

GUILBERT ENTERPRISES LTD., ET AL. V. ECONOMICAL MUTUAL: BAD FAITH AND POLYGRAPH EVIDENCE

It has become all too common for allegations of bad faith to be pleaded against insurers. The phrase “bad faith” is short-hand for “breach of the duty of good faith.” That duty imposes on insurers obligations to act reasonably, honestly and fairly in the handling of claims.

The insured also owes a duty of good faith to its insurer. This includes obligations not to dishonestly exaggerate the extent of a loss and to be honest in describing the circumstances of the loss. In a case, for example, where the cause of the fire affecting the insured is in question, the insured must be honest when responding to inquiries relating to possible motives. To some extent the insured’s duty is codified in statutory conditions 6 and 7. (For convenience, a copy is attached at Schedule “A” hereto.)

The polygraph or lie detector test is a device which measures several physical indicators, such as blood pressure, pulse, respiration and skin condition, while the subject is asked questions. There are experts in the administration of such tests. The initial questions are intended to establish a baseline. Deviations from that baseline can be interpreted by the expert. The polygrapher will in the end categorize the subject’s responses to the questions pertaining to the particular case as deceptive, truthful or inconclusive.

Though generally the results of a polygraph are inadmissible in evidence, law enforcement officials regard them as reliable. Such tests are routinely used where possible, typically to exclude persons of interest as suspects in criminal investigations. Some insurance companies also rely on polygraph testing in assessing whether a claim should be paid.

On February 25, 2015, the Neepawa Home Hardware Store and its contents were destroyed by fire. The store was owned and operated by Guilbert Enterprises. The loss was investigated in the normal manner. An independent adjuster was appointed. An origin and cause expert was engaged. A representative of the Province’s Office of the Fire Commissioner (OFC) also investigated. Both the insurer’s expert and the OFC representative reported the cause of the fire as “undetermined, probably electrical.”

However, an employee came forward and made certain statements which suggested that the cause may not have been accidental. As well, in a post-loss interview by a representative of the insurer the insured was less than candid about various matters, especially the details of his efforts to sell the business in the months and days immediately before the fire.

The insurer denied the claim, asserting that the insured had committed arson, that he had been wilfully dishonest in his statements, and that he had breached his duties of good

faith and statutory conditions 6 and 7. In the statement of claim which followed, the plaintiff pleaded:

6. The plaintiffs state that the fire was accidental and that the Fire Commissioner of Manitoba, investigated said fire and concluded in its report that "there is no possibility, nor was there the opportunity for human action to have caused this fire in the identified area of origin. The only source of ignition in this area is electrical wiring".

7. The plaintiffs state that the conclusions of the Fire Commissioner were at all times material known to the defendant.

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12. The plaintiffs state that the defendant has refused without justification to cover the said loss which refusal was a breach of the policy of insurance between the defendant and the plaintiff Enterprises. The plaintiffs state that the defendant, taking the position as it has that the fire loss was caused by the criminal act of the plaintiff Guilbert, is false and egregious; the plaintiff Guilbert states further, that at all times material hereto, the defendant knew that the plaintiff Guilbert was the operating mind of the plaintiff Enterprises.

13. The plaintiffs state that the allegation by the defendant of the criminal act of arson, has been made by the defendant falsely and maliciously and designed to provide it an economic benefit. It has caused the plaintiff Guilbert emotional distress, angst and reputational damage and is a breach of the duty of good faith and a breach of contract (as between the defendant and plaintiff Enterprises).

14. The plaintiff states that the defendant has maintained its position that the plaintiffs were involved in a criminal offence vitiating the insurance policy in the face of a Fire Commissioner's report exonerating the plaintiffs and declaring that the fire was innocently set and did so falsely, egregiously, and in a reckless and highhanded manner, and therefore, the defendant should be liable to pay punitive, exemplary and aggravated damages.

In its statement of defence and counterclaim, the insurer pleaded:

6. As to paragraphs 7 and 8 of the statement of claim, the defendant says that:

(a) the fire occurred at a time when the corporate plaintiff was having difficulty paying its employees, Patrick had recently learned that the hoped-

for sale of the business to a local business-person would not occur, the corporate plaintiff had received a tax demand from the provincial taxing authority, the corporate plaintiff had in late 2014 received notice that orders for new inventory by the corporate plaintiff required special approval, and the corporate plaintiff was insolvent;

(b) the fire was set by Patrick;

(c) the fire commissioner was mistaken in saying, and had no basis whatever to say, that human action could not have caused the fire;

(d) there was and is no evidence whatever that the fire was caused by an electrical problem or malfunction; and

(e) the defendant did not receive the report of the fire commissioner until October, 2015, and had no earlier notice of the opinion or reasoning of the fire commissioner.

7. As to paragraph 10 of the statement of claim, the defendant says that in later August, 2015, counsel for the defendant wrote to then counsel for the plaintiffs as follows:

Economical has now had an opportunity to carefully review your client's second proof of loss in this matter and the circumstances leading up to and surrounding the loss.

As you know, in any claim, the insured and the insurer each owe the other a duty of good faith. Among other things, this requires that the insured in the presentation of his claim be honest and forthright. This is in fact confirmed in statutory conditions 6 and 7 of the policy and in *The Insurance Act* itself, where the statutory conditions are codified.

Economical's investigation has confirmed that at the time of the fire, the business was insolvent and about to fail. Your client had attempted to sell the business, but failed to do so. Your client had built the apartments above the store with a view to converting them to condominiums and raising capital through the sale of the units. This plan had also failed. Yet despite all these circumstances, in communication with Economical's agents after the fire, when Economical was interested in the financial situation of your insured's business, your client minimized the seriousness of the financial problems. This was an obvious effort to mislead Economical regarding your client's motive for committing arson.

Your client indicated to Economical after the fire that on the day of the fire, before he exited the building after the employees, he remained on the premises only for the purpose of setting the alarm. He said this would have taken him perhaps thirty seconds or a minute at most. But in fact, independent witnesses say that he remained on

the premises for several minutes. This was to conceal the fact he had (and took) the opportunity to set the fire which was discovered within but a few minutes.

For these reasons, among others, Economical says that your client breached statutory conditions 6 and 7 and his duty of good faith. And for similar and other reasons, Economical says that your client deliberately committed arson in that Patrick Guilbert caused the fire to the business premises at 366 Mountain Avenue, in Neepawa. Accordingly the insurance claim of Guilbert Enterprises Ltd. c.o.b. Neepawa Home Hardware is hereby denied and its proof of loss rejected.

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11. As to paragraphs 13 and 14 of the statement of claim, and in reply to the whole thereof, the defendant says that:

- (a) it has not denied and would not deny coverage to its insured in this matter if it did not believe with good reason that its insured had breached the terms of coverage in a fundamental way;
- (b) the plaintiffs owed a duty of good faith to the defendant;
- (c) the plaintiffs were bound by statutory conditions 6 and 7;
- (d) these duties and conditions meant that Patrick was bound as the directing mind of the corporate plaintiff to be honest and candid in his communications with the defendant;
- (e) in contravention of the foresaid duties and conditions, Patrick, among other things, minimized the seriousness of the financial problems of the corporate plaintiff in an effort to mislead the defendant regarding the strength of the motive to commit arson, and stated that on the day of the fire he only remained in the building after the employees left for 30 seconds to a minute, when in fact it was significantly longer than that;
- (f) at all material times, the defendant acted reasonably, prudently and fairly;
- (g) the decision to deny any claim, including the corporate plaintiff's, on the basis of dishonesty and arson, is not taken lightly, but seriously; all of the evidence was weighed and balanced, and was reviewed by several experienced persons to ensure the decision was justified; and
- (h) the defendant at all times acted in good faith.

The RCMP investigated the matter. In the course of that investigation the RCMP invited the insured to submit to a polygraph test and he did so. Ultimately it was determined that charges would not be pursued.

In due course, the plaintiff's counsel sought to schedule examinations for discovery. The insurer's counsel indicated that before any examinations could occur, the file of the RCMP should be obtained. It would contain statements of various witnesses whose evidence was likely to be material. The insured's counsel inquired whether the production of the RCMP file would include the results of the polygraph test which he understood that his client had taken and, he said, had passed. The insurer's counsel said that if there was a polygraph test in the RCMP file then obviously production of the file would include the polygraph. The insured's counsel then reiterated that the insurer was in possession of the OFC report which "cleared" his client and of a "polygraph result" which "does the same, regardless of its admissibility issues, all of which inflames the punitive damages issues."

Of course, before punitive damages of any kind would be in play, it would have been necessary to have found the insurer liable and to have determined that the insurer had breached its duty of good faith. The suggestion that the results of the polygraph, then believed by plaintiff's counsel to have been confirmatory of his client's truthfulness in denying complicity in the arson, could "inflare" the punitive damages issue necessarily implied that the plaintiff's counsel believed that the result of the polygraph test was admissible. And the point of producing it into evidence would be to argue that for the insurer to continue to deny the claim in the face of the insured passing the polygraph – i.e., being determined by the polygrapher to have been truthful in denying any role in causing the fire – should increase the amount of punitive damages awarded against the insurer.

The insurer's counsel pointed out that if the result of the polygraph was as believed by the insured, then the insured certainly could have no objection to the production of the associated documents and that the results of the polygraph should be available to all parties.

The insured's counsel responded by suggesting that the insurer's counsel was (interpreting the comment diplomatically) being insincere and that the insurer was "well aware" that his "client passed the polygraph."

A short time later, the insured's counsel contacted the insurer's counsel to say that he had been misinformed and that in fact the result of the polygraph had been inconclusive. [The evidence from the polygrapher at trial was that the subject is not notified of the result of the test.]

The RCMP file was produced. The polygraph report was within it. It stated that the insured's answers to the material questions had been deceptive. That is, in ordinary parlance, the insured had failed the polygraph, or the results of the polygraph implied that the insured was lying when he denied complicity in causing the fire.

The insurer's counsel believed that if the insured intended to pursue the allegation of bad faith at trial, the polygraph evidence should be admitted. This was not just because of the position expounded by plaintiff's counsel when he had believed the insured had "passed"

the test. The insurer had to some extent relied upon or at least considered the polygraph result in maintaining its denial of coverage. (Indeed, it is possible that the insurer would have paid the claim had the determination been that the insured was truthful in his denials of complicity.) In evaluating the question whether the insurer had acted reasonably, fairly and honestly, the court would have to evaluate all of the data available to and considered by the insurer in making and maintaining its decision to deny coverage. The result of the polygraph was one factor considered by the insurer.

At the pre-trial conference not long before the trial, the insured's counsel was specifically advised that if the allegation of bad faith against the insurer was pursued at trial, the insurer would be seeking to adduce the result of the polygraph. The insured's counsel stated that bad faith would be pursued and expressed the view that it was clearly the law of Canada that polygraph evidence is inadmissible.

The trial began in the ordinary manner, with opening statements by counsel. At the end of the opening remarks of the insurer's counsel, the court was advised that the insurer would be seeking to adduce the results of the polygraph test to which the insured had voluntarily submitted, but only in the context of the assertion by the insured that the insurer had acted in bad faith in the adjustment and denial of the claim, and not in the matter of the arson and fraud allegations. The insured's counsel expressed outrage that the polygraph had even been mentioned and stated that it was notorious that polygraph evidence is inadmissible. Further submissions were made and it was determined that there would be a *voir dire* [which is akin to a trial within a trial] to determine whether or not and if so for what purpose the result of the polygraph test would be admitted into evidence. It must be clearly understood that at no point did the insurer's counsel suggest that the polygraph result was admissible in the context of the issues of arson, fraud or the insured's bad faith. The insurer contended that the polygraph test not only could but must be admitted into evidence because the insurer had received the associated report and had referred to it or considered it or relied upon it in maintaining its position that the claim was deniable.

In due course, both parties submitted legal authorities and arguments were made. The trial judge ultimately ruled as follows:

I believe it is appropriate to admit the [polygraph] evidence. It is probative – it's probative value outweighs any possible risk of confusion. And bear in mind, that at the end of the day, when I assess the evidence as a whole, the polygraph may prove to be of little or of no weight, or somewhere in between. It will go to course of conduct, as I said, and that is it. I further order that it won't be referred to or relied on or used in any way in the context, argument, or the determination of the issues of arson, fraud, breach of statutory conditions, and/or breach of duty of good faith, as pled by Economical.

[The transcript of the submissions made to the trial judge on the issue whether the polygraph evidence should be admitted into evidence, and the judge's ruling on the point, are on the MFP website and referred to as [Guilbert v. Economical #2 \(polygraph\) – October 23, 2018](#)]

Within a week or two of the trial date, the insured's counsel sent an expert's report to the insurer's counsel. It was authored by a person who no doubt had expertise in how insurance claims should be handled. The insured's counsel indicated that he intended to adduce the report into evidence and have the author testify. The purpose of the report and *viva voce* evidence of this expert was to impugn the conduct of the insurer's independent adjuster in this matter. In particular, it was to support the argument that the independent adjuster had acted unreasonably, unfairly and/or arbitrarily in the handling of the claim. (The transcript of that expert witness's evidence is attached as Schedule "B" hereto.)

The contrast between the evidence the expert gave in chief and his evidence on cross-examination is striking. As you may read, the expert had suggested in direct that the insured's claim as outlined in the proof of loss was reasonable. By the end of his cross-examination, the witness had acknowledge in effect that Economical was entirely justified in rejecting the last proof of loss ever filed by the insured. In fact, he suggests that had the independent adjuster submitted that proof of loss and requested payment based on its contents, Economical would have been justified in firing the independent adjuster.

The main reason for this article being written is that none of the above could be gleaned from the reasons for decision of the trial judge. The trial judge determined that the insured had been guilty of arson. So it was unnecessary for him to deal with the polygraph evidence and the arguments regarding bad faith. Yet for insurers and for counsel, what occurred and how it occurred may I think be instructive.

MGF

Requirements after loss

6(1) On the happening of any loss or damage to insured property, the insured must, if the loss or damage is covered by the contract, in addition to observing the requirements of Statutory Condition 9,

- (a) immediately give notice in writing to the insurer,
- (b) deliver as soon as practicable to the insurer a proof of loss in respect of the loss or damage to the insured property verified by statutory declaration
 - (i) giving a complete inventory of that property and showing in detail quantities and costs of that property and particulars of the amount of loss claimed,
 - (ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,
 - (iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,
 - (iv) stating the amount of other insurances and the names of other insurers,
 - (v) stating the interest of the insured and of all others in that property with particulars of all liens, encumbrances and other charges on that property,
 - (vi) stating any changes in title, use, occupation, location, possession or exposure of the property since the contract was issued, and
 - (vii) stating the place where the insured property was at the time of loss,
- (c) if required by the insurer, give a complete inventory of undamaged property showing in detail quantities and cost of that property, and
- (d) if required by the insurer and if practicable,
 - (i) produce books of account and inventory lists,
 - (ii) furnish invoices and other vouchers verified by statutory declaration, and
 - (iii) furnish a copy of the written portion of any other relevant contract.

6(2) The evidence given, produced or furnished under subparagraph (1)(c) and (d) of this condition must not be considered proofs of loss within the meaning of Statutory Conditions 12 and 13.

Fraud

7 Any fraud or wilfully false statement in a statutory declaration in relation to the particulars required under Statutory Condition 6 invalidates the claim of the person who made the declaration.

File No. CI15-01-98227
Appeal No. _____

IN THE COURT OF QUEEN'S BENCH FOR MANITOBA
JUDICIAL CENTRE OF WINNIPEG

BETWEEN

PATRICK GILBERT AND GILBERT ENTERPRISES LTD.

Plaintiff

and

ECONOMICAL MUTUAL INSURANCE COMPANY,
TRADING AS THE ECONOMICAL INSURANCE GROUP

Defendant

TRIAL
(Evidence of Paul Topp)
(Pages T1 - 77)

October 23, 2018
Winnipeg, Manitoba

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1 Proceedings taken in the Court of Queen's Bench, Winnipeg, Manitoba

2

3

4 October 23, 2018

Morning Session

5

6 The Honourable Mr. Justice

The Court of Queen's Bench
for Manitoba

7 D. Kroft

8

9 M. Davids

For the Plaintiffs

10 S. Fast

For the Plaintiffs

11 M. Finlayson

For the Defendants

12 G. Lisi

For the Defendants

13 D. Delaronde

Court Clerk

14

15

16 **PAUL TOPP, Affirmed, Examined by Mr. Davids**

17

18 THE COURT CLERK:

Thank you. You may be seated.

19

20 THE COURT:

Good morning, Mr. Topp.

21

22 THE WITNESS:

Good morning.

23

24 THE COURT:

I'm David Kroft; I'm the judge. If you
could speak up when you're giving your evidence just because --

25

26

27 THE WITNESS:

Okay.

28

29 THE COURT:

-- we all have to hear you. That would be
great. Do you need a water or anything to -- if you like?

30

31

32 THE WITNESS:

I wouldn't mind.

33

34

35 THE COURT:

Okay. Madam clerk.

36

37

38

39

40

41

THE WITNESS:

Thank you.

THE COURT:

You're welcome.

1 THE COURT CLERK: You're welcome.
2
3 Q MR. DAVIDS: Mr. Topp, I'm going to ask this first
4 question from here just to turn your attention to the agreed book of documents.
5
6 THE COURT: Can I cut you off. You haven't said
7 anything wrong, but I had a thought and I just want to do it before I forget. I would
8 like to switch out the label for Exhibit 1. Because I've been marking up the copy
9 that says Exhibit 1, so I would like to put Exhibit 1 on the copy that is with the
10 witness.
11
12 MR. FINLAYSON: You mean tab 1 of Exhibit 1?
13
14 THE COURT CLERK: The whole thing.
15
16 THE COURT: The whole thing. I want --
17
18 MR. FINLAYSON: Okay.
19
20 THE COURT: -- I want to identify the copy -- the
21 witness copy. Because that has, also, in a central place, all the drawings that have
22 been made to date, and I've had some notes in mine.
23
24 MR. DAVIDS: That certainly makes sense, My Lord.
25
26 THE COURT: All right.
27
28 THE COURT CLERK: What's the -- oh, I can check that. Okay.
29 So I'm just -- just transferring Exhibit 1 and --
30
31 THE COURT: Just transfer the tag.
32
33 THE COURT CLERK: Yeah. Actually, because it's -- I realized
34 that because it's a registry document it doesn't get a tag just an administrative
35 detail. But it will just now -- the registry set will be -- document 65 on registry will
36 be that set --
37
38 THE COURT: All right. I just want --
39
40 THE COURT CLERK: -- instead of this set.
41

1 THE COURT: -- the official one that --
2
3 THE COURT CLERK: Yeah.
4
5 THE COURT: -- people will follow when they're
6 reading the transcript --
7
8 THE COURT CLERK: Exactly.
9
10 THE COURT: -- to be the witness copy and not my
11 copy.
12
13 THE COURT CLERK: So this will now be 65 on registry and
14 Exhibit 1.
15
16 THE COURT: Thank you.
17
18 THE COURT CLERK: And this will be a copy.
19
20 THE COURT: Thank you.
21
22 THE COURT CLERK: Thank you. Okay.
23
24 THE COURT: Okay. Sorry about that, Mr. Davids.
25
26 MR. DAVIDS: Not at all, My Lord.
27
28 THE COURT CLERK: I have a bit more marking to do. I can do
29 it later. I'll do it later.
30
31 THE COURT: Thank you.
32
33 Q MR. DAVIDS: So, Mr. Topp, if you could pick up
34 volume 8 of the agreed book, and go to document 167, please.
35
36 MR. DAVIDS: I can -- I can confirm for the Court, My
37 Lord --
38
39 THE COURT: Yes.
40
41 MR. DAVIDS: -- that 167 is one document containing

1 two elements. The first is Mr. Topp's CV, if you like, an outline of his insurance
2 background, and the second part is general information with respect to property
3 insurance and claims. It's Mr. Topp's report. It is founded on an assessment of
4 damages prepared by Mr. Tapper. My learned friend has seen this assessment of
5 damages.

6
7 I'm wondering if I can show the Court the foundation for Mr. Topp's report. It's not
8 going to be admitted in evidence over my learned friend's objections. If he has a
9 problem with the document, that's fine, but it's the basis of Mr. Topp's report. He's
10 commenting on my client's assessment of damages. Of course, there will be
11 several other documents led in that regard, but it's just the foundation for what he
12 has stated.

13
14 So if I can refer this to my learned friend.

15
16 THE COURT: So I obviously haven't read through this.
17 Is -- is this a -- sort of, an explanation of -- of what terms mean?

18
19 MR. DAVIDS: It's -- Mr. Topp's evidence is going to
20 assist the Court in determining how this insurance policy ought to be interpreted.
21 He will be talking about things like proofs of loss and replacement cost and what
22 his experience in this regard is, being a person high up in the hierarchy of
23 Programmed Insurance Brokers. So he will be asked to give evidence, essentially,
24 as a fact based expert. Although, there will be a small element of opinion to the
25 extent that he's going to talk about his experience as an insurance broker and
26 experience with the claims process.

27
28 My understanding is that my learned friend has no difficulty with the admission of
29 the document, being 167, and that Mr. Topp is qualified to give limited opinion
30 evidence based on his experience, so long, of course, as it is set out in the report.

31
32 THE COURT: Well, as long as there's no objection to it.
33 I just want to make sure that I'm hearing it and -- through the lens that both of you
34 agreed to.

35
36 MR. DAVIDS: Yes, My Lord.

37
38 THE COURT: Mr. Finlayson?

39
40 MR. FINLAYSON: I don't have a problem with Mr. Topp's
41 report, and I think he is an expert that can provide some assistance to the Court.

1
2 With respect to the document that Mr. Davids just gave me, which is entitled an
3 assessment of damages, and it's a one, two -- four-page document, I -- candidly, I
4 don't remember ever seeing it before. I hope Your Lordship knows I don't want to
5 do anything to make things any more complicated than they are, so I wouldn't
6 have a problem. If -- if Mr. Topp, in some sense, relied or utilized this in preparing
7 his report or in assessing the matter, if we wanted to mark this A for identification,
8 I don't have a problem with that, just for simplicity sake.
9

10 THE COURT: Yes.

11
12 MR. FINLAYSON: But I just want you to know that there's a
13 lot of stuff -- a lot of material in here that is contentious.
14

15 THE COURT: All right. So you're describing the
16 document I don't have in the agreed book; right? What Mr. Finlayson --
17

18 MR. DAVIDS: That -- that's --
19

20 THE COURT: -- just referred to, there's another
21 document --
22

23 MR. DAVIDS: That -- that's --
24

25 THE COURT: -- that you're saying Mr. Topp relied on
26 in preparing the document that's at -- well, document 167?
27

28 MR. DAVIDS: That's correct, My Lord. And that's my
29 failing that it's not in the agreed book. It was discussed, and amongst all of the
30 documents, the flurry of documents, exchanged between our respective offices,
31 this was there. And I think at one point I simply said, I believe to Ms. Lisi, fine,
32 we don't really need this assessment, just not realizing that Mr. Topp was asked by
33 me to comment on it.
34

35 Now, of course, this is not tendered as anything but a foundation for Mr. Topp's
36 comments, which I believe the Court will find is helpful.
37

38 THE COURT: Okay.
39

40 MR. DAVIDS: So --
41

1 THE COURT: Well, let's proceed. And if there's an
2 objection, I'm sure Mr. Finlayson will stand up and let that objection be known.
3

4 MR. DAVIDS: Thank you, My Lord.
5

6 I'm giving Mr. Topp a copy if he wishes to refer to it. And to madam clerk tender
7 the document itself, which would be --
8

9 THE COURT: Exhibit B.
10

11 MR. DAVIDS: -- 'A' or 'B'?
12

13 THE COURT CLERK: 'B'.
14

15 THE COURT: And what were going to call it?
16

17 MR. DAVIDS: Plaintiff's assessment of damages.
18

19 THE COURT CLERK: Exhibit B.
20

21 **EXHIBIT B - FOR IDENTIFICATION - Plaintiff's Assessment of Damages**
22

23 THE COURT: Thanks. And just going forward, and I'm
24 sure you're going to get to it, is -- is this really plaintiff's -- this will be the
25 foundational document that you're going to want ...
26

27 MR. DAVIDS: Well, again, it depends on how effective
28 the proofs are seen to be. Mr. Guilbert filed several proofs of loss, and I'm going to
29 be going --
30

31 THE COURT: Sorry, and I'll get to that. I don't want to
32 pre-empt it. I just thought maybe this reflects what's in the proofs of -- of loss. At
33 the end of the day --
34

35 MR. DAVIDS: It's --
36

37 THE COURT: -- you're going to point me, I'm sure in
38 argument, to exactly what's being claimed and where that claim is because --
39

40 MR. DAVIDS: Yes. Yes, My Lord.
41

1 THE COURT: I'm telegraphing that now. I mean, I'm
2 not going to close this off until you tell me, at the end of the day, here's what I'm
3 claiming, here's the amount, here's what you look at to come to that amount.
4

5 MR. DAVIDS: Yes, My Lord. Thank you.
6

7 THE COURT: So I was just asking if this is it, but I'm
8 going to wait for that. Okay.
9

10 Q MR. DAVIDS: Mr. Topp, if you go to the first paragraph
11 -- I'm sorry, the -- the second paragraph, under basis of loss settlement in your
12 report, do you see the phrase: (as read)
13

14 It is common for commercial insurance policies to provide
15 a choice of loss settlement to the insured.
16

17 A Yes.
18

19 Q Could you describe for me what that phrase choice of loss settlement means?
20

21 A Well, under the terms of the contract the insurer is obligated to pay the lesser
22 of the actual cash value, or the financial interest of the insured in the property
23 that's in question, or the limit of the policy. So they have to pay the least of
24 whichever those are under the terms of the policy.

25 Now, most insurance policies -- commercial policies do have an endorsement
26 called replacement cost endorsement. Those -- the replacement cost
27 endorsement basically gives the insured the choice of replacing -- it's repair or
28 replacing the lost items, property, and up to the limit of the policy.
29

30 Q Did Mr. Guilbert -- did the plaintiffs -- I should identify that you are aware that
31 a claim under a policy, and I'll show you the policy in a moment, was made by
32 the plaintiff, Guilbert Enterprises Ltd., in this matter; correct?
33

34 A I'm sorry --
35

36 Q You are aware that in this matter we're talking about a claim for a fire loss
37 having been made by the plaintiff, Guilbert Enterprises Ltd.?
38

39 A Yes.
40

41 Q Okay. Just briefly then, could I ask you to turn to volumes 1 and 2. We have a
break between the two documents. There's a policy, document 15, and then
declaration as to coverages, 16.

1 A I'm sorry, volume 1?

2

3 Q So -- well, it's both volume 1 and 2. Fifteen is the very end of volume 1.

4 A Okay.

5

6 THE COURT CLERK: (INDISCERNIBLE)

7

8 MR. DAVIDS: Well, it's 1 and 2.

9

10 THE WITNESS: Okay. Okay.

11

12 THE COURT CLERK: One should be there (INDISCERNIBLE)

13

14 THE COURT: Yeah.

15

16 THE COURT CLERK: Okay. This is 2.

17

18 THE COURT: All right.

19

20 Q MR. DAVIDS: So if I could ask you to turn to volume
21 (sic) 15 and describe what that represents in the context of Mr. Guilbert's
22 insurance policy?

23

24 THE COURT: Sorry, volume 15?

25

26 MR. FINLAYSON: Tab.

27

28 MR. DAVIDS: I'm sorry, tab 15. Volume 1, tab 15.

29

30 A So you want me to go through the --

31

32 Q MR. DAVIDS: I -- I'd just like you to describe generally
33 what that document is and what it represents in the context of Mr. Guilbert's
34 insurance coverage through --

35 A Well, this --

36

37 Q -- Economical?

38

39 A -- looks like it's a document that's been prepared by Economical Insurance and
40 provided to Programmed Insurance Brokers outlining the program for our
41 Home Hardware dealers across Canada. The numbers that are prefaced by the
CP and that sort of thing, those are wordings that insurance company uses as

1 the basis of the policy. So this is just an outline of what the wordings are in
2 their program for us.

3

4 Q So --

5 A And the next part, the next bit of it is the -- basically, what they're calling the
6 proposal, but it's -- it is, basically, the outline of our program that's available to
7 the Home Hardware dealers.

8

9 Q So this is a general description of coverages?

10 A Right. It's the -- it's the -- the highlights. It's definitely not the -- the meat and
11 potatoes of it. It's basically the highlights, this is what we're offering to provide
12 to the Home Hardware dealers.

13

14 Q I take it then, if you turn to volume 2, tab 16, is that closer to the meat and
15 potatoes, in other words --

16 A Well, not --

17

18 Q -- the actual coverage?

19 A -- not -- not necessarily, no. This is the certificate of insurance, which,
20 basically, provides all the pertinent information that identifies the insured
21 person, identifies mortgagees and loss payees, limits of coverage, that sort of
22 thing. The meat and potatoes follows, in 15, after this tab, that's where the
23 wordings have been printed out. And I don't know if it's complete wordings
24 because there are a lot of wordings and a lot of --

25

26 THE COURT: Can you -- why don't we just give some
27 page numbers here. So you're saying that between pages 3, up at the top right, and
28 38 -- no, sorry, 36 --

29

30 MR. DAVIDS: This is in 15, My Lord?

31

32 THE COURT: In 15.

33

34 THE WITNESS: Yes.

35

36 THE COURT: Is, sort of, the summary --

37

38 A Yeah. It's basically --

39

40 THE COURT: -- outline of the insurance program?

41

1 A Yeah. That they've provided to us to sell us, you know, this is what we want to
2 do for your dealers, this is what we want to provide for them.

3
4 THE COURT: Okay.

5
6 A So --

7
8 THE COURT: So --

9
10 A -- following on after that, so page 37, appears to be the wordings. And I'm
11 assuming they're complete, but I -- I don't know a hundred percent.

12
13 THE COURT: Okay.

14
15 Q MR. DAVIDS: There's reference to coverages on pages
16 22 and 23. Could you --

17 A In the proposal?

18
19 Q Yes. Could you explain what pages 22 and 23 represent? In the table of
20 contents it says coverages.

21 A Okay.

22
23 THE COURT: Sorry, where are you --

24
25 A So -- so --

26
27 THE COURT: -- Mr. Davids?

28
29 A -- so I guess (INDISCERNIBLE)

30
31 MR. DAVIDS: Pages 22 and -- 22 and 23 of tab 15.

32
33 A It's stamped 24 at the top of the page that the --

34
35 THE COURT: Yeah, that's the pages I was going by.
36 Twenty-four?

37
38 A Yeah. So you're referring to the property coverages?

39
40 Q MR. DAVIDS: That's correct.

41 A Okay.

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Q If you could just elaborate, please?

A Okay. So property of every description. When we have an insurance policy, it's normally broken up into lines. It would say stock, equipment, and building.

THE COURT: M-hm.

A Under a property of every equipment form, all of that is considered under one limit.

Q MR. DAVIDS: Sorry, you said property of every equipment form?

A Of every description, sorry. Property of every description.

So -- and the limit of loss we have on that is 15 million. So every Home Hardware dealer across Canada has a 15 million limit on property. And, again, the most the insurance company is obliged to pay is the lesser of the actual cash value, or the financial interest, or the -- or limit specified on the declaration page. The 15 million limit that we have on these is for -- it's a benefit of the Home Hardware dealer in case their limits as stated on the policy were inaccurate, not correct by some sort of oversight. And in a lot of cases it's been used on our program when a dealer has built a building and has forgot to let us know. That does happen. So -- so he isn't penalized by his oversight, he'll be indemnified in case of a loss.

Q If we go to tab 16, there's a heading coverage description right in the middle left -- on the first page of tab 16, right in the middle of the page, where it says coverage description; do you see that?

A Yes.

Q So underneath that there's a number of subheadings. First, the limitation of loss, and then there's a reference to building, and underneath building mortgagee, equipment, underneath equipment loss payee, stock, and then equipment, specifically coverage for apartments. And then on the next page there's a number of coverage descriptions starting with dealer plus, buildings, bylaw, endorsement, boiler, and machinery, and so on. To begin with, going back to the very first page, just to confirm that the limit -- policy limits are described under limit of insurance; correct?

A Yes.

Q And what that means is that the estimated -- well, I should, perhaps, ask you.

1 What goes into selecting those numbers below the 15 million dollars --

2

3 MR. FINLAYSON: My Lord -- My Lord, if I can -- I think I
4 can save some time. We're not contending and we've never contended that these
5 numbers, the 1.35 million or the 127, are, in any way, limits on what could be
6 recovered in this matter, okay. We accept that the 15 million dollars is the limit so.

7

8 MR. DAVIDS: Very well, My Lord. Thank you.

9

10 Q MR. DAVIDS: There's reference on the first page to
11 mortgagees. Do you see where it says mortgagee and then there's three of them
12 listed?

13 A Yes.

14

15 Q So if we go back to your report, where you make reference to ...

16

17 MR. DAVIDS: And I'm going to advise the Court that
18 I'm going to leave document 16, for the most part, and talk about the issue of the
19 mortgagees in the context of document 167.

20

21 Q MR. DAVIDS: So if we could return to 167, where you
22 say the interest of the insured and the property. Can you tell me whether or
23 not --

24

25 THE COURT: Sorry, where -- you've got -- I know
26 you're not going --

27

28 MR. DAVIDS: Okay.

29

30 THE COURT: -- quickly, but I am having trouble
31 following you.

32

33 MR. DAVIDS: Tab 167.

34

35 THE COURT: I'm there.

36

37 MR. DAVIDS: I -- I -- I'm leaving --

38

39 THE COURT: Where does it say interest?

40

41 MR. DAVIDS: About two-thirds of the way down, under

1 basis of loss settlement, second paragraph --

2

3 THE COURT:
4 paragraph?

It is common for -- for -- are you in that

5

6 MR. DAVIDS:

Yes. Fourth -- fourth line.

7

8 THE COURT:

Okay.

9

10 MR. DAVIDS:

Third line and fourth line.

11

12 THE COURT:

Okay.

13

14 Q MR. DAVIDS:

So the insurer will pay up to an amount not exceeding whichever is the least of the replacement cost, the interest of the insured, and the property the limit showed in this policy. Can you describe what you mean by interest of the insured in the property?

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41

MR. FINLAYSON:

The mortgagee.

THE COURT:

Okay.

Q MR. DAVIDS:

So -- well, you've described, as the mortgagee, you're limited to the amount owing on the mortgage; correct?

A Correct, yeah.

Q

But in terms of the insured, because the -- the mortgagee is named as mortgagee -- and I'm not asking you to, in effect, go into the difference between mortgage and Guilbert Enterprises as an insured -- what's Guilbert Enterprises interest in the property in general, as described on the policy coverages, document -- tab 16? In other words, is -- is Mr. Guilbert's interest net of the debt?

A Well, that's an interesting question. I've never had that posed to me before. Essentially, I would say it's -- his interest is absolute in this case. He is

1 beholden to whoever has an interest in the property up to their financial
2 amount. But there's no reason why he can't claim for everything on here.

3
4 Now, the insurance company will put the loss payees and the mortgagees on
5 the policy as co-payees so that they're not paying twice in the event of a loss.
6 So that they don't pay the claimant full value and they don't pay the interest at a
7 later date. So they're always very careful about that sort of thing because if
8 they make a mistake then they do end up paying twice.

9
10 Q Thank you. If I could ask you to turn to --

11
12 THE COURT: Sorry, are you saying anything other than
13 if there's an amount owing to a bank or a mortgagor -- a mortgagee that the insured
14 takes out a policy for the -- and his interest is in the full amount, but there's a loss
15 payee, in other words -- but to the extent money is owing it -- it -- goes to the --
16 the lender?

17
18 A If I can simplify the example with a home --

19
20 THE COURT: That's how I always thought --

21
22 A -- home owners.

23
24 THE COURT: -- it understood, but I want to know
25 your --

26
27 A So your house burns down --

28
29 THE COURT: Yeah.

30
31 A -- and you have a mortgage on it. If you want to take a cash payout and -- or
32 just build it yourself, or replacement cost, whatever the arrangements are, and
33 the insurance company will write a cheque to you, but they'll also put the
34 bank's name on it.

35
36 THE COURT: Right.

37
38 A So the bank will make sure that they get their interest cleared, and then
39 whatever is left --

40
41 THE COURT: Understood.

1

2 A -- is yours.

3

4 THE COURT:

Understood. That's what I thought you

5 were saying.

6

7 A Yeah.

8

9 Q MR. DAVIDS:

So if there's evidence that the bank has

10 already been paid, there's no co-payee in this case; correct?

11 A I -- I would assume that if the financial interests have been paid in a claim that
12 the claimant either has been paid or should have been part of that. But under
13 the mortgage clause of an insurance policy, a mortgagee can make a claim
14 without the consent of the insured, named insured.

15

16 Q If I could have you turn to documents in volume 2, tabs 22 -- I'll list them
17 because they're all in fairly close succession, 22, 23, 28, 29, and 31, in volume
18 2. Let's start with document 22.

19 A Is this tab 22 you're --

20

21 THE COURT:

Yes.

22

23 Q MR. DAVIDS:

Yes.

24 A -- referring to?

25

26 Q Tab 22, volume 2.

27

28 THE COURT:

Madam clerk, I think I need that.

29

30 THE COURT CLERK:

(INDISCERNIBLE)

31

32 THE COURT:

Oh, I've got -- I've got it. You're right.

33

34 THE COURT CLERK:

(INDISCERNIBLE)

35

36 THE COURT:

You're right, I've got it.

37

38 Q MR. DAVIDS:

My understanding is that you were in
39 touch with Mr. Guilbert with respect to his proofs of loss; is that a fair
40 statement?

41 A Very accurate statement, yes.

1

2 Q Yes. And, in fact -- and I'm not going to ask you turn there, we'll get to it
3 shortly, but you do have familiarity with what's called an activities list, which
4 outlines Mr. Guilbert's communications with PIB relative to his insurance
5 history, we'll call it, contacts regarding his policies and -- and, then subsequent,
6 his claim?

7 A Correct. Now, that activities list, for everybody's general knowledge, is just
8 part of our customer management system. So the activities list, basically, keeps
9 a list of every time someone's called, sent an email, sent correspondence, fax,
10 that sort of thing.

11

12 MR. DAVIDS: For the record, My Lord, that's tab 93.

13 We will, like I say, get to that.

14

15 Q MR. DAVIDS: What I'm asking you now then, Mr.
16 Topp, is to refer back to document 22, and the additional pages, which go
17 beyond page 1, that Mr. Guilbert has signed. Signs a document dated April
18 15th, 2015; it's called fire proof of loss. If you could go through the subsequent
19 pages in that tab and confirm for me that, to the best of your knowledge, these
20 are documents with which you'd be reasonably familiar, and that if Mr.
21 Guilbert said these are documents which have, as their source, Home Hardware
22 SKUs relating to the numbers ascribed to various things that he buys from
23 Home Hardware, you wouldn't disagree with me, I take it?

24 A I -- I've gone through here, and the -- the amounts claimed do not seem out of
25 the ordinary.

26

27 Q Is it reasonable for Mr. Guilbert to have submitted these -- in your experience,
28 is it reasonable for him to have submitted these in support of the number that
29 he sets out as replacement cost, there's simply one number in number 22,
30 389,744.16, and then he relates it to a variety of what appears to be furniture
31 and -- equipment and furnishings? Do you see that on the first page -- first
32 page of the --

33 A Yeah.

34

35 Q -- list, which has no SKUs, but it's --

36 A Correct, yes. There isn't that type of room on there for a detailed report. But the
37 insurance companies do ask for that type of detail, and in some cases even
38 more detailed than that, to prove a loss.

39

40 Q If Mr. Guilbert were to say that this is all he could get, is that a reasonable -- is
41 -- is it reasonable to proceed in adjusting this claim on the basis of these

1 numbers?

2 A If -- if he presented this and said this is how much it's going to cost for me to
3 replace, that would be reasonable. The insurance company may, on the other
4 hand, say, well, if this is what the replacement cost is, show us where you got
5 that information from, did you get it from a catalogue, did you get it from a
6 wholesaler providing you with a list, that sort of thing. Now, if this is -- this list
7 is made up as actual cash value for something, then it would be easy for the
8 insurance company to say, well, we think that number is in line with actual
9 cash value because the replacement cost would be much higher.

10

11 So in -- in this case, I think asking for more detail depends on how much he's
12 asking for. So if he's asking this -- coming at this from an actual cash value
13 place, I think it would be fairly easy to verify whether these numbers are in
14 line. And if it's replacement cost numbers, I think would also be fairly easy to
15 -- to figure out what the replacement cost is because it's the cost of what
16 someone is selling it now. Now, is it -- if it's prove you had it, if this is a
17 question of prove that you had a service desk or receiving tools, it might be
18 difficult for someone when everything's lost in a fire, it might be difficult to
19 prove what they had.

20

21 Q What is your understanding of what an S-K-U is?

22 A Well, I'm not a retail expert, but an S-K-U -- generally, what we use it for on
23 the claims side is to, basically, separate or differentiate each product. Every
24 single product that you'll find in a store has its own separate SKU, so there's no
25 two identical SKUs. The SKU is a -- is a number that will have a lot of
26 identifying factors behind it. It'll describe the product. It will -- in the case of
27 Home Hardware, it can show a suggested retail price. It can show what they
28 call a 'C' list price, which I'm not sure how that's determined, but each Home
29 Hardware dealer has a factor that they apply to the 'C' list to come out with
30 their cost. And the 'C' list price and their factor is -- is a factor of transportation
31 cost plus the cost to -- of purchase and -- and markup.

32

33 Q So if we -- if we move on to tab 23 -- document 23 ...

34

35 THE COURT:

36 I'm not asking this question, but I -- I -- I
37 -- I -- I -- I want to know if -- and maybe through another witness, but the -- when
38 I'm -- when you're -- when you've got a SKU and you've got the number, is that --
39 what is that number? I don't know if this witness can -- and you don't -- I'm not
40 asking this witness, he doesn't have to answer. But I'm not sure what that number
41 is or where it comes from. Is that the unit price?

- 1 MR. DAVIDS: Well, I -- I -- the -- the witness --
2
- 3 THE COURT: Anyway, I'm just -- I'm telling you that
4 I'm having that question in my mind --
5
- 6 MR. DAVIDS: The -- the --
7
- 8 THE COURT: -- so I don't --
9
- 10 MR. DAVIDS: Yeah.
11
- 12 THE COURT: -- and I'm not understanding that.
13
- 14 MR. DAVIDS: The -- the witness was describing, My
15 Lord, the components of the S-K-U and what it --
16
- 17 THE COURT: I understand that.
18
- 19 MR. DAVIDS: -- may well mean. Does it relate to a
20 specific concept? I suppose the witness certainly can be asked what he understands
21 the numbers. If I start on the page where the first S-K-U is listed, and that's -- it's
22 1886 in the very upper right-hand corner, of tab 22.
23
- 24 MR. FINLAYSON: Sorry, what page?
25
- 26 MR. DAVIDS: One eight eight six. And I believe that's
27 your numbering, Mr. Finlayson. Sixteen of 27 with the fax header.
28
- 29 MR. FINLAYSON: Ah, thank you.
30
- 31 A Are you asking for comment?
32
- 33 Q MR. DAVIDS: Well, I'm asking for comment on -- if --
34 if you start with the S-K-U, it's -- the first reference is fans times three.
35 A Okay.
36
- 37 Q So what I need to know is what the \$47.98 means, or the \$56.99 under fans
38 times three, and then there's a turbo fan, and then we go to air conditioners
39 times four, each having an S-K-U number; I'm wondering what the dollar
40 amount represents?
41 A I believe that's dealer cost. I -- I can't verify that though. Like ...

1

2 Q But if Mr. Guilbert's said it was cost to him, then that's --

3 A And easy to verify with Home Hardware.

4

5 Q And there's nothing inconsistent between those statements? In other words, if
6 Mr. Guilbert has said in evidence, yes, that's my dealer cost, you would have
7 no reason to disagree?8 A I would have no reason to disagree. Now, the adjustor might want to verify
9 that, and it would be simple to do.

10

11 Q And if you go on, for the -- the balance of those pages -- there's a heading
12 receiving, and then next page receiving tools, and then the fourth is ten-piece
13 hole saw kit. If you go to -- right to the end, I take it the same concept applies,
14 that that reflects Mr. Guilbert's dealer cost, or it's reasonable to conclude that
15 Mr. Guilbert is correct in saying that's his dealer cost?

16 A If it has a SKU, then it's easy to verify. Now --

17

18 THE COURT: And dealer cost means Mr. Guilbert's
19 costs to acquire it from the dealer, or the dealer's cost to acquire it from
20 somewhere else?

21

22 A Well, Mr. Guilbert's the dealer. And --

23

24 THE COURT: Okay.

25

26 A -- and that's -- what he pays is a -- essentially, a wholesale rate --

27

28 THE COURT: Okay. That's what I'm asking.

29

30 A -- for a product.

31

32 THE COURT: Okay.

33

34 Q MR. DAVIDS: So this is what he pays or is obliged to
35 pay Home Hardware?

36 A For the product, yes.

37

38 Q Now, if we go to document 23, Mr. Guilbert has outlined four items, inventory,
39 equipment and repairs, revenue, and FFE, which I understand is furniture,
40 fixtures and equipment. On that basis, that FFE means furniture, fixtures and
41 equipment, the others being somewhat self-explanatory, is it your

1 understanding that Mr. Guilbert's coverage included all of those items?

2 A As far as I understand the coverage, yes, that it was property of every
3 description that's part of the business. Now, the revenue, I believe that comes
4 from the rental income.

5

6 Q We'll get to that.

7

8 My overall question is -- if you turn to documents 28, 29, and 31, or tabs 28,
9 29, and 31. I want to turn your attention to the heading replacement cost. In
10 each of the rows and -- well, each of the rows in the columns right in the
11 middle of the page, in each case there's a heading item involved, and then
12 immediately to the right is replacement cost. In documents 29 and -- I'm sorry,
13 documents 28 and 29, in each of those cases Mr. Guilbert is listing replacement
14 cost. Do you recall your discussions with Mr. Guilbert about claiming
15 replacement cost?

16 A I don't recall specific discussions.

17

18 Q Did you discuss this with him at all?

19 A I'm sure we did. I don't recall any specific discussions. I know Patrick and I
20 had a lot of communication, and he asked a lot of good questions.

21

22 Q What I'm wanting to know is whether or not, at any point, you told Pat that it's
23 unreasonable to claim replacement cost?

24 A I don't believe I ever said that.

25

26 Q And to the best of your understanding, was Pat claiming replacement cost? I
27 guess more to the point is did he discuss these replacement cost numbers with
28 you, to the best of your recollection?

29 A I recall seeing these sheets and discussing them with him.

30

31 Q These sheets, being the proofs of loss?

32 A The proof of loss, yeah. So I'm assuming that we did go over that and ...

33

34 Q Now, I'm going to then ask you to turn to 93, that's document -- or tab 93.

35

36 THE COURT: Mr. Davids?

37

38 MR. DAVIDS: Yes.

39

40 THE COURT: Again, not necessarily for now, but I --
41 as you know, I'm not shy when I -- because I think it helps everybody when I have

1 a question.

2

3 MR. DAVIDS:

Indeed, it does, My Lord.

4

5 THE COURT:

I'm not entirely clear -- and if it's in the --

6 if it's in the recording on past days you can just say go back -- I don't entirely
7 understand the evolution of these proofs of loss, if it's relevant. I -- I -- I know
8 some are copies of others, but there's some that have some information and then
9 some that have others. If it's uncontested, I'd appreciate you or Mr. Finlayson
10 describing -- I would have thought it would have come through your client -- but,
11 sort of, how -- you've shown me 22, 28, 29. I don't quite understand which one I'm
12 looking at at the end of the day, or am I looking at two together, three together.
13 And maybe that's part of the dispute.

14

15 MR. DAVIDS:

My Lord --

16

17 THE COURT:

I'm not sure. But I -- I'm --

18

19 MR. DAVIDS:

-- My Lord --

20

21 THE COURT:

Yeah.

22

23 MR. DAVIDS:

-- the short answer is inherent in Mr.

24 Guilbert's statement, in evidence, saying nobody was helping me and when I --
25 that's, first of all, what he said, nobody was helping me. Secondly, he did refer in
26 his evidence to Mr. Topp, but he also referred to Mr. LaBrash having sent him
27 correspondence saying that's not good enough. So what these all represent is Mr.
28 Guilbert's attempt to satisfy Mr. LaBrash's inquiries. I don't think it really assists
29 the Court in going through each of Mr. LaBrash's letters. That could, perhaps, be
30 done on cross-examination. But, again, Mr. Guilbert is making his case in-chief,
31 that's understood.

32

33 THE COURT:

I do have a recollection though of -- of
34 evidence, and maybe it was -- you'll remind me which document it was, where --
35 and I believe his evidence was this was my final attempt, my -- my last kick at this
36 cat, and -- and which -- so what I'm asking you is, as we progress, at the end of the
37 day is there going to be a proof of loss that represents the last best attempt to
38 submit the evidence to the insurer?

39

40 MR. DAVIDS:

Yes. Yes --

41

1 THE COURT: Which -- and which one is that?

2

3 MR. DAVIDS: That -- that -- that would be the June
4 17th document. That's --

5

6 THE COURT: Document?

7

8 MR. DAVIDS: Number 29.

9

10 THE COURT: So document 29 is -- is, what I describe,
11 for lack of a better description, is the last best attempt?

12

13 MR. DAVIDS: Yes. I'm not sure that there's any dispute
14 from my learned friend to the effect that Mr. LaBrash, rightly or wrongly, I mean,
15 it's just Mr. LaBrash doing his job, did not accept Mr. Guilbert's proofs of loss,
16 and Mr. Guilbert kept trying --

17

18 THE COURT: Yeah.

19

20 MR. DAVIDS: -- and that ultimately, he ended up with
21 document 29.

22

23 THE COURT: That's what I'm asking you.

24

25 MR. DAVIDS: Yes.

26

27 THE COURT: Okay. Thank you.

28

29 Q MR. DAVIDS: So on that basis, that you were
30 communicating with Mr. Guilbert, communicated with -- with him a number of
31 times, if you could turn to document 93, please.

32 A Okay.

33

34 Q And that's in volume 5. The very first page of document 93 is headed activities
35 list, item 00208 is the numbering. At the bottom of the page it starts April 2nd,
36 2015. If we go to the previous page, April 1st. If we could go back to -- it's
37 page 00217; it's approximately ten pages in. At the top of page 217 there's a
38 reference to email to Patrick informing him that Paul Topp will fly to Neepawa
39 to meet with him, as well as adjutor from Crawford, to meet with him today as
40 well; do you see that reference there?

41

A Yes.

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Q Okay. Do you recall flying -- you're not going to fly direct to Neepawa from Ontario or Toronto, but do you recall flying to Manitoba, Winnipeg, and then going out to Neepawa shortly after February 25th?

A Yes.

Q And you met with Patrick in Neepawa?

A Yes, I did.

Q And you discussed the claim with him?

A Yes.

Q You also met with an adjustor from Crawford. Can you, to the best of your recollection, tell me who that was?

A Well, it says here Susan Thaine. Now, I spoke to her on the telephone but didn't meet her. I met with Randy LaBrash at the site of the fire the next morning after I arrived.

Q Was there any discussion with either Ms. Thaine or Mr. LaBrash with respect to a methodology, we'll call it, of approving this claim?

A I didn't -- not with Susan Thaine. The only discussion I had with her was about fencing and security of the site, and that she was not going to be the adjustor, she was just the one on-call when the fire was reported. With Mr. LaBrash, he outlined that he would have Cause and Origin people attend the site. And I think I got to meet them. They showed up later that morning, and they were going to go through the fire, see if they could determine a cause.

Q Did -- did you have any conversations with Pat as to what he had to get together in order to make this claim?

A Mostly what the conversations I had with Pat were about the coverages he had, limits, deductibles, that sort of thing, to describe what the relationship was with the adjustor, that the adjustor would be working with him to help him prove the loss, and that the adjustor would be working with the insurance company to investigate the loss, that a examiner would be the one to make determination on coverage or not.

Q So Mr. Guilbert, according to my rendition, expressed a concern that nobody was helping him. On that point, is there -- in reference to your evidence that you just gave to the effect that Mr. LaBrash would be helping Mr. Guilbert, can you describe where Mr. Guilbert, in the normal course of adjusting a claim, would look for help in filling out the proofs of loss?

1 A Well, that would initially come from the adjustor to say, okay, I've just
2 received this, what am I supposed to put on there, the adjustor should provide
3 some guidance with that. And if he wasn't satisfied with the assistance he was
4 receiving from the adjustor, that's when it's time to contact us to see if we can
5 help get things going and get the questions answered.
6

7 Q And what's your recollection of whether or not Mr. Guilbert did that?

8 A I recall Mr. Guilbert asking us for assistance, that he didn't know how to fill
9 out the forms. He asked questions about the building limit because he said that
10 the building limit didn't seem to be right but that, I believe, there was appraisal
11 coming or -- or was being done, and that the appraisal would be a more
12 appropriate number. And according to my notes that I put on the system, the
13 contemporaneous notes, that he asked a question about what if he made an
14 error on the statement, would that come back to bite him, and I believe I
15 advised that as long as he didn't do it intentionally he'd be fine, that it could be
16 corrected, but that, I believe, the initial proof of loss was just for him to get the
17 claim started so that he could have some money advanced. And it might have
18 been on the recommendation of Randy saying, listen, I can't really do anything
19 for you until you substantiate the loss.
20

21 Q Well, if we go back to -- well, before we get to that and replacement cost, just
22 if we could go through from page 00216, which follows the page including the
23 date on which the fire took place, so from 217 back through 216, all the way to
24 208, if you can just have a -- a look at the names under the heading creator,
25 where your name, Paul Topp, shows up, and just confirm that, to the best of
26 your recollection, this is a fair and accurate list of the activities in which you
27 were involved in Mr. Guilbert's claim. Just thumb through at a -- at a
28 reasonably quick but careful pace to confirm that you are indeed the person
29 who is the creator of that entry.

30 A If it has my name next to it, then it was definitely me that made that entry. And
31 I'll apologize for the typos.
32

33 Q Now, I'm going to read from your report, where you say, first page: (as read)
34

35 The -- the --
36

37 THE COURT: Document 167?

38
39 MR. DAVIDS: That's document 167, My Lord.
40

41 Q MR. DAVIDS: If you go back to document 167, Mr.

1 Topp, and if you could explain, please, what the definition of replacement cost
2 is?

3 A Well, essentially, replacement cost is the cost that it would take to replace or
4 repair an item that's been damaged or lost.

5
6 Q And you say that in the second last paragraph of the report, first page. But then
7 you also say: (as read)

8
9 In order for the insurer to deliver a replacement cost
10 settlement, the insured is obligated to actually replace the
11 lost or damaged property.

12
13 See where it says that, right at the bottom?

14 A Yes.

15
16 Q So what do you mean by actually replace?

17 A Well, it has to be replaced. So in order to get a replacement cost settlement, the
18 insurer will have to reimburse after the person replaces the lost item or items.

19
20 Q And what if the insured, as a result of financial exigency, financial difficulty,
21 cannot afford to actually replace the item, what happens then?

22 A Well, that's not an easy question to answer. There is the actual cash value
23 settlement that he could accept. But if it was his intention to rebuild, in many
24 cases the insurance company will advance funds based on settlement of the
25 building or equipment. And in some cases, they will advance as much as the
26 actual cash value of the lost items.

27
28 Q And how is that process put into place?

29 A It tends to be just an agreement. The client asks for it, and the insurance
30 company has their adjustor go out and investigate to say, okay, yes, this bit of
31 property was lost or damaged, it will cost a certain amount to replace or repair.
32 And it'll cost much less as an actual cash value. There'll be a much lower limit.
33 So they're -- again, according to the contract, they are at the least amount of
34 actual cash value, financial interest, or -- sorry, for the settlement, and
35 replacement cost tends to be much higher.

36
37 So if they do get the money advanced, they can start purchasing, replacing,
38 reconstructing, that sort of thing. And they can show the invoices to the
39 insurance company saying, hey, this is what we're doing, we are moving
40 forward with the replacement cost on this, we need more, we've exhausted our
41 actual cash value funds, you can see that we've spent it here, and we need more

1 to effect replacement cost.

2

3 Q Do you recall talking with Mr. Guilbert about moving forward with replacing
4 the building and contents?

5 A I know we had many discussions on the insurance and that sort of thing and
6 how it's going to work, but I don't remember a -- a conversation in particular
7 that we just talked about that sort of thing. I do remember that he had options
8 to lease a property next door, that was one of the options. Another option was
9 rebuilding on site. And -- and so there was -- we did talk about many different
10 things regarding the claim.

11

12 Q If you go to the top -- second paragraph on the next page of your report, tab
13 167, you set out the -- or state the phrase: (as read)

14

15 If the insured elects not to replace the lost or damaged
16 property.

17

18 How does -- how would Mr. Guilbert have gone about electing not to replace
19 the lost or damaged property?

20 A Well, in my experience, you basically tell the adjustor I'm not going to rebuild,
21 I'm not going to replace, I would like a cash settlement.

22

23 Q And to the best of your knowledge, did that ever happen in this case?

24 A I don't recall it. I didn't see any correspondence on that, that I recall.

25

26 Q Now, there's also a reference to actual cash value, and you state, again in that
27 same paragraph: (as read)

28

29 The generally accepted insurance definition of ACV ...

30

31 Being actual cash value, I take it: (as read)

32

33 ... is replacement value less depreciation.

34

35 How is depreciation determined?

36 A Well, that is one of the toughest questions to answer in insurance. In a lot of
37 cases, it -- it's -- it ends up being a negotiation between the insured and the
38 insurer. The insurance company will make an offer -- when they realize the
39 client has -- wants to go ahead with that, they'll make an offer, we'll give you
40 this much, and it's usually a negotiation. Some take the market value of an
41 object and -- and give it that as the actual cash value. That goes against the

1 insurance definition, but it's something that is used to find the actual cash value
2 of an object. It's easier to do with automobiles that are lost. You can look at
3 hundreds, if not thousands, of identical vehicles that are up for sale and figure
4 out what its cash value is.

5
6 Q I take it for depreciation you could use a factor?

7 A I suppose you could. I don't know what that is, but you --

8
9 Q So you're not aware of --

10 A There's no hard and fast rule that it's 50 cents on the dollar or 60 cents or 70
11 cents but ...

12
13 Q Going back to your activities report, document 93, the activities list. The very
14 first page, 208, last entry in which you're involved is April 21st, 2015. You see
15 where it indicates your having spoken to Pat on the phone, advised that we
16 have had not had any updates from Econ? I take it that's Economical Mutual
17 Insurance?

18 A Correct.

19
20 Q And then the list ends at April 21st, 2015; correct?

21 A Yes.

22
23 Q What is your explanation for the activities list ending at April 21st, 2015?

24 A I have no idea. I know I worked with Pat well into June and July, and mostly
25 that was proofs of losses.

26
27 Q Very well. So --

28 A Going back and -- I -- I don't know why this list is incomplete. It appears to be
29 incomplete. But certainly, the file wasn't closed in April.

30
31 Q So from that point of view, you say that the list may be incomplete and that
32 you continued to work with Pat; correct?

33 A Yes.

34
35 Q What about continued correspondence with the adjustor, Crawford?

36 A The correspondence I had with the adjustor around that time --

37
38 THE COURT: That time being?

39
40 A Late April. Mid to late April.

41

1 THE COURT:

Okay.

2

3 Q MR. DAVIDS:

Of 2015?

4 A Yes.

5

6 Q Was -- basically, I was carbon copied on correspondence going back between
7 him and Patrick, so there wasn't much. If Patrick, for instance, would contact
8 me and say I haven't heard from Randy, Randy isn't answering me, when is this
9 going to happen, then I would, in turn, send my concerns on to Randy saying,
10 hey, Randy, are you going to get back to Patrick on this. And correspondence
11 from Randy would be, I've asked Economical or I put that to Economical and I
12 await their answer. So ...

13

14 Q Do you recall continuing communications with Crawford beyond April?

15 A I'm -- I don't recall it, but I'm sure there must have been, but there wasn't a lot.
16 Like, the communication, like I say, was mostly here's a letter going out to
17 Patrick with you being carbon copied on it.

18

19 Q Did -- did communication with Crawford ever stop?

20 A Well, it did. Communication with Patrick stopped as well. It -- so, yes,
21 communication with Crawford did stop. I can't say when, and I don't know -- I
22 don't think that there was any reason for it, other than the claim was denied and
23 -- and the books were closed at that time.

24

25 Q Can you recall, approximately, when that would be?

26 A I think early June, Patrick -- I think we were expecting an answer on the final
27 proof of loss, I believe, and it may -- may -- may not have been the final. But it
28 was, essentially, 60 days after he submitted his proof of loss and it was
29 declined, saying that you made mistakes on your proof of loss and it was being
30 rejected, please correct it. That was early June. And I know there was a few
31 other iterations with the proof of loss. I believe it was early June. That's going
32 on my recollection.

33

34 Q Would it refresh your memory if I made reference -- if -- if I asked you to go --
35 to go back to tab 29 in volume 2?

36 A Okay, I have it.

37

38 Q The date on that is June 17th, 2015; correct?

39 A Yes. So this is likely the proof of loss that followed the June 9th, and --

40

41 Q You said June 9th. Is there --

1 A I think -- I think I recall June 9th being the day that the -- the claim denial letter
2 was received.

3
4 MR. FINLAYSON: You mean the complete final denial, that
5 one?

6
7 A Well -- no. It would have been the --

8
9 MR. FINLAYSON: Because that was August 25th.

10
11 A -- it would have been the rejection of the proof of loss by -- that we received
12 from Randy.

13
14 MR. FINLAYSON: July 6th. It's tab --

15
16 A It's July 6th?

17
18 MR. FINLAYSON: -- tab 32. (INDISCERNIBLE)

19
20 A My mistake.

21
22 MR. DAVIDS: Very well. Yes. Thank you, Mr.
23 Finlayson.

24
25 I'm wondering, My Lord, if we could take a -- a brief break. I -- I can carry on, but
26 I do have a question for my learned friend about a specific document that, itself,
27 does not show up in the agreed book of documents.

28
29 THE COURT: Okay. Well, we'll take a 15-minute
30 recess. Okay. Let me just -- one second.

31
32 (ADJOURNMENT)

33
34 THE COURT CLERK: Oh, we're back on the record. So you can
35 be seated, it's now on the record.

36
37 MR. DAVIDS: If I might just have a moment, My Lord,
38 to review a document that I -- again, was -- Ms. Lisi copied. And it's something
39 that doesn't come from the defendant, but I just wanted to review it very briefly
40 with my client just for a moment.

41

1 THE COURT: Yeah. Do you want me to step out or do
2 you want to --
3

4 MR. DAVIDS: No.

5
6 THE COURT: -- just take a minute?
7

8 MR. DAVIDS: This will, like --
9

10 THE COURT: Okay.
11

12 MR. DAVIDS: -- be 15 seconds.
13

14 THE COURT: It's okay.
15

16 (WITNESS RE-TAKES THE STAND)
17

18 Q MR. DAVIDS: Mr. Topp, this is a document that Mr.
19 Guilbert advises that he created, which is undated but has headings which
20 include the word buyout and the phrase move to co-op and the phrase build
21 new. It appears that the version I've got duplicates the first page which is
22 numbered 00990, and then there's a -- following -- following that are two
23 additional pages outlining what appears to be replacement costs of the
24 building. Does this look familiar to you?

25 A I don't recall this particular document. I do recall talking to Patrick about
26 moving to co-op, and this may have been part of the discussion. And I would
27 say that the buyout version, without really drilling down on this, may be his --
28 his attempt to come up with an actual cash value settlement on the buyout.
29 Move to co-op would be that option he mentioned about leasing the space next
30 door that was unoccupied. And the build new is the cost that he is estimating
31 for replacing the building, equipment, and contents, all of the chattels of the
32 business, brand new.
33

34 Q Thank you.
35

36 MR. DAVIDS: My Lord, given that the witness can
37 identify it, and that I had my opportunity to lead it through Mr. Guilbert, I'd seek
38 my learned friend's comments as to whether he feels it's helpful and/or admissible.
39

40 MR. FINLAYSON: C for Identification, My Lord, please.
41

1 THE COURT: All right. We'll identify it as Exhibit C
2 for Identification.

3
4 THE COURT CLERK: Exhibit C. And what's it called?

5
6 MR. DAVIDS: Outline of options.

7
8 THE COURT CLERK: Outline of options, okay.

9
10 MR. DAVIDS: Outline of settlement options prepared
11 by plaintiff.

12
13 THE COURT CLERK: Exhibit C.

14
15 **EXHIBIT C - FOR IDENTIFICATION - Outline of Settlement Options**
16 **Prepared by Plaintiff**

17
18 THE COURT: Thank you.

19
20 Q MR. DAVIDS: So again, Mr. Topp, going back to this
21 concept of electing not to replace his loss, is it fair to say that Mr. Guilbert, at
22 no point, ever elected to not replace his assets?

23 A As far as I know, he didn't declare it to me saying I'm just going to ask for a
24 payout.

25
26 Q He did not?

27 A I don't believe so. We probably discussed it. I would discuss that with all of my
28 clients who had a loss, giving them all the options that would be available.

29
30 Q If we could go to -- back to document 167, second page of your report, where
31 you make reference to the assessment of damages. So item one is inventory,
32 and you describe what inventory is, and make a general statement saying that:
33 (as read)

34
35 Replacement cost for this item would ...

36
37 And I'm reading from the very bottom: (as read)

38
39 Replacement cost for this item would be available if the
40 stock were, in fact, replaced, otherwise it falls back to
41 ACV.

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Again, if you could confirm for me how Mr. Guilbert was going to replace his inventory in this case?

A Well, stock is a unique property that's covered under a property policy in that the actual cash value is, essentially, all that the retailer would be allowed to claim because that is the replacement cost is the actual cash value. The stock doesn't depreciate. It's -- it would be unfair for the insurance company to say we're going to depreciate the stock you've just bought and haven't used, it's held for sale. In the same sense, they can't get retail value of that stock item because that would be unfair to the insurance company.

Q In that regard, I'm going to suggest that a recent inventory -- if a recent inventory at the store was done, would that include a useful number, to the extent that Home Hardware set out what the inventory at Mr. Guilbert's store was?

A Now, the way I understand retail operations is that when you do an inventory it's not based on the retail value of the items, it's based on the cost of the items.

Q So if I could have you turn then to document 29 in volume 2, which is what we've referred to as Mr. Guilbert's final attempt to provide a proof of loss -- comprehensive proof of loss. There actually is one following it. If you could turn to that, please. And --

THE COURT:

Sorry, what tab?

MR. DAVIDS:

That's tab 29, My Lord.

THE COURT:

Yeah.

Q MR. DAVIDS:

And go to the third last page. So right at the end, just before tab 30, and then count three pages back to a document entitled full inventory recap; do you see that?

A Yes.

Q So the date is January 18th, 2015. And if you go seven lines down, there's an entry, total inventory counted, \$202,065.55; you see that line?

A Yes.

Q To what extent does that reflect a reasonable actual cash value for the inventory in Mr. Guilbert's store as of that date?

A Well, in my opinion, that would be the actual cash value.

1
2 Q And if Mr. Guilbert calculated his sales and replacement of new inventory as
3 of the date of the fire at \$175,000, would that be in keeping with your
4 experience as to a reasonable rate of reduction of that amount, keeping in mind
5 that Mr. Guilbert was not able to order new goods? And I guess I've said a
6 number of things there, but you may well be aware that Mr. Guilbert was not
7 able to replace stock because his ordering on his dealer account was restricted?

8 A I -- I would say that it would be fairly easy to come very close to the actual
9 number of lost stock based on the sales and any new inventory coming in. And
10 if there were no new inventory coming in, it would be fairly easy to figure out
11 what would, essentially, be left as inventory in the -- inside the store at the time
12 of the loss.

13
14 Q On the understanding that \$202,065, as set out in the full inventory recap, is, to
15 the best of your understanding, a reasonable statement as to the actual cash
16 value of the inventory at that time?

17 A I believe so. And I believe it was counted by a third party and verified by a
18 third party.

19
20 Q You're familiar with Kevin Leis, of Home Hardware?

21 A I -- I've never met him, but I -- if anyone from Home Hardware were to do a
22 onsite inventory check, I'm sure that you could probably accept their work as
23 good.

24
25 Q There's reference in the materials to a stocking rate. Are you familiar with that
26 term?

27 A I'm not.

28
29 Q Okay. So my summary question is if Mr. Guilbert says \$175,000 is the value of
30 inventory as the date -- as of the date of the fire, February 25th, 2015, is it fair
31 to say that's a reasonable estimate, on its face?

32 A In my opinion, absolutely. We -- we see a lot of these types of issues, where
33 physical inventory hasn't been done for years, and it can take months and
34 months to come up with a number that is acceptable to both the insurer and the
35 insured. In a case like this, where the inventory being done around a month
36 before, I think it's -- I think it's pretty easy to say that that's fairly accurate.

37
38 Q Your next area in your report is entitled equipment of the apartments. If we go
39 to the very first page of document -- or tab 29, Mr. Guilbert has stated \$8,160.
40 If Mr. Guilbert said this is based on the SKUs sent by Home Hardware
41 representing my having purchased fridges and stoves for the apartments, would

1 that be a reasonable basis on which to make the claim?

2 A Yes. I think it would be very easy to verify that again. And to me, \$2,000 for a
3 fridge and a stove seems fairly modest.
4

5 Q There being four apartments?

6 A Yes.
7

8 Q Yeah. Item three is rental income. Now, you described that it's provided under
9 the business interruption form of the policy --

10 A Yes.
11

12 Q -- and that it will stop if the insured elects not to repair, replace the property?

13 A Yes.
14

15 Q But you also indicate that -- and I'm reading from the first paragraph: (as read)
16

17 Business interruption coverages commonly provide
18 indemnity for 12 months after the time of the loss.
19

20 Do you see where it says that?

21 A Correct.
22

23 MR. DAVIDS:

Again, going back to 167, My Lord.

24 That's the -- now the third page of the --
25

26 THE COURT:

M-hm.
27

28 MR. DAVIDS:

-- report.
29

30 Q MR. DAVIDS:

31 Did Mr. Guilbert's -- or his company's
32 coverage include business interruption coverage, to the best of your
33 knowledge?

34 A Yes, it did.
35

36 Q Okay. And that would have included the rental from the apartment?

37 A Yes.
38

39 Q Now, in terms of how to calculate the rents, I take it one would have to look at
40 the actual rents received?

41 A Yes.

1 Q So if I can turn you to document 117, please; that's in volume 6. I'm sorry, it's
2 not 117. It's been referred to in evidence as the MDD report, and I took 117
3 from a different source.
4

5 MR. FINLAYSON: It's either 140 or 137.
6

7 MS. LISI: One forty.
8

9 MR. FINLAYSON: One forty.
10

11 MR. DAVIDS: Thank you, Mr. Finlayson. That's
12 correct.
13

14 Q MR. DAVIDS: If you could turn to tab 140.
15

16 THE COURT: What page?
17

18 MR. DAVIDS: I haven't got to the page yet --
19

20 THE COURT: Oh, I'm sorry.
21

22 MR. DAVIDS: -- My Lord.
23

24 THE COURT: It's okay.
25

26 MR. DAVIDS: Because I -- I had the number wrong in
27 the first place.
28

29 MR. FINLAYSON: And it's appendix 'C'.
30

31 MR. DAVIDS: Yes, I've found it now. Just counting,
32 from the back, one, two ...
33

34 THE COURT: Yeah.
35

36 Q MR. DAVIDS: Seven pages from the back, working
37 from the very end, just before tab 141, count seven pages back to the document
38 that's entitled appendix 'C' in the upper right-hand corner. Do you --
39

40 A Yeah.
41

Q -- see where it indicates under other revenue, about halfway --

1

2 THE COURT:

At page 2 -- page 2 of appendix 'C'.

3

4 MR. DAVIDS:

That's correct. Page 2 --

5

6 THE COURT:

Yeah.

7

8 MR. DAVIDS:

-- of appendix 'C', My Lord.

9

10 Q MR. DAVIDS:

11 about two-thirds of the way up the page because it's oriented widthwise, you
12 see where it says other revenue?

13 A Yes.

14

15 Q If I were to tell you that this report is a financial condition analysis prepared by
16 forensic accountants, having a date of February 26th, 2016, and, admittedly,
17 you don't know, necessarily, what a forensic accountant is or who these people
18 are, but if the figures in appendix 'C' are an accurate statement of the rents
19 received historically, starting December 31st, 2012 up to December 23rd,
20 2014, would an average of those rents averaged out over that period of time,
21 December 31st, 2012 to December 31st, 2014 -- and you see where it says rent
22 suite one, suite two, suite three, suite four?

23 A Yes.

24

25 Q So would an average of those rents be a reasonable means of establishing
26 rental income for the purpose of item three in your report?

27 A Well, in my experience, it's the -- whatever the actual rent was multiplied by
28 the -- the time that the building was unacceptable or inaccessible or rents were
29 not paid because of an insured loss.

30

31 Q What about rents not paid simply because the renter was behind?

32 A I don't believe there's coverage for that in the insurance policy. That would be
33 an accounts receivable type of policy, a credit insurance policy, but not -- not
34 recoverable under a general property insurance policy.

35

36 Q So it's calculated based on actual rents received?

37 A What the rental value of each suite was multiplied by the number of months, or
38 days in cases, unoccupied.

39

40 Q If we move on to item four, equipment, and item five -- so in the assessment of
41 damages, which -- which is our guide, there's items four and five, which

1 outline equipment in item four and item five is furniture and fixtures. You say
2 that's one line in the proof of loss?

3 A That's correct. One -- one item or coverage section.
4

5 Q And, again, if we go back to tab 29, and the outline of the various items
6 claimed, including supporting SKUs, Mr. Guilbert has a figure of 147,328 for
7 the equipment, and \$240,405 for the furniture and fixtures. That's in his proof
8 of loss. Not in the assessment of damages, in his proof of loss. If Mr. Guilbert
9 can establish those two numbers, again 147,328 and 240,405.80 as the total of
10 equipment, furniture and fixtures based on SKUs, is that a fair assessment of
11 the actual cash value of the -- I'm sorry, of the replacement cost of the items?

12 A Well, again, a Home Hardware dealer has a -- is in a unique position to buy it
13 wholesale. So if he were to replace all of those items through Home Hardware,
14 he would, essentially, be saving the insurance company some money. He
15 doesn't have to buy it from Home Hardware. But on the fixture side of things,
16 he'd have to buy the -- purchase through them the counters and the -- the store
17 specific items, but there'd be other things he wouldn't necessarily have to pay.
18 So it would be fair to say that the actual cash value, if you were purchasing
19 everything on a SKU through Home Hardware, would be the actual cash value.
20

21 Q In other words --

22 A To replace it brand new through Home Hardware, I think it would be actual
23 cash value. If you were to purchase it through some other type of agent, then I
24 guess it would be replacement cost.
25

26 Q But you accept that the actual cash value, to the extent that it's purchased
27 through Home Hardware, is, more or less, what his purchase price through
28 Home Hardware is?

29 A Right. Like, you and I couldn't buy the same thing for the same price through
30 Home Hardware.
31

32 THE COURT:

33 So what was the answer though to the
34 question? And maybe I missed it. He -- I think -- do you want to repeat the
35 question or was it -- I think you --

36 MR. FINLAYSON:

He said yes.

37
38 MR. DAVIDS:

It -- it --

39
40 MR. FINLAYSON:

He said yes.
41

1 THE COURT:

It was fair?

2

3 MR. FINLAYSON:

He said yes, it was fair.

4

5 THE COURT:

Okay. Sorry.

6

7 Q MR. DAVIDS:

Fair that the S-K-U's -- the SKUs, to the extent that they're used to establish the value -- replacement cost of the equipment and the replacement cost of furniture and fixtures, as set out in tab 29, is that a fair setting out of what the ACV is, the actual cash value?

10

11 A

12 Well, I guess if the -- if the ACV option were to be utilized in this case, that the insurance company could take the value of what he had and depreciate that and base the actual cash value on what he had, not what he's replacing it with.

13

14

15 Q

16 But, again, the -- the -- you're saying replacement cost, if he actually replaces it, is accurately reflected, to the extent that it's set out in a series of SKUs?

17 A

18 Yes. And -- and, again, it would be fairly easy to verify those numbers with Home Hardware because they do open these stores on a monthly basis across Canada, so they got a good handle on what the cost would be to outfit a store.

19

20

21 Q

22 If we could move on to the building item. And, again, referencing tab 29, where Mr. Guilbert has said the cash value of the building is \$1,559,402 and he says see schedule. If you go to the very back of the tab, tab 29, there's a reference to replacement cost by way of square footage. And there's actually two. The very last page sets out basement construction, \$40 per square foot to \$75 per square foot, and then residential apartments, \$150 to \$200 per square foot. The previous page sets out a different person's estimate. The first one was Pat Weir. The second one is Darren Eddie. Main floor with foundation, \$240 per square foot, second floor is \$200 -- the apartments, in other words, \$200 a square foot. If we go to your report, on building -- this is the last page of your report, document 167 -- you say: (as read)

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Replacement cost assessed at \$175 per square foot seems on the high end of reasonable.

35

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41

So I'd like to break that down. First of all, \$175 per square foot, I take it you're -- you're taking from the assessment of damages, where -- and -- and I'm reading from Exhibit 'B' --

A I took that from the information you sent me when you asked me to review.

1 Q Again, the assessment of damages. And I'll -- I'll show it to you. Very last
2 page, where you indicate: (as read)

3
4 The square footage of the three elements of the building
5 were multiplied by a reasonable estimate of replacement
6 cost per square foot ...

7
8 The word foot is missing: (as read)

9
10 ... \$175 and used to determine the replacement cost
11 claimed.

12
13 A Okay.

14
15 Q But then you say the coverage limit under the policy is \$1,350,906. So what I'd
16 like you to comment on, Mr. Topp, is whether or not that averaging of
17 replacement cost factors is reasonable, and what you mean by \$175 being at
18 the high end of the range?

19 A Well, I've been involved in a -- a few total loss fires with Home Hardware
20 stores and the rebuilding, and the rebuilding cost generally runs between \$145
21 to \$155 a square foot. Now, those Home Hardwares did not have
22 condominiums or apartments above them, which is why I said that may
23 account for -- I don't know what the finishings were like in the -- the
24 apartments, for instance, just have no idea. But generally, the cost per square
25 foot runs between 145, \$155 a square foot, and will also depend on warehouse
26 space and that sort of thing. And, again, I would defer to the engineers who had
27 more information than I did.

28
29 Q Okay. But to the extent that Mr. Guilbert was still seeking to rebuild, if the
30 efforts on his part to rebuild were found to be genuine, and policy limits were
31 exceeded by the actual cost to rebuild, it's fair to say that he would be entitled
32 to policy limits; correct?

33 A Could you rephrase that?

34
35 Q Well, if Mr. Guilbert is making reasonable efforts to rebuild, and his cost to
36 rebuild exceeds the policy limits based on square footage times \$175 or
37 whatever number takes you to the policy limit shown there, it's fair to say that
38 he would be entitled to the policy limit?

39
40 MR. FINLAYSON: Well, My Lord, I just want to -- I want to
41 stop the confusion here. The policy limit is undisputed, 15 million dollars. Is my

1 friend now saying that 15 million dollars is claimed? Because that makes no sense,
2 I'm sorry.
3

4 Q MR. DAVIDS: Well, the -- the report is based on an
5 assessment, and perhaps I've put too much stock in the assessment. I -- I guess
6 what I'm saying is that Mr. Guilbert has multiplied a -- or is -- is asking, in
7 making this claim, for the replacement cost to be assessed by way of a factor;
8 correct? By way of a number per square foot?

9 A Oh, okay.
10

11 Q And I'm --

12 A And that came from the engineers, which is, kind of, accepted practice.
13

14 Q And to the extent that he has calculated this based on an average, and it turns
15 out to be \$175 a square foot, you're saying this is -- forgetting about policy
16 limits all together. I agree with my learned friend that that was a confusing
17 question, and subject to some confusion on my part. Forgetting about policy
18 limits altogether, what I'm asking you is is it, in your experience, reasonable to
19 assess replacement cost on a factor which is represented by cost per square foot
20 to rebuild?

21 A Yes.
22

23 Q Okay. And that if Mr. Guilbert said it was \$175 per square foot, it seems high
24 to you but within the reasonable range?

25 A Depending on circumstances. Different parts of the country have higher
26 rebuilding costs than other places, labour costs are higher, materials are higher,
27 that sort of thing. It's -- it's not tried and true. But if it were out of the ordinary,
28 then certainly the insurance company wouldn't just sit back and accept that
29 number, but they would verify it, likely with their own appraisal.
30

31 Q The final item is business interruption. If you go to the last page of your report,
32 you say: (as read)
33

34 Business interruption ...
35

36 MR. DAVIDS:

Again, at tab 167, My Lord.

37
38 Q MR. DAVIDS:

(As read)

39
40 Business interruption insurance endeavours to provide
41 funds to cover continuing expenses after a loss and top up

1 income to the profit level of the business at the time of the
2 loss.
3

4 So my general question is, for business interruption insurance to apply, what's
5 the connection between that and profitability?

6 A Well, in order for it to apply the loss has to be covered by an insured peril,
7 which in this case fire is an insured peril. And if it damages the building and
8 you can't operate your business, then it would apply. And, basically, it's to keep
9 you in the same financial position as you were just before the loss, so that your
10 continuing expenses would be covered, and even though your doors are closed,
11 you would get the profit that you were making on a daily basis, essentially.
12 You wouldn't -- it wouldn't just cover your continuing expenses and that would
13 be it, it would give you what your profits were.
14

15 Q And if the store was making no profits, if expenses exceeded revenue, how
16 would that be calculated?

17 A Well, that is beyond my scope of expertise, and I'm not sure how that's derived
18 or what type of a factor that is. I --
19

20 Q Would you be able to claim anything in terms of continuing expenses if you
21 weren't making a profit?

22 A This -- this example was the first time I've ever come across that. And it was --
23 I -- I believe it was calculated by the forensic accountants, they're auditors, and
24 their answer was no. And it was -- it's beyond my scope of understanding.
25

26 Q So from the point of view of covering continuing expenses, if there were
27 wages, for example, to be paid because Mr. Guilbert was choosing to relocate
28 and continue with the same labour -- or same staff, would those wages be
29 covered as a continuing expense?

30 A Well, there is a -- an endorsement to that part of the policy that's ordinary
31 payroll, and it covers for up to 90 days of ordinary payroll, and that would be
32 your basic staff, excluding key personnel. So that's -- that's what payroll
33 coverage is for. In this case, I had a really hard time understanding why there
34 wouldn't be any business interruption paid. And the -- I wouldn't say the best
35 explanation, but the -- the way it was described to me is that insurance is a
36 contract of indemnity, and that if Patrick received any business interruption
37 payment he would be profiting from the loss and not being indemnified
38 because the business was losing money on a daily basis instead of making a
39 profit.
40

41 Q But you didn't accept that statement or don't accept that?

1 A I don't understand it. I don't understand it, honestly.

2

3 Q So you're saying it's reasonable for Patrick to have made a business
4 interruption claim?

5 A Yes.

6

7 Q And, at minimum, the business interruption claim would have covered his
8 continuing labour expense, for example?

9 A Up to 90 days for that.

10

11 Q And this would be regardless of whether he was making a profit?

12 A Well, this is a profit form of business interruption coverage, so I think that
13 might have something to do with it.

14

15 Q I'm not sure I follow. If -- if --

16

17 MR. FINLAYSON:

18 Well, I have to rise. I've tried to allow
19 my friend a lot of latitude. No business interruption claim was presented, none is
20 in the proof of loss, when it was raised at the discovery stage with Mr. Tapper, he
21 said none was being made, there's no evidence of one, there's no calculation of
22 one, there's no documents proving one, so I object to further evidence on
23 something that's entirely academic, irrelevant, and has nothing to do with this case.

24 THE COURT:

Mr. Davids?

25

26 MR. DAVIDS:

27 Well, again, the proof of loss, clearly,
28 does not set out business interruption, but it is certainly relevant that Mr. Guilbert
29 had business interruption insurance and had advice to the making of a claim for
30 business interruption insurance, and the result being that it was, as Mr. Topp has
31 explained, found -- found to be wanting. Again, it -- it, ultimately, goes to the
32 issue of good faith.

33 THE COURT:

34 I don't remember -- and the record will
35 say what it is. You're saying he got advice from the company not to -- I don't
36 remember any evidence to that --

37 MR. DAVIDS:

38 No. Mr. -- Mr. Topp's evidence was that
39 he understands that somewhere in the materials is an analysis of how Mr. Guilbert
40 had no basis to make such a claim.

41 THE COURT:

You'll have to, I guess, point that out

1 somewhere --

2

3 MR. DAVIDS:

4

Very well.

5 Q MR. DAVIDS:

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I'll -- I'll move on from that point to the last point, which is when we talk about rebuilding, it was not necessary for Mr. Guilbert to rebuild as a Home Hardware store in order to be properly claiming for replacement cost on the building; is that fair?

A I -- I'm not a hundred percent sure on that. I don't think that he would be entitled to replacement cost if he was building a repair garage, for instance.

Q What if it was another retail outlet?

A If it was a like kind of retail, I think it would be -- I don't think it would have to be branded as a Home Hardware store. But a restaurant, there may be some difficulty with that.

Q I'm going to ask you to turn to document 158. And, admittedly, this is outside the report. But this Pat's dealer equity account. It's in volume 7. At tab 158, the title is outstanding equity for Guilbert Enterprises Ltd. Could you explain to me the extent to which equity for Guilbert Enterprises Ltd. is considered an asset of the business and subject to a claim, if -- if applicable at all? Is -- is -- in other words, his total equity of -- as of March 31st, 2015, \$413,370, is that something that would be considered if, for example, he lost his right to make a claim in that regard? Is that, to the extent that it shows up in his financial statement, something for which he can claim?

A On an insurance policy?

Q Yes.

A Not this insurance policy, no.

Q Okay.

A Under a credit insurance policy it's possible, but not under this.

Q If we could go back to your conversations with Economical, the -- the defendant, because -- and you do refer to, in your activities list, conversations with Economical, you recall that?

A They -- there weren't many, and most of the communications were between myself and Randy LaBrash. And I think the only times I reached out to Economical is if I wasn't getting a response from Randy or Patrick wasn't getting a response.

1 Q Okay. Now, you say you talked to Patrick after the end of that activities log
2 and that it's an incomplete document?

3 A I think so.

4

5 Q Yeah. And it may well have been into June, and you indicate June 9th was a --
6 a date that stuck in your mind?

7 A Yes. I thought that was the -- the 60 day period with which --
8

9

10 Q Okay.

11 A -- Economical had to respond.

12

13 Q Yeah.

14 A And maybe it was July that --

15

16 Q Okay.

17

18 MR. FINLAYSON:

Well, the proof is dated June 17th.

19

20 Q MR. DAVIDS:

21 So what I'm asking you, Mr. Topp, is do
22 you have any recollection of when, to the best of your recollection, you
23 stopped communicating with the defendant itself, with Economical?

24 A It would have been probably around June, July, in there, when -- when Patrick
25 stopped communicating to me that he wasn't getting anywhere with -- with
26 Randy.

26

27 Q And that's of 2015?

28 A Yes.

29

30 Q Okay.

31 A But, again, the only contact I had with Economical was, basically, to say
32 Patrick's not hearing anything from Randy, can you follow up, please.
33

34 MR. DAVIDS:

Thank you, Mr. Topp.

35

36 My Lord, no further questions for this witness.

37

38 THE COURT:

Okay.

39

40 MR. FINLAYSON:

1:30, My Lord?

41

T45

1 THE COURT:

Yeah, 1:30 is -- is fine.

2

3 MR. FINLAYSON:

Thank you.

4

5 MR. DAVIDS:

Thank you, My Lord.

6

7 THE COURT:

Thanks. Okay.

8

9

10

11 PROCEEDINGS ADJOURNED UNTIL 1:30 PM

12

1 October 23, 2018

Afternoon Session

2

3 The Honourable Mr. Justice

4 D. Kroft

The Court of Queen's Bench
for Manitoba

5

6 M. Davids

For the Plaintiffs

7 S. Fast

For the Plaintiffs

8 M. Finlayson

For the Defendants

9 G. Lisi

For the Defendants

10 D. Delaronde

Court Clerk

11

12

13 **Discussion**

14

15 THE COURT CLERK:

All right. We're back on the record.

16

17 THE COURT:

Okay.

18

19 **PAUL TOPP, Previously Affirmed, Cross-examined by Mr. Finlayson**

20

21 Q MR. FINLAYSON:

Mr. Topp, you're familiar with statutory

22 conditions 6 and 7?

23 A I couldn't recite them. If you could refresh me.

24

25 Q I can.

26 A Thank you.

27

28 Q You're welcome.

29

30 THE COURT CLERK:

Thank you.

31

32 THE COURT:

Thank you.

33

34 Q MR. FINLAYSON:

Now that you see them, you're reminded

35 of them?

36 A Yes. Thank you.

37

38 Q You're welcome.

39

40 And you say in your report you referred to the duty of good faith that an
41 insured has as well; correct?

1 A Absolutely, yes.

2

3 Q And, in fact, at page 1 of your report, in the second paragraph, you say, and I
4 quote: (as read)

5

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And then you say: (as read)

14

15

It is up to the insured to provide proof of their loss.

16

17

18

And all of that is true; correct?

19

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21

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A To the best of my knowledge, yes.

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Q And so if an insured is dishonest in presenting his claim, then that's a breach of
that insured's duty of good faith; right?

A Yes.

Q Right? That's obvious; right?

A If it's intentional, yes.

Q Yeah. You're suggesting that dishonesty might be accidental?

A Yes.

Q How -- how is that?

A Well, for instance --

Q As opposed to being mistaken?

A Well, it would be the same thing.

Q No. No. No. You're saying the word dishonest does not imply intent? I want to
make sure we're on the same page.

A Well, I guess I -- I meant mistaken then.

Q Okay.

A But --

1 Q So you agree with me that if an insured is clearly dishonest in presenting his
2 claim that that would be a breach of his duty of good faith?

3 A Yes.

4
5 Q Yeah. And I agree with you, if it's just an honest or innocent mistake, that
6 would not be a breach; right?

7 A Correct.

8
9 Q And if an insured attempts to mislead or conceal information that's material to
10 the presentation of the claim, that would be a breach of the duty of good faith
11 as well; right?

12 A Yes, correct.

13
14 Q Yeah. And one of the first things that an insurer has to do in reaction to a claim
15 that's being presented is to determine whether the loss is covered by the policy;
16 fair?

17 A Yes.

18
19 Q And in the context of evaluating whether the loss is covered by the policy, the
20 insured may, depending on the circumstances, have to look at exclusions
21 within the policy?

22 A Absolutely.

23
24 Q And some exclusions in a policy and this policy like virtually every other
25 property coverage policy, relate to the cause of the loss; right?

26 A Yes.

27
28 Q And there's no doubt that an insurer will want to satisfy itself to the extent
29 possible regarding the cause of the loss?

30 A Yes.

31
32 Q And if the cause was the result of a wrongful intentional act of the insured, say
33 by setting fire to the property insured under the policy of insurance, then there
34 would be no coverage; right?

35 A In that case, the insurance company wouldn't have to respond if the insured
36 made a claim.

37
38 Q So you're agreeing with what I said?

39 A Yes.

40
41 Q Oh, thank you.

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And if the circumstances of the loss appears suspicious, then then insurer is certainly justified in making inquiries and asking questions and investigating further; correct?

A Even if it's not suspicious they have that right and duty.

Q Now, assume that an insured is in financial extremis, that is the -- it's insolvent and it's on the verge of bankruptcy; are you with me so far?

A Yes.

Q All right. And that the loss is caused by a fire that occurs four minutes after the insured leaves the premises that are insured; are you with me again still?

A I am, yes.

Q All right. You'd agree it would be entirely appropriate for the insurer to investigate at some -- in some detail the circumstances of the cause of the loss; fair?

A Fair.

Q Yeah.

A I would say that if you didn't investigate any loss of that size you wouldn't be doing your job.

Q So assume that the loss is questionable, as you've just agreed it would be in those circumstances, and that the concern of the insurer is possible arson by the insured, okay; you with me?

A Yes.

Q It would be reasonable for the insurer, in the course of responding to the claim presented, to ask the insured, for example, about the financial condition of his business; fair?

A It's an obligation in the policy that they have to provide that, yes.

Q And the insurer would be justified in asking whether the business had been for sale; right?

A Yes.

Q And would be justified in asking, if it were for sale, the particulars and status of the potential sale?

A Absolutely.

1 Q And the status of the negotiations connected to the potential sale?

2 A Yes.

3

4 Q And the insurer would also be entitled, in this concern regarding arson, about
5 asking questions with some particularity regarding the opportunity that the
6 insured may have had to set the fire; fair?

7 A I think in order to establish arson you need that -- you need --

8

9 Q So you agree with me?

10 A Yes.

11

12 Q Yes. So you'd expect the insurer to ask how the business was doing just before
13 the loss occurred, you said that would be typical?

14 A Absolutely.

15

16 Q And if the insured were acting in good faith, the insured would give an honest
17 answer to that question?

18 A Yes.

19

20 Q And if the insured business were doing badly, say it was insolvent, all right, --
21 assume that it's insolvent, it can't pay its debts as they are arising; are you with
22 me?

23 A I hear you.

24

25 Q Then you wouldn't expect the insured, if he is discharging his duty of good
26 faith, to say, in response to the question how is your business doing, that it's
27 doing all right; right? That's -- you agree with me?

28 A I guess that's fair.

29

30 Q Yeah.

31 A However, in the context of -- of when and where the question were asked, it
32 might be -- a different answer might pop up.

33

34 Q Yeah. But suppose --

35 A If, for instance --

36

37 Q -- suppose -- suppose what's happened is an independent adjuster is trying to
38 find out the state of the insured's business and is asking about the debts and the
39 mortgages and everything else and says how's your business doing, you
40 wouldn't expect an insolvent business owner to say, oh, it's doing all right,
41 would you?

1 A No. No, you wouldn't.

2

3 Q No. No.

4

5 Now -- now -- now with respect to the possibility of the business being for
6 sale, all right, I want to talk about that now. Let's assume that there were
7 discussions between the insured and an interested party about the potential
8 purchase and sale of the business, all right; you with me?

9 A Yes.

10

11 Q If the insurer inquired about the negotiations and offers or proposals between
12 those two parties, if the insured were acting in good faith, you would expect
13 the insured to answer honestly about the negotiations and any offers; correct?

14 A Yes.

15

16 Q And if the insurer said to him specifically were you offered anything, you'd
17 expect an honest answer; right?

18 A Yes.

19

20 Q And if the insurer asked the insured and what amount would you accept --
21 would you have accepted, you'd expect an honest answer?

22 A Yes.

23

24 Q Now, it follows from what you just said that if the insured concealed a
25 document that he had prepared and had asked the potential buyer to sign -- if
26 he concealed that and lied about it under oath even at an exam for discovery,
27 you'll agree with me that that would not be in discharge of a duty of good faith;
28 correct?

29 A Not knowing all the particulars, if there was a --

30

31 Q Just assume there's a lie about an agreement that he prepared and he said he
32 didn't prepare it, that he'd never seen it before.

33 A Was there any other statutory restraint from him answering --

34

35 Q No.

36 A -- the question?

37

38 Q No. None. None.

39 A Okay. Then -- then yes, it'd be dishonest.

40

41 Q Yes.

1
2 And if, in fact, the way the negotiations were left was that two days before the
3 fire the potential buyer had said to the insured I'm not going to buy your
4 business, I couldn't pay you anywhere near what you want, you should go
5 bankrupt, assume that that was said by the potential purchaser or the hoped for
6 purchaser, you'd expect that information to be communicated to the insurer in
7 response to the question after the loss how were the negotiations left at --
8 before the fire; right? Fair?

9 A Yes.

10
11 Q Now, in this case, just so you're aware, Mr. Topp -- and it may be unusual in
12 your experience; it's unusual in mine -- Mr. Guilbert, through his counsel, more
13 than once, has admitted he had a motive to set the fire, all right; you with me
14 so far?

15 A Yes.

16
17 Q So you can assume that in what I'm about to ask you about --

18 A Okay.

19
20 Q -- all right. So one of the issues that the insurer had to inquire about and
21 investigate was to what extent Mr. Guilbert had the opportunity to set the fire;
22 do you understand what I'm saying?

23 A Absolutely.

24
25 Q All right. So in response to questions about how long Mr. Guilbert had been in
26 the store alone before he left just before he set the alarm, you'd expect him to
27 be honest if he were discharging his duty of good faith?

28 A Yes.

29
30 Q Now, you'll agree with me that it would not be unusual for, in a case, because
31 of the 60-day requirement that you referred to in your evidence-in-chief, that is
32 proof of loss filed, served, communicated by the insured to the insurer, the
33 insurer only has 60 days to respond?

34 A Yes.

35
36 Q And it has to make a decision on the information it's got at that time?

37 A Yes.

38
39 Q You'll agree with me that a responsible insurer, if it denied a claim before the
40 deadline, it would be totally appropriate for it to continue to investigate the loss
41 thereafter to ensure it hadn't made a mistake; right?

1 A If it denied the claim?

2

3 Q Yes, it denies the claim -- so the 60 days is approaching, it denies the claim,
4 and it continues its investigation, in response to various things, of course, but
5 that would be reasonable to do?

6 A I guess.

7

8 Q Right? I mean, suppose it uncovered --

9 A If you're -- if you're anticipating this going further, being appealed --

10

11 Q Right.

12 A -- then, yes, absolutely.

13

14 Q Now, you agree with me that it is equally a breach of statutory condition 6 and
15 7, and the duty of good faith, to dishonestly exaggerate the amount of your
16 claim; right? Dishonestly exaggerate the amount of your claim?

17 A Well --

18

19 Q Not mistakenly, dishonestly?

20 A I get what you're saying. However, insurance companies and adjustors expect a
21 small amount of exaggeration with almost every claim.

22

23 Q Yeah. That's called --

24 A But gross exaggeration, no.

25

26 Q That's called puffery. That's called puffery.

27 A Yeah.

28

29 Q I'm not talking about that. I'm talking about fraud.

30 A Okay.

31

32 Q Okay. You agree with me that fraud's no good?

33 A Fraud is bad.

34

35 Q Right. Right. So if an insured deliberately, intentionally, dishonestly
36 exaggerates the amount of its claim, that would be a breach of the duty of good
37 faith?

38 A Yeah.

39

40 Q Yeah.

41 A Yes.

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Q And if I know, as an insured, that I've only received, in the last year before the fire, \$22,000 in rent for my four apartments, but I claim 48, 50,000, 51,000 whatever it is, I'll come to it in a minute, if I claimed more than double what I received, that might not just be a mistake? You wouldn't know, of course, but it could be willfully dishonest; correct?

A Now, under -- as I understand rental income, it's based on what the agreed upon rent is, not whether or not people have paid the rent up until time before that.

Q Really? Because in-chief you talked about not being recovered for your receivables; you said it was actual rent received and not the amount that was owing?

A I think you misunderstood me.

Q M-hm.

A The rental income -- and the rental income is basically the rent that you should receive if your rent -- you're fully rented by the time of the loss. So if you had -- if he had one empty apartment, he'd still be entitled to that rent going forward.

Q Okay. But suppose he had four full apartments who weren't paying what he claimed over the one year?

A Well, it depends on what the agreement was. If -- if they're not paying the agreed upon rent, that's a civil issue that he has to deal with. For -- for insurance purposes, he's entitled to the rent that he would be, under contract, getting if -- if everybody were paying at the time.

Q Oh, so you're saying he had another motive to set the fire because he could get his rent paid in full? Is that what you're saying?

A I -- I can't speak to motive --

Q Yeah. No, I know. It wasn't really --

A -- and -- and won't.

Q -- a serious question.

Let's go to the proof of loss, please. Let's go to the first one, which is at tab 22 in book 2.

THE COURT:

What -- what tab?

1

2 MR. FINLAYSON: Twenty-two.

3

4 THE COURT CLERK: Twenty-two.

5

6 THE COURT: Can you give me a minute.

7

8 MR. FINLAYSON: Sure.

9

10 THE COURT: Just one second.

11

12 MR. FINLAYSON: Yeah.

13

14 THE COURT: I just want to finish my

15

16 Okay.

17

18 Q MR. FINLAYSON: So this was the first proof of loss
19 submitted by Mr. Guilbert. You'll see it's date, April 15th, 2015; can you see
20 that?

21 A Yes.

22

23 Q And you'll notice some things about it, I think. It doesn't name the insurer, it
24 doesn't name the insured, it doesn't tell us the dates in which the policy was
25 enforced, it's got no line items, it's just got a total; do you see that?

26 A Yes, I do. Yeah.

27

28 Q And then it's got a bunch of documents attached to it that we'll come to in a
29 minute because they also are part of the second proof submitted. And at the
30 end of that tab you'll see another page, I think my friend may have taken you to
31 it, but it's the last page of tab 22. And this has got some other line items in
32 there. It's got \$624,000; do you see that?

33 A Yes.

34

35 Q And then it's got -- before that it's got -- a few pages before that, the page -- the
36 number at the top is 01894, it's page 24 of 27, so it's got the retail condo
37 there --

38 A Yes.

39

40 Q -- do you see that?

41 A M-hm.

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Q So this was the first proof submitted by Mr. Guilbert, all right; are you with me?

A Yes.

Q And if you could go to tab -- and this is the letter I think you must have been thinking of because of the date, June 9th of 2015 -- tab 27. Let's take it paragraph by paragraph.

THE COURT:

Are you on 27 now?

MR. FINLAYSON:

Yes.

Q MR. FINLAYSON: So this is the letter by which Mr. LaBrash, on behalf of Economical, rejected the first proof; are you with me?

A Sorry, say that again, please?

Q Mr. LaBrash, on behalf of Economical, with this letter, rejected the first proof of loss, the one we just looked at --

A Okay.

Q -- at tab 22. And in the first paragraph you'll see Mr. LaBrash is just clarifying the date; yes?

A Yes.

Q And then he says this, he says, and I quote: (as read)

A proof of loss is a significant document in connection with an insurance claim and is to be regarded seriously both by the insured and by the insurer.

You'll agree with that?

A Yes.

Q (As read)

That it must be declared before a commissioner for oaths or a notary public as confirmation of this, all of the information implicitly or explicitly required by the ICBC form ...

1 Pardon me: (as read)

2
3 ... IBC form which is within the knowledge of the insured
4 must be provided, and it must be provided in a manner
5 which permits the insurer to properly assess it.
6

7 Do you agree with that?

8 A Yes.

9
10 Q Okay. And then he points out the missing information in it; do you see that? It
11 says you don't have the expiry date, you don't have the interest of the insured,
12 you don't have the understanding of the cause of loss; do you see that? You can
13 go back to 22 if you -- if you like.

14 A Yes.

15
16 Q Okay. And then he points out that there are two substances with the proofs
17 regarding the amount of the claim, neither states the amount claimed under the
18 policy, both have amounts under the heading replacement costs, these amounts
19 are not supported in a way we can properly assess, it's difficult, if not
20 impossible, to ascertain what portions of the attached pages relate to inventory,
21 what portions relate to equipment, what portions relate to the other two items,
22 what is meant by revenue. In other words, there are a whole bunch of
23 uncertainties, according to Mr. LaBrash, on the basis of which he rejects that
24 particular proof. And you have no reason to -- to say that that's unreasonable at
25 that time?

26 A I don't think so. It took a while to get to that point, but, no, that's not
27 unreasonable.
28

29 Q Now let's go to tab 29, which is what, I think, through an exchange between
30 His Lordship and Mr. Davids, is understood to be the final last best proof of
31 loss. And you'll see at tab 29 that Mr. Guilbert has now filled in the
32 information requested; right?

33 A Yes.

34
35 Q And I take it it's fair to say, Mr. Topp, that you were available at all times for
36 Mr. Guilbert if he needed your assistance in completing or considering how to
37 -- what to do with respect to the proof of loss; fair?

38 A We -- we were available, yes.

39
40 Q Yeah. And he understood that you were there to provide assistance if he
41 needed it?

1 A Yes.

2

3 Q Because you were working for the broker; right?

4 A Yes.

5

6 Q And the broker is the agent of the insureds?

7 A Yes.

8

9 Q And in this case you -- your client was Mr. Guilbert and his company?

10 A Yes.

11

12 Q Yes. Now, let's talk about -- if I -- if I'm able I'm going to try to deal with it in
13 order -- let's deal with the building first. You talked somewhat about the
14 building, and you said -- first of all, you talked a bit about this notice -- notion
15 of -- of an election to take ACV. And I've been doing this type of work for 34
16 years -- yes, I know it -- it shows -- 34 years, and I've never heard of a form
17 signed by an insured where he -- he, in writing, says he's electing ACV. It
18 normally happens through discussions or a course of conduct.

19 A Yes.

20

21 Q Is that fair?

22 A Yes.

23

24 Q Okay. And there might be things that are occurring between the parties that
25 lead one to infer, reasonably, that he's not going to replace, he's going to want
26 to take ACV; fair?

27 A I would hate to infer something that important, but I suppose it could be
28 inferred --

29

30 Q Sure.

31 A -- but I think I would want it expressed.

32

33 Q Right. Well, let's suppose, for example -- let's suppose, for example, that it
34 became understood that the insured was probably desirous of taking ACV
35 because he knew he was going to have problems rebuilding and he'd expressed
36 that one way or another?

37 A Well, in cases I've been involved with where the client wishes to choose an
38 ACV settlement, they make that well known, clear and -- and concise.

39

40 Q Right. And in a case where somebody's going to replace, you would expect
41 certain things to be done by the person, would you not?

1 A Absolutely.

2

3 Q Yeah. If they need land on which to build, you want to make sure they have the
4 land arranged, either leased or -- or purchased; right?

5 A Yes.

6

7 Q If the land on which, for example, this Home Hardware store in Neepawa
8 existed was one where you could not rebuild there because of changes in the
9 town bylaws, then there's some hard decisions to be made, right, by the
10 insured?

11 A I don't know that there would be hard choices, there just would be choices
12 that --

13

14 Q Oh, okay.

15 A -- would have to be made.

16

17 Q Well, easy choices then. So there'd be --

18 A Well --

19

20 Q -- some easy things for him to decide?

21 A Well, the bylaws -- there is bylaws coverage within the wording of the policy
22 that would afford any additional expenses that were brought on by changes in
23 bylaws.

24

25 Q Oh, so would he be able to -- to change the bylaws? Because that's the issue
26 I'm concerned about.

27 A Would he be able to change the bylaw?

28

29 Q Yeah. Does the insurance say that the insurance company will be able to
30 change the bylaws?

31 A That, I do not believe, is in the wordings. But the wordings do say that if there
32 are additional expenses as a result to changes in bylaws over the course of time
33 then that increase the cost to rebuild it'll be covered by the insurance policy.

34

35 Q Oh, I understand what you're saying. I want you to understand what I'm saying.
36 Suppose the bylaws mean you can't rebuild on the property?

37 A That does happen.

38

39 Q That does happen?

40 A Yes.

41

1 Q So the insurance company -- the -- the insurance coverage of bylaw coverage
2 doesn't help you rebuild on the property if it's not legal --

3 A Not that property.

4
5 Q -- -- to rebuild?

6 A But it would help you --

7
8 Q Right.

9 A -- build elsewhere.

10
11 Q Exactly. Exactly. So in a case like that, where there's a financial -- potential
12 financial impediment to -- to actually rebuilding and/or a legal impediment to
13 building on that site, the issue of how to quantify the actual cash value of the
14 building might be a problem?

15 A It's possible, yeah.

16
17 Q Yeah. And you'll agree with me then certain circumstances, though I -- I
18 appreciate and I agree with you that it's commonly in -- common in the
19 insurance industry that ACV is arrived at by applying some form of
20 depreciation to the replacement cost, there are cases where you have to look at
21 other sources of information to come up with --

22 A Right.

23
24 Q -- a fair ACV; fair?

25 A Yeah.

26
27 Q All right.

28 A And you can pay appraisal companies to do that.

29
30 Q Exactly.

31 A Unfortunately, it's very difficult to do that after a loss like this.

32
33 Q Yes. So some of the things though one might look at in valuing the building
34 would include the following, and you tell me if I'm wrong, for example, it
35 would be of interest to know how much the building was worth at the time of
36 acquisition, that would be useful to know; right?

37 A Not necessarily.

38
39 Q Oh, why is that?

40 A Well, because we take a look at -- for replacement cost, what the --

41

1 Q I didn't ask about replacement cost. I'm asking about ACV.

2 A Well, ACV is a moving target, so if you wanted to use that as a benchmark you
3 could.

4

5 Q No. I said it would be one factor to look at. I wasn't saying it should be a
6 benchmark. You're -- you're not suggesting to the Court, sir, are you, that it
7 would be unreasonable to consider, as a factor in trying to determine the actual
8 cash value of a building, how much the owner paid for it, are you?

9 A Yes.

10

11 Q You're saying it's unreasonable?

12 A I -- I think without more information -- because you can have a close
13 relationship with the vendor, who can sell it to you at a deal --

14

15 Q M-hm. This was --

16 A -- and that should --

17

18 Q -- this was arm's length.

19 A So if -- if that were the case, then -- then yes. But with all factors being known,
20 perhaps it is.

21

22 Q You'll agree with me, sir, that if the original purchase was with an arm's length
23 -- in an arm's length arrangement that the original purchase price would be one
24 factor that might reasonably be considered in assessing the actual cash value of
25 the building, subject to depreciation and appreciation; correct?

26 A Yes.

27

28 Q Yeah. And you'll agree with me that if the building -- if part of the building is
29 only two years old then you might want to look at how much it cost to build
30 that part of the building; that would be reasonable?

31 A That would be exceptional. It would be awesome if you had that information.

32

33 Q Yeah. Well, we know in this case that the four apartments above the hardware
34 store were built between -- for between 350 and \$400,000, and that possession
35 was taken, the construction was complete on April the 1st of 2013; that's useful
36 information, right?

37 A Yes.

38

39 Q And it would, likewise, be useful, as you said, to consider what expert
40 appraisers have said was the value of the building at the time of the loss;
41 correct?

1 A Absolutely.

2

3 Q Yes. You would rely on that?

4 A Absolutely.

5

6 Q Yeah. Now, I'm moving now from the building. I want to talk about -- let's talk
7 about stock. So in this same document, tab 29 of volume 2, the very -- the very
8 -- the very third last page -- the very third last page is something that my friend
9 referred you to. And you said, and I agree, this is useful information because
10 approximately a month before the fire inventory was taken by Home
11 Hardware, which, presumably, is competent in taking inventory, and so we
12 have, sort of, a -- a benchmark to talk about a month later, which is pretty
13 reasonable; fair?

14 A It's great.

15

16 Q Yeah.

17 A You hardly ever get that with one of these claims.

18

19 Q Now, help me with this idea of inventory, okay. So I -- I think if it's a hardware
20 store so you got some hammers and you got some saws, you might have air
21 conditioners, you might have sinks. You know the type of stuff that's in
22 hardware stores; right?

23 A Yes.

24

25 Q Yeah. And some of it is obviously more in demand than others, you know, you
26 sell more, whatever, antifreeze than you do -- than you do table saws, for
27 example; right?

28 A Yes.

29

30 Q Yeah. Do you agree with me that if -- if something has been on the shelf in that
31 store for three years, it might not be able -- might not have the same value on a
32 market basis, an ACV basis, that it had originally; is that fair?

33 A No, that's very fair. I would -- would agree with that. And retailers generally
34 put those items on clearance table.

35

36 Q So if we look at the sheet that I've referred to you. It's actually page 23, on my
37 count, of tab 29, and it's the third last page. You see where it says 202,000,
38 total inventory counted?

39 A Yes.

40

41 Q And then if we go down there, it shows -- there are three lines of slow movers;

1 do you see that?

2 A Yes, I do.

3

4 Q So slow movers, no sales of one year; slow movers, no sales of two years; and
5 then one that actually, sort of surprises me, no -- slow movers, no sales of three
6 years. I'm not saying we can know by how much, but you'll agree with me that
7 those probably aren't worth now what they were when they were first acquired;
8 fair?

9 A I think that's a fair assumption.

10

11 Q Yeah.

12 A However, it's not definitive.

13

14 Q No, of course. No, no. And I'm not saying that anybody would be able to know
15 how much. It's just it makes sense to me that if you couldn't sell whatever it is
16 for \$10 three years ago, and it's been there for three years, it probably suggests
17 a lack of a market for that thing at that price; fair?

18 A Very fair.

19

20 Q Yeah. So the -- the next line is equipment in the apartments, and I -- I guess I'm
21 -- I'm at a loss. So I'm Economical, okay, pretend I'm Economical, and
22 somebody says to me I've just lost my building and on the second story were
23 four apartments and in the apartments were, collectively, four fridges, four
24 stoves; you with me?

25 A Yes.

26

27 Q Yeah. Pay me \$8160 for those things; that -- that's what you're saying to me,
28 okay?

29 A Okay.

30

31 Q Okay?

32 A Yes.

33

34 Q And I'm Economical and I say, okay, I understand, fridges and stoves, like,
35 definitely got some value, right. But they're not new, right, they're two years
36 old because this --

37 A Yes.

38

39 Q -- fire occurred --

40 A M-hm.

41

1 Q -- two years after they would have been put in the apartments; right?

2 A Correct.

3

4 Q And they've been used for two years by whoever lived there?

5 A Yes.

6

7 Q And I don't know -- I'm Economical, I don't know whether when they were
8 originally purchased they were -- I don't even know what amount is appropriate
9 -- \$1500 fridges or \$2,000 fridges or \$800 fridges, \$1,000 stoves, \$600 stoves,
10 I have no idea. So, as Economical, am I not entitled to say to you, look, Paul,
11 just go to Home Hardware, do whatever you got to do, but show me what you
12 paid actually, and what models they were, like, were they top of the end,
13 whatever that is, Whirlpool or Maytag or -- or what were they? Am I -- is it
14 unreasonable of me to ask that?

15 A No. It's --

16

17 Q Okay.

18 A -- actually typical --

19

20 Q Okay.

21 A -- of almost every loss.

22

23 Q All right.

24 A You have to substantiate the loss --

25

26 Q Yeah. That's what I thought.

27 A -- the best you can.

28

29 Q Okay.

30 A Now if all your records are destroyed in a fire --

31

32 Q Yeah.

33 A -- that could be difficult.

34

35 Q Sure. But --

36 A But if they're only two years old, likely wherever you purchased them or the
37 agent you purchased them through, you can likely get an idea.

38

39 Q Well, my recollection is that Mr. Guilbert said he got them through Home
40 Hardware. Home Hardware would have those figures?

41 A Should be easy.

1
2 Q So -- so it should be no problem for -- for Mr. Guilbert to have got this
3 information to me?

4 A That -- that would be my assumption.
5

6 Q Okay. Now, the next heading is the rental income. I think we covered that off.
7 Equipment. So let's go to some of these documents that are behind. Let's go to,
8 let's say, page -- let's go to page 8. I think -- yes, this says equipment. Tell me
9 when you're -- oh, sorry -- yeah, the eighth page of this document, the --
10 starting with the very first page. So at --

11 A Which -- which tab?
12

13 Q It's the same tab. Sorry. Tab --
14

15 THE COURT: Twenty-nine.
16

17 Q MR. ~~DAVIDS~~: *FINLAYSON* -- tab 29, eighth page. The first words on
18 the page are paint department. Top two words are paint department and then it
19 says auto tinter.

20 A Okay.
21

22 Q Okay. So again, I'm Economical, and I get -- I get this sheet, it says paint
23 department, okay, and then it says auto tinter, \$24,608. So tell me, Mr. Topp,
24 can you tell me how old this auto tinter is?

25 A I can't, no.
26

27 Q Okay. Can you tell me how much it cost originally?

28 A I can't.
29

30 Q Can you tell me what it did?

31 A I can probably tell you --
32

33 Q Yeah.

34 A -- what that is.
35

36 Q Yeah.

37 A So it's a computerized device that they would use to accurately tint the paint.
38

39 Q So if I'm Economical though, and I'm of a mind that I'm only bound to pay, if
40 anything, the actual cash value, then I'm going to want to know how old it is,
41 what the original cost was --

1 A Yeah.

2

3 Q -- what model it was --

4 A M-hm.

5

6 Q -- so that I can assess the claim as presented --

7 A Right.

8

9 Q -- and decide to pay it or -- or negotiate something better or make enquires of a
10 third party?

11 A Yes.

12

13 Q Fair?

14

15 Do you see anywhere in -- have you seen anywhere in tab 29 or anywhere that
16 -- any document you've been given by Mr. Davids some information which
17 would allow you to tell me what I, as Economical, need to know about the auto
18 tinter, that is how old it is, how much you paid for it, et cetera?

19 A I have not seen any --

20

21 Q Okay.

22 A -- documentation.

23

24 Q And that's true for everything on this list; correct?

25 A Yes.

26

27 Q Yes.

28

29 Now, if we turn to page 9. Do you know what a -- I'm not even sure if -- there
30 might be a word cut off here. It looks like purley -- P -- P-U-R-L-E-Y?

31

32 THE COURT CLERK: P-O-R?

33

34 A P-U --

35

36 MR. FINLAYSON: P-O-R?

37

38 THE COURT: No.

39

40 MR. FINLAYSON: Mr. Davids, can you help us? Do you
41 know?

- 1
2 MR. DAVIDS: I'm -- I'm sorry, I was talking to my
3 client.
4
- 5 MR. FINLAYSON: Oh, sorry. Purley water -- natural water
6 system? Page 9 of -- the next page -- the next page. Do you know what that is?
7
- 8 MR. GUILBERT: Purely Natural.
9
- 10 MR. DAVIDS: Purely Natural.
11
- 12 MR. FINLAYSON: Purely Natural. Thank you. That makes
13 sense. Thank you.
14
- 15 Q MR. FINLAYSON: Okay. Do you know what that is?
16 A I'm -- I'm going to make an assumption, but I'm --
17
- 18 Q Don't. Don't.
19 A Okay.
20
- 21 Q Do you know what it is?
22 A Then, no, I don't know what it is.
23
- 24 Q Okay. Okay. So I'm Economical, I get this, and I say, well, that's nice, but what
25 is it? Like, how much did it cost, how old is it, what does it do, is it
26 obsolescent, was it in use, was it broken, was it working; those are reasonable
27 questions?
28 A Yes.
29
- 30 Q Now, if we go to page 6 -- sorry. Yeah, the sixth page of the document 29
31 within volume 2. It's -- the only word on the page is the word computers.
32
- 33 MR. DAVIDS: Sorry, which page now?
34
- 35 MR. FINLAYSON: Six.
36
- 37 THE COURT: My numbering is not lining up with
38 yours.
39
- 40 MR. FINLAYSON: Oh, great. Great. It's just got one word on
41 it at the top left-hand corner, My Lord, it just --

1

2 THE COURT: I'll find it.

3

4 MR. FINLAYSON: -- the word is computers. So it should be,
5 hopefully, near the front.

6

7 THE WITNESS: I found it near the front of the tab.

8

9 THE COURT: Near the front?

10

11 THE WITNESS: Yeah.

12

13 MR. FINLAYSON: Yeah, six pages from the front.

14

15 THE COURT: Okay.

16

17 Q MR. FINLAYSON: So here Economical has a one-page thing
18 that says computers. Now, if I'm Economical, I think I -- I know or I'd want to
19 know what make of computer, what capacity of computer, how many
20 computers, what the original cost of the computers was, you know computers
21 become obsolete or obsolescent rather -- fairly quickly, the age of the
22 computers; that's information I'd be entitled to know, right, as Economical?

23 A Absolutely.

24

25 Q All right.

26 A Yeah.

27

28 Q Now, at page -- and there's no -- I apologize, there's really no -- there's no
29 rhyme and there's no reason -- page 11, the first word on the page -- since
30 we've got a pagination issue, the first words on the page are front tills.

31

32 THE COURT: In my book it comes after the page with
33 Purely Natural water systems.

34

35 MR. FINLAYSON: Oh, okay. I'm sorry. That's weird.

36

37 A I have it --

38

39 Q MR. FINLAYSON: You have it?

40 A -- we're looking at different pages, right?

41

1 Q Oh, that's not good.

2 A Mine has -- front till is the first one here.

3

4 MR. DAVIDS: There's two pages where front tills is --

5

6 MR. FINLAYSON: Oh, I'm sorry.

7

8 MR. DAVIDS: -- the first word.

9

10 MR. FINLAYSON: (INDISCERNIBLE)

11

12 THE COURT: Yeah.

13

14 MR. DAVIDS: One has the general rubric --

15

16 THE WITNESS: It's the one referring to --

17

18 MR. DAVIDS: -- furniture and fixtures total --

19

20 MR. FINLAYSON: The last number is 5917?

21

22 THE WITNESS: Yeah.

23

24 THE COURT: Is that the one we're on?

25

26 MR. FINLAYSON: Yeah.

27

28 THE COURT: Okay.

29

30 THE WITNESS: Sorry for looking over your shoulder.

31

32 THE COURT: I appreciate it.

33

34 Q MR. FINLAYSON: So on this -- and this is just a few more
35 questions in the same vein, sir, and then we'll move on. But -- so, for example,
36 in the second last line before the word total, I see floor mats times eight; do
37 you see that? Second last line --

38 A Oh, yes.

39

40 Q Yes. It says \$2400, so that's \$300 per floor mat. And, again, if I'm Economical,
41 I want to know, okay, how old were they, how big were they, where did you

1 get them, how much did you pay for them; fair?

2 A Yes, absolutely.

3

4 Q And I'd be entitled to know that?

5 A Yeah.

6

7 Q Now, let's get into SKUs. Let's go to what, for me, is page 16. At the top the
8 word is general, and the first item under the word general is fans times three.
9 Are you there?

10 A (NO AUDIBLE RESPONSE)

11

12 Q So you've got to help me now. I'm -- I'm looking at this, it says air conditioners
13 times four; do you see that, it's in the fourth line?

14 A Yes.

15

16 Q And then that must be a SKU number, 3812-977?

17 A Yes.

18

19 Q Okay. So I'm Economical, and this -- this page has, for that line, something that
20 the other ones we've been looking at doesn't have, what's called the SKU
21 number, which I -- stock keeping unit number. That's my recollection from
22 earlier on in the trial when somebody educated me kindly. So as you know --
23 you have no reason to think that's not what it is?

24 A That's right.

25

26 Q All right. So I'm Economical -- and what you said in your evidence in-chief, I
27 was quite struck by, you said adjustor might want to verify, would be simple to
28 do, if the adjustor has the SKU then easy to verify. So I'm the adjustor, I'm
29 Randy LaBrash, I get this. Tell me, what capacity are these air conditioners?
30 How does the SKU number help me?

31 A Well, you would be able to take it right to any Home Hardware and ask them
32 to look that up for you.

33

34 Q Oh, that -- well, that's very nice. But you're presenting the claim to me, why
35 should I have to look it up?

36 A You shouldn't have to. But --

37

38 Q Okay. Oh, okay.

39 A -- what I'm saying is it's easy to verify, easy to get to the information.

40

41 Q I see.

1 A So if you --

2

3 Q You weren't saying -- you weren't --

4 A -- if you ask the claimant to please --

5

6 Q Okay.

7 A -- get more information, it would be easy for them to do.

8

9 Q Okay. So you weren't saying that the insured doesn't have a duty, if asked, to
10 give the further information necessary?

11 A No. I'm saying it would be easy to get. Whereas there's some things that you
12 can't get --

13

14 Q Oh, I -- I understand.

15 A -- things that are destroyed in the fire that you can't recreate, it's -- it's gone and
16 you're --

17

18 Q Thank you.

19 A -- acting on good faith and trying to -- to --

20

21 Q Thank you.

22 A -- recreate what you had before the loss.

23

24 Q All right. So you don't have any criticism of Mr. LaBrash when he says, you
25 know, those SKU numbers are very nice but I need more?

26 A If I were Randy LaBrash, I would not have accepted that.

27

28 Q Okay.

29 A I would have said I can't -- I can't take this to the examiner, they'll just --

30

31 Q Laugh.

32 A -- they'll fire me.

33

34 Q Yeah. Okay.

35 A So ...

36

37 ~~MR. DAVIDS:~~ FINLAYSON

Those are my questions. Thank you, sir.

38

39 THE COURT:

Is there any re-examination of this

40 witness?

41

1 MR. DAVIDS: Yes, My Lord.

2

3 **Mr. Davids Re-examines the Witness**

4

5 Q MR. DAVIDS: Mr. Topp, you'll remember giving
6 evidence earlier when I asked you about the role of the adjustor in the concept
7 -- in the context of helping, so you indicated both you and Mr. LaBrash were
8 reasonably seen as persons who could help Mr. Guilbert in the course of his --
9 making his claim?

10

11 MR. FINLAYSON: This is not new. This is not proper re-
12 direct. I object.

13

14 THE COURT: I was going to wait for the question --

15

16 MR. FINLAYSON: Oh, sorry. Sorry.

17

18 MR. DAVIDS: Yes.

19

20 Q MR. DAVIDS: The -- the -- the --

21

22 THE COURT: -- and then I'll --

23

24 Q MR. DAVIDS: -- the -- the question is when Mr.
25 Finlayson asked you about getting this information --

26

27 MR. FINLAYSON: What information?

28

29 Q MR. DAVIDS: -- on the SKUs to Mr. LaBrash, it seems
30 to me -- and the specific reference was to paint department, is it not the case
31 that Mr. LaBrash could reasonably seen to -- be seen to have been asked by
32 Mr. Guilbert to help?

33

34 MR. FINLAYSON: Objection. It's not new. This is not --

35

36 MR. DAVIDS: Well, it -- it --

37

38 MR. FINLAYSON: -- proper re-direct.

39

40 MR. DAVIDS: -- it -- it is new because your -- the
41 question put to --

1

2 THE COURT: What does it arise from? My -- my --
3 what I'm figuring out is what came out new from Mr. Finlayson's cross that this is
4 addressing?

5

6 MR. DAVIDS: That Mr. -- that Mr. LaBrash is not
7 expected to help. Mr. LaBrash is expected to help.

8

9 THE COURT: Okay. So ask -- what's your question?

10

11 MR. DAVIDS: Is it reasonable for Mr. Guilbert to have
12 expected -- in the context, for example, of the paint department question --

13

14 THE COURT: I don't -- I don't think that was exactly
15 the -- the -- the answer. And in any event, I think it -- it was -- the duty was on --

16

17 MR. DAVIDS: Mr. Guilbert.

18

19 THE COURT: -- was on the insured to provide the
20 information, ultimately, was the answer.

21

22 MR. DAVIDS: Yes. But my understanding is that my
23 learned friend was asking the witness, more or less, to say it's not up to Mr.
24 LaBrash to help, and I just wanted to clarify that because that's not what the
25 witness said earlier.

26

27 THE COURT: You can --

28

29 THE WITNESS: Can I answer?

30

31 MR. FINLAYSON: Well, I -- I --

32

33 THE COURT: Go ahead.

34

35 MR. FINLAYSON: I don't think I used the word help. Like, I
36 think that --

37

38 THE COURT: I don't -- I don't think so.

39

40 MR. FINLAYSON: -- this is way too vague. I don't know
41 what this means. I -- I'm concerned.

1

2 THE COURT: And I -- I sustain, unless you can focus it
3 a bit more. I -- I didn't hear the exchange in that way. I can have the reporter re-
4 read -- that was right at the end of the examination.

5

6 MR. DAVIDS: It's under equipment, paint equipment.
7 And my --

8

9 THE COURT: No, I think we have it right at the end.
10 That was maybe the last question that was asked.

11

12 Madam clerk?

13

14 If you want. Re-read it or you don't have to ask it.

15

16 THE COURT CLERK: I -- I can do that.

17

18 THE COURT: Well, I'm asking --

19

20 THE COURT CLERK: Oh.

21

22 MR. DAVIDS: I -- I -- I -- I can leave the -- the point --

23

24 THE COURT: Okay.

25

26 MR. DAVIDS: -- and move on to another point, which is
27 new, very new.

28

29 Q MR. DAVIDS: Mr. Finlayson asked you if the cause is
30 arson what would be the insurance company's duty in that regard. The answer
31 -- I'm actually focusing on more the answer. I don't have the question. But you
32 indicated that if the cause is arson the insurance company wouldn't have to
33 respond?

34 A That -- that's not the question he asked. He asked me if it was a wrongful act.

35

36 Q If it was a wrongful --

37 A If -- if -- if he set the fire it was a wrongful act. Arson is covered if it's not
38 committed by the insured.

39

40 Q Right. If it's a wrongful act, if he burned the place down, you indicated that the
41 insurance company wouldn't have to respond. And my question is what if the

1 cause is undetermined, does the insurance company have to respond?

2 A I believe they do.

3
4 Q Thank you.

5
6 In your experience in investigations, to what extent is it reasonable for the
7 adjustor to use the local authorities to assist in the investigation?

8 A Commonly, investigators and adjustors will rely heavily on local witness's
9 accountants.

10
11 Q But I'm -- I'm talking about the -- the police. My specific question is to what
12 extent is it the adjustor's duty to keep the insured informed of the extent to
13 which they're seeking to use the police in the investigation?

14 A I don't think they have any duty to keep the insured informed on their
15 investigation.

16
17 Q To -- to the --

18
19 THE COURT: Where is this coming out of?

20
21 MR. DAVIDS: This is --

22
23 THE COURT: I -- now -- well, Mr. Finlayson hasn't
24 stood up, but I -- I --

25
26 MR. FINLAYSON: I -- I'm metaphorically standing.

27
28 THE COURT: -- I don't know where this is -- this is all
29 -- could have been part --

30
31 MR. DAVIDS: Well, it -- it -- it --

32
33 THE COURT: -- and parcel of asking this witness about
34 the duties and -- and -- that's why you called this witness. It's not coming out of
35 anything that I heard raised on cross.

36
37 MR. DAVIDS: Well, the -- the -- the question is the
38 issue of the financial condition of the business and the responsibility to disclose
39 this, and I'm wondering how far the adjustor is entitled to go. The -- the answer --
40 the -- the -- the answer is that the adjustor has a responsibility to ask these
41 questions when it comes to financial condition. And what I'm asking the witness,

1 simply, is what is the proper method, in general, to determine the financial
2 condition, how far do you go, and do you actually use local authorities to help you
3 determine that question.
4

5 MR. FINLAYSON: Objection.
6

7 THE COURT: Sustained.
8

9 MR. DAVIDS: No further questions, My Lord.
10

11 THE COURT: Thank you.
12

13 You're done. Thank you for coming.
14

15 THE WITNESS: Thank you.
16

17 MR. DAVIDS: Thank you, Mr. Topp.
18

19 THE WITNESS: Thank you.
20

21 (WITNESS STANDS DOWN)
22

23 _____
24

25 EXCERPT CONCLUDED

IN THE MATTER OF PATRICK GUILBERT AND GUILBERT ENTERPRISES
LTD. V. ECONOMICAL MUTUAL INSURANCE COMPANY,
TRADING AS THE ECONOMICAL INSURANCE GROUP

I, KARI SHORT, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Seventy-six (T76), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.



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