the exact input of Intact into the actual retainer of MKA is unknown on the record before me, the role of MKA is known, namely to provide scope of repairs and costing advice for use by Intact/ClaimsPro in assessing and settling the claim. There is no credibility issue on this point. The position of the plaintiffs is not that MKA's role was unclear; the complaint of the plaintiffs is that MKA did not do a good job. However, the question as to whether MKA did a good, or even adequate job, is irrelevant to the issue whether a duty existed from MKA to the plaintiffs. There is no reason why a trial is necessary before a decision may be made on this issue.

[35] Cases in respect of adjusters such as *Abbasi v. Portage La Prairie Mutual Insurance Co.*, 2003 ABQB 760, 23 Alta. L.R. (4th) 293, *Standen's Ltd. v. Commercial Union Assurance Co. of Canada*, 52 Alta. L.R. (3d) 6, [1997] 9 W.W.R. 222, and *Pilat v. Federation Insurance Co. of Canada*, 2003 SKQB 320,

which deferred the question to a trial on an application to strike out the claim or an application for summary judgment, do not appear to have been governed or influenced by a similar rule. They also predate *Hryniak*, the logic from which encourages a greater utilization of the summary judgment rule.

[36] The bottom line is that I agree with the approach expressed in *Elliott* and used by MKA to submit that it owed no duty to the plaintiffs. Without a duty, there can be no successful claim.

[37] I dismiss the claim against MKA.

The Intact Motion

[38] The claim against Intact is based upon allegations of bad faith. The plaintiffs rely upon authorities such as *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Cross v. Canada Life Assurance Co.*, 2002 CarswellOnt 223, [2002] I.L.R. I-4044; *Wilson v. Saskatchewan Government Insurance*, 2010 SKQB 211, 405 Sask.R. 8; *Sagl v. Chubb Insurance Co. of Canada*, 2011 CarswellOnt 9271, 2011 ONSC 5233; and *Kings Mutual Insurance Co. v Ackermann*, 2010 NSCA 39, 292 N.S.R. (2d) 120, in which courts have recognized that insurers owe a duty of good faith in the assessment and payment of claims made on policies issued by them. Insurers are not obliged to pay every claim that is made against them. However, insurers are obliged to consider each claim carefully and in a timely way, failing which, they expose

themselves to additional claims for damages, including aggravated and punitive damages.

[39] The motion for summary judgment filed by Intact relies on two grounds, namely:

a) The plaintiffs have released Intact from all claims, including claims of bad faith.

b) A good hard look at the evidence indicates that the complaints of the plaintiffs about bad faith are simply not sustainable.

Is the claim alleging a breach of the insurer's duty of good faith covered by the release included in the proof of loss signed by the plaintiffs?

[40] The evidence before me includes a copy of the proof of loss in which is situated the release wording set out earlier in this judgment. It also discloses a letter of December 23, 2011 from the principal officer of Cityscape to Intact in which at least inferentially, although somewhat ambiguously, the spectre of a bad faith claim is raised. There is no evidence as to where the proof of loss was signed, nor any evidence as to what was specifically discussed immediately prior to the signing of the proof of loss, or indeed why it was that the release in its current form was even signed by the plaintiffs, or whether there was any effort on the part of the plaintiffs to amend it.

[41] There are two approaches to this release. The plaintiffs argue that a claim for breach of a duty of good faith is a claim independent of the insurance contract, and therefore, the proof of claim relates only to the claim for coverage

and not the administration of the claim. The contrasting argument is that without a fire loss, there would be no claim to administer, and therefore, the release is properly written to include both the claim for coverage and the claim for breach of a duty of good faith. There is merit in interpreting the release in an inclusive fashion since to do otherwise allows one party (the releasor) to represent to the other party (the releasee) that it wished to settle a claim when in fact the releasor had no intention of doing so.

[42] In the circumstances laid before me, the language of the release is potentially capable of at least these two interpretations, and the circumstances under which it was signed would be of value to anyone making a proper interpretation of it. In my view, the interpretation of that clause ought to be better left for trial when a court might more fairly impose an interpretation upon it, having been given more information as to the circumstances surrounding its execution.

[43] There is no ambiguity in the release insofar as it applies to a claim under the Policy for monies payable under the Policy. At the hearing, counsel for the plaintiffs did not urge that the plaintiffs continued to claim monies payable under the insurance contract, and after the hearing by letter at my invitation confirmed that to be so. However, the statements of claim as currently drafted include this latter claim, and to the extent that the summary judgment motion is intended to dismiss this latter claim, it must be successful. In that regard, the plaintiffs have released Intact from claims for any further monies that may have been payable

under the insurance contract. Whether the release covers the bad faith claim will be left to the trial judge.

Is there a genuine issue as to whether Intact breached its duty of good faith?

[44] In this case, the plaintiffs complain that Intact was slow in making its initial offer to resolve the case. Furthermore, the plaintiffs complain that in the initial discussions and communications, Intact failed to provide documentation and explanation as to the basis for its low estimates. Additionally, the plaintiffs complain that the estimate program used by MKA, the Intact consultant, was unique, difficult to understand, and set in metric units, and infers that this was done to complicate the plaintiffs' own assessment. In particular support for their suspicions, the plaintiffs point to an early internal document which provided a higher estimate of loss than initially proposed by Intact.

[45] The plaintiffs acknowledge that an insurer is not necessarily acting in bad faith if it initially misassesses the claim in a minor way. However, it does allege that when an insurer is found to have been "too wrong" in its initial assessment and is too slow in remedying a defective initial assessment, then these are symptoms from which bad faith may be inferred.

[46] Intact argues that it conscientiously developed and pursued a principled approach to the claim. It acknowledges that it made concessions along the way, but argues that the making of concessions should in no way be used against an insurer as evidence of bad faith.

[47] Claims alleging bad faith are difficult claims to make. In setting a claim, the parties are in adversarial positions and each is entitled to negotiate a resolution with its best interests in mind. The bad faith element arises when an insurer fails to properly and objectively consider the claim, or uses inappropriate negotiating techniques which are designed to frustrate or delay the attempts of the honest insured to be paid.

[48] Most cases in which allegations of bad faith are made will not be accompanied by acknowledgements on the part of the insurer that it intentionally attempted to grind an insured by delaying or confusing matters. In most cases, a court will be faced with the task of making proper inferences from the evidence placed before it. I am not convinced in this case that I can make a conclusive enough inference about the intentions of the Intact without seeing and hearing representatives from the Intact or its consultants. Further, it is difficult to assess the complaints of the plaintiffs without actually listening to them. Under the circumstances, I am convinced that there is a genuine issue for trial in the case against Intact. This is not a mainly legal issue as was the case concerning MKA.

[49] I take some solace in this view from the decision of the Supreme Court in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3. In that case, the trial judge had concluded that the insurer had not acted in bad faith. The British Columbia Court of Appeal overturned that decision. The Supreme Court restored the decision of the trial judge and in so doing said this:

> 64 The proper characterization of Sun Life's conduct on the "good faith" issue requires a careful consideration of the evidence. The trial

> judge concluded that Sun Life did not act in bad faith. He heard the evidence over nine days. He had an opportunity to observe the witnesses, who included James Craig, a representative of Sun Life's disability management unit, and Ms. Fidler herself. Bearing in mind the subjective element of the duty of good faith, the trial judge's assessment of Mr. Craig's credibility in particular takes on some significance in determining whether Sun Life acted with an improper purpose in denying Ms. Fidler's claim.
>
> [emphasis added]

[50] This result underscores the importance of actually hearing and assessing witnesses in a case based upon a claim of bad faith.

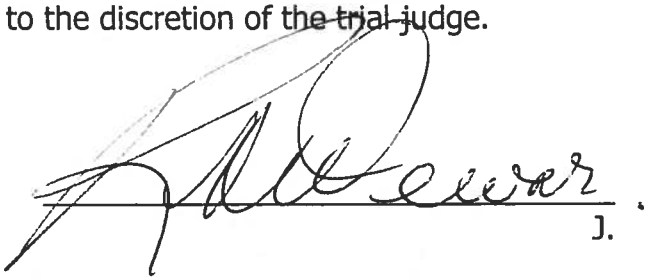
[51] Some cases will lend themselves more easily for a court on a motion for summary judgment to come to a definitive conclusion and thus save all parties the anxiety, inconvenience, and cost of a full trial. In those cases, the Supreme Court of Canada in *Hryniak* has encouraged judges on an application of summary judgment to spare the parties those concerns. Where allegations of bad faith are made and some evidence exists from which inferences, both for and against, might be drawn, a trial is warranted. I therefore dismiss the motion for summary judgment by Intact.

[52] In coming to this conclusion, it should not be inferred that the case of the plaintiffs is necessarily strong. That remains to be seen. These kinds of claims are relatively new and more often than not are unsuccessful. Nonetheless, there is a danger in being too dismissive of difficult claims at the summary judgment level, and if in doubt, the responding party should be entitled to their full day in court.

CONCLUSION

[53] The motion of MKA is allowed with costs. If counsel cannot agree on the class of costs to be applied, they may speak to it at a later time.

[54] The motion of Intact is dismissed with respect to the claim for breach of the duty of good faith, but allowed with respect to the claim for monies payable under the Policy. Within 40 days of the signing of the order, the plaintiffs shall file a motion before the Master requesting leave to amend the claims to reflect the dismissal of the part of the claim that requests judgment against Intact for insurance proceeds. Costs of the Intact motion shall be costs in the cause, since if the plaintiffs are unsuccessful at trial, they should bear the costs of this motion as well. The class of costs will be left to the discretion of the trial judge.



J.