

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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ENTERPRISES LTD.,)	
)	<u>MICHAEL J. DAVIDS</u>
plaintiffs,)	for the plaintiffs
)	
- and -)	<u>MICHAEL G. FINLAYSON</u>
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COMPANY, trading as the)	
ECONOMICAL INSURANCE GROUP,)	
)	JUDGMENT DELIVERED:
defendant.)	MARCH 21, 2019

KROFT J.

I. INTRODUCTION

[1] The plaintiff Guilbert Enterprises Ltd. (Enterprises) operated a Home Hardware store in Neepawa, Manitoba.

[2] The plaintiff Patrick Guilbert (Guilbert) was the principal and controlling mind of Enterprises and the business.

[3] The defendant Economical Mutual Insurance Company, trading as the Economical Insurance Group (Economical) insured the business.

[4] On February 25, 2015, the store was destroyed completely by fire.

[5] Economical denied insurance coverage alleging the fire was deliberately set by Guilbert. Economical also alleges that in the course of investigations and in its sworn proof of loss, Enterprises, through Guilbert, misrepresented facts or failed to provide sufficient information, all in breach of Enterprises' statutory, contractual and common law duties to Economical.

[6] Guilbert and Enterprises now sue Economical for coverage and punitive damages.

[7] Economical defends the claim and counterclaims for, among other things, \$596,112, the aggregate amount paid to Enterprises' two mortgagees under the insurance policy, and clean-up costs of \$45,773.20.

[8] For the following reasons, the plaintiffs' claim is dismissed, and Economical's counterclaim is allowed.

II. THE LAW

[9] The legal principles relevant to this case were not disputed. They may be summarized as follows:

(a) Onus

- At trial, the onus is on the insured to establish, on a balance of probabilities, a loss occurred and the amount of that loss. This onus

remains the same even if arson is alleged. See ***Gebara v. Economical Insurance Group***, 2017 ONSC 801, [2017] O.J. No. 458 (QL) at para. 35.

- Where arson is raised as a defence, the onus is on the insurer to establish the arson allegation on a balance of probabilities. The court is to look at all of the evidence, including circumstantial evidence. A finding of arson often includes, but does not require, proof of incendiary origin, motive, and exclusive opportunity. See ***F.H. v. McDougall***, 2008 SCC 53, [2008] 3 S.C.R. 41 at paras. 42, 49; ***Roy v. TD Home and Auto Insurance Co.***, 2016 MBQB 9, [2016] M.J. No. 3 (QL) at paras. 3–6; ***Lancer Enterprises Ltd. v. Saskatchewan Government Insurance***, 2011 SKCA 28, 332 D.L.R. (4th) 624 at paras. 17–25; ***Richardson v. Smith***, 2012 NBCA 75, 354 D.L.R. (4th) 355 at para. 28.

- An investigator's conclusion as to the cause of a fire, even when arrived at by applying recognized guidelines such as the National Fire Protection Association 921 (NFPA 921), does not preclude the trial judge from reaching a different conclusion where supported by the evidence at trial. See ***Bidart Estate v. Portage la Prairie Mutual Insurance Co.***, 2018 NSCA 52, [2018] N.S.J. No. 224 (QL) at paras. 49–50.

(b) **Utmost Good Faith**

- An insurance contract is one of utmost good faith. See *Gebara* at para. 35; *Adams-Eden Furniture Ltd. v. Kansa General Insurance Co.* (1996), 141 D.L.R. (4th) 288 at 294–95 (Man. C.A.).

(c) **Conditions Imposed by Statute in Insurance Contracts**

- Following a loss, an insured must:
 - ♦ immediately give notice in writing to the insurer,
 - ♦ deliver as soon as practicable to the insurer a proof of loss verified by statutory declaration setting out, among other things:
 - a complete inventory of property lost, showing quantities, costs, and particulars of the amount lost,
 - how the loss occurred and, if by fire, how the fire originated,
 - that the loss did not occur by a willful act of the insured,
 - ♦ if required by the insurer, give a complete particularized inventory of undamaged property, and
 - ♦ if required by the insurer and if practicable, produce:
 - books of account and inventory lists,
 - invoices verified by statutory declaration.

See Statutory Condition 6 set out in Schedule B (section 136.4) to *The Insurance Act*, C.C.S.M. c. I40.

- The intention of Statutory Condition 6 is to give insurers the means to determine as fully as possible if the insured's claim is just as to its nature and amount, without resorting to litigation. The proof of loss should be as specific as possible, and requires, if necessary, taking all reasonable steps to obtain information from third parties. See *Permaform Plastics Ltd. v. London & Midland General Insurance Co.*, [1996] 7 W.W.R. 457 at paras. 138–40 (Man. C.A.); *Cedar Hut Restaurant Ltd. v. Wawanesa Mutual Insurance Company et al.*, [1985] 5 W.W.R. 673 at 682–83 (Sask. Q.B.).
- The insured owes the insurer a duty of honesty and accuracy. See *Gebara* at para. 35.
- Any fraud or willfully false statement in a statutory declaration invalidates the claim of the person who made the declaration. See Statutory Condition 7.
- A willfully false statement includes one made with willful blindness to the truth or with reckless disregard for the truth. See *Skuratow v. Commonwealth Insurance Co.*, 2005 BCCA 515, 259 D.L.R. (4th) 333 at para. 14.
- When a person takes it upon himself to make an insurance claim, he is responsible for the contents of the statement made. See *Skuratow* at para. 19.

- A false statement is material when it has the capacity to affect the mind of the insurer in managing the claim or deciding to pay it. The question is not whether the insurer was actually misled. See ***Skuratow*** at paras. 22–24.
- It is not sufficient for an insured to correct its false statement at a later date and then seek to rely on the corrected version to obtain coverage. See ***Skuratow*** at para. 25.

III. APPROACH

[10] The balance of my decision is divided into the following sections:

1. Undisputed Background Facts
2. Allegation of Arson
3. Allegations of Misrepresentations by Guilbert during Economical's Investigation
4. Damages
5. Punitive Damages
6. Counterclaim
7. Conclusion

[11] Despite my best efforts to compartmentalize, there is some factual overlap among the categories.

IV. UNDISPUTED BACKGROUND FACTS

[12] Enterprises became a Home Hardware dealer in 2008, when it purchased the business from the prior owner, Ron Goldade (or a company owned by him).

[13] Economical insured Enterprises' dealership.

[14] Enterprises is owned equally by Guilbert and his wife Laurie, both of whom are guarantors of Enterprises' obligations to Home Hardware under a dealer agreement dated April 24, 2008. Laurie played no active role in, and had minimal knowledge of, the affairs of Enterprises and the store. But for a few read-ins from discovery, she did not give evidence at trial.

[15] The store occupied what originally was a single-storey commercial building in Neepawa, Manitoba. The storefront faced east. The back of the building faced west. The receiving area was at the back of the building. At the end of each day, Guilbert and staff would exit through a door in the receiving area.

[16] Towards the south wall of the receiving area were stairs leading to a basement. The basement contained an office and staff facilities such as lockers and a toilet. Access to the stairs was by way of a hinged door built right into the floor. Staff used the basement daily. The practice was to keep the basement door open. When closed, the basement door was flush with the floor.

[17] Directly above the stairs, in the ceiling of the receiving area, was the hatch to the attic. The hatch was covered by a piece of plywood. According to Guilbert,

the plywood was thin, not nailed down, and easy to open. Because the attic hatch was directly above the stairs to the basement, the only possible way to access the attic without falling into the basement was to first close the basement door. A ladder was kept close to the basement stairs as that part of the receiving area also was used for aboveground storage.

[18] Looking into the attic eastward toward the front of the building, there was a brick wall. The wall was only twenty inches from the hatch and had a two-foot hole in it—wide enough for a person to pass through.

[19] Between October 2012 and April 2013, Guilbert constructed four apartments on top of the building. As such, the attic was sandwiched between the main floor and the new apartments.

[20] During its early years, business was good for Enterprises. However, by at least 2014, Enterprises was experiencing difficulties. By the time of the fire on February 25, 2015, Enterprises was in financial straits. Stock was depleted, access to Home Hardware credit was restricted, dealer and other accounts were unpaid, and cheques, including for payroll and taxes, were bouncing. Home Hardware was insisting on financial and other information from Enterprises.

[21] Guilbert had hoped to generate funds by converting the newly built apartments to condominiums and selling them. Neither the conversion nor any sales occurred prior to the fire.

[22] Beginning in late 2014, discussions occurred between Guilbert and a Ryan McLaughlin (owner of a GM dealership in Neepawa) about the possibility of McLaughlin purchasing Enterprises' business assets. The discussions did not result in a purchase. In fact, on February 23, 2015, two days prior to the fire, McLaughlin, in consultation with his financial advisors, suggested to Guilbert that perhaps Enterprises' best option was to assign itself into bankruptcy.

[23] On the day of the fire, Guilbert was the last person to leave the building, setting the alarm at 6:09 p.m. At 6:13 p.m., Arlene Vaughan, office manager/comptroller, confidante of Guilbert, and tenant of one of the new apartments, reported to the Neepawa Volunteer Fire Department that smoke was coming from the northwest corner of the building. The fire department arrived at about 6:20 p.m.

[24] The building and its contents were destroyed.

[25] When fire fighters first arrived at the building, they saw the smoke at the northwest corner and decided to enter through the east-facing front doors. No flames were detected in the building until fire fighter Derrick McGorman opened the attic hatch.

[26] The parties agree the fire started in the attic but do not agree where: Economical says Guilbert deliberately started the fire close to the attic hatch, on either side of the nearby brick wall. Guilbert denies setting the fire or that it started in the vicinity of the brick wall.

[27] The fact of the fire was immediately reported by Enterprises to Home Hardware, to Programmed Insurance Brokers Inc. (PIB), Enterprises' broker, to Economical, and to Crawford & Company (Canada) Inc. (Crawford), the independent insurance adjuster.

[28] A detailed summary of Crawford's adjusting steps was tendered through its representative, Randy LaBrash, as trial exhibit 17. The first entry is the date of the fire; the last is September 19, 2017. A similar summary of Economical's investigations was tendered through its representative, Shane Devlin, as trial exhibit 8.

[29] Although I discuss specific communications between Enterprises and Economical later in these reasons, I note now that Enterprises submitted its final proof of loss on or about June 18, 2015. On August 25, 2015, Economical denied coverage, with reasons provided.

[30] To the extent payments were made by Economical, \$434,056.23 and \$162,055.77 (totalling \$596,112) were paid to Beautiful Plains Credit Union Ltd. and Sunrise Credit Union respectively, the mortgagees referenced in paragraph 7 of these reasons. The amount of \$45,773.20 also was paid to clean up the fire scene.

V. ALLEGATION OF ARSON

[31] Because considerable trial time was devoted to Economical's arson defence and because the onus is on Economical to prove that defence on a balance of probabilities, I will address the arson allegation first.

[32] The cases suggest that evidence, including circumstantial evidence, of an intentional setting of the fire, exclusive opportunity to set it, and motive is highly relevant.

[33] At trial, Guilbert conceded financial motive—his business was failing. I must still consider the other evidence.

A. Lay Witnesses**1. Economical's Evidence**

[34] Economical relies on evidence introduced through witnesses called by both itself and the plaintiffs. I have reviewed all the trial evidence but will refer only to facts most relevant to my findings.

[35] Three former Enterprises employees gave evidence: Victoria Adamyk, Sharon Howe, and Richard Bannerman. Each of them worked on the day of the fire, though Bannerman left before closing. Other employees working the day of the fire were Vaughan, Gwen Baryla, and Judy Masters Collins.

[36] Adamyk and Howe testified that until just days before the fire, Guilbert's practice was to leave the building by 3:30 p.m., not to stay until closing at 6 p.m. Guilbert staying to closing time on the day of the fire was a rare occurrence.

[37] On the day of the fire, after retrieving jackets from the basement, all staff, except Guilbert, exited together from the receiving area door at two or three minutes after 6 p.m. Upon leaving, those staff members met just outside the door in the rear parking area.

[38] Adamyk and Howe, each of whom was aware that Enterprises' business was in difficulty, remembered the meeting in part because the temperature was -25°C and because news of a potential buyer for the business was reported by Vaughan and discussed. The meeting lasted four or five minutes (i.e., to 6:06 or 6:08 p.m.), after which all staff departed.

[39] Neither Adamyk nor Howe saw Guilbert leave the building prior to their departure. Howe recalled Guilbert's truck was running.

[40] Both Adamyk and Howe testified that when they exited the building, the basement door was open and the ladder was standing nearby in its usual spot.

[41] Adamyk recounted that at approximately 2 p.m. on the day of the fire, she smelled an odour in the store similar to when a heater turns on for the first time. Adamyk reported the odour to Howe and Bannerman, neither of whom smelled anything remarkable. Guilbert was not present at the time.

[42] Howe and Bannerman walked throughout the premises to investigate, ultimately attributing the odour to a fluorescent light ballast that burned out (something which had occurred on prior occasions). There were no electrical disruptions or other problems in the building that day. The store remained open for business.

[43] On cross-examination, Bannerman also testified that on the day of the fire, he was directed by Guilbert to remove from the building an ice auger owned personally by Guilbert and place it in Guilbert's vehicle.

[44] Joey Levandoski, a longtime acquaintance of Guilbert and contractor whose company built the second-floor apartments, gave evidence. Unbeknownst to Guilbert, Levandoski was the silent partner of McLaughlin. Levandoski was knowledgeable about the financial situation of Enterprises, the discussions between Guilbert and McLaughlin about selling the business assets, Guilbert's asking price of \$800,000, McLaughlin not being prepared to pay anything close to that much, and the fact a sale did not occur. Because of this, Levandoski was surprised when, during the weekend before the fire, he received a phone call from Guilbert advising Enterprises had just sold the business and Guilbert was seeking employment.

[45] As McLaughlin's silent partner, Levandoski knew this was not true.

[46] Levandoski briefly testified about the construction of the apartments above the store in 2012. At some point during construction, a drywall screw pierced a

metal casing in the attic through which electrical wires ran. The issue was identified and remedied at the time. Levandoski's evidence was corroborated by electrician Kent Hiller.

[47] Three of the volunteer fire fighters who fought the fire testified. Their evidence was consistent.

[48] As noted in paragraph 25 of these reasons, the fire fighters entered the store through the front doors and were escorted by Vaughan to the attic hatch in the receiving area.

[49] The attic hatch was knocked open, flames were visible, and McGorman began dousing. Using a ladder that was standing open in close proximity to the hatch McGorman inserted himself into the attic, but was obstructed by his breathing apparatus. A chain saw was used to expand the hatch. Once able to insert the top of his body into the attic, McGorman doused the flames immediately in front of him, exposing the brick wall and hole referenced in paragraph 18 of these reasons. Given the close proximity of the wall, McGorman was able to extend the hose through the hole, but a decision soon was made to abandon the hatch and access the attic through the ceiling of the store, about fifteen feet to the east. Upon doing so, it was apparent the fire had progressed to a point where, for safety reasons, the fire fighters vacated the building to fight the blaze from the outside.

[50] At no time did any fire fighter notice, or believe there was, a basement or basement door in the building. None of the fire fighters reported to any person they had checked a basement.

[51] In support of its arson defence, Economical also relies on evidence obtained through the cross-examination of Guilbert, including:

- Guilbert was familiar with the attic, having been up there a few times over the years.
- It would take a very short time to close the basement door, open the ladder, enter the attic hatch and reverse the steps.
- Two nights prior to the fire, following the meeting with McLaughlin referenced in paragraphs 22 and 44 of these reasons, Guilbert returned to the building where he spent about an hour and forty-five minutes (7:46 p.m. to 9:30 p.m.) alone. Guilbert also was in the building the previous Monday night (Louis Riel Day) for thirty-five minutes (8:55 p.m. to 9:30 p.m.). Alarm records for the day preceding the fire show that, after closing, someone re-entered the building for a minute (6:14 p.m. to 6:15 p.m.).
- In addition to removing his ice auger from the building on the day of the fire, Guilbert also removed his fishing tackle.

- Guilbert had no knowledge of any employee closing the basement door before they left.
- When Guilbert left the building the day of the fire, he did not see staff meeting.

2. Plaintiffs' Evidence

[52] The plaintiffs rely on the following facts from the testimony of Guilbert:

- Guilbert stayed to the end of the workday approximately sixty times per year.
- Guilbert was not the only key holder. Vaughan, Howe, Bannerman and Valerie Graham also had keys to the building.
- Although Enterprises was in financial straits at the time of the fire, Guilbert and his wife had \$40,000 in an account at Bank of Montreal.
- Guilbert did not shut the hardware business down as his mind-set at the time was that Enterprises could survive.
- Guilbert had not been in the attic since the fall of 2014.
- Guilbert did not know of the odour smelled by Adamyk on the day of the fire until it was reported to him after the fire had taken hold of the building.

- On the day of the fire, Enterprises' staff did not leave together. Masters Collins emerged from the basement first, leaving at 6:05 p.m. or 6:06 p.m., followed by Adamyk, Graham, and finally Vaughan at 6:08 p.m. Once Vaughan left, Guilbert locked the door, retrieved his computer from his main floor office, set the alarm at 6:09 p.m., exited and locked the door from the outside.
- When he left, Guilbert did not see staff meeting behind the building.
- Guilbert had no recollection of using the ladder or of anyone shutting the door to the basement.
- During an interview with R.C.M.P. Cst. Mallory Cawthra at the scene of the fire, Guilbert's hands and clothes were checked for dirt. They were clean other than some dust from carrying items.
- Guilbert was in tears the night of the fire.
- The purpose for returning to the building on February 23, 2015, following his meeting with McLaughlin, was to review accounting records and consider a counteroffer to McLaughlin.
- Despite a police investigation, the R.C.M.P. ultimately chose to not pursue charges against Guilbert.

B. Expert Evidence

[53] Three experts gave evidence about the origin and cause of the fire: R.E. (Dick) Harvey, Fire Investigator with the Office of the Fire Commissioner (who first attended at the request of the police on the evening of the fire); Matthew Hopley, Professional Engineer of Jensen Hughes Consulting Canada Ltd. (the plaintiffs' expert); and, Dr. Norbert Karl Becker, Professional Engineer and founder and President of The Becker Engineering Group (Economical's expert).

[54] That each of these experts was qualified to give expert testimony about fire origin and cause was not disputed.

[55] Each expert was familiar with and guided by NFPA 921 referenced earlier in paragraph 9 of these reasons. Harvey and plaintiffs' expert, Hopley, prepared reports opining as to where and how the fire was caused. Economical tasked Becker with reviewing and commenting on those reports.

[56] Neither Hopley nor Becker attended the fire scene. Due to the destructive nature of the fire, neither one examined physical evidence. Hopley's opinion and Becker's review thereof relied on witness statements/transcripts, photographs, investigative notes of officials, building plans, and Harvey's report.

1. R.E. (Dick) Harvey

[57] Harvey completed his report on or about March 25, 2015, one month after the fire. Based on the facts known to him at that time, Harvey concluded: the fire originated in the attic; the only source of ignition in the attic was wiring; and,

an exact cause of the fire could not be determined. Immediately preceding the conclusion section of his report, Harvey also expressed it was not possible, nor was there an opportunity, for a human to have caused the fire.

2. **Matthew Hopley**

[58] Hopley's initial report is dated May 30, 2016. He concludes the evidence is substantially inconsistent with an incendiary fire and, to the extent it is possible to refine where in the attic the fire started, it likely would have started above the central part of the store.

[59] In the same portion of the report, Hopley also states:

- The responding fire fighters found no evidence of a fire in the basement.
- During the afternoon prior to the fire, a smoke odour was detected but, after investigation, the source of the odour was not determined. The odour, in conjunction with older wiring and combustible insulation in the attic, could be consistent with a smouldering fire in the attic.
- It is unclear whether the basement door was open or closed at the time of the fire such that he cannot say the circumstances are consistent with an incendiary fire cause.
- The cause of the fire is undetermined.

[60] In an October 19, 2016 report responding to Becker's review, Hopley reaffirmed his conclusions.

3. Dr. Norbert Karl Becker

[61] Becker reviewed the reports of both Harvey and Hopley. His reports issued on May 13, 2016, and September 12, 2016, respectively.

[62] As to Harvey's report, Becker opines that Harvey's conclusion that the only source of heat for ignition was electricity, is inconsistent with the evidence and with NFPA 921, which guideline cautions against eliminating possible sources absent evidence supporting the elimination. Becker also states Harvey's opinions are based on inaccurate and incomplete information regarding the status and findings of the R.C.M.P. investigation. The R.C.M.P. investigation had not been completed at the time of his report.

[63] As to Hopley's report, Becker takes issue with his conclusions that the evidence suggests an undetermined cause. In fact, Becker concludes the timing, area of origin and rapid spread of this fire are consistent with an incendiary fire.

[64] In specific reference to the summary portion of Hopley's report referenced in paragraph 59 of these reasons, Becker comments:

- He disagrees with Hopley's statement that there is conflicting information regarding the basement door. None of the witnesses interviewed after the fire reported the basement door was closed when

the employees exited. The fire fighters did not report or even know there was a basement, presumably because the door was shut.

- Guilbert was the last person to leave the building and the only person who could have closed the basement door.
- Hopley refers to the conclusions of Harvey. However, as was pointed out previously by Becker, Harvey's report was prepared only one month after the fire while the R.C.M.P. investigation was still ongoing. Many of the documents reviewed by both Hopley and Becker were not available to Harvey.

C. Reconciling Lay Witnesses

[65] I find the trial evidence of the Enterprises employees, the volunteer fire fighters and Levandoski was honest, straightforward and credible. I accept it. In respect of the employees, their testimony was consistent but not identical. If it had been identical, I would have been wary of it. My observations are similar in respect of the fire fighters.

[66] In contrast, aspects of Guilbert's evidence in respect of the lead-up to the fire and the investigation into the loss by Economical, when taken together, raise significant credibility concerns:

- Guilbert acknowledged that two days after the fire, he might have deleted multiple text messages between himself and McLaughlin.

- Guilbert removed personal items from the building on the day of the fire.
- Guilbert's version of the store closing seems to have changed over time. At trial, he testified his employees left one after the other between 6:05 p.m. and 6:08 p.m. In statements made to police immediately following the fire, and during direct examination, he suggested his staff left together, followed by him.
- Guilbert testified he did not see his staff having a meeting outside. To me, this is inconsistent with his earlier statements that he left more or less with the staff. Had he done so, he would have encountered them.
- In April 2014, when Enterprises was experiencing financial difficulties and under the watch of Home Hardware, Guilbert represented to Home Hardware that all four "condominiums" had sold for \$500,000. The units were not sold. They were not even condominiums. Misrepresentations about the status of sales continued right to the time of the fire.
- Guilbert was not truthful with Levandoski when he told him Enterprises had sold the business.
- Trial exhibit 1, document 163, is a typed proposal containing a purchase price for Enterprises' business of \$800,000. Guilbert originally denied

preparing this document for McLaughlin claiming he did not even see it until a day or two before examinations for discovery. On cross-examination, when presented with an email from neepawahh@mymts.net to Vaughan attaching the document and asking for comments (trial exhibit 1, document 104), Guilbert conceded he might have prepared it and sent it to Vaughan for review intent on asking McLaughlin to sign it.

- After the fire, Guilbert was questioned by Crawford about Guilbert's discussions with McLaughlin including what, if anything, McLaughlin thought Enterprises' business assets were worth. Guilbert's responses to Crawford were at times defensive, confusing and less than forthright. Levandoski's evidence, which I accept, was that he and McLaughlin might have considered an offer closer to the \$300,000 to \$400,000 range.
- During an interview with Crawford two days after the fire, when asked how business was doing leading up to the fire, Guilbert responded, "It's alright . . . it's February . . . there's not really much going on". When challenged on cross-examination, Guilbert testified the word "alright" was intended to mean "not very good" and, in any event, Economical had financial information from which it could draw its own conclusion.

- In a later interview, when asked about payroll, Guilbert suggested two or three cheques had bounced whereas, at trial, Guilbert conceded the number of cheques was closer to fourteen.
- To blunt somewhat his admission of motive, Guilbert testified that personally, he and his wife had \$40,000 in their bank account. However, this would not account for personal exposure as guarantor of Enterprises' obligations.
- During cross-examination, Guilbert was asked more than once whether, when questioned by police and Crawford, he was aware of concerns that he had set the fire. Guilbert's responses were evasive, even when shown a transcript of an R.C.M.P. interview the day following the fire where the officer specifically told Guilbert he was a suspect.
- Guilbert's evidence in respect of property values has been inconsistent, including in the course of the trial. As to inventory, Guilbert initially testified supporting documents showed replacement cost. After hearing from Home Hardware's representative, Heather Brincheski, Guilbert's position in this regard seemed to change or, at least, became less certain.
- Enterprises' insistence at trial that it is entitled to the replacement cost is not consistent with prior clear communications from its lawyer to

Economical that Enterprises sought actual cash value. See paragraphs 82 and 85 of these reasons.

[67] Some of these concerns are referenced again in paragraph 86 of these reasons.

[68] Due to my concern about Guilbert's credibility, where his testimony about circumstances leading up to the fire differs from that of other lay witnesses, I prefer the evidence of those witnesses. To be clear, in addition to Guilbert's admission of financial motive, I find as fact:

- During the weekend preceding the fire, Guilbert told Levandoski he had sold the business, which was not true.
- On the day of the fire, Guilbert removed personal items from the building.
- The employees left the building together at about 6:05 p.m. and met for a short time in the back lot.
- When they left the building, the basement door was open.
- Guilbert was alone in the building from about 6:05 p.m. to 6:09 p.m.
- Guilbert closed the basement door.
- It took very little time to close the basement door, open the ladder, enter the attic and reverse those steps.

- By the time Guilbert left the building, the staff meeting had ended and the employees had dispersed.
- Guilbert left in his truck.
- When the fire fighters arrived, the basement door was closed and the ladder was nearby and open.
- The source of the odour smelled at 2 p.m. was a burned-out ballast, not a fire.
- It cannot be ruled out that the fire started along or close to the brick wall in the attic.

[69] The R.C.M.P.'s decision to not pursue criminal charges against Guilbert is not determinative of these civil proceedings.

D. Reconciling Expert Witnesses

[70] In respect of the expert evidence of Harvey, Hopley and Becker, I prefer the opinion of Becker. My conclusion is based on the following, much of which is identified in Becker's report and arose during Economical's cross-examinations of Harvey and Hopley.

[71] As to Harvey, his opinion was based on the facts as he knew them one month after the fire. Significantly, Harvey:

- did not know the R.C.M.P. investigation continued;

- did not have information gathered by the R.C.M.P. or Crawford;
- did not inquire of Guilbert or the employees as to the timing of their departures from the building;
- was not aware that in the days before the fire, Guilbert had been at the building alone after hours;
- could not recall the basis for his handwritten notation that there was no fire in the basement;
- did not know Guilbert removed personal items from the building on the day of the fire;
- did not know Guilbert had told Levandoski the business was sold when it had not been.

[72] Harvey candidly testified he would not have concluded his report had he known the R.C.M.P. investigation was ongoing. He also testified that in reaching the conclusion he did, he was not suggesting the fire could not have been started intentionally.

[73] As to Hopley, the following testimony emerged:

- Pursuant to NFPA 921, motive, including financial stress, is among the factors to consider when determining whether a fire was intentionally set.
- Hopley was not aware that on February 23, 2015, Guilbert returned to the building after discussions with McLaughlin.

- Hopley was aware of no evidence suggesting the odour smelled by Adamyk on the day of the fire was other than a burned-out ballast and, at the time of his report, obviously was not aware of Adamyk's trial evidence that she, Howe and Bannerman believed they had found the cause of the odour.
- Had there been an electrical issue, there most likely would have been other indications such as lights flickering or computers failing. There was no physical evidence of an electrical fire.
- Certain evidence in the material both he and Becker reviewed was omitted from Hopley's report, including:
 - ♦ A staff meeting occurred after closing while Guilbert remained in the building.
 - ♦ Hopley's "incident time line" references an odour being noticed at 2 p.m. but fails to mention there was no odour thereafter.
 - ♦ Guilbert removed personal items from the building on the day of the fire.
- Hopley's fundamental conclusion as to the origin of the fire is that it was in the attic. Although he goes on to refine the location to a spot above the store rather than the receiving area, he ultimately conceded

it is possible the fire started along the brick wall referenced in paragraph 18 of these reasons.

- Hopley agreed that perhaps the most significant difference between his opinion and Becker's review is the weight Hopley gave to evidence concerning the basement door. Hopley conceded that if, when the fire fighters arrived, the basement door was closed and the ladder was open nearby, those facts are consistent with an incendiary fire. I have found the door was closed and the ladder was open. See paragraph 68 of these reasons.

E. Summary of Arson Findings and Conclusion

[74] To summarize, to the extent Guilbert's evidence differs from the evidence of the other lay witnesses, I prefer the evidence of the lay witnesses. As to the experts, I accept the observations and opinions of Becker. Taking all the evidence into account, which in this case is mostly circumstantial, motive, opportunity, and incendiary cause are established. Economical has proved, on a balance of probabilities, Guilbert started the fire—a clear breach of the plaintiffs' contractual and statutory obligations to Economical summarized in subparagraphs 9(b) and (c) of these reasons.

[75] One final note about the fire expert reports. The experts were asked to look at much of the same evidence I considered. There was no physical evidence

or scientific data to interpret. In the circumstances, although I carefully considered the expert reports, at the end of the day, they are not essential to my conclusion.

VI. ALLEGATIONS OF MISREPRESENTATIONS BY GUILBERT DURING ECONOMICAL'S INVESTIGATION

[76] For this section and the balance of my reasons, a few more facts may assist.

[77] Crawford's and Economical's investigations into the circumstances of the fire commenced immediately following the event, continuing into winter 2016. Between late February and mid-March 2015, Guilbert was interviewed several times by Crawford. The transcripts were tendered as part of trial exhibit 1, portions of which were used by Economical to cross-examine Guilbert.

[78] At or around the same time, Guilbert, with some input from PIB, Enterprises' broker, prepared proofs of loss for Economical. Initial proofs of loss were submitted to Economical on or about April 15, 2015.

[79] On June 9, 2015, in a written response to the proofs of loss, Crawford advised Guilbert, among other things:

- The proof of loss is a significant and sworn document.
- Full disclosure of information in a manner that Economical can understand is required.
- The proofs of loss are deficient because:
 - ♦ The amount claimed under the policy is not set out.

- ♦ There is insufficient information, including documentation, to permit Economical to understand and evaluate the loss.
- ♦ Enterprises provided no evidence of replacing the insured property or of its actual cash value. Replacement cost, as opposed to actual cash value, can only be paid if and when the property has been replaced.
- Economical is continuing its investigation as to the cause of the fire and the financial position of Enterprises immediately prior to the fire.

[80] On or about June 18, 2015, Guilbert's lawyer submitted to Economical a further and final proof of loss.

[81] On June 23, 2015, Crawford acknowledged receipt of the proof of loss and indicated it was under review. Crawford reiterated that replacement cost could be considered only if Guilbert replaced the property and, thus far, it had no evidence suggesting a desire on the part of Enterprises to replace the lost property. Crawford asked for clarification in that regard.

[82] On July 2, 2015, Guilbert's lawyer wrote confirming to Crawford that Enterprises is requesting actual cash value, not replacement cost.

[83] On July 6, 2015, Crawford advised Guilbert's lawyer, among other things, the proof of loss is being reviewed, but, based on the information provided,

Economical still could not determine how the actual cash value of the property was arrived at.

[84] At trial, Paul Topp, Enterprises' representative at PIB (broker), testified on cross-examination that Crawford's requests for additional information were not unreasonable.

[85] On July 22, 2015, Enterprises' lawyer wrote to Crawford with a view to assisting Crawford to understand "how [Enterprises] arrived at the actual cash value for the building claim, including apartments as well as equipment, fixtures and furniture." The letter drew strictly from the proof of loss as submitted. No further or better documentation was provided.

[86] As noted in paragraph 29 of these reasons, on August 25, 2015, Economical, through its lawyer, formally denied Enterprises' insurance claim.

[87] According to Economical, as part and parcel of Guilbert's overarching effort to misrepresent the cause of the fire, Guilbert specifically misrepresented Enterprises' financial circumstances immediately before the fire. Economical points to at least three examples:

- On February 27, 2015, during an interview with Crawford, Guilbert was asked how Enterprises' business was doing at the time of the fire. Guilbert answered, "It's alright . . . it's February . . . there's not really

much going on". As admitted at trial, business was not alright. It was in financial crisis. Guilbert's statement was not true.

- On March 17, 2015, during an interview with Crawford and Economical, Guilbert was asked further about the financial state of Enterprises and, on more than one occasion, whether a sale price was ever discussed between himself and McLaughlin. Guilbert responded "no". However, it is clear from the evidence at trial that numbers were discussed—Guilbert wanting \$800,000; McLaughlin refusing to pay more than \$300,000 to \$400,000, recommending Enterprises assign itself into bankruptcy instead.
- During the same March 17, 2015 interview, Guilbert was asked about payroll and whether any cheques were returned NSF. Guilbert responded "two or three individual cheques". This was not true. The evidence at trial was that approximately fourteen payroll cheques bounced as did other cheques.

[88] Each of these examples was touched upon by me earlier in paragraph 66 of these reasons in the context of assessing Guilbert's credibility.

[89] On cross-examination, Guilbert acknowledged knowing he had a duty to be honest with Economical and Crawford. I am satisfied from all the evidence, especially the number of questions posed by Economical about financial matters, Guilbert appreciated Enterprises' financial situation at the time of the fire was

highly relevant to Economical (and the police) during their investigations. I am also satisfied Guilbert knew his representations were false or made recklessly, disregarding the truth. Individually and certainly collectively, they were material, in the sense of having the capacity to affect the mind of Economical as it managed Enterprises' claim.

[90] These misrepresentations are further breaches of the plaintiffs' contractual and statutory obligations to Economical summarized in subparagraphs 9(b) and (c) of these reasons.

VII. DAMAGES

[91] In its final proof of loss and paragraph 11 of the statement of claim, Enterprises seeks indemnification from Economical in the amount of \$3,022,593.80, the alleged aggregate replacement cost of the real and personal property destroyed by the fire (i.e., building, stock, apartment equipment, rental income, equipment, and fixtures and furniture).

[92] Economical submits this number was intentionally exaggerated by Enterprises (not mere "puffery") and/or unsupported by the attachments to the proof of loss; in other words, further breaches of its obligations to Economical disentitling Enterprises to indemnification or at least to indemnification in the amount claimed.

[93] Other than describe the plaintiffs' position on damages as I have done, I do not intend to further discuss or provisionally assess them. To do so is neither

necessary nor, in my view, consistent given my findings and general concern about the reliability of the plaintiffs' evidence.

VIII. PUNITIVE DAMAGES

[94] The plaintiffs request punitive, aggravated and exemplary damages. In their statement of claim, they allege Economical's position that Guilbert caused the fire in the face of Harvey's report (the fire commissioner) was egregious, reckless and high-handed.

[95] As a consequence of my findings in sections V and VI of these reasons, the claims for punitive, aggravated and exemplary damages have no factual foundation. I also find Economical acted in good faith, within the parameters of its rights and responsibilities to Enterprises. So there is no uncertainty, before reaching these conclusions, I reviewed and weighed the testimony of Guilbert (including his assertions that Economical did not help him complete the proof of loss and threatened to "ruin him" if he did not tell the truth) along with the testimony of Topp (PIB), Devlin (Economical), LaBrash (Crawford), and the summaries of investigative steps referenced in paragraph 28 of these reasons.

IX. COUNTERCLAIM

[96] There was no dispute at trial that despite denying coverage to the plaintiffs pursuant to the insurance policy, Economical was obligated to pay \$434,056.23 to Beautiful Plains Credit Union Ltd. and \$162,055.77 to Sunrise Credit Union with a right to claim those amounts from the plaintiffs. Similarly, the plaintiffs did not

contest the clean-up costs of \$45,773.20. Documents evidencing these payments were tendered at trial.

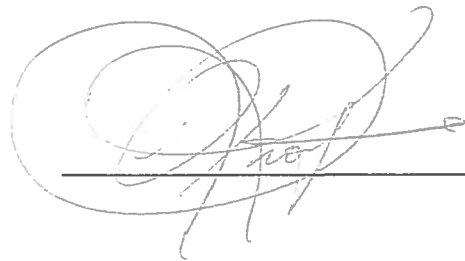
[97] As a result of my findings in sections V and VI of these reasons, Economical is entitled to recover these amounts as claimed, plus interest from the dates of payment.

X. CONCLUSION

[98] The plaintiffs' claim against Economical is dismissed in its entirety.

[99] Economical's counterclaim for \$434,056.23, \$162,055.77 and \$45,773.20 is allowed, plus interest from the dates of payment.

[100] Economical is entitled to costs and disbursements in this action. If the parties cannot agree on the amounts, the matter should be brought back to me.


_____ J.