Date: 20240927
Docket: CI 19-01-21382
(Winnipeg Centre)
Indexed as: Swaine et al.
v. Intact Insurance Company
Cited as: 2024 MBKB 145

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

FREDERICK RONALD SWAINE and CATHERINE ISABEL SWAINE, plaintiffs,	)	Frederick Ronald Swaine Catherine Isabel Swaine on their own behalf
- and -	)	Thomas W. Percy Mason Warholik
INTACT INSURANCE COMPANY, defendant.	)	for the defendant
	)	Judgment Delivered: September 27, 2024

GRAMMOND J.

INTRODUCTION

[1] The plaintiffs seek judgment against the defendant pursuant to an insurance policy purchased in 2017 (the "Policy"). More specifically, the plaintiffs allege that a sinkhole developed under their residence in the River Heights area of Winnipeg (the "Property"), which caused sudden and immediate structural damage to their house. The defendant denied coverage on the basis of an exclusion clause in the Policy.

BACKGROUND

[2] The plaintiffs' two-storey house was constructed in 1929. Thereafter, a two-storey addition, including an attached garage, was constructed at the rear of the house (the "Addition"). The plaintiffs purchased the Property in 1975.

[3] In 1983, the plaintiffs discovered that the northeast corner of the house had dropped over a period of time. As a result, they retained an engineer to inspect the Property, who prepared a written report in 1984 (the "1984 Report"). The 1984 Report reflects that the front half of the house (which faces east) sloped towards the street at a gradient of about 5/16 inches per foot. The parties agree that, as such, the house had dropped by approximately 3 inches in elevation. Accordingly, the plaintiffs had four concrete piles installed to underpin the foundation at the front of the house (the "1984 Piles").

[4] In June 2017, the plaintiffs travelled to their cottage out of province for the summer, as they had done previously. On September 7, 2017, the individual responsible for checking on the Property during their absence reported a burst pipe on the second floor of the Addition, resulting in water damage to the house. Shortly thereafter, the plaintiffs initiated an insurance claim with the defendant. On September 11, 2017, a representative of the defendant attended at the Property and observed both structural and water damage to the Property.

[5] The Policy provided insurance coverage for "All Risks" subject to certain terms, conditions and exclusions, as follows:

> **SECTION I – PROPERTY COVERAGES**
>
> …
>
> **INSURED PERILS – Dwelling, Building, Additional Buildings and Loss of Use of Your Dwelling.**
>
> You are insured against All Risks of direct physical loss or damage to the property described in Coverages A and B subject to the exclusions and conditions of this policy.
>
> …
>
> **LOSS OR DAMAGE NOT INSURED – All Section | Coverages**
>
> We do not insure loss or damage:
>
> …
>
> 12. caused by snowslide, earthquake, landslide or any other earth movement. If any of these results in fire or explosion we will pay only the resulting loss or damage.
>
> 13. caused by settling, expansion, contraction, moving, bulging, buckling or cracking except resulting damage to building glass.

[6] On September 18, 2017, the defendant wrote to the plaintiffs and advised that there was no coverage for the loss, based upon the application of exclusions 12 and 13 set out above. Thereafter, the plaintiffs and their insurance broker communicated with the defendant regarding the denial of coverage. They took the position that the proximate cause of the damage was the "very hot and dry" weather in Winnipeg in July and August 2017, and tree roots, which gave rise to a "sudden and accidental" event that should be covered by the Policy.

[7] On April 23, 2018, the defendant provided to the plaintiffs a copy of a legal opinion that it received from its counsel (who was not counsel at trial), and advised the plaintiffs that the water damage to the Property would be covered under the Policy

pursuant to an exception to exclusion 13. The defendant maintained its denial of coverage for the structural damage to the Property.

[8] After the loss, the plaintiffs engaged a structural engineer, Mr. Fred Kemp, who gave recommendations to remediate the Property, including the removal of some cedar trees from the Property and the installation of 12 additional piles under the east, north, and south foundation walls (the "New Piles"). The plaintiffs accepted and followed these recommendations.

[9] In the late summer and early fall of 2018, a contractor excavated the Property, installed the New Piles, repaired the west foundation wall, and installed multiple steel braces. The plaintiffs claim $124,689.81 for the remedial work that was performed, and an additional $22,641.80 for repairs that have yet to be completed.

[10] In February 2019, the plaintiffs raised with the defendant for the first time the concept of a sinkhole, or subsidence[1], as the cause of the loss. In response, the defendant's counsel advised the plaintiffs that in ***Engle Estate v. Aviva Insurance Company of Canada***, 2008 ABQB 645, the court approved the following definition of "settling": "the gradual subsidence of a structure resulting from the condition of the ground".

[1] At trial and in the documents before me, the terms "sinkhole", "subsidence", "collapse", "caving", "deep soil consolidation" and "soil degradation at depth" were used to describe essentially the same concept. Throughout these reasons, I will use, in the main, the terms "sinkhole" or "subsidence" to describe that which the plaintiffs allege occurred at the Property.

[11] At trial, the plaintiffs disputed the denial of coverage for the structural damage, and argued that the loss was caused by a sudden occurrence, namely a sinkhole or subsidence, and not by settling.

[12] The defendant denied that there was a sudden occurrence such as a sinkhole, and maintained its position that exclusion 13 applied to the structural damage. The defendant also noted that earth movement is excluded from coverage pursuant to exception 12 of the Policy.

[13] In other words, the parties agree that the earth under the plaintiffs' house moved, giving rise to the loss, but they disagree on how, why, and how quickly that movement occurred.

ISSUES

[14] The main issue before me is whether the structural damage to the Property was covered by the Policy.

[15] I must also determine whether the defendant acted in bad faith in its handling of the claim, as alleged by the plaintiffs.

EXPERT EVIDENCE

[16] I will consider first the expert evidence called by the parties at trial.

Fred Kemp

[17] The plaintiffs called as a witness Mr. Kemp, who is a civil engineer with experience in structural engineering. After a *voir dire* at trial, and over the objections of the defendant, I qualified Mr. Kemp to give opinion evidence in structural engineering, and in particular, foundations and failures in foundations. He is not, and did not

purport to be, a geotechnical (sub-surface) engineer, although he testified that he took a course on basic soil engineering at university in the mid-1960's. He has since used that knowledge in residential inspections because it is unusual to have a geotechnical report in that context.

[18] Mr. Kemp testified that initially, he believed that the structural damage at the Property was caused by settling of the residence over time, which is typical of houses in Winnipeg. He also stated that in the River Heights area of Winnipeg in particular, houses will often dip or slope towards the street because moisture is drawn away from the house by trees on the boulevard, and that this issue can be exacerbated by traffic vibrations from the street.

[19] On October 28, 2017, Mr. Kemp advised the plaintiffs that:

> [T]he cedars and dry summer resulted in significant soil consolidation at depth[2] which with the vibration from road construction on Kingsway resulted in a dramatic settlement in the front half of your house and caused the house to pull away from the garage. As I said the soil matrix can provide on going support from progressive drying and then with some added vibration suddenly give way.

[20] Mr. Kemp testified that in 2018, after the remedial work at the Property began, he observed that the foundation walls of the house were cracked, and that the width of some of the cracks exceeded two inches, with the wall displaced. He also observed that tree roots were not present when the Property was excavated and the New Piles installed. Mr. Kemp did not complete any testing while the excavated area was open, and he did not observe any evidence of a sinkhole while the excavation was ongoing. Neither Mr. Kemp nor the plaintiffs' remedial contractor testified that they observed the

[2] At trial, Mr. Kemp testified that by "at depth" he meant approximately 10 feet underground.

1984 Piles to be in contact with the east foundation wall footing at the time of excavation for the remedial work.

[21] Mr. Kemp testified that in 2019, after the remedial work was completed, Mr. Swaine asked him to consider the cause of the loss, and provided him with a number of articles on the concept of subsidence, of which he was not aware previously. Mr. Kemp then conducted an additional review, and determined that subsidence was the only possible cause of the loss.

[22] Mr. Kemp's report dated May 2, 2019 provides that "the dramatic downwards movement at [the Property] has been caused by deep soil consolidation or caving that developed in 1983 and 2017. This phenomenon most likely occurred due to artesian water degradation of the glacial till layer." In other words, he concluded that the foundation movement was the result of subsidence or, put another way, "the development of a sinkhole in the soil stratum above bedrock".

[23] Mr. Kemp testified that in arriving at this conclusion, he assessed the plaintiffs' house by comparing how the structure performed both before and after the installation of the 1984 Piles. He learned that after the installation thereof, the front of the house moved downward an additional 3 ½ inches. Mr. Kemp expressed the view that the 1984 Piles should have stabilized the elevation and prevented further movement at the front of the house, though he acknowledged that the back of the house could have continued to shift up or down. Since the front of the house had settled almost 7 inches overall (3 inches before 1984 and 3 ½ inches after 1984), Mr. Kemp concluded that

something unusual was happening, and that the 1984 Piles did not work to stabilize the foundation.

[24] Mr. Kemp's report also reflects that the movement of the plaintiffs' house was not caused by it "settling under its own weight, or the drying out of the bearing soil due to exceptionally dry summers", because during the remedial work the soil below the basement floor was found to be "quite moist".

[25] Mr. Kemp testified that he was certain that there was soil degradation and consolidation below the 1984 Piles, at least 30 feet underground, because each of the plaintiffs' house, the 1984 Piles, and the soil dropped by 3 ½ inches. Mr. Kemp also opined that tree roots were not the cause of the problem, because the trees on the Property would have affected only the top 10 feet of the soil, above the natural water table.

[26] Mr. Kemp concluded that the plaintiffs' cracked foundation was caused by a sudden drop in the foundation due to subsidence. He explained that when one side of a foundation wall is losing support there will be structural redistribution to other locations until the weak spot can no longer bear the weight. Then, there is a sudden drop and a significant loss of support in one area of the wall, which is what he believes happened here. The foundation wall began to separate horizontally because of inadequate support underneath it, in one area compared to another. Mr. Kemp opined that although foundation cracking can be caused by soil pressure, shrinkage, or frost action, these factors did not apply in this case because the cracks were severe and indicative of structural collapse.

[27] Mr. Kemp attempted to illustrate the process of subsidence by providing a drawing of what he believes occurred underground at the Property, and at two other projects on which he worked in his career. One of the projects was a school that had settled in the early 1980s and required underpinning at one end of the building. Mr. Kemp consulted with a geotechnical engineer on that project who suggested that a sinkhole had developed under the ground. Having said that, no holes were drilled on the site and the school was later demolished.

[28] The second example advanced by Mr. Kemp was a water reservoir site in Winnipeg where underpinning was installed, despite which some of the support columns under each of two reservoirs settled between 4 and 6 inches. Mr. Kemp advised that the construction managers on that project "knew" that there had been aquifer water degradation of the till layer. It is unclear whether any soil investigation was conducted on that site.

The Defendant's expert evidence

[29] The defendant called two expert witnesses at trial: Mr. Gilbert Robinson, a geotechnical engineer, and Mr. John Wells, a structural engineer. Both Messrs. Robinson and Wells testified that the structural damage incurred at the Property was caused by settling, and that the existence of a sinkhole was highly improbable.

Gilbert Robinson

[30] Mr. Robinson is a civil engineer, with a Masters' degree in geotechnical engineering and 28 years of experience in Winnipeg. After a *voir dire* at trial, I qualified Mr. Robinson to give opinion evidence in geotechnical engineering.

[31] Mr. Robinson testified that in 2023 he was asked to prepare an opinion on geotechnical issues relative to the Property, after which he attended at the Property and observed the ground, including site drainage and vegetation. Mr. Robinson testified that mature trees can have a big impact upon the performance of shallow foundations, and that although there were not a lot of mature trees on the Property, there were some trees in close proximity to the plaintiffs' house.

[32] Mr. Robinson did not conduct a geotechnical investigation at the Property, and did not drill any holes. Having said that, he drilled a test hole a couple of blocks away where a new home was being built, and found that the soil moisture content at that location was below normal levels.

[33] Mr. Robinson concluded, and his report provides, that the movement of the foundation at the Property was:

> [D]irectly related to drying (i.e. shrinkage) of the clay soil that is present at the site. Many homes and shallow surface features (e.g. sidewalks, pavements) have been affected in Winnipeg over the years since the City of Winnipeg was developed, mainly during periods of dry weather and since 2012 (approx.).

[34] His report also provides that:

> Factors impacting the magnitude of shallow foundation and floor slab movements include deep rooted trees and climatic (e.g. droughts, excess moisture) effects which can impact changes in the sub-soil moisture conditions. A general rule of thumb is that root systems from trees will extend radially outward by a distance that is about 1 to 1.5 times the height of the tree. The

> large deciduous trees located near the northwest and southeast corners of the [Property] and along the boulevard are estimated to be about 50 feet tall which suggests the root systems will extend under much of the building.

And that:

> The dry weather conditions encountered since 2012 and culminating with a severe drought in 2021 have likely resulted in drying and shrinkage of the clay soil below the building as the tree roots have drawn moisture from these areas.

[35] Mr. Robinson's report reflects, with respect to Mr. Kemp's report, that:

> As a Geotechnical Engineer with over 28 years of experience in Winnipeg and extensive experience with building foundations, I disagree with the conclusions of Mr. Kemp regarding the cause of the building movements. I have never observed the development of a sinkhole as described by Mr. Kemp and this "phenomenon" was not investigated and proven out by undertaking a geotechnical investigation. If the building, including the 1983 underpinning piles, had been affected by a sinkhole then installation of new/more underpinning piles in 2019 would not be feasible and the new piles will eventually be affected by the sinkhole.

[36] At trial, Mr. Robinson testified that he has neither experienced nor hypothesized artesian water degradation of the glacial till layer as referenced in Mr. Kemp's report. He acknowledged that there is ground water (artesian aquifer) in the bedrock, and that if one drills into the bedrock, that water can rise up to 20 – 25 feet below the ground surface and flow laterally. In other words, while a sinkhole can occur, he is not aware of any that have formed in Winnipeg, which could be determined by drilling test holes.

[37] Mr. Robinson also testified that it is unclear whether there was differential vertical movement of approximately 6 ½ inches at the front of the plaintiffs' house as they assert, because unless there was a permanent benchmark to which movement was compared over time, it is difficult to say what the total amount of movement might have been. He agreed that the 1984 Piles would have stopped the house from falling

forward, but he stated that the rest of the structure could have moved because the footings of the foundation walls remained on clay soil, the moisture content of which will change seasonally.

[38] Mr. Robinson acknowledged that the expansive clay soils in Winnipeg can cause movement in the range of 6 to 12 inches, but that the timeframe of that movement can vary widely. In addition, he stated that trees do not necessarily draw moisture from the ground consistently or uniformly, and that ground conditions can be different from one spot to another.

John Wells

[39] Mr. Wells has a PhD in structural engineering and has been a practising engineer in Winnipeg since 1990. After a *voir dire* at trial, I qualified him to give opinion evidence in structural engineering and building failure.

[40] Mr. Wells observed the Property together with Mr. Robinson in 2023, after the remedial work was completed. He provided a report setting out his opinions on the probable cause of the foundation displacement at the Property, and the opinions expressed by Mr. Kemp. Mr. Wells opined that the cause of the foundation displacement at the Property was long-term shrinkage in the underlying clay due to a loss of moisture, and not artesian or groundwater effects in the soil as stated by Mr. Kemp.

[41] Mr. Wells testified that the plaintiffs' house was constructed on a standard concrete foundation wall, which presumably rests upon a strip footing, and that the concrete walls likely were not reinforced, although no radar or invasive testing was

done. More specifically, the weight of the two-storey, wood frame house rests upon the foundation walls, which in turn rest upon the underlying clay soil. This type of foundation system is characterized as a shallow foundation, which is generally vulnerable to changes in soil moisture content, causing both rising and falling of the structure over time.

[42] Mr. Wells testified that he observed large deciduous trees in close proximity to the foundation of the Property. He noted that the River Heights area of Winnipeg has highly moisture sensitive clay soil, and that there is a well-established cause and effect between the movement of houses on shallow footings in that area and the close proximity of houses to large deciduous trees.

[43] Mr. Wells noted that he would not have recommended the installation of the 1984 Piles at the front of the plaintiffs' house only, because the effect of that underpinning was to lock that side of the structure in place. Since the moisture content of clay soil is dynamic, not static, the other sections of the foundation would have been free to move more freely than the side with underpinning.

[44] Mr. Wells also stated that in the 1980s, Winnipeg experienced a cumulative drought and many foundations settled. Thereafter, in the 1990s, soil moisture returned, and structures were raised up because the soil pushed up footings underground. Mr. Wells opined that as the clay soil swelled, both the back and the sides of the plaintiffs' house could have risen up, causing structural damage. He acknowledged the possibility that the east side of the house lifted off of the 1984 Piles because there was no tensile connection between those piles and the foundation.

[45] Mr. Wells accepted that the plaintiffs' house may have experienced differential movement of 6 ½ inches over time, but he rejected the assertion that the south-east corner necessarily dropped by that amount, because they did not use a constant benchmark in their measurements. In addition, Mr. Wells stated that the movement of structures is not uniform. The nature of movement depends upon the soil moisture content, the location of trees, and tree root projection. As such, different sides of a structure can move differently. Here, it is possible that the south-west corner of the plaintiffs' house heaved and moved up relative to the north-east corner, which suggested to the plaintiffs that the north-east corner dropped when it did not do so.

[46] Mr. Wells testified that in over 30 years, he has never seen a sinkhole in Winnipeg, though it is possible that one could occur. He has also never seen structural displacement caused by a sinkhole. Instead, it has always been caused by soil desiccation. He also stated that it was possible, though improbable, that the 1984 Piles displaced downwards.

[47] Having said that, Mr. Wells stated that sudden, downward movement of a structure is not uncommon because desiccation of the clay on an ongoing basis will cause a continuing loss of support of the footing, such that eventually the concrete fails and drops suddenly. In other words, shrinkage or settlement of the clay over a period of time will eventually result in the sudden, downward movement of a foundation wall. This is so because structural displacement is resisted through load redistribution in the structure until a section of the structure can no longer support the imposed loads and a sudden displacement occurs. He described this process as a "creep to failure", the

timing of which is unpredictable. Mr. Wells concluded that this process was the probable cause of the displacement and structural damage to the plaintiffs' house.

[48] Mr. Wells testified that a large horizontal crack in a foundation wall can be caused by a tensile failure, not necessarily by hydrostatic stress from the exterior. Here, the large horizontal crack in plaintiffs' foundation that Mr. Wells observed in a photograph looked like it dropped down and separated. He postulated that if the west side of the plaintiffs' house heaved upward, it could have been torn from the grade beam that supports the garage.

THE LAW

[49] The leading case on the interpretation of insurance contracts is ***Consolidated-Bathurst v. Mutal Boiler***, 1979 CanLII 10 (SCC), where the court stated, as a general rule, that effect must be given to the intention of the parties at the time they entered into the contract, and that their intentions should be gathered from the words they used in the contract.

[50] In ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, 2010 SCC 33, the court stated, in keeping with the principles set out in ***Consolidated-Bathurst***, that:

> [22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can

> be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> [24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

[51] With respect to the application of exclusion clauses and the onus of proof, the court in ***Kravetsky v. Dominion of Canada General Insurance Co.***, 1994 CanLII 16926 (MBKB), 96 Man. R. (2d) 238, (appeal dismissed), stated:

> [12] Under a comprehensive policy of insurance, an insured must simply show that the loss was a result of a casualty; i.e., not an inevitable event such as wear and tear. The onus then shifts to the insurer to show it is clearly excluded.

[52] The insurance claim in ***Kravetsky*** involved the movement of concrete slabs, which the court found was slow movement and was, by definition, "settling" pursuant to the applicable insurance policy, regardless of whether the cause of the settling was consolidation, drought, or the absorption of water by tree roots. In other words, the language of the exclusion clause did not limit "settling" to certain causes. The court concluded that the damage was not caused by a sudden occurrence or collapse.

[53] In ***Tomko v. Wawanesa Mutual Insurance Co. et al.***, 2007 MBCA 8, the court stated that all of the words in an exclusion clause should be considered together, and concluded that an exclusion clause applied in that case, because the damage at issue was caused by normal wear and tear and natural causes.

ANALYSIS

[54] The Policy provided coverage to the plaintiffs for all risks of direct physical loss or damage to the Property, subject to the exclusion clauses and other conditions in the Policy. Having said that, as set out in ***Kravetsky*** and ***Tomko***, the plaintiffs must establish that the loss was the result of a casualty, and not an inevitable event such as wear and tear.

[55] The plaintiffs submitted that although subsidence is not a common occurrence in Winnipeg, it is the most logical cause of the structural damage at the Property, because there was a sudden collapse at the north-east corner of house after the 1984 Piles were installed. The plaintiffs acknowledged that no-one knows for certain what happened at the Property or why it happened, and that there could be other explanations or theories as to what occurred. The plaintiffs submitted that subsidence is a peril that was covered by the Policy.

[56] The defendant accepted that the Policy provided broad coverage to the plaintiffs, to be narrowed by the application of exclusion clauses. The defendant also accepted that if the plaintiffs established a loss that arose from an accidental, fortuitous, or unplanned event, the burden would shift to the defendant to show that the loss falls within one of the exclusions, to be interpreted narrowly. The defendant conceded that the movement of the structure at the Property was unplanned, but given the history of the Property it did not concede that the movement was unexpected.

[57] There is no question that the house on the Property moved over a period of decades. The 1984 Report reflected that there was movement of the front wall of the house, together with "differential movement as to the attached garage and the house". The 1984 Report also reflected that "up to 1979, the 50 odd years since construction had produced appreciable foundation movements without causing serious damage to the upper part of the house". The engineer who authored the 1984 Report described the movement as "settlement", and the plaintiffs did not disagree with that characterization at the time. In addition, as recommended by the engineer in 1984, Mr. Swaine watered around the house every year to replace moisture in the soil.

[58] The 1984 Report also reflected that a disadvantage to installing the 1984 Piles would be that only part of the foundation would be stabilized, which would cause stress to the other parties of the foundation that would continue to "float". Mr. Swaine testified that after installation of the 1984 Piles, the house continued to experience seasonal movement. More specifically, the joint between the Addition and the main part of the house would separate approximately ¼ of an inch in the summer, and then come back together in the winter.

[59] The plaintiffs argued that unlike the issues they experienced prior to 1984, the damage incurred in 2017 was caused by a sudden, dramatic collapse. They advised that the most visible exterior damage in 2017 was significant cracking at the connection between the house and the Addition. At trial, Mr. Swaine was reluctant to acknowledge that a large, horizontal crack on the south exterior wall of the Addition, that had been patched previously, appeared between 1984 and 2017. Mrs. Swaine testified that she

did not remember when that crack occurred, but she agreed that it was most likely after 1984 and before September 2017.

[60] I note Mr. Kemp's initial view that the structural damage at the Property was caused by settlement over time. In addition, both the plaintiffs' remedial contractor and their insurance broker expressed the same view in 2017. It is clear that the plaintiffs took no issue with that assessment at the time. At trial, Mr. Swaine acknowledged that Winnipeg soil can be unpredictable and can cause movement of structures.

[61] Mr. Swaine testified that the plaintiffs changed their position as to the cause of the loss when Mr. Kemp had a "good look" at the core samples that the remedial contractor took while performing the remedial work. The plaintiffs then came to believe that the structural damage was caused by subsidence. The plaintiffs' evidence on this point differs from that of Mr. Kemp, who testified that Mr. Swaine provided him with articles on subsidence, and that he was not familiar with that concept previously. In other words, according to Mr. Kemp, it was not he but the plaintiffs who brought forward the concept of subsidence. I accept Mr. Kemp's evidence on this point, and I also accept his evidence that the plaintiffs asked him for a report stating that the movement at the Property was caused by subsidence. It was after these exchanges with the plaintiffs that Mr. Kemp changed his position on the cause of the structural damage and provided the written reports upon which the plaintiffs relied at trial.

[62] Having said that, Mr. Kemp's evidence on these points is cause for concern, because the law is clear that an expert witness must conduct themselves in an impartial, independent, and unbiased manner. In ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, the court stated that:

> [10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence.…

And that:

> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

[63] In this case, I have concluded that the plaintiffs led Mr. Kemp towards the concept of subsidence and asked him for a report reflecting that conclusion, which impacts both the impartiality and independence of his opinion, and diminishes the weight that I can attach to his opinion.

[64] The defendant argued that Mr. Kemp's opinion may have been biased because he knew the plaintiffs for many years prior his retainer in this matter, and had performed some engineering work for Mr. Swaine's mother in the past. In my view, while this pre-existing relationship may have contributed to the fact of Mr. Kemp's retainer and the manner in which their communications unfolded, that factor alone does

not impact the weight to be attributed to Mr. Kemp's opinion. Experts are required to be impartial, independent, and unbiased, but not necessarily strangers to the parties.

[65] There is, however, another issue that impacts the weight of Mr. Kemp's opinion, namely that he is not a geotechnical engineer. That is not to say that he has no knowledge of geotechnical issues, because I accept that certain concepts applied in structural engineering will necessarily overlap with those applied in geotechnical engineering. As a result, I would imagine that individuals with expertise in either of those disciplines would necessarily acquire some knowledge in the other discipline. In this case, Mr. Kemp testified that he spoke to three geotechnical engineers to inform his opinion that a sinkhole developed at the Property, but those individuals were not identified and did not testify at trial. Certainly, these factors diminish the weight that I am prepared to attribute to Mr. Kemp's opinion, particularly as it relates to soil conditions at the Property, and the impact, if any, of tree roots upon soil moisture content.

[66] I note also that although Mr. Kemp's report reflects that there was deep soil consolidation or caving at the Property in each of 1983 and 2017, the 1984 Report does not reflect that these issues occurred in 1983. Mr. Kemp testified that he based his opinion in this regard upon there being two instances of foundation movement at the Property. I cannot conclude, however, that Mr. Kemp could be better positioned in 2019 to discern what occurred at the Property in 1983, than was the engineer who prepared the 1984 Report. In other words, Mr. Kemp's putative conclusion with respect

to what occurred at the Property in 1983 is an overreaching and unsupported statement.

[67] I note also Mr. Kemp's evidence that the plaintiffs asked him to determine the cause of the structural damage in 2019, after the remedial work was completed. It is clear that no investigation was conducted at the Property while the remedial work was ongoing. Moreover, it is clear that no-one took soil samples at the Property either prior to or during the performance of the remedial work. Surely, the logical time to conduct an investigation was while the Property was being excavated and the New Piles installed, but this was not done. In fairness, while the remedial work was ongoing, the plaintiffs' theory that a sinkhole caused the loss had not yet been developed, and everyone involved appeared to accept that the structural damage was caused by the settlement of the foundation.

[68] Mr. Kemp acknowledged that although he oversaw the remedial work in 2018, he did not see any evidence of a sinkhole at the Property at that time. He took no photos or notes while the work was ongoing and maintained no other records of his attendances at the Property. On the basis of the foregoing, the fact that Mr. Kemp oversaw the remedial work does not enhance his opinion that a sinkhole caused the structural damage. In fact, the value of his firsthand observations of the Property in 2019 is similar to those of the defendant's experts who attended the Property in 2023.

[69] Mr. Kemp maintained, nevertheless, that there was soil consolidation at depth on the Property, because the plaintiffs' house, the 1984 Piles, and the basement all dropped together, which is unusual. As such, the only logical conclusion was

consolidation at depth, which he testified was an "irrefutable" conclusion. Having said that, Mr. Kemp acknowledged that he does not know what actually happened at depth at the Property.

[70] I do not accept Mr. Kemp's assertion that each of the house, the 1984 Piles, and the foundation dropped together. There is simply no evidence that this occurred, and conversely, the evidence before me suggests otherwise, including: the 1984 Report, the plaintiffs' admissions that there was ongoing movement of the structure from 1984 to 2017, and the evidence of both Mr. Kemp and Mr. Wells that where part of a foundation wall is losing support there will be a structural redistribution until it can no longer bear the weight, resulting in a sudden drop and a significant loss of support in one area of the wall.

[71] I also reject the plaintiffs' position that by 2017 their house had dropped by 6 ½ inches at the north-east corner. The plaintiffs did not provide survey data on the performance of the house between 1984 and 2017, and they do not appear to have used a constant benchmark when they attempted to measure the movement of the structure.

[72] I have also considered the moisture content of the soil at the Property. The plaintiffs noted that when the remedial work was performed, the remedial contractor used a large, air-operated auger to drill holes for the New Piles. There is a photograph in evidence that shows the auger after it had been in the ground, full of what appears to be mud. The contractor's representative who testified at trial stated that water is not pumped down to lubricate or assist the auger, but that a little bit of water may be used

at the outset to start the drilling process, which was done in this case. He also stated that the cores removed from the ground were moist and flexible all the way down, which was not caused by the water used at the outset of the drilling process. After reviewing the same photograph, Mr. Kemp testified that the soil would not have stuck to the auger if it was dry, so he concluded that it was moist.

[73] I have concluded that over the years there were changes in the soil moisture content at the Property, as would have been the case in Winnipeg generally. The only evidence before me with respect to the soil moisture content at the Property from 2017 to 2019 are the photographs taken while the remedial work was being performed, including the photograph of the auger, because neither the plaintiffs nor the defendant took any soil samples or conducted any investigation into the soil moisture content at the material time. Because no details of the soil moisture content can be discerned from a photograph, I am not prepared to attach much weight to the photograph.

[74] It is clear that there were large, deciduous trees near the plaintiffs' house, which Mr. Robinson opined caused soil desiccation at the Property. Mr. Wells opined that these conditions in turn caused a continuing loss of support of the footings or a "creep to failure" as described above, such that parts of the foundation failed over time, leading to a sudden drop. I accept that this process took place over a period of years, culminating in a sudden event.

[75] For all of the foregoing reasons, I reject Mr. Kemp's opinion that subsidence was the cause of the structural damage to the Property. I am satisfied, on a balance of

probabilities, that the cause of the damage was soil desiccation and a resultant loss of foundation support as opined by Messrs. Robinson and Wells.

[76] I have not concluded, however, that the plaintiffs' loss was the result of an inevitable event or wear and tear. The loss was an unplanned and unexpected casualty, and constituted direct physical loss and damage to the Property. As such, the plaintiffs have met their onus as referenced in ***Kravetsky***, and the defendant bears the onus of establishing that the loss is excluded by the Policy.

[77] At trial, the defendant did not maintain its reliance upon exclusion 12. As referenced above, in April 2018 the defendant's counsel advised that exclusion 12 did not apply to the plaintiffs' claim because it was intended to apply to dramatic and cataclysmic earth movement events such as snowslides, earthquakes, and landslides. Given my factual finding that there was no sinkhole at the Property, I have not considered, and will not comment upon, whether such an event would be considered "earth movement" to which exclusion 12 would apply.

[78] I will consider, then, the application of exclusion 13.

[79] The plaintiffs argued that they were unable to understand the meaning of exclusion 13 because its language is ambiguous, which should be construed against the defendant pursuant to the doctrine of *contra proferentum*. The plaintiffs pointed to ***Pavlovic v. Economical Mutual Insurance Co.***,[3] 52 BCAC 98, where the court found that an exclusion clause was ambiguous because it was unclear whether it would

[3] ***Pavlovic*** was followed by the Manitoba Court of Appeal in ***Rivard v. General Accident Assurance Co. of Canada***, 2002 MBCA 70, although in that case the court found that the exclusion clauses at issue were clear and unambiguous.

apply to a loss "where seepage or leakage is a 'contributing cause', as opposed to the only cause" of the loss".

[80] The plaintiffs also submitted that they asked the defendant to define certain terms used in the Policy, including "settling", because that word was not defined in the Policy itself.

[81] As the defendant's witnesses testified, when a word is not defined within a policy, it will consult other resources to interpret that word including: its management staff or consultants, previous insurance claims, the drafters' intended meaning of the words used, or the dictionary.

[82] I appreciate that many of the words used in the Policy are not defined within it, but the law does not require that an insurer or other contracting party define every word used in a contract. Similarly, insurers are not required to utilize standardized definitions across the insurance industry as the plaintiffs suggested should be done. Contracting parties, including insurers, are generally free to use whatever contractual language they see fit.

[83] The plain language of exclusion 13 reflects that a loss caused by settling or moving is excluded from coverage, which is similar but not identical to the language of the exclusionary clause considered in ***Kravetsky***. In ***Kravetsky***, the trial judge concluded that the exclusion clause was not ambiguous, and stated that "it is difficult to imagine language which would be clearer". I agree. The plain meaning of the words used in exclusion 13 is clear. As Mr. Kemp testified, engineers will generally

characterize downward movement of a home as "settling", and that is what is meant by that word in that clause.

[84] For all of the foregoing reasons, I have concluded that the wording of exclusion 13 is not ambiguous, such that there is no need to apply the doctrine of *contra proferentum* to my interpretation of the Policy.

[85] I have also considered the intentions of the parties to the Policy.

[86] As the defendant noted, the plaintiffs and their witnesses used language similar to that found in exclusion 13 in their evidence at trial. In addition, in 1984 the plaintiffs encountered a similar situation at the Property, but they did not file an insurance claim at that time, or thereafter when cracking of the structure continued. As such, considering the history of the Property, I agree that the plaintiffs knew or ought to have known that they did not have insurance coverage for structural damage caused by settling or moving.

[87] I have also considered the steps taken or not taken by the plaintiffs in and after the loss in 2017. From 2017 and into 2018 they appear to have agreed with Mr. Kemp, the remedial contractor, and their insurance broker that the loss was caused by settlement. It was only after completion of the remedial work that the plaintiffs changed their view and argued that there was a sudden collapse caused by a sinkhole. That position evolved into the theory of subsidence that they advanced at trial. To their credit, the plaintiffs acknowledged that settling is not covered under the Policy because of the application of exclusion 13.

[88] I note that in ***Engle Estate v. Aviva Insurance Company of Canada***, 2010 ABCA 18, the court found that the exclusion clause was meant to exclude damages for passive, gradual, and naturally occurring events, and that this interpretation was consistent with the reasonable intentions of the parties. In other words, the exclusion clause applied to naturally occurring settlement, but not settlement that occurred due to an unexpected, fortuitous event. The court stated "given the almost inevitable nature of settlement, it is understandable that an insurer would intend to exclude it and that an insured would not expect such naturally occurring settlement to be covered".

[89] In ***Kravetsky***, the court concluded that the exclusion applied, because:

> [13] … The cause of the damage cannot be characterized as a collapse. It was not a sudden occurrence. The concrete slabs slowly sunk down from their proper level. That, by definition, is settling… Whether the settling was caused by consolidation, drought or the absorption of water by tree roots is immaterial. The language of the exclusion clause does not limit the settling to certain causes.

[90] In this case, and having found that the integrity of the plaintiffs' foundation diminished over time, I have concluded that the loss experienced at the Property was caused by "settling" or "moving" and falls directly within the language of exclusion 13. The fact that the foundation failed slowly, followed by a sudden drop in September 2017 does not change that conclusion, because exclusion 13 does not speak to the speed of the settling or moving in a given case. I echo the comments of the court in ***Kravetsky*** that the cause of the settling is immaterial because the language of the exclusion clause does not limit its application to specific causes only.

[91] I reject the plaintiffs' submission that the term "settling" should be limited to downward movement within the first ten years of a building's life, on the basis of a definition apparently utilized by Zurich Insurance Group in its insurance policies[4].

[92] I also reject the plaintiffs' argument that the Property experienced "differential foundation movement" that is not subject to the exclusion clause. Exclusion 13 clearly applies to "moving", regardless of the nature thereof.

[93] Accordingly, I have concluded that the defendant has established that exclusion 13 applies to the plaintiffs' claim, such that coverage does not extend to the plaintiffs' loss.

BAD FAITH

[94] In ***Fidler v. Sun Life Assurance Co. of Canada***, 2006 SCC 30, the court considered the obligations of an insurer to deal with an insurance in claim in good faith. At paragraph 63, the court quoted the legal standard to which insurers are held as it was set out in ***702535 Ontario Inc. v. Non-Marine Underwriters Members of Lloyd's London***, 2000 CanLII 5684 (ONCA), [2000] O.J. No. 866, as follows:

> 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

[4] At trial, the plaintiffs attempted to enter into evidence a Zurich Insurance Group document reflecting a definition of "settling". I did not permit the document to be entered as an exhibit.

> claim. Mere denial of a claim that ultimately succeeds is not, in itself, an act of bad faith.

[95] In ***3746292 Manitoba Ltd et al v. Intact Insurance Company et al***, 2018 MBCA 59, the court stated that: "even-handedness in the claims-handling process means that an insured is not an adversary; the insured is entitled to correct information, a fair interpretation of the policy, a timely and balanced assessment of the claim based on its objective merits, and prompt and full payment of a valid claim".

[96] The plaintiffs allege that the defendant committed the following acts of bad faith when handling their claim:

a) the defendant sent an adjuster to the Property to observe the damage. It did not send an engineer to the site until 2023;

b) the defendant did not send anyone to inspect or investigate the site or take a soil sample before the remedial work was completed;

c) the defendant did not send anyone to inspect the remedial work performed by the plaintiffs' contractor;

d) the defendant did not recognize the opinions of the defendant's insurance broker that coverage should be extended to the plaintiffs;

e) the defendant did not recognize subsidence as the cause of the loss or accept Mr. Kemp's opinion on that issue;

f) the defendant refused to define words used in the Policy, including "settling", advised the plaintiffs to ask their broker for a definition of the term, and then rejected the broker's opinion;

g) the defendant ceased communication with the plaintiffs in March 2019; and

h) the defendant has continued to include exclusion 12 in its insurance policies.

[97] I am not satisfied that the defendant's conduct amounts to bad faith, because:

a) the defendant handled the claim promptly;

b) the defendant treated the plaintiffs respectfully;

c) the defendant appears to have considered the claim carefully, and with regard to the relevant factors;

d) there is no evidence that the defendant considered any improper factors in denying the claim;

e) when the plaintiffs challenged the denial of coverage, the claim was reviewed by multiple individuals with the defendant's hierarchy, including the Coverage Committee, a claims consultant, and the Ombudsman;

f) in April 2018, the defendant changed its position with respect to the water damage and extended coverage to the plaintiffs, which confirms that the defendant continued to consider the merits of the claim on an ongoing basis;

g) the defendant conducted itself in a transparent manner by, among other things, sharing with the plaintiffs the legal opinion that it obtained with respect to coverage;

h) the defendant communicated with the plaintiffs on an ongoing basis from September 2017 until March 2019, when its counsel advised the plaintiffs that its denial of coverage was final, and that the defendant would not entertain any further submissions on the subject. The defendant was not required to continue to communicate with the plaintiffs *ad infinitum*; and

i) the fact that the defendant abandoned its reliance upon exclusion 12 in this matter does not preclude it from including exclusion 12 in insurance contracts going forward.

[98] In my view, the plaintiffs' real complaint is that the defendant denied the claim, despite their efforts to convince the defendant otherwise. Although I appreciate that the plaintiffs were frustrated by the denial of coverage, the reality is that none of the steps taken or not taken by the defendant amounted to bad faith and there is no basis for that aspect of the plaintiffs' claim.

DAMAGES

[99] Despite my decision that the plaintiffs' claim for coverage has failed, I have assessed their damages claim on a provisional basis.

[100] Had the claim been granted, the remedial costs that arose from the loss and that the plaintiffs incurred would have been awarded. Having said that, it is unclear what amounts comprise the plaintiffs' claim for remedial costs incurred in the amount of $124,689.81[5]. Certainly, the largest expense incurred by the plaintiffs was $75,327.00

[5] Although it is unclear from the trial record what items comprise the amount claimed, the defendant agreed that the plaintiffs have provided invoices for repairs which total that amount.

including GST which they paid to the remedial contractor, and I am satisfied that this amount would be properly awarded if the claim had succeeded.

[101] It is clear, however, that some of the items claimed by the plaintiffs would not have been awarded, including:

a) invoices that reflect little detail as to the work performed, such as

   (1) "Repairs to basement" (three invoices totalling $4,960.00);

   (2) "Repairs to basement bathroom" ($1,105.00); and

   (3) "Repair bathroom" ($1,124.00);

b) invoices for repairs that do not appear to arise from the loss, and appear to constitute betterment:

   (1) $10,155.00 to repair cracks in walls and ceiling "throughout" the house, and labour to paint the interior walls and ceiling[6];

   (2) $1,745.00 for repairing the basement walls, which the plaintiffs could not explain;

   (3) $1,619.17 for new sod and shrubbery in 2023, five years after the remedial work was completed;]

   (4) $1,452.05 for electrical upgrades;

   (5) $1,124.00 for a new shower and new tiles in 2nd floor bathroom;

   (6) $924.00 to level the basement floor;

[6] The evidence is clear that the plaintiffs' house shifted repeatedly over the years. The plaintiffs failed to establish the scope of the work for which these invoices were issued, and whether all of the costs were attributable to the loss.

(7) $489.05 for sump pump servicing; and

(8) $223.75 for sewer clean-out.

Total: $24,921.02

[102] The balance of the plaintiff's claim for remedial expenses incurred was not explained at the trial beyond the filing of documentary exhibits, but it was not contested by the defendant. As such, had the plaintiffs' claim succeeded I would have awarded damages to the plaintiffs in the principal amount of $99,768.79 ($124,689.81 less $24,921.02).

[103] The plaintiffs also claimed the sum of $22,641.80 for expenses that they have yet to incur, including:

a) $11,968.95 to repair and repaint the whole of the exterior of the house; [

b) $5,825.00 plus taxes to supply and install new heating lines to the radiator in the Addition; and

c) $4,847.85 to remove and replace a sidewalk on the Property.

[104] These amounts would not be properly awarded to the plaintiffs for a variety of reasons. First, these items are not damages that the plaintiffs have actually incurred. Second, there is an issue of betterment, because the plaintiffs did not establish that the loss gave rise to the need for the whole of the exterior of the house to be repaired and repainted, or that the existing sidewalk must be replaced. Third, the plaintiffs do not have insurance coverage for the cost of repairing damaged plumbing[7] in the house.

[7] The plaintiffs' extended water damage coverage specified that the defendant did not insure loss or damage to a plumbing system from which water escaped, which would include the radiator in the Addition.

[105] The plaintiffs also claimed the all-inclusive sum of $10,000.00 in general damages for pain and suffering, but the only medical evidence advanced at trial was a report from Mrs. Swaine's physiotherapist which referenced a series of appointments for back pain, both before and after a surgery. There is no evidence that Mrs. Swaine's back issues were caused, even in part, by the insurance claim or the defendant. The defendant accepted, as do I, that the plaintiffs were frustrated by the denial of coverage, and would have experienced heightened stress because of the loss and the denial of their insurance claim, but that is an insufficient basis upon which to establish this aspect of their claim. As such, even if I had granted the plaintiffs' claim, I would make no award for general damages.

[106] The plaintiffs also advanced a claim for loss of income, in the amount of $674,000.00. In support of this claim, the plaintiffs filed financial statements for a numbered company that is not a party to this litigation. The income of that corporation fluctuated significantly from 2011 to 2021, and increased in some of the years following the loss. This claim is entirely without merit and the plaintiffs would not be entitled to any award under this head of damage.

[107] The plaintiffs also sought an award for their time spent managing repairs at the Property, at a rate of $50.00 per hour for 500 hours, or $25,000.00. The plaintiffs kept no records of the time they spent, and they were at the lake in 2018 while the remedial work was performed. The plaintiffs would not be entitled to any award under this head of damage.

[108] The plaintiffs also sought an award for living expenses of $300.00 per day for 4 weeks while the remedial work was ongoing in 2018. By their own admission, they stayed at their lake cabin throughout that time and incurred no out-of-pocket costs to do so. As such, I would have made no award for this head of damage.

[109] The plaintiffs sought interest on their claim at 5% per year, with no basis to support that rate. If the plaintiffs were entitled to any award of interest, the Court of King's Bench rate would have applied.

[110] The plaintiffs also sought an award for their time spent preparing their legal case in this matter. They advanced an estimate that they spent 4 hours per week over 6 years, such that at a rate of $50.00 per hour they sought an award of $57,600.00. Again, the plaintiffs advanced no evidence of the time they spent preparing their legal case, and they did not seek to reply upon established law regarding costs awards to self-represented litigants. If the plaintiffs' claim had succeeded, I would have considered a costs award in their favour based upon the appropriate legal framework.

CONCLUSION

[111] The plaintiffs' claim is dismissed.

[112] If costs cannot be agreed upon, the parties may seek an appearance to make submissions.

_____

J.