

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

GIACOMO VINCENZO ABIUSI AND MARIA)	
ANTONIETTA ABIUSI,	)	<u>Timothy J. Fry</u>
	)	<u>Jordan M. Kreml</u>
	)	for the plaintiffs
plaintiffs,)	
- and -	)	<u>Alexandre Mireault</u>
	)	<u>Justin Lafferty</u>
LAWYERS' PROFESSIONAL INDEMNITY	)	<u>Kirsten Nynych, Articling</u>
COMPANY CARRYING ON BUSINESS AS	)	<u>Student</u>
LAWPRO AND AS TITLEPLUS,	)	for the defendants
)	
defendants.	)	<u>Judgment Delivered:</u>
	)	October 28, 2025

TOEWS J.

INTRODUCTION

[1] The parties, hereinafter referred to as Abiusi, or in the alternative, the plaintiffs, and Lawyers' Professional Indemnity Company, hereinafter referred to as Lawpro, LAWPRO, or the defendant, have agreed to have the court deal with the matters at issue between them on the basis of an Agreed Statement of Facts, which are set out in their entirety in the following paragraphs. The parties have also identified the issues in dispute

between them, and those issues are identified as the agreed statement of issues and are set out in these reasons immediately following the Agreed Statement of Facts.

[2] The parties also rely on an Agreed Book of Documents (“ABD”) filed with the court and rely on those documents.

[3] I would also note that in its written argument, the defendant objected to the court giving any weight to a building assessment report authored by Tower Engineering (“Tower”) and produced at ABD p. 8. However, following arguments at the hearing of this matter, the defendant agreed to waive its objection to the court considering this report on the basis that the maker was biased. Accordingly, the court will consider the evidence contained in this report without a consideration of the allegation of bias on the part of the maker of the report.

[4] The parties agree that the loss suffered by the plaintiffs falls within the coverage of the policy. In other words, the loss referred to as “the Loss” in the Agreed Statement of Facts is a covered loss under the policy issued by the defendant (see para. 7 of the Agreed Statement of Facts). The issue in dispute relates to how the plaintiffs’ loss is to be calculated.

[5] For purposes of these reasons, where a term is defined or used in a specific way in the Agreed Statement of Facts and identified by the capitalization of the first letter of that term or the entire term, that term will be understood to be defined or used in a similar manner in my discussion of those terms in these reasons.

AGREED STATEMENT OF FACTS

[6] The parties rely on the following, as stated in the Agreed Statement of Facts:

A. THE PARTIES

1. The Plaintiffs Giacomo "Jack" Vincenzo Abiusi and Maria Antonietta Abiusi are individuals residing in Winnipeg, Manitoba, and are spouses of each other.
2. The Defendant, Lawyer's Professional Indemnity Company ("**LAWPRO**"), is a corporation that carries on business as LawPRO and as TitlePLUS throughout Canada as an insurer, and particularly as a provider of title insurance for residential real estate.

B. POLICY AND PROPERTY

3. The Plaintiffs are the named insureds under a policy of insurance bearing Policy Number 202102003786 (the "**Policy**"), issued by LAWPRO, to which the Plaintiffs subscribed on March 1, 2021.
4. The Policy provided what is commonly referred to as "title insurance", which the Plaintiffs obtained in connection with their purchase of a property at the civic address 1880 McCreary Road, Winnipeg, Manitoba, on lands legally described as:

ALL THOSE PORTIONS OF OTM LOTS 18 AND 19 PARISH OF SAINT CHARLES BOUNDED AS FOLLOWS: ON THE NORTH BY THE PRODUCTION IN A STRAIGHT LINE ELY OF THE NORTHERN LIMIT OF LOT 66 WHICH LOT IS SHOWN ON A PLAN OF SURVEY OF PARTY OF LOTS 20 TO 23 OF SAID PARISH PLAN 1563 WLTO ON THE SOUTH BY THE PRODUCTION IN A STRAIGHT LINE ELY OF SOUTHERN LIMIT OF SAID LOT 66 ACCORDING TO SAID PLAN, ON THE EAST BY A LINE DRAWN WEST OF PARALLEL WITH AND PERP DISTANT 25 FEET FROM THE EASTERN LIMIT OF SAID LOT 18 AND ON THE WEST BY THE WESTERN LIMIT OF SAID LOT 19

(the "**Property**")

5. The Property contained a home of approximately 3,474 square feet (the "**Residence**") on approximately 5 acres of land.
6. At all material times hereto, the Plaintiffs were and are currently the owners of the Property.

C. THE POLICY PROVISIONS

7. The Policy was valid and in force at the time of the Loss (defined below) and LAWPRO agrees the Loss is a covered loss under the Policy.

8. The Policy provided title insurance coverage for the Property, subject to the terms, conditions and limitations set forth in the Policy.

9. The Policy provided coverage, as follows:

Part 1 – INSURANCE COVERAGE

This POLICY insures your interest in the LAND described in Schedule “A” and the legal services provided by your lawyer for the TRANSACTION subject to:

[...]

- the terms and conditions set out in this POLICY.

Your insurance coverage is described below and starts on the POLICY DATE. This POLICY does not cover or insure you against any risk described in the “Title Coverage” section that arise or begin to affect the TITLE or the LAND after the POLICY DATE unless expressly stated in this POLICY.

TITLE COVERAGE

This POLICY insures you if you suffer an ACTUAL LOSS because of any of the risks listed below, provided they affect your TITLE as of the POLICY DATE (except for risks (8) and (15) which are insured if they arise or occur after the POLICY DATE):

[...]

Compliance Risks

[...]

(13) any order by a court or other authority after the POLICY DATE forcing you to remedy any of the following conditions existing as of the POLICY DATE: (a) a breach of a zoning by-law; (b) the lack of approval from a conservation or similar authority for the existing residential structure; or (c) the lack of a building permit for the existing residential structure;

[...]

10. The Policy defined “ACTUAL LOSS” and “LAND” as follows:

“ACTUAL LOSS” means any direct financial loss incurred by you or any MORTGAGE LENDER:

- a) due to a decrease in the value of your TITLE or the LAND;
- b) due to bringing your LAND into compliance with any of the title risks covered by items (11) – (16) of your Title

Coverage, and with respect to the MORTGAGE LENDER, items (6) – (11) of the Mortgage Coverage;

c) arising directly from a delay in the sale, mortgaging or leasing of your LAND; or

d) arising from any of the risks listed under the Legal Service Coverage.

[...]

“LAND” means the land described in Schedule “A” to this POLICY together with any improvements on the land (such as buildings or other permanent improvements) which are real property.

11. The Policy defined the “POLICY DATE” as March 1, 2021.

12. Upon notice of a claim by the insured, the Policy provided as follows:

Our Choices When You Notify Us of a Claim

After we receive your claim notice or otherwise become aware of a matter for which we are liable, we can in our discretion do one or more of the following:

a) Pay the claim against your TITLE;

b) Repair, replace or relocate any building, structure or improvement on the LAND;

c) Remove any building, structure or improvement from the LAND altogether and pay you any resulting diminution in value to the LAND;

[...]

If you incur settlement costs, legal fees and expenses, we will not reimburse you for them unless they have been approved by us in advance.

13. The Policy defined the “POLICY AMOUNT” as \$1,100,000, equal to the purchase price of the Property (as set out below).

14. The Policy further provided for indemnification for alternate living expenses as follows:

If you cannot live on the LAND because of a risk covered under this POLICY and you rent reasonable substitute accommodation, we will repay you for your actual rent until you can live on the LAND or we settle your claim.

15. The Policy provided the following limit on LAWPRO’s obligations to pay under the Policy, as follows:

OBLIGATION TO PAY

Our obligation to pay for any one or more claims made under this POLICY is limited to the lesser of:

- a) your ACTUAL LOSS; or
- b) the POLICY AMOUNT in force when the claim is made;

plus any costs, fees, and expenses we incur in defence of any third party claim and the reimbursement of rent for substitute accommodation, and this limit shall apply regardless of any other terms and provisions of this POLICY.

If we remove or rectify a claim, we will have no further liability for it except for any ACTUAL LOSS that remains afterwards.

D. PROPERTY DISCLOSURE

16. The sellers of the Property, John and Susan Cunningham (together, the "**Sellers**"), prepared and delivered a property disclosure statement dated July 24, 2020 (the "**Disclosure Statement**") to the Plaintiffs, which provided answers to the following disclosure related questions, *inter alia*:

- a) "Are you aware if the property, or any part of it, currently does not comply with municipal or other regulatory requirements (such as zoning, health, occupancy or environmental by-laws or regulations, building or fire codes, or other protection-related codes, by-laws or regulations)?"

i. Sellers' answer: "Yes"

- b) "Are you aware of any additions or alterations to the buildings or improvements on the property that were made while you owned the property and were made without required building, electrical or other permit, or without obtaining a final inspection from the regulatory authority?"

i. Sellers' answer: "No"

[...]

17. The Disclosure Statement further noted (as a follow up to the Sellers' affirmative answer to the first questions above) that a City of Winnipeg (the "**City**") permit review for the "shop" (a detached structure located on the Property yard separate from the house) had been commenced, but which requirement had been waived by the City.

E. PURCHASE OF PROPERTY

18. On November 22, 2020, following a review of the Disclosure Statement, the Plaintiffs delivered an offer to purchase the Property to the Sellers for a total purchase price of \$1,100,000, which offer to purchase was accepted by the Sellers on the same day.
19. On March 1, 2021, the Plaintiffs purchased and took possession of the Property for the purchase price of \$1,100,000.
20. The Plaintiffs paid \$300,000 from their own funds for the purchase of the Property.
21. The Plaintiffs acquired a mortgage on the Property from Steinbach Credit Union Limited ("SCU") in the amount of \$1,500,000, which was registered against title to the Property on March 3, 2021 (the "**Mortgage**"). The Plaintiffs received \$800,000 from SCU under the Mortgage. As of July 1, 2025, the outstanding balance on the Mortgage was \$113,677.46.
22. Following the sale of their previous residence located at 31 Shier Drive in Winnipeg, Manitoba, the Plaintiffs received net sale proceeds of \$565,298.60.

F. VIOLATION NOTICE

23. On March 3, 2021, the Plaintiffs applied to the City for building permits and plans for the Residence.
24. Between March 8 and 11, 2021, the Plaintiffs' contractor, Olafson Construction Ltd. ("Olafson"), began demolition of the Residence, including removal of the kitchen and bathroom, and discovered mould in the floors and walls of the new bathroom area. Olafson continued opening up walls and flooring and discovered further defects in the Residence.
25. Upon discovery of the various defects, Mr. Abiusi contacted the head of the City's Planning, Property and Development Department ("**Planning Department**") seeking advice on who to speak with regarding non-permitted construction in the Residence. The department head put Mr. Abiusi in touch with the appropriate housing inspector, who Mr. Abiusi requested attend and inspect the Residence.
26. On April 22, 2021, at approximately 1:30 p.m., Steve Zawadowski, a Housing Inspector for the Planning Department, attended the Property for an inspection of the Residence. During the inspection, Mr. Abiusi provided the inspector with a copy of blueprints for the Residence from 1974 (the "**Blueprints**") from the City's records office.

27. Later that day, the City issued a By-Law Violation Notice to the Plaintiffs dated April 22, 2021 (the "**Violation Notice**"), noting violations of City of Winnipeg By-law #4555/87.

28. The Violation Notice appended an explanatory letter explaining that the City concluded (following review of the Blueprints) that between 1974 and 1998, two different constructions were done to the south side of the Residence without required permits (including without electrical and plumbing permits), and more particularly:

- a. the detached garage of the Property was converted into an "attached garage" without required permits; and
- b. a bedroom, bathroom and sunroom addition were constructed on the Residence without required permits.

29. For clarity, it would later be confirmed that the "two different constructions" noted in the Violation Notice were: (1) the detached garage (with carport) was attached to the main premises structure; and (2) the previously detached (now attached) garage was converted to a living space with a bedroom, bathroom and family room/sunroom addition (the "**Non-Compliant Work**").

30. The City noted that the plaintiffs discovered the Non-Compliant Work while doing cosmetic renovations to the Residence.

31. The City recommended that permits for building (with engineering), plumbing and electrical post-construction be acquired for repairs of the south addition of the Residence.

32. The City did not issue an unsafe building order with respect to the Property or the Residence, and the Residence was never declared unfit for occupation, but the City issued a Residential By-Law Violation Notice on April 22, 2021, stating that "WORK ON THE PREMISES SHOULD NOT CONTINUE until all identified deficiencies and areas of non-compliance have been remedied and reinspected by the issuing Inspector/Officer or their delegate".

G. PROOF OF LOSS

33. On May 4, 2021, the Plaintiffs provided LAWPRO with a Proof of Loss under the Policy (the "**Proof of Loss**"), which stated the loss was "Part of home build [sic] without a permit" (the "**Loss**"). The Plaintiffs claimed to have become aware of the claim on April 22, 2021, (being the date of the Violation Notice).

34. LAWPRO agreed to indemnify the plaintiffs for the Loss.

H. POST-LOSS INVESTIGATIONS, APPRAISALS, AND COMMUNICATIONS

35. On June 2, 2021, LAWPRO obtained a building assessment report from Tower Engineering ("**Tower**") dated June 2, 2021 (the "**Tower Report**").

Mr. Abiusi is a principal mechanical engineer and managing partner for Tower. Notwithstanding, LAWPRO agreed to the use of Tower as an engineering firm in the investigation of the Loss. The Tower Report determined, among other things:

- a. the Residence was originally constructed in 1974;
- b. a second storey was added to the Residence over the original building with a two storey high entrance and a single storey dining room, all completed with drawings and permits;
- c. the conversion of the previously unattached garage to an attached living space and a new attached triple garage were apparently constructed without obtaining City of Winnipeg permits;
- d. the roof peak at the junction of the original home and the attached garage converted to living space has a visible bulge and is sagging.

(the Non-Compliant Work, the triple garage constructed without permits, and the sagging roof, collectively, the "**Deficiencies**").

36. On November 5, 2021, Tower's engineer, Ted Nocita, wrote to LAWPRO's adjuster advising that Tower anticipated replacement cost of the Deficiencies to be \$848,422.47 (inclusive of GST) and that, in addition, costs for "Jack's live-out expenses (to-date and future)... Jack's legal costs... etc." would need to be added to the cost and that Mr. Nocita hoped this would "help lead to a claim settlement on the file as more time and effort appear counter-productive to me."

37. On December 1, 2021, Tower provided LAWPRO with a proposal for structural engineering consulting services in connection with the Deficiencies, and summarized two initial proposed options (see Agreed Statement of Facts and issues, p. 8, para. 37):

- a. Option A – maintain existing structure and renovate Non-Compliant Work to compliance; or
- b. Option B – demolish Non-Compliant Work to original 1974 condition.

38. On January 10, 2022, LAWPRO responded to correspondence from Plaintiffs' counsel noting that:

- a. in LAWPRO's view, Tower's responses to LAWPRO's inquiries following the Tower Report lacked impartiality and that another local engineering company would be retained to complete the investigation;
- b. in LAWPRO's view the Residence was not in an unsafe condition for habitation, and that the plaintiffs sought alternative living without informing LAWPRO or permitting LAWPRO an opportunity to explore

options that may address the Plaintiffs' concerns with the Residence while the investigation remained ongoing;

- c. the garage constructed without permits would require demolition and that LAWPRO was investigating options relating to the bedroom, bathroom and sunroom addition (including revisions to the original permitted condition of a garage and carport) and that an engineer would be required to provide the best economic option and drawings to for contractor estimates; and
- d. LAWPRO continued to investigate the roof issue as to the need for replacement and the cause of the moisture damage, noting that the moisture issues in the roof were in the section of the roof constructed with a permit, and that Tower had not provided a conclusive answer on this issue.

I. LAWPRO RETAINS ENGINEERING FIRM TO INVESTIGATE LOSS

39. In January 2022, LAWPRO retained Crosier Kilgour Partners Ltd., Consulting Structural Engineers ("CKP") to continue investigating the Loss.

I. PLAINTIFFS FILE CLAIM

40. On January 26, 2022, the Plaintiffs filed the within Statement of Claim against LAWPRO. The Plaintiffs served LAWPRO with the Statement of Claim on February 7, 2022.

J. ALTERNATE LIVING EXPENSES

41. The Plaintiffs claimed an inability to live in the Residence due to their inability to pay for the required remedial work, including removal and replacement of the deficient roof over a substantial portion of the home, reconstruction of the kitchen (which is located under the deficient roof) and the mould remediation efforts that were required, following the issuance of the Violation Notice.

42. On July 22, 2021, the Plaintiffs entered into a lease for a condominium at 411 – 765 Sterling Lyon Parkway, for an initial one-year term beginning July 27, 2021 (the "Condominium Rental"). The cost for the Condominium Rental, including parking, was \$2,825 per month.

43. On November 7, 2022, LAWPRO informed the Plaintiffs that it would cover their alternate living expenses so far incurred in the amount of \$39,819.62, and delivered a cheque in this amount to the plaintiffs, broken down as follows:

- a. rent payments from August 1, 2021, to July 31, 2022, totaling \$33,525;
- b. tenant insurance of \$394;
- c. storage fees of \$4,435.20;

- d. water delivery of \$451.76 for use at the Property to flush toilets, maintain pool, and water the landscaping; and
- e. Manitoba Hydro (gas only) expenses from October 1, 2021, to May 31, 2022, totaling \$1,013.66 for the Property to maintain a proper temperature within the Residence.

K. CONDOMINIUM PURCHASE

44. In the summer of 2022, the Plaintiffs purchased a condominium in Winnipeg which they have now occupied as their residence since August 2022. The Plaintiffs requested payment of alternate living expenses from LAWPRO for the mortgage principal and interest, taxes, and utility payments.

45. By letter dated January 26, 2023, LAWPRO informed the Plaintiffs that it received all information submitted by the Plaintiffs for consideration of alternative living expense coverage covering the period August 1, 2022 – February 28, 2023, and found that \$19,975.06 is covered under the Policy. The \$19,975.06 comprised of the following amounts:

- a. rent payments from August 1, 2022, to February 28, 2023, totaling \$18,025.00, based on the rents the Plaintiffs had paid prior to purchasing the condominium and not based on the condominium expenses, paid on a good faith, without prejudice basis;
- b. vacant permit coverage totaling \$240.00;
- c. storage fees totaling \$962.50; and
- d. Manitoba hydro (gas only) from October 1, 2022, to December 20, 2022, totaling \$747.56.

46. On February 3, 2023, LAWPRO issued an additional cheque in the amount of \$19,975.06 for alternate living expenses.

47. In total, LAWPRO has paid the Plaintiffs \$59,794.68 for alternate living expenses.

L. REMEDIATION COSTS

48. On November 29, 2022, CKP issued a report noting two options to remedy the Deficiencies (the "**CKP Report**"). The CKP Report concluded that the options for dealing with the Deficiencies were:

- a. demolish the existing garage, sunroom, and bedroom area and repair or replace the vaulted roof area over the centre of the home (the "**First Scope**"); or

- b. demolish the existing garage, restore the bedroom area to the original garage, restore the sunroom to the original concrete outdoor patio, repair or replace the remaining vaulted roof area over the centre of the home.

49. The First Scope would result in the removal of the Non-Compliant Work and Deficiencies, and would repair portions of the Residence, though it would result in a diminution of value to the Property.

50. On February 2, 2023, Winnipeg Building and Decorating Ltd. ("**WBD**") delivered to LAWPRO a budget for the First Scope following review of the CKP Report. WBD quoted \$370,668.55 (inclusive overhead, profit, and GST) for the remediation.

51. On February 7, 2024, WBD advised LAWPRO that its quote for \$370,668.55 for the remediation of the Residence was still valid.

M. RETROACTIVE APPRAISALS AND REPLACEMENT QUOTE

52. On January 6, 2023, LAWPRO obtained a retrospective appraisal of the Property from Rempel-Wagner-Dunn Real Estate Appraisers ("**RWD**"). RWD retroactively appraised the Property to April 22, 2021, at a market value of \$812,000 with the Deficiencies removed.

53. On May 4, 2023, Mr. Abiusi obtained a retrospective appraisal of the Property from Red River Group ("**RRG**"). RRG retroactively appraised the value of the Property to November 22, 2020, at a market value of \$765,000 (with the Deficiencies removed) or \$1,150,000 if the Non-Compliant Work and garage of the Residence were constructed without deficiencies.

54. On May 10, 2023, Mr. Abiusi obtained an estimate from Olafson Construction Ltd. for the repair and replacement of the Deficiencies for an estimated cost of \$541,695 (inclusive of GST), but without allowance for design drawings and structural engineering.

55. On December 9, 2024, Mr. Abiusi obtained a budget from WBD for reconstruction of the Deficiencies (without design fees and partial demolition for the sagging roof only). WBD quoted \$1,025,971.96 (inclusive of overhead, profit, and GST) for this work.

N. LAWPRO PAYMENTS TO THE PLAINTIFFS

56. On May 24, 2024, LAWPRO issued a cheque to Mr. Abiusi on behalf of the Plaintiffs in the amount of \$644,903.84 under the Policy (the "**Payment**"), which included payments for:

- a. \$288,000 for the assessed diminution in value to the Property due to the loss of the garage, sunroom, and bedroom addition; and

- b. \$356,903.84 for the cost to demolish existing garage, sunroom, and bedroom area, and replace the remaining vaulted roof area over the centre of the home. This amount had initially been assessed at \$370,688.55 by WBD, but the estimate was reduced to exclude the cost of asbestos remediation (as these costs were not covered under the Policy) and the costs for certain permits.

57. The Plaintiffs accepted the Payment, and have obtained a demolition permit from the City, but, as of this date, have not commenced demolition of the garage, sunroom and bedroom addition or replaced the vaulted roof area over the centre of the Residence. The Plaintiffs continue to reside in their condominium.

58. In total, LAWPRO paid the Plaintiffs a total of \$704,698.52 (comprised of alternative living expenses and the Payment) for their Loss under the Policy. The Plaintiffs have accepted these payments.

59. The parties agree that, if the Defendant is entitled to rely upon the "diminution of value" method to value the loss, then the defendant agrees to indemnify the plaintiffs a further \$23,500 to resolve the matter of the diminished value of the Property detailed at paragraphs 52 and 53 hereof.

AGREED STATEMENT OF ISSUES

The parties respectfully submit that the issues for trial are as follows:

1. With regard to the Policy at issue in this Action:
 - a. Subject to the Policy limits, does the Defendant have an obligation to indemnify the Plaintiffs for the costs to repair or replace the Residence, or is the Defendant permitted to remove portions of the Residence and to indemnify the Plaintiffs for any resulting diminution in value to the Property, or indemnify the plaintiffs based on a combination of these options?
 - b. What amounts, if any, are still owing by the Defendant to the Plaintiffs with regard to Question 1a?
 - c. Does the Defendant have an obligation to pay the Plaintiffs amounts related to their alternate accommodation expenses related to a condominium they purchased in August 2022 and have occupied since?
 - d. What amounts, if any, are still owing by the Defendant to the Plaintiffs with regard to Question 1c?

- e. After resolving the issues raised in Questions 1a to 1d, does the Defendant have any further indemnification obligations to the Plaintiffs pursuant to the Policy?

THE POSITION OF THE PLAINTIFFS

[7] It is the plaintiffs' position that the defendant is obliged to indemnify the plaintiffs for the cost to repair the Deficiencies, and not, as the defendant argues, that the defendant can elect to remove portions of the Residence and indemnify the plaintiffs for any resulting diminution in the value to the Property. The diminution in value approach provides a substantially lesser amount than the cost to repair the Deficiencies.

[8] In advancing their position, the plaintiffs rely on the decision of the court in ***Gemeinhardt v. Babic***, 2016 ONSC 4707, where the court addressed the defendant's argument that it could value the loss based on diminution of value and that it was not obligated to indemnify the plaintiff for the cost to repair the deficiencies. Ultimately, the court in ***Gemeinhardt*** found in favour of the plaintiff, rejecting the argument that the loss could be based on diminution of value rather than full indemnification. The plaintiffs argue that the facts in ***Gemeinhardt*** are substantially the same as the facts in this case. In both cases, title insurance was in place and in both, the insurers rely on contractual language apparently allowing them to pay the diminution of value of the property rather than a full indemnity to remedy the defects.

[9] The plaintiffs argue that the principles of contractual interpretation support the position that the defendant is obligated to indemnify the plaintiffs for the cost of repairing or replacing the Deficiencies. In this respect, the plaintiffs point to the decision in

MacDonald v. Chicago Title Insurance Company of Canada, 2015 ONCA 842, a case relied upon by the court in ***Gemeinhardt***.

[10] The plaintiffs state, relying on the ***Gemeinhardt*** and ***MacDonald*** cases, permitting the defendant to remove a part of the Residence from the Property and pay the resulting diminution of value of the Property does not produce a reasonable commercial result. It states that it cannot be the case that the Policy permits the defendant to satisfy its obligations under the Policy by demolishing a portion of the Residence and paying the plaintiffs for the resulting diminution in value of the Property, given that this leaves the plaintiffs without a home to live in.

[11] The plaintiffs also point out that the court in ***Gemeinhardt*** considered that title insurers market their policies to real estate lawyers in a manner so as to encourage them not to complete due diligence searches prior to purchase and instead, to rely upon the title insurance policy for coverage. As a result of this marketing, the insured, the plaintiffs should be entitled to receive compensation for the repair costs to the Residence to the full value of the Policy rather than the lesser amount of the diminution in value. The plaintiffs take issue with the defendant's position that this calculation should take into account the value of the vacant property itself.

[12] The plaintiffs also argue that the defendant is obligated to pay them further amounts pursuant to the Alternative Living Expense Clause ("ALEC"). The defendant has made certain payments in this regard, but states that no further amounts are payable pursuant to this provision.

[13] The plaintiffs state that the ALEC obligates the defendant to pay the plaintiffs for alternative living expenses that include costs incurred by them due to the fact that they cannot reside at the Residence even though those costs are not strictly “rents” *per se*. The plaintiffs argue the Policy indemnifies and protects the plaintiffs while the substantive covered risk is being resolved.

[14] The plaintiffs state that this was the defendant’s interpretation of the ALEC as well, as evidenced by the defendant’s payments to the plaintiffs while the plaintiffs were living in a condominium which they owned and not in a rental accommodation. The plaintiffs state that the defendant’s own language in a letter dated January 26, 2023, where it stated that it had “... received all information by the Policyholders for consideration of alternative living expenses ... and find that \$19,975.06 is covered under the Policy” (ABD, p. 18). This, the plaintiffs argue, demonstrates that the compensation obligation is not limited to rents *per se*.

[15] The plaintiffs argue that the defendant’s argument is unduly technical. The plaintiffs could have arranged their affairs so as to enter into a rental agreement for the condominium to avoid this issue and on that basis, the defendant would apparently raise no objection to the payment under the ALEC.

[16] The plaintiffs point out that it is the defendant who drafted the Policy and chose not to define the term “rents”. Accordingly, the defendant’s own conduct in paying these expenses, including while the plaintiffs resided at their condominium, demonstrates that the defendant’s position now is not the position it had when initially assessing and administering the plaintiffs’ claim.

[17] The damages being sought by the plaintiffs in this action for the repair costs necessary to address the Deficiencies are \$455,096.16. Those costs are calculated and set out in their written brief at paragraphs 50 and 51.

[18] The plaintiffs state that if the court were to take the approach being urged by the defendant by adopting the “diminution of value” approach and not indemnify them for their repair costs, the remaining amount payable by the defendant is the further sum of \$23,500. However, if the defendant is obliged to indemnify the plaintiffs for alternative living expenses as a result of an obligation to indemnify the plaintiffs for their repair costs for the Residence (as asserted by the plaintiffs), the plaintiffs state their damages are \$73,225 to date, and will continue to accrue until the plaintiffs are able to reside in the Residence.

[19] In the alternative, the plaintiffs argue that if the defendant is obliged to pay the plaintiffs for alternative living expenses and the defendant is permitted to rely on the “diminution of value” option, then the amount payable by the defendant is also \$73,225. This calculation is based on the period of March 1, 2023 to August 31, 2025. This is calculated on the basis of monthly rental payments of \$2,825 and the assumption that the plaintiffs would have been able to carry out any necessary work to move into the Residence within 15 months.

[20] The calculation of the amounts in the two preceding paragraphs is set out in paragraphs 54 and 55 of the plaintiffs’ written arguments.

THE POSITION OF THE DEFENDANT

[21] The defendant states the Policy provides the defendant LAWPRO with the discretion as to how to indemnify the plaintiffs. The defendant states that based on the plaintiffs' own evidence, even if the Residence were a total loss, the raw land itself is still valued at \$550,000. In light of the payments already made, the plaintiffs have already been over-indemnified by \$22,883.84. In respect of the payments on account of rents, the defendants state that the plaintiffs are only entitled to be indemnified for actual rents paid. Accordingly, the defendant submits that the claim should be dismissed.

[22] In advancing this position, the defendant states that a contract of insurance is a contract of indemnity and that it should not be allowed to turn this misadventure into profit. In other words, the extent of the indemnity must not be greater than the value of the actual loss. No more than that is payable.

[23] The defendant relies on the decision of the Supreme Court in ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, 2010 SCC 33, and summarizes the principles of interpretation for an insurance policy from that case at paragraph 21 of its written argument as follows:

21 ... The Court has offered guidance as to how an insurance policy should be interpreted:

- a. the Court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promotes the true intent and reasonable expectations of the parties at the time of entry into the contract;
- b. where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected;
- c. ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties;

- d. an interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided;
- e. coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly;
- f. the contract of insurance should be interpreted to promote a reasonable commercial result; and
- g. a clause should not be given effect if to do so would nullify the coverage provided by the policy.

[24] The defendant states that the plaintiffs have been indemnified in full for any loss as a result of the Violation Notice. It states that having provided the plaintiffs with \$644,903.84 for losses related to the issuance of the Violation Notice and the remediation of the Residence, there is no basis in fact or in law to suggest that there is any reason to further indemnify the plaintiffs under the Policy.

[25] The defendant takes issue with the plaintiffs' position that they should be indemnified to the Policy limits to reconstruct the Residence. It advances the position that since the assessed value of the Property, if vacant, is \$550,000, the maximum amount payable under the Policy would be \$622,020. This represents \$550,000 for the value of the Residence plus \$72,020 for the demolition of the Residence. Therefore, the defendant argues that if the court accepts the Residence needs to be replaced in its entirety, the plaintiffs have already been over-indemnified by having received the \$622,020 which is \$22,883.84 over the \$1.1 million Policy limit.

[26] LAWPRO argues that based on the provisions of the Policy, it is in its discretion how indemnification proceeds. It relies on the following provision of the Policy, which it

states it can elect to indemnify the plaintiffs for the diminution of value of the Property (see Agreed Statement of Facts and issues, Tab 1. p. 9):

After we receive your claim notice or otherwise become aware of a matter for which we are liable, we can in our discretion do one or more of the following:

. . .

- b) Repair, replace or relocate any building, structure or improvement on the LAND;
- c) Remove any building, structure or improvement from the LAND altogether and pay you any resulting diminution in value to the LAND; ...

(the "Indemnification Provision")

[27] The defendant states that in applying the case law, the court should conclude:

- a) the interpretation of the Policy as a whole allows Lawpro to elect how to indemnify the plaintiffs, which is in keeping with the true intent of the Policy and the reasonable expectations of the parties; its interpretation of the Indemnification Provision and the resulting payment to the plaintiffs of \$644,903.84 were also therefore in keeping with the true intent of the Policy and the reasonable expectations of the parties;
- b) no words in the Indemnification Provision are capable of two or more meanings,
- c) the Indemnification Provision is clear and unambiguous;
- d) the interpretation of the Indemnification Provision adopted by Lawpro and the resulting payment to the plaintiffs of \$644,903.84 do not result in either a windfall to Lawpro or an unanticipated recovery to the plaintiffs; and

- e) the interpretation of the Indemnification Provision adopted by Lawpro and the resulting payment to the plaintiffs of \$644,903.84 promote a reasonable commercial result – the insured was made more than whole for the loss they had suffered.

[28] The defendant states that to pay the plaintiffs the maximum amount of \$1.1 million under the Policy while retaining the underlying property which is valued at \$550,000, would grant the plaintiffs a windfall and run contrary to the principles set out in ***Progressive*** and the principles of insurance law generally.

[29] In respect of the indemnification for rents, the defendant takes the position that the Violation Notice did not prevent the plaintiffs from living in the Residence. They argue the only reason the plaintiffs could not live in the Residence was that they had removed the kitchen and the bathroom. These losses occurred after March 21, 2021 and were therefore not covered by the Policy. While the defendant elected to pay for any alternative living expenses they have incurred in the past, they were not obliged to do so.

[30] The defendant also argues that it is only obligated to indemnify the plaintiffs for “actual rent”. It states that there is no evidence that the plaintiffs are paying rent and that any payments the plaintiffs have made in relation to the acquisition of the condominium in which they are currently living are not indemnifiable under the Policy.

[31] Finally, the defendant takes the position that the plaintiffs have failed to mitigate their losses. It argues that the plaintiffs have significant means to remediate or even rebuild the residence, including access to a mortgage of \$1,500,000 with \$700,000

available to them, net sale proceeds from the sale of their prior residence in the amount of \$565,298.60, and the \$644,903.84 it received from the defendant.

DECISION

[32] The issues identified by the parties are set out in these reasons.

Issue a. - Subject to the Policy limits, does the defendant have an obligation to indemnify the plaintiffs for the costs to repair or replace the Residence, or is the defendant permitted to remove portions of the Residence and to indemnify the plaintiffs for any resulting diminution in value to the Property, or indemnify the plaintiffs based on a combination of these options?

[33] It is my conclusion that, subject to the provisions of the Policy, the obligation of the defendant is to indemnify the plaintiffs for the costs to repair or replace the Residence. In this regard, I rely on the reasons of the court in *Gemeinhardt*. While there are some differences in the facts and the Policy provisions in that case and the case at bar, I am satisfied that the differences are not substantive and do not call for a different conclusion here.

[34] The Policy stipulates that the defendant will indemnify the plaintiffs for their Actual Loss (as that term is defined by the Policy) for an insured peril. There is no dispute here that the loss suffered by the plaintiffs is an insured peril. Furthermore, I agree with the plaintiffs' submission that the evidence here clearly establishes that the construction carried out without the required building permits was woefully inadequate and in breach of the building codes to the extent that there is no doubt that major demolition and reconstruction works are required to the residence.

[35] The options to address the Deficiencies identified in the report by Crosier Kilgour & Partners Ltd on November 29, 2022 support this position. The plaintiffs' position is supported by the building assessment report authored by Tower Engineering (produced at the Agreed Book of Documents, Tab 9), the initial Winnipeg Building & Decorating estimate of February 2, 2023 and the December 9, 2024 WBD report.

[36] There is a paucity of Manitoba case authority in respect of the interpretation of title insurance contracts. However, it appears to me the ***Gemeinhardt*** decision involves the consideration of an attempt by a title insurer to rely on similar contractual language to advance the position that the insurer was only responsible to the insured for the diminution in value of the property.

[37] The facts of that case are similar to those here, namely:

- a) the plaintiff purchased a property for \$950,000 with said transaction being insured by title insurance;
- b) the plaintiff discovered latent defects and major structural deficiencies after purchasing the property. At least three additions were built without proper permits, and a garage on the property was found to be unsafe and was ordered to be demolished; and
- c) the plaintiff claimed against her title insurance, and when that claim was denied, she commenced an action against the title insurer in the same proceeding she claimed against the vendors.

(See ***Gemeinhardt*** at paras. 1-2, 8, 16, and pp. 522-23)

[38] In ***Gemeinhardt*** the insurer argued that, under the policy, the plaintiff's damages were limited to the loss in market value of the insured assets (as is asserted by the defendant in this matter). The court rejected this argument, and ordered the title insurer to pay the full cost of remediation. The court reviewed the governing law on the interpretation of insurance contracts (including title insurance policies) and found that the insurer's position essentially rendered the policy coverage "completely useless to the insured" (see para. 540 and following, and particularly para. 545), ultimately going on to state:

[572] The Policy provides as follows concerning claims under Covered Title Risk 20(f):

. . .

- (ii) Where the cost of removing or remedying the portion of the structure built without a permit is greater than \$50,000, we may,
1. Pay for the removal or remediation; or
 2. End the coverage for the claim by paying you your Actual Loss as determined by an appraisal conducted by a member of the Accredited Appraiser Canadian Institute and those costs, legal fees and expenses incurred up to that time which we are obligated to pay. The appraiser will be selected by you from a list of at least 2 appraisers to be provided by us. The appraiser will be instructed by us. We will pay the appraiser's fees and expenses. If we cannot agree on the value of the Actual Loss, we can end all coverage under this Policy by paying you the current fair market value of the Land without regard to the defect insured against by the Policy, and you will transfer your Title of the Land to us.

[573] I have found there is coverage under the Policy and that the cost of remediation is more than \$50,000. It involves not only the septic system but a host of other defects. I have concluded that the cost of remediation is in the amount of \$592,941.41 regarding the house, additions and garage.

[574] Stewart Title submits that if this court finds there is coverage, damages are limited to the loss in market value of the title insured assets. The measure of damages would be equal to the value of the insured interest with and without the defect.

[575] Stewart Title further submits that remedial costs should not be awarded to Ms. Gemeinhardt if the court finds that such costs exceed the appraised value of the asset. The Policy describes the "lesser of" certain actual loss measures. As

well, Stewart Title asserts that basic contractual principles provide that where remediation is higher than the resultant fair market value increase, the cost of remediation should not be awarded. Stewart Title therefore submits that, should damages be awarded against it, the proper measure of damages would be the diminution of the value of the property and not the cost of remediation.

[576] I have considered the issue of damages and specifically the cost of remediation relating to Ms. Gemeinhardt's claim against the Babics. I have reviewed all of the evidence including all the engineering and appraisal evidence. I identified the shortcomings in the appraisal evidence specifically and as a whole and concluded that the cost of remediation in all the circumstances was the most appropriate remedy. The evidence of Mr. Emmons was preferred to the evidence of others including Mr. Carruthers and Robin Jones, the appraiser called by Stewart Title for reasons stated. I am not satisfied that Ms. Gemeinhardt would receive any "windfall" in this case. Rather, she is entitled to recover the full value of the loss, in order to place her, as reasonably as possible, in the monetary position she would have been in if the agreement of purchase and sale had been fulfilled: *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 2002 CanLII 10432 (ON CA), 58 O.R. (3d) 321 (Ont. C.A.), at para. 16.

[577] I have considered the reasonableness of the cost of rectification. It is not unreasonable nor is it grossly disproportionate. I have considered the diminution of value to the property. The house and its additions and the garage – all in their present condition, have no value. They are to be demolished given the host of serious problems previously identified. Mr. Emmons' evidence is the best evidence regarding the cost of remediation.

[578] I have found that Ms. Gemeinhardt has coverage under Stewart Title's Title Insurance Policy. She is entitled to indemnification under that Policy. I find that Stewart Title breached its Title Insurance Policy by denying coverage. Stewart Title shall pay the sum of \$592,941.41 to Ms. Gemeinhardt being the replacement cost of house, additions and garage.

[39] At paragraph 546 of ***Gemeinhardt***, the Ontario court also pointed out that title insurers deliberately market their policies to real estate lawyers in a manner so as to encourage them not to complete due diligence searches prior to purchase and instead to rely upon the title insurance policy for coverage, finding that the insured is then entitled to the coverage it bargained for and expected to receive; that being compensation for repair costs.

[40] I agree with the position of the plaintiffs that the reasoning and conclusion in ***Gemeinhardt*** are applicable in this matter. The interpretation of the Policy being advanced by the defendant would leave the plaintiffs with a significant problem in rendering the Residence habitable and this was not the expectation of the parties upon entering the contract.

[41] The position of the plaintiffs is also supported by the principles identified and set out in the ***MacDonald*** decision in which the court set out the principles of the interpretation of insurance contracts. It states:

[66] The following principles of interpretation for insurance contracts cited by the appellants in their factum are well settled in Canadian law and are not disputed by Chicago Title:

- the court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promotes the true intent and reasonable expectations of the parties at the time of entry into the contract; [page681]
- where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected;
- ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties;
- an interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided;
- coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly;
- the contract of insurance should be interpreted to promote a reasonable commercial result; and
- a clause should not be given effect if to do so would nullify the coverage provided by the policy. [Citations omitted.]

[42] I agree with the position of the plaintiffs that if the defendant's proposed options were permitted to proceed by simply removing various portions of the Residence, the Residence would be uninhabitable and unmarketable. The defendant's preferred option would not, in the words of the ***MacDonald*** case, produce "a reasonable commercial result". Accordingly, I reject the defendant's argument that bearing in mind the

applicable principles of the interpretation of insurance contracts, the provisions of the Policy should not be interpreted here so as to accept the diminution in value approach.

Issue b. - What amounts, if any, are still owing by the defendant to the plaintiffs with regard to Question 1a?

[43] Given the stipulated limit of \$1.1 million under the Policy in respect of this aspect of the claim, the plaintiffs are entitled to the difference between the amount already paid to them by the defendant and the \$1.1 million Policy limit. In this case, I have considered the estimates provided by the parties and accept the WBD estimate of December 9, 2024 relied upon by the plaintiffs. This is the most recent and fulsome evidence on the costs to fully remediate the Deficiencies.

[44] Based on the submissions of the parties, it is my opinion that the costs of the demolition of the roof should be added to this amount and that together with the additional cost of design fees, permit fees and heating/hoarding/utility expenses, the claim exceeds the \$1.1 million sought by the plaintiffs in respect of the full remediation of the Residence. Accordingly, the amount of the outstanding damages owing must be reduced to the \$1.1 million ceiling.

[45] If the parties are unable to agree on the amount of outstanding damages payable pursuant to the Policy or that the total damages for this aspect of the claim exceed the \$1.1 million Policy limit, they may contact the court to address that point.

Issue c. - Does the defendant have an obligation to pay the plaintiffs amounts related to their alternate accommodation expenses related to a condominium they purchased in August 2022 and have occupied since?

[46] It should be noted that any successful claim for alternate living expenses under the Policy is in addition to the amount payable in the context of the \$1.1 million cap stipulated by the Policy. However, the defendant takes the position that the plaintiffs have been indemnified in full for any loss suffered as a result of alternate living expenses. LAWPRO admits that it has indemnified the plaintiffs in the amount of \$59,794.70 in this respect, but also takes the position that it was under no obligation on the basis of fact or law to do so.

[47] The relevant provision of the Policy provides:

- a) If you cannot live on the LAND because of a risk covered under this POLICY and you rent reasonable substitute accommodation, we will repay you for your actual rent until you can live on the LAND or we settle your claim. (See Agreed Statement of Facts and issues Tab 1, p. 9, para. 14)

[48] The defendant submits that the Violation Notice did not prevent the plaintiffs from living in the Residence. It states that the only reason the plaintiffs are unable to live in the Residence is as a result of the steps they took to remove the bathroom and the kitchen. Since these steps were taken after March 1, 2021, this is not a loss covered by the Policy.

[49] Furthermore, the defendant argues that the plaintiffs are only obliged to indemnify the plaintiffs for "actual rent" paid by them. The defendant points out that the plaintiffs are not paying any rent as they live in a condominium which they have purchased, and this investment is not indemnifiable under the Policy.

[50] I do not accept the defendant's position. In my opinion, the defendant's obligation to pay the alternate living expenses continues. The defendant advances an unduly technical and restrictive interpretation of the ALEC. As argued by the plaintiffs, had they rearranged their affairs in a relatively simple way, their expenses for living in the condominium would be recoverable. The court should not be persuaded to disallow this claim on the basis of the form of the payment rather than the substance of the claim being made and the context in which the claim is being advanced. The amounts being claimed by the plaintiffs as rent are not unreasonable or in any respect improperly inflated. Indeed, the defendant paid this expense based on its assessment of the expenses in administering the plaintiffs' claim, but has now changed its position in this regard. As the plaintiffs state in their written argument:

49. ... The fact that it has taken this many years for the claim to be addressed is proof that the Plaintiffs' approach was correct and they should not be faulted for it, nor should the Defendant be advantaged in any way by it.

[51] I accept the plaintiffs' calculations that the amount payable by the defendant to the plaintiffs on account of alternative living expenses is \$73,225 as of August 2025 and will continue to accrue until the plaintiffs are able to reside in the Residence, calculated as follows:

- a) \$73,225 for alternative accommodations for the period March 1, 2023 to August 30, 2025, calculated based on the amount of the monthly rental payment of \$2,825 for the rental unit; and

b) \$2,825 for each month for the period of September 1, 2025, to the date the Deficiencies are remedied and the plaintiffs can begin residing at the Residence.

(See Agreed Statement Facts and issues at para. 42)

[52] The steps the plaintiffs took in the circumstances, including the removal of the kitchen and the bathroom, did not place that loss outside the scope of the Policy. The steps taken by the plaintiffs were reasonable and there is no failure by them to mitigate their losses so as to adversely impact the claim being advanced here.

Issue d. - What amounts, if any, are still owing by the defendant to the plaintiffs with regard to Question 1c?

Issue e. - After resolving the issues raised in Questions 1a to 1d, does the defendant have any further indemnification obligations to the plaintiffs pursuant to the Policy?

[53] In view of my previous findings and conclusions as set out in these reasons, it is not necessary to provide further reasons in respect of these two questions.

CONCLUSION

[54] The plaintiffs are entitled to indemnity from the defendant for their costs to repair the Residence and their alternate living expenses until they are able to reside in the Residence following the conclusion of all necessary repairs, as set out in these reasons. The plaintiffs shall have their costs based on the applicable Tariff.

_____ J.