

Case Name:

TGA General Contracting v. Cirillo

**IN THE MATTER OF the Construction Lien Act, R.S.O. 1990,
Chapter C.30, as amended**

Between

**TGA General Contracting and Restoration Inc., Plaintiffs, and
Francesco Cirillo, also known as Frank Cirillo, Liberata
Cirillo, Defendants**

And between

**Francesco Cirillo A.k.A. as Frank Cirillo and Liberata
Cirillo, Plaintiffs, and
the Wawanesa Mutual Insurance Company, Defendant**

[2009] O.J. No. 4377

[2010] I.L.R. I-4907

Newmarket Court File Nos. 76153/05, 75585/05

Ontario Superior Court of Justice

G.P. DiTomaso J.

Heard: May 26-29 and September 4, 2009.

Judgment: October 15, 2009.

(172 paras.)

Insurance law -- Property insurance -- Household or homeowner's policies -- Action by contractor to recover payment for home repairs allowed -- Contractor performed repairs on home damaged by fire -- No issue taken with quality of work -- At issue was responsibility for payment -- Court found that homeowners had been reimbursed to full extent of policy with insurer -- Insurer had no contractual relationship with contractor -- Homeowners exclusively liable to contractor -- Insurer fulfilled all obligations to homeowners and did not undervalue cost or scope of repair work.

Construction law -- Contracts -- Building contracts -- Parties -- Action by homeowner for payment of insurance proceeds dismissed -- Action by contractor to recover payment for home repairs allowed -- Contractor performed repairs on home damaged by fire -- No issue taken with quality of work -- At issue was responsibility for payment -- Court found that homeowners had been reim-

bursed to full extent of policy with insurer -- Insurer had no contractual relationship with contractor -- Homeowners exclusively liable to contractor -- Insurer fulfilled all obligations to homeowners and did not undervalue cost or scope of repair work.

Action by the plaintiffs, the Cirillos, against the defendants, the Wawanesa Mutual Insurance Company, tried in conjunction with action by the plaintiffs, TGA General Contracting, against the defendants, the Cirillos. The Cirillos owned a home that was extensively damaged in a fire. TGA was the contractor hired to repair the damage. Wawanesa was the Cirillos' insurer. At issue was quantification of repairs and responsibility for the costs. TGA commenced a lien claim for unpaid work and materials in the amount of \$153,000. The Cirillos denied that they owed TGA money. They contended any money owed was Wawanesa's responsibility. TGA submitted that payment was not contingent upon receipt of insurance proceedings. The Cirillos sued Wawanesa under their home insurance policy for any money owed to TGA regarding the repairs. Wawanesa contended that the Cirillos were indemnified to the extent of the policy. The Cirillos argued that Wawanesa undervalued the scope of work and pricing for the house repairs. Wawanesa asserted that it had no contractual obligation to pay TGA, as TGA was the Cirillos' contractor.

HELD: Action by TGA allowed and action by the Cirillos dismissed. The evidence clearly established that Wawanesa was not party to the contract between TGA and the Cirillos. There was no collateral contract between TGA and any other party relating to the fire restoration work or payment on behalf of the Cirillos. The Cirillos took no issue with the work performed by TGA. The Cirillos knew and understood that the contract was not contingent upon payment of insurance benefits. Wawanesa had no obligation to TGA. TGA was entitled to \$153,000, the monies owed under the contract. The Cirillos were not entitled to any further benefits or payments under the building coverage of their homeowners' policy with Wawanesa. The policy covered the cost of repairing the premises with material of similar kind and quality and did not require Wawanesa to pay whatever TGA charged to repair the premises. The guaranteed replacement cost endorsement encompassed coverage up to the lowest estimate of repair subject to any revisions. At no time did the Cirillos take issue with Wawanesa's position regarding the scope or costs of repair based on that estimate. There was never any issue taken in respect of the final payment made by Wawanesa to the Cirillos. Wawanesa had no further obligation to the Cirillos.

Statutes, Regulations and Rules Cited:

Construction Lien Act, R.S.O. 1990, c. C.30,

Ontario Rules of Civil Procedure,

Counsel:

M.F. Cooper, for TGA General Contracting and Restoration Inc.

Francesco Cirillo, Self-represented.

Francesco Cirillo, Self-represented.

M. Forget, for The Wawanesa Mutual Insurance Company.

REASONS FOR JUDGMENT

G.P. DiTOMASO J.:--

INTRODUCTION

1 This dispute arises out of a house fire which occurred on March 7, 2004. The house located at 473 Woodbridge Avenue in Woodbridge, Ontario was owned by Francesco Cirillo also known as Frank Cirillo and his wife Liberata Cirillo (the Cirillos). As a result of the fire, the house was extensively damaged. The dispute arose between the Cirillos, their contractor TGA General Contracting & Restoration Inc. (TGA) and the Cirillos' insurer The Wawanesa Mutual Insurance Company (Wawanesa). At the heart of the dispute was the amount of repairs and which party was responsible to pay for those repairs.

2 At the time of the fire Kevin Ferris, son-in-law of the Cirillos, along with his family were temporarily living with the Cirillos while the Ferris house was being built. Mr. Ferris, because of his knowledge of English and his past dealings with insurers through his own business agreed to assist his in-laws in overseeing the restoration of their home.

3 Vincenzo Cirillo also known as Enzo Cirillo is the son of the Cirillos. It was agreed that Enzo Cirillo could present the case on behalf of his parents at trial as English was not their first language.

4 At all material times, the Cirillos allege that they were insured through a homeowners' policy of insurance with Wawanesa. The Wawanesa insurance policy covered the house, its contents and additional living expenses in the event of a fire loss.

5 TGA was a general contracting firm hired by the Cirillos to repair their home as a result of the fire damage.

THE ACTIONS

6 There are two actions arising out of this fire loss. These actions were tried together over five days of trial.

7 In the first action (The TGA action), TGA commenced Construction Lien proceedings advancing a claim for unpaid work and materials in the amount of \$152,961.06 together with a claim for unjust enrichment. The Cirillos denied owing any money to TGA and if any money was found owing, then Wawanesa and not the Cirillos ought to pay TGA.

8 In the second action (the Cirillo action), the Cirillos sued Wawanesa for any money owed to TGA regarding the repairs to the Cirillo house which was damaged by fire. The claim was based on the Cirillos' policy of insurance with Wawanesa to cover the cost of such repairs. Wawanesa denied owing the Cirillos any money for repairs as the Cirillos were indemnified to the extent of the policy and as the Cirillos' claim for building coverage had been settled. Further, Wawanesa alleged that the policy was void for material misrepresentation as the Cirillos failed to advise Wawanesa on the application for insurance that the house was heated by two wood stoves in breach of statutory condition #1. In any event, Wawanesa asserted that it had no contractual or any other obligation to pay TGA. TGA was Cirillos' contractor and the dispute regarding any outstanding payment was solely between the Cirillos and TGA and did not involve Wawanesa.

9 The Cirillos claimed Wawanesa had relied upon undervalued scope of work and pricing for the house repairs. They were underpaid on their claim for building coverage by Wawanesa and sought further payment from their insurer for all the repairs effected by TGA. The Cirillos claimed the Guarantee Replacement Cost (GRC) provision of their policy of insurance with Wawanesa supported their claim for additional payment. Wawanesa has denied that such an interpretation of policy gives rise to the Cirillos' claim.

10 The parties consented that all of the evidence at trial would be heard to determine issues in both actions. The evidence should not be segregated and would be included for both actions to determine credibility and weight.

POSITIONS OF THE PARTIES

(a) TGA

11 TGA submits that its contract for fire restorative services was between TGA and the Cirillos and not with Wawanesa. Payment to TGA under the contract was not contingent upon receiving any payment of insurance proceedings from Wawanesa to the Cirillos or any other party. Only TGA and the Cirillos were parties to the fire restoration contract. TGA through Kevin Ferris kept in contact with the Cirillos throughout the job. TGA completed the job on March 29, 2005. The Cirillos were pleased and accepted the work. There was no dispute whatsoever in respect of any deficiencies or quality of workmanship or delays on the part of TGA.

12 TGA submits that the Cirillos were aware of the scope of the work and the price of the work. At all times, their obligations were under the fire restoration contract to pay TGA for the work completed.

13 The Cirillos received insurance proceeds from Wawanesa but breached the contract with TGA. They did not pay TGA for all of the work performed. The non-payment by the Cirillos carried through the life of the contract and in the end, TGA was owed approximately \$152,000.

14 At no time did any representative of TGA tell the Cirillos that any party except the Cirillos were obligated to pay TGA for the restorative work caused by the fire. Part way through the contract, the Cirillos hired Rosso Construction, another general contractor, to do part of the restorative work. TGA has not advanced any claim that involves any of the work performed by Rosso Construction. TGA's final revised estimate sets out all of the work that TGA did which ultimately totalled the amount being claimed of \$152,961.06.

(b) Wawanesa

15 Wawanesa advances three defences to the Cirillo claim. Wawanesa asserts that the insurance policy is void as the Cirillos breached statutory condition #1. There was a material misrepresentation as they failed to disclose that their home was heated by two wood stoves. It is not disputed that the cause of the fire related to the operation of one of these wood stoves.

16 The other two defences are somewhat similar to each other. Wawanesa contends that they responded to the fire insurance policy. They have fully indemnified the Cirillos under the policy. The only coverage in dispute is for the dwelling. The policy limit for the dwelling was \$219,000. However, because of the GRC provision in the policy, the Cirillos would be entitled to an increased cost of replacement or repair to their home irrespective of the policy limit. As a result of the GRC provision, the Cirillos were paid more than the \$219,000 limit for restorative repairs. In the end, the Cirillos were paid approximately \$295,000 by Wawanesa under the policy to repair their home.

17 Wawanesa was not a party to the TGA contract. There was no connection between TGA and Wawanesa. TGA was the Cirillos' contractor. Wawanesa was not obliged to pay TGA but to pay the Cirillos.

18 The Cirillos knew that they were entitled to receive payment based on the lowest estimate which in this case was the estimate of Bachly Construction. Wawanesa denied that the Bachly estimate was wrong or undervalued the work. The Cirillos were told that if they decided to use their own contractor and if their own contractor's price was higher, then the Cirillos would pay the difference between Wawanesa's lowest estimate (the Bachly estimate) or their own contractor's price. The Cirillos were aware of Wawanesa's position throughout.

19 Wawanesa followed a process involving the Cirillos, Kevin Ferris, and TGA through their representative Douglas Wilkins which resulted in a final payment being made to the Cirillos to fully indemnify them for their building coverage claim and to arrive at a final settlement of the Cirillos' claims relating to this fire loss.

20 Ultimately, the Cirillos were paid the sum of \$295,392.11 by Wawanesa in full and final settlement of the Cirillo building claim under the fire insurance policy. Wawanesa owed the Cirillos nothing more in respect of this claim.

(c) **Cirillos**

21 The Cirillos deny that there has been any material misrepresentation in respect of the wood stoves.

22 The restoration cost is in issue. The Cirillos contend that from the very beginning Wawanesa obtained estimates from Bachly Construction (Bachly) and Leda Restoration (Leda) that were wrong. Both estimates undervalued the scope of the work and the pricing of that work. From the beginning, and carried through this entire piece, Wawanesa relied upon the Bachly estimate which was the lowest price. The Bachly estimate missed work that needed to be done which resulted in erroneous pricing.

23 The Cirillos also contend that Rosso Construction undertook part of the scope of work under the direction of Mr. Wilkins of TGA. The Cirillos used part of the proceeds of insurance from a contents payout received from Wawanesa to pay Rosso Construction as opposed to paying TGA. Further monies received from Wawanesa were used to reimburse the Cirillos because they had already paid Rosso Construction directly. The Cirillos contend that they paid Rosso Construction \$116,000. They are entitled to a credit for this amount from TGA as TGA did not perform the Rosso work.

24 There is no dispute that TGA did a great job. There is no dispute as to deficiencies, quality of TGA work or delay.

25 The Cirillos' ultimate position is that if any money is owed to TGA then Wawanesa and not the Cirillos should be obliged to pay any outstanding TGA account.

ISSUES

26 A number of main issues were identified as follows:

- (a) what are the contractual relationships between the parties;
- (b) if money is owed by the Cirillos to TGA, what is the amount owed and as between the Cirillos and Wawanesa, who should pay it?
- (c) as between the Cirillos and Wawanesa, are the Cirillos fully indemnified or are they entitled to further payment? Has Wawanesa settled the building coverage claim with the Cirillos? Is there a breach of statutory condition #1 for material misrepresentation by the Cirillos regarding the undisclosed heating of their home by two wood stoves?

EVIDENCE

27 Because these two actions were tried together, there was some intermingling of the evidence in respect of the various issues. Also, submissions were made and I ruled that the evidence given by Mr. Ferris bound the Cirillos as he acted as their authorized agent at all times.

28 On behalf of TGA, Douglas Wilkins testified at trial. He was employed by TGA for 16 years and was a senior estimator with the company at the time. He was well experienced in estimating fire claims losses for his company which was a general contractor specializing in fire restoration work. While at TGA, he handled close to 2,000 fire claims. His approach was very much hands-on and he was involved in the Cirillo project from start to completion. He kept detailed notes and he generated correspondence to Wawanesa during the course of the project to keep the insurer advised throughout. He was on site on a weekly basis to deal with the project and any problems that might arise during the restoration of the Cirillo home. I found Mr. Wilkins to be a truthful witness. His evidence was straight-forward and clear. His oral testimony was supported by consistent documentation made contemporaneously with the events recorded. His evidence which I accept was both credible and reliable. It demonstrates TGA's diligence in performing the repairs which were entirely satisfactory to the Cirillos. The work was timely and was without any complaint regarding deficiencies, quality of work or delay. The work was performed by TGA under contract with the Cirillos. TGA was paid in part for the work that it had performed and was claiming the balance of monies owing by the Cirillos in respect of TGA's unpaid account.

29 Evidence was given by Cameron Snodden of Bachly Construction. He is the estimating manager with Bachly and was responsible for all the day to day estimates. He has been with Bachly since 2002 and has been the estimating manager for at least three years. Bachly has been in the fire loss restoration business for the last 48 years. On average, Bachly would handle fire loss claims at a rate of one or two per week throughout the year. He described the method by which he would prepare a scope of work and price the same. He too spoke of a hands-on process in determining the scope and price. He testified as to how he was involved in the Cirillo project and how Wawanesa had asked Bachly to prepare a scope of work and price. His evidence was also clear and concise. He described how he had prepared the initial estimate and a subsequent estimate when further smoke

damage was discovered. He explained why he was of the opinion that his estimate was accurate being an estimate to repair the house with materials of similar kind and quality. He went through a number of items by comparison and gave his evidence in respect of those various items. His evidence was credible and reliable.

30 On behalf of Wawanesa further evidence was given by senior claims adjuster Sharda Dookhie-Kangal and her manager James Phinn. Both Ms. Dookhie-Kangal and Mr. Phinn were excellent witnesses. Their oral evidence was clear and cogent. They had an excellent recollection of this particular claim which was supported by a meticulous insurance file consisting of telephone call notes, reports, summaries, computer entries involving Ms. Dookhie-Kangal, her manager Mr. Phinn and his manager Dieter Mayer. Their evidence demonstrated a consistent and professional handling of the file which entirely supported the position taken by Wawanesa. They were professional and competent in handling this claim which was acknowledged by Mr. Ferris and Mr. Wilkins. Mr. Ferris also testified that Wawanesa's representatives were courteous in all their dealings with the Cirillos.

31 The evidence of Ms. Dookhie-Kangal and Mr. Phinn speaks to a step-by-step chronology of events supported by an impeccable claims file created in the ordinary course of the claim with entries contemporaneous with events described. The evidence of Ms. Dookhie-Kangal and Mr. Phinn is both credible and reliable. It is trustworthy and accurate.

32 I now come to the evidence of Mr. Kevin Ferris on behalf of the Cirillos. Mr. Ferris is not involved in the construction or insurance business for a living. At the time of the fire, he was 29 years of age. He has a background in auto mechanics and he is the manager of a tire and auto repair shop. At the time of the fire he was working full time, 50 hours a week. He was in-between homes living with his in-laws, wife and two children while his own home was being built. During the time of the fire, Mr. Ferris had a lot on his plate.

33 He agreed to help his in-laws who mainly spoke Italian and it was felt that Mr. Ferris could better deal with Wawanesa and contractors. Mr. Ferris was authorized by the Cirillos to represent them throughout and he did so. He described Ms. Dookhie-Kangal and Mr. Phinn as competent, courteous and professional. He had no communication problems with Ms. Dookhie-Kangal. All calls were answered and all questions were answered. Mr. Ferris agreed that at no time was Wawanesa trying to be difficult with him.

34 Contrary to the other witnesses described, I did not find Mr. Ferris entirely credible on the critical issues. There were matters that he could not recall but the other witnesses had clear recollection. When he did have recall and his evidence was at variance with the other witnesses, I prefer to accept the evidence of Mr. Wilkins, Mr. Snodden, Ms. Dookhie-Kangal and Mr. Phinn over the evidence of Mr. Ferris.

35 Unlike the other witnesses, he did not prepare notes throughout. In many instances he was only going from his memory which was not always clear and not always consistent with events described. At times, his evidence was implausible, vague and not reliable.

36 However, he did agree that he had no problem with the quality of the work done by TGA. Neither did he have any problem with respect to the professional and competent handling of the claim by Wawanesa.

37 In addition to these general comments that I have made regarding the credibility and reliability of these witnesses, further specific comment will be made in the course of these reasons.

THE TGA ACTION - EVIDENCE AND FINDINGS

38 I accept the evidence of Douglas Wilkins who testified on behalf of TGA. He described his hands-on involvement regarding the restoration of the Cirillo home from start to completion. The Cirillo home was located at 473 Woodbridge Avenue in Woodbridge. The fire originated in the basement near a wood stove. The fire destroyed the main floor and living room above. There was smoke damage to the rest of the house.

39 Mr. Wilkins on behalf of TGA was originally contacted by Kevin Ferris at a time when National Fire Adjusters (NFA) was still acting for the Cirillos. Mr. Wilkins declined to be involved while NFA was still acting for the Cirillos. At that time, Mr. Wilkins was aware that there was a difference in the scope and pricing of the job as between NFA and Wawanesa's contractors, namely Bachly and Leda.

40 I accept Mr. Wilkins' evidence as to how he prepared the scope of work detailing all of the damages and repairs and replacements with individual rooms in the home and a breakdown with costs. This was his standard procedure to set out the extent of the damage which was detailed and specified in all fire restoration work and insurance damage claims.

41 He was contacted a second time by Kevin Ferris who advised that the Cirillos' contract with NFA had been terminated and would TGA be interested in taking on the restoration project. Kevin Ferris was authorized to be the agent for the Cirillos. All documentation, meetings and telephone calls flowed between Mr. Wilkins through Mr. Ferris to the Cirillos. Throughout the contract, it is undisputed that Kevin Ferris acted as the Cirillos authorized representative in dealing with TGA as well as dealing with Wawanesa.

The Fire Restoration Contract

42 Following the Cirillos' submission of a Proof of Loss relating to the fire, the Cirillos, Kevin Ferris and Mr. Wilkins had meetings and discussions with a view to retaining the services of TGA and in respect of performance, scope of work and pricing of restoration work on the Cirillo house. Mr. Wilkins wanted to see the entire insurance policy and was given a copy of the Insurance Declaration sheet.¹ Mr. Wilkins never did receive a full copy of the policy although he had asked Kevin Ferris to produce that document on a number of occasions early on. Mr. Wilkins wanted to see the limits of coverage and any provisions for additional coverage under GRC. Mr. Wilkins never did see a copy of the entire policy until trial. This is contrary to the evidence of Kevin Ferris who had testified that Mr. Wilkins had received a copy of the entire policy. In this regard, I accept the evidence of Mr. Wilkins over the evidence of Kevin Ferris.

43 Mr. Wilkins was aware that there was a guaranteed replacement cost provision in the policy. He was also aware that insofar as property coverages were concerned, the dwelling was covered in the amount of \$219,500. Mr. Wilkins testified that the GRC extended the additional amount to restore damage based on costs. The insured would need to submit documents to substantiate the expenditures incurred to repair the building. He knew that Wawanesa already had two quotes from Bachly at \$175,000 and Leda at \$203,000. He knew that there was substantially more damage than was allotted for in the initial two estimates. The NFA quote was for \$235,000. It was apparent to Mr. Wilkins that they were going to be getting into a GRC situation to repair the dwelling.

44 Mr. Wilkins advised the Cirillos that his estimate was higher than the other two quotes. The Cirillos were concerned about getting the work started because there was a time issue. TGA required the Cirillos to sign an authorization contract to start the work. The fire had taken place early in March of 2004 and by the time Mr. Wilkins was having discussions with the Cirillos and Mr. Ferris in July, no work had commenced.

45 There were discussions with the Cirillos about how payment draws would be made. Mr. Wilkins knew that the Cirillos had received \$162,000 from Wawanesa. Mr. Wilkins told Mr. Ferris that he was looking for an initial draw of \$100,000 because he needed to order material. He prepared a scope of work and pricing and gave it to Mr. Ferris who discussed it with the Cirillos. In so doing, Mr. Wilkins had used the NFA scope as a guideline. However, Mr. Wilkins did a line-by-line estimate based on what he saw and he prepared the TGA estimate himself. Mr. Wilkins prepared the initial estimate after the second meeting with Kevin Ferris on site. That estimate was in the amount of \$282,454.40.² The Cirillos were given a copy of the estimate when Mr. Wilkins submitted it to Kevin Ferris on July 29, 2004. No work had been commenced at that time. Mr. Ferris in turn forwarded a copy of the estimate to Wawanesa. The document is called an estimate because with smoke and fire damage one can only determine the extent of that damage after demolition has taken place. If further smoke damage was discovered, then TGA would advise the insureds and Wawanesa that there would be a price increase. Mr. Wilkins told Kevin Ferris that the price would go up because of smoke damage which was discovered by TGA.

46 The evidence of Douglas Wilkins was clear that TGA's contract was with the Cirillos only and did not include Wawanesa. At all times, Mr. Ferris approved the estimate and the scope of work. Mr. Wilkins did not seek approval from anyone else because Mr. Ferris was his contact and had authorization to represent the Cirillos regarding this restoration project.

47 TGA and the Cirillos entered into a contract on July 23, 2004. There was no collateral contract between TGA and Wawanesa or any other party relating to the fire restoration contract or to payment on behalf of the Cirillos to TGA. The fire restoration agreement executed by the Cirillos and Mr. Wilkins.³ The Cirillos gave TGA permission to go on the premises and effect the repairs. Cheques from Wawanesa were to be made co-payable to TGA so that TGA would get paid. Wawanesa was never a party to the contract. TGA kept Wawanesa apprised of the progress of the work so that Wawanesa would not "get any surprises". The contract was not contingent on monies being paid to the Cirillos by Wawanesa. The Cirillos were aware of TGA's requirement of co-payable cheques. Further, the Cirillos were aware the contract was not contingent on monies being paid to them by Wawanesa. They were aware of all of this at the meeting involving Kevin Ferris and Mr. Wilkins when the contract was signed on July 23, 2004. The Cirillos understood that the contract was between them and TGA only and that there were no other parties to the contract.⁴

48 In cross-examination, Mr. Ferris confirmed that the agreement only involved the Cirillos and TGA. It was not executed by Wawanesa. Wawanesa was never a party to the contract and no representative with Wawanesa was present when the contract was signed. Mr. Ferris confirmed that at the time the contract was signed, the Cirillos wanted to get the repairs done quickly and time was of the essence.

49 Regarding the original scope of work and pricing prepared by TGA and provided to Kevin Ferris and the Cirillos, both Kevin Ferris and the Cirillos understood the scope of the work as being part of the fire restoration. The Cirillos took no issue in respect of the price of the work or the scope. There were no discussions about pricing. I reject the evidence of Mr. Ferris that the Cirillos

and Ferris did not know any better. They did know better because they took exception to the Bachly and Leda estimates as well as the estimate of NFA whom the Cirillos had retained before entering into the contract with TGA.

50 After the review of the scope, the Cirillo instructions were to proceed with the work as quickly as TGA could proceed. The Cirillos knew all about the other estimates and all of the other estimates had different prices. There were four different scopes and four different prices. After the Cirillos saw TGA's scope and price, they took no issue with that price or scope. Mr. Ferris in cross-examination confirmed that the Cirillos understood that they were paying based on TGA's price and not some other price.

51 Mr. Wilkins went on to testify that by late August early September 2004, TGA had completed demolition and had found considerably more smoke damage in the wall cavities. Mr. Wilkins told Wawanesa about the additional smoke and structural damage. In his notes, Mr. Wilkins had described the meeting with Ms. Dookhie-Kangal on site on September 1, 2004 along with representatives of Bachly and Leda to review the extent of the additional damage claim.

52 After the meeting, the scope of work had to change. Mr. Wilkins prepared a revised estimate dated October 26, 2004 in the amount of \$351,880.60.⁵ He described how the revised estimate was prepared. It included the additional work required to complete the restoration of the building. He took his initial estimate and went through that estimate line-by-line and also determined what additional work needed to be done and applied those amounts to the revised estimate. He gave a copy of the revised estimate to Kevin Ferris. Both Kevin Ferris and Wawanesa were aware that there was additional smoke damage and the scope of work and pricing needed to be increased.

53 The Cirillos were pleased to see that additional work was identified because of smoke damage. The Cirillos were pleased that TGA got a handle on the damages and kept the project going without delay in any way. The Cirillos were well aware that in addition to the initial estimate there was approximately \$68,000 more found in respect of smoke damage and as such, they were well aware of the increase and kept TGA proceeding forward.

54 In cross-examination, Mr. Ferris testified that as a result of the new scope of work and pricing (the revised estimate) the Cirillos still understood that they were responsible for TGA's new price and new scope. The Cirillos were not expecting to pay Bachly or Leda's revised price because a lot of items were missed. The Cirillos' understanding was to pay TGA on the contract and this was not contingent on a payment to the Cirillos by their insurer. Once again, Mr. Ferris agreed that the contract was only between the Cirillos and TGA. There was no collateral contract with Wawanesa. Payments to TGA were not contingent on payments by Wawanesa to the Cirillos. The Cirillos understood that their responsibility to TGA was not contingent on funding received from Wawanesa.

55 Kevin Ferris was asked specifically whether Mr. Wilkins advised him or the Cirillos that TGA was not going to hold the Cirillos responsible for payment on the contract. The answer was no. When asked if the Cirillos' understanding was that they were responsible to pay TGA for the contract, Mr. Ferris answered yes. However, Mr. Ferris went on to say that there was an understanding that TGA would help the Cirillos with the insurance company. He attempted to qualify his answer by saying that the Cirillos understood that they were responsible to pay TGA so long as TGA and Mr. Wilkins set out what they promised to do and assist the Cirillos with the insurance company. Mr. Ferris agreed that there was nothing in the insurance contract that said this. Further, Wawanesa was not party to the contract.

56 I find the Cirillos understood that they would be responsible for payment based upon TGA's original estimate and revised estimate and not for the pricing indicated by Bachly, Leda or NFA's scope of work or amended scope of work. It is clear on Mr. Ferris' own evidence that at no time were the Cirillos advised or did TGA represent that anyone other than the Cirillos would be responsible for payment under the contract.

57 Further, I accept the evidence of Mr. Wilkins that throughout the course of the project in dealing with the Cirillos and Wawanesa, TGA corresponded with Wawanesa on a regular basis. At all times, TGA not only kept Wawanesa advised of any changes or developments regarding the dwelling restoration work, but also contacted Wawanesa in respect of claims made by the Cirillos regarding additional work not contemplated by the restoration contract (extras) and other items relating to contents coverage. In my view, TGA acted diligently and responsibly at all times in performance of the work contemplated by the contract and assisted the Cirillos not only in respect of matters pertaining to the restoration of the Cirillo home but also other claims being advanced by the Cirillos outside the original and additional scope of repairs. This is evidenced by not only the notes and correspondence of Mr. Wilkins but also evidenced by testimony of Ms. Dookhie-Kangal, Mr. Phinn and the Wawanesa file.

58 TGA satisfactorily completed the project and there were no complaints from the Cirillos in respect of deficiencies, quality of the work or delays. There was no issue with TGA's work. In fact, on his examination-for-discovery, Enzo Cirillo testified TGA did "phenomenal" work. He also testified that the only reason TGA was not being paid by the Cirillos was because the Cirillos did not receive "the money" from Wawanesa.⁶

59 Kevin Ferris agreed that TGA was not fully paid for the fire restoration project. He took the position that as long as TGA could prove and justify their work, they were definitely owed money. Put to Mr. Ferris on his cross-examination was the proposition that the Cirillos were obliged to pay TGA for the balance owed on the restoration project. Mr. Ferris answered "as long as Doug Wilkins fulfills his end of the bargain - yes". There is no evidence that Mr. Wilkins did not fulfil his end of the bargain or TGA for that matter. The Cirillos were perfectly content with the restoration work done by TGA. The only reason TGA was not paid was because the Cirillos did not receive the money from Wawanesa. However, I have found that payments to TGA were not contingent on payments by Wawanesa to the Cirillos. The Cirillos understood that their responsibility to pay TGA was not contingent upon funding from Wawanesa. This was specifically underscored in Mr. Ferris' cross-examination evidence.

TGA's Work Under the Contract and the Cirillos
Failure to Make Payment Under the Contract

60 The evidence is and I have found that TGA successfully completed all the work under the contract and that work was acknowledged as being complete by the Cirillos on March 29, 2005. The Cirillos executed a Certificate of Completion dated March 29, 2005.⁷ The evidence of Enzo Cirillo on his examination-for-discovery and Kevin Ferris at trial was that the Cirillos were completely satisfied with all the work completed by TGA under the contract and did not, at any time, complain of any deficiencies, quality of work or delay on the part of TGA.

61 In his evidence on cross-examination, James Phinn on behalf of Wawanesa testified that Wawanesa paid the Cirillos the sum of \$295,392.11 for the building claim. None of this money was paid to TGA by Wawanesa. Mr. Ferris told James Phinn the contract for repair was between the Ci-

rillos and TGA and on that basis, the final payment should be made to the Cirillos. Mr. Phinn on behalf of Wawanesa agreed and the final payment was made.

62 The Cirillos received a number of payments from Wawanesa. The total payment on the building loss to all parties was the sum of \$295,392.11.⁸ Wawanesa paid the Cirillos the following payments: \$160,680.45, \$64,000, \$62,684.06 for the building loss. Wawanesa also paid some final hydro bills related to the fire that were subsequently submitted by Kevin Ferris. The last payment for the hydro bills was made May 26, 2005 in the amount of \$267.54.⁹

63 The first of these payments was in the amount of \$160,860. That cheque was co-paid to the Cirillos, NFA and a mortgagee. The Cirillos obtained NFA's endorsement and deposited these funds into the Cirillos' bank account. Mr. Wilkins knew that these funds had been paid once TGA begun the project and after NFA was no longer involved.

64 Mr. Wilkins told Mr. Ferris that he was looking for a draw of \$100,000 because he needed to order material. Mr. Ferris agreed that \$100,000 would be paid. In accordance with this discussion TGA invoiced the Cirillos \$100,000 plus GST of \$7,000 for a total of \$107,000 by invoice dated August 12, 2004.¹⁰ However, TGA only received partial payment of the invoice of \$50,000 on September 1, 2004. The cheque was received from Mr. Cirillo for \$50,000 dated September 3, 2004. The cheque was received by TGA almost three weeks after the initial invoice.¹¹ Mr. Ferris explained to Mr. Wilkins that Mr. Cirillo was of the view that TGA had not incurred \$100,000 of charges yet and this is why TGA was only paid \$50,000. As far as Mr. Wilkins was concerned, the Cirillos renegeed on the agreement that \$100,000 would be paid and not payment of \$50,000. Mr. Ferris agreed that Mr. Wilkins had requested \$100,000 but only received \$50,000. Mr. Ferris' explanation was that he and the family felt there was no reason to give Mr. Wilkins \$100,000 to start the job. The sum of \$50,000 was ample. Mr. Wilkins agreed to the \$50,000 payment when Mr. Ferris spoke with him. Although Mr. Wilkins was upset, TGA kept working. It is clear and I find that Mr. Wilkins asked for \$100,000 and invoiced \$100,000 plus GST in accordance with a discussion that he had with Mr. Ferris. However, after Ferris and the Cirillos had a discussion, they were only prepared to pay TGA \$50,000 at that time.

65 The Cirillos paid the second cheque dated November 8, 2004 in the amount of \$50,000.¹² Approximately five weeks had elapsed between the payment of these two cheques.

66 The Cirillos made these payments on the TGA invoice for \$107,000 in spite of having sufficient funds to make full payment up to and beyond November 12, 2004 which is the date upon which they made the second of the two incomplete payments.¹³

67 A second payment from Wawanesa to the Cirillos in the amount of \$64,200 took the form of a co-payable cheque to TGA and the Cirillos. This amount was deposited by Francesco Cirillo into his personal bank account. TGA expected to receive the full amount of \$64,200. There had been discussions between Mr. Wilkins and Mr. Ferris that TGA was to have received a co-payable cheque for \$64,200. TGA invoiced this amount as evidenced by invoice dated December 23, 2004. The Wawanesa cheque payable to the Cirillos, Mutual Trust and TGA was dated January 25, 2005. When the funds were not received, TGA stopped work. It was only after the work stoppage that TGA received the sum of \$50,000 from Frank Cirillo by cheque dated February 8, 2005.¹⁴ In total, TGA received only three payments from the Cirillos, each in the amount of \$50,000 for total of \$150,000.

68 Kevin Ferris testified that the co-payable cheque in the amount of \$64,200 was mistakenly deposited by Frank Cirillo. Mr. Ferris later chastised his father-in-law for depositing the money into his own account when the cheque was co-payable. I reject the notion that Mr. Cirillo did not know what a co-payable cheque was or what steps were required to be taken before deposit into his own account. He had already received a co-payable cheque to the Cirillos, NFA and a mortgagee in the amount of \$160,000 from Wawanesa. He understood enough at that time that NFA's endorsement was required before deposit into Mr. Cirillo's own account. The NFA cheque was so endorsed and the funds were deposited into Mr. Cirillo's account. Whether Mr. Cirillo was mistaken or he intentionally sought to deprive TGA of the co-payable cheque is not an issue for me to decide. Again, it is apparent and I find that TGA should have received the co-payable cheque in the amount of \$64,200 from the Cirillos but in the end the cheque was deposited into Mr. Cirillo's account. After TGA discovered what had happened to the co-payable cheque they had retained legal counsel to deal with the bank. Instead of receiving \$64,200 ultimately TGA received Mr. Cirillo's cheque dated February 8, 2005 in the amount of \$50,000.¹⁵

69 The Cirillos received a cheque from Wawanesa in the amount of \$62,684 after TGA had completed all work under the contract. This was the third cheque received from Wawanesa. It is established from the evidence of Mr. Ferris, Ms. Dookhie-Kangal and Mr. Phinn that prior to receiving this cheque, the Cirillos were advised by Wawanesa that this cheque would represent final payment from Wawanesa for the restoration of the house.¹⁶

70 As was borne out by the evidence, Mr. Wilkins experienced difficulties with receiving payment from the Cirillos throughout the course of the contract. He commenced to forward correspondence, invoicing making and verbal requests to Wawanesa that the final cheque be sent to TGA. He even improperly added a check mark to the Fire Restoration Contract dated July 23, 2004 and sent that document as amended without the knowledge and the consent of the Cirillos to have Wawanesa direct the last payment to TGA.

71 At this point in time, it is obvious on the evidence of all parties that TGA and the Cirillos were engaged in a foot race to the door of Wawanesa in order to obtain payment for the last cheque. The Cirillos won the race for the final payment by sending an authorization dated May 3, 2005 to Wawanesa directing that the final cheque be paid to the Cirillos.¹⁷ There are also notes in Wawanesa's file and the testimony of Ms. Dookhie-Kangal and Mr. Phinn that Mr. Ferris insisted that as the contract of insurance was only between the Cirillos and Wawanesa, payment should not be made to TGA but rather directly to the Cirillos. Wawanesa agreed with Mr. Ferris picking up the final cheque for \$62,684.

72 The Cirillos did not remit any of the final payment to TGA.

The Revised Final Estimate and Funds Due to TGA

73 Mr. Wilkins testified that he prepared the original estimate for scope of work and pricing in the amount of \$282,454.46.¹⁸

74 Upon conducting demolition work, additional smoke damage was discovered which prompted Mr. Wilkins to prepare a revised estimate for repairs dated October 26, 2004 in the amount of \$351,880.60.¹⁹

75 Following completion of all the work under the contract, Mr. Wilkins prepared a revised final estimate dated February 9, 2006.²⁰ This revised final estimate sets out the work performed by TGA

and only by TGA. It does not charge for any work undertaken by the insured or by others. Those items of work to be performed by the insured or by others is specifically segregated out of the revised final estimate, leaving a grand total in the amount of \$302,206.26. The Cirillos acknowledge that TGA performed all the work for which the Cirillos were invoiced in the revised final estimate. Mr. Ferris had an opportunity to review the revised final estimate at trial. He testified that TGA had performed all of the items in the revised final estimate where there is an itemized price.

76 Mr. Wilkins testified that he prepared the revised final estimate in order to determine what work TGA did and what work was done by either the insured or by some other party.

77 The Cirillos had no concerns with the pricing set out in the original estimate or revised estimate. The pricing in the revised final estimate consists of essentially the same pricing as the revised estimate in the amount of \$351,880.60 with the exception of certain price deletions made by TGA where the insured or others had taken responsibility for the work.

78 The value of the work performed by TGA under the contract in accordance with the revised final estimate is \$302,206.26. Added to that amount is the sum of \$754.80 paid by TGA to Roto Rooter for sewer back-up which amount was paid directly by Wawanesa to the Cirillos. TGA was never reimbursed for this amount. I find the total amount claimed by TGA in the revised final estimate is the sum of \$302,961.06. When credit is given for the \$150,000 paid by the Cirillos, I find the total owing by the Cirillos to TGA is the sum of \$152,961.06.²¹

79 Although the Cirillos have acknowledged that they owe funds in the amount of \$125,000 to TGA for work under the contract, Mr. Ferris in his testimony was not prepared to agree to any number that was owed and certainly did not agree with the amount claimed by TGA.²²

Work Allegedly Performed by Rosso Construction

80 The Cirillos assert that they asked Mr. Wilkins if they could hire an additional contractor under TGA's supervision to complete some of the scope of the work to keep within the limitation period imposed by Wawanesa. TGA agreed and the Cirillos hired Rosso Construction to complete a portion of the revised scope of work which was in the amount of \$351,880.60. The Cirillos further assert that TGA supervised Rosso Construction and approved Rosso's invoice in the amount of \$116,523.90 at the completion of the portion of the scope of work of the contract. Rosso Construction invoiced the Cirillos and were paid by the Cirillos in the amount of \$116,523.91.²³ The Cirillos plead that they used the funds received from Wawanesa for the contents portion of the insurance policy to pay out Rosso Construction. The Cirillos further plead that they advised Mr. Wilkins and TGA that any money received from Wawanesa for the dwelling portion of the insurance policy a portion would be given to TGA as payment towards their contract and a portion of the money would be retained by the Cirillos as a repayment for their contents money used to pay Rosso Construction.

81 Further, the Cirillos submit that the revised scope of work should show a deduction of \$116,523.90 being the amount paid by the Cirillos as evidenced by the Rosso invoice.

82 Mr. Wilkins' evidence was that the Cirillos had a couple of trades that they wanted to use to expedite the job. Mr. Wilkins agreed but within the terms of the contract. Mr. Wilkins would be paying those contractors from insurance proceeds received directly. However, TGA had been on the job for about four months when the rules were changed. Instead of TGA paying Cirillos' contractors directly for work out of the insurance proceeds, Mr. Wilkins was told that Mr. Cirillo would pay his own contractors directly. As previously indicated, Mr. Wilkins had taken out any work not per-

formed by TGA in the revised final estimate.²⁴ This work reflected in Rosso's invoice was work that Mr. Wilkins took out of his revised final estimate. This revised final estimate indicates the total amount of the work that only TGA performed at the house.

83 He further testified that the Cirillos retained their own contractor and their own sub-trades. He was questioned about the Rosso Construction invoice in the amount of \$116,000. Mr. Wilkins testified he never met Rosso, had no dealings with Rosso Construction and was never given any documents from Rosso Construction. He was never shown any documents or time sheets. As far Mr. Wilkins knew, the various trades showed up to the site but he was not aware that they were working for another general contractor. He did not know who Rosso Construction was. Insofar as the Rosso invoice for \$116,000 was concerned, TGA never agreed that TGA's contract would be reduced by \$116,000. TGA would pay the Cirillo contractors upon invoicing and understood that TGA would be receiving individual invoices from Mr. Cirillo. However, Mr. Cirillo changed the rules of the game. I accept Mr. Wilkins' evidence in respect of TGA's dealings with the Cirillos regarding Rosso Construction. Mr. Wilkins was never asked any questions about his knowledge and agreement that proceeds from Wawanesa would be used to pay TGA in part towards their contract and a portion of the money would be retained by the Cirillos as repayment for their contents money used to pay Rosso Construction. I accept Mr. Wilkins' evidence that he did not even know who Rosso Construction was and did not know that the Cirillos had hired another general contractor to work on the job. He was of the view that the contractors on the job were sub-trades hired by Mr. Cirillo.

84 Further, Kevin Ferris in cross-examination testified that not all of the co-payable cheque in the amount of \$64,200 should have been paid to TGA. Rosso Construction had also performed work regarding which Mr. Wilkins was aware. Rosso Construction also needed some money. Mr. Ferris advised Mr. Wilkins that the Cirillos were going to give Rosso some of the co-payable money in the amount of \$64,200. Mr. Wilkins agreed to accept \$50,000 of the \$64,200. However, Mr. Wilkins accepted the \$50,000 only after the \$64,200 was deposited into Mr. Cirillo's personal bank account.

85 I totally reject Mr. Ferris' evidence in this regard. I accept Mr. Wilkins' evidence that he and Mr. Ferris had discussions and an agreement that TGA was to receive a co-payable cheque in the amount of \$64,200. There was discussion at a meeting on January 25, 2005 regarding that co-payable cheque. The meeting involved Ms. Dookhie-Kangal, Mr. Phinn, Mr. Wilkins and Kevin Ferris.²⁵ Mr. Wilkins expected to receive a co-payable cheque and prepared notes to that effect.²⁶ The note is dated January 28, 2005. It reads as follows:

We are receiving a progress check (*sic*) from the Insurance Company for \$64,000 next week. It will be co-payable and Darren can take it and have it endorsed by the insured.

86 Darren was a TGA employee. I find Mr. Wilkins was never made aware that he was not going to get all the money. There was no discussion about Rosso Construction receiving any of that money or the Cirillos keeping a portion of that money as repayment for funds paid to Rosso Construction out of contents proceeds received from Wawanesa. Mr. Wilkins realized that he was not going to get paid and he stopped work. After he stopped work the Cirillos paid \$50,000. TGA subsequently learned that Mr. Cirillo had deposited the \$64,200 co-payable cheque into his own bank account.

87 Mr. Ferris in his cross-examination testified that he did not know when Mr. Wilkins was advised by Frank Cirillo that Rosso Construction was being paid directly by the Cirillos.

88 Mr. Ferris was certain that Mr. Wilkins was advised about Rosso Construction and how Rosso Construction would be paid out of the contents money. This would have occurred either before or after January 11, 2005. I reject this evidence as being vague and self-serving. Rather, I accept the evidence of Mr. Wilkins that he and TGA did not even know who Rosso Construction was and certainly did not know and agree to the arrangement for payment suggested by the Cirillos involving Rosso Construction.

89 Mr. Ferris testified that he supervised Rosso Construction, that Rosso completed the work set out in its invoice and that Rosso Construction received \$116,523.91 for which the Cirillos ought to receive credit.

90 Put to Mr. Ferris was Rosso's invoice which indicated as of January 11, 2005 a received amount of \$116,523.91. Put to Mr. Ferris was a money order dated January 31, 2005 in the amount of \$25,000, a money order dated January 26, 2005 in the amount of \$25,000, and a cheque dated November 25, 2004 in the amount of \$15,000 for a total of \$65,000 all payable to Rosso Construction.²⁷ Mr. Ferris could not find any other documents anywhere when asked to show that the outstanding balance of \$51,000 had been paid by the Cirillos to Rosso Construction. He did not know how the balance of \$51,000 was paid. Other than Rosso's invoice, there are no other documents obtained by Kevin Ferris in respect to the work performed by Rosso Construction.²⁸ Neither Mr. Ferris nor the Cirillos attempted to retain anyone to give evidence at trial regarding the work performed by Rosso Construction. The only document is the Rosso invoice dated January 11, 2005 in the amount of \$116,523.91.

91 In cross-examination, Mr. Ferris agreed that the two money orders dated January 26 and 31, 2005 each for \$25,000 were not paid as of January 11, 2005. He agreed the invoice showing the sum of \$116,523.91 marked paid as of January 11, 2005 was inaccurate. He denied that he and the Cirillos asked Rosso Construction to prepare an invoice indicating the sum of \$116,523.91 "received" when that amount had not been received in order to negotiate with TGA to bring down the price.

92 He could offer no explanation why the invoice stated \$116,523.91 "received" when Rosso Construction only received \$15,000 by cheque dated November 25, 2004. In cross-examination, two copies of the Rosso invoice was put to Mr. Ferris.²⁹ He agreed there were at least nine differences between the two documents. He agreed they were completely different documents. He agreed that one was not a photocopy of the other. He agreed there was no reason why Rosso Construction would send two different copies of the same invoice. Lastly, he agreed that the reason there were two separate invoices was because the Cirillos asked Rosso Construction to send two separate invoices. Notwithstanding this testimony on cross-examination, Mr. Ferris continued to maintain the Cirillos paid Rosso Construction in full. He agreed that if Rosso Construction was paid in full, Frank Cirillo would have produced more cheques. No such further cheques were tendered in evidence at trial.

93 On his examination-for-discovery, Vincenzo (Enzo) Cirillo undertook to provide the Rosso Construction file. Defence counsel received the following response at that time:

There is no file with Rosso Construction only an invoice which is included.³⁰

94 I find that the Rosso invoices are suspicious documents. They are completely different documents purporting to establish that as of January 11, 2005 the Cirillos had paid Rosso Construction

\$116,523.91. I am not satisfied that the Cirillos have proven the authenticity of the invoice, that the work was performed by Rosso for \$116,523.91 or that the Cirillos ever paid that amount. One cheque for \$15,000 dated November 25, 2004 predates the invoice. There is no Rosso Construction file. There are no other documents except two money orders dated January 26 and 31, 2005. No witness from Rosso Construction testified about the invoice or any Cirillo payments. Mr. Ferris' evidence was neither credible nor reliable regarding the Rosso invoice. Despite his repeated assertions that the Cirillos paid the full amount of the invoice, I am not satisfied that they ever did. He could not explain the two different invoices yet he claimed to have supervised Rosso Construction. I reject that the Rosso invoice is valid and that the Cirillos paid it in full.

95 The Cirillos further assert that the funds paid by them to Rosso ought to be subtracted from the amount payable to TGA under the contract - that \$116,000 ought to be deducted from the revised estimate in the amount of \$351,880.60.³¹ I find there is no substance or merit to this approach. Mr. Wilkins in preparing his revised final estimate in the amount of \$302,206.26 had already discounted work performed by the insured and by others. Even if Rosso performed work, this does not change the value of the work performed by TGA. The work priced and charged to the Cirillos for the restoration project was only the work performed by TGA. Regarding TGA's work, I find the Cirillos have acknowledged that: (a) TGA performed all the work for which the Cirillos were invoiced in the revised final estimate; (b) they took no issue with the pricing set out in TGA's estimates; (c) TGA's work was completely satisfactory; and (d) the only reason TGA was not paid was because the Cirillos did not receive money from Wawanesa.

96 The evidence establishes that payment of TGA's account was not contingent or dependant upon the Cirillos receiving money from Wawanesa. The Cirillos were obliged to pay TGA under their contract with their own contractor, TGA.

97 The Cirillos also assert that they were not at fault because TGA went "over budget". I disagree. TGA did not go over budget. I find TGA performed all the work set out in the revised final estimate in the amount of \$302,206.26 on top of which TGA paid the Roto Reuter's account of \$754.80. Less the sum of \$150,000 paid by the Cirillos, I find the outstanding amount of \$152,961.06 is owed by the Cirillos to TGA. I find the evidence establishes that Wawanesa is not obliged to pay this outstanding amount to TGA. That obligation rests with the Cirillos.

98 The Cirillos also submitted that from the outset Wawanesa was relying upon undervalued work to be performed in restoring their home. Both the scope and pricing of the work was wrong. Wawanesa erroneously relied on the lowest estimate being the estimate of Bachly Construction. There was no evidence tendered that TGA's scope and pricing was in error. The Cirillos knew that they were dealing with TGA's scope and pricing and not that of NFA, Bachly Construction or Leda Renovations.

99 Further Cameron Snodden testified on behalf of Bachly Construction. I accept his evidence over the evidence of Mr. Wilkins who compared comparison charts between TGA's costs and the costs of Bachly and Leda. Mr. Wilkins' testified he prepared those charts on August 26, 2007.³²

100 However, Mr. Snodden testified how he prepared the Bachly original estimate and revised estimate after additional smoke damage was discovered. He had specific knowledge about the job and attended the house three times. His estimates were detailed and specific. The last estimate responded to TGA's claim regarding additional damage. Bachly's revised estimate was in the amount

of \$280,886.11. This was the amount that Bachly proposed in order to complete the job using similar kind and quality materials.

101 Mr. Snodden reviewed the comparison chart prepared by Mr. Wilkins on August 26, 2007 comparing the Bachly quote with the TGA quote. Mr. Snodden testified why he was of the opinion that his estimate was accurate. He went through a number of items giving evidence to support his pricing of those items. For example, there was a cost difference between cleaning and replacing certain items. In the opinion of Mr. Snodden cleaning was sufficient. He agreed another contractor could be of a different view in that replacement was necessary. Mr. Snodden was not cross-examined by Mr. Cirillo.

102 I am not satisfied that the Cirillos have established that the Bachly estimate relied upon as the lowest estimate by Wawanesa was in error regarding the scope and pricing of the restoration work.

The Cirillos' Knowledge of Wawanesa's Payment Limit

103 In cross-examination, Mr. Ferris testified that he knew as of August 17, 2004 Wawanesa would pay the lowest estimate namely the Bachly Construction estimate for the same scope of work. If there were additional costs, Wawanesa would re-inspect. However, the Cirillos instructed TGA to continue working based on TGA's estimates. As at December 21, 2004, the Cirillos knew Wawanesa would only pay an additional \$120,000 towards the restoration costs of the house.³³

Lien Documents

104 I find TGA's Claim for Lien and Certificate of Action registered on title to the Cirillos house by TGA are valid. The quantum, timeliness and lienability of TGA's work were proven at trial in the amount of \$140,892.05.³⁴

105 I find the difference between the lien amount and the total amount owing to TGA in the amount of \$152,961.06 is the sum of \$12,069.01. I find that TGA has proven that the Cirillos have been unjustly enriched in the amount of \$12,069.01 as the Cirillos have received the benefit of TGA's work and materials for that amount. TGA had pleaded a claim for unjust enrichment in the alternative.

CONCLUSIONS

106 For the previous reasons, TGA shall have total judgment against Francesco Cirillo also known as Frank Cirillo and Liberata Cirillo in the amount of \$152,961.06.

107 TGA has proven a valid lien in the amount of \$140,892.05 being the amount of the claim for lien and shall have judgment against Francesco Cirillo also known as Frank Cirillo and Liberata Cirillo for that amount pursuant to the provisions of the *Construction Lien Act*.

108 Further, TGA shall have judgment against Francesco Cirillo also known as Frank Cirillo and Liberata Cirillo for unjust enrichment in the amount of \$12,069.01. Prejudgment interest is awarded on \$140,892.05 and \$12,069.01 in accordance with the provisions of the *Courts of Justice Act* from the date of issuance of the Statement of Claim namely June 27, 2005.

THE CIRILLO ACTION - EVIDENCE AND FINDINGS

109 The Cirillos sued their property insurer Wawanesa seeking additional benefits under the policy of insurance which they described as the funds they owe to their contractor TGA, if any.

110 The fire which is the subject of this action occurred on March 7, 2004. The sole issue between the Cirillos and Wawanesa is whether the Cirillos are entitled to any further benefits or payments under the building coverage of their homeowners' policy. Wawanesa denies any further liability under the policy of insurance. It has asserted three defences:

- (i) By failing to advise that the house was heated by two wood stoves, the Cirillos breached statutory condition #1 of the policy rendering the policy void. They are not entitled to any further payments.
- (ii) In the alternative, the Cirillos have already been indemnified to the extent the policy allows.
- (iii) In the further alternative, the claim for the building coverage has been settled precluding the Cirillos from recovering anything further from Wawanesa.

111 I will deal first with the issues of indemnification and settlement and last, with the issue of breach of statutory condition voiding the policy.

Have the Cirillos Been Indemnified to the Extent the Policy Allows?

112 Mr. Ferris testified on behalf of the Cirillos in respect of their claim against Wawanesa. Cameron Snodden, Sharda Dookhie-Kangal and James Phinn testified on behalf of Wawanesa. I have previously commented on the credibility and reliability of the evidence given on behalf of Wawanesa. In critical areas of dispute, I have accepted the Wawanesa evidence over the evidence of Mr. Ferris whose memory and recall did not compare with the manner in which the Wawanesa's witnesses testified. They had excellent recall supported by impeccably organized documentation. The same cannot be said for Mr. Ferris, who had neither.

113 As plaintiffs, the Cirillos bear the onus to establish that they are entitled to additional benefits for payments under the policy. The evidence establishes that the Cirillos' policy entitled them to the cost of repairing the premises with material of similar kind and quality. The policy does not require Wawanesa to pay whatever TGA charged the Cirillos to repair the premises which is the position advanced by the Cirillos supported by their mistaken interpretation of the guaranteed replacement cost endorsement.

114 The evidence of Ms. Dookhie-Kangal and Mr. Wilkins regarding the industry's practice in quantifying the amount owing under this coverage was largely uncontradicted. In order to determine the replacement cost of repairing fire related damage, the insurer retains two contractors to attend and inspect the damage. In this case, it was Bachly Construction and Leda Restoration. The two contractors would determine a scope of repair and provide estimates with itemized pricing. The coverage is limited to the lowest estimate. The insured is given the option to retain one of the two contractors and if so, that contractor's estimate becomes the contract of price. As the contractor would be bound by his estimate, the estimate accurately reflects the cost of repair.

115 If the insured decides to retain his own contractor (as was the case with the Cirillos) the insurance coverage still remains the lowest estimate. Coverage is contingent on the insureds repairing the premises and typically the insureds as with the Cirillos would be paid in stages as the restoration and repair progressed. Where additional damage is discovered as in this case, the insurer asked the contractors Bachly and Leda to re-attend, inspect the damage and provide revised estimates based

on the expanded scope of repair. The lowest estimate on the expanded scope from either Bachly or Leda would become the insureds' limit of insurance.

116 Where there is a dispute as to the extent of the damage or the cost of repairing the damage, this dispute is resolved by way of appraisal as indicated by both Mr. Wilkins and Mr. Phinn.

117 The Cirillos have contended that Guaranteed Replacement Cost (GRC) entitles them to whatever their contractor charged them to rebuild the house. This contention is incorrect. It is not supported by any evidence or by the wording of the policy. The Guaranteed Replacement Cost entitles the insured to replacement cost regardless of the limit of the insurance shown on the declaration page which for the dwelling in this case was \$219,500. Mr. Phinn is the claims supervisor in Wawanesa's Toronto branch property department. He has held this position since December 1994. His supervisor is Dieter Mayer who is the Claims Manager, Toronto Branch. Sharda Dookhie-Kangal was one of Mr. Phinn's Senior Adjusters.

118 Mr. Phinn testified that the real purpose of GRC coverage is to deal with unforeseen fluctuations of costs and repairs, such as an increase in pricing materials. He agreed with the evidence of Ms. Dookhie-Kangal that Wawanesa would retain two contractors and would pay the lowest estimate. This is the practice throughout the industry. He went on to describe that the insured would retain one of the preferred contractors or could retain his own contractor.

119 If the insured retained a third party contractor, Wawanesa stayed out of that relationship. If there was a dispute on quantum of repairs, there was a statutory provision in the policy for appraisal. This was a binding arbitration process that would go to an umpire who would set a binding value. The appraisal process takes place where there is a dispute in respect of the value of the loss and it could be for any loss.

120 The Cirillos have received the sum of \$287,564.51 under the building coverage. In the end, Wawanesa paid out the sum of \$295,392.11 to all parties in respect of the Cirillos' loss regarding the building. To succeed in their action, the Cirillos must establish that their home could not be repaired with material of similar kind and quality for the amount paid out by Wawanesa under the building coverage. The Cirillos must show that they are entitled to additional payments. On the evidence, I find they have not discharged that burden.

121 The Cirillos asserted that they were not aware of the terms of the policy and were ignorant of the process. I disagree that ignorance of the terms of the policy would create coverage that otherwise did not exist. Further, I disagree that they were ignorant of the process.

122 Quite to the contrary, the evidence of Ms. Dookhie-Kangal and Mr. Phinn established conclusively that the Cirillos were fully aware of the extent of their coverage and aware as to the process.

123 In his cross-examination, Mr. Ferris admitted to being told of the extent of the coverage.

124 Ms. Dookhie-Kangal and Mr. Phinn testified at trial. Wawanesa's detailed notes, records and correspondence regarding this claim were also filed in evidence.³⁵

125 I accept Ms. Dookhie-Kangal's testimony that she explained the process to Mr. Ferris. She was the senior adjuster handling this loss on a day-to-day basis. She prepared hand-written notes that were made contemporaneously with conversations or immediately after a call. She agreed that the building claim was the only issue in this case. Her testimony supported by her notes establish that Mr. Ferris was told by her that Wawanesa would have Bachly and Leda inspect the damage,

prepare a scope of work and provide an estimate of repair and that the Cirillos coverage under the building coverage would be limited to the lowest of the two estimates. Also explained to Mr. Ferris was that the Cirillos would have the option of retaining either Bachly or Leda at the cost of their respective estimates or they could retain their own contractor. If they retained their own contractor the extent of the coverage remained the lowest estimate of repair regardless of which contractor they retained and what they ultimately were charged by their own contractor.

126 Ms. Dookhie-Kangal repeated her explanation in discussions with Mr. Ferris on July 21, 2004 "advised we pay lowest if scope the same"³⁶ Also on August 17, 2004 she spoke with Mr. Ferris again. Her note covers six points discussed with Mr. Ferris.³⁷ The note reads as follows:

Called insured Kevin. (1) advised deal with TGA. If he has brought TGA in we will deal with TGA through insured. (2) Agreed scope of work - we pay lowest estimate. (3) advised don't pay increased cost. (4) if additional we will re-inspect. (5) Again we pay lowest estimate for same scope of work. (6) Advised if TGA can match Bachly's cost that's great.

127 She testified and I accept her evidence that Mr. Ferris fully understood the terms and raised no issue.

128 It is uncontested that in the summer of 2004 Wawanesa provided the Cirillos with a cheque in the amount of \$160,680.45 as an advance towards the building coverage that both sides expected would be used to commence the repair and reconstruction.

129 Ms. Dookie-Kangal's evidence is consistent with the evidence of Mr. Wilkins in that she re-attended the site for further inspection on September 1, 2004. This attendance was required because Mr. Wilkins had discovered additional smoke damage and additional work was required. Following that inspection, Mr. Wilkins wrote to Wawanesa listing additional areas of damages which were not contained in either the previous estimates of Bachly or Leda. Wawanesa did not dispute any of the areas raised and asked both Bachly and Leda to provide estimates of this new expanded scope of work.

130 Bachly and Leda re-attended and provided revised estimates. Bachly's revised estimate totalled \$280,886.11. Leda's revised estimate for the expanded scope of work totalled the sum of \$319,377.72.

131 On December 17, 2004, Mr. Sam Scarfo of Wawanesa attended the site to inspect the progress made with a view to issuing a draw. He met with Frank Cirillo, Kevin Ferris and Doug Wilkins on site.³⁸ Mr. Scarfo's note to Wawanesa's file shows that the Cirillos were asking for an additional \$100,000 on top of the \$160,000 paid so far. Mr. Scarfo told them he would get back to them regarding their concerns and requests for more money.

132 On December 21, 2004, Mr. Scarfo spoke with Kevin Ferris.³⁹ Mr. Scarfo made a note of his conversation with Mr. Ferris. Mr. Scarfo told Mr. Ferris that the limit under the building coverage was \$280,886.11 (Bachly's revised estimate) based on the expanded scope and that after deducting the \$160,000 remitted in the summer, there remained the balance of \$120,000. These were approximate figures. Wawanesa was prepared to pay \$60,000 of the remaining \$120,000 with the last \$60,000 to be paid upon completion of the repair. Mr. Ferris acknowledged this conversation and did not raise any issue or suggest that the amount of coverage should be whatever TGA ultimately charged the Cirillos which is what the Cirillos contended at trial.

133 Ms. Dookhie-Kangal testified that there was another meeting at Wawanesa's office on January 25, 2005 involving Mr. Wilkins, James Phinn but not Kevin Ferris. At that meeting, it was agreed that a cheque for \$60,000 with GST in the amount of \$4,200 for a total of \$64,200 would be paid. TGA had rendered an invoice for this amount. The balance of \$56,000 would be paid once Wawanesa was presented with a summary. At no time during the January 25 meeting did the Cirillos ever take issue with Wawanesa's position regarding the scope of repair nor its position with respect to the cost of repair. Mr. Wilkins was told that there was \$56,000 left and he did not raise an issue.

134 Although the Cirillos had agreed that the cheque would be made co-payable, Frank Cirillo deposited the cheque without TGA's endorsement. TGA walked off the job, ceased work and retained counsel. Only after TGA ceased work (February 5, 2005) did the Cirillos agree to pay TGA the sum of \$50,000. After that payment was made, Mr. Ferris immediately contacted Wawanesa on February 8, 2005. Ms. Dookhie-Kangal had a conversation with Mr. Ferris on that date as evidenced by her notes.⁴⁰ In that conversation, Mr. Ferris advised that any additional payments should go to the Cirillos. He was advised that Wawanesa would require receipts to support payment. Wawanesa would review those receipts and supporting documents prior to payment. Mr. Ferris' request was in contrast to Mr. Wilkins' understanding as evidenced by his notes. Those notes indicate that Mr. Wilkins spoke with Kevin Ferris and that as of February 3, 2005 Mr. Wilkins was expecting to receive \$60,000 in the following week.⁴¹ Instead of a co-payable cheque being sent to TGA, it was not the intention of the Cirillos to pay the last payment to TGA but rather have that payment made directly to them. While Mr. Ferris provided Ms. Dookhie-Kangal with no reason for direct payment to the Cirillos, it is clear that the Cirillos wished to control insurance proceeds and did not want those funds to be paid to their contractor contrary to discussions between Kevin Ferris and Mr. Wilkins.

135 Ms. Dookhie-Kangal also testified about a meeting involving herself, Mr. Ferris, Mr. Phinn and Mr. Wilkins on February 23, 2005. The purpose of the meeting was to discuss additional repairs, and request an extension to the limitation period for 60 days. A letter had been received from Mr. Wilkins dated February 24, 2005 listing and referring to additional items.⁴² Wawanesa agreed to consider these additional items but requested supporting documentation and particulars. At no time during the meeting did the Cirillos raise an issue with Bachly's estimate for repair or dispute the extent of their coverage. The only issue raised was additional items that Wawanesa conceded had not been considered by Bachly.

136 These additional items were listed in correspondence from Mr. Wilkins dated February 24, 2005.⁴³ Upon receipt of the particulars and some supporting documentation, Ms. Dookhie-Kangal calculated the final amount owing as \$73,882.76 (\$56,005.66 from the Bachly estimate and \$17,817.10 of additional items).⁴⁴

137 Ms. Dookhie-Kangal testified which testimony is supported by her notes that she spoke to Mr. Ferris twice on April 28, 2005⁴⁵ She spoke with Mr. Ferris about the final payment of \$73,822.76. She told him how she arrived at this number regarding the additional repairs which were referred to in Mr. Wilkins' letter dated February 24, 2005. She referred to her notes which gave a breakdown of these additional items which Wawanesa allowed. The final item was the building damages outstanding at \$56,005.66. Mr. Ferris understood that the \$73,000 figure was a final payment. He did not disagree. She had no further discussions regarding more money with Mr. Ferris. Had there been, she would have noted it because her file would go to her supervisor due to the fact that further payment would be beyond her payment authority.

138 Her note of April 28, 2005 reads:

3:19 called Kevin advised final payment \$73,822.76. Will have to advise how payment will be made. He will get back to me.

139 Mr. Ferris did not raise any issue as to the method of calculation or the ultimate amount. I find that his only concern was to whom the cheque was to be made payable as was born out by further events characterized as the race for the final payment as between the Cirillos and TGA.

140 The last two cheques were issued for about \$11,000 regarding drapes and \$62,684.06 for repairs. These payments were issued only to the Cirillos. Her next involvement with Mr. Ferris was on May 6, 2005 when she was advised that TGA had liened the Cirillo property. There were some discussions later in the day about a few hydro bills but there was no discussion about any additional building payments. The last of the hydro bills for a relatively minor amount were paid in May 26, 2005. This concluded her involvement. The claim was done and paid for. She was of the view that the claim was adjusted in the normal fashion. The insureds were easy to deal with and she had no problems in respect of this particular file.

141 It is uncontradicted that the Cirillos were paid the sum of \$287,564.41 under the building coverage. They bear the onus of establishing that it required more than that sum to repair their home with material of similar kind and quality. I have previously referred to the Cirillos relying upon the comparison chart prepared by Mr. Wilkins. I have also reviewed the evidence of Mr. Snodden of Bachly Construction regarding how he prepared his estimates both original and revised which included additional work for the repair of fire related damage in the amount of \$280,886.11.

142 As between the Wilkins comparison chart and the revised Bachly estimate, the best and more cogent evidence is that of Mr. Snodden. Bachly would have repaired the fire related damage for that amount and would have been bound by that figure as the contract price. There was no incentive on the part of Bachly to come in with under-valued estimates of repair or scope of work because their revised estimate would have been the contract price had the Cirillos retained Bachly. However the Cirillos did not retain Bachly and retained their own contractor. Nevertheless, the Cirillos were told that Wawanesa would pay the lowest estimate which was that from Bachly Construction.

143 As for Mr. Wilkins' comparison chart, he testified that he used his revised final estimate of February 9, 2006 to prepare the chart. He did not consult with Bachly, review photos or attend the premises. He also testified that the Cirillos had made several changes and upgrades during the course of the project which were ultimately incorporated into TGA's revised final scope and invoices. These changes adversely affect the TGA comparison chart as being a reliable means upon which to determine whether the Cirillos are entitled to further payments.

144 I accept Mr. Snodden's evidence and estimate based on his inspection without any of the changes and upgrades made by the Cirillos. His evidence is preferable to that of the comparison chart prepared by Mr. Wilkins several years later for a different purpose and lacking in reliability as opposed to the Bachly revised estimate. The two Bachly estimates specifically set out the scope of the work and pricing to carry out restorative work. I find they were neither under-valued estimates nor were they flawed because they missed work to be done. The revised Bachly estimate fairly describes the additional scope of work and cost of repairs. The Cirillos had decided to retain TGA to carry out repairs prior to and irrespective of Bachly's revised estimate.

145 The Cirillos have been paid more than \$280,886.11 being Bachly's revised estimate. They were paid \$287,564.51 under the building coverage of their policy. Wawanesa ultimately paid \$295,392.11 for the building claim in total. None of this money was ever paid to TGA by Wawanesa. I find that the Cirillos have not established that they are entitled to further payment under the building coverage of the policy. In all respects, the Cirillo claim was handled in a professional and competent manner by Wawanesa. This is evidenced by the testimony of Wawanesa's witnesses together with their detailed documents and as further confirmed by the evidence of Mr. Ferris and Mr. Wilkins. I find the Cirillos have been indemnified to the extent the policy allows.

Was the Claim for Building Coverage Settled?

146 Wawanesa submits that the Cirillos' building coverage claim was settled prior to the commencement of this law suit.

147 I find that the Cirillos were informed that their coverage for the building repair was limited to the lowest of the contractors estimates. The Cirillos were also aware that Bachly had the lowest estimate and that TGA's estimate was higher. The Cirillos chose to retain TGA knowing that their insurance coverage would not cover TGA's contract price. The Guaranteed Replacement Cost endorsement was not capable of such an interpretation by the Cirillos as I have previously found.

148 Further, the Cirillos were told on December 21, 2004 by Mr. Scarfo on January 25, 2005 and by Ms. Dookhie-Kangal that the estimate of the expanded scope totalled \$280,886.11. There was also a meeting between herself, Mr. Wilkins, Mr. Ferris and Mr. Phinn on February 23, 2005. The purpose was to discuss additional repairs and to request an extension of the limitation period. At no time during any of those meetings or discussions did the Cirillos take issue with the amount of coverage.

149 Once the extras were considered and accepted as a result of Mr. Wilkins letter of February 24, 2005, Ms. Dookhie-Kangal explained to Mr. Ferris that there would be a final payment in the amount of \$73,882.76. Her evidence was unmistakably clear on this point. She advised Mr. Ferris on more than one occasion that Wawanesa would be issuing a final payment. Mr. Ferris raised no issue regarding final payment. In his evidence, Mr. Ferris testified he was "shocked" when told that the Cirillos would be receiving this final payment. There was nothing that they could do and it was essentially presented to them by Wawanesa as a *fait accompli*.

150 I do not accept Mr. Ferris' evidence on this point. He knew on a number of occasions that a final payment was going to be issued by Wawanesa. The Cirillos and Wawanesa had reached this juncture in the resolution of the building claim. Mr. Ferris was quite aware that he could have protested or complained at any time that the amount was wrong. He could have demanded that the Cirillos be paid more money by Wawanesa. He could have disputed Wawanesa's payment based on the lowest estimate being the Bachly estimate. He could have argued the Bachly estimate was wrong. He could have done all of those things which would have triggered the appraisal mechanism. Nevertheless, he did not take issue with the amount that Wawanesa was paying as the final payment.

151 Ms. Dookhie-Kangal had also testified that on April 28, 2005 she spoke to Kevin Ferris about a final payment in the amount of \$73,822.76. She described how she arrived at this number. Mr. Ferris understood that it was the final payment. He did not disagree and was to advise Ms. Dookhie-Kangal as to how payment was to be made to the Cirillos because by then, Wawanesa had

obtained a copy of the authorization "amended" by Mr. Wilkins which purported to direct payment from Wawanesa to TGA. The race was on for the final payment and everybody knew it.

152 Ms. Dookhie-Kangal also spoke with Mr. Wilkins on May 3, 2005 advising him that there would be a final payment of \$73,822.76. She further advised Mr. Wilkins that Mr. Ferris was to get back to her to advise how payment would be issued.

153 Mr. Ferris also spoke with Mr. Phinn who kept computerized notes.⁴⁶ I accept Mr. Phinn's evidence and the evidence of Ms. Dookhie-Kangal that by late April beginning of May 2005 the issue had become how Wawanesa was to direct final payment. At this point in time, Wawanesa had received the TGA agreement with a check mark indicating that Wawanesa was to pay TGA. There was no discussion about amounts and no discussion disputing amounts and no discussion about a law suit at that time either.

154 Proceeding through Mr. Phinn's entries of May 3, 2005, he was of the view that if the Cirillos disagreed with the final figure then they could go to appraisal. This was something that he reported to his superior Mr. Mayer. If there was any mention of the Cirillos wanting more money, then Wawanesa would hold back payment and go to appraisal. Mr. Phinn agreed that this was the approach.

155 Mr. Phinn was presented with an authorization signed by the Cirillos to make the final payment to them and not co-pay TGA.⁴⁷ He was not comfortable issuing cheques to the Cirillos because he had received a copy of an agreement from TGA with a check mark on that agreement.⁴⁸ He had sent a copy of that agreement with the check mark to Kevin Ferris. There were discussions with Mr. Ferris who advised that the Cirillos had rescinded the agreement which they did not recall signing. The Cirillos were the insureds of Wawanesa and Wawanesa should issue the cheque directly to the Cirillos. Ultimately, this is what Wawanesa did.⁴⁹ There were no discussions about the \$73,000 amount being insufficient and no discussions demanding more money. Wawanesa knew that TGA had a higher estimate. Had Mr. Ferris said he was not satisfied with the \$73,000 final payment, then Wawanesa would not have settled for \$73,000 and would have gone to appraisal.

156 Mr. Phinn had another dealing with Mr. Ferris on May 13, 2005. Mr. Ferris had called Mr. Phinn about TGA putting the bank on notice regarding the cheque for \$64,200. At that time there was no mention of any additional money to be paid on the building claim. There was no suggestion that the Cirillos would sue Wawanesa for more money. Mr. Phinn was merely told about the cheque for \$64,200 which Mr. Cirillo had deposited into his own bank account.⁵⁰

157 The evidence clearly shows that the only issue raised at this time by Mr. Ferris was the manner in which the cheques were to be paid to the Cirillos. The evidence of Ms. Dookhie-Kangal and Mr. Phinn is corroborated by their contemporaneous handwritten and computer notes.⁵¹ The handwritten notes refer to "final payment" on several occasions and the computer notes described the last payments as "FP" referring to final payment as opposed to "PP".

158 Mr. Wilkins had also testified that he was concerned that the Cirillos would settle the claim cutting out TGA which is exactly what the Cirillos did.

159 The Wawanesa correspondence enclosing the final two cheques in the amount of \$11,138.70 for the drapery replaced and \$62,684.06 for the additional building repairs were described as final payment for building damages on this loss. The letter was dated May 5, 2005 from Ms. Dookhie-Kangal to Mr. and Mrs. Cirillo.⁵² It was Mr. Ferris who picked up the cheques from Wawanesa. Mr. Ferris agreed in cross-examination that the letter and the cheques were consistent with the notes of

Ms. Dookhie-Kangal and Mr. Phinn regarding the final payment. He agreed that the cheque for \$62,684.06 was for additional building repairs. He further agreed that the cheque was deposited into Frank Cirillo's account with the full knowledge that these were final cheques and they were deposited on May 5, 2005. Mr. Ferris agreed that as of May 6, 2005 he had no dispute with Wawanesa.

160 After Mr. Ferris picked up the two cheques, both Ms. Dookhie-Kangal and Mr. Phinn spoke with Mr. Ferris and at no time did Mr. Ferris dispute the amount of the final payment. In fact, Mr. Ferris was seeking additional payment for some hydro bills which was also paid by Wawanesa.

161 I find that the evidence is overwhelming in support of Wawanesa's position that there was never any dispute or issue raised by the Cirillos with Wawanesa throughout this entire claim. Ms. Dookhie-Kangal testified that after the issuance of the final payment she considered the matter closed. The Cirillos had been explained the extent of their coverage and were provided with detailed breakdown of payments under that coverage and they accepted those payments. They were complimentary towards the manner in which they were treated by Wawanesa. They were treated by Mr. Phinn and Ms. Dookhie-Kangal in a professional, courteous and competent manner.

162 I find that the building coverage claim was settled prior to the commencement of this action.

163 Given Mr. Ferris' admission that after receiving the final cheques the Cirillos had no issue with Wawanesa, the question becomes why would the Cirillos commence proceedings against their insurer. It becomes readily apparent on all the evidence that the sole reason the Cirillos commenced their action was to have Wawanesa satisfy TGA's claim for payment. I also find that just as TGA was not entitled to any payment directly from Wawanesa neither was Wawanesa obliged to pay TGA's account. We come full circle to the original finding that there was no contract between TGA and Wawanesa obligating Wawanesa to pay anything to TGA. Neither was there any agreement between the Cirillos and Wawanesa that Wawanesa was obliged to pay whatever TGA's outstanding account was in regard to the repair and reconstruction of the Cirillo home.

164 A number of useful authorities were cited by Wawanesa. From those authorities it is well established that whether a claim under the building coverage was settled is a matter of fact. In *Decelle v. Lloyds of London*,⁵³ the insured cashed a cheque which the insurer stipulated was in settlement of the claim. He then sued for additional benefits. The court held that whether an agreement was reached was a question of fact. In that case, the insured advised the insurer that he would not accept the amount offered and the court held that based on the voiced objection it could not find there was an agreement.

165 Similarly in *Pulla v. Simcoe and Erie General Insurance Company*⁵⁴ the insurer sent the insured a cheque and a covering letter indicating the cheque was in full settlement of his claim. Upon receipt of the cheque, the insured immediately advised the insurer the cheque was insufficient. The cheque was not deposited by the insured but rather retained by his lawyers until the claim was resolved. On those facts, the court held that although the cover letter included the word "final" there was clearly no agreement in that regard.

166 Those cases are distinguishable from the case at bar. The Cirillos were advised throughout that coverage would be limited to the lowest estimate of repair namely \$280,886.11. There were a number of discussions in respect of the remaining balance and several discussions once the final figure was calculated.

167 The notes and records show the last cheque was "final". The correspondence enclosing the cheque refers to it as "final". Ms. Dookhie-Kangal and Mr. Phinn understood and issued the cheque on the basis that it was final. Mr. Phinn was clear in his testimony that had their been any dispute raised by the Cirillos, the cheque would not have been issued and the matter would have referred to appraisal. Mr. Ferris, the Cirillos and TGA knew the last cheque was final.

168 Mr. Ferris admitted at trial that after receiving the cheques, the Cirillos had no further issues with Wawanesa. Mr. Ferris fully understood that the cheques were a final payment and he picked them up. There was never any dispute or issue raised by the Cirillos in respect of the amount of the final payment. Their only concern was to receive that final payment before TGA did.

169 I find that the facts of this case overwhelmingly support a finding that the Cirillos building coverage claim was settled and the Cirillos are precluded from seeking further payment from Wawanesa.

170 Counsel for Wawanesa agreed that should I make findings in favour of Wawanesa regarding the indemnification and settlement issues, it would not be necessary to make any finding regarding whether the policy was void for breach of statutory condition #1. Having so found in Wawanesa's favour regarding the indemnification and settlement issues, it is not necessary for me to determine whether the policy was void for material misrepresentation.

CONCLUSION

171 Accordingly, for reasons given, the Cirillos action against Wawanesa is hereby dismissed.

COSTS

172 The parties agree that costs shall be determined by way of written submissions. The parties shall exchange and file written submissions on costs within 14 days of this decision with the trial co-ordinator at Barrie. Those submissions shall consist of a concise written summary of position no longer than two pages in length, together with a supporting bill of costs, costs outline in accordance with forms 57A and 57B of the *Rules of Civil Procedure* and any relevant authorities.

G.P. DiTOMASO J.

cp/e/qllxr/qljxr/qlaxw/qlhcs

1 Exhibit 1 tab 1

2 Exhibit 1 tab 2

3 Exhibit 2A tab 8

4 Enzo Cirillo transcript on examination-for-discovery held March 1, 2007 page 101 Q 490.

5 Exhibit 1 tab 8

6 Excerpt from Enzo Cirillos examination-for-discovery held March 1, 2007 p. 171 Qs 811 - 813

7 Exhibit 1 tab 15

8 Exhibit 2C tab 74 p. 746

9 Exhibit 2C tab 103

10 Exhibit 1 tab 4

11 Exhibit 1 tab 5

12 Exhibit 1 tab 6

13 Exhibit 1 tabs 4-6; exhibit 2A tabs 14, 15, 16; exhibit 3 tab 1 pp. 1-6 (Cirillos' banking records)

14 Exhibit 1 tab 11

15 Exhibit 1 tab 11

16 Exhibit 2A tab 19

17 Exhibit 1 tab 18

18 Exhibit 1 tab 2

19 Exhibit 1 tab 8

20 Exhibit 1 tab 19

21 Exhibit 1 tab 25 as amended

22 Excerpt from Enzo Cirillo's examination-for-discovery held March 1, 2007 p. 171 Q 810

23 Exhibit 2B tab 60

24 Exhibit 1 tab 19

25 Exhibit 2C tab 73 p. 701

26 Exhibit 2C tab 76 p. 780

27 Exhibit 3 tab 3

28 Exhibit 2B tab 60

29 Exhibit 2 tab 60; exhibit 5 tab 6

30 Exhibit 2B tab 60

31 Exhibit 1 tab 8

32 Exhibit 5C tabs 4 and 5 (they were charts prepared at the request of counsel to prepare costs. Mr. Wilkins prepared the charts without returning to the site and without taking photos. They were based on his own estimates as an appraiser without having any discussions with Bachly Construction).

33 Exhibit 2C tab 73 p. 699

34 Exhibit 1 tabs 23 & 26

35 Exhibits 2A, B, C and Exhibit 4 - photograph brief

36 Exhibit 2C tab 73 p. 686

37 Exhibit 2C tab 73 p. 692

38 Exhibit 2C tab 73 p. 700

39 Exhibit 2C tab 73 p. 699

40 Exhibit 2C tab 73 p. 706

41 Exhibit 2C tab 76 p. 784

42 Exhibit 2C tab 73 p. 709

43 Exhibit 2C tab 95 p. 855

44 Exhibit 2C tab 73 p. 704

45 Exhibit 2C tab 73 p. 712

46 Exhibit 3 tab 5

47 Exhibit 2C tab 99

48 Exhibit 1 tab 3

49 Exhibit 3 tab 5 p. 49

50 Exhibit 2C tab 73 p. 718

51 Exhibit 2C tab 73; exhibit 3 tab 5

52 May 5, 2005

53 *Decelle v. Lloyds of London*, [1973] S.J. No. 276

54 *Pulla v. Simcoe and Erie General Insurance Company*, [1984] O.J. No. 1067