

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1048977 B.C. LTD. v. Aviva Insurance
Company of Canada,*
2025 BCSC 1532

Date: 20250811
Docket: S189003
Registry: Vancouver

Between:

1048977 B.C. LTD.

Plaintiff

And

Aviva Insurance Company of Canada and
Don Wotherspoon & Associates Ltd.

Defendants

Before: The Honourable Justice Giltrow

Reasons for Judgment

Counsel for the Plaintiff:

G. Allen
K. Meyer
C. Trudel

Counsel for the Defendant, Aviva Insurance
Company of Canada:

D. Reisler
L. Leung
M. Jeganathan

Place and Dates of Trial:

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and December 16-19, 2024

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Overview

The Claim

[1] The plaintiff, represented by its principal, Trina Allam, brings this claim against the defendant Aviva Insurance Company of Canada for the underpayment of business losses owed under an insurance contract between the parties. The plaintiff also alleges the defendant breached its duty of good faith contractual performance, both in the administration of the plaintiff's insurance claim, and in its conduct through these court proceedings.

[2] The insurance claim arose from a significant land subsidence in August 2016, which halted the plaintiff's progress toward opening a restaurant and special event business in South Surrey. Following that land subsidence, which was caused by construction on neighbouring property, further unfortunate events befell the property, including a hydrogen sulphide gas escape, and a flood from burst pipes. Thefts also followed, although they were not at issue at trial. Ultimately the business never opened, and the property was sold by the plaintiff in December 2017.

[3] The defendant paid the plaintiff \$1,065,937 for business losses for the 12-month indemnity period following the August 2016 subsidence. The plaintiff claims that this does not meet the defendant's contractual obligations, as it both undervalues the income loss of the business, and fails to compensate for the full indemnity period for which the plaintiff was insured, which should have run to the end of the 12 months after the second occurrence that caused business interruption, the December 2016 flood.

[4] The plaintiff brings the claim for breach of good faith contractual performance based on the defendant's conduct administering (or adjusting) the claim, and in the subsequent litigation. Throughout the claims process the defendant cancelled and later reinstated its policy with the plaintiff three times; it took conflicting positions on whether the property was vacant, impacting the plaintiff's coverage; and ultimately the defendant took the position that the plaintiff had accepted a cash settlement of the claim instead of continuing with repairs, then promptly cancelled the plaintiff's

policy a final time for that reason. The plaintiff's key contact at Aviva knew that Aviva was very likely to cancel the policy once the plaintiff elected to take a settlement, but did not advise the plaintiff of this risk. The plaintiff says this loss of insurance impacted the foreclosure process that was by then underway, materially prejudicing the plaintiff's efforts to keep the property. The plaintiff also alleges that the defendant's handling of the repair process was overwhelmingly inadequate, causing delay that ultimately forced the plaintiff to have to sell the property below its full market value.

[5] The plaintiff also advances the bad faith aspect of the claim based upon the defendant's unilateral refusal to consider information submitted by the plaintiff with respect to valuation of the business income loss, considering instead only the defendant's own information despite what the defendant knew to be deficiencies in its own information.

[6] The plaintiff further alleges that the defendant's conduct within this litigation breaches the defendant's duty of good faith contractual performance as an insurer. Specifically, despite previously investigating and concluding that Ms. Allam had made no misrepresentations in her application for insurance, Aviva maintained throughout this litigation that the plaintiff's insurance coverage was in question because of alleged misrepresentations by Ms. Allam and unspecified exclusions under the policy. The defendant only withdrew this allegation in closing submissions, and even so, did so ambiguously.

[7] The plaintiff's claim against the defendant insurance broker who sold her the policy at issue, Don Witherspoon & Associates, was settled before trial.

The Defence

[8] The defendant's position shifted during the administration of the claim, and over the course of trial. However, ultimately in submissions at trial, counsel for the defendant confirmed that coverage is not at issue in this case, nor is there a dispute about the applicable terms of the policy. The defendant argues that it evaluated the

claim and indemnified the plaintiff in a timely manner and in accordance with the policy of insurance for which the plaintiff applied.

[9] The defendant further states that the Court must recognize the important difference between the defendant's actions in the administration of the plaintiff's claim, and the defendant's litigation conduct as represented by counsel. The defendant says that once the plaintiff sued, the defendant was entitled to defend itself. In both processes, the defendant denies breaching any duty of good faith. The defendant denies that its conduct led to the losses the plaintiff claims. Rather, the defendant says, the plaintiff embarked on a "foolhardy business plan" that led to lenders foreclosing and eventually the sale of the property.

Issues and Summary

[10] I must determine the following issues:

- a) Did Aviva fail to sufficiently compensate the plaintiff for business income loss by undervaluing the business income or not compensating for the full indemnity period under the policy?
- b) Did Aviva breach any duty of good faith contractual performance in the administration of the claim, or in litigation of the action?
- c) If Aviva did breach a duty of good faith, what, if any, damages flow from this?

[11] For the reasons I explain below, I am of the view that the defendant did fail to compensate the plaintiff adequately for business income loss in accordance with the policy. This is so not only because the defendant did not compensate for the full 12-month indemnity period following the second insured incident (the flood), but because the defendant undervalued the reasonably anticipated revenue of the business. While it is difficult to assess the lost revenues of a business that has yet to open, it can and must be done based upon a fair evaluation of the evidence available. In my view, the defendant failed to do so, ignoring important factors

affecting valuation. At the same time, I am not persuaded that the likely business income the plaintiff would have earned had the insured events not occurred is as high as the plaintiff claims. In particular, contrary to the plaintiff's arguments, I am of the view that a contingency must be allowed for the fact that the business was new, and did not have an established record of performance as a restaurant, nor any events booked for the months after anticipated opening.

[12] I am also of the view that in the administration of the claim, Aviva failed to meet its obligation to carry out its contractual obligations in good faith. This is so particularly with respect to Aviva's failure to advise Ms. Allam that if she accepted the "actual cash value" of repairs rather than an indemnity for repairs done, Aviva would likely cancel her existing insurance policy. I also find that Aviva's failure to consider the evidence of business loss submitted by the plaintiff, and its unilateral reliance on the estimates of loss provided by the accountant that Aviva had hired, Jarvie & Co—estimates which were advantageous to Aviva—breached Aviva's duty of good faith contractual performance in this case.

[13] However, I am not persuaded that Aviva's bad faith conduct led to losses compensable in damages. The plaintiff claims she was forced to sell the property for under market value due to Aviva's conduct. However, even if the property was sold under value, which I need not decide, I am unable to conclude that Aviva's bad faith conduct was the cause. I am also not persuaded that the defendant's conduct in this case goes beyond requiring a declaration that Aviva breached its duty of good faith contractual performance to warranting an award of punitive damages.

[14] Nor do I find that the defendant's conduct during this litigation provides a basis for a finding of bad faith in its performance of the contract. While the defendant's conduct in this litigation may well give rise to consequences in costs, I am not of the view that this translates to an award in damages for bad faith, even if such an award is available in the insurance context.

[15] Accordingly, I would order the defendant to pay an additional \$2,278,000 to the plaintiff in unpaid business income loss under the terms of the policy. And, while

I would grant the plaintiff's request for a declaration that Aviva breached its duty of good faith contractual performance in the administration of the claim, I would dismiss the requested award for consequential damages for the breach.

Overview of Witnesses

[16] I found all witnesses at trial, except for one, to be credible and reliable. The one witness about whose testimony I have some concern is Mr. Milacek, called by the defendant. Mr. Milacek, through his company BES Investments Ltd., was an early lender to the plaintiff as she sought to finance her business. At the time of trial Mr. Milacek was 89 years old, and had evident difficulty in recalling events from approximately 10 years earlier, affecting his reliability, which had some effect on his credibility.

[17] The principal witness for the plaintiff was Ms. Allam. Despite the defendant's urgings to the contrary, I found Ms. Allam to be both credible in her testimony and reliable in the memories she recounted. Further, despite the defendant's strong urgings that Ms. Allam not be found credible, it was not clear in argument what material fact at issue the defendant says should be affected by a negative credibility finding against Ms. Allam. In response to this question from the Court, counsel for the defendant said that Ms. Allam's credibility is relevant to the question of how profitable the business would have been had it opened. However, both parties led expert evidence on the expected revenues of businesses with comparable features to those the plaintiff was working to open. Ms. Allam's credibility is not particularly relevant to the Court's evaluation of this competing evidence.

[18] In any event, as I have said, I found Ms. Allam to be a credible witness, even after extensive cross-examination.

[19] I also found the defendant's main witness, Lynda Sanders, to be credible. Ms. Sanders was the adjuster in charge of the plaintiff's claim at Aviva, and was Ms. Allam's main contact with the defendant throughout the claims process. While Ms. Sander's testimony included evidence that I have found supports the plaintiff's

claim that the defendant breached its duty of good faith contractual performance, I found Ms. Sanders to be credible in her testimony.

Issue 1: Did Aviva fail to sufficiently compensate the plaintiff for business income loss by undervaluing the business income or not compensating for the full indemnity period under the policy?

[20] The first issue I must determine is whether the defendant should have paid the plaintiff more for business income loss than it did, and if so, how much more.

[21] The defendant takes the position at trial that, although it compensated the plaintiff for business income loss, in fact the plaintiff would have earned no income, because it was unlikely the business would ever have opened. In the alternative, if the business would have opened, the defendant says that the plaintiff has been adequately compensated for any business income loss it suffered.

[22] The plaintiff argues that not only would the business have opened, but based on factors the defendant did not—or did not properly—assess, the business would have earned revenues significantly greater than those estimated by the defendant. Additionally, and in any event, the plaintiff says the defendant failed to compensate her for the full indemnity period covered under the policy by essentially ignoring the effect of the second insured occurrence, the flood.

[23] The questions for the Court to determine are:

- a) Would the business have opened but for the insured occurrences?
- b) When would it have opened?
- c) When did all applicable indemnity periods end?
- d) What would the business income have been during the indemnity period?

[24] On the first three questions: I have determined that the business would have opened, and would have done so by October 1, 2016, which is the same date the defendant ultimately used in the administration of the claim. Further, I find that the

full indemnity period under the policy should have flowed for 12-months following the second insured occurrence, the flood, and not merely the first, the subsidence. This adds another approximately two and a half months to the indemnity period for which the plaintiff should have been compensated. I address the fourth question below, after first explaining my reasons for the first three answers.

Law: Relevant Contractual Provisions

[25] There is no dispute between the parties that the policy insures “the actual loss of business income” suffered during the “indemnity period” as a result of “damage” in accordance with the terms and conditions of the policy.

[26] The “Measure of Recovery” for actual business losses is set out in the policy:

The measure of recovery in the event of a loss hereunder shall be determined as follows:

- i. First, the amount by which the Insured’s business income has been reduced will be established. This will include the reduction in any rents the Insured normally would have received.
- ii. Second, the amount of those expenses that do not necessarily continue during the indemnity period will be subtracted from (i). Any of the Insured’s ordinary business expenses will be considered necessary if:
 - (a) Such expenses would have been covered by the Insured’s business income before the loss, and
 - (b) Such expenses are required so that the Insured’s business can return to operations with the same quality of service as before the loss.

- iii. Finally, the amount of any extra expenses necessarily incurred by the Insured to continue or resume operations as nearly as normal as possible will be added.

[27] The policy defines indemnity period as:

“Indemnity period” means the period beginning with the occurrence of the “damage” and ending not later than 12 consecutive calendar months...thereafter during which the results of the “business” shall be affected in consequence of the “damage.”

Law: *Murano* Factors

[28] A difficulty arises in this case because the business was working toward opening, but had not yet opened, when the subsidence occurred. The parties referred the Court to *Murano v. Bank of Montreal et al* on this point ([1995] O.J. No. 883, 1995 CanLII 7410 (C.J.), and see [1998] O.J. No. 2897, 1998 CanLII 5633 (C.A.) varying on other grounds). While *Murano* is a tort case, both parties agreed that the principles it articulates are of assistance in the insurance context and should be applied in the case before me. In *Murano* the Court recognized that a record of past earnings obviously increases the certainty associated with predicting future earnings, but that the lack of evidence of past earnings should not preclude a new business from recovering lost earnings:

[161] Rather, a new business must be allowed to prove lost profits to a reasonable level of certainty by expert testimony, by evidence of actual profits of similar businesses, by evidence of proven managerial experience and expertise, and by evidence of subsequent earnings if such evidence is available.

[29] The Court in *Murano* went on to warn, though, that “damages should not be awarded for lost profits which are entirely speculative and uncertain.” Finding a fair balance in uncertain circumstances is of fundamental importance. As the Court said in *Murano*, albeit in the tort context:

[161] [O]nce a defendant has been shown to have caused a loss, liability should not be escaped because the amount of the loss cannot be proven with precision. Consequently, the reasonable level of certainty required to establish “the amount” of the loss is generally lower than that required to establish “the fact or cause of” a loss.

[30] I agree with the parties that *Murano* provides helpful guidelines for the analysis required in this case to assess losses in the insurance contract context. Actual loss must be proven on a balance of probabilities. Beyond that, the amount of the loss must be established to a “reasonable level of certainty” that must not be “entirely speculative and uncertain.” The admonition against speculative reasoning in *Murano* is consistent with the general principle that when assessing hypothetical events—such as what would the business have earned, had it opened—the Court must base the assessment on evidence not speculation. It is, at the same time, an assessment, not a calculation.

[31] The plaintiff relies on this statement of Justice Brongers in the tort context in *Anthonipillai v. Lacelle*, 2021 BCSC 1723 to describe this Court’s task in this case:

[69] Significantly, as with past loss of income, the plaintiff is not required to prove hypothetical events on a balance of probabilities; so long as the future possibility is “real and substantial” and not mere speculation, it can be considered ... The court will then determine the measure of damages by assessing the likelihood of the event occurring. The process has been described in the jurisprudence as “crystal ball gazing”, a metaphor which conveys the notion that it involves assessment through judgment as opposed to a precise mathematical calculation.

[32] I agree with the plaintiff that in exercising my judgment in determining the business income loss in this case I must assess the probability of hypothetical events occurring.

[33] I understand the defendant to agree with this too. The defendant relies on *656203 Ontario Inc. v. Simcoe & Erie General Insurance Co.*, [1995] O.J. No. 2572, a business interruption claim under an insurance contract, much like the case before me. Indeed, in that case too there was no history of earnings upon which to assess the income loss, because the insured sawmill burned down on its first day of operation. In *Simcoe*, the Court found the plaintiff’s expert report assessing income loss to have been prepared on the correct basis, the method required under the policy, but nevertheless the conclusions required adjustment by the trial judge:

[176] Counsel for the defendants submitted that Mr. Dragony’s report was speculative, misleading and unreliable. I do not agree but, although I find that

his methodology was appropriate, in view of the fact that the new business had no track record and that no firm orders had actually been placed, I find the report to be very optimistic. Certainly, it is a best case scenario.

[34] Based upon his assessment of the evidence at trial, the trial judge determined the claim should be reduced by 60%. One basis for the need for downward adjustment was the need to allow time for the build up of inventory: “an inventory of cut lumber would have had to have been built up before sales, delivery and payment could have taken place” (para. 195). Another basis upon which downward adjustment was made was the uncertainty of sales to a particular buyer beyond the first quarter of the 12-month indemnity period at issue in that case (paras. 189 and 195). The defendant urges a similar approach in this case.

[35] I agree that my analysis must include a global assessment of the evidence, and, if appropriate, I must adjust the final assessment of loss to account for the likelihood of hypothetical events occurring.

Would the Business Have Opened But For the Occurrences?

[36] The threshold question of whether the plaintiff suffered actual business income loss rests on determining whether the business would have opened but for the subsidence. While this is a hypothetical event, in my view it must be established on a balance of probabilities rather than a lesser standard because without the business opening, there is no business income loss. The fact of loss must be established on the balance of probabilities; the amount is then assessed at a lesser standard of certainty: *Murano*.

[37] In addressing the *Murano* framework in closing argument, counsel for the defendant confirmed that his submissions were directed at the question of the “amount” of loss, and that he conceded that loss was established. Since the only basis upon which loss could be established is that the business would have opened to receive business income but for the insured occurrence, this concession of loss must logically entail the concession that the business would have opened. However,

the defendant nevertheless pressed the argument that it was not likely the business would have opened. I will accordingly address this argument here.

[38] In my view the likelihood of the business opening is to be measured against two factors:

- a) was the plaintiff's plan for opening the business likely to lead to its opening, and if so
- b) was the plaintiff on track with her plan to open the business such that it was likely the business would open?

[39] The plaintiff testified that her intention from the outset was that she would renovate the building to prepare it to open as a restaurant and event venue; she would then commission a post-renovation appraisal which she expected would be at a higher valuation than her purchase price; she would then refinance the newly renovated property, and finally, she would use the funds from the refinancing along possibly with her own funds to open the business.

The Plan

[40] The reasonableness of the plaintiff's plan rested substantially on the equity in the property at the time at which the plaintiff needed to refinance. The plaintiff's plan was built on her own view that she had acquired the property for a price lower than its market value. There was no expert evidence at trial that the plaintiff acquired the property below market value.

[41] The reasonableness of the plaintiff's opinion about the value of the property—and of the basis for her plan—can only be assessed with reference to the evidence at trial. The relevant time-period in which the plaintiff needed to hold sufficient equity in the property to be able to refinance is the latter half of 2016. This was the period in which she intended to complete renovations and open the business.

[42] In my view, the whole of the evidence at trial supports finding that during the relevant time period, the market value of the property exceeded the plaintiff's debt obligations registered against the property.

[43] The best evidence of the market value of the property in this period is the price for which the plaintiff sold it in December 2017: \$5.9 million. While this sale price is from a year after the relevant time period, there was no evidence to suggest that the passage of this period of time produced a significant increase in the market value of the property and thereby overvalues the equity available in the property in the second half of 2016.

[44] The plaintiff also points to the evidence that the lender from which she borrowed the funds to purchase the property in 2015, BES Investments, loaned the plaintiff more than the purchase price of the property at the time. BES loaned the plaintiff \$3.6 million to purchase the property for an approximate price of \$3.3 million. The plaintiff argues that this circumstantially supports her opinion that the market value of the property was likely greater than the price at which she purchased it, as the lender was prepared to lend more than the purchase price, based on the security of the property. In cross-examination, the principal for BES Investments, Stan Milacek, confirmed that during the subsequent 2017 foreclosure proceeding he brought against the plaintiff, he felt comfortable because in his view there was a lot of equity in the property.

[45] The \$5.9 million sale price in December 2017, without completed renovations or improvements to the property, is a 77% increase over the price at which the plaintiff acquired the property in September 2015, \$3,333,499 million. Taking into account the debts mortgaged and liens registered against the property, which I discuss below, the \$5.9 million sale price reveals over \$1 million in equity in the property.

[46] I heard no evidence either way as to whether over \$1 million was sufficient equity to make it probable the plaintiff could have refinanced in late 2016 absent the consequences of the subsidence and flood.

[47] The only evidence weighing against the likelihood of the plaintiff obtaining refinancing is that in August 2016 the plaintiff sought further financing from Community Development First for Business. This and subsequent attempts to obtain refinancing were unsuccessful. However, there was no evidence of an attempt to refinance that did not have the sceptre of the subsidence and flood hanging over the property. I do not take these efforts as indicative of what the plaintiff's likely success in refinancing would have been absent the unfortunate advent of these insured occurrences.

[48] The plaintiff says she was unable to refinance because of the subsidence and flood and the inability to provide a concrete timeline for repairs to the property. The defendant, on the other hand, pointing particularly to the plaintiff's debt obligations, says that this was evidence of a "foolhardy business plan and would never have succeeded." The evidence is that at all times the plaintiff held sufficient equity in the property to cover the debt obligations registered against it with at least \$1 million left over. In my view, this establishes that successful refinancing would have been more likely than not.

[49] Accordingly, on the first component of the first issue, I find on a balance of probabilities that the plaintiff's plan for opening the business, based on debt financing, was likely to lead to its opening.

Was the Plaintiff's Plan on Track to the Business Likely Opening

[50] I also find that by the time of the subsidence in August 2016, the plaintiff was on track for the business to open within the coming months. By then Ms. Allam, who had experience in both the construction and hospitality industries, had hired an award-winning chef, with experience in opening restaurants, Victor Bongo; a chief operating officer Sathi Rajan who had experience in the hospitality industry who had worked closely with Mr. Bongo; Anna Lyth who had decades of experience as a server, bartender, staff manager and in overseeing large events, as well as others including Ms. Allam's ex-husband whom Ms. Allam had worked with to open a café. I do not agree with the defendant's characterization of the team Ms. Allam hired as

“unsophisticated.” The individual and collective experience of the group of people that was working closely and intensely together to prepare the business to open was, in my view, deep enough to make likely the business would have opened.

[51] Further, by August 2016 the plaintiff’s contractors had completed substantial renovations of the main building on the property. I will address the extent of these renovations below, but for now I note that the renovations had progressed to a point where it was likely the business would open.

[52] The main factor the defendant argues demonstrates that the plaintiff’s plan to open was not likely to come to fruition is the state of the plaintiff’s financing and debt obligations in August 2016 and afterward.

[53] In my view, to assess whether the plaintiff’s debt obligations would likely have impacted her ability to refinance and open the restaurant, it is important to distinguish between those steps taken by creditors before the subsidence event, and those taken after. This is because the subsidence event, and then the flooding, caused a significant and unanticipated disruption to the plaintiff’s plans to complete the renovations and open the business to produce a revenue stream.

[54] In my view, while there were creditor proceedings underway against the plaintiff at the time of the subsidence, they were not individually or cumulatively so significant that they would likely have prevented the plaintiff from refinancing the property and then opening the business.

[55] The first of the debt obligations the defendant points to is two insurance premium payments the plaintiff missed in early 2016. I am not persuaded that these missed payments demonstrate that the plaintiff’s business was at risk of not opening or of generating revenue. The insurance policy required the plaintiff to pay premiums of \$487 a month. This is a small amount compared to the much larger business expense payments the plaintiff was making at that time. I accept that the non-payments of the insurance premiums were due to error or oversight on the plaintiff’s part, rather than demonstrative of financial strain on the plaintiff.

[56] Another minor debt obligation arose on March 1, 2016, when Paragon Remediation Group Ltd. filed a builder's lien against title to the property for \$5,250.36. Ms. Allam testified that in 2015 the previous owner of the property, Berezan Management Ltd, had arranged for Paragon to attend the property to remove debris. Paragon completed this work in 2015 but did not issue an invoice to the plaintiff or to Berezan as far as the plaintiff knew. Ms. Allam testified that she did not know about the invoice until the lien was filed. She paid the total amount owed to Paragon; she testified "it was ridiculous to go to Berezan for \$5000." I do not consider this lien to be evidence supporting the defendant's argument that the plaintiff would not likely have opened for business.

[57] Another creditor proceeding had been brought against the plaintiff by Galligan's Construction Ltd., which was one of the contractors the plaintiff had hired to work on the renovation. The plaintiff testified that Galligan's had not met the terms of its contract with her: it had neither performed the scope of work she commissioned, nor had it performed the work on time. The plaintiff had had to hire other contractors to complete the work Galligan's had failed to complete. This led to two consequences: a) delay in the overall renovation project, and b) a dispute between the plaintiff and Galligan's about payment of Galligan's invoice.

[58] The delay caused by Galligan's is not directly relevant to the question of whether the business would have opened, because the plaintiff factors in that previous delay when she argues the business would have opened by October 1, 2016.

[59] What is relevant is that the plaintiff decided to pay only about half of the invoice received from Galligan's because Galligan's had performed only half the work it was contracted to perform. The plaintiff wrote and provided Galligan's a cheque for \$33,200 on the same day she received the invoice for \$61,016 from them, January 14, 2016. However, Galligan's did not cash the cheque, and then filed a builder's lien against the property in April 2016. This, the defendant says, was just one of the creditors that was seeking to enforce its remedies against the plaintiff at

that time, and the preponderance of these converging financial pressures made it unlikely that the plaintiff would be able to open her business.

[60] On April 18, 2016 BES Investments (the plaintiff's first mortgage lender and first loss payee under the insurance policy) issued a notice of default and demand for payment under its mortgage to the plaintiff. On June 30, 2016 BES filed a foreclosure petition against the plaintiff, Ms. Allam and others, seeking payment of \$3,693,776.67 under its mortgage as of June 13, 2016. BES also filed a Certificate of Pending Litigation against the property.

[61] There was competing evidence at trial as to what the terms of the loan agreement were between the plaintiff and BES. Ms. Allam testified that she and Mr. Milacek, who was the principal of BES, had a verbal understanding that she need not make regular payments on the loan while the business was renovating because Mr. Milacek recognized the significant equity available in the property, and knew of Ms. Allam's plan to refinance after renovations. Ms. Allam also testified that Mr. Milacek advised her he had filed the foreclosure petition only to preserve his rights, and that he did not intend to proceed against her. Mr. Milacek denied this in testimony.

[62] I need not resolve the competing credibility of the witnesses on this point, because whatever the initial agreement may have been, it is uncontroverted that BES ultimately did proceed to foreclose against the plaintiff. BES was granted an order *nisi* by this Court on September 30, 2016 based upon the plaintiff's default, with a six-month redemption period and a redemption amount of \$3,787,122.44, with a daily interest rate of \$776.52. The plaintiff was subsequently granted a two-month extension to the redemption period to May 30, 2017.

[63] Another order *nisi* was granted to GSO135 Ventures Ltd. on January 10, 2017, with a redemption amount of \$222,762.54 and six-month redemption period with a daily interest rate of \$98.57. Ms. Allam testified that GSO had provided the plaintiff a loan in May 2016 for purposes unrelated to the business or the property,

but the loan was secured by a mortgage and assignment of rents against the property.

[64] Counsel for the defendant argued in submissions that “it is possible that they could have opened the restaurant after this”, referring to the builder’s liens, unprocessed insurance payments, and foreclosure proceedings, “just not likely.” I have already determined that neither the missed insurance payments nor the lien filed by Paragon are persuasive evidence that the plaintiff was under financial strain that was likely to hinder opening. Nor do I find the lien filed by Galligan’s to be such evidence. The plaintiff’s decision to pay only for the services rendered by Galligan’s was a reasoned decision based on the value received, not one driven by financial strain.

[65] The strongest evidence that the plaintiff was under financial strain that may have hindered opening in late 2016 are the two orders *nisi* issued against the plaintiff in September 2016 and January 2017. However, both of these orders *nisi* were obtained after the subsidence event. I must be cautious in assessing the likelihood of whether the plaintiff’s business would have opened but for the subsidence based on events that happened only after the subsidence. This is particularly so here, where so much hinged on the plaintiff’s reasonable plan to refinance after renovations. The plaintiff was never able to attempt her plan to refinance without the sceptre and uncertainty of the subsidence, and then the flood, hanging over the property.

[66] Even if the orders *nisi* would have been sought and obtained in the absence of the subsidence event, that does not mean that final orders would necessarily have followed. The redemption periods are a significant factor in this evaluation, as they would have allowed the plaintiff to seek refinancing on a property whose value exceeded the debts secured against it. At all relevant times there was sufficient equity in the property to cover the debt obligations registered against the plaintiff and the property, with at least \$1 million left over. As I have found, this evidence tends to establish that it was more likely than not that the plaintiff would have succeeded in

obtaining the refinancing she planned for. The evidence of the value of the property and the value of the debts does not support the defendant's argument that the plaintiff's debts would have prevented the business from opening even if the subsidence had not happened.

[67] Accordingly, I find that, having considered the plaintiff's business plan and assessing the extent to which the plaintiff was on track with that plan, it is more likely than not that the business would have opened and would have begun to generate income.

When Would the Business Have Opened?

[68] The defendant also spent some time in evidence and argument suggesting that the preparations to open the business were not on track, as the plaintiff had not ordered table linens or new kitchen equipment as of August 2016. However, table linens had been ordered by the plaintiff, and existing functioning kitchen equipment was on site, and Ms. Allam had an arrangement with a kitchen appliance supply company that she understood would deliver new equipment within two weeks.

[69] The defendant did not seriously dispute the October 1 opening date, if the business were to open. Indeed, October 1, 2016 was ultimately the date upon which the defendant based the commencement of the compensation it did pay to the plaintiff for business income loss. The thrust of the defendant's arguments at trial, if the business were found likely to open, related to the degree to which the plaintiff would have begun to generate revenue and when, which I will address below.

[70] I find that the evidence supports the plaintiff's position that the business would have opened on October 1, 2016, but for the subsidence.

When Did all Applicable Indemnity Periods End?

[71] The indemnity period under the policy started August 18, 2016 when Ms. Allam reported the subsidence incident. However, there was no business income, or anticipated business income but for the insured occurrence, at that time.

October 1, 2016 is the date upon which “actual loss of business income” began to accrue.

Two Insured Occurrences

[72] In closing argument, the defendant conceded that there were two separate insured occurrences, the subsidence and the flood. This was a different position than the defendant had taken throughout the claim administration process, and in its pleadings and evidence at trial.

[73] At trial, the representative for the defendant, Linda Sanders, said that the defendant determined that the subsidence and water damage were part of the same occurrence. This was the position Aviva took throughout the claim administration process and trial, until closing submissions. Ms. Sanders acknowledged that the policy would provide for two separate indemnity periods if there were two separate occurrences, but testified that Aviva determined the two events were part of the same occurrence for two reasons: 1) the plaintiff had no operating business at the time of the water damage, 2) at the time of the water damage the “soil had not stopped moving” and 3) it “boded to her advantage to not have a second claim on file”, referring to the plaintiff. The defendant did not explain these reasons in evidence, nor did Aviva explain them to the plaintiff during the claim administration process.

[74] As I have said, in closing argument counsel for the defendant conceded that the subsidence and the flooding were two separate occurrences. I agree. There was no assertion by the defendant, or evidence, that the water damage (or the gas emission and shut down of the building that preceded it) was caused by the subsidence. In light of this, I need not determine the further point argued by the plaintiff, that in any event, in determining whether an “occurrence” has happened, “the focus must be on the immediate circumstances of a loss, not its originating cause”, citing *R.C. Heating & Gasfitting Ltd. v. The Sovereign General Insurance Company*, 2017 BCSC 1916 at para. 16; and *Pickford & Black Ltd. v. Canadian General Insurance Co.*, [1977] 1 S.C.R. 261, 1976 CanLII 153.

[75] I was offered no argument as to how the other reasons given by the defendant's representative for determining the subsidence and the flood to be a single occurrence accord with the definitions or provisions under the policy. Nor are such interpretations evident to me on the face of the policy.

[76] This gives rise to distinct, yet partially overlapping, indemnity periods under the policy. The defendant argues to the contrary. Despite have conceded that there were two separate occurrences, counsel for the defendant persisted in the position that two occurrences would lead to no coverage on the second occurrence, rather than coverage for both occurrences. Counsel argued that the policy supports this construction, but did not explain how. The defendant's written argument cites Ms. Sanders' testimony for this proposition, not the policy itself. I see no basis in the policy for this interpretation. If there were language in the policy upon which the defendant's interpretation rests, it would need to be unambiguous or survive a *contra proferentum* analysis to prevail in favour of the defendant: *Wingtat Game Bird Packers (1993) Ltd. v. Aviva Insurance Company of Canada*, 2009 BCCA 343 at para. 19. In my view, the defendant's position can not, and does not, prevail.

End Date of Flooding Indemnity

[77] However, the fact that two indemnity periods arose from two separate occurrences does not mean that entitlement to compensation for a full 12-months automatically flows from the date of the flood.

[78] The bulk of the damage to the building arose from the flood. However, delays to repairs persisted in part because of the unsettled land movement from the subsidence.

[79] The evidence was that it would take approximately four months to repair the damage from the flooding. This was accepted by the defendant in the administration of the claim, and the defendant did not dispute this at trial. The permit to undertake the repairs was not received from the City of Surrey until July 5, 2017, although the defendant, who was the party dealing directly with the City, did not advise the plaintiff that the permit was ready until August 14, 2017.

[80] Even so, the permit for which the architect hired by the defendant applied was insufficient to authorize the work necessary to repair the damage from the subsidence and the flooding. The full scope of work required included electrical and plumbing work. There was no evidence at trial that the defendant had taken steps to secure the permits required for any electrical and plumbing work. Nor did the defendant ever ask the two engineers it had hired to examine the property to provide any opinion about whether it was yet safe to repair the property, in light of the subsidence and the ongoing land movement. I address later in these reasons the defendant's argument that these were not the defendant's responsibility.

[81] Even if the scope of permit and the absence of geotechnical confirmation of safety to repair were not issues, I find that it would have taken at least four months to complete the repairs necessary from the flooding, and this work would not have started before mid-August 2017 when the defendant advised the plaintiff the permit was ready. Accordingly, the end of the indemnity period is December 21, 2017, approximately 4 months later and 12 months after the flood.

[82] Accordingly, the full indemnity period for which the plaintiff is entitled to compensation is from the date she reported the subsidence, August 18, 2016 to 12 months after the flood, December 21, 2017. However, as the plaintiff would not have opened the business before October 1, 2016, the operative indemnity period during which compensation for business interruption loss was owed to the plaintiff is October 1, 2016 to December 21, 2017.

[83] The next question is what were the business losses for which the defendant was bound to compensate the plaintiff under the policy throughout the entirety of the relevant indemnity period, from October 1, 2016 to December 21, 2017.

What Would the Business Income Have Been During the Indemnity Period?

[84] The parties' positions on what the plaintiff's income would have been during the indemnity period are significantly at odds. The plaintiff argues that she suffered business income losses of \$9,530,478 from October 1, 2016 to December 21, 2017.

This is \$8,464,541 in excess of the \$1,065,937 the defendant paid the plaintiff for business income losses.

[85] The defendant, by contrast, says that if the business would have opened it would have operated at a loss of \$130,804, or at best a profit of \$498,804, during the indemnity period ending August 18, 2017. In either case, the defendant says that it has more than compensated the plaintiff for what she was entitled to under the policy.

[86] I have already found that the relevant indemnity period extended to December 21, 2017, not August 18, 2017 as the defendant argues. However, this is not where the substance of the difference lies between the parties' positions. It lies in the significantly different prospects the parties argue the business would have faced, had it opened.

[87] Loss having been established on a balance of probabilities in this case, the amount of the loss is to be assessed on a lesser standard of certainty. It must not, however, be speculative, and must be grounded in the evidence: *Murano*.

[88] The parties' arguments were focused on what they referred to as the *Murano* factors: expert testimony, evidence of profits of similar businesses, evidence of proven managerial experience and expertise, and evidence of subsequent earnings if such evidence is available. The last factor is of assistance in this case, as the business never produced subsequent earnings, having never opened.

[89] The defendant challenged the "proven managerial experience" of Ms. Allam and the team she had assembled to start and run the business. I have already found that the individual and collective depth of relevant experience, among the team of people Ms. Allam had assembled was sufficient to establish that the restaurant was more than likely to open. I am further satisfied that the combined experience of the team was at least sufficient to make it likely the business would have enjoyed success that can be compared to the restaurants upon which the expert evidence of revenue was based. Ms. Allam had worked in the hospitality and event planning

industry for many years in a variety of roles, including managing and opening new restaurants. Mr. Bongo had held roles as head chef at two restaurants, and business partner at another where he led the process of improving an existing restaurant. He had, by 2016 won international awards in recognition of his talent as a chef, which he continued to do after 2016. Mr. Rajan, was experienced in the restaurant and bar industry, including in creating bar and beverage programs, and worked for a number of years with Mr. Bongo as his manager. Ms. Lythe's decades of experience working as a server, bartender, staff manager and in overseeing large weddings and other events equipped her for her anticipated role in the business, training and managing staff.

[90] Ms. Allam and Mr. Bongo shared a vision for the restaurant that there would be a set menu in the downstairs portion, as well as a "chef's table" where guests could watch Mr. Bongo cook, and he would serve them. They intended this would be a fine dining experience in South Surrey, without the need to travel to Vancouver. Additionally, the building, which had under the previous owners been called "Chateau Cargill" and run as an events facility, would be available to host events on one floor, while approximately half the restaurant seating would remain available on the main floor.

[91] To the extent that adjustment need be made to the assessment based upon the lack of track record for this team and this business model, I address this below, in discussing the concept of a "ramp up period."

[92] The question of what are appropriately comparable "similar businesses" was important at trial. This question in turn impacted evidence on likely "build out" costs, management expenses, and revenue projections. The parties' experts testified on these points.

[93] The plaintiff called two expert witnesses whose evidence related to business income loss: Greg Herman, who was qualified to give opinion evidence relating to the operation of a restaurant and special events business in the Lower Mainland, and Tony Volpe, who was qualified to testify as an expert in forensic accounting.

[94] The defendant also called two expert witnesses relating to business income loss: Kelly Gordon, qualified to give opinion evidence on the development and operation of restaurants and special events businesses in the Lower Mainland, and Ivor Gottschalk, qualified to testify as a forensic accounting expert.

[95] The accountants rely upon the restaurant experts to varying extents in coming to their expressed opinions regarding business income loss. The plaintiff's accounting expert, Mr. Volpe, relied upon the projected revenues opined by the plaintiff's restaurant expert Mr. Herman in coming to his opinion on the plaintiff's business income loss. By contrast, the defendant's accounting expert, Mr. Gottschalk, did not rely on the defendant's restaurant industry expert, Mr. Gordon's, projected revenues in coming to his own opinion about the plaintiff's business income loss. Instead, Mr. Gottschalk relied upon an "average revenue per square foot" calculation from an American restaurant industry publication.

[96] I will begin by addressing the restaurant expert evidence. Mr. Gordon, for the defendant, is an established restaurateur. He has experience owning and operating a number of well-recognized restaurants, including Milestones, the Boathouse, and the Keg. He has been inducted into the British Columbia Restaurant Hall of Fame. The plaintiff readily accepts Mr. Gordon's expertise in the restaurant industry.

[97] Mr. Herman, for the plaintiff, has worked 24 years in the restaurant industry, beginning with several years as bartender at the Wickaninnish Inn in Tofino, and for the last 11 years at the Kingfishers Waterfront Bar & Grill in Maple Ridge. Mr. Herman describes Kingfishers as an upscale, high-volume restaurant and pub space with a seating capacity of 201. For the past eight years Mr. Herman has been General Manager of Kingfishers. Within his role, he is also responsible for booking wedding and corporate events. Kingfishers books on average 125-175 private events a year. Mr. Herman has direct experience with successful niche independent restaurants whose success depends in part upon their location, both in terms of physical surroundings (including factors such as landscape), but demographics and uniqueness within an area.

[98] I qualified both to testify as experts at trial with the consent of the parties and after hearing evidence about the extent and nature of each of their experiences in the restaurant industry. In closing arguments each party urges the Court to reject the evidence of the other parties' restaurant industry expert. The defendant urges so because of Mr. Gordon's greater experience than Mr. Herman, and particularly his experience in opening and financing numerous successful restaurants. The plaintiff urges so because Mr. Gordon's experience is particular to opening chain restaurants with corporate backing, and does not include opening an independent local restaurant, nor did he research independent restaurants for the purpose of providing his opinion to the Court.

[99] I neither reject nor wholly rely on either expert's evidence. I found each expert's evidence to be of some assistance on different points. I found Mr. Herman to be a reliable and helpful witness. His experience derives from working for many years in independent businesses that have several similarities to the plaintiff's business. While Mr. Herman has not owned a restaurant, he demonstrated strong familiarity with and understanding of the factors contributing to revenue, and with the managerial and staffing needs of such restaurants. His evidence is helpful on these points, as well as with respect to special events, which are an active part of the role he has held for eight years.

[100] By contrast, Mr. Gordon did not consider the special events aspect of the plaintiff's business in his report, and he does not have significant experience with special events. I was not assisted by Mr. Gordon's revenue projections because they were internally inconsistent within his report and the basis for them was not substantiated in his report. I also found Mr. Gordon's opinion evidence regarding the extent of the "build out" (to use his term) or renovations necessary to open a restaurant, to be unhelpful to the circumstances at issue in this case, because it was based on a chain restaurant model that reproduces a particular and consistent branded product, space and experience, and did not take into account the particular requirements of an independent restaurant. However, I did find Mr. Gordon's

evidence regarding the trends and patterns of restaurant revenue and success after opening, as well as factors contributing to revenue, such as location, to be helpful.

[101] Mr. Gordon's evidence regarding restaurant revenue was internally inconsistent, and the basis for it was not substantiated in his report, nor satisfactorily explained in his *viva voce* testimony. For example, Mr. Gordon states in his report: "I do not see 4.0 million revenue in the restaurant as achievable. 2.8 million to 3.0 million is more realistic [on] an ongoing basis." First, it is not clear what \$4.0 million projection Mr. Gordon is responding to in this statement. More importantly however, Mr. Gordon does not explain the basis for the \$2.8-3.0 million revenue figure he opines is realistic.

[102] By contrast, in his expert report prepared for trial, Mr. Volpe transparently employed the methodology of estimating table turnover and then multiplying daily table turns by an estimated average customer check value. This was the same methodology the accountants retained by the defendant in the claims administration process, Jarvie & Co, and Mr. Volpe, for the plaintiff, had used in the claims administration process.

[103] For his part, Mr. Gottschalk, the accountant expert for the defendant at trial, employed a different method altogether, relying on average revenue projection figures from an industry report multiplied by square footage. These methods were described and transparent, and can be assessed by the Court, as I do below. Mr. Gordon is of course not bound to employ the same methodology as any of the other experts; however, without explaining what, if any, methodology he did employ to arrive at what he estimates is a realistic revenue for the business, his opinion on this point is of very limited assistance to the Court, and I give it little weight on this point.

[104] Furthermore, Mr. Gordon then goes on his report to state that he views "a more realistic sales level of 3.75 million to 4.25 million as at the high end of reasonable." These figures are different from those Mr. Gordon had elsewhere opined were "realistic" (a term he uses in his report in both instances). While the

greater sums may be explained as the “high end of reasonable” as Mr. Gordon puts it, the basis for this is too opaque to be of assistance. Moreover, Mr. Gordon does not provide the basis for this opinion, nor explain whether this estimate includes event revenue or restaurant revenue only. The plaintiff argues that the table Mr. Gordon produces in his report appears to reveal that his estimates do not include event revenue, as he does not include revenue for room rentals, which would be expected to be associated with events.

[105] In a further apparent incongruity within his report, the table in Mr. Gordon’s report identifies \$4 million as “expected” revenue and a \$3 million revenue as a “low” likelihood. Mr. Gordon’s table identifies \$5 million and beyond to \$12 million as “aggressive” up to “very unrealistic.” Opining that \$3 million is a “low” likelihood and \$4 million is “expected” for this restaurant is inconsistent with Mr. Gordon’s previously articulated opinion “I do not see 4.0 million revenue in the restaurant as achievable. 2.8 million to 3.0 million is more realistic [on] an ongoing basis.”

[106] Overall, I was unable to rely upon Mr. Gordon’s opinion evidence regarding projected revenues for the plaintiff’s business.

[107] I find I am similarly unable to rely upon Mr. Gottschalk’s opinion on restaurant revenue. I will explain first that Mr. Gottschalk provided business income loss estimates based upon three scenarios: Scenario 1 was that the business did not open. This, not surprisingly, led to a conclusion that no business income loss was incurred by the plaintiff. I have not considered this evidence, as I have determined that the business would have opened, and would have done so October 1, 2016.

[108] Mr. Gottschalk’s Scenarios 2A and 2B are distinguished as being with and without a further “build out.” The build out Mr. Gottschalk refers to is that which Mr. Gordon opined was necessary. Mr. Gordon stated in his report: “For a 7000 square foot restaurant in 2016 with a medium build of \$750 a square foot comparable to Brown’s quality you will be looking at \$5,000,000 before soft costs....I am not seeing the capital budget in the documents provided.”

[109] In reliance upon this opinion of Mr. Gordon, Mr. Gottschalk determined in his report “a renovation costing \$5.8 million is required. Assuming Ms. Allam had already completed \$1.2 million for this renovation, a further build-out of \$4.6 million was required.” This was the basis for Mr. Gottschalk’s Scenario 2B, which assumed a further buildout.

[110] I do not find that a further \$4.6 million renovation was required before the plaintiff’s business could open. Mr. Gordon’s estimated required expenditure on renovations to prepare the business to open was starkly at odds with the evidence at trial. While it is not possible on the evidence to conclude exactly how much the plaintiff had spent on renovations by August 2016, the parties do not dispute that it lay somewhere between \$800,000 and \$1.2 million. This is significantly less than the \$5.8 million that would be required under Mr. Gordon’s estimate. Yet, by August 2016, the physical renovations and preparations to open were nearing completion, and were well beyond the 20% mark which \$1.2 million would represent when measured against Mr. Gordon’s \$5.8 million estimate.

[111] By August 2016 substantial renovations had been done. In 2015 the previous property owner completed some renovations, including updating the air conditioning, water, sewers, roof, entrances and doors. After the plaintiff took possession, the following further work was done:

- a) updating the kitchen, including the equipment layout, electrical, plumbing, paint, drywall, insulation for both the prep area and main kitchen;
- b) updating the bathrooms, including the toilets, backsplashes, fixtures, vanities, lighting, fans, and doors;
- c) updating the lower level and upper level dining areas including replacing the flooring, updating the lighting, updating the mouldings, updating the cabinets, and painting the rails and dome above the stage on the main level;

- d) updating and building out a bar in the lower and upper levels of the main building;
- e) designing and adding a chef's table room for small, private events;
- f) updating the office space, including adding a shower, doors and painting;
- g) purchasing new furniture, linens, small wares, and equipment; and
- h) replacing all outside parking, lighting, signage, improving the grounds and landscaping on the Property.

[112] This is well beyond 20% of the work needed to open the restaurant. As I have found, based upon the physical work done by August 2016, as well as the business preparation, it is likely the business would have opened October 1.

[113] It may be that Mr. Gordon's estimated build out costs so substantially exceed what the plaintiff required to open because they derive from Mr. Gordon's experience opening chain restaurants with particular branding requirements. Indeed Mr. Gordon stated that his estimate was based upon "Browns quality" renovations. Mr. Gordon acknowledged on cross-examination that he did not research independent restaurants in arriving at his opinion. I need not determine why Mr. Gordon's opinion on necessary build out costs so significantly exceeds what was demonstrated to be reasonably necessary in this case for this particular business. His opinion on this point was not substantiated in his report, and this was not assisted by his *viva voce* testimony.

[114] Accordingly, the "with build out" scenario in Mr. Gottschalk's report is not of assistance to the Court.

[115] Mr. Gottschalk's "without build out" scenario relies upon several facts and assumptions that I am not persuaded are appropriately applied in the circumstances of this case.

[116] First, Mr. Gottschalk relies on a reported survey of restaurants in the United States to determine average revenues. The average revenues derive from a sample of more than 400 restaurants of which only a limited number share a similar constellation of relevant characteristics with the plaintiff's business. 40% of the restaurants owned the land and buildings upon which they operated, as the plaintiff did. 23% of the surveyed restaurants did not have full liquor licences, while the plaintiff intended the business would have one, and the evidence demonstrates it was likely the plaintiff would have obtained such a licence.

[117] Only 23% of the surveyed American restaurants hold a number of seats comparable to the plaintiff's restaurant. While Mr. Gottschalk was of the view that number of tables was not relevant, preferring to rely instead on square footage as the relevant comparator, only approximately 20% of the surveyed restaurants have a square footage similar to the plaintiff's restaurant.

[118] I am concerned that the U.S. data, upon which Mr. Gottschalk relies in coming to his opinion, does not provide sufficiently reliable "evidence of actual profits of similar businesses" as the *Murano* framework contemplates.

[119] I am not persuaded that estimating revenue based on square footage sufficiently engages relevant indicators for comparison purposes. I accept that the more relevant and helpful indicators are how many people can be expected to sit in a seat and order a meal over the course of a day, instead of the overall square footage within which they do so. Accordingly, while I keep Mr. Gottschalk's analysis in mind as a benchmark, my assessment of projected income loss proceeds on the basis of likely table turns and average customer check value, as Mr. Herman uses. Mr. Gordon did not employ table turns in coming to his estimated revenues, or at least he did not say that he did. He did however comment on the table turns of another restaurant, Cactus Club, as part of his analysis. I also note that this was the approach used by Jarvie & Co for the defendant in the administration of the claim. While I find Mr. Herman's analysis reliable in its own right, I can infer from Mr. Gordon's reference and Jarvie's use of this method in advising Aviva, that this is

not an outlier as a method for estimating restaurant revenue in the industry, and I find it to be the most reliable basis available to me on the evidence.

[120] I am also not persuaded that the “average revenue” per square foot approach is appropriate for estimating the revenue. Under cross-examination Mr. Gottschalk stated that an ‘average’ approach was appropriate in this case because the plaintiff’s restaurant had never opened. It essentially treats the business as one that never existed, and on that rationale, chooses the average of a large sample of restaurants as the basis for comparison. However, leaving aside that I have concluded the business would have opened (which could not have been known to Mr. Gottschalk when he drafted his report), Mr. Gottschalk’s approach effaces or ignores the several particular characteristics that were known about this restaurant. In my view, this is inconsistent with the *Murano* framework that the defendant agrees should be employed in this case. That framework requires the Court to consider “similar” businesses.

[121] Once the characteristics that establish similarity are factored in, the merit in using the “average” begins to fall away. For instance, the median total sales per square foot of the full set of surveyed restaurants was US\$310, which was the value Mr. Gottschalk used in determining projected revenues for the plaintiff’s business. However, on cross examination, Mr. Gottschalk admitted that for surveyed restaurants with a full liquor licence this value was US\$345. He also admitted that restaurants with an average check over \$18, which he agreed he understood the plaintiff’s restaurant would have been, this value was US\$325. Mr. Gottschalk further agreed that for those restaurants surveyed with an annual sales volume over \$2 million, that value was US\$548. He confirmed that he estimated that the plaintiff’s restaurant would have over \$2 million in annual sales volumes. When asked why he did not employ these metrics in his analysis, he confirmed it was because the plaintiff’s business had never opened, and therefore we do not know how it would have operated.

[122] I am not persuaded that the business not yet having opened warrants ignoring those factors that were known, knowable, or reasonably anticipated in projecting the business revenue. This falls short of *Murano* in two ways. It pays insufficient attention to factors that establish the “similarity” of businesses, and it applies an inappropriate evidentiary burden. Just because the restaurant did not open does not mean we can determine nothing about it, and therefore should apply an average that effaces most of the characteristics of the business that would make it similar to some, and different from other, restaurants.

[123] I found Mr. Herman’s evidence to be reliable and helpful in determining revenue losses suffered by the plaintiff’s business. In the instructions for his expert report to the Court, Mr. Herman was asked by the plaintiff to provide his opinion on the assumptions made by Mr. Volpe in his first report dated April 2017, which was provided by the plaintiff to Aviva for the administration of the claim. In his April 2024 expert report tendered as evidence at trial, Mr. Volpe then applied Mr. Herman’s estimates of table turn and estimated revenue per cover to determine projected daily revenues.

Turnover Rate

[124] The first issue to be determined is the number of “table turns” the restaurant would be expected to see. In assessing this, it is necessary to distinguish between “event” and “non-event” days. On the former, the upstairs of the building would be used for an event and unavailable to the restaurant.

[125] In his April 2017 report for the claims administration process, Mr. Volpe assumed that the restaurant would achieve a turnover rate of 1.8 on non-event days, when the restaurant would have 298 seats available, and 2.0 on event days, when the restaurant would have 186 seats available. By comparison, Jarvie & Co had estimated 1.5 for event and non-event days in its report to Aviva for the administration of the claim, and found that the weighted average of turnover rates of the five South Surrey restaurants, Mr. Volpe examined as comparators, was 2.8.

[126] The identification and selection of comparator restaurants was made by the plaintiff, and was provided to Mr. Volpe during the claim administration process. The comparators were “blinded” in Mr. Volpe’s report to Aviva—their identity was not set out, but their relevant characteristics were. The plaintiff offered to show the identity of the comparators to Ms. Sanders during the claim administration process, but had made commitments to some of the comparator restaurants not to distribute their confidential business information by sending it to Aviva. Ms. Sanders did not accept the invitation to view the documents. This is an issue to which I will return in assessing the plaintiff’s claim that the defendant breached its duty of good faith to assess the claim in a fair and balanced way.

[127] At trial the identities of these five comparator restaurants were in evidence, along with relevant information such as average table turns and seating capacity. The defendant received this information from the plaintiff in pre-trial disclosure, and provided it to Mr. Gordon for the preparation of his report. Mr. Gordon relied on the information in his report, noting from this information that the Cactus Club in South Surrey, with 280 seats, has a turnover rate of 4 turns per seat Monday to Thursday and 6.5 Friday to Sunday.

[128] Mr. Herman’s opinion was that the turnover rates used by Mr. Volpe in his April 2016 report were conservative estimates for 2016, stating: “A unique restaurant and event location, being located in South Surrey, has a population to comfortably support these turnover rates in a 298 seat restaurant & event space with a celebrity chef. This location had the advantage of a previously booked event space to draw from. A new restaurant concept with a celebrity chef would be an attraction not found in the area.”

[129] Mr. Herman explained that it is not reasonable to assume all seats will be seated at the same time, as it takes time to fill seats leading to a peak, and there will always be empty seats, even when all tables are full. Accordingly, in his opinion the lunch time period (between 11am – 4pm) should see a 40-50% seating capacity, with an average of 2 seatings per capacity, and the dinner services, from 5pm to

11pm should see a 50-60% capacity because dinner seating is slightly more efficient due to reservations. Mr. Herman would expect to see 2-3 seatings per capacity during the dinner period. Based on this, the turnover rate he would expect for the full day is 2.28. Mr. Herman was not challenged on his table turn estimates on cross-examination.

[130] I conclude that Mr. Herman's table turn estimates are a reasonable basis upon which to estimate the plaintiff's restaurant revenues. By contrast to Mr. Gordon's revenue estimates, the basis of which was not explained and which were internally inconsistent within his report, Mr. Herman explained the basis for the table turn estimates he projected for the restaurant. The explanations were reasonable, were based on the available number of seatings per service (lunch and dinner), the reasonable expectation that not all seats would be full at any time, the application of 40-60% capacity for that reason (as applicable between lunch and dinner, and depending on whether the restaurant's full seating capacity was available or not, dependent on event days), and were made with reference and in comparison to other restaurants in South Surrey whose characteristics were known.

[131] That said, Mr. Herman gave a range of capacity estimates. I am persuaded by Mr. Gordon's evidence that location is an important contributing factor in consistently attracting customers. The location of the plaintiff's restaurant is a factor to consider. I accept that there are a lot of features to recommend the property as a destination, including its grounds and its proximity to greenspace. However, to the extent that it was a destination to which patrons had to drive, and that it was not proximate to other businesses or higher density residential housing, in my view on the evidence before me, the particular location of the property would tend to push the capacity toward the lower rather than toward the higher end of the range estimated by Mr. Herman.

[132] Accordingly, I accept Mr. Herman's estimates of 2 seatings per capacity over lunch and dinner and the low end of the average seating capacity he projected,

being 40% and 55% at lunch on non-event and event days respectively, and 50% and 65% percent at dinner for non-event and event days respectively.

[133] I would similarly accept the low end of the average check range estimate provided by Mr. Herman. In his view \$35-\$45 per cover at lunch was a reasonable expectation, and \$80 to \$100 per cover at dinner. The latter is significantly higher than the former, as in Mr. Herman's experience guests will order more expensive dishes at dinner and drink more alcohol. He would also expect tasting menus to bring up the average check per cover at dinner. Mr. Herman attested that in 2010, when working at a high-end restaurant, he regularly sold tasting menus for \$250 per cover. Mr. Herman expected a chef of Mr. Bongo's caliber would offer tasting menus. However, Mr. Bongo did not say in his testimony that he intended to offer tasting menus, accordingly I would give this latter factor little weight. I would accept the low end of Mr. Herman's estimated check range per cover, leading to the following calculations:

[134] For non-event days:

- i. Lunch: (seating capacity 298 x average seatings per capacity 2 x average seating capacity 40% = projected covers 238.4) x average revenue per cover \$35 = projected daily revenue \$8,344.
- ii. Dinner: (seating capacity 298 x average seatings per capacity 2 x average seating capacity 50% = projected covers 298) x average revenue per cover \$80 = projected daily revenue \$23,840.
- iii. Total daily revenue: \$32,184.

[135] For event days:

- i. Lunch: (seating capacity 186 x average seatings per capacity 2 x average seating capacity 55% = projected covers 204.6) x average revenue per cover \$35 = projected daily revenue \$7,161.

- ii. Dinner: (seating capacity 186 x average seatings per capacity 2 x average seating capacity 65% = projected covers 241.8) x average revenue per cover \$80) = projected daily revenue \$19,344.
- iii. Total daily revenue: \$26,505.

[136] This leads to the conclusion that the restaurant could be expected to generate a total daily revenue of approximately \$32,000 on non-event days, and \$26,505 on event days. By comparison, I note that in its first report to the defendant as part of the administration of the claim, Jarvie & Co estimated a daily revenue of approximately \$24,500 if the restaurant were operating at its full potential (that is, without the incremental ramp up period Jarvie applied, which I discuss below).

[137] However, even at the low end of Mr. Herman's average estimates, I consider this nevertheless to be a "best-case scenario", to echo the Court's words in *Simcoe*.

[138] There are two salient ways in which this scenario may overestimate the business income the plaintiff would have earned during the indemnity period. The first is what was referred to at trial as the "ramp up" period—that is, the period after opening day during which the restaurant built up to its full expected customer level. The second is the untested nature of the business. Mr. Herman's opinion is based upon his experience with established restaurants that have operated for several years. The menus and experiences of customers in those restaurants have demonstrated that they resonate with customers enough to generate the table turn rates and average check rates upon which Mr. Herman based his opinion. None were in their first year of operation. By contrast, the plaintiffs' business has no track record—there is no evidence either way as to whether this business, with this head chef and this physical space, would draw customers as reliably as established restaurants had done. The evidence of Mr. Bongo's positive notoriety as a chef is helpful, and supports the average check rates that I have accepted the business would achieve if the business succeeded in drawing customers. However, Mr. Bongo's reputation does not, without more, create a reasonable level of certainty

that the business would attract customers to the full potential of other established, longer-operating restaurants.

[139] In my view, both the reasonable possibility that some ramp up period would be required, as well as that the business model was untested with customers, are material contingencies arising on the evidence that are not merely speculative, accordingly, I am bound to assess them. This is “the assessment of possibilities that may affect, positively or negatively, the quantum of damages for a loss that has been established” discussed in *Webster v. Ernst & Young*, 2000 BCCA 229 at paras. 21 and 22, cited by the plaintiff.

Ramp Up

[140] The plaintiff argues “Mr. Herman and Mr. Gordon agree that there is no “ramp up” period for new restaurants.” In closing argument, the defendant conceded that the experts agreed on this in testimony, but argued that it applied only to restaurant revenues, and not to events.

[141] Despite the defendant’s concession on this point with respect to restaurant revenue, I am nevertheless of the view that the statement that both experts agree there is no ramp up period for new restaurants overstates the evidence.

[142] Mr. Herman opined that the business would not have a “ramp up” period, and that the term is not used in the restaurant business. Instead, he said, new restaurants experience an influx of excited diners, creating higher turnover rates in the first six months, before leveling off to a regular operating volume. He said this would have been especially true for the plaintiff’s business, as the property was already an established event venue and the restaurant was a unique concept for the area, featuring a celebrity chef. Mr. Herman did attest however, that his expectation that this would apply to the plaintiff’s restaurant was contingent on sufficient and appropriate pre-opening marketing having been done. He agreed on cross-examination that he did not know what marketing the plaintiff had undertaken.

[143] The plaintiff points to supporting Mr. Bongo's guest appearance cooking at the White House in Washington DC, the word of mouth by which people were learning Mr. Bongo would be part of the restaurant, and an early concept of a logo and a "behind the blur" campaign to build "buzz" and slowly reveal Mr. Bongo's upcoming role as chef. However, on the whole of the evidence I am unable to conclude that the pre-opening marketing was of a sufficient nature to establish, even on the lesser standard contemplated in *Murano*, that the restaurant would have enjoyed the full customer volume estimated by Mr. Herman from its opening day throughout the full indemnity period.

[144] Mr. Gordon wrote in his report: "Most restaurants see their peak sales levels in the first 24 months of operations due to guests wanting to try something new. After that restaurants in general stabilize or decline." The plaintiff says this is helpful evidence and I should rely upon it. While I accept that, I do not accept that it goes so far as to say that there is no ramp up period for restaurants. Mr. Gordon agreed on cross-examination that a "slow" ramp up period over several months may not be an appropriate projection for a new restaurant. That is important evidence, but it does not go so far as the plaintiffs argue—to say that there is *no* ramp up period at all. Mr. Gordon also stated in his reply report that one of the issues new restaurants face is an influx of interest of diners. He said this creates an operational challenge for restaurants, to maintain that level of revenue once the initial interest wears off. Mr. Gordon also stated, based on his experience, that "60% of restaurants close after year one, 80% of restaurants close after 5 years."

[145] In my view allowance both for the possibility that some ramp up period would be required in the initial months, and that the plaintiff's business model had not yet been tested with customers, must be factored into the assessment of the losses that result from the valuation of loss based on Mr. Herman's figures. Given these factors, and my assessment of the limited level and nature of pre-opening marketing that had been done, in my view a 15% reduction of the full operating revenues for the restaurant, projected based on Mr. Volpe and Mr. Herman's evidence above, is appropriate.

Event Revenue

[146] I am not persuaded that there is a reasonable level of certainty that the business would have achieved event revenues at the level proposed by the plaintiff in reliance on Mr. Herman's estimates.

[147] Mr. Gordon did not consider or project the event aspect of the business at all. Mr. Herman estimated the business would book 150-215 events a year. Ms. Allam planned to cater to events such as weddings and holiday parties. However, other than one August wedding booking, there was no evidence of any event bookings for the business. Events, unlike individual choices to go out for a meal, would reasonably be expected to require several months of planning.

[148] In the face of the very limited evidence on the number of events the business might reasonably have booked and held in the its first 15 months of operation, I conclude that some time would be required before the regular pattern Mr. Herman would expect to see would have established itself. Several months would reasonably be accorded to this. I assess there is a reasonable possibility that the business would have booked and held approximately 100 events during the indemnity period had it opened.

[149] I do accept Mr. Gottschalk's use of the average cost of a wedding ceremony and reception in Canada in 2017 as a reasonable guide. Mr. Gottschalk assumed that weddings would cost more than holiday parties. This average cost was \$19,925 per event.

[150] I conclude therefore that the business would have received revenue of \$1,992,500 for 100 events during the indemnity period.

Business Income Percentage

[151] The plaintiff points out that both of the accounting experts arrived at business income percentages (defined under the policy as "the percentage obtained by dividing the "business income" by the "revenue" during the financial year immediately before the date of the "damage""), that are remarkably consistent with

one another: Mr. Gottschalk for the defendant arrived at 37.06% and Mr. Volpe for the plaintiff 38.95%. The plaintiff also notes that these percentages are also similar to the 35.7% Jarvie & Co arrived at in its advice to Aviva in the administration of the claim.

[152] I assess the appropriate business income percentage to be the midway between Mr. Gottschalk and Mr. Volpe's estimates: 38%.

Non-Continuing Expenses

[153] Calculation of compensable business income loss under the policy requires a determination and deduction of those expenses of the business "that do not necessarily continue during the indemnity period." These are referred to as "non-continuing expenses" in the evidence. These expenses are to be subtracted from the revenue loss in determining the compensation for business income loss. The policy states:

Any of the Insured's ordinary business expenses will be considered necessary if:

Such expenses would have been covered by the Insured's business income before the loss, and

Such expenses are required so that the Insured's business can return to operations with the same quality of service as before the loss.

[154] Mr. Volpe and Mr. Gottschalk both determined the value of non-continuing expenses by first determining the categories of expenses that would be non-continuing.

[155] Mr. Volpe assumed the following expenses would be discontinued during business closure, and he discounted them all 100% discontinued unless noted: leased kitchen equipment; utilities; credit card charges on revenue; marketing; professional fees; wages and management salaries (being 24.5% and 10% of total revenue respectively); licencing fee (assumed to go dormant after April 2017); depreciation; and cleaning services.

[156] Mr. Gottschalk included many of the same categories of expenses Mr. Volpe did, although he would have assumed some depreciation continued during closure and so should not be deducted, and he would have added additional financing costs for the further build out and soft-opening costs Mr. Gordon opined were necessary. As I have explained, I do not accept Mr. Gordon's opinion on the necessary further build out of the restaurant; and, the basis for his estimate of \$350,000-400,000 "soft costs" was not established in his testimony or in evidence. Accordingly, I do not find a basis in the evidence to include the additional financing expense in non-continuing expenses.

[157] Mr. Gottschalk opined that \$1,154,860 of non-continuing expenses should be deducted from the business income loss, for the period August 18, 2016 to August 17, 2017. Mr. Volpe estimated that \$2,226,972 of non-continuing expenses should be deducted from the business income loss for the period October 1, 2016 to December 21, 2017, which is the indemnity period I have found applies. If one were to extend Mr. Gottschalk's figure to the full applicable indemnity period, the calculation renders an estimate of approximately \$1,445,000. I accept Mr. Gottschalk's opinion that some allowance must be made for depreciation, but I would not allow for the financing changes he attributes to the "build out" Mr. Gordon recommended. In my view, a reasonable assessment of the non-continuing expenses to be deducted warrants adjusting the estimate derived by Mr. Volpe, taking into account Mr. Gottschalk's opinion. I would accordingly assess the non-continuing expenses during the indemnity period at \$1,835,273.

Conclusion on Business Income Loss

[158] Based upon my determinations above, I find the plaintiff has established that she is entitled to an award of unpaid business income loss under the policy of \$2,278,000.

[159] For ease of reference this is based upon:

- a) 345 non-event days and 100 event days in the indemnity period.

- b) Non-event day restaurant revenues of: \$11,040,000 (345 x \$32,000).
- c) Event-day restaurant revenues of \$2,650,000 (100 x \$26,500).
- d) Applying a 15% contingency reduction to restaurant revenues = \$11,636,500.
- e) \$1,992,500 revenue for events (100 x \$19,925).
- f) Applying a 38% business income percentage to \$13,629,000 gross revenue = \$5,179,020 (Net Income).
- g) \$5,179,020 (Net Income) – \$1,835,273 non-continuing expenses = \$3,343,747 business income loss.
- h) \$3,343,747 business income loss - \$1,065,937 amount paid by Aviva = \$2,277,810 (the unpaid loss).

Issue 2: Did Aviva breach any duty of good faith contractual performance in the administration of the claim, or in litigation of the action?

[160] The plaintiff argues the defendant breached its duty of good faith contractual performance by the cumulative impacts of its actions throughout the administration of the claim and trial. The plaintiff says that the defendant failed to exercise its contractual discretionary powers in good faith, and engaged in behaviour designed to evade its contractual obligations to the plaintiff under the policy.

[161] The plaintiff's claim against the defendant for breach of its duty of good faith rests upon the long-recognized principle that an insurance contract is governed by the principle of *uberrima fides*, or utmost good faith. As the Court of Appeal put it in *Planidin v. Insurance Corporation of British Columbia*, 2004 BCCA 498 at para. 10:

Contracts of insurance have long been recognized to be governed by the principle of *uberrima fides*. The exercise of good faith is required of both insurer and insured. Broadly expressed, the insured must be forthright in disclosing the risk to be underwritten and the insurer must respond in like manner to a claim when it is presented, having due regard for the interests of the insured and indemnifying the insured to the full amount to which there is entitlement for the premium paid.

[162] This Court described an insurer's duty of good faith and fair dealing in *McDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283:

[201] (1) an insurer must perform a balanced and reasonable investigation and assessment of the first party claim; (2) it must be prompt in handling and assessing the loss; (3) the insurer must assess the merits of the claim in a balanced and reasonable manner; (4) it must give as much consideration to the interests of the insured as it does to its own interests and is not to do anything to injure the insured's right to benefits under the policy; and (5) a want of reasonable care in settling a claim suggests an absence of good faith.

[163] Bad faith may be demonstrated in cases where the handling of the claim was "overwhelmingly inadequate" or where there was an "introduction of improper considerations into the claims process": *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 71.

[164] Where there are multiple shortcomings in an insurer's investigation of a claim, the cumulative effect of those shortcomings can constitute a breach of an insurer's duty of good faith, even if each failure or omission, taken on its own, would not amount to a breach. Justice Balance put it this way in *McDonald*:

[249] An insurer does not have to have an iron-clad case in order to deny coverage. It is not expected to investigate a claim with the skill and forensic proficiency of a detective. Nor is it required to assess the collected information using the rigorous standards employed by a judge. The duty of good faith does not impose a standard of absolute liability in respect of an insurer's wrong decision. The duty simply dictates that an insurer bring reasonable diligence, fairness, an appropriate level of skill, thoroughness and objectivity to the investigation, and the assessment of the collected information with respect to the coverage decision. My criticisms of the calibre of Ms. Baadsvik's investigation and the shortcomings of her ultimate assessment should not be interpreted as suggesting that each individual omission or failing is, of itself, necessarily a violation of good faith and fair dealing. It is their cumulative effect that constitutes a breach of its duty of good faith.

[165] The plaintiff also relies on the "organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance" recognized by the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71 at para. 93, including the duty exercise contractual discretionary powers in good faith.

[166] In this case, the plaintiff pursues the claim for breach of good faith contractual performance based on the defendant's conduct administering the claim, and in the subsequent litigation. The plaintiff says that the defendant's handling of the repair process was overwhelmingly inadequate, and contributed to her need to sell the property for a price below its full value. The plaintiff also says that during the claim process, the defendant cancelled and later reinstated its policy with the plaintiff three times; it took conflicting positions on whether the property was vacant, impacting the plaintiff's coverage; and ultimately the defendant took the position that the plaintiff had accepted a cash settlement of the claim instead of continuing with repairs, then immediately cancelled the plaintiff's policy a final time. Ms. Sanders, who was Ms. Allam's key contact at the defendant, knew that the policy was very likely to be cancelled once the plaintiff elected to take a settlement, but did not advise the plaintiff of this risk. The plaintiff says this loss of insurance accelerated the foreclosure process that was by then underway, materially prejudicing the plaintiff's efforts to keep the property.

[167] The plaintiff also advances the bad faith aspect of the claim based upon the defendant's unilateral refusal to consider information submitted by the plaintiff with respect to valuation of the business income loss. The defendant considered instead only the defendant's own information despite what the defendant knew to be deficiencies in its own information. As a result, the plaintiff says defendant failed to assess the plaintiff's business loss claim in a fair and balanced manner.

[168] The plaintiff further alleges that the defendant's conduct within this litigation breaches the defendant's duty of good faith contractual performance. Specifically, despite previously investigating and concluding that Ms. Allam had made no misrepresentations in her application for insurance, the defendant maintained throughout this litigation that the plaintiff's insurance coverage was in question because of alleged misrepresentations by Ms. Allam and unspecified exclusions under the policy. The defendant only withdrew this allegation in closing submissions, and even so, did so ambiguously.

[169] The defendant does not deny that the duty of good faith contractual performance exists at law, but focuses instead on the fact that the plaintiff did not plead punitive damages in her relief sought. In closing argument, the defendant further argues that:

- a) “Ms. Sanders’ meticulous handling of the Plaintiff’s claims was exceptional.”
- b) “There was no ‘prejudgment’ in the adjusting. Ms. Sanders immediately retained Jarvie & Co. accountants, who provided calculations.”
- c) “The policy was cancelled twice because of the Plaintiff’s failing to pay its premiums. It was only cancelled once arguably by mistake and promptly reinstated. Further, it is not bad faith to cancel a commercial property insurance policy. Aviva has the right to cancel the policy. In any event, the Plaintiff was provided with valid reasons for the November 2017 cancellation.”
- d) “This is a case of an insurer giving the insured the benefit of the doubt. Aviva did so by calculating and indemnifying based on a restaurant/events venue, in disregard for the policy’s coverage for ‘BUILDING OWNER – MULTIPLE OCCUPANCY’. Aviva cannot be found to have acted in bad faith.”

[170] The trouble with the defendant’s responses is that they fail to address the substance of the bad faith allegations made by the plaintiff.

[171] First, it is no answer to the plaintiff’s allegation of “pre-judgment” or imbalanced assessment of the plaintiff’s losses, to say that the defendant “immediately retained Jarvie & Co. accountants, who provided calculations.” The plaintiff’s concern is that the defendant insurer knew Jarvie’s calculations to be deficient, yet chose to consider only those calculations, which posited a lower loss, to the exclusion of the calculations provided by the accountant retained by the plaintiff, which posited a higher loss.

[172] Second, it is no answer to the plaintiff's allegation that the defendant failed to exercise its contractual discretionary powers in good faith to say "Aviva has the right to cancel the policy." Aviva's contractual right is not the question—the good faith exercise of the right is. The defendant further avoids the substance of the plaintiff's claim when it says: "In any event, the Plaintiff was provided with valid reasons for the November 2017 cancellation." The "valid reason" to which the defendant refers is the defendant's determination that the plaintiff had accepted a cash settlement rather than opting to repair the property, and the defendant's policy is to cancel existing policies in such circumstances. This, however, is precisely the plaintiff's concern: the defendant knew but did not tell the plaintiff that the defendant would likely cancel the plaintiff's existing insurance policy if the plaintiff opted for a cash settlement rather than indemnity for repairs. The plaintiff says she had not finally determined what option she would take, but the defendant deemed her to have decided to opt for cash settlement, then promptly cancelled her policy.

[173] Third, it is no answer to the plaintiff's claim of bad faith to say that Aviva gave the plaintiff the "benefit of the doubt" "by calculating and indemnifying based on a restaurant/events venue, in disregard for the policy's coverage for "BUILDING OWNER – MULTIPLE OCCUPANCY". Rather than addressing the concern the plaintiff raises, the defendant's response highlights the theme that persisted through the defendant's administration of the claim and defence of it through the trial process. Aviva does not usually insure restaurants under the sort of policy the plaintiff purchased. When Aviva discovered, after the loss was reported, that the plaintiff's business was a restaurant and event venue, rather than a building owner landlord with tenants, Aviva questioned the basis upon which the insurance contract was entered into, and the validity of the contract. In March 2017, Aviva investigated the representations made by the plaintiff to the broker in the purchase of the policy. Aviva concluded the plaintiff had not misrepresented the intended use of the property, and the contract was valid. Aviva proceeded with the administration of the claim. It makes no sense then, for Aviva to say now that in the administration of the claim it gave the plaintiff the "benefit of the doubt" by calculating her business loss based upon a restaurant and event venue—that was the insurance the plaintiff

contracted for, based on Aviva's own conclusion. At trial, the defendant confirmed (despite its pleadings) that coverage was not in issue. Once the contract was determined to be valid, the plaintiff was entitled to full compensation for loss in accordance with the contract. That is not the benefit of the doubt, that is the plaintiff's contractual right.

[174] In assessing whether the defendant's conduct amounts to bad faith, I must keep in mind that the duty of good faith contractual performance does not import a fiduciary duty upon the relationship between insurer and insured, and does not obviate the arms-length nature of the relationship between the contracting parties.

Delay in Repairs

[175] While the evidence reveals deficiencies in Aviva's handling of the repairs to the property, I do not conclude that these deficiencies in themselves, or in combination with other factors, support a finding of breach of the duty of good faith. That said, I do not accept the defendant's argument that the delays in repairs are the plaintiff's responsibility or fault. That is wholly inconsistent with the evidence.

[176] Aviva appointed Crawford and Company to act as independent adjuster in the administration of the plaintiff's claim, including determining the extent of damage and cost to repair the property under the policy.

[177] On August 31, 2016 Mike Unger, from the adjuster Crawford, wrote to Ms. Allam to "provide reassurance and outline the process we will follow in adjusting and settling the claim." This was referred to by the defendant at trial as the "critical path" letter. In the letter, Mr. Unger explained that the engineering firms Glotman-Simpson and Geo Pacific had been retained to "assist in developing the scope of repairs required to restore the building and property." Mr. Unger also explained that the adjuster had retained "Philip Maxwell of Aviva" to serve as "Construction Appraiser." Mr. Maxwell's role would be to work with the engineers and "other requisite experts" to "identify the scope of repair work to be undertaken and to secure competitive bids for repairs." Mr. Unger explained that Ms. Allam would be given an opportunity to review the scope of repair work to identify deficiencies, and

upon her agreement, the scope would be tendered to various contractors for bids. The Construction Appraiser, from Aviva, would then compare all bids to determine the lowest bid; Mr. Unger explained “[n]ormally this sum represents the measure of loss, identifies the sum required to restore the building and the indemnity owed under the Policy.”

[178] Mr. Unger explained in the letter that, as building owner, Ms. Allam would be responsible for selecting and retaining the contractor that would do the repairs. However, it was clear from the letter that the necessary steps preceding that—identifying the scope of repair necessary and the cost of that repair—were being taken care of by Aviva, with the assistance of the adjuster Crawford. Indeed, the scope of what Aviva undertook went beyond what was expressly described in the letter—it was the architect retained by Aviva that applied to the City of Surrey for the building permit for the repairs. However, it also became clear on the evidence that neither Aviva nor the adjuster Crawford asked either of the engineering firms that had been retained to opine on if, or when, it was safe to commence repairs on the building in light of the unstable ground and soil movement. It also became clear on the evidence that the permit for which the architect retained by Aviva applied was not at all sufficient to cover the repairs necessary. This permit contemplated only \$50,000 worth of superficial repairs, with no allowance for necessary electrical and plumbing work. Aviva’s own evidence was that the true scope of repairs required was at least \$400,000. Based on the role Aviva and Crawford took on as outlined in the critical path letter and in their actions following it, these are both substantial deficiencies in advancing the necessary repairs. However, I do not think they exhibit the characteristics of conduct that breach the insurer’s obligation of good faith as described for example in *McDonald* at para. 201.

Cancellations and Re-Instatements of Policy

[179] I am also not persuaded that Aviva’s repeated cancellation and reinstatement of the insurance policy amounts to bad faith. The first two cancellation notices arose because of the plaintiff’s failure to make premium payments, as I have discussed above. This does not support a claim of bad faith. The third cancellation is more

troubling. This cancellation arose because Aviva's "commercial lines" or underwriting department determined that the building was "vacant" and therefore the policy should be cancelled in accordance with Aviva's policy not to insure vacant buildings. Strikingly, this determination was made by Aviva only three weeks after a representative from another Aviva department, Ms. Sanders from adjusting, had expressly confirmed that Aviva did not consider the building to be vacant.

[180] On May 10, 2017, Ms. Salvacion (the broker through whom the plaintiff had purchased the policy) emailed Aviva asking if Aviva needed to amend the risk to "vacant" since it would take at least 5 or 6 months to repair the property.

Ms. Sanders wrote back that the property:

... isn't 'vacant' other than due to the loss and we have a security system in place because of that just like many of the larger losses that we handle. Repairs should be starting around the end of May and then it will be occupied daily by workers until repairs are completed approx. Sept.

[181] However, on May 31, 2017, Mr. Marven from Aviva's underwriting department wrote to Ms. Salvacion, taking the position that Aviva wanted to get off risk (which Ms. Salvacion explained in testimony is a term in the insurance industry that means no longer insuring the property) on the basis that the property had been vacant since before the policy was issued. Mr. Marven wrote: "This property has actually been vacant since the day it was bound with Aviva. A vacant risk is not one Aviva wants to be insuring any longer than 90 days and we've been on risk since February 1, 2016."

[182] Ms. Salvacion drew to Mr. Marven's attention the opposing conclusions about whether the property was vacant that had been drawn by Aviva's two departments, and asked Mr. Marven in the underwriting department to communicate with Ms. Sanders in Aviva's claims department. When Mr. Marven refused to accept Ms. Salvacion's position (and that articulated by Ms. Sanders in the claims department) that the building was not "vacant", Ms. Salvacion escalated the matter within Aviva.

[183] However, on June 27, 2017 Aviva sent the plaintiff, the broker and BES a notice of cancellation of the plaintiff's policy. The notice incorrectly (and inexplicably)

said that it was the plaintiff that had requested the cancellation of the policy. I say this was inexplicable because there was no evident rational reason for this statement, and nor did any witness for the defendant explain it at trial.

[184] When Ms. Salvacion followed up with Aviva about this error, she was told that Mr. Marven was no longer working with Aviva. Ms. Evans at Aviva apologized for sending the incorrect notice of cancellation but did not clarify why the policy was cancelled at that time or rescind the cancellation. That day, Ms. Evans advised that Aviva had “recancelled the policy with a new cancellation date of July 24/17”.

[185] Representatives of the broker advocated for the plaintiff at this point, pointing out to Aviva how difficult it would be to “remarket the risk”—that is, find a new insurer—because of the uncertainty surrounding the property, including that the repairs had not yet been done, and that Aviva still had not determined the total cost and scope of the necessary repairs. Ms. Salvacion wrote to Aviva that it would be very difficult to remarket the risk with this uncertainty, and she did not “want to put the insured in a very bad situation with no coverage.”

[186] In response to this, Ms. Evans from the underwriting department at Aviva wrote to Ms. Salvacion: “Ok so I have thought about this a great deal and do see where you are coming from. I will agree to reinstate the policy until renewal date at which time I would ask that you remarket this file.”

[187] This response is an important counter to the argument that Aviva breached its duty of good faith when it provided notice that the policy would be cancelled in July 2017.

[188] The notice of the July 2017 cancellation of the policy by Aviva was at odds with the “peace of mind” (as the Supreme Court of Canada described it in *Whiten v. Pilot Insurance Co*, 2002 SCC 18) insurers sell. In circumstances fraught with uncertainty and bad fortune, such as the unsettled soil movement, the gas release, and the flood that Ms. Allam had to helplessly watch destroy the interior contents of

the building and all the renovation work they had done to date, having Aviva cancel the insurance policy at that time was very unwelcome news for Ms. Allam.

[189] However, Ms. Evans' response to Ms. Salvacion on July 21, 2017 demonstrates that Aviva was open to considering the plaintiff's position and interest, and reinstated the policy.

[190] I also note that the cancellation did not come to pass—Aviva changed its mind 3 days before the intended cancellation.

[191] The evidence before me (referred to by the plaintiff at para. 145 of its closing argument) is insufficient to establish that this issued and rescinded notice to cancel the policy in July 2017 was a material factor in the foreclosure proceedings as the plaintiff argues.

[192] While I do not find that this cancellation notice and reinstatement by Aviva supports a claim for bad faith, it does reveal inconsistencies between the departments within Aviva overseeing the relationship with the plaintiff. It also reveals that Aviva was aware that its cancellation of the plaintiff's insurance policy would put the plaintiff in a very difficult position. These are relevant to my consideration of Aviva's ultimate cancellation of the plaintiff's insurance policy.

Final Cancellation of Policy

[193] I find that Aviva's ultimate cancellation of the plaintiff's insurance policy in November 2017 breached its duty of good faith contractual performance, including the duty to exercise its contractual discretionary powers in good faith. Ms. Sanders testified that in discussing the plaintiff's options with Ms. Allam, Ms. Sanders was aware of Aviva's internal policy that made it likely that if Ms. Allam opted for a cash settlement rather than proceeding with indemnified repairs, Aviva would cancel the plaintiff's existing insurance policy. However, Ms. Sanders did not advise Ms. Allam of that. Ms. Sanders explained in testimony that this was "not my role; I am in claims."

[194] I do not need to determine whose job it was at Aviva to inform the plaintiff of this significant and material consequence of the choice Aviva was offering the plaintiff; it was Aviva's obligation in the good faith performance of its contract with the plaintiff. Aviva was bound to "give as much consideration to the interests of the insured as it does to its own interests and is not to do anything to injure the insured's right to benefits under the policy": *McDonald*. Aviva was well-aware that if it cancelled the plaintiff's policy the plaintiff would face serious prejudice, as it would be very difficult for her to reinsure considering the existing damage to the property and the ongoing uncertainty with the soil movement.

[195] I do not find that it was a breach of Aviva's duty of good faith for it to interpret Ms. Allam's statements as being an election to take a cash settlement rather than to repair the property. On August 14, 2017, after explaining why she felt she needed to move the business to another location since, even on the best outcome for repairs at that point she would not be able to open business before December or January 2018, Ms. Allam wrote to Ms. Sanders and Mr. Unger: "I have not sold the building and will consider redeveloping however I require further information from Mike, Phil, and John to make an informed decision. In saying all of this I can tell you that I will not be repairing the building given the above" (emphasis added).

[196] While I accept that Ms. Allam's communication subsequent to this may allow an inference that she had not in fact finally determined whether she would take a cash settlement instead of repairing the building, it was not clear. And in light of her August 14 statement above, it was not bad faith for Aviva to understand this to be Ms. Allam choosing not to repair.

[197] I do, however, find that it was a breach of Aviva's duty of good faith for the company not to advise Ms. Allam that it would likely cancel her policy if she chose to accept "actual cash value" of the repairs rather than repairing the property.

[198] Aviva was bound either to tell the plaintiff of the company's own policy to cancel insurance policies when a cash settlement was chosen over indemnification for repairs—so the plaintiff could consider this consequence in making her choice—

or Aviva was bound not to exercise its discretionary power to cancel the policy in this instance. It is no answer for Aviva's adjuster, Ms. Sanders, to say the decision to cancel the policy was made in a different department than hers. The plaintiff's contract was with Aviva.

Aviva's Consideration of Competing Valuations of Loss

[199] I also find that prior to this, in the administration of the claim itself, Aviva breached its duty of good faith contractual performance by failing to assess the evidence of loss in a balanced manner. Aviva retained Jarvie & Co as accountants to assess the plaintiff's business income loss. Ms. Sanders testified that Aviva knew Jarvie & Co did not have restaurant industry expertise, and that they had stated in their report that some of their assumptions were speculative rather than based on data, yet she accepted Jarvie's conclusions without reviewing or requesting the underlying information Jarvie relied upon or verifying the assumptions made in the Jarvie report.

[200] By contrast, Ms. Sanders demanded detailed supporting information from the plaintiff's accountant, Mr. Volpe, and did not consider the supporting information when it was provided. Ms. Sanders suggested in testimony this was because some information about comparable businesses was redacted, however the evidence demonstrates that the plaintiff had offered to show Ms. Sanders the unredacted information but she had not accepted. Additionally, in anticipation of receiving information from Mr. Volpe on behalf of the plaintiff, Ms. Sanders stated in an email to her superior at Aviva "I anticipate us having some issues with their submission." In cross-examination Ms. Sanders was taken to documents indicating that she had already sought and received approval to make a payment based solely on Jarvie's figures before she had even received the further information she had requested from the plaintiff's accounting expert. Ultimately, the amount Aviva paid was exactly the same amount its retained accountants, Jarvie & Co, had concluded.

[201] This unilateral reliance on the evidence commissioned by the insurer and refusal to meaningfully consider the evidence submitted by the plaintiff does not demonstrate the good faith performance of Aviva's contractual obligations.

[202] As Justice Morrison put it in *Asselstine v. Manufacturers Life Insurance Co*, 2003 BCSC 1119 at para. 213:

...The defendants, and insurance companies generally, cannot expect to be able to disregard compelling medical and other information while placing undue emphasis on evidence aligned only with their interests; and rely on a report based on flawed premises generated and selectively disclosed by them, meanwhile steadfastly maintaining an unsupportable position, and be seen as balancing fairly the interests of both the insured and the insurer. I award punitive damages here as a reminder that it is not in the economic interest of the insurer to engage in similar conduct in future similar situations.

Conclusion on Breach of Duty of Good Faith

[203] I would accordingly issue the declaration sought that Aviva has breached its duty of good faith contractual performance in its administration of the claim and its exercise of its contractual discretion to cancel the plaintiff's policy of the claim. This breach is based upon Aviva's failure to assess evidence of loss in a fair and balanced manner, and its cancellation of the plaintiff's policy based on her choice to accept actual cash value rather than indemnity for repairs, without having previously advised the plaintiff of the consequences of this choice.

[204] I would not, however, extend the declaration to Aviva's litigation conduct. While I agree that Aviva's conduct increased the complexity and duration of the trial process due to issues raised but then abandoned at trial, in my view this conduct is better addressed by an award of costs than damages. Costs are the traditional mechanism by which party conduct in litigation may be sanctioned by the Court, and in this case I am not persuaded that the defendant's conduct was of a character to warrant departing from this usual practice.

[205] I would grant the plaintiff's request to make submissions on costs following release of this judgment.

Issue 3: If Aviva did breach a duty of good faith, what, if any, damages flow from this?

[206] Having found that Aviva breached its duty of good faith contractual performance, I must next determine what, if any, damages flow from this. In closing argument, the plaintiff claims both compensatory and punitive damages. Neither is expressly pled. In its notice of civil claim, the plaintiff seeks “damages for breach of contract including damages for bad faith.”

Compensatory Damages

[207] The plaintiff’s claim for compensatory damages is specifically for the difference between the amount the plaintiff received for the sale of the property and the actual market value of the property at the time of its sale in December 2017. The plaintiff’s argument is that, but for Aviva’s bad faith conduct in the handling of the plaintiff’s claims, the plaintiff would not have been placed in a position where it had no choice but to sell the property for “land value only,” as the plaintiff puts it, below market value.

[208] The plaintiff’s arguments focus on the ways in which Aviva’s conduct delayed repairs, such that necessary repairs had not started by December 2017. This in turn, the plaintiff says, compelled her to decide to sell the property in December 2017 as it was.

[209] I am not persuaded that either of the points, upon which I have found Aviva failed to meet its duty of good faith, caused the plaintiff to sell the property in December, 2017 or that it caused her to sell for under market value. Nor do I find that any delays caused by Aviva in advancing the repair process, which I have not found to breach the duty of good faith, caused the plaintiff to decide to sell the property at the price she did.

[210] In the face of the evidence of ongoing uncertainty about the safety of the ground, I am unable to conclude that “but for” Aviva’s conduct, the plaintiff would not have been in the position she was in by December 2017 when she sold the property. In closing argument, the plaintiff emphasized the evidence that emerged at trial that

in fact, despite having retained two engineering firms to assess the property, and despite knowing that the plaintiff could not take occupancy of the building until the structure was deemed safe to occupy, Aviva never asked either engineer to opine on the safety of the building or the property in the face of ongoing soil movement.

[211] However, the plaintiff has not established on the evidence that Aviva's failure to ask either of the engineers whether the ground movement had abated to a point that it was deemed safe to conduct repairs, caused actual delay in the commencement of repairs. As the plaintiff points out in her closing arguments, as late as December 2017, Mr. Carter from GeoPacific engineering conducted an assessment of the property and reported that some ground movement persisted on the property, stating in an email:

There still appears to be some movements accumulating near the east property line, away from the building, close to the original excavation. The majority of the excavation is now backfilled. At the end of the day, we do not know the extent of the disturbance immediately at the east [property line] as the shoring works were not witnessed. However, we suspect the movements in this localized area could continue to accumulate for some time as voids at depth naturally fill and consolidate.

[212] In November 2017, an engineering firm the plaintiff had hired, Omega and Associates, did a walkthrough and reviewed documents related to the property, and on December 19, 2017 wrote:

After field observation and reviewing all the reference documents and correspondence, we conclude that although recent building survey results indicate the building conditions have been stabilized, still there are chances for further ground and therefore building movements. We recommend that the client not commence repairs until there is confirmation that further movements will not occur. We also recommend additional geotechnical investigation be completed in order to either confirm that no further ground movement will occur, or provide a geotechnical solution to stop possible future ground movement.

[213] In light of this uncertainty about ongoing soil movement that persisted in December 2017, I do not conclude that it was the defendant's conduct that caused the delay in commencing repairs or the plaintiff to have to sell at the time and for the price she did. In saying this, I wish to be clear that I am not accepting the defendant's

argument that the soil had been stable for some time, and any delays in commencing repairs lay at the feet of the plaintiff. That is not at all supported by the evidence. In written closing argument counsel for the defendant wrote:

By way of an email sent April 5, 2017, Mr. Carter reported that the ground stabilized. Specifically, he wrote “All other movements appear to be within typical survey accuracy of the equipment, i.e., that is, no indications of movement”.

[214] This is a stark misrepresentation of Mr. Carter’s brief email, which described ongoing ground movement at different spots on the property, and anticipated that the “lateral movement should cease sooner rather than later” because the foundation wall on the neighbouring property was nearing completion. This is not a report that the ground had stabilized by April 2017.

[215] In the end, I accept neither party’s argument regarding the ultimate cause for the delay in the repairs, which had yet to start by December 2017.

[216] The plaintiff also argued that the ultimate cancellation of the insurance policy in November 2017 contributed to her decision to sell the property in December 2017. I find, however, there was insufficient evidence to support this argument.

[217] Accordingly, I dismiss the plaintiff’s claim for compensatory damages for the breach of Aviva’s duty of good faith contractual performance.

Punitive Damages

[218] The plaintiff also seeks punitive damages for the defendant’s breach of its duty of good faith.

[219] In the insurance context, an insurer’s good faith obligation exists independently of its contractual obligations under the policy to compensate for loss, and this is an actionable wrong for which punitive damages are available: *Whiten* at para. 79.

[220] The objective of punitive damages is to punish and deter especially deplorable conduct, not to compensate an insured for a specific loss. The classic

example of punitive damages in the insurance context is *Whiten*, in which the insurer's conduct was described by the Supreme Court of Canada as "exceptionally reprehensible." In that case the insurer knew early on that the arson allegation it made against the insured was contrived and unsustainable, and the denial of the insured's claim was designed to force the insured, who was in a vulnerable position and had suffered devastating loss, to settle for less than she was entitled to under the insurance contract.

[221] I do agree that in this case there are echoes of the conduct sanctioned by the Court in *Whiten* in the conduct of the defendant here. One example is the defendant's persistent aspersions of fault against Ms. Allam for the fact that the business she was pursuing was not what Aviva expected. These aspersions continued throughout trial, including closing arguments, even though Aviva had internally determined that Ms. Allam had not misrepresented her business when she purchased the policy, and despite Aviva not pursuing the question of coverage at trial. Ms. Sanders confirmed in testimony that Ms. Allam had advised the broker that the building would be a restaurant and have no tenants, and that Aviva confirmed by March 2017 that Ms. Allam had not provided incorrect information to the broker in purchasing her policy. Despite confirming the plaintiff's coverage and the validity of the contract after its March 2017 investigation during the claims process, Aviva continued to leave the question of coverage as a sceptre overhanging the whole trial, yet without actually asking this Court to determine the question.

[222] This was not passive on Aviva's part—it did not merely neglect to amend its pleadings when it determined coverage was not in issue in the proceeding—Aviva persisted in this characterization of the plaintiff throughout trial, including in closing argument. Although it was not clear why counsel for the defendant kept raising Aviva's initial confusion about the nature of the plaintiff's business at trial, Aviva appeared to be seeking to rely on this apparent uncertainty to justify compensation for business losses less than the plaintiff would be entitled to under the policy. I was made aware of no legal basis to support such an argument, and despite making vague suggestions, the defendant did not ever actually advance this argument.

[223] The other instances of bad faith conduct that I have found—the cancellation of the policy based on Aviva’s determination that the plaintiff had accepted a cash settlement, without having warned her of this likely consequence, and the refusal to consider the plaintiff’s calculations of loss in favour of exclusively considering its own accountant’s calculations which Aviva knew to be deficient—are also instances that echo of the bad faith exhibited in other cases that have attracted punitive damages. For example, in *Asselstine*, the Court found that the insurer had breached its duty of good faith to the insured during its investigation of the claim by disregarding pertinent information and placing undue emphasis on unreliable, incomplete and otherwise deficient evidence, and by choosing only to accept certain evidence even in the face of compelling, conflicting evidence.

[224] However, in my view, the first of these, the defendant’s conduct at trial, is better addressed through an award of costs. As I have said, I am not persuaded that the circumstances of this case warrant departing from the usual route of addressing a party’s litigation conduct through costs rather than damages.

[225] And, while I have found the defendant did breach its duty of good faith contractual dealings with the plaintiff, that does not inherently mean the defendant’s conduct demonstrates characteristics that take it beyond the finding of breach of the duty of good faith to warranting punitive damages.

[226] The defendant argues that punitive damages were not expressly pled, and accordingly should not be awarded. The defendant specifically argues that:

Nowhere in the pleadings or in this Trial were these key words even used: “punitive”, “harsh”, “vindictive”, “reprehensible”, “malicious”, “high-handed”, “arbitrary”, “marked degree”. Pleadings of punitive damages are required to be “rigorous”.

[227] I am not persuaded that the plaintiff’s failure to use these terms in pleadings is fatal to her request for punitive damages. In the face of a similar argument about lack of pleading in *Whiten*, Justice Binnie said “The time-honoured adjectives describing conduct as ‘harsh, vindictive, reprehensible and malicious’ (per McIntyre J. in *Vorvis*, *supra*, p. 1108) or their pejorative equivalent, however apt

to capture the essence of the remedy, are conclusory rather than explanatory” (para. 87). The fundamental question is one of trial fairness.

[228] What I am concerned by is the absence of any pleading that explains how the defendant’s conduct goes beyond the breach of the duty of good faith to the further level of warranting an award of punitive damages, which is “very much the exception rather than the rule” (*Whiten* at para. 94). Nor was the factual basis for this apparent in evidence or argument.

[229] The plaintiff acknowledges that the “standard for establishing a bad faith claim is not the same as the test for punitive damages. The threshold for punitive damages is more demanding”: *McDonald* at para. 191.

[230] Certainly, a finding of breach of the duty of good faith in contractual performance against an insurer is a serious and negative finding. But it does not automatically import an award of punitive damages. Something more is required, and that something more was not made clear by the plaintiff in pleadings or argument, or, in my view, established on the evidence. I would accordingly dismiss the plaintiff’s claim for punitive damages.

Conclusion

[231] I grant judgment for the plaintiff for the amount owing under the insurance contract, being \$2,278,000 for unpaid business income loss, and a declaration that the defendant breached its duty of good faith contractual performance. I dismiss the claim for compensatory and punitive damages for the breach of the duty of good faith.

[232] I grant the plaintiff's request that submissions may be made on costs after release of this judgment. The parties may contact the Supreme Court Scheduling to schedule a hearing for this purpose.

"Giltrow J."