COURT FILE NO.: 94-CQ-59069

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
PANAGIOTIS SHOLIDIS	)	Unrepresented
	)	
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
ECONOMICAL MUTUAL INSURANCE COMPANY and ROGER R. JAMES INSURANCE BROKERS LIMITED	)	Thomas J. Hanrahan, for the Defendant Economical Mutual Insurance Company M. Barett and M. O'Donnell for the Defendant Roger R. James Insurance Brokers Limited
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** April 2, 3, 4, 5, 9, 10, 11, 12, 15, 16, 19, 2002; June 3, 4, 5, 6, 24, 25, 26, 28, 2002; October 22 and 23, 2002

Thomson J.

OVERVIEW:

[1] The plaintiff, Panagiotis Sholidis [Sholidis] , suffered a fire loss January 2, 1994. He was insured with The Economical Mutual Insurance Co. [Economical]. It denied coverage of the plaintiff's claim. Mr. Cal Murphy [Murphy] was the sales agent of the broker Roger James Insurance Brokers Ltd. [James].

[2] The parties claimed and cross-claimed for the following damages:

1. The Plaintiff claimed for losses for non-payment of the replacement cost of his house, personal property and additional living expenses from the defendant Economical.

2. The Plaintiff claimed damages against Economical for treating him in bad faith.

3. He also claimed punitive damages against Economical.

4. Further, he claimed damages against James in the event Economical was not required to pay because James was negligent.

5. The defendant, Economical counterclaimed against the plaintiff to the recovery of $77,278.46 it paid to the mortgage company of the plaintiff for the value of the building.

6. James claimed over against Economical for any damages it was required to pay to the plaintiff.

[3] The defendant Economical defended on the basis that first, the plaintiff did not disclose on the application form that he had had three [3] previous claims for losses in the last five [5] years and secondly, he did not disclose he had been refused coverage by another insurance company. Secondly, Economical claimed that the plaintiff had either set the fire himself or had an agent do so. James took the position that its agent was not negligent and had asked the proper questions and recorded the answers given.

ISSUES:

1. Did Murphy ask Sholidis whether he [a] had suffered any previous losses and [b] whether any insurer had cancelled, declined or refused to renew or issue habitational insurance within the past 5 years and [c] did Sholidis answer in the negative?

2. Did Sholidis have a positive duty to disclose prior losses and cancellations in a subsequent application for insurance?

3. Was Sholidis responsible for the fire at his residence? In other words was the fire an incendiary and therefore arson?

4. Was James [though its agent, Murphy] negligent when he took the application from the plaintiff?

5. What were the damages between the plaintiff and the defendant Economical?

6. Has Economical proven its counterclaim?

7. Is the plaintiff entitled to punitive damages?

8. Was James' claim of set off against Economical proven?

9. Was the appraisal process under the Insurance Act, s. 128 fair in the circumstances of this case in that the insured was not a party to the appraisal process.

10. Costs.

OVERVIEW:

[4] The plaintiff called the defendant broker and spoke to Murphy who arranged to attend the plaintiff's house in order to take a new application for habitation [house] insurance. Murphy attended, viewed the house, measured it with Sholidis, made notes and eventually an insurance binder was issued followed by the policy of insurance covering the subject property at 916 Scarlett Rd.. The binder indicated coverage from October 30,1993 to and including October 30, 1994. The circumstances surrounding the taking of the application were critical to the first issue.

THE EVIDENCE: A BRIEF OVERVIEW:

THE APPLICATION FOR HABITATION INSURANCE:

Evidence of the Plaintiff, Panagiotis Sholidis [Sholidis]:

[5] The plaintiff testified that Murphy attended his house on October 29, 1993. He spent between one half and three quarters of an hour with the plaintiff. They both went outside and the plaintiff held the tape while Murphy measured the outside of the house. Murphy later inspected the inside. They then met in the kitchen and at the end of the meeting Murphy told Sholidis that the quantum of insurance for the house would be $182,000.00 and the annual fee would be $619.00 per year. Sholidis wrote a cheque for $668.52 payable to James dated October 29, 1993 and gave it to Murphy. The plaintiff's wife and daughter were home and were sitting close to him at the time.

[6] Exhibit 2 was the application for habitation insurance. The plaintiff testified over and over again that he had never seen the application form until February 10, 1995 when it was produced to his lawyer at the time. He said the application form was not before Murphy when the interview took place in the house. Sholidis denied that he was asked any questions about previous loses or whether he had been refused coverage. He was not asked the questions and he did not give any answers. Sholidis did not sign the application. None of the handwriting or markings on the application were made by him.

[7] The plaintiff could not explain how Murphy learned of his trade and marked the words "refrigeration repairs" on page 2 of exhibit 2. He did not recall if he had told Murphy what he did or what his previous address was. He didn't know how Murphy learned about the year the house was built or had been renovated. He said he answered all questions truthfully. He said that Murphy did not review the application, the questions on it or the actual policy with him. He

continued to deny being asked any questions about previous losses or cancellation of insurance policies.

[8] Sometime later Sholidis received a confirmation of a binder from Economical dated October 29, 1993.

[9] The defendants agreed that the policy covered "guaranteed replacement cost of the building" and "replacement cost on personal property", all as set out in a "Gold Homeowners Policy".

[10] Sholidis agreed in cross-examination that he was previously insured with Zurich Insurance Co. [Zurich] regarding his other house at 149 Symington Ave. He testified that he did not know how the box beside the words " has applicant changed address in the last three years" was marked " yes" or how the previous address of 149 Symington was put on exhibit 2. He could not explain how the name of his previous insurer " Zurich" and the expiration date of the policy "Oct. 1993" were on the form. Further, on the front page he could not explain how the year "1929" appeared beside the words "original year building" and the year "1986" as the date when the electrical, heating, plumbing and roofing was renewed.

[11] As well, he agreed he had had a number of losses concerning another house he owned at 149 Symington. There had been a fire loss January 2, 1993, a burst water pipe loss February 3, 1993 and a further fire loss on February 9, 1993. He explained that the first fire was caused from something on the stove. The water pipe burst because there was no heat in the house after the first fire. The second fire was caused by a plumber working on the house who was soldering and who lit some wood [a joist sic] in the area of the soldering on fire.

[12] Defence counsel agreed there was no evidence of unlawfulness concerning any of those fires at 149 Symington Ave.. No criminal or civil sanctions were sought against the plaintiff though Zurich eventually cancelled the policy "due to the frequency of claims".

[13] After the fire at the subject property, the plaintiff moved back to Symington Ave. On August 19, 1994 he transferred the Symington Ave. house to his daughter, for whom he said he held it "in trust" until she was 18 years old. He made the transfer because "persons were chasing me for responsibility" after the fire at the subject property. The Symington Ave. house was insured with State Farm Insurance.

[14] It was suggested to him that he transferred the house because he knew he could not get insurance because of all his claims. He agreed.

Cal Murphy [Murphy]:

[15] He was 74 years old when he testified at this trial. He had been a licensed broker for twenty [20] years in total and had been with James for six or seven [6 or 7] years selling house insurance.

[16] According to him, Sholidis called him on the telephone. He had never dealt with him before. He had no problem understanding the plaintiff. He had his application book handy and it had applications stacked one on another and they were bound together in a pad. The applications had two sides with many questions on each side.

[17] He spoke to the plaintiff and asked some preliminary questions. He wrote down the answers on a piece of paper. He then took an application from the pad while still at the office and typed in the name of the applicant [he thought the plaintiff had spelled his name for him], the address, the name of the loss/payee [Metropolitan Trust Company of Canada, the mortgagee] and its address. With this information he then left to go to the plaintiff's house.

[18] He arrived around 2.30 or 3.00 p.m., introduced himself and commenced to measure the outside of the house with the plaintiff. He said he wrote the information on a piece of paper.

[19] After measuring he went in the house and looked around. He didn't go upstairs. There was a woman in the house he had no dealings with her at all. He sat at a table inside the house and asked questions of the plaintiff. He recorded the answers on the application, exhibit 2, as the plaintiff answered the questions. He asked if the plaintiff had had any prior loss claims and if he had ever had any insurance cancelled or refused. He recorded the negative answers on the application.

[20] If the plaintiff had indicated that there had been prior claims, Murphy would have checked with the office manager to determine if James wanted to write the policy. If the plaintiff had indicated he had been refused or had a policy cancelled, Murphy said he would have had no part of it.

[21] After the questions had been answered, Murphy told Sholidis what coverage Economical was prepared to offer and the price of the coverage. He did not ask to be paid. He was shown exhibit 3, the cheque for $668.52 dated October 29, 1993 and said he had never seen it before. The plaintiff said he gave it to Murphy on October 29. It was interesting to note that the binder covering the property was dated October 29, 1993. Exhibit 2 was dated and signed by Murphy on October 30. The application was not sent to Economical until November 3, 1993 according to the handwritten note on the face of the application that Murphy said he wrote.

[22] So, something happened on the 29th and something else happened on the 30th. The real question was what happened on the 29th and, were the questions asked by Murphy and were they answered by Sholidis.

[23] Murphy could not recall which he did first, the notes or the typing on the application. He could not tell when he wrote in the information regarding Zurich Insurance on the back page of exhibit 2, that is, whether it was on the 29th or the 30th.

[24] Regarding exhibit "c", he said he could have gotten that information over the telephone originally and then typed it in on exhibit 2. Exhibit "d" could have been written either at the house or the office. He said exhibit 2 was done on the 30th. There were no questions or answers

concerning exhibits b, c and d. The information gained on exhibit 2 and on exhibits b, c and d could have been obtained at the same time. In other words, b, c and d were done early and exhibit 2 later.

[25] The seminal question was whether he asked Sholidis the questions on October 29 or not.

[26] After he had taken the information and informed the plaintiff about the coverage and the cost, he left.

[27] Economical did not require an application to be signed by an applicant. It was interesting to note that Murphy signed the application on October 30, 1993.

[28] Tabs 2, 3 and 5 in the book of documents were the notes Murphy said he made by hand.

THE FIRE AT 916 SCARLET RD.

[29] The fire occurred January 2, 1994.

[30] The plaintiff testified that he left the house at or about 3-3.30 p.m. and went to Niagara Falls. He submitted receipts that authenticated his trip. He had locked all the doors and closed the windows when he left the subject property. All other family members had left the house when he left for Niagara Falls. The family did not use the front door to enter or leave the house. They used the north side door. After buying the house he had changed the lock on the north side door. There were only five [5] keys and each was in the hands of a family member.

[31] He said when he closed the transaction he did not receive all the keys for the house and introduced evidence [exhibit 28] that the former owner or a representative of the former owner still had a key for the house. He eventually received a key from someone. The key was for the front door on the east side of the house. He put it in an envelope and kept it there. There were no other keys. The former owner was not called to give evidence.

[32] Sholidis received a page from his next-door neighbour about 9 p.m. while he was still in Niagara Falls. He was told that his house was on fire. He also talked to a police officer at that time and then returned to Toronto. He denied he ever told his neighbour that he was not coming back and that he only came back when the police officer told him to do so. He arrived back at the subject property about 11.30 p.m. He saw a police officer and after entering the cruiser, answered questions from the officer.

[33] On January 13, 1994 he signed a statutory declaration setting out his side of the story. He had met with an adjuster named Brunt on January 12, 1994 in Brunt's truck at the subject property. They discussed the situation. He then met with another adjuster named Watson and, after some amendments to the declaration, he later returned it to Brunt. At paragraph 7 he stated "I do not know what caused the fire or fires in the building at 916 Scarlett Rd. Etobicoke January 2, 1994 nor did I set the fire or fires nor did I arrange for someone else to have a fire or fires set in the building".

[34] Prior to the fire at Scarlett Rd. he said he had not removed any articles from Scarlett Rd. and taken them to Symington Ave.. He also said that he saw nothing unusual around the house before he left. He smelled nothing. The east and west doors were locked from the inside. 90% of the time the family used the north side door for entry and egress.

[35] No one was ever charged with arson concerning the first fire at Scarlett Rd.

The second fire at 916 Scarlett Rd.

[36] There was a second fire on July 15, 1994. The plaintiff was not living at the subject property at the time. The house was effectively completely destroyed at this time.

[37] The defence claimed this evidence was relevant because the house was repairable or restorable after the first fire but had to be demolished after the second fire. Economical took the position that it was not responsible for all the damages.

[38] No one was ever charged with this second fire at Scarlett Rd. All the pictures introduced of the subject property were after the first fire and before the second one.

The Plaintiff's Income and Expenses for his business, Symington Ave. and Scarlett Rd..

[39] In cross-examination, the plaintiff was asked about his sources of income. He indicated he earned income only from his refrigeration business called City Refrigeration, a registered single proprietorship. Neither his wife nor his children were working at the time.

[40] He was asked directly what his income was in 1993 and he could not tell the court. He said he had money to pay his bills. He always collected cash from his clients. He used a bank. He had no books to show how much he made or when he made it. During the trial, he was given the chance to obtain his income tax returns but did not introduce any of them in evidence.

[41] In his examination for discovery he was asked if he had any income tax returns with him. He did not. His counsel at the time undertook to produce what income tax returns the plaintiff had available. He responded to the undertaking by indicating "the plaintiff has not filed income tax returns for the 5 years prior to the fire loss" at Scarlett Rd.. Sholidis could not say if all the cash money he earned from his business was declared in the income tax return. An accountant always prepared his income tax returns. He knew he had to file income tax returns.

[42] Exhibits 20, 21, 22 and 23 were G.S.T. returns for the calendar year 1993. They indicated a total declared income of $5498.00 for that year. There was no evidence his income was any different from that figure.

[43] When he went home he did return with a Canada Pension Plan Statement [exhibit 27]. It indicated that income had been declared by Sholidis during the five [5] years prior to the fire at

Scarlett Rd.. The statement indicated that C.P.P. deductions had been made but no income tax returns were entered.

[44] He was then taken through his expenses for the business and the houses at Symington Ave. and Scarlett Rd.. The expenses totalled approximately $60,000.00 per year. Sholidis agreed he was not earning nearly that amount.

[45] In an effort to perhaps explain this situation he indicated that he had gone back to Greece from 1980-1985. Prior to leaving he had bought and sold a number of houses and had established a store business in two of his houses. When he left Canada he sold all his property and his business and had about $125,000.00 in cash. He had $70,000.00 when he returned to Canada in 1985 and again began to work.

[46] Subsequently, two of his children were involved in an automobile accident and eventually they received a settlement of $150,000.00. He did not testify whether they contributed to the costs of upkeep of his business, Symington Ave. or Scarlett Rd..

[47] He said he kept the $70,000.00 he had when he returned from Greece at the house because he felt it was safer than in a bank notwithstanding he used at least two banks.

[48] Prior to the fire at Scarlett Rd. on January 2, 1993, he had tried to sell both Symington Ave. and Scarlett Rd.. There was some interest in the properties but he did not receive any offers.

Issue # 1:

[49] Did Murphy ask Sholidis whether he [a] had suffered any previous losses and [b] whether any insurer had cancelled, declined or refused to renew or issue habitational insurance within the past 5 years and [c] did Sholidis answer in the negative?

[50] In determining the answer to these questions, it will be necessary to determine the credibility of Murphy and Sholidis.

[51] In regard to the cancellation by Zurich, Sholidis admitted that he was cancelled because he had had the three prior losses. He was well aware that his prior loss history was a material fact in regard to the insurance he was trying to obtain.

[52] Sholidis denied that he was asked any of the seminal questions set out above on the application. His evidence never changed. He didn't say, "I was asked some of the questions. I wasn't asked others." His evidence all along was "I was never asked any of these questions."

[53] On the other hand, Murphy's evidence was that he did ask Sholidis those questions and wrote down the answers he was given. They both were ad idem on the fact that Murphy had come to the house, measured the outside and that he and Sholidis sat at the kitchen table for approximately 15 minutes.

[54] Sholidis testified that the only thing Murphy did during that time was to do the calculations for the insurance premium. Murphy indicated that in addition to doing the calculations, he also got the answers to the questions on the application form.

[55] Exhibit 2 [the application] contained some very specific information on its face. One entry indicated that the building was built in 1929. It does not say the house was built in the 1920s or in the 1930s. It said specifically 1929. Sholidis admitted getting Exhibit Eight a letter from Economical asking him for a photograph of the house because it was built in 1929. Sholidis was asked whether or not he ever questioned Murphy or anyone else as to where they got that number. He indicated he did not.

[56] It was rather curious how that date and the date of renovation were included on the application. To assist in determining the matter of the date on the application, the real estate listing for Scarlett Rd., when Sholidis attempted to sell it, indicated on its face that the house was renovated in 1987 one year after the date of renewals on exhibit 2. He did not know where the real estate agent got that information. Sholidis said he did not tell Murphy either date.

[57] Right below where the question "original year building" appeared on the application it stated, "If constructed over 20 years ago, indicate year the following were last renewed". The application indicated that the electrical was fully renewed in 1986, the heating was fully renewed in 1986, the plumbing was partially renewed in 1986, and the roofing was fully renewed in 1986.

[58] It would appear that someone has entered information in this section carefully. The person didn't simply tick off some boxes. The boxes indicated that the electrical, heating and roofing were fully replaced, whereas the plumbing was a partial renewal. This section gave the appearance of someone asking for this information and being given these specific answers.

[59] On the back page of the application regarding "occupation", the words "refrigeration repairs" appear. Sholidis indicated that information was correct.

[60] Right below 'occupation' was the question "Has the applicant changed addresses in the last three years?" The box was checked off "yes". The next question asked, "If yes, provide previous address.", and 149 Symington Avenue was entered. This was information that Murphy would not have at hand. He must have received this information from Sholidis, and yet, Sholidis told the court that he did not provide any of this information to Murphy.

[61] The application also asked for the name of the previous insurer, and the answer was "Zurich". Sholidis indicated that answer was true. The specific expiration date for the Zurich policy was also indicated, "October 1993". That was information that Murphy would not have at hand in completing the application form. The only reasonable source for that information would have been Sholidis. His position that he was not asked any of these questions and did not provide any of that information was simply not credible. Murphy was a very experienced insurance broker. The Court would have to accept that he never asked any of those questions and simply guessed at the information and somehow, got most of it right.

[62] Sadie Pokhai, the underwriter from Economical indicated that if this application form had been submitted and the information wasn't completed, she would not have accepted the application. She was asked specifically about the section dealing with prior losses and the section dealing with prior cancellations. She indicated quite clearly that she would not have accepted the application if that information had not been completed.

[63] Sholidis suggested, without the support of any real evidence, that the information was filled in sometime later. That just doesn't seem likely. The application was signed by Cal Murphy, and dated October the 30th, 1993.

[64] There was a notation on Murphy's copy that it was sent to the company on November the 3rd, 1993. On Economical's copy, Exhibit 107, it showed that it was received at the company on November 3rd, 1993.

[65] Sadie Pokhai's evidence was unequivocal and uncontradicted when she said that all of the information on Exhibit 107 was on the form when she received it from the broker. It was not plausible or credible, based on the documentary evidence and on the oral evidence, to suggest the information on the application was added later.

[66] In regard to the question on the back page of the application, "State all losses or claims by the applicant or other members of the applicant's household in the past five years.", the box was not left blank. In fact, in rather bold writing it said, "None", and it was underlined. In regard to the question, "Has any insurer cancelled, declined or refused to renew or issue habitational insurance to the applicant within the past five years?", the answer was checked off, "No". There was an answer that appeared on that application form. Murphy was adamant that he asked those questions and received those answers.

[67] Sholidis admitted in cross-examination that in the past at least some insurance brokers had asked him about prior losses. His Zurich insurance broker, who he had been dealing with for a number of years, refused to do any further business with him because of the previous losses. Sholidis testified that he never discussed the effect of these losses with Murphy.

[68] It seems incredible to conclude that, if he had those problems with Zurich Insurance and with his own insurance broker, when he approached Murphy, he made no inquires as to what effect the prior losses would have on the new house insurance. It seems more likely that Murphy, an experienced insurance broker who was familiar with the insurance industry, would have asked about prior losses and was told "none". Likewise, Murphy would have asked about prior cancellations and was told "no". It seems likely that Sholidis knew that, if he disclosed these losses and the prior cancellations, his insurance would be very expensive or he would not get any insurance at all.

[69] Sadie Pokhai indicated in her evidence that with three prior losses and a cancellation Sholidis would be in the high-risk market. Ms. Pokhai was clear that all losses had to be reported by the broker and, on a new application, Economical would not have accepted the business.

CONCLUSION:

[70] I listened carefully to both the plaintiff and Murphy. Murphy was a very experienced broker. There was no question that the application was sent to Economical November 3, 1993. On November 12, Economical sent a letter to James asking for a picture of the house because it was built in 1929. Pokai was not impeached when she said that all the information on the application in evidence was on it when it was received on November 3, 1993.

[71] I find that the evidence of Murphy was far more persuasive than that of Sholidis. Sholidis had been turned down for insurance by Zurich because of too many claims. He knew how important a "yes" answer was to the prior loss question and the cancellation or refusal. He knew he would either be turned down or the insurance would be very expensive. Murphy had no reason to mislead anyone while Sholidis did. Although Murphy was no longer in the business when he testified, he was forthright and had a firm recall of the event. I accept the evidence of Murphy and find that he did ask the questions and Sholidis answered them as indicated on the application. I reject the evidence of Sholidis when he said he was never asked the relevant questions on exhibit 2. He had a motive to answer the way he did and I find he was not truthful when he said he was not asked the questions. There was no way that Murphy could have learned the answers recorded on the application if Sholidis had not been asked the questions and given the answers. There was just too much specificity in the answers. The information was not put on the application at some date after November 3, 1993.

[72] After considering all the evidence and argument, I conclude, on balance, that the plaintiff deliberately withheld information about prior losses and cancellation from Murphy at that time of the application. I am satisfied that, on balance, Murphy did ask the questions concerning prior losses and cancellation or refusal and received the answers which he recorded on the application. The questions were clear and unambiguous and Sholidis failed to answer them honestly in contravention of the law.

[73] The answer to question 1 is “yes”.

Issue # 2

[74] Did Sholidis have a positive duty to disclose prior losses and cancellations in a subsequent application for insurance?

[75] *Ford v. Dominion of Canada General Insurance Co.*, [1991] 1 S.C.R. 136, rev'g [1989] M. J. No. 674 (C.A.), dealt with this question. In about two lines the Supreme Court eventually adopted the minority position at the Court of Appeal.

[76] Ford, the insured, had disclosed one prior loss and one prior cancellation, but he did not disclose a second loss and a second cancellation. The trial judge found that the insured did have a positive duty to disclose this information to the insurance company.

[77] The Manitoba Court of Appeal, reversed the trial judge, but Mr. Justice Philp, in dissent, indicated that the insured had a positive duty to disclose the information.

[78] In the Supreme Court of Canada, Mr. Justice Cory stated:

> I am in agreement with the minority reasons given by Philp, J.A. (1989). As a result, I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment at trial.

[79] In the Court of Appeal, Mr. Justice Philp had stated at p. 6

> A contract of insurance *uberrima fides*; utmost good faith must be observed by both parties. It has been said that the relationship between an insurer and an insured is one in which the insurer knows nothing of the risk to be undertaken and the insured knows everything. From this relationship arises the obligation of the insured to disclose all material facts so that the risk of the insurer undertakes will be the risk he intends to undertake.
>
> This fundamental principle of insurance law has been applied by the courts for over 200 years. The cases are referred to by Professor Harvey Ivamy in his text, General Principles of Insurance Law (4th edition) at chapters 12 and 13. In my view, it is not necessary to review and analyze those decisions for the purposes of this appeal.

[80] In *Shakoor v. The United States Fidelity and Guaranty Co.*, [1994] O.J. No. 460 (Gen. Div.) the fact situation was not unlike the present case. The plaintiff had had three losses and a prior cancellation, none of which had been reported to his present insurer. Mr. Justice Doyle stated in para. 22:

> The plaintiff had acknowledged that a cancellation of a previous policy must be brought to the attention of the successor insurer.

[81] The judge found that this in fact had not been done. He then dealt with the fact that there was a fraudulent omission and misrepresentation. At p. 7 he reviewed the decision of Mr. Justice Galligan in *Chenier v. Madill*, (1973) 2 O.R. (2d) 361 (H.C.) where Galligan J. stated:

> It must be noted immediately that any misrepresentation of a material circumstance renders the contract of insurance void while it is only a fraudulent omission to communicate a material circumstance that renders the contract void. This all-important distinction was pointed out by the Supreme Court of Canada in *Taylor v. London Associate Corporation.* It is therefore necessary to examine the circumstances of this case and consider separately

> what misrepresentations are relied upon by the defendant and what material circumstances the defendant alleges that Mrs. Chenier fraudulently omitted to communicate to the insurer.

[82] In doing that, Doyle J. reviewed the decision in *William Ford v. The Dominion of Canada* [supra] and accepted the fact that a contract of insurance is *uberrima fides* and it must be observed by both parties. Then in determining whether or not the issue of the previous policy cancellation and the three non-disclosed risks were material, Justice Doyle referred to the *Hicks v. Saskatchewan Mutual Company,* 20 C.C.L.I. 223 (Sask Ct. Q.B.)

[83] In Hicks, the situation concerned the non-disclosure of three prior losses and a cancellation. The application was taken over the phone. The broker said that he had asked the questions but was not told of the prior losses. On page 228 the court, in reviewing the evidence, stated that (the broker) had stated:

> … the application form was in his writing and that all the information obtained from Mr. Hicks by telephone was placed on the form. He stated he specifically asked Mr. Hicks the last two questions on the back of the form, that Mr. Hicks did not tell him of prior claims or previous policy cancellation by Saskatchewan Government Insurance and if Mr. Hicks had given him this information he would have recorded it on the form.

[84] In considering the evidence presented the court said at p. 230:

> He had a great deal to gain by non-disclosure of previous losses and prior insurance policy cancellations. I am satisfied that he knew if he disclosed that information to Mr. Forster, he would not have received insurance coverage.

[85] At page 231 the court stated:

> I also accept the evidence of Mr. Frank C. Tappin that a previous claim record is very significant and that prior cancellation of an insurance policy is very material to the acceptance of any risk and was very material to the acceptance of this risk. He also stated that if the last two questions on the form had been answered truthfully that it is not likely Saskatchewan Mutual Insurance Company would have provided insurance coverage.

[86] In *Shakoor*, Doyle J. used that statement to blend with the quote from Mr. Justice Galligan where he said it is only material misrepresentations that will render the policy void.

[87] *Pilieci v. Carmichael and Associates Insurance Brokers Ltd.*, [1993] O.J. No. 1007 (Gen. Div.) was a decision of O'Brien J. and it was concerned with a situation where the defendant insurer said there was a misrepresentation because the insured denied being asked any questions about prior fire losses. The broker's evidence was that he had asked about the losses and was told there were none. The insured had had three prior losses. It was the evidence of the broker that it was his usual business practice to ask about prior losses. The insurance application did not require a signature. At page 4, the judge stated:

> I conclude the plaintiff deliberately withheld information about prior losses from Brosbell at that time and this is consistent with what I conclude occurred when he made the application to Mr. Hartnett. I conclude the plaintiff deliberately withheld information about his previous three losses from Harnett, and I conclude, specifically, that question was asked.

[88] In *McGinn v. All-Pave Parking Lot Services*, [1990] A.J. No. 853, Guardian Insurance refused to renew a previous policy. One of the issues raised was whether or not the question on the application form was in any way ambiguous. The question was:

> Has any insurer, to the knowledge of the applicant, cancelled, declined or refused to renew or issue automobile insurance to the applicant or spouse within the three years preceding their application? If so, state name of insurer.

[89] In the case at bar the question asked on the back of the application form by Murphy was strikingly similar:

> Has any insurer cancelled, declined or refused to renew or issue habitational insurance to the applicant within the past five years?

[90] In *McGinn*, the court determined that the meaning of the question was clear and unambiguous. At p. 4 the court concluded:

> We are satisfied that the words in question 6B conveyed a clear and unambiguous message, namely that the Respondent was asking for, among other things, a disclosure that the current insurer had "turned away" from a continuation of the insurance coverage represented by the current policy. It defies common sense to conclude that this Respondent, being a prospective insurer and new to the particular risk being offered to it, did not expect disclosure of the action taken by the current insurer as set out in its memo to Banner.

[91] In that context, Ms. Pokhai stated that if that information had not been given to Economical, it would not have considered underwriting the risk until such time as the information was given to it.

[92] In *Kehoe v. British Columbia Insurance Company*, [1993] B.C.J. No. 1172 (C.A.) the court considered the issue of whether an insurer was acting reasonably in denying a claim for non-disclosure of past losses. The previous insurer had refused to renew because of a claims history. British Columbia Insurance Corporation stated that if the claims history had been revealed to them, it would not have accepted the policy.

[93] At para. 16, the Court of Appeal referred to the Supreme Court of Canada decision where it stated;

> The question then arises is BCIC also required to demonstrate that such an underwriting practice is "reasonable" when assessing the risk of coverage to be provided an applicant. In my opinion, the decision of *Henwood and Prudential Insurance Company of America* [1967] S.C.R. 720 is determinative of the issues raised. It clearly holds that there is no such obligation upon the insurer.

[94] And then on paragraph 19, the court stated:

> No evidence was called on behalf of the insured's beneficiary to contradict the categorical statement made by the insurer's own doctor that, if true information had been made available to the insurers respecting the applicant's pre-existing state of health, the premium rate for the policy would have been very high. The trial judge dismissed the claim against the insurer on the ground that the failure of the insured to disclose her prior state of health on the application was an omission material to the risk and rendered the policy voidable.

[95] Then, quoting from the Henwood decision, where Mr. Justice Ritchie at para. 21 stated:

> The question that remains to be determined is whether in treating the untrue answers as material, the respondent was acting as a reasonable insurer, and whether it has sufficiently discharged the burden of proving that its actions were those of such an insurer by calling its own officials to prove the company's practice.
>
> Like the learned trial judge, I cannot escape from the fact that there is no evidence to suggest that any reasonable insurance company would have taken a different attitude, and I am also impressed by the fact that Dr. Roadhouse spoke as a medical doctor who had 11

> years experience in the specialized field of underwriting in his capacity of medical director of the respondent company.

[96] And at para. 23 of the Kehoe decision Ritchie J. concluded his reasons at p. 727 with this passage:

> The determination of this appeal is to be governed by what was said by Lord Salvesen in the Mutual Life case at page 351-2 where he said:
>
> > it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

[97] In reaching its conclusion, the Court of Appeal at para. 26 stated:

> To paraphrase Ritchie J. in Henwood, in the absence of any evidence to suggest that BCIC's practice is anything but reasonable or that any other insurer will follow a different course, it has been shown affirmatively that the non-disclosure by the applicant of his claim history was material to the risk and BCIC was entitled to avoid the policy.

[98] In this case, the only evidence the Court has heard was that not only was the policy not acceptable to Economical with the claims history and the prior cancellation, it was also not acceptable to Zurich Insurance. Sholidis indicated to us that his broker had no longer wished to do business with him, and one can only assume that he didn't have a market to place this business if he revealed the past claims and the refusal to insure.

CONCLUSION ON ISSUE 2:

[99] On the issue of the material misrepresentation, Sholidis admitted to the three prior losses and the cancellation while he was insured with Zurich. The cases demonstrate that these would be considered to be material to the underwriting of a risk. Sadie Pokhai said that Economical would not have underwritten this policy if the disclosure had been made. Sholidis had a positive duty under the *Ford* decision to be proactive about reporting these losses. He had a legal duty to report these prior losses and the cancellation. He has never said he reported them to James. He's always stated he was never asked and he never disclosed.

[100] The law demands that the insured be forthright and answer questions honestly. As the court has said, it's a policy of *uberrima fides* and the insured knows everything of the risk

and the insurer knows nothing. Thus, the obligation is on the insured to disclose all material facts to allow the insurer to properly assess the risk.

[101] In my view Sholidis had a positive duty to disclose those losses and the cancellation to Murphy. He can't stand by and enjoy a windfall even if the broker didn't ask about it. It is important to keep in mind that he never suggested in his evidence that he told the broker the information, but Murphy got it wrong. His evidence was consistent. He said he never was asked those questions and he never disclosed the answers to Murphy. I am satisfied that Sholidis made a material misrepresentation when he didn't disclose the losses and the cancellation. I find that the non-disclosure by the applicant of his claim history and cancellation was material to the risk that was to be undertaken by Economical. As a result, Economical had the right to treat the policy as void and not pay the claim as submitted by Sholidis.

Issue 3.

[102] Was the plaintiff responsible for the fire at his residence? Was the fire an incendiary fire and therefore arson?

Sholidis' argument that he was not responsible for the fire or fires:

[103] Sholidis alleged that the fire investigation was biased and skewed because the investigators knew that he had had three previous fire losses and therefore did all they could to ensure that he must have been responsible for this fire.

[104] He commenced his argument by referring to the evidence of various investigators. Joe Druri was the Fire Captain who arrived at 916 Scarlett Road shortly after the call and was the first to conduct a scene investigation. He removed propane tanks from the basement. Peter Heyerhoff was retained to investigate the fire on January 17, 1994. Heyerhoff also testified about the existence of the propane tanks and the fact they were mentioned in the Etobicoke Fire Department report. However, none of the other investigators made mention of the propane tanks. None of the investigators investigated what, if any, part the propane tanks played in this fire. They should have done that investigation. Because they did not do the investigation any findings they did make were not credible.

[105] Heyeroff initially was of the opinion that the burning on the living room carpet originated from a fire in the basement that travelled up the joist to the floor and burned the carpet. Sholidis argued that there was no connection established between this burned area on the carpet and any accelerant. Druri could not determine the source of ignition. O'Halloran's initial submission (Exhibit 147) stated that the fire was centered in the basement spread into the walls and up to the attic. However, his final conclusions were much different. In the end he concluded that there was no connection between the fire in the basement and the one in the attic. Sholidis argued that this change in opinion was inconsistent and contradictory and therefore the court should not accept their evidence of the dual points of origin of the fires.

[106] As well, Economical claimed that Sholidis let the dogs out of the house prior to leaving on January 2, 1994 because he willfully set the fire. However, Captain Druri testified that on January 2, 1994 there were two dogs found on the second floor of the house as well as a bird. They had to be moved to safety by the firefighters. The fact that the pets were found in the home provided evidence that the Sholidis family was occupying the home at the time of the fire. Piccinini, the next door neighbour saw them occupying the home prior to January 2, 1994. O'Halloran commented that there were many food items in the refrigerator and freezer (see Exhibit 125). There was also evidence shown in Exhibit 129 and 146 that showed Christmas wrapping paper and a decorated Christmas tree. This evidence proved that the Sholidis family had just celebrated Christmas in the house and had not abandoned the residence.

[107] Phil Brunt was concerned that there were few contents found and there were no pictures hanging on the walls.

[108] Jack Armitage from Arcon Engineering did his electrical investigation of the fire without the use of any tools. However, he was able to conclude that there was no electrical failure. Sholidis submitted that Jack Armitage could not have undertaken a thorough electrical investigation. Therefore, his conclusions were not credible in determining whether that an electrical failure was not the cause of the fire.

[109] Sholidis argued that the case of *Roland Roy Fourrurers Inc v. Maryland Casualty Company* [1974] S.C.R. 52., set out the standard of proof. The court held that the standard of proof was higher than in a normal civil case. The court decided that the courts were obligated to approximate the "beyond a reasonable doubt" standard and the defendants did not meet this standard and therefore this allegation failed and Economical should pay.

[110] In *Chiusolo v. Royal Insurance Company*,[1985] O.J. No. 677 (H.C.J.), there were allegations of arson made by the insurance company because the fire investigators determined that the fire was of incendiary origin. The courts decided that if the insured had both a motive and the opportunity to set the fire, then the test was whether it was more probable than not that the willful act of the insured caused the fire.

[111] Regarding a financial motive Sholidis testified that he immigrated to Canada in 1971 as a certified electrician and he successfully obtained his license to practice in Canada. He upgraded his license by taking further courses and moved into the refrigeration and air conditioning business. Sholidis was self-employed and owned and managed his business known as City Refrigeration since about 1977. Up to 1980, Sholidis and his wife also owned and managed a grocery and variety store on Lappin Avenue in Toronto. Sholidis supported himself and his family with these businesses for all the years that he was able to work. Sholidis was also in the business of buying and selling homes and enjoyed speculating in the real estate market.

[112] Sholidis stated that over the years he bought and sold about ten different properties, the first of which was purchased in 1971, four months after coming in Canada with a down payment of $300.00.

[113] The fact that he had listed both of his properties on the market prior to the fire of January 1994 does not mean he was in financial need. It merely suggested that he was speculating about how high a price he could get for his properties. The listing of 916 Scarlett Road in September of 1993 (Exhibit 26) further exemplified this point because it had a listing price of $269,000.00.

[114] In January 1994, Sholidis was not in any debt, did not have any loans and was up to date in the payment of all his utility bills, taxes, rents and mortgage payments. Although Sholidis did have a personal chequing account with Royal Bank in January of 1994, he refrained from depositing the $70,000.00 he had from Greece for personal reasons. He also had a business account with the National Bank for his City Refrigeration business. He argued he had nothing to gain from setting fire to his own home which was newly bought and recently renovated.

[115] Regarding opportunity Sholidis testified that on the date of the fire he and his family left their home at 916 Scarlett Road between three and 3:30 pm. to go to Niagara Falls. There was no question that Sholidis was there that day and early evening. Sholidis testified that when they left Scarlett Rd. the doors were locked. It was not plausible to suggest that Sholidis set the fire prior to leaving his home as he left at 3 p.m. and the fire started at about 8 p.m. This amounts to a five-hour gap.

[116] In *Vidakovic v. Portage LaPrairie Insurance* [1985] A.J. No. 764 (C.A.), the court decided that there was no exclusive opportunity even though the insured had keys, was on welfare, disabled, and had listed the insured premises for sale.

[117] The court should find that he did not have a motive or the opportunity and the defence should not be successful.

Economical's Position on the arson:

[118] Sholidis or someone on his behalf started fires in two places in the house and intended to burn the house and claim the insurance money. He had motive because he had financial difficulties. He had opportunity because he locked the house before he left and no one else had entered. The house was still secure when the fire department personnel arrived.

The Law:

[119] If an insurance company denies a claim on the basis of arson, the onus of proof is on the insurance company to establish the arson so long as the Plaintiff has established the presence of the insurance policy and the fact that the fire occurred. Economical conceded that the plaintiff had established these two facts.

[120] Economical submitted that the Roland v. Roy case [supra] raised by Sholidis had now been either ignored or specifically rejected by the Supreme Court of Canada and almost every appeal court. The most followed case is the recent decision of Farley J. in *Rizzo v. Hanover Insurance Company,* [1990] O.J. No. 475 (H.C.J.). It set out the requirements that a defendant

had to prove in order to be successful utilizing this defence. The case went to the Ontario Court of Appeal where Justice Farley was upheld. It was further appealed to the Supreme Court of Canada and leave to appeal was refused.

[121] At the bottom of page 9, Farley J. stated:

> [t]herefore, it seems to me that for the Defendant insurance company to be successful in its defence against the Plaintiff's claim, it must prove on a balance of probabilities that the only reasonable conclusion to be drawn from the facts as they have been found in this case was that the fire was started by the Plaintiff or at his request based on the elements that, (a) the fire was of incendiary origin, (b) the Plaintiff had sufficient motive that the fire be set, and (c) that the Plaintiff had the appropriate opportunity to do so. As the defence depends upon proof that the Plaintiff has committed a criminal offence, even though this is a civil action, the degree of probability has to be commensurate with the gravity of the offence of arson, and in that respect, I am required to give the matter special scrutiny in all respects.

[122] This case was a civil action and the appellate courts have been clear that there is only one standard of proof in a civil action, proof on the balance of probabilities. What Farley J. seemed to be suggesting was that a trial judge had to review the evidence carefully, perhaps more carefully than in most civil cases, but the standard had not changed. If the trial judge, after reviewing the evidence carefully and with special scrutiny, was satisfied that, on the balance of probabilities, it was more likely than not that the insured caused the fire, then the standard was met.

[123] Regarding circumstantial evidence, Macdonald J. in *Oprea v. Royal Insurance Co. of Canada,* [1994] I.L.R. 1-3059 (Ont. Ct. Jus. Gen. Div.) dismissed an action for damages. The Court of Appeal dismissed the appeal and the Supreme Court of Canada did not grant leave to appeal. At page 2 the trial judge stated:

> Before setting out the facts, I make the following observations about arson cases in the civil context. Arson is a discreet act. It does not by its very nature take place in circumstances where it will be readily or easily detectable. In this context, I note the following observations of Perry J. of the British Columbia Supreme Court in *Lally v. Safeco Insurance Co. of America* (1990), 49 C.C.L.I. 83 at pages 106-7: In both civil and criminal cases where arson is alleged, the proof must very often depend on circumstantial evidence. What was the nature of the fire? Was it caused by an act of incendiarism or by accident or natural means? In Monteleone [sic] v. R., [1988] 2 S.C.R. 154 [sic], the Supreme

> Court of Canada held that the incendiary nature of the fire may be proved by circumstantial evidence in reference to arson.
>
> MacIntyre J. delivering the judgment of the court quoted with approval at p. 200, a passage from McWilliams, Canadian Criminal Evidence, 2d ed. (Toronto: Canada Law Book Ltd., 1984) wherein the author refers to the words of Wills, an Essay on the Principles of Circumstantial Evidence, 6th ed. (1912), p. 326:
>
> > It is clearly established that it is not necessary that the *corpus delicti* should be proved by direct and positive evidence, and it would most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy, and human tribunals must act upon such indications as the circumstances present…

[124] I will deal with the three elements that Rizzo [supra] indicated have to be proven, namely [a] whether it was an incendiary fire, [b] whether the Plaintiff had sufficient motive to set the fire and [c] had the appropriate opportunity to set the fire.

[a] Was the fire incendiary [arson]?

[125] Joe Druri, the Fire Captain, was one of the first persons on the scene. When he arrived at the scene, he could immediately see that there was a fire in the attic at the northeast corner of the house and what he described as a working fire in the basement. It was readily apparent that he could not see any area burning between the basement and the attic. After the fire he had an opportunity to walk through the premises and he could see no evidence of burning or fire on the main floor. He could find no area where the fire had traveled from the first floor to the second floor, and because he could find no connection between the two fires, he decided to call in the Fire Marshall.

[126] The Fire Marshall, Joe O'Halloran, was called in to do an investigation into the fire. He was an independent public official, and after investigation, found two distinct areas of origin. First was a small localized fire in the basement and secondly a much larger fire in the attic. He attempted to find some connection between the two fires. He opened up some of the walls and ceilings only to find there was no point where there was a path connecting the basement fire with the attic fire. It was his opinion that the wall cavities that were opened up demonstrated that the fire from the basement had stopped before reaching the second floor. The burning on the second floor was all in the attic area with no low-level burning. O'Halloran went through each and every room on the second floor and in none of those rooms could he find any evidence of low level burning. It was his opinion that there were no connecting points between

the two fires. He concluded that both fires were incendiary fires and therefore the fires were arson.

[127] Jack Armitage of Arcon Engineering was retained by Economical as an expert in fire investigation. He did an independent examination and also concluded that there were two separate and distinct fires. He found an area of origin in the base of the wall at the bottom of the basement stairs and found that the fire had spread along the ceiling of the basement to the first floor. Armitage testified that he could find no place where the fire from the first floor had reached the second floor. He indicated that there was little or no low-level burning on the second floor and he could not find any connecting path between the basement fire or the attic fire.

[128] He also examined the electrical system throughout the house and could find no evidence of any electrical problems that contributed to the fire in any way. He examined the fuse panel and found no evidence of shorting or burning anywhere in the vicinity of the electrical panel. He concluded that the panel itself had not contributed to the fire. He could find no electrical circuits which had contributed in any way to the fire in the attic. He was questioned extensively on cross-examination in regard to the old knob-and-tube wiring. He pointed out that although there was knob-and-tube wiring, it was not connected to a power source.

[129] He also tested and examined the furnace and found no evidence of malfunction and no actual burning in the vicinity of the furnace.

[130] Armitage concluded that there were two separate fires and each was incendiary.

[131] Mr. Marinoff was an electrical engineer with the Fire Marshall's office. He found no evidence of any shorting in any of the wires, switches, or receptacles that he examined. He testified that none of the components he tested were faulty and he was unable to find any electrical cause of the fire.

[132] Peter Heyerhoff was an experienced Fire Marshall and private fire-origin expert who indicated he'd investigated over 2200 fires in his career. He formed an initial opinion but later concluded that there were two separate and distinct fires, one in the basement and one in the attic. He came to the more informed opinion after he had opened up some of the walls and ceilings in the house and tried to find a connection between the two fires. He could not find any connecting path between the fire in the basement and the fire in the attic. In the end he too concluded that the fire was incendiary.

[133] Sholidis pointed to the presence of propane tanks having been in the house and having been found by the Fire Department. There was no evidence that the propane tanks in any way contributed to either of these fires. The investigators gave specific information as to where the fire in the basement started. There was no relationship established between where the propane tanks were in another area of the basement and place where the basement fire originated.

[134] Regarding the matter of the accelerant, O'Halloran took five samples from the living room/dining room area. They were placed in jars, sealed and delivered to the Centre for

Forensic Science. Ms. Anne Sprung, the chemist from the Centre for Forensic Sciences, stated that she had examined these samples and found the presence of mineral spirits in two of the samples. She testified that the term mineral spirits included such products as kerosene, varsol and solvents for pesticides.

[135] During the cross-examination of Sholidis, he had advised that he did not store any of these products in his home. Sholidis raised the issue that Ms. Sprung had advised that there was not enough presence of accelerant to actually collect samples. However, in her evidence she advised that that allegation did not in any way inhibit her from being able to determine the identification of the product. There just wasn't enough of it for her to get a liquid sample from it. Her evidence was reasonable in all of the circumstances and was not impugned in any way by cross-examination. Her opinion was well founded and I accept it without question.

Motive:

[136] In *Laurie v. Prudential of America General Insurance Co. (Canada)*, [1992] N.S.J. No. 366 (Sup. Ct.) the importance of basing a claim of arson on circumstantial evidence was highlighted. The facts of that case were similar in that the insured had previous fires, there were no signs of forced entry and the motive was said to be financial difficulties.

[137] Sholidis by his own admission could not afford to carry both houses. He had both houses up for sale prior to the fire and had not had much interest in either home. He was not certain whether he had received any offers on either of the houses.

[138] He testified that he reported all of his income from his business and the amounts shown on the CPP contribution statements [exhibit 27] were accurate. They showed the following amount of insurable earnings: 1993, $4443.99; 1992, $3682.00; 1991, $3393.00 and in 1990, $9522.00. In the four years before the fire, Sholidis' income was basically negligible. His business GST forms for the four quarters of 1993 indicated total gross sales of $5498.00. This was the only evidence of his income. He testified during cross-examination that he had declared all of his income and that those CPP statements were accurate. No income tax returns were ever produced.

[139] In comparison to the income he had, it was interesting to consider what expenses he was incurring. The mortgage on 916 Scarlett Road was $1606.00 per month or $19,200.00 per year. The estimated taxes were $1800.00 to $1900.00 per year. The heat was $600.00 per year. The hydro was $400.00 per year and he was paying $619.00 in house insurance each.

[140] The mortgage on 149 Symington Avenue was $1400.00 per month or $16,800 per year. The water bill was $160.00 per year. The heat expenses were somewhere between $800.00 to $900.00 per year. The hydro was approximately $500.00 per year and his insurance was $600.00 per year.

[141] In addition to those expenses, he was paying rental income for his business at the rate of $868.00 per month or $10,416.00 per annum.

[142] He estimated that food for the five people who were living in his home would have been about $150.00 per week, or $7800.00 per annum. In regard to clothing, he could offer no estimate as to the amount spent on clothing each year.

[143] After totalling all of these expenses, Sholidis required about $60,000.00 per annum just to meet his bills. He was not earning anything close to $60,000.00 per year according to any of the records in evidence in this trial.

[144] In cross-examination, Sholidis said that he had $70,000.00 in cash that he brought back with him from Greece. He was keeping it at his house. He was asked why he was keeping the money in his house. His only explanation was that he did not like dealing with banks, and yet, he was dealing with banks both on a personal level and on a business level, but for some reason, he had decided to keep $70,000.00 in his home. Even if Sholidis did have $70,000.00 in cash, the money would have been quickly consumed just to meet the bills that he was incurring on an annual basis.

[145] Economical suggested that by 1994, Sholidis was becoming desperate as a result of his lack of funds. He spent a good deal of time testifying and advising that he had wanted to give a house to his daughter and yet he put both of the houses up for sale before the fire. It appeared that he was prepared to sell whichever house he could because he could not afford to carry both houses. It also appeared that he had a motive to start the fires in order to obtain cash.

[146] He had financial obligations that were pressing. He had listed both houses for sale and by his own admission needed to dispose of one of the houses. He had motive.

[147] At any trial the credibility issue raises its head. It is important to assess the credibility of Sholidis on this particular issue. It must be considered on the totality of all of the evidence. I have taken into account all of the evidence in the trial when determining his credibility on this issue. I have already made a finding about his credibility on the application issue.

[148] Sholidis advised that he was looking after the mortgage arrangements and payments after the property had been transferred to Tina Sholidis. Yet he advised the court that when she went to arrange the insurance with State Farm, he had no input into what she told the insurance agent.

[149] He tried to suggest that the house was a total loss as a result of this fire. However, his own witnesses, Bob Watson and Donald Powers, from NFA were hired to prepare repair estimates. NFA prepared a building estimate that was marked as Exhibit 52 and which showed that the house was repairable. NFA also obtained an estimate from CNA Construction that showed that the house was repairable.

[150] When Watson was asked in cross-examination why these estimates were never sent to Economical Insurance, he advised that Sholidis had told him not to send them because Sholidis wanted the house to be a total loss.

[151] In regard to the issue of the contents of the house, there was a noticeable shortage of contents for a house that was being occupied by five people. Fire Captain, Joe Druri indicated that on his first walk through the house, he noticed that there were few contents in the kitchen or in the closets in the bedrooms. O'Halloran also indicated that there were few contents in the kitchen and few clothing items in the closets in the bedrooms and he referred to the photos he took that clearly showed very few contents.

[152] Brunt, a very experienced fire adjuster, indicated that when he entered the home and walked through, he was struck by the fact that there were so few contents in the house. In the photos taken by Brunt, he pointed out that the items were covered in soot and if the items were covered in soot, you would be able to see the outline of any items that had been moved or removed afterwards. No such outlines were seen. O'Halloran also reviewed Brunt's photos and said that they depicted the house as he found it after the fire.

[153] During the course of the trial, Sholidis provided a list of items that were supposedly removed from the house on January the 4th, 1994 after the fire. In cross-examination before he had produced the list, Sholidis said he believed the first time he was in the house after the fire was the day he met with Brunt to give his statement. The statement was taken by Brunt on January the 12th, 1994, yet the list of goods that Sholidis removed from the house was marked as January the 4th, 1994. It was certainly open to interpretation that Sholidis had removed most of his goods prior to the fire.

[154] On this point, I find Sholidis was not a credible witness and I disbelieve him. He clearly had too many expenses and not enough money to pay them. He had a motive to set the fires.

[c] Opportunity:

[155] The final area in the analysis is opportunity. Sholidis testified that when he left the house, all three doors to the house were locked. He also testified that only family members had keys. He indicated in his submissions that he had the locks on the north door changed. He always kept the other doors to the house locked. When he left the house on January the 2nd, all of the doors to the house were locked.

[156] Druri testified that when the Fire Department arrived, the house was still locked. He described how they had to use a halogen tool to pry open the side door. Photographs showed evidence of the damage to the side door from the Fire Department having to force its way in. There was no evidence of any of the doors or windows being opened prior to the arrival of the Fire Department.

[157] Sholidis originally said that he had left his home on January the 2nd, 1994 at around 3:30 p.m. It was his evidence that it took him approximately one and a half hours to drive to Niagara Falls and that he did not make any stops along the way. He said in cross-examination that the first thing he did when he arrived in Niagara Falls was to get gas. The gas receipt showed that he got gas at 5:50 p.m. If it took him an hour and a half to drive to Niagara Falls, which is a reasonable amount of time from Etobicoke, he would have had to have left his home somewhere between 4:15 and 4:30 p.m. and not 3.30 p.m.

[158] The fire was discovered by a neighbour, Piccinini, around 8:15 p.m. and was well advanced at that point. He saw a lot of smoke in the basement and fire in the attic area. It was reasonable to conclude that the fire had certainly started before Piccinini discovered it.

[159] When the Fire Department arrived, there was a fully engaged fire in the basement and in the attic. During the time frame from when Sholidis left the house until the fire was discovered there was no evidence that anyone else had access to the home. There was no evidence offered to suggest that there was anyone else in the home during that time frame.

[160] After considering all of the evidence, I find that Sholidis locked his home when he left. When the Fire Department arrived the house was still locked. Therefore Sholidis or someone acting on his behest had the best opportunity to set the fires.

Conclusion:

[161] After revisiting the facts, scrutinizing them carefully, considering the law, particularly the defence law and the onus concerning the allegation of arson and finally applying the law, I find that the facts and circumstances allow me to conclude, on balance, that the only reasonable inferences and conclusions that I can draw are the following:

a. There was no bias or skewing of the reports of the fire investigators, fire fighters, adjuster or electrical engineers.

b. The Centre of Forensic Sciences did its work accurately and I find that an accelerant was used to set the fires.

c. I accept the evidence of all of the fire investigators and find that there were two points of origin and the fire was incendiary.

d. The fire in the basement did not connect at any time or at any place in the house with the fire that originated in the attic. Notwithstanding the apparent inconsistencies in the evidence of the investigators, I am satisfied on the totality of the evidence that the conclusions drawn in items b. and c. were proven on balance and beyond a reasonable doubt.

e. There was no electrical cause of the fires.

f. Propane played no part in the fires.

g. The fires were not caused by accident or natural means.

h. The fires were incendiary in origin and therefore were arson.

i. I am satisfied that Sholidis had both sufficient motive and appropriate opportunity to start the fires and it was more probable than not that a willful act of the insured caused the fires.

j. Sholidis or someone acting on his behalf was responsible for setting the fires.

[162] As a result, regarding the arson ground of denial of coverage, I find that Economical was reasonable in its actions and was legally and contractually able to deny coverage because of the arson. Economical's defence on this ground will be successful.

[163] Further, because I have accepted Economical's arson defence, I find that as a matter of causation, it doesn't matter whether or not the broker was negligent because a proximate cause of the uninsured loss was the Plaintiff's activities in setting the fire, and not the broker's alleged negligence.

Issue 4:

[164] Was James [though its agent, Murphy] negligent when he took the application from the plaintiff?

[165] Notwithstanding my comments in issue 3, I am going to answer this question because Sholidis was unrepresented.

[166] The onus in establishing a breach of duty on the part of the insurance broker rests wholly with the plaintiff. In other words, the onus is on Sholidis to prove that Murphy failed to properly ask the relevant questions and accurately record the relevant answers provided by Sholidis. By failing to do so, Murphy breached his duty of care to Sholidis, was negligent and/or breached the contract.[see Hicks supra at p. 230]

[167] This onus on the plaintiff can be met by complying with the usual burden of proof in a civil action. [see *Davca Building Supply Ltd v. Clarke,* [1992] N.S. No. 196 (T.D.)]

[168] The case against James as pled is basically in contract and negligence. It is important to note that Sholidis did not say that Murphy asked him only some questions but not other questions. It was Sholidis' evidence that he was not asked any of the information on the application. His evidence was that none of the information contained on the back of the application concerning previous losses or refusals was secured from him and, that he has no idea where the broker got any of that information. Sholidis went further and alleged that James entered into some type of conspiracy wherein the application was, in some fashion, cobbled

together at some point, perhaps after the loss. In fact, Sholidis' theory amounted to an allegation of fraud against the broker.

[169] James took the position that Sholidis did not meet the burden of proof that was upon him. Credibility was very important in this discussion as well.

[170] *Faryna v. Chorny*, [1952] 2 D.L.R. 354 was a decision from the British Columbia Court of Appeal, and it turned basically on who said what to whom. At p. 3 the Court said:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witnesses carry conviction of the truth. The court must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

[171] *Faryna* was adopted by the Ontario Court of Appeal in *R. v. Norman*, [1993] O.J. No. 282 (C.A.)

[172] *Oprea* [supra] was concerned with an arson allegation and a claim under an insurance policy. At para. 42. McDonald J. cited the passage above from *Faryna* with respect to gauging the credibility of witnesses.

[173] Sholidis led no evidence regarding the standard of care to which an insurance broker is to be held nor any evidence of what an insurance broker's standard practices are, nor whether there are any industry practices in the insurance brokerage industry concerning the taking of an application.

[174] *Agincourt Motor Hotel v. Tomenson, Saunders, Whitehead Limited* (1982), I.L.R. 1-1590 was a decision of the Ontario Supreme Court. It dealt with whether the broker had recommended particular coverage to the applicant. The coverage in question dealt with an electrical apparatus endorsement. At pages 1144 and 1145, the court commented that:

> I find it most significant that Mr. Briggs, whose expertise is oriented specifically to boiler policies, was called into the picture on the 1971 renewal date, specifically for the purposes of examining the premises which he did for the better part of that day considering the policy and its coverages and options available there under and for the purpose of advising owners of such coverages and options.

> Given the fact that ninety-five percent of boiler policies issued contain such miscellaneous electrical apparatus coverage, Mr. Briggs' expertise in that respect and the purpose of his attendance to examine, assess and recommend upon the renewal of 1971, I am led to the conclusion that in all probability, he did explain the availability of the option to the owner or at least to its manager. I accept the evidence of Mr. Briggs, Mr. Flood, Mr. Heber as well as that of Mr. Dwyer from which I had inferred that such miscellaneous electrical apparatus clause was in all probability explained and recommended to the owner's representative as an option which recommendation was refused on the basis of costs.

[175] *Negash v. H. Later and Company* (1986), I.L.R. 11-1856 was a decision that dealt with a claim against an insurance broker concerning an application for automobile insurance. The applicant had failed to disclose a license suspension. The issue was whether the applicant was asked about it. Again, the court accepted the broker's evidence about what he would have done as a matter of standard practice, on page 7131:

> Mr. Later, while having no actual recollection of the event, relies on his customary practice of taking auto insurance applications and on his notes which he says were made at the time of his dealings with the plaintiff and which indicate the recalculation of the premium without collision coverage and the calculation of the balance still owing on the Canadian general policy. He says that he went over the application form with the plaintiff, asked the questions as required, filled in the form on behalf of the plaintiff and had the plaintiff sign the application form.

At p. 7132, the Court said:

> I am however satisfied that it is highly improbable that he would have the plaintiff sign the application form in blank, and I am convinced that this is not the case because of the information in the application which was in the knowledge of the plaintiff and not that of Mr. Later and which could not have been produced by Mr. Later from his file. I find therefore that the answer to item 6(a) relating to any licence suspension of the applicant to which the answer was no was put in the application form by Mr. Later after he posed the question to the plaintiff. The answer therefore denying that the licence was suspended is the answer of the plaintiff.

[176] In the Pilieci case at p. 4 regarding credibility, O'Brien J. said:

> Regarding following his usual practice, I agree with statements regarding that issue contained in the decisions in Negash v. H. Later & Company Limited et al. (1986) I.L.R. 11-1856] at 7131 and the decision in Agincourt Motor Hotel Limited v. Tomenson, Sauders, Whitehead Limited, (1982) I.L.R. [1-1590] at 1144 where courts considered evidence of the usual practice of insurance agents regarding procedures they followed. I make the same inferences regarding Mr. Hartnett's evidence and procedure in this case and accept, his evidence and also accept his evidence that he followed his usual practice which included going through the form and dealing specifically with each question contained on it.

[177] And lastly the Manitoba case of *Gulay v. Temple* [2000] M.J. No. 535 dealt with an application for a policy of life insurance. The allegation was that the broker had not asked one of the questions on the application.

[178] At para. 37, the court again accepted the broker's evidence of what her standard practice was. The court stated:

> Ms. Temple was well aware of the importance of the application she was taking and the answer she was reporting. It was her evidence, which I accept, that she followed her standard practice, carefully reading each question to the applicant, explaining the forms and recording the answers. There was no reason for her not to do so.

[179] Sholidis did not lead any evidence regarding an insurance broker's standard practice or what industry practices were at the time of the application. Murphy said that it was his practice to ask all of the questions on an application for insurance. He had been an agent for a very long time. He also told the court that if he had been advised of prior claims or losses or prior non-renewals or cancellations, it was his practice to record the answers and then speak to his boss about whether they wished to continue to attempt to place insurance for this particular client. There is no evidence this occurred here.

[180] Sholidis did not lead any evidence regarding an insurance brokers' standard practices or industry practices in relation to the question of the standard of care applicable to Murphy.

[181] *Webster v. Robinson* [1991] B.C.J. No. 2448 (S.C.) was a decision that concerned an alleged failure on the part of the insurance broker to give proper advice on available coverage for a motor vehicle. At p. 4 the Court stated:

> Ms. Robinson helped the applicants complete the necessary forms to obtain insurance, transfer insurance from one car to the next and work of a similar nature. As such, she held herself out as a person

> of a particular skill and ability. It is not a skill or ability whose standard of performance could easily be assessed by an average person. Whether she was negligent or not depended on the common practice of persons doing a similar type of work.
>
> In other words, the plaintiff had to prove as a matter of fact that Ms. Robinson failed to meet the standard of care of an ordinary competent insurance agent. Lacking any evidence that Ms. Robinson acted other than in an ordinary competent fashion, it would be wrong for me to find a standard of care expected of her extended as far as the plaintiff suggests. I would be in a position of prescribing a standard of practice for insurance agents based on my own opinion of what they should do. That would be incorrect, since my opinion would not be founded on any facts as to what constituted an appropriate standard. It would be akin to me fixing the standard of care for a professional man, such as a doctor, an engineer, an accountant or a lawyer without hearing any evidence as to what is the ordinary reasonable standard in similar situations.

[182] Further, *M.S.A. Ford Sales v. Rand and Fowler Insurance Limited* [1997] B.C.J. No. 491 (C.A.) was a case that dealt with an application for motor vehicle insurance. The claim against the insurance broker turned on whether the broker had a duty to verify that the signatures on the forms in question were genuine. At p. 3 Hall J.A. stated:

> Shortly put, there was not established by the evidence the duty or standard of care pleaded and argued on behalf of the plaintiff. I do not believe that the learned trial judge erred as alleged by deciding the case on a different basis than was pleaded. Central to this case was the issue of whether the agent ought to have done something other than it did, and the weight of the evidence made it clear that it acted in accordance with industry practice.

[183] The court in the case at bar did hear from Mr. McFarlane. While his evidence was not tendered specifically for purposes of evidence of the common practices of insurance brokers, it was his evidence and also the evidence of Tina Sholidis, that McFarlane did exactly what Murphy said he did, that was, to ask the questions on the application and write down the answers given to him. It certainly appeared that the way Murphy and McFarlane asked the questions and wrote down the answers was the industry practice.

[184] Here there were certain uncontroverted facts. The policy of homeowners insurance was issued to the plaintiff for the policy period October 30, '93 to October 30, '94. The application contained considerable detailed information. It contained the plaintiff's address, the identity of the mortgagee, the identity of the prior carrier, Zurich, the plaintiff's prior address and the plaintiff's occupation. The information was all correct. The application contained detailed

information regarding renovations to the home that was an older home. In fact, Sholidis himself in his cross-examinations on the arson issue made much of the age of the home, the wiring and the furnace.

[185] The very nature of that detailed information on the application was such that, as a matter of common sense, it raised the inference that it all must have come from Sholidis. Where else would the insurance broker get it? It was a matter of common sense that, if all of that information came from Sholidis, it would follow that the answers to the questions regarding prior losses and claims and prior cancellations must also have come from Sholidis.

[186] This inference is further assisted by the fact that there appeared to be nothing wrong otherwise with the application than apparently the two questions regarding the prior claims and losses and non-renewals or cancellations.

[187] It appears the answers to those questions aren't true. Importantly, those are the very questions, if answered truthfully, that would have resulted in Sholidis being refused insurance coverage or being charged a much higher premium.

[188] Sholidis had not dealt with James before. He initially contacted Murphy by telephone and at least to some extent discussed Sholidis' request for insurance at that time. They arranged an appointment and Murphy came to Sholidis' home. His attendance was at least half an hour long and appeared not to be just perfunctory. He took measurements of the outer dimensions of the home while assisted by Sholidis. At some point they went into the home, sat at a table and discussed insurance. Murphy wrote something down on something while he was there. After the loss, Sholidis never complained to Murphy about Economical's denial of coverage.

[189] As a result of these facts, Sholidis' position is all the more a marked departure into the improbable. Murphy told the court that he was an insurance broker of some years experience. He gave evidence that he knew and understood that the two questions in issue were important. He testified that it was his practice to ask all the questions in the application.

[190] Therefore, it is a reasonable inference that an insurance broker with many years of experience, who knew the questions were important, must have asked the questions.

[191] Murphy was elderly at the time he testified at the trial and he admittedly expressed some uncertainty or confusion when he was pressed on cross-examination. I am satisfied that Mr. Murphy was an honest witness who tried his best to tell the truth to the best of his recollection. He admitted his uncertainties. O'Brien, J. in Pilieci [supra] commented on credibility at p. 2295. He remarked:

> Dealing with the issue of credibility, there was a good deal of evidence at this trial dealing with that issue. Mr. Harnett is a gentleman who is now well into his 70s. He retired in 1990. His recollection of some details was imprecise and he admitted in

> cross-examination that there was some doubt in his mind about whether he talked to the plaintiff in person or by phone regarding placing of the home insurance. **He was definite, however, that he followed in his usual practices of asking all questions contained on the insurance application form**. I conclude that he did so." [Emphasis added]

[192] Here, after cross-examination by Sholidis and some pointed questioning by myself, Murphy also remained absolutely adamant that the source of information on the application was Sholidis and, that he specifically asked Sholidis about prior claims and losses and about prior cancellations and non-renewals. His last words in re-examination regarding where the information on the application came from were, "I got it from him, from Mr. Sholidis."

[193] Murphy also told the adjustor that he asked those questions. His evidence was consistent on this point.

[194] Sholidis was not an unsophisticated individual. He testified about his extensive history of successful investment in the real estate market through the 1970s and 1980s until the downturn in the market in the early 1990s. He told the court that he had properties in Greece. In cross-examination Sholidis agreed that he had held insurance on his other properties in Ontario.

[195] Mr. Hanrahan asked Sholidis whether other insurance brokers had asked him about prior claims and losses. Sholidis admitted that at least some had done so.

[196] I find that on an analysis of the facts and circumstances of the application there is a clear inference that Sholidis knew that he had prior cancellations or non-renewals, and he knew the importance of a claims history. I also find that in the circumstances Sholidis had a motive not to disclose the prior claims and prior refusal to renew to Murphy. He also knew that he would not be able to secure mortgage financing for the Scarlett Road property without insurance or if he did, it would be very expensive.

[197] On the other hand, Murphy had every reason to ask the questions. He was an experienced insurance broker. It was his practice to ask the questions on the application. He had nothing to gain by not asking them, and still less by making up an answer.

[198] Regarding non disclosure in an insurance policy a passage from *Brown and Menzies Insurance Law of Canada* citing *Carter v. Boehm* is very helpful. It states the proposition that, "A person applying for insurance must disclose all matters within his or her personal knowledge which are relevant in determining the nature and extent of the risk. The duty applies even in the absence of questions from the insurer.

[199] Sholidis made much of the fact that the application was signed by Murphy and not by himself. Sadie Pokhai, the underwriter from Economical testified that so far as Economical was concerned, the application for insurance need not have been signed by the applicant at that

particular period of time. Nothing turns on whether or not the application for insurance was signed by Sholidis.

[200] Murphy was entitled to rely on Sholidis's answers to the questions posed. He was not obligated to go behind the answers given to him and investigate the answers to find out if they were true.

[201] In *Webster* [supra] at p. 266 the Court stated:

> "He...," [that is the applicant], "...had the opportunity to tell her...," [her being the broker], "...he might tow his own vehicles but he remained silent. I don't believe it was reasonable to expect her to ferret out his possible other use. In the circumstances, she had a right to depend upon his representations as to the use he intended for the vehicle without further inquiry on her part."

[202] *Goodbrand v. Pearson Insurance Brokers,* [2001] O.J. No. 1522 (Sp. Ct. Jus.) was a case where a policy of motor vehicle insurance was voided for misrepresentation. The question was whether the insurance broker asked all the questions on the application. On p. 4, Mossip, J. rather pithily stated:

> In my view the agent in this latter case is not a private detective who is required to cross-examine his own client as to the answers given on an application. The agent is merely a scribe or secretary of the insured in completing the application for insurance.

Conclusion:

[203] I find there was no conspiracy. The questions were asked and the answers were given as Murphy testified. James was not negligent in any way and this claim against James is dismissed. Murphy did all he was expected to do. He was definite that he followed in his usual practices of asking all questions contained on the insurance application form. I find that he did ask the questions and that Sholidis gave the answers recorded on the application.

[204] Even if Murphy did not ask the questions, Sholidis was the person applying for insurance and he was required to disclose all matters within his personal knowledge that were relevant to determining the nature and extent of the risk. This duty applied even in the absence of questions from the insurer.

[205] Therefore, no matter what position was taken, Murphy was not negligent and he practiced the appropriate standard of care required of him in the circumstances of this case.

Issue 5:

[206] What were the damages between the plaintiff and the defendant Economical?

[207] There were five [5] heads of damages in this case and concerned the following:

1. the dwelling
2. the contents
3. the additional living expenses
4. the counterclaim and
5. punitive damages.

[208] The policy of insurance was entered as Exhibit No. 11. The payment sections in the policy indicated that payment would be on an actual cash value basis unless the dwelling was repaired or replaced. It was never repaired or replaced.

[209] The same clause applied to the contents. There was no evidence of the contents being replaced or repaired.

[210] The coverage on the dwelling was $182,000, on the personal property was $127,400, and the additional living expenses was $36,400.

The Dwelling

[211] Economical had obtained two estimates for the repair of the building. Alex Taylor established that it would cost $106,435.90. He explained the basis of the estimate and assured the court that he could have repaired the building for that amount of money.

[212] Sands Restoration also prepared an estimate in the amount of $111,117.66. David Coons advised us that Sands could have repaired the building after the fire on January 2nd, 1994 for that amount.

[213] Bob Watson from NFA testified on behalf of Sholidis. He indicated that its estimate was for the repair. NFA was content that the building could be repaired.

[214] However, there was a second fire of July 15th, 1993, that rendered the building a total loss. That fire was not the subject matter of this litigation. However, as a result of that fire, the building was rendered a total loss and eventually was demolished because of a demolition order from the municipality. In this case the policy provided for payment on an actual cash value basis.

[215] A process was commenced under s. 128 of the Insurance Act. The insurer and the mortgagee [claiming to be an insured] each appointed an appraiser to give an opinion as to the value of the building and the land. The appraisers also appointed an umpire, Mr. Edwarth. He determined that the market value of the property, including the dwelling, was $215,000. The actual dwelling value was at $70,000. He came to that conclusion because both appraisers agreed

to that dwelling value. The appraisers said that amount was fair value for the building. The remainder was land value. I will have more to say about this procedure in issue 8.

[216] Economical paid the mortgagee the $70,000, plus interest and costs, for a total payment of $77,278.46. It is necessary to keep in mind that Mr. Sholidis received the benefit of that payment. His mortgage principal and accumulated interest was reduced as a result of that payment by Economical to the mortgagee.

[217] Sholidis argued that he should have been entitled to participate in the appraisal process. Notwithstanding that position, Sholidis did not bring any evidence forward indicating that the valuation amount of $70,000 was an unreasonable value for the house or that the decision of the umpire was improvident.

[218] Economical argued that the $70,000 was only a small part of the outstanding principle owed by Sholidis on the mortgage. As well, it would be in the mortgagee's best interest to obtain the highest payment from the insurance company for the house in order to limit the mortgage company's exposure for the balance outstanding. If the mortgagee felt it should be able to get more money, it would have fought for more. Therefore the process was above criticism.

[219] Sholidis knew the value that was assigned by the umpire since at least January 16th, 1997, when he wrote a letter to Mr. Edwarth. However, he did not provide any evidence demonstrating that the value determined by the umpire was incorrect, low, unfair or improvident.

[220] In the circumstances I am satisfied that the evidence entered allows me to only have regard to the value attributed by the umpire.

[221] It is with some reluctance that I find the damages for the loss of the dwelling, based on the value of the building, are $70,000.00. Sholidis eventually sold the land and paid off the mortgage. I will deal with the process in issue 8.

The Contents.

[222] The only valuation concerning the contents was provided by NFA. The estimated replacement cost was $43,142.56 and the actual cash value was $32,545.56. Again under the terms of the policy the plaintiff was only entitled to the actual cash value unless the contents had been replaced.

[223] From the actual cash value, NFA took depreciation in amount of 25 per cent. In the circumstances and in the absence of any evidence to the contrary from Economical I find 25 per cent a reasonable figure for depreciation. Therefore, I fix damages for loss of personal contents to be $32,545.56.

The Additional Living Expenses.

[224] Statutory Condition 12 of the policy stated that this kind of loss was payable sixty days after a proof of loss was filed. The only proof of loss that was ever filed by Sholidis with Economical Insurance was on February10th, 1994. Under the heading "additional living expenses" it indicated "Not Determined."

[225] Mr. Watson of N.F.A. led the only evidence on this topic. He indicated that a fair rental value of the destroyed property was approximately $2,000 per month. Sholidis had moved to 149 Symington after the fire and lived there. This evidence was persuasive and I accept it as being fair. The only question to determine was the length of time he would be able to claim rent. I find that a reasonable amount of time for the contractors to repair the damage in the subject house would be 6 months. I fix the damages under this subheading at $12,000.00. No other evidence was called concerning any other living expense.

Issue 6:

[226] Has Economical proven its counterclaim?

[227] Sholidis made no submissions about the counter claim other than to state "Economical has separate policy of insurance and derives all the benefits and all the obligations under the policy of insurance that there should be not counterclaim against Sholidis".

[228] The standard mortgage clause provided a right of subrogation and stated that whenever the insurer paid a mortgagee any loss or award under this policy in claims, that as to the mortgage owner, no liability therefore existed.

[229] Economical paid $70,000, plus interest and costs to the mortgagee based on the appraisal process carried out. The total payment was $77,278.46

[230] The mortgagee admitted that the payment was made and that it had provided a release to Economical. Sholidis admitted that the payment was made to the mortgagee. Therefore, Economical's Counterclaim would be in the amount of $77,278.46, plus prejudgment interest and costs.

[231] Notwithstanding my reluctance about allowing the award under the appraisal methodology used by the insurer and the mortgage company, this aspect does assist the insured. If the award had been higher, Economical would have paid more and this counter claim would be higher.

[232] I am satisfied that Economical has made out its counter claim and damages are set at $77,278.46 plus prejudgment interest.

Issue 7:

[233] Is the plaintiff entitled to punitive damages?

[234] There is no doubt that the seminal case in regard to punitive damages is the Supreme Court of Canada decision in *Whiten v. Pilot Insurance Co.* [2002] S.C.J. No. 19. It is interesting to note that the Court in the Whiten case made it clear that punitive damages are to be awarded against a defendant only in exceptional cases where there has been malicious, oppressive and high-handed misconduct that offends the Court's sense of decency. [see para. 36]

[235] The court referred to *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 where it stated:

> The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour.

[236] In *Whiten* the facts were probably about as unusual as one could find. Without exception, everyone who investigated the fire in the six months after it occurred concluded that the fire was accidental.

[237] The first person to investigate the fire was the Fire Chief who concluded that a single point of origin was found and the cause of the fire was a malfunctioning kerosene heater. The fire fighters said that they saw no evidence of arson and, therefore, they did not request the Fire Marshall's office to investigate. The insurance adjuster retained by Pilot advised that "There is no suspicion on behalf of the insureds or any members of their family." Pilot did not accept the insurance adjuster's recommendation.

[238] The Insurance Crime Prevention Bureau investigated the fire and found no basis for denying the claim. Again, Pilot decided to ignore this recommendation. Pilot instructed their adjuster to pursue further investigation and the adjuster still felt there was no basis for arson. Pilot then retained an engineer by the name of Hugh Carter and he concluded that the fire was accidental and, in two further reports to Pilot, he confirmed that the fire was accidental.

[239] Still not satisfied with this evidence, Pilot retained a forensic engineer, a fire investigator and a fire fighter to further investigate the loss. The fire fighter insisted that the fire was likely accidental. The forensic engineer and fire investigator provided some basis for the arson.

[240] It was the opinion of the Ontario Court of Appeal and the Supreme Court of Canada that they probably formed those opinions based on the influence of the solicitor acting on behalf of Pilot.

[241] In the case at bar, everyone who investigated the fire after the loss had concluded that it was incendiary. The first persons to investigate the fire were the Fire Captain and the fire fighters called to the scene. The Fire Captain thought that there were two separate and distinct points of origin and as a result he decided to call in the fire marshall. The Fire Marshall, John O'Halloran, investigated the fire and concluded that there were two separate and distinct points of origin and concluded that the fire was incendiary [arson].

[242] O'Halloran took carpet samples that he submitted to the Centre for Forensic Sciences. It found the presence of an accelerant in two samples. O'Halloran felt that the presence of the accelerant and the two separate and distinct points of origin further strengthened his opinion that the fire was incendiary.

[243] Ed Merinoff, an electrical engineer with the Fire Marshall's office, investigated for any potential electrical causes and he found no electrical problems related to the fire.

[244] Economical retained Jack Armitage of Arcon Engineering, who also concluded that there were two separate and distinct points of origin. Mr. Armitage could not find any electrical problems that contributed to the fire. He too concluded that the fire was incendiary.

[245] Economical also retained Peter Heyerhoff, a very experienced private fire investigator who was formerly with the Ontario Fire Marshall's office. He investigated and also found two separate and distinct points of origin and concluded that the fire was incendiary.

[246] Economical insurance retained Phil Brunt, a very experienced fire adjuster. Brunt was also concerned about the two separate points of origin and the fact that there were so few contents in the home.

[247] The insurance claim was denied not only on the basis of arson, but also due to the serious material misrepresentations on the application.

[248] Further, it was important to look at the behaviour of the insured. Sholidis purposely withheld evidence in regard to the repairs of the building. Bob Watson of NFA testified and brought his file with him. Mr. Hanrahan found an estimate in the file prepared not only by NFA, but also by another contractor. In cross-examination, Watson was asked why these estimates were never provided to Economical Insurance, and he said that Sholidis had directed him not to because he wanted the house to be a total loss.

[249] Economical had cogent evidence of opportunity. Sholidis was the last person to leave the home. He indicated that he had locked the doors and when the firefighters arrived the building was still found to be secure. There was no evidence of a break and entry. No one other than family members had keys to the Sholidis home. There was also evidence of a financial motive because Sholidis had been recently trying to sell both houses [Scarlett and Symington] and had very little employment income at the time of the loss.

[250] In *Whiten* the court recognized that an insurance company had the right to vigorously defend an arson case. At para. 102 the Court said:

> The respondent claims that an insurer is entirely within its rights to thoroughly investigate a claim and exercise caution in evaluating the circumstances. It is not required to accept the initial views of its investigators. It is perfectly entitled to pursue further inquiries. I agree with these points.

[251] I am satisfied that in light of the misleading evidence regarding the prior claims and the cancellation, decline or refusal to renew a policy as well as the arson investigation evidence, the actions of Economical were perfectly reasonable when it denied the insured's claim.

[252] On this issue, Sholidis raised a question about whether the Symington property had been for sale before the fire at Scarlett Rd.. Sholidis was cross-examined by Mr. Barrett. At page 42 of the transcript,

Question: Thank you. And I understand you moved to Scarlett Road in May of 1993 -- sorry, in 1993, you tried to sell the Symington Avenue property? Answer: Yes, I did.

Question: But you weren't able to sell it; is that correct? Answer: Well, I had some - some action but I didn't sold it."

Again on September 11th, 1997, in an examination for discovery before the Official Examiner, Sholidis was asked at page 19 of the transcript,

Question 144: Mr. Sholidis, it looks from the documents as if the closing date would have been April 30th, 1993, and I gather then your best recollection is that you moved in about a month later? [to Scarlett Rd]

Question 146: What did you do with 149 Symington while you were living? Answer: I put for sale at that time.

Question 155: Do you know if the house was still up for sale at the time of the fire in January of 1994, that's about seven months later? Answer: I cannot remember exactly was on listing or was off market. I cannot remember right now."

[253] Economical does not even come close to replicating the conduct of Pilot. Its actions were reasonable, thorough and careful in all the circumstances. The plaintiff is not entitled to punitive damages.

Issue 8

[254] Was James' claim of set off against Economical, in the event it was required to make any payment to the plaintiff, proven?

[255] During the course of the trial, James and Economical agreed to the dismissal of the cross claim of James against Economical on a without costs basis.

Issue 9

[256] Was the appraisal process under the Insurance Act, section 128 fair in the circumstances of this case in that the insured was not party to the process where the referee was involved in determining the value?

[257] Economical argued that it would be in the mortgagee's best interest to obtain the highest payment from the insurance company for the house in order to limit the mortgage company's exposure for the balance outstanding. By receiving $70,000, it was reducing the mortgage amount owed by Sholidis by $70,000.00. If the mortgagee felt it should be able to get more it would have fought for more, therefore the process was above criticism.

[258] The policy of insurance indicated that the dwelling was subject to a replacement cost endorsement under the "basis of claim payment" section of the policy. This amount will be paid if the building is rebuilt. If the building is not rebuilt, the insurer will pay the actual cash value of the damage at the date of the occurrence.

[259] Metropolitan Trust Company was the mortgagee of the property. On May 5, 1994, some five [5] months after the fire, it made a demand for payment of the principle balance plus accrued interest and advised that no further payments would be accepted on the mortgage.

[260] On May 16th, 1994, the mortgagee forwarded to P. D. Brunt & Company Ltd. a Proof of Loss in regard to the fire. There was no amount on the form. The form was passed on to the insurance company. There were ongoing negotiations between Economical and Metropolitan Trust but they were not able to reach an agreement on the value of the property.

[261] Counsel for Economical wrote to the mortgagee on January the 24th, 1995 suggesting that the matter be settled by way of appraisal under the Appraisal section of the policy pursuant to Statutory Condition No. 11. Economical and Metropolitan Trust agreed that Mr. Edwardth be hired as the Umpire under the appraisal section of the Act.

[262] On October 17, 1995, Edwardth issued his findings and determined that the overall value of the property was $215,000.00 as of January 1, 1994 and the land value portion as of that date was $145,000.00. The house value then became $70,000.00.

[263] On December 18, 1995, Economical issued a cheque payable to counsel for the mortgagee, in trust, for $77,278.46 for principle, interest and costs. The mortgagee then issued a release to Economical.

The Statutory Provisions:

[264] The Insurance Act, R.S.O. 1990, c. I-8 sets out the Statutory Conditions and the relevant sections are as follows:

128. (1) This section applies to a contract containing a condition, statutory or otherwise, providing for an appraisal to determine specified matters in the event of a disagreement between the insured and the insurer.

Appraisers, appointment

(2) The insured and the insurer shall each appoint an appraiser, and the two appraisers so appointed shall appoint an umpire.

Appraisers, duties

(3) The appraisers shall determine the matters in disagreement and, if they fail to agree, they shall submit their differences to the umpire, and the finding in writing of any two determines the matters.

Costs

(4) Each party to the appraisal shall pay the appraiser appointed by the party and shall bear equally the expense of the appraisal and the umpire.

Appointment by judge

(5) Where,

(a) a party fails to appoint an appraiser within seven clear days after being served with written notice to do so;

(b) the appraisers fail to agree upon an umpire within fifteen days after their appointment; or

(c) an appraiser or umpire refuses to act or is incapable of acting or dies,

a judge of the Ontario Court (General Division) may appoint an appraiser or umpire, as the case may be, upon the application of the insured or of the insurer. R.S.O. 1990, c. I.8, s. 128.

148. (1) The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario and shall be printed

in English or French in every policy with the heading "Statutory Conditions" or "Conditions légales", as may be appropriate, and no variation or omission of or addition to any statutory condition is binding on the insured.

Appraisal

11. In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the *Insurance Act* before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

[265] In *Greer v. Co-Operators General Insurance*, [1999] O.J. No. 3118 (Sup. Ct. Jus), Shaughnessy J. stated at para. 10: "I find that an appraisal is mandated pursuant to the provisions of the Insurance Act and the decision of the two appointed appraisers and/or the umpire selected by them will be determinative of the valuation of the property insured, damaged or lost as specified in this action."

[266] Also in *Seed v. ING Halifax Insurance*, [2002] O.J. No. 1976, Wright J. at para. 9 stated: "the process is mandatory. No action for recovery under the policy may be taken until the issues in dispute as to damages are settled by the process of appraisal. 'The intention of Statutory Condition 11 is unambiguous and cannot be unilaterally waived by either the insurer or the insured in the event of a disagreement. The Statutory Condition to which both parties agree is clear there must be an appraisal before there can be any recovery under the policy'." (*Saskatchewan Government Insurance v. Nipawin*, [1999] I.L.R. 5501).

[267] Section 128 of the Insurance Act defines the process to be followed. The insured and the insurer shall each appoint an appraiser and the two appraisers shall appoint an umpire. If the two appraisers cannot agree on the valuation of the property, they shall submit their differences to the umpire and the finding in writing of the two of the parties to the appraisal determines the matter.

The concern of the Court on this issue.

[268] Sholidis, the owner of the equity and an insured under the policy, was not included in the appraisal process as an insured. In other words, because he was cut out of the appraisal process, was the process fair and equitable in the circumstances?

The law:

[269] Originally insurers felt that, if the insured had committed arson or some other act that would have invalidated coverage under the policy, they should be entitled to simply deny not only the insured but the mortgagee too.

[270] The Supreme Court of Canada made it clear that there are two separate and distinct contracts in one policy and that, in fact, the mortgagee, or in Quebec, the hypothecary, are in fact insureds under the policy.

[271] Regarding the concept that a mortgagee has a separate policy of insurance, the case of the *Royal Bank of Canada v. Red River Valley Mutual Insurance Co.,* (1986), 5 W.W.R. 236 (Man. C.A.) dealt with this question. The Court stated at p. 5:

> It is now necessary to consider whether or not the bank as well as the original owner of the property who placed the insurance was bound by the policy conditions. A consideration of this question requires an appreciation of the relationship between the bank as mortgagee and the insurer. The relationship between a mortgagee and an insurer under a policy of fire insurance under which the mortgagee was protected by virtue of a standard mortgage clause attached to the policy was considered by Logie, J. in London Loan and Savings Co. of Canada v. Union Insurance Co. of Canton Ltd. [1925] 4 D.L.R. 676 at p. 679 where he said:
>
> > the effect of such a mortgage clause is to bring the insurer and the mortgagee into privity, to convert the mortgagee into a party to the contract of insurance, to give the mortgagee separate and distinct protection as to his interest, to create in him an interest in the policy distinct from that of the property owner, and in fact, to make him an insured.

[272] Then further down at the bottom of the page the court in *Royal Bank* said:

> These statements of Logie, J. and of Middleton, J.A. were approved expressly by Ritchie J. delivering the judgment of the Supreme Court of Canada in London and Midland Gen. Ins. V. Bonzer, [1973] S.C.R. 10 at p. 19. Ritchie J. also quoted at p. 18 from Couch on Insurance, (2d). ed., volume. 11, p. 348, para. 42:694 [now 2nd. ed., (Rev.) volume. 10A, p. 761, para. 42:727] the position of the courts in the United States:
>
> > Under the standard or union mortgage clause, an independent or separate contract of undertaking exists

> between the mortgagee and the insurer, which contract is measured by the terms of the mortgage clause itself. There are accordingly, in substance, two contracts of insurance, the one with the mortgagee and the other with the mortgagor.

[273] The Court of Appeal indicated that "the statement in Couch on Insurance is essentially similar to that made by Logie, J., and is, as I understand the judgment of Ritchie J., adopted by him as a statement of the law in Canada".

[274] In regard to the same point, the Supreme Court of Canada in *National Bank of Greece (Canada) v Katsikonouris*, [1990] 2 S.C.R. 1029 at p. 5, referring to the standard mortgage clause, the court stated:

> The clause which, with variations, is used throughout North America, was obviously intended to have the same effect in both common law and civil law jurisdiction and reference will be made to the cases arising under both judicial systems. To avoid terminological confusion, I have, consistently, with the clause itself, used the word "mortgage" and related expressions in the English version of these [page 1036] reasons to include "hypothec" and related concepts."

[275] Then at para. 4, dealing with the interpretation of the Mortgage clause, the court stated:

> In her reasons in Caisse Populaire, at page 1021, L'Heureux Dube J. has drawn attention to the fact that the civil law explanation for the operation of the standard mortgage clause harmonizes with the interpretation that has emerged in the common law jurisprudence. My colleague has pointed out that the standard mortgage clause was first used in the United States. A review of the American authorities reveals an all but universal consensus to the effect that this clause evidences an independent contract between the insurer and the mortgagee. My colleague has also noted that the "two contract" theory is now well anchored in Canadian jurisprudence. Notably, in London and Midland General Insurance Co. v. Bonzer, [1973] S.C.R. 10, a common law decision, this Court expressed approval of the two contract theory, and several recent lower court decisions have also adopted this approach to the operation of the standard mortgage clause; see Caisse Populaire, at p. 1019-20.

[276] Also in the *National Bank* case at para. 24 the Court stated:

> In summary, when the standard mortgage clause is interpreted in the light of the settled principles that govern the construction of insurance contracts, there can be no doubt that the insurer, by virtue of this clause, is representing to the mortgagee that a separate and distinct contract exists between them, and that the validity of this independent contract depends solely on the course of action between the mortgagee and the insurer. Moreover, even if the language of the clause was ambiguous, art. 2499, C.C.L.C. reminds us that it would be necessary to resolve that ambiguity against the insurer. No mortgagee would wish that the validity of its "separate and distinct" contract with the insurer rest on the question whether its mortgagor dealt in good faith in effecting coverage on its (the mortgagor's), insurable interest. From the perspective of the mortgagee, this would stand to defeat the very purpose of relying on the standard mortgage clause in the first place.

[277] Then at para. 34, the court said:

> Turning from this consideration of the conceptual difficulties encountered by the courts in early attempts to understand the nature of the standard mortgage clause, I would observe that a historical overview of the introduction of the standard mortgage clause makes it clear that it became an all but universal feature of fire insurance policies precisely because it was perceived as providing for the creation of a separate and independent contact of insurance between the mortgagee and the insurer.

[278] Finally, in *Caisse populaire des Deux Rive v. Societie mutuelle d'assurance contre l'incendie de lawyer Vallee du Richelieu*, [1990] 2 S.C.R. 995, the Supreme Court of Canada at para. 18 dealing with the interpretation of the Hypothecary Clause stated:

> In the Respondent's submission, the hypothecary clause is actually a second contract between the insurer and the hypothecary creditor. A contract which is separate and apart from that purchased by the hypothecary debtor. This second contract would then have been purchased from the insurer by the hypothecary debtor as mandatory for his hypothecary creditor. It follows, the Respondent argues, that the completely independent contractual link means that the fault of the hypothecary debtor cannot be invoked against his creditor. I am of the view, for the reasons which follow, that we have to recognize that the latter interpretation more adequately reflects the intent expressed by the parties to the insurance contract and is consistent with the general

> scheme of insurance law as it is practiced in North America, as well as being in keeping with the rules of Quebec civil law as a whole.

[279] At para. 23, the Court stated:

> The hypothecary clause in the insurance policy obtained by the hypothecary debtor, and in which the respondent contended there was a second insurance contract, repeats the standard formula approved by the Insurance Bureau of Canada and used in a great many insurance policies both in Quebec and other Canadian provinces.

Lastly, at para. 51:

> In the second insurance contract contained in the policy, the hypothecary creditor and not the debtor is the insured. Accordingly, the hypothecary creditor is not benefiting from his intentional fault when he claims to be entitled to the insurance indemnity as a result of the fire caused by the intentional fault of his debtor. In such circumstances, the insured (the hypothecary creditor) has not committed any fault, intentional or otherwise. Neither does the hypothecary debtor benefit from his intentional fault, since the payment of the indemnity by the insurer does not result in his release, but simply a substitution of debtor (subclause (b) of the hypothecary clause). Thus, moral considerations discussed above do not stand in the way of indemnifying the hypothecary creditor.

[280] Based on these authorities I find that there are two separate contacts of insurance in the situation at bar. The mortgagee is to be considered an insured under the policy and therefore entitled to utilize the provisions of s. 128 of the Insurance Act.

[281] However, the provisions do not state that only one of two or more insured can take part in the appraisal process. *Royal* Bank [supra] did not specifically cut out the owner because it considered the bank as well as the owner in the analysis. Suppose there were two mortgagees, then there would be at least two insured and, if there was any equity, three insured. Can only one take part in the process? Are all three privy? If only one can be involved in the process, who protects the ones that are not participating in the appraisal.

[282] Here, Sholidis had filed a proof of loss. He was not notified of the hearing. He was not told he could participate in the process. He only learned about the result some time later.

[283] The case law does not limit the process to only one insured. It does not rule out the owner of the equity in the property from participating. The cases indicate that there are two

policies of insurance. They do not specifically state that when an insured [owner of the equity] is involved in the dispute over the value of the property he or she is cut out of the process when the insurer and the mortgagee chose to utilize the provisions of the Act.

[284] The insurer and mortgagee have different agendas than the owner of the equity in the property. The insurer does not want to pay out more money on a high valuation for a house. The lower the valuation, the less the insurer has to pay on the policy to the mortgagee. So the insurer only wants to have the lowest valuation.

[285] On the other hand, all the mortgage company wants to make sure that the total value of the property, land and building, is more than the outstanding principle and interest. In the event that scenario is true, the mortgage company it is not concerned if the value of the house is low because the total value will be more than enough to cover the outstanding amounts when the property is sold.

[286] However, if there is a distress value put on the land and building by the appraisers, the owner of the equity may be deprived of some of the value of that equity especially if the mortgage company sues and takes control of the sale of the land.

[287] If the two parties to the appraisal process can agree, more or less, about the value of the building and they don't have to be concerned about the owner of the equity and his or her views on the value of the building value, they can agree to a lower value. The insurer can then pay a lower amount to the mortgagee and the mortgagee can release the insurer and each can move along. The mortgagee can then move against the owner of the equity to sell the land and have the remaining outstanding amounts paid to it.

[288] I find that the process is unfair and unreasonable. The section should not be limited to the extent that the owner of the equity is cut out of the process. This matter has dragged on for 9 years. Even if there were an accusation of misrepresentation there has been no finding until now. Condition 11 specifically requires an appraisal " whether the right to recover under the contract is disputed or not."

[289] The legislation needs to be amended to take into account the current state of the law and the fact that a certain unfairness exists that cuts out one of the insured's, namely, the owner of the equity. Here, if Sholidis had been allowed to participate, it is unlikely that there would have been an agreement as to the value of the building as he too would have had the opportunity to have an appraisal done. In that case, an umpire would have had to determine the issue alone because there would have possibly been an even number of participants and the legislation anticipates an odd number namely three, two of which make the binding determination.

[290] Moreover, “the determination of the amount of loss arising from property damage cannot be before the court in the action” *Seed* [supra] at 13. The fact that there may be situations where a party is estopped from asking the court to re-determine the property damage issue further illustrates the need to include all insureds in the appraisal process.

[291] In *Verlysdonk v. Premier Petranas Construction* Co, [1987] O.J. No. 532 (Div. Ct.), the plaintiff was not bound by an earlier determination by an umpire in relation to a claim made against her insurer, where dissatisfied, she later sued the tortfeasor. There, issue estoppel did not apply because the parties to the judicial decision or their privies were not the same persons as the parties to the proceedings in which the estoppel was raised.

[292] If Sholidis was considered privy to that decision, it would prevent him from raising the issue at trial. He was not privy because he was not included in the appraisal process. Estoppel could not be raised as a defence against him. In the normal course, had he been included in the appraisal process, he would have been privy. If he had been represented here, he may well have appreciated the law and been able to assess his position and make representations on this particular issue because estoppel would not apply.

[293] However, at the end of the day, Sholidis did not challenge the appraisals with evidence of his own establishing a higher valuation of the building. That being said, I have no choice but to accept the valuation put before me as it was the only evidence I had of the value of the building distinct from the value of the land. Nevertheless, in this case the whole process was not fair to Sholidis.

Issue 10.

Costs.

[294] Costs to the defendant Economical in both the main action and as plaintiff in the counter claim. Costs to the defendant James in the main action. I may be contacted if it is necessary to deal with the question of costs.

"original signed by Justice Thomson"
Gordon I. Thomson
Justice

Released: May 23, 2003

COURT FILE NO.: 94-CQ-59069

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

PANAGIOTIS SHOLIDIS

Plaintiff

- and –

ECONOMICAL MUTUAL INSURANCE COMPANY and ROGER R. JAMES INSURANCE BROKERS LIMITED

Defendants

REASONS FOR JUDGMENT

Thomson J.

Released: May 23, 2003