CITATION: Truong et al v. Jeweler's Mutual Insurance Company
2023 ONSC 4006
COURT FILE NO.: CV-16-00001037-0000
DATE: 2023 07 05

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
DUNG TRUONG and THUAN NGUYEN	)	W. C. Wolfe, for the Plaintiffs
	)	
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
JEWELER'S MUTUAL INSURANCE COMPANY	)	A. B. Schwisberg, for the Defendant
	)	
	)	
Defendant	)	
	)	
	)	
	)	**HEARD:** January 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, February 17, March 2, 23, 2023

REASONS FOR JUDGMENT

DALEY J.

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I) Introduction – Paras. [1] – [9]:

[1] In this action, the plaintiffs sued their insurer seeking payment of the value of six pieces of jewellery which they alleged were stolen from them on March 7, 2015, while they were traveling in Vietnam.

[2] The defendant insured the plaintiffs' jewellery pursuant to an insurance policy specifically providing jewellery coverage only, with the six pieces of jewellery being scheduled items. Each piece of jewellery was identified by detailed descriptions as to the type of jewellery, and the quality and character of the diamonds included in each piece.

[3] The description of each piece of jewellery included in the insurance policy schedule was based on appraisals provided by the plaintiffs to the defendant at the time the insurance coverage was applied for.

[4] Following the alleged theft of the jewellery, the plaintiffs submitted a proof of loss to the defendant seeking payment for the insured value of the jewellery or its replacement. As required by the terms of the insurance policy, the plaintiffs attended under-oath examinations regarding the circumstances surrounding the theft and their claim.

[5] The defendant did not issue a formal letter of denial of the plaintiffs' claim after its adjuster conducted the investigation of their claim. As no payment of the plaintiffs' claim was made, this action was commenced.

[6] At trial, the insurer advanced several defences as outlined below. Essentially, it was the defendant's overall position that the plaintiffs were not entitled to coverage for the loss as the evidence they offered was inconclusive, on the balance of probabilities, in establishing that they owned the jewellery and that a theft and the loss of the jewellery as appraised had occurred.

[7] It was acknowledged by the defendant that it was not asserting that any misrepresentations were made by the plaintiffs in their application for insurance coverage, and as a result the defendant did not treat the policy as *void ab initio* and return the plaintiffs' premium to them.

[8] The defendant further acknowledged that the insurance policy was always valid and in full force at all times.

[9] For the reasons that follow, I have concluded that the plaintiffs are entitled to coverage under the insurance policy for the loss and judgment is granted to them in the terms set out below.

II) The Jewellery and the Application for Insurance – Paras. [10] – [33]:

[10] The plaintiffs, Dung Truong ("Truong") and Thuan Nguyen ("Nguyen"), were married in Canada in 1997.

[11] Truong was born in Vietnam in 1967 and came to Canada as a refugee in 1980 when he was approximately 13 years of age. He is the youngest of ten

children and his siblings all reside in Vietnam. He is employed as a Vietnamese/English interpreter.

[12] From their date of marriage in 1997 to the date of the alleged jewellery theft in March 2015, the plaintiffs traveled to Vietnam every one or two years to visit family. Truong also visited his brother, with whom he had a shared business interest in a shrimp farm in Vietnam.

[13] At the time of their marriage in 1997, Truong's mother gave him Vietnamese currency with the equivalent value of $130,000 CAD.

[14] Also, at the time of their marriage or shortly following it in 1998, Truong's mother gave him and his wife two diamond rings. At the time, these rings were given to them, Truong had no information as to their value.

[15] In the summer of 2014, Truong, at the urging of family members, decided to purchase jewellery insurance coverage given that the plaintiffs would be traveling to Vietnam for a family wedding and that they planned on bringing jewellery with them.

[16] He had never previously insured any of the family jewellery. He contacted an insurance company or insurance brokerage firm in Mississauga during the summer of 2014, and he and his wife met with a representative of that firm to

discuss placing insurance coverage on their jewellery. As he did not have appraisals for all the jewellery, he could not obtain coverage.

[17] Truong testified that, through an advertisement in a local Vietnamese magazine, he learned of the defendant insurance company and the fact that it offered jewellery insurance. He contacted a representative of the defendant for the purpose of applying for insurance for one of the two diamond rings that were given to the plaintiffs by his mother.

[18] On August 28, 2014, Truong completed an online application for insurance coverage with the defendant for a “ladies ring” with the “jewelery wearer” being his wife, Nguyen, with a reported replacement value of $205,000. The plaintiff did not meet in person with a representative of the defendant insurer, nor an agent or broker on behalf of the company.

[19] In completing the online application for insurance coverage for this ring, the plaintiff was required to answer several questions. He stated among other things that he had never applied for coverage with the defendant previously, he had not been convicted of a criminal offence, and he had never experienced a previous loss of jewellery. He further confirmed that he had never been denied coverage by an insurance company and he confirmed that his home was not equipped with a safe or alarm system.

[20] In the application, the plaintiff reported that the jewellery was worn “daily” and further that the plaintiffs traveled on “1 to three trips” overseas in a 12-month period.

[21] The online application was completed and submitted to the defendant insurer on August 28, 2014. Accompanying the plaintiffs’ online application was a certificate of appraisal completed by jewellery appraiser Michael Stern in respect of a ladies 18 karat white gold diamond custom-made ring with an estimated replacement value of $205,000 including taxes. This appraisal was dated July 22, 2014. The names of the plaintiffs appeared on the appraisal as “Truong Van Dung and Nguyen Thi Bich Thuan”, with their address stated as Ontario.

[22] On August 29, 2014, the defendant’s office in Neenah, Wisconsin, U.S.A. issued a letter to the plaintiffs thanking them for insuring their jewellery with the company. The letter was accompanied by a letter from Darwin Copeman, president and CEO of the defendant, advising them that they had “joined more than 300,000 jewellery owners who insure their special pieces” with the insurer who has been in business as a jewellery insurance specialist for more than 100 years.

[23] This form letter further provided suggested safety precautions that were recommended in order to protect the insured jewellery.

[24] On the same date, an offer of insurance coverage was issued by the defendant to the plaintiffs in respect of the diamond ring with an insurance limit of $205,000 subject to a deductible of $2,500 and requiring payment of a total premium of $2,814.45.

[25] On August 29, 2014, a Personal Jewelry – New Business Declaration was sent to the plaintiffs with a policy period from August 29, 2014, to August 29, 2015, which provided coverage for the ladies diamond ring with a policy limit of $205,000 and no deductible amount, with a total premium of $3,432.24. Truong testified that they accepted this quote and the premium required was paid to the insurer by way of his CIBC Visa credit card.

[26] Truong testified that the plaintiffs wished to insure five additional pieces of jewellery as they planned to travel out of the country. On September 18, 2014, he sent appraisals relating to the five additional pieces of jewellery to the defendant's representative and the defendant agreed to add this jewellery to the insurance policy. On September 29, 2014, the defendant issued a Policy Change Declaration adding the additional five items of jewellery to the policy schedule effective September 18, 2014.

[27] The Policy Change Declaration issued by the defendant identified the six pieces of jewellery insured by way of detailed descriptions of each item in accordance with the appraisal certificates provided by the plaintiffs from three

jewellery appraisers, namely Michael Stern (“Stern”), Sherwood Ho (“Ho”), and an appraiser who was not called as a witness and whose appraisal certificate was not introduced in evidence.

[28] The jewellery insured pursuant to the policy of insurance was as follows, and the name of the appraiser and appraisal dates are as indicated:

> Item A – 18 karat white gold ladies diamond ring –$205,000 – appraiser Stern, July 22, 2014;
>
> Item B – 14 karat white gold gent’s custom-made diamond ring – $51,000 – (appraisal certificate introduced into evidence for limited purpose only);
>
> Item C – a pair of stamped 18 karat white gold earrings with two round brilliant cut diamonds – $20,800 – appraiser Ho, September 5, 2014;
>
> Item D – stamped 18 karat white gold pendant with one round brilliant cut diamond – $70,300 – appraiser Ho, September 5, 2014;
>
> Item E – stamped 18 karat white gold bangle set with one round brilliant cut diamond – $76,500 – appraiser Ho, September 5, 2014;
>
> Item F – stamped 18 karat white gold ring with one round brilliant cut diamond and 48 princess cut diamonds – $78,500 – appraiser Ho, February 20, 2009.

Total Value of Scheduled Jewellery Insured – $502,100

[29] It was noted that Item E above was misdescribed as “LDS RG 18 KT” on the Policy Change Declaration; however, it is clear from the evidence and the relevant appraisal, that this item is in fact an “18 karat white gold bangle” as described above.

[30] Also, as set out below, appraisals in respect of five of the six pieces of jewellery were introduced into evidence through the appraisers called as witnesses. The jewellery referenced above as Item B, namely the diamond ring with an insured value of $51,000 was insured in accordance with an appraisal submitted by the plaintiffs to the defendant at the time coverage was requested. However, the appraisal document was not introduced into evidence as the appraiser was not called to testify, as he could not be located.

[31] The premium for the insurance coverage of all six items of jewellery was paid by the plaintiff, Truong, by his CIBC Visa credit card in the amount of $8,373.24.

[32] He further testified that jewellery Item F was purchased by the plaintiffs in 2009, at which time he was provided with the appraisal certificate dated February 20, 2009 by the seller of the jewellery, which was submitted to the insurer. This

appraisal was completed by Sherwood S. W. Ho. The name of the persons to whom the appraisal was provided was left blank on the appraisal certificate form.

[33] As to the items of jewellery referenced above as Items C, D and E, Truong testified that these pieces of jewellery were acquired by the plaintiffs over several years following their marriage, whenever they had the means to purchase jewellery.

III) The Acquisition and Appraisal of the Jewellery – Paras. [34] – [56]:

[34] Truong testified that the two rings referenced above as Item A and Item B were given to him and his wife around the time or shortly following their wedding. As considered below, the evidence offered by Nguyen as to the provenance of the ring referred to as Item A differed from that of her husband.

[35] As to the diamond ring referred to as Item F above, Truong testified that it was acquired in 2009 from a jewellery shop in Chinatown in Toronto. He acquired it through the trading in of another ring along with a cash payment.

[36] The diamond in Item F was installed in the setting by the jeweler at the shop where it was purchased. After that was completed, the plaintiff returned to the shop, paid the cash in addition to the trade-in value of a ring given to the seller. He acknowledged that no HST was paid at the time this ring was acquired.

[37] At the time of purchase of this item, he was not provided with a bill or receipt either in respect of the cash purchase or the trade-in used to acquire this piece of jewellery. He was given a small slip of paper prepared by the jeweler but testified it could not be located.

[38] Further, he testified that at the time he purchased this item in 2009, the jeweler provided him with the appraisal from the appraiser Ho which was dated February 20, 2009. He understood that the piece of jewellery had been previously appraised, and the appraisal was simply provided to him at the time he acquired the item.

[39] He recalled visiting three or four jewellery stores in Chinatown in Toronto around the time this ring was purchased.

[40] Apart from the rings referred to as Item A and Item B, which were given to the plaintiffs by Truong's mother, and the ring referred to as Item F, which he acquired in 2009, the other three pieces of jewellery were acquired by the plaintiffs over time.

[41] Truong testified that over the period from 1997, when they were married, to approximately 2009, he and his wife would from time to time, acquire jewellery by trade-ins along with cash payments. No evidence was offered with respect to

when Items C, D or E were acquired nor were any records produced relating to their acquisition.

[42] As to the appraisals that were obtained in 2014 in respect of Items A, C, D, and E, Truong testified that he understood that appraisers working in Chinatown could not be approached directly by the public because of security concerns and the risk of robbery. As a result, he testified that he had three individuals assist him in obtaining the 2014 jewellery appraisals.

[43] He identified those individuals as Mr. Luu (“Luu”), Mr. Tam (“Tam”), and Mr. Binh (“Binh”). He described these individuals as members of his “community” who were known to him. The witness’ evidence as to his knowledge of these individuals, including their contact information such as phone numbers or addresses, was somewhat confused and disjointed.

[44] In examination-in-chief, Truong testified that he met Tam and provided him with the three pieces of jewellery that were appraised in September 2014. In cross-examination however, he acknowledged that he actually did not know Tam and that he had turned over the jewellery to Luu, who in turn then gave it to Tam, to arrange for appraisals. Further, in cross-examination, he acknowledged that he did not know Binh and he wished to correct his evidence from his examination-in-chief in that regard.

[45] As to the appraiser Stern, Truong acknowledged that he did not know him. He further stated that it was only through Luu that he arranged to get the appraisals prepared.

[46] As to the locations where the jewellery appraised in 2014 was obtained, in his under-oath insurance examination in 2018, he had testified that all the jewellery was acquired at two jewellery shops. Then, later on during his examinations for discovery, he testified that they were acquired at four jewellery shops.

[47] Truong, in his interview with the insurance adjuster, did not mention that the rings referred to as Items A and B were given to him and his wife by his mother; however, he did so in a letter to the insurer on May 28, 2015, after the theft.

[48] Truong further admitted that he told the insurance adjuster that he paid for the jewellery at the values indicated on the appraisals; however, he acknowledged at trial that the amounts paid, including the trade-ins, were less than the stated appraisal amounts shown on the appraisal certificates.

[49] The plaintiff, Nguyen, testified with the assistance of a Vietnamese interpreter. She has the equivalent of a Grade 5 education from Vietnam. She cannot read or write English and has little ability in spoken English.

[50] She testified that of the six items of jewellery insured with the defendant, apart from the rings that were given to her and her husband by her mother-in-law, the remaining items were purchased at two Chinatown jewellery stores, which she recalled were named Ngoc Chau and Minh Chau.

[51] The plaintiff could not recall from which store each of the items of jewellery were purchased. She testified that she and her husband would visit Chinatown to look at jewellery from time to time and that her husband would go back on his own to purchase items without her. On the other hand, it was her husband's evidence that she was always with him when he acquired jewellery by trade ins and cash payments.

[52] Nguyen acknowledged that her husband makes all the important decisions for their family and that he takes care of everything at their home.

[53] As to the acquisition of Item C, the earrings, Item D the pendant, and Item E, the bangle, this witness testified that her husband purchased them by way of a combination of trade-ins and cash. She testified that she believed no receipts were being provided as they were acquiring the jewellery by cash. Also, she testified that on one occasion she requested a note confirming a trade-in, but this was refused by the jeweler.

[54] The witness had no direct knowledge of how the appraisals were obtained but testified that a friend of her husband's arranged an intermediary to get the appraisals.

[55] She acknowledged that she told her children and anyone who would ask about the jewellery that it was fake, apparently over concerns as to its value.

[56] In her evidence on examination for discovery she testified that the ring identified as Item A was acquired by the plaintiffs by way of a trade -up. However, in her evidence at trial, she acknowledged that this was incorrect and that in fact, the ring had been given to her and her husband by her mother-in-law as an heirloom gift.

IV) The Theft of the Jewellery – Paras. [57] – [63]:

[57] The plaintiffs traveled to Vietnam on March 2, 2015, to attend Nguyen's brother's wedding.

[58] During their travel to Vietnam, the plaintiffs wore the jewellery in question and removed it upon arrival in Vietnam over concerns of possible theft. After arriving in Vietnam, the jewellery was carried by Nguyen in her purse.

[59] They proceeded to the Can Tho City, where Truong's niece lived, and they had arranged to stay in a hotel nearby her home.

[60] On the evening of March 7, the plaintiffs were walking along a street in Can Tho City when a motorcycle passed by them, and one of the two occupants grabbed Nguyen's purse which contained the jewellery, and sped off.

[61] The following day, the plaintiffs and Truong's niece attended at a local police station to report the theft. Nguyen provided a statement to the police as to the circumstances of the theft. The following day, they re-attended at the police station to obtain a copy of her statement as stamped and sealed by the police authorities. A certified translation of a copy of the police statement was entered into evidence.

[62] Although not addressed by counsel when the police statement was adduced in evidence, I have concluded that this piece of evidence can only be considered as evidence in support of the narrative of events, for the purpose of context, and not as to the truth of the contents of the statement. The circumstances surrounding the making of the statement written by Truong's niece was based on information provided to her by Nguyen. Thus, the statement is unproven double hearsay.

[63] Upon returning to Canada, the plaintiffs delivered to the defendant a proof of loss providing details of the alleged theft. They also attended under-oath examinations pursuant to the terms of the insurance contract. The statements

made were then incorporated by reference into their oral examinations for discovery for the purpose of this action.

V) The Positions of the Parties – Paras. [64] – [76]:

A – The Plaintiffs' Position – Paras. [64] – [68]:

[64] It is submitted on behalf of the plaintiffs that they sought and were granted insurance coverage by the defendant for the six pieces of jewellery, and that they provided to the defendant all the requested information as to the jewellery and its appraised value prior to coverage being granted to them.

[65] They further assert that the jewellery was stolen and that they are entitled to coverage under the insurance contract for the jewellery's insured value. They also seek reimbursement of premium monies paid to the defendant after the loss occurred.

[66] Although it has been asserted by the defendant that in order to have their claim acknowledged and paid, they must first prove that they owned the insured jewellery, the plaintiffs submit that there is no requirement in the insurance contract that they establish ownership, having already done so at the time the insurance coverage was granted to them by the defendant.

[67] Furthermore, it is the plaintiffs' position that their ownership and insurable interest in the jewellery was proven to the defendant at the outset of the insurance contract. And this was acknowledged by the defendant when it

admitted that there was no evidence that the plaintiffs made any material misrepresentations in their application for insurance coverage.

[68] The plaintiffs further submit that they reasonably relied upon the defendant's acceptance of their application for insurance coverage and that the defendant's position that they must prove ownership and an insurable interest in the jewellery based on the defendant's erroneous interpretation of the terms of the insurance contract constitutes bad faith conduct deserving of an award of punitive damages.

B – The Defendant's Position – Paras. [69] – [76]:

[69] Although the defendant concedes that there were no material misrepresentations made by the plaintiffs that would allow it to treat the insurance contract as void from the outset, it is urged by the defendant that the evidence adduced by the plaintiffs as to their ownership of the jewellery, the occurrence of the theft and the value of the loss, is all inconclusive and thus fails to meet the onus on the plaintiffs to establish their claim on a balance of probabilities.

[70] As to the insurance contract, it is the defendant's position that for the plaintiffs to establish their entitlement to coverage for the alleged loss, they must comply with the language of the insurance contract which requires them to prove ownership and an insurable interest in the jewellery at the time of the loss.

[71] Subsumed within its general denial of the plaintiffs' claim, the defendant submits that the insurance contract requires that, as part of the claim process, the plaintiffs must prove their ownership and insurable interest.

[72] The defendant further submits that the plaintiffs' evidence with respect to the alleged theft is illogical, reckless and contrary to the security recommendations as to the storage and handling of insured jewellery provided by the defendant at the time coverage was granted to the plaintiffs.

[73] It is also submitted that, in any event, the jewellery in question constituted contraband and as such represented property which was expressly excluded from coverage under the terms of the insurance contract.

[74] The basis for this position rests with the assertion that, over time, the plaintiffs smuggled Canadian currency into Canada from Vietnam, which was in turn used to purchase the jewellery. As such, the jewellery was tainted having been purchased with Canadian currency smuggled into Canada, thus making it contraband within the meaning of the exclusion in the insurance contract.

[75] The defendant also asserts that the plaintiffs have failed to comply with the terms of the insurance contract as to the proof of loss, including by their failure to cooperate with the insurer.

[76] Although no letter of denial was issued by the defendant prior to the plaintiffs instituting their action, the overarching position of the defendant regarding the plaintiffs' claim is that, on applying a proper interpretation of the language of the insurance contract, the evidence adduced by the plaintiffs is inconclusive and as such the plaintiffs have failed to establish their claim on a balance of probabilities.

VI) The Contract of Insurance – Paras. [77] – [77]:

[77] As the determination of the issues at stake in this action, in many respects, will turn on the interpretation of several provisions in the insurance contract, I have set out below specific provisions that were addressed during this trial, in order to put in context my reasons for decision.

> **Definitions**
>
> 1. "Covered property" means items shown on the declarations page under Scheduled Jewelry.
>
> …
>
> 5. "You" and "Your" mean the individual(s) listed in the Named Insured and Address section of the declarations page.
>
> **Property Covered**
>
> "We" cover direct physical loss or damage caused by a covered peril to "your" "covered property" while it is anywhere in the world.
>
> **Property Not Covered**
>
> "We" do not cover contraband, or property in the course of illegal transportation or trade.
>
> …
>
> **What Must Be Done in Case of Loss**

…

3. Proof of Loss – “You” must send “us”, within 90 days after “our’ request, a signed, sworn, proof of loss. This must include the following information:

a. the date, time, place, and details of the loss;

b. other insurance or service agreements that may cover the loss;

c. “your” interest and the interest of all others in the “covered property” involved in the loss, including all liens and encumbrances;

d. changes in the title of the “covered property” during the policy period; and

e. an inventory of “your” lost and damaged “covered property”. This must show in detail the quantity, description, cost, and actual cash value of the “covered property”, and the amount of the loss. Copies of all bills, receipts, and related documents that substantiate the inventory must be attached.

…

How Much We Pay

1. Insurable Interest – “We” do not cover more than “your” insurable interest in the “covered property”.

…

Loss Settlement

1. Our Loss Settlement Options – “We” may at “our” option:

a. repair, replace, or rebuild the “covered property”; or

b. settle based on the actual cash value of the “covered property” at the time of loss.

…

Conditions

…

8. Misrepresentation, Concealment of Fraud – This policy may be void as to “you” and any other “insured” if, before or after a loss:

a. “you” or any other “insured” have willfully concealed or misrepresented:

1) a material fact or circumstance that relates to this insurance or the subject thereof; or

2) "your" interest herein; or

b. there has been fraudulent conduct or false swearing by "you" or any other "insured" with regard to a matter that relates to this policy or the subject thereof.

VII) Legal Framework – Paras. [78] – [93]:

The Principles of Interpretation of Insurance Contracts:

[78] The principles of interpretation of insurance contracts have been firmly established in several appellate decisions.

[79] A short and concise statement of the general law on interpreting insurance contracts was provided by Laskin J.A. in *Sam's Auto Wrecking Co. (Wentworth Metal) v. Lombard General Insurance Co. of Canada,* [2013] ONCA 186 at para. 37:

> The principles for interpreting insurance policies, and in particular exclusion clauses, are well-established. The policy should be interpreted to promote a reasonable commercial result; provisions granting coverage ought to be construed broadly; provisions excluding coverage ought to be construed narrowly; in the case of ambiguity, the interpretation most favourable to the insured should be adopted; and even a clear and unambiguous clause should not be given effect if to do so would nullify the coverage provided by the policy.

[80] In the Court of Appeal decision of *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, Hourigan J.A., at para. 66, stated additional principles applicable to the interpretation of insurance contracts,

including: (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) an interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided.

[81] As to the main goal of the principles of interpretation of insurance contracts, Hourigan J.A. further stated, at para. 67:

> Responsible consumers purchase insurance policies for indemnification. Canadian courts have developed these fundamental principles of interpretation as a means of ensuring that these consumers are treated fairly and that their reasonable expectations are protected. The principles are to be applied rigorously in the interpretation of insurance contracts. It is not sufficient, as the motion judge did in this case, to cite the principles and then move on to an interpretation of a contract of insurance that is free from any analysis of how the principles apply to the contract in issue.

[82] If the application of the principles for resolving ambiguity in the provisions of a contract of insurance are inadequate, the court should interpret the provision *contra proferentum*, that is against the party who drafted the policy, namely the insurer: *Carter v. Intact Insurance Company*, 2016 ONCA 917, at paras. 27-30.

[83] An insurance policy is an instrument, whereas an insurance contract, by contrast, creates contractual obligations between the parties.

[84] Considerations as to the differences between an insurance policy and an insurance contract were discussed in the Court of Appeal decision in *Van Huizen v. Trisura Guarantee Insurance Company*, 2020 ONCA 222, at paras. 21-27.

[85] In its decision in *Van Huizen*, the Court of Appeal made several important statements as to the nature of insurance contracts including: (a) the formation of insurance contracts is governed by the law of contracts. There must be an offer and acceptance, and an agreement on the material terms, including the premium, the nature and duration of the risk to be covered, and the extent of liability; (b) in determining whether to enter into a contract of insurance, the insurer assesses the risk and determines an acceptable premium based on the representations made by the applicant for insurance: para. 24.

[86] Fundamental to the proper interpretation of insurance contracts is the vantage point from which they are examined, as was discussed by the Supreme Court of Canada in its decision in *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121, at para. 13:

> At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[87] As to the mutual duty of an insurer and an insured to act with the utmost good faith, Strathy C.J.O., in the decision in *Usanovic v. Penncorp Life Insurance Company (La Capitale Financial Security Insurance Company)*, 2017 ONCA 395, 138 O.R. (3d) 462 thoroughly reviewed the applicable principles at paras. 25-29 and stated as follows:

> [25] There is no doubt that parties to an insurance contract owe each other a duty of utmost good faith: *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, [2014] S.C.J. No. 71, 2014 SCC 71, at para. 55; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, at para. 79.
>
> [26] This court has held that this duty requires an insurer to deal with claims by its insured in good faith. See *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*, 2000 CanLII 5684 (ON CA), [2000] O.J. No. 866, 184 D.L.R. (4th) 687 (C.A.), at para. 27, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 258:
>
> > The relationship between an insurer and an insured is contractual in nature. The contract is one of utmost good faith. In addition to the express provisions in the policy and the statutorily mandated conditions, there is an implied obligation in every insurance contract that the insurer will deal with claims from its insured in good faith. [Citation omitted]
>
> [27] The duty of good faith is not the same as a fiduciary duty: *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.* (1994), 1994 CanLII 653 (ON CA), 18 O.R. (3d) 663, [1994] O.J. No. 1023 (C.A.), at p. 669 O.R. In contrast to a fiduciary duty, the insurer is not obliged to treat the insured's interests as paramount. However, the insurer must give as much consideration to the welfare of the insured as to its own interests: *Bullock v. Trafalgar Insurance Co. of Canada*, [1996] O.J. No. 2566, 9 O.T.C. 245 (Gen. Div.), at para. 101. This requirement is based on the recognition that the insured is typically in a vulnerable position when making a claim: *Bhasin*, at para. 55.
>
> [28] The scope of the duty of good faith has not been precisely delineated or definitively settled: Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed. (Markham, Ont.: LexisNexis, 2014), at p. 52; *Kang v. Sun Life Assurance Co. of Canada*, [2013] O.J. No. 768, 2013 ONCA 118, 303 O.A.C. 64, at para. 39. [page 469] Although the assessment is fact-

specific and will depend on the particular circumstances of each case, courts have recognized some general requirements of the duty of good faith.

[29] In *702535 Ontario Inc.*, at paras. 27-30, this court provided an overview of the insurer's duty of good faith to act promptly and fairly when handling claims by the insured:

> The duty of good faith requires an insurer to act both promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds.
>
> The first part of this duty speaks to the timeliness in which a claim is processed by the insurer. Although an insurer may be responsible to pay interest on a claim paid after delay, delay in payment may nevertheless operate to the disadvantage of an insured. The insured, having suffered a loss, will frequently be under financial pressure to settle the claim as soon as possible in order to redress the situation that underlies the claim. The duty of good faith obliges the insurer to act with reasonable promptness during each step of the claims process. Included in this duty is the obligation to pay a claim in a timely manner when there is no reasonable basis to contest coverage or to withhold payment.
>
> The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.
> This duty of fairness, however, does not require that an insurer necessarily be correct in making a decision to dispute its obligation to pay a claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.
> (Citations omitted)

[88] The doctrine of good faith in the contractual context has been held to redress power imbalances in certain classes of contracts such as employment, landlord–lessee, and insurance: *Bhasin v. Hrynew* [2014] 3 S.C.R. 494, 2014 SCC 17, at para. 44.

[89] Although *Bhasin* was not concerned with a contract of insurance, the court reaffirmed the existence of a duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the way it investigates and assesses the claim and to the decision whether to pay it: *Bhasin*, at para. 55.

[90] Furthermore, the court in this decision stated that the duty of good faith is reciprocal, and the insurer must not act in bad faith when dealing with the claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy: *Bhasin* at para 55.

[91] Where a party to a contract, such as an insurance contract which is inherently subject to a mutual duty of utmost good faith, purports to exercise discretion in the way it deals with the rights of the other contracting party, it is a general doctrine of contract law that the exercise of that discretion must be done in good faith in securing the performance and enforcement of the contract. If the contract is interpreted as providing some form of discretion to one of the contracting parties, the use of that discretion cannot be as a device to create new and un-bargained for rights and obligations or to alter the express terms of the contract: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, at paras. 129-130.

[92] Furthermore, it has been held that it runs contrary to the good faith obligation that an insurer owes to an insured, for the insurer to agree to insure a risk, whether at the binder stage or at the time the policy is issued, when it knows or should know that there is information relevant to the risk that it does not have and that it did not even inquire into or that is incomplete, and then raise the lack of information as a defence to a claim under the policy: *Sagl v. Chubb Insurance Company of Canada*, 2009 ONCA 388, at paras. 61-62.

[93] As to the burden of proof in an insurance claim, it has been held that even where evidence of suspicious circumstances may exist giving rise to a denial of the insured's claim, and even where fraud is not specifically alleged, the burden remains with the insured to prove on the balance of probabilities that they have sustained an insured loss. The absence of a pleading of fraud by the insurer does not eliminate the need for the court's consideration of alleged suspicious circumstances in determining whether the insured has proven their case on a balance of probabilities: *Demetriou v. AIG Insurance Company of Canada*, 2019 ONCA 855, at paras. 5-6; *Shakur v. Pilot Insurance Co.* (1990) 74 O.R. (2d) 673 (C.A.).

Analysis – Paras. [94] – [231]:

[94] In opposing the plaintiffs' claims, the defendant has denied liability for the plaintiffs' claim on several grounds including three fundamental positions in

respect of which it says that the totality of the plaintiffs' evidence is inconclusive, namely: (a) that they owned and had an insurable interest in the scheduled jewellery as of the date of the loss; (b) that a theft and loss of the jewellery actually occurred; and (c) that the jewellery insured had a value as claimed by the plaintiffs.

[95] The defendant, as already noted, has also raised other contractual defences which will be considered below.

Ownership & Insurable Interest – Paras. [96] – [178]:

[96] The defendant has put the plaintiffs to the strict proof of demonstrating that they owned the jewellery in question in this action at the date of the loss.

[97] It is submitted on behalf of the plaintiffs that by accepting the plaintiffs' applications for insurance, along with the certificates of appraisal of value, and the premium paid by them, the policy of insurance was issued. The defendant is therefore estopped from denying that the plaintiffs had an ownership and insurable interest in the jewellery.

[98] It is notable that, in its statement of defence, the defendant has acknowledged that the plaintiffs had an insurable interest in the jewellery at the time the policy was issued to them and further it has never alleged that any type of material misrepresentation was made by the plaintiffs at the time they applied

for the insurance coverage or at any time. The defence is simple – the plaintiffs have failed to prove all the necessary elements of their claim.

[99] In post-contractual documents sent to the plaintiffs by the defendant, the defendant made certain statements regarding the coverage being provided.

[100] In a letter dated August 29, 2014, addressed to the plaintiffs from the defendant, confirming the placement of their insurance coverage, reference was made to “your jewelry” and “peace of mind”. Also, in an undated letter addressed to the plaintiffs, which accompanied the letter of August 29, 2014, the term “your jewelry” is also used along with the phrase “your prized possessions”. In closing, the letter also suggests to the plaintiffs that if they have any other pieces of jewellery adding it “to your existing Jewelers Mutual policy is a cost-effective way to keep it all protected.” This sentence ends with an asterisk and the following footnote related to it states: “*Adding jewelry to an existing policy requires a current copy of a detailed receipt, appraisal or evaluation.”

[101] It is most significant that, despite the footnote referred to, at the time coverage was granted to the plaintiffs, they were not required to produce any supporting documents before coverage was granted to them, apart from appraisals for each piece of jewellery. No evidence of ownership or insurable interest, apart from the plaintiffs’ statements to that effect in their application, was required along with the certificates of appraisal. Furthermore, it has been

acknowledged by the defendant in its statement of defence that, even without documentary proof of ownership of the jewellery, the plaintiffs had an insurable interest in the jewellery at the time the contract of insurance was entered into and the policy document and declarations were issued to them.

[102] In its decision in *Kosmopoulos v. Constitution Insurance Co.* (1987), 63 O.R. (2d) 731, at para. 42, the court considered the meaning of insurable interest and Wilson J. stated as follows:

> In my view, there is little to commend the restrictive definition of insurable interest. As Brett M.R. has noted over a century ago in *Stock v. Inglis*, *supra*, it is merely "a technical objection ... which has no real merit ... as between the assured and the insurer". The reasons advanced in its favour are not persuasive and the policies alleged to underlie it do not appear to require it. They would be just as well served by the factual expectancy test. I think *Macaura* should no longer be followed. Instead, if an insured can demonstrate, in Lawrence J.'s words, "some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring", that insured should be held to have a sufficient interest. To "have a moral certainty of advantage or benefit, but for those risks or dangers", or "to be so circumstanced with respect to [the subject matter of the insurance] as to have benefit from its existence, prejudice from its destruction" is to have an insurable interest in it. To the extent that this Court's decisions in *Clark v. Scottish Imperial Insurance Co., supra, Guarantee Co. of North America v. Aqua-Land Exploration Ltd*., *supra*, and *Wandlyn Motels Ltd. v. Commerce General Insurance Co*., *supra*, are inconsistent with this definition of insurable interest, I respectfully suggest that they should not be followed.

[103] It is submitted on behalf of the defendant that subparagraph 3 (e) of the contract of insurance under the section “What Must Be Done in Case of Loss” requires that the plaintiffs, upon making their claim, produce documents as evidence of ownership of the six pieces of jewellery insured under the contract.

[104] This subsection requires the filing with the defendant of a signed and sworn proof of loss that must include the following information:

> "(e) an inventory of "your" lost and damaged "covered property". This must show in detail the quantity, description, cost, and actual cash value of the "covered property" in the amount of the loss. Copies of all bills, receipts, and related documents that substantiate the inventory must be attached."

[105] On considering this term of the contract of insurance, within the context of the contract in its entirety, including the circumstances surrounding the creation of the insurance contract, including the fact that no bills or receipts were ever requested by the defendant, and on examining the language of this provision as it would be understood by the average person applying for insurance, its plain and ordinary meaning does not disclose any requirement that, an insured submitting a claim for the loss or theft of jewellery, is required, as part of the proof of loss process, to again prove ownership and an insurable interest in the item insured. Notably, the word "substantiate" is used by the insurer within this subsection in relation to the "inventory" without any mention or suggestion that ownership must again be proven in order to qualify for coverage and payment of a claim.

[106] The acceptance of the interpretation of the scope of this proof of loss requirement, as urged by the defendant, would not promote a reasonable commercial result given that the contract of insurance was entered into on the

implicit basis that the plaintiffs, owned and had an insurable interest in the jewellery at the time they entered into the contract with the defendant. This is particularly so given that the defendant has acknowledged in this litigation that the plaintiffs had an insurable interest in the jewellery from the outset of the coverage. To interpret the proof of loss section, quoted above, as to require the plaintiffs to again provide proof of ownership and an insurable interest in the jewellery is entirely inconsistent with the language of the contract of insurance as a whole, the circumstances surrounding the entering into of the contract of insurance, the reasonable expectations of the plaintiffs and the reasonable commercial purpose of the contract.

[107] If the interpretation advanced by the defendant were accepted, the effect would be the complete exclusion from coverage of any claim for a jewellery loss where documentary evidence was unavailable as to ownership, after the insurer had premised its issuance of the policy of insurance on the basis that the applicant was the owner and had an insurable interest to be protected. Thus, the provision in question, if it was intended to exclude coverage, must be construed narrowly.

[108] Furthermore, although I do not conclude that the language in this provision is ambiguous, if it were so construed, the construction and

interpretation of this provision must be read most favourably having regard to the interests of the insured.

[109] Therefore, on considering the requirements of this specific paragraph and the language of the contract of insurance as a whole, I have concluded that proof of ownership, following a loss, when a proof of loss is being filed, is not a condition precedent or requirement that must be met before the insurer is obligated to honour a claim.

[110] In cross-examination, the defendant's insurance adjuster, Nick Tucci, acknowledged that in the circumstances of a claim like this, which involved two pieces of jewellery that were heirlooms, in that they were gifted to the plaintiffs by Truong's mother, no bills or receipts, as evidence of ownership, would likely be required by the insurer.

[111] Quite apart from the application of contractual rules of interpretation, courts have considered a practice often referred to as "retrospective underwriting" or "post-claim underwriting" in the interpretation of contracts of insurance in the claims adjudication process.

[112] Typically, post-claim underwriting occurs in life, health and creditor insurance cases and often involves alleged misrepresentations made by the

applicant for insurance coverage, which are not detected until a claim is made and a fulsome medical review of the applicant's medical history is undertaken.

[113] In the Court of Appeal decision in *Sagl*, the plaintiff claimed against her insurer as a result of a fire loss. As part of its defence, the insurer asserted that the insured had failed to disclose or misrepresented material information as to her ownership of the property in question and failed to disclose that several mortgages on the property were in default.

[114] Epstein J.A., although referring the matter back for a new trial, did agree with the trial judge's conclusion that "it runs contrary to the good faith obligation that the insurer owes to the insured for the insurer to agree to insure a risk, whether at the binder stage or at the time the policy is issued, when it knows or should know that there is information relevant to the risk that it does not have and that it did not even inquire into or that is incomplete, and then to raise the lack of information as a defence to a claim under the policy." See para. 62.

[115] It was further stated by the court that it was open to the trial judge to draw the inference that undisclosed matters, such as the ownership and mortgage status of the property, which were relied upon by the defendant insurer to avoid coverage, were not material to its decision to insure the property at the outset.

[116] Although the defendant in this action has not sought to void the policy of insurance and thereby deny liability based on material misrepresentations, the conclusion reached by Epstein J.A. is apt in the present case in that the only evidence as to what information the defendant required before it underwrote the insurance risk were the applications for insurance and the appraisals.

[117] Absent any evidence as to its underwriting of the plaintiffs' insurance coverage, I have concluded that it is open to me to find that, as no evidence of ownership was required by the defendant, apart from the plaintiffs' statements in their application for insurance and the appraisals, the question of ownership did not constitute a matter material to the defendant's decision to offer the insurance to the plaintiffs. Furthermore, as pleaded by the defendant in paragraph 8 of its statement of defence which reads in part: "…The Policy was issued on the basis that the Plaintiffs had an insurable interest in the scheduled jewelry articles." However, in paragraph 3 of the statement of defence it is stated: "[with] respect to paragraph 4 of the Claim, JM admits that it issued the policy as defined therein. However, JM has no knowledge whether the Plaintiffs truly own or have any insurable interest in the jewelry they insured."

[118] Thus, the defendant has not disputed the plaintiffs' assertion that they owned the jewellery, but it has simply taken the position that it does not know if they did.

[119] Apart from production of the application for insurance coverage, and correspondence from the insurer to and from the plaintiffs by letter or email at the time coverage was being applied for, no other evidence was introduced as to the defendant's underwriting process.

[120] It was urged on behalf of the plaintiffs that an adverse inference should be drawn against the defendant as a result of the absence of any evidence from a representative of the defendant, specifically with respect to its underwriting practices and procedures that were applied in granting the insurance coverage to the plaintiffs.

[121] An unfavourable inference can be drawn, when in the absence of an explanation, a party litigant does not testify at trial. Similarly, an adverse inference may be drawn against a party who does not call a material witness over whom they have exclusive control and does not offer an explanation as to the absence of the witness: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. at p. 386.

[122] While the decision not to call a representative of the defendant insurer left an evidentiary gap, especially as to the defendant's underwriting practices, as has been noted in the decisions of other courts, the expansive scope of examination for discovery may now generally serve to obviate the necessity or justification for the making of an adverse inference where a party litigant fails to

call a witness, especially on behalf of the corporate defendant. Also, to draw any adverse inference against the defendant for failing to call an underwriting witness would result, to some extent, in the shifting the burden of proof to the defendant.

[123] Furthermore, the court may still make the necessary findings and conclusions based on the totality of the evidentiary record adduced and from reasonable inferences that may be drawn from the evidence, or lack of evidence, without the need to draw an adverse inference.

[124] Therefore, I have concluded that it is not necessary to draw an adverse inference against the defendant as a result of its strategic decision not to introduce any evidence at this trial as to its underwriting or claims practices and procedures, as related to the plaintiffs insurance coverage.

[125] The plaintiffs also submitted in the alternative that the defendant should be estopped from denying the plaintiffs' ownership and insurable interest in the jewellery given the representations made by it when coverage was granted to the plaintiffs. It was urged that as the plaintiffs detrimentally relied upon the representations made by the defendant, the defendant should therefore be estopped from disputing their ownership of the jewellery.

[126] The doctrines of waiver and estoppel, if applicable, may give rise to equitable remedies. Both equitable doctrines must be expressly pleaded. Having

considered the statement of claim, there is no expressed plea of waiver or estoppel, and as such, I have made no determination as to the application of these equitable doctrines.

[127] Having concluded that the defendant did not regard the plaintiffs' ownership interest in the jewellery as a material issue for their underwriting assessment or alternatively having implicitly accepted that the plaintiffs owned the jewellery and in the absence of any evidence that the plaintiffs were requested to provide proof of ownership at the time they applied for the coverage as part of its claim evaluation process, the defendant cannot raise the absence of evidence of ownership as a defence to the plaintiffs' claim in this action: *Sagl*, at para. 62.

[128] Further, as acknowledged by the defendant's witness, Tucci, in the case of heirloom jewellery, documentary evidence of ownership may not be available and in such a case other evidence may be considered by the insurer when it maintains the position that proof of ownership is necessary on the submission of a claim. Thus, there may be circumstances where the defendant insurer would exercise some discretion, or "leniency" as defence counsel referred to it, as to the level of proof of ownership it would require.

[129] As will be considered further below, the defendant's good faith contractual obligation must be honoured when any discretion is exercised by it so

as to prevent the discretion from being used to "'create new, un-bargained for rights and obligations' or 'to alter the express terms of the contract'": *Wastech Services Ltd.*, at para. 130.

[130] Thus, I have concluded that the plaintiffs were not required, as part of the claims process, to prove again their ownership and insurable interest in the jewellery, when filing their proof of loss.

[131] It was implicit in the manner in which the insurance was offered and underwritten that the plaintiffs owned the jewellery and there is no expressed and clear statement in the contract that would lead any reasonable consumer reading the contract of insurance to conclude that, if and when a loss occurs, they must again prove to the insurer that they owned the jewellery in order to be entitled to coverage and payment of their claim. To conclude otherwise would allow the defendant to offer what has been referred to in legal academic literature as "phantom insurance", in that the insurance coverage the insured believed they had may not be real and recoverable from, as it would vanish upon the presentation of the claim.

[132] Furthermore, I have concluded that the defendant attempted to impose upon the plaintiffs' terms and conditions requiring them to prove their ownership of the jewellery which are not provided for on a reasonable reading of the contract of insurance. No such terms were agreed to nor bargained for when the

plaintiffs applied for the insurance coverage. Imposing such terms may constitute bad faith conduct and bargaining, and may give rise to liability for punitive damages.

[133] Despite my conclusion that, by the terms of the contract of insurance, the plaintiffs are not required to establish their ownership of the jewellery when the loss occurred and at the time of submitting their proof of loss, I will nevertheless consider the evidence of ownership that was adduced at trial.

[134] As noted already, the defendant's position is that the plaintiffs' evidence of ownership is at best inconclusive and that the evidence adduced on their behalf was contradictory in some respects and unreliable. Further, the defendant asserts that, in any event, the jewellery constituted contraband in that it was allegedly acquired by the plaintiffs by the use of funds [allegedly] unlawfully brought into Canada from Vietnam. As such, by the terms of the insurance contract related to contraband, it would be excluded from coverage.

[135] As to the *viva voce* evidence regarding the provenance of the jewellery, the evidence offered by the plaintiffs, and in particular, Nguyen, was at times confusing and contradictory.

[136] In considering the evidence offered by the two plaintiffs, generally where their evidence conflicted or did not coincide, I found the testimony of Truong to

be more credible and reliable on the more material aspects of the evidence as to the provenance of the jewellery. That is not to say that I found Nguyen to have been dishonest or misleading in her testimony, but rather she did not seem to have a clear recollection or memory of many of the relevant events, particularly with regard to the acquisition of the jewellery. She presented as a reluctant and anxious witness. Overall, she acknowledged that she left many things to her husband including decisions related to the purchase of jewellery.

[137] While demeanor plays only a minor role as one of the factors in evaluating credibility and reliability of a witness' testimony, Nguyen's nervous presentation as a witness leads me to the conclusion that she did not have a good recollection of events and in many respects her memory of events differed significantly from her husband. I did not find her evidence, either in examination-in-chief or cross-examination, to be evasive. In many instances, she had no memory of some of the important events; however, I cannot conclude that this was a strategy used by her to avoid answering questions posed to her.

[138] In the decision of *R. v. H.C.*, 2009 ONCA 56, at para. 41, Watt J.A. set out the basic principles to be applied where a court must examine and assess the credibility and reliability of witnesses:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrisey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514, at 526 (C.A.). [Citations added.]

[139] One recommended approach to the assessment and evaluation of the credibility and reliability of testimony suggests:

(a) consider the testimony on a "stand-alone" basis and whether it is inherently believable;

(b) if satisfied, consider the evidence's consistency with other witnesses and documentary evidence. Special consideration should be given to those witnesses who are independent;

(c) finally, the court should consider which version of events is most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable": *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 187.

[140] Apart from the diamond rings, Items A and B, which Truong testified were given to him and his wife by his mother, and which were insured by the defendant in the amounts of $205,000 and $51,000 respectively, the other four

pieces of jewellery were acquired by the plaintiffs over several years between their wedding in 1997 through to summer of 2009. Thus, the history of the provenance of the other four pieces of jewellery covers a period of approximately 12 years, which in total commenced approximately 17 years prior to 2014 when four of the six appraisals were obtained.

[141] Although he provided more detailed evidence as to the acquisition and appraisal of the jewellery as compared with his wife, there were times where Truong changed his evidence from what he had previously stated either on examinations for discovery or in the under-oath examination conducted pursuant to the terms of the policy of insurance.

[142] Despite Truong being, at various points, a poor historian as to the circumstances surrounding the acquisition of the items of jewellery and the arrangements for the appraisals, in the context of all of the evidence, documentary and oral as given by the plaintiffs and the witnesses called on their behalf, I have concluded that the events he testified about were reasonable and believable and on the balance of probabilities occurred as he described them.

[143] Following the loss of the jewellery, Truong met with the defendant's adjuster, Tucci, and was asked by him to visit the jewellery stores in Chinatown where the plaintiffs stated they had acquired the four pieces of jewellery, apart

from the heirloom items. No admissible evidence was introduced as to what transpired during the visits to the jewellery stores.

[144] During the examinations for discovery of the plaintiffs, they undertook to obtain from four different jewellery stores any records of purchases or trade-ins made by the plaintiffs. Only one jewellery store responded to letters sent by counsel for the plaintiffs, namely Minh Chau Jewelry. It responded through its legal counsel by a letter (Exhibit 11) dated April 11, 2016. Although this document was introduced as an exhibit without any limitations as to its use, I have concluded that the contents of the letter represent double hearsay and as such I have determined that the information contained in this letter is inadmissible for trial purposes. The information contained in the letter is offered by a lawyer apparently based on representations made to him or her by an unknown party and as such the letter has no evidentiary value.

[145] Similarly, the details of what may have transpired and what was said by unknown persons upon the visit to the jewellery stores by Truong, in the company of Tucci, are inadmissible as well, as hearsay evidence.

[146] It was submitted on behalf of the defendant that an adverse inference should be drawn against the plaintiffs as they did not call as witnesses any representative of the jewellery stores where they allege they purchased at least four pieces of the jewellery in question.

[147] There is no admissible evidence as to what transpired when Truong and the defendant's adjuster attended at the jewellery stores other than the adjuster's testimony that Truong stated that the persons in the jewellery stores were not telling the truth.

[148] I have concluded that the absence of witnesses from the jewellery stores does not represent a proper foundation for the drawing of an adverse inference against the plaintiffs.

[149] Firstly, there is no evidence as to the identity of any person within the jewellery stores who could have offered any evidence. It must also be noted that the evidence with respect to the timeframe during which the plaintiffs state they acquired the jewellery is lengthy and over several years.

[150] Further, there is no evidence that the persons spoken to by the adjuster and Truong were persons in charge of the stores or were the owners of the jewellery stores at any time.

[151] I have also concluded that it is reasonable to infer that any inquiry of the persons employed at the jewellery stores in respect of jewellery acquired by a cash payment and trade-up of other jewellery would be met with serious concern given the cash nature of the transaction, without any purchase documentation. I have further concluded that it is reasonable to infer that any shop owner

approached on this basis would be concerned about the taxation and legal ramifications arising from cash transactions not recorded and so they would be reluctant to provide any information in the circumstances.

[152] I have therefore concluded that this is not an appropriate case for the drawing of an adverse inference against the plaintiffs.

[153] As to evidence beyond the testimony of the plaintiffs that is supportive of their position that they owned the jewellery in question, 34 photographs depicting the plaintiffs, in various scenes and family gatherings, wearing jewellery, were introduced in evidence for the reasons provided in a mid-trial ruling.

[154] The photographs do provide some independent evidence which corroborates the plaintiffs' testimony as to ownership of jewellery that is similar in many respects to the jewellery depicted and described in the appraisal certificates.

[155] The photographs are of varying quality, and some provide better views of the jewellery than others. Some of the photographs are of lesser quality, however overall, in combination with the testimony of the appraisers, the evidence of the witnesses Bao Truong and Van Su Nguyen – the plaintiff Nguyen's brother and sister-in-law respectively – I have concluded on the

balance of probabilities that the jewellery depicted in the photographs is the jewellery owned by the plaintiffs and insured with the defendant.

[156] Several of the photographs were taken while the plaintiffs and their children were on a Caribbean cruise. The photographs depicted Nguyen wearing five articles of jewellery that are probably one and the same as the women's jewellery insured by the defendant. I have reached this conclusion based on the evidence considered below.

[157] Both Bao Truong and Van Su Nguyen, on examining the photographs of the plaintiffs on their Caribbean cruise, stated that they believed they had seen the plaintiff Nguyen wearing the same jewellery depicted in the photographs in the past. I found the evidence of these witnesses to be forthright and straightforward and without any embellishment or exaggeration whatsoever.

[158] Appraiser Stern testified that he had appraised the $205,000 diamond ring on July 22, 2014, and upon examining the ring depicted on the plaintiff Nguyen's left hand in the photograph at Exhibit 9 (H45 of CaseLines), he testified that the ring depicted looked similar to the one he had appraised.

[159] Appraiser Ho testified that he appraised four of the items of jewellery, namely the diamond earrings, diamond pendant, diamond bangle and a diamond

ring, three of which were appraised on September 5, 2014, while the diamond ring was appraised on February 20, 2009.

[160] When presented with the photographs of the plaintiff Nguyen, showing her wearing jewellery, Ho testified that the diamond bangle looked “very similar” to the item he had appraised. He also testified that the diamond pendant looked “very similar” to the pendant he appraised. Although the photograph of the diamond ring was somewhat blurry, he testified that the ring depicted in the photograph looked “very close” to the photograph in his appraisal certificate.

[161] The appraisers, Stern and Ho, both testified in a clear and forthright manner. Both readily acknowledged that they did not have a specific recollection of completing the certificates of appraisal; however, they explained their appraisal processes and confirmed the authorship of the certificates of appraisal and the accuracy of the appraised amounts. They both agreed that the appraised amounts were generally higher than what would be the wholesale value of the jewellery.

[162] On considering the whole of the evidence offered by the plaintiffs and despite their inability to provide supporting documentation evidencing their purchase of the pieces of jewellery other than the heirloom jewellery, and further taking into account their sometimes confused history of the provenance of their acquisition of the jewellery, I have concluded on the balance of probabilities with

the benefit of the independent evidence of the appraisers and the plaintiffs' relatives, and the photographs of the plaintiffs wearing jewellery, that the plaintiffs were in possession of, and owned, the jewellery that was insured by the defendant at the time of the loss.

[163] I have reached this conclusion recognizing that the certificate of appraisal of Haikush Novchadian, in respect of the jewellery Item B, the gentleman's custom-made diamond ring with a value of $51,000, was introduced into evidence, in accordance with my mid-trial ruling, for the purpose of narrative only and not as to the truth of the contents of the document. The evidence, however, is clear and uncontradicted that the defendant insurer accepted and relied upon all the certificates of appraisal as to value at the time it offered insurance coverage to the plaintiffs and when it issued the declarations as to coverage and the contract to the plaintiffs. Therefore, the policy issued by the defendant to the plaintiffs provided coverage for this item of jewellery at the value stated in the certificate of appraisal, and as such, given that the defendant acknowledges that no misrepresentations were made by the plaintiffs at the time of their application for coverage, I have found that coverage was granted to the plaintiffs for this item at the stated appraised value.

[164] In addition to the defendant's position that the plaintiffs have failed to prove on the balance of probabilities that they owned the jewellery and had

insurable interest in it, it is further asserted that their claim should be denied on the basis that the jewellery constituted “contraband”.

[165] As to the evidentiary basis for this assertion, both plaintiffs acknowledged that on travels from Vietnam to Canada they individually never brought more than $10,000 in Canadian currency into Canada from Vietnam, as they were aware from reading their customs declaration forms that they would be required to declare an amount in excess of $10,000.

[166] It was submitted on behalf of the defendant that in order to have sufficient funds to purchase or trade-up to acquire the jewellery in question, the plaintiffs would have had to bring into Canada funds in excess of $10,000 per person over the period in question. This submission is wholly speculative as there is no evidence upon which the court can reach this conclusion.

[167] Counsel for the defendant, in cross-examining the plaintiffs as to their possible failure to declare income received by the plaintiff Truong from a shrimp business in Vietnam that he operates in partnership with his brother, attempted to demonstrate that the failure to declare income to the Canada Revenue Agency represented evidence supportive of the defendant’s position that the jewellery purchased or acquired in Canada was therefore tainted by some form of illegality and therefore constituted contraband.

[168] Whether the plaintiffs have declared their income to the Canada Revenue Agency is a matter for that government agency and has no bearing on the interpretation of the exclusion with respect to “contraband” or the plaintiffs’ entitlement to coverage.

[169] The contract of insurance provides that – “Property Not Covered” – is stated as follows: “‘We’ do not cover contraband, or property in the course of illegal transportation or trade.”

[170] The word “contraband” in the Concise Oxford English Dictionary, 11th Edition, Revised, is defined as follows: “contraband –n. goods that have been imported or exported illegally--trade in smuggled goods.”

[171] Even if it were determined that the jewellery was purchased with funds that were in some way tainted or illegal because they were unlawfully brought into Canada, which I cannot conclude on the evidence adduced, there is no evidence whatsoever that the jewellery was imported or exported illegally or constituted smuggled goods. This basis for denial of the plaintiffs’ claim is completely unfounded on the evidence introduced.

[172] Furthermore, applying the rules of interpretation outlined above, there is no reasonable basis whatsoever upon which the court could accept the

defendant's interpretation of this exclusion in its attempt to defend its denial of coverage.

[173] The defendant further submits that in addition to the other defences raised, due to the plaintiffs' failure to cooperate with the insurer in its investigation of their claim, they have no right to coverage under the contract of insurance.

[174] The defendant submits that certain undertakings were given by Truong during his examination under-oath pursuant to the terms of the insurance contract, which testimony was incorporated into his evidence on discovery, by agreement of counsel and that those undertakings were not fully complied with.

[175] It was open to the defendant, as is the usual course, to bring a motion for an order directing that the plaintiff Truong comply with undertakings given on his examination for discovery. The alleged failure to cooperate within the litigation process does not constitute failure to cooperate within the context of the contract of insurance. The defendant had its remedies so far as any undertakings or refused questions were concerned, and simply did not pursue them. Thus, I have concluded that any alleged non-cooperation has no bearing on the plaintiffs' entitlement to pursue and recover damages in this action.

[176] The defendant raises a further contractual defence that having issued their statement of claim on March 3, 2016, the action was instituted prematurely.

There is no basis within the terms of the contract of insurance that supports this position. Furthermore, the defendant does not assert that the plaintiffs' action is in any way barred by reason of a breach of the contract of insurance or any statutory provision that would govern their claim.

[177] As already noted, no formal denial of coverage letter was ever issued by the defendant to the plaintiffs. The "Amendatory Endorsement – Canada", forming part of the contract of insurance, contained an amendment specifically related to Canadian insureds. In summary, it provided that no action against the insurer to recover a loss may be brought unless the terms of the policy had been complied with and until 60 days following the filing of a proof of loss, with the requirement that any action to be brought must be brought within 2 years after the loss.

[178] The plaintiffs' decision to institute this action within approximately one year from the date of loss does not make the action premature as asserted by the defendant. In any event, the defendant has not asserted that any legal consequence adverse to the plaintiffs should follow based on the date of issuance of their statement of claim. Furthermore, the defendant has failed to plead any breach or noncompliance with the terms of the contract of insurance relating to the date of institution of the action.

The Theft – Paras. [179] – [189]:

[179] It was submitted by the defendant that there are several factors which cast doubt on the legitimacy of the alleged jewellery theft, including the plaintiffs' reckless behavior in failing to take proper care of the jewellery.

[180] Although the assessment of credibility and reliability of the plaintiffs' evidence as to the ownership of the jewellery, as considered above, was core to my alternate determination that they had proved ownership, their credibility and reliability must be further evaluated within the context of the alleged theft, and the same level of scrutiny must be applied to this aspect of their case.

[181] In denying the occurrence of the theft of the jewellery, apart from the evidence as to the event as presented by the plaintiffs, the defendant submits that their account of the theft and the surrounding circumstances is illogical and they were reckless in their handling of the jewellery. Although the defendant provided a form letter to the plaintiffs with several security recommendations as to the safekeeping of insured jewellery, none of the recommendations set out in this letter formed part of the insurance contract. Any failure to follow the recommended safety steps does not constitute a breach of the policy terms and conditions.

[182] The plaintiffs both acknowledged that upon arrival in Can Tho City, in Vietnam, it was decided that the six pieces of jewellery would be carried in the plaintiff Nguyen's purse when they went out on the evening of the theft.

[183] Although their son remained at Truong's niece's home while they went out for the evening, and although it was acknowledged that her home was a safe place, they took the jewellery with them that evening.

[184] As to the option of storing the jewellery in a hotel safe, Truong testified that he believed that the use of a hotel safe was not secure and reliable, and so it was decided not to store the jewellery in the safe at their hotel.

[185] Following the theft, as noted above, the plaintiffs attended at a local police station the following day with Truong's niece, who provided a written statement to the police in her handwriting as to the theft, as described by Nguyen. That statement and a translation of it were entered into evidence. However, as noted, given the absence of the plaintiff's niece as a witness and further given the nature of the written statement as hearsay, the statement and its translation can only be accepted for the limited purpose as evidence as to the narrative and not as to the truth of its contents.

[186] While the plaintiffs' evidence as to their decision to carry the jewellery with them, which had a value in excess of $500,000, as they walked in the

streets of Can Tho City could be considered imprudent and negligent by many, when one considers the risks of leaving the jewellery at their hotel or the niece's home, on the whole of the evidence, and absent any evidence to the contrary, I have concluded that on the balance of probabilities the theft occurred as described. The evidence offered by the plaintiffs as to the theft of the jewellery was generally consistent and the narrative evidence of the filing of the police report and the report itself are to some degree corroborative of their testimony, although that documentary evidence has not been authenticated nor has the truth of the contents been established. The evidence relating to the report to the police is not in and of itself determinative of the question as to whether the theft occurred, but is just one consideration leading me to the conclusion that the theft occurred as described by the plaintiffs.

[187] One additional piece of evidence that was considered in reaching this conclusion was an online newspaper article from Thanh Niên News dated March 17, 2015, entitled: "Police Arrest Bag Snatchers Soon after Viet kieu Reports Case." This online news article was introduced into evidence as Exhibit #27 by counsel for the plaintiff during his cross-examination of Tucci as to his investigation of the plaintiffs' claim. This article was put to Truong during his under-oath examination pursuant to the terms of the contract of insurance.

[188] In summary, the article states that police in Ho Chi Minh City had arrested two suspects accused of approaching a female pedestrian standing on the sidewalk, as they drove by on a motorcycle, when one of the suspects grabbed the pedestrian's bag which contained cash of $7,700 USD, cell phones, a watch and some jewellery.

[189] This exhibit, which is a document that had been in the possession of the defendant, was introduced in evidence without objection by the defendant, however, again, it cannot be considered as to the truth of its contents given its hearsay nature. However, as it was a document in the possession of the defendant which it obtained during its investigation of the plaintiffs' claim, it is open to consideration as forming part of the narrative and background to the defendant's investigation and the state of mind of its adjuster. Notably, the occurrence referenced in the online article is stated to have occurred on March 5, 2015, with the theft involving the plaintiffs having occurred on March 7, 2015, in Can Tho City. Again, this evidence was not determinative in and of itself as to my finding that the theft had probably occurred as described by the plaintiffs.

Damages for Breach of Contract – Paras. [190] – [197]:

[190] For the reasons stated, I have concluded that the defendant breached the contract of insurance by failing to honour the plaintiffs' claim.

[191] As to how a claim would be honoured by the insurer, the contract of insurance provided that the insurer's coverage liability would be no more than the insurable interest of the property insured (see "How Much We Pay").

[192] Further, on settlement of a loss, where a claim is being honoured by the insurer, the Loss Settlement section of the contract in summary provides that, at the option of the insurer, it may (a) "repair, replace, or rebuild the 'covered property'; or (b) "settle based on the actual cash value of the 'covered property' at the time of loss".

[193] The proper measure of compensatory damages for breach of contract calls for the plaintiff being put in the position that he or she would have been if the breach had not occurred and their rights were observed: S.M. Waddams, *The Law of Damages*, Canada Law Book Looseleaf ed. Section 5.20.

[194] As a result of the defendant's breach of the contract of insurance, it is no longer entitled to exercise the options provided for in the contract as to the valuation and resolution of the loss with the plaintiffs.

[195] The contract of insurance is a contract which involves risk allocation and by entering into the contract with the defendant, the plaintiffs were purchasing peace of mind in respect of uncertain future events related to the property insured. As a result, I have concluded that the plaintiffs are entitled to a measure of damages that would restore them to their position had the loss not occurred, namely by the defendant paying to them the value of the jewellery as insured at the appraised values set out above.

[196] For the reasons outlined above, I have concluded as follows: (a) a reasonable interpretation of the contract of insurance and the surrounding circumstances, including the application process and evidence provided by the plaintiffs to the insurer at that time, does not support the defendant's position that despite acknowledging they had an insurable interest in the jewellery when the insurance was provided, they must, upon the happening of a loss, again prove ownership and an insurable interest; (b) alternatively, for the reasons expressed, I have concluded that in any event on the evidence as a whole, the plaintiffs have proven on the balance of probabilities that they owned and had an insurable interest in the jewellery at the time they sought the insurance coverage and at the time of the loss; (c) further, I have concluded that the theft of the jewellery as described by the plaintiffs probably occurred; (d) the proper measure of damages is the actual recorded value of each piece of jewellery as stated in the policy

declarations based on the certificates of appraisal as to value provided by the plaintiffs to the defendant.

[197] The plaintiffs also seek reimbursement of the premium paid by them to the insurer after the date of loss, in respect of which they have received no value. Five months of premium, in the total amount of $3,488.85 was paid by the plaintiffs, after the date of loss. As no expressed claim is set out in the statement of claim for repayment of the premium amount paid post-loss, no such award may be made.

Punitive Damages – Paras. [198] – [231]:

[198] Within the context of the findings of fact I have made and the contractual breaches by the defendant, which I have determined, I now turn to the plaintiffs' claim for punitive damages.

[199] As stated by Hourigan J.A. in *MacDonald*. at para. 67, insurance contracts are consumer contracts. Additionally, they are contracts of utmost good faith and the application of the good faith requirement to the interpretation of insurance contracts, has been held to redress the power imbalance in certain types of contracts, such as employment, landlord and tenant, and insurance contracts: *Bhasin*, at para. 44.

[200] Further, I have concluded that the insurance contract wording in this case is a standard form contract which I conclude was generally applicable to the

defendant's insurance coverage as placed in the United States. I reach this conclusion based on the fact that the contract of insurance with the plaintiffs contains an "Amendatory Endorsement – Canada", containing specific terms applicable to contracts entered into in Canada.

[201] As is generally the case, the defendant's contract of insurance is a standard form contract drafted by the defendant. There is no evidence that the plaintiffs had the ability to negotiate with the defendant as to any of the terms and conditions in the contract, and on its face it appears to be a standard form document not customized for the plaintiff's requirements. Therefore, I can reasonably infer that the contract was a standard form document which was unilaterally imposed upon the plaintiffs when they purchased their insurance.

[202] In addition to being a consumer contract of insurance requiring both the insurer and the insured to act with good faith, the contract also has a unique hallmark by its nature; namely, it is a "peace of mind contract". Although it was not a pre-contractual representation by the defendant, as already noted, in its letter to the plaintiffs of August 29, 2014, the defendant assured the plaintiffs that the contract was one offering "peace of mind".

[203] It is asserted on behalf of the plaintiffs that the defendant's conduct in denying their claim primarily based on their failure to produce evidence of

ownership of the jewellery, as part of their proof of loss, constitutes bad faith conduct that rises to a level warranting an award of punitive damages.

[204] The Supreme Court of Canada considered the proper purpose and objectives of an award of punitive damages and as to what conduct warranted the imposition of such an award.

[205] In *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, McIntyre J. for the majority, held that at para. 25, that punitive damages may be recoverable provided that the defendant's conduct gives rise to the claim itself as an actionable wrong.

[206] The requirement of an independent tort in order to advance a claim for punitive damages was modified by Binnie J in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 79, when he concluded that an actionable wrong as discussed in *Vorvis* did not require an independent tort. A breach of the contractual duty of good faith would qualify as an independent wrong so as to form a foundation for a claim of punitive damages. This was also reaffirmed in the Supreme Court's decision in *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 62.

[207] As to the nature and character of the bad faith conduct that may ground a claim for punitive damages, in *Whiten*, at para. 70, Binnie J. proposed a more nuanced analysis of the conduct required, where he stated:

> Fourth, the incantation of the time-honoured pejoratives ("high-handed", "oppressive", "vindictive", etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount. Lord Diplock in *Cassell*, *supra*, at p. 1129, called these the "whole gamut of dyslogistic judicial epithets". A more principled and less exhortatory approach is desirable.

[208] In its decision in *Fidler v. Sun Life Assurance Company of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 at para. 62, the court discussed the principles that govern the award of punitive damages stating that in cases of breach of contract, the breach must constitute a marked departure from ordinary standards of decency. Although subsequently modified, in part, by the court in *Honda Canada Inc.*, the court stated as follows at para. 62:

> In *Vorvis*, McIntyre J., for the majority, held that punitive damages are recoverable provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong". This position stood until 2002 when my colleague Binnie J., writing for the majority, dealt comprehensively with the issue of punitive damages in the context of the *Whiten* case. He specified that an "actionable wrong" within the *Vorvis* rule does not require an independent tort and that a breach of the contractual duty of good faith can qualify as an independent wrong. Binnie J. concluded, at para. 82, that "[a]n independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation." In the case at hand, the trial judge and the Court of Appeal concluded that Honda's "discriminatory conduct" amounted to an independent actionable wrong for the purposes of allocating punitive damages. This being said, there is no need to discuss the concept of "actionable wrong" here; this was done in *Whiten*. What matters here is that there was no basis for the judge's decision on the facts. I will therefore examine the facts and determine why punitive damages were not well justified according to the criteria in *Whiten*. I will also discuss the need to avoid duplication in damage awards. Damages

> for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.

[209] The duty of good faith resting on the insurer and its corresponding duty of fairness to the insured does not necessarily require the insurer to be correct in law in its denial of a claim. The mere denial of a claim that ultimately succeeds is not in and of itself an act of bad faith: *Ursanovic*, at para. 29.

[210] The objectives of an award of punitive damages include punishment for the bad faith conduct, and deterrence and denunciation of the wrongdoer's egregious conduct.

[211] In the circumstances of this case, the defendant's denial of the plaintiffs' claim, while it may in part be related to its general suspicion as to the validity of their claim, was principally based on its position that the plaintiffs could not offer sufficient proof of ownership and an insurable interest in the jewellery as of the date of loss.

[212] The defendant's position was simply that while the plaintiffs may have had an insurable interest at the inception of the coverage, once a claim was presented the plaintiffs then had to prove again their ownership and insurable interest in the insured jewellery.

[213] Thus, from the commencement of the insurance coverage to a point in time immediately before the date of loss, the plaintiffs had the insurance coverage and the peace of mind that they had bargained for. However, upon the happening of the loss, their insurable interest vanished according to the defendant's interpretation of its own insurance contract, thereby requiring the plaintiffs to once again establish ownership of the jewellery.

[214] At the time the insurance coverage was granted to the plaintiffs, in accordance with the terms of the contract of insurance, it has been admitted in the defendant's statement of defence that: "The policy was issued on the basis that the plaintiffs had an insurable interest in the scheduled jewelry articles."

[215] In receiving the plaintiffs' application for insurance in first instance and when the additional five items of jewellery were added by way of a Policy Change Declaration, the defendant made no request for any evidence of ownership, whether documentary or otherwise, from the plaintiffs.

[216] The defendant was prepared to bind coverage in favour of the plaintiffs in exchange for their payment of premium in the sum of $8,373.24, without documentary evidence of ownership in the jewellery.

[217] It was not until the plaintiffs' claim was submitted to the insurer that it required evidence of ownership, purportedly in accordance with the language of paragraph 3 (e) in the section of the contract entitled "Proof of Loss".

[218] For the reasons expressed above, I have concluded that the obligations of the plaintiffs after a loss do not include that they prove ownership of the jewellery when their proof of loss is submitted.

[219] The decision in *Sagl* is most apt in the circumstances of this case. Although this decision relates to claims arising from a fire loss, and although the matter was referred back for a new trial on specific issues, the court agreed with comments made by the trial judge regarding the insured's failure to provide proof of ownership of the property in question: see paras. 61-63.

[220] It was only after the plaintiffs sustained the loss forming the basis of their claim that the defendant sought to impose a new term upon them requiring documentary proof of ownership of the insured jewellery. This conduct by the defendant in evaluating the plaintiffs' claim is not what has been referred to as post-loss underwriting, but rather it constitutes the unilateral imposition of post-loss terms and conditions clearly not bargained for by the plaintiffs at the time they purchased the insurance. Applying the principles cited above as to the proper interpretation of insurance contracts, no reasonable interpretation of the

provision in question would lead an insured individual to conclude that when a loss occurs they must again prove their ownership of the items insured.

[221] It is most notable that the defendant did not require the production of “bills and receipts” demonstrating their ownership interest in the jewellery at the time it accepted the plaintiff’s premium.

[222] Furthermore, even if section 3 (e) were to be interpreted as requiring evidence of ownership at the time a claim was presented, the defendant’s adjuster agreed in his evidence that having regard to heirloom jewellery such as the two diamond rings, the insurer, on assessing the plaintiffs’ claim, would exercise some discretion and not require proof of ownership by way of bills and receipts.

[223] This is not a case where the defendant, based upon a possibly reasonable interpretation of its contract of insurance, which turned out to be incorrect in law, denied the plaintiffs’ claim. The defendant in this case put forward a purposeful and most unreasonable and unfair defence based on its completely untenable interpretation of the contract of insurance in an attempt to impose un-bargained for obligations upon the plaintiffs. This egregious and high-handed conduct warrants sanctioning by an award of punitive damages.

[224] Further, apart from my conclusion that section 3 (e) does not require proof of ownership after a loss, if the insurer purports to exercise some discretion as to the level of proof of ownership it requires, such discretion must be exercised in good faith. The defendant is not entitled to impose un-bargained for requirements upon the plaintiffs when a claim is presented and any conduct in doing so constitutes bad faith on the part of the insurer: *Wastech Services Inc*., at paras. 129-130.

[225] For these reasons, I have concluded that the defendant acted in bad faith in denying the plaintiffs' claim based on the imposition of post-loss un-bargained for obligations in the context of a peace of mind consumer contract of insurance.

[226] I find that the defendant breached its contract with the plaintiffs and that it's interpretation of the contract of insurance as to the plaintiffs' post-loss obligations is wholly unreasonable and constitutes a marked departure from ordinary standards of decency recognizing the nature of this consumer contract and the insurer's obligations as enunciated in the decisions cited above: see *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*, [2000] O.J. No. 866, at paras. 27-30.

[227] In my view the defendant's position on the post-loss requirements it attempted to impose upon the plaintiffs constitutes nefarious conduct. Its position

with respect to the plaintiffs' obligations under the terms of the contract were deceptive and entirely misleading to the plaintiffs and to any consumer when applying for insurance coverage with the defendant.

[228] The defendant is in the business of marketing and selling only jewellery insurance, at the consumer level, and as such, deterrence, punishment and denunciation must be paramount considerations in determining a proper and rational award of punitive damages.

[229] The amount of the award should further the core objectives of punitive damages, while representing a rational award at the lowest level that would serve the purpose of such an award.

[230] The defendant is an insurer based in the United States and it also carries on business in Canada. A finding of bad faith conduct by the defendant in this case should result in a salutary effect on the defendant's marketing and sale practices in offering this type of consumer insurance.

[231] As to proportionality and having regard to the overall award of damages to the plaintiffs in this action, I have concluded that punitive damages in the amount of $45,000 meets the objectives of this type of award and is also proportionate in terms of the amount at stake.

Conclusion – Paras. [232] – [233]:

[232] As determined, and for the reasons set out above, judgment shall issue in favour of the plaintiffs as follows:

(i) Damages in respect of the stolen jewellery in accordance with the terms of the contract of insurance in the insured values in the total amount of: $502,100;

(ii) Punitive damages in the amount of $45,000; and

(iii) Prejudgment interest to be determined.

[233] As to costs and prejudgment interest, counsel for the plaintiffs shall serve and file a bill of costs, along with submissions of no longer than 4 pages within 20 days from the date of release of these reasons. Submissions of a similar length shall be submitted on behalf of the defendant within 20 days thereafter. No reply submissions shall be delivered.

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Daley J.

Released: July 5, 2023

CITATION: Truong et al v. Jeweler's Mutual Insurance Company
2023 ONSC 4006
COURT FILE NO.: CV-16-00001037-0000
DATE: 2023 07 05

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DUNG TRUONG and THUAN NGUYEN

Plaintiffs

- and -

JEWELER'S MUTUAL INSURANCE COMPANY

Defendant

REASONS FOR JUDGMENT

Daley J.

Released: July 5, 2023