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(Winnipeg Centre)
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The Sovereign General Insurance Company
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2009 MBQB 203 (CanLI)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

MINOX EQUITIES LIMITED and WINNIPEG
CONDOMINIUM CORPORATION NO. 106,

Plaintiffs,

- and -

THE SOVEREIGN GENERAL INSURANCE
COMPANY,

Defendant.

) **APPEARANCES:**

)
) D. Hill and M. Low
) for the Plaintiffs

)
) J. Edmond and M. Malden
) for the Defendant

)
) Judgment delivered:
) July 21, 2009

)

BRYK, J.

INTRODUCTION

[1] In 1977, the plaintiff, Minox Equities Limited (Minox), constructed the Apple Meadows Complex (Complex) at 161 - 193 Quail Ridge Road consisting of nine two-storey buildings with four units on each of the first and second stories. The Complex was registered as a condominium by the plaintiff, Winnipeg Condominium Corporation No. 106 (Winnipeg), but none of the condominium units were ever sold. For ease of

reference, the plaintiffs jointly will be referred to as Minox. Minox owned all of the units comprising the property and rented them to various tenants.

[2] Within two years of completion of construction, the buildings experienced humidity problems caused by various factors. As a result, mould began to occur in some but not all of the units throughout the Complex. The visible mould was removed and the units repaired from time to time.

[3] In 1993, the defendant The Sovereign General Insurance Company (Sovereign) issued a policy of insurance which was maintained by Minox up to and including 2003.

[4] In 2001, it was determined that some of the mould was toxigenic.

[5] In 2002, Minox filed two proofs of loss relating to damage caused by toxigenic and other mould in the Complex.

[6] The claims were denied by Sovereign for a variety of reasons.

ISSUES

[7] Minox and the defendant each provided a list of issues from which I have extracted the following:

1. Is the damage caused by mould a risk covered under the policy, i.e. are the losses fortuitous or inevitable?
2. Is mould excluded from coverage under the policy?
3. Did the loss or damage occur within the policy period?

4. If the losses are otherwise excluded, has Sovereign waived its right to rely on the exclusions by reason of its failure to make inquiries as to the condition of the building?
5. Is the loss or damage absolutely barred pursuant to the two-year limitation in *The Insurance Act*, R.S.M. 1987, c. I40?
6. If the losses are covered under the policy, what is the amount recoverable?

EVIDENCE

Mould and its Consequences

[8] At the commencement of trial, three volumes of exhibits were filed by consent. They included 247 documents all of which related to Exhibit 248 which was an Agreed Chronology of Facts (Agreed Chronology). Those agreed facts as well as others elicited from the testimony of the various witnesses will be referred to throughout this judgment. Additional Exhibits 249 to 278 to which reference will also be made were filed during the course of the trial.

[9] The witnesses for the plaintiff included Michael Joseph Nozick (Nozick), the principle shareholder in Minox and Winnipeg, as well as in Fairweather Properties Inc. (Fairweather), the management division of Minox. Also testifying for Minox were Kelly John Hearson (Hearson), President and managing partner of Crosier Kilgour & Partners Ltd. (Crosier), consulting structural engineers, and Jay Snedden (Snedden), partner in

Pinchin Environmental (Pinchin), consultants in environmental health and safety management. Dr. Om P. Malik (Malik) provided expert testimony on behalf of Minox.

[10] Testifying on behalf of the defendant was Mark Lennox Taylor (Taylor), owner of Insight Infrared Energy Inspections Inc. (Insight), a roofing consultant. Douglas Neil Wylie (Wylie), a partner in OHG Consulting (OHG), testified as an expert on behalf of the defendant.

[11] Both Malik and Wylie were qualified as experts in the areas of the nature of mould and its characteristics, factors contributing to or causing mould growth, warning signs or other indicators to detect the onset or occurrence of mould growth, distinction between toxigenic and non-toxigenic mould, the probability of mould growth generally and at the Complex specifically, potential damage caused by mould to both property and health, methods of mould abatement, and moisture problems and mould at the Complex specifically and steps taken to address same.

[12] At the very root of the dispute between the parties is the question of whether any distinction should be made between toxigenic and non-toxigenic mould. Minox admits the existence of mould at the Complex since shortly after it was constructed. However, they say that toxigenic mould, which poses more serious health problems, was not identified until 2001 following which they took reasonable steps to eradicate it and to prevent its recurrence. On being advised that the steps taken to remediate the Complex would be the same for both toxigenic and non-toxigenic mould, Minox

proceeded to take the necessary remedial steps recommended by Hearson and Snedden.

[13] The defendant contends that the growth of mould at the Complex was inevitable because of the defective design and construction of the Complex which led to high humidity and moisture levels and the failure to rectify those problems at the early stages.

[14] An understanding of what mould is, what causes it to occur, the distinction between toxigenic and non-toxigenic, and abatement and remediation procedures needs to be understood.

[15] In response to a request from plaintiffs' counsel, Malik provided a letter dated November 1, 2004 (Exhibit 256) which included information regarding mould. As that evidence is uncontroversial, I now reproduce portions of it for purposes of information and understanding:

What is Mould?

The term mould applies to a large group of microorganisms that form the Fungi Kingdom of living matter. The common usage of the term 'mould' is restricted to those commonly described as 'microfungi', differentiating them from 'macrofungi' such as mushrooms. There are over 200,000 species of mould, they help decompose decaying organic material and are considered the world's largest garbage eaters. Moulds are simple-celled organisms that do not need energy from light for growth.

What is Mildew?

The microfungi also includes mildews and yeasts. Mildew generally has a thin, sheet-like appearance that often coats entire surfaces. Mildew can be black or white in color. As mildew grows, it leaves behind a musty, sour-like odor.

Are they Similar?

In everyday usage the definition of mould includes mildew. The word mildew is generally used for blackish slimy growth found in areas of high humidity within a home or a whitish fungal growth on the plants. Mildew is generally composed of several mould species.

...

What causes mould to form?

The word 'form' is not applicable to mould in its strictest sense however most moulds reproduce by forming a large number of unique seed like structures called 'spores' and therefore in that sense it can be stated that 'spores' cause mould to form. Spores are usually unicellular, reproductive propagule (sexually or asexually) from which mould or fungi germinate when appropriate growth conditions are present. They are invisible to the unaided eye, are practically indestructible, are ubiquitous and are distributed by wind, insects, floods, animal and human activity.

...

What causes mould to grow after its formation?

When spores settle on an organic surface (food source), under appropriate moisture temperature and lighting conditions they absorb water, swell to 2-3 times their original size (1-3 microns) and begin to form thread like structures known as 'hyphae'. As the hyphae grow, they interweave to form a tangled mass known as [mycelium]. With continued availability of moisture (water), the mycelium extends across the surface of the food source (referred to as 'substrate') generally in a circular pattern with hyphae growing above and below the food source.

Moisture (including materials dissolved in water) and availability of food sources are therefore the predominant causes for mould to grow after its formation.

...

What is toxigenic mould?

Toxigenic mould generally refers to mould(s) that release mycotoxins which are poisonous substances found on or within mould spores. However, there is no agreed upon definition of what constitutes toxic or toxigenic mould. ... "... all moulds have the potential to cause health effects". The American Industrial Hygiene Association identified five 'marker' species that are generally indicative of water damaged building materials; these species are sometimes referred to as the 'water indicator fungi'. The five species are:

Aspergillus fumigatus

Aspergillus versicolor
Aspergillus flavus
Fusarium Moniliform.
Stachybotrys chartarum (atra)

These species have been implicated in adverse health effects and therefore sometimes they are referred to as toxigenic mould.

...

How does it form?

The process of formation of one or another type of mould is the same as described above. It is formed by deposition of spores on a damp food source (cellulose based) substrate.

How does it grow?

The growth process is no different than that for any other mould. The type of spores, the type of substrate (plywood, drywall, cardboard, particle board etc.), the water activity (amount of available moisture), pH (acidity/alkalinity), temperature are some of the factors that determine the type of mycotoxins formed as a result of metabolism and hence an indicator of toxicity (ability to cause harm).

As suggested earlier many of the mould species commonly referred to as 'toxigenic' moulds require high moisture content and therefore their growth or amplification is enhanced by excessive moisture.

...

[16] It is universally agreed that moisture is an essential ingredient for the development of mould. Both Malik and Wylie agreed that while the growth of mould is not inevitable even with all of the essential ingredients present, its growth and development under those conditions is highly likely or highly probable. It is fair to say that Wylie assessed a greater degree of probability than did Malik.

[17] Both Malik and Wylie made reference to a publication entitled "*Guidelines on Assessment and Remediation of Fungi in Indoor Environments*" issued by the New York

City Department of Health, Bureau of Environmental & Occupational Disease Epidemiology (New York Protocol). The first of two such guidelines was produced in 1993. Its purpose was to establish policies for medical and environmental evaluation and intervention to address *stachybotrys atra* also known as *stachybotrys chartarum* (*SC*) contamination. At that time, *SC* was a variety of mould known to produce micro toxins. Because of mould growth problems in several New York City buildings in the early 1990's, the guidelines were developed to address issues of abatement and remediation. The literature suggests that *SC* was considered to be a more potent and therefore more dangerous form of mould than other non-toxigenic types. That appeared to be the prevalent view throughout the 1990's and in the early 2000's. The universal consensus appeared to be that remediation of buildings with *SC* should be done with more caution and concern for the health of people involved in the remediation.

[18] In 2000, revised guidelines were developed which expanded the original guidelines. The reasons for the expansion of the guidelines were several. It came to be understood that many fungi including *aspergillus*, *penicillum*, *fusarium*, *trichoderma*, and *memnoniella*, in addition to *SC*, could produce potent mycotoxins some of which were identical to the compounds produced by *SC*. As a result, it was concluded that *SC* could not be treated as uniquely toxic in indoor environments. The revised New York Protocol deemed people who were performing renovations/cleaning of widespread

fungal contamination were thought to be at risk for developing organic dust toxic syndrome (ODTS) or hypersensitivity pneumonitis (HP).

[19] The 2000 New York Protocol included the following recommendations found at p. 9:

In all situations, the underlying cause of water accumulation must be rectified or fungal growth will recur. Any initial water infiltration should be stopped and cleaned immediately. An immediate response (within 24 to 28 hours) and thorough clean up, drying, and/or removal of water damaged materials will prevent or limit [mould] growth. If the source of water is elevated humidity, relative humidity should be maintained at levels below 60% to inhibit mould growth. ... Emphasis should be on ensuring proper repairs of the building infrastructure, so that water damage and moisture buildup does not recur.

[20] In March 2001, "*Guidelines for the Investigation, Assessment, and Remediation of Mould in Workplaces*" was developed by Workplace Safety and Health Division, Manitoba Department of Labour and Immigration (Manitoba guidelines). They were similar to the 2000 New York Protocol.

[21] Generally speaking, the guidelines recommended remediation of building materials supporting fungal growth as rapidly as possible. The steps to do so included repairing the defects that led to the water accumulation or elevated humidity in conjunction with or prior to fungal remediation. It also emphasized the prevention of contamination through proper building and HVAC system maintenance and prompt repair of water damage.

[22] As previously noted, both Malik and Wylie agreed that the recurrence of fungal growth was not inevitable. Wylie testified there was a very high likelihood that it would recur if the cause of water accumulation or high humidity was not rectified. Malik also

used the expression "high likelihood" when speaking of recurrence but emphasized that other ingredients were also essential. For example, whether the water was acidic or alkaline would have an impact. He also observed that if recurrence of mould was inevitable, even with the existence of all of the essential ingredients including high humidity or moisture, all of the suites within the Complex would have experienced mould growth and they did not.

[23] A variety of problems existed throughout the Complex which resulted in or contributed to the high humidity levels and water damage within the units.

[24] The clothes dryers were not vented outside the units. As a result, the moist air from the clothes dryers was discharged into the unit. Some time later, some of the clothes dryers were replaced with the new ones being vented into the crawl space below the first story units.

[25] Many of the second story units experienced build-up of snow and ice on the balconies against the patio doors which resulted in water leaking into the interior when the ice melted. That resulted in carpeting, baseboards and even the drywall surrounding the patio doors being wet for prolonged periods of time.

[26] The units were heated with electric baseboard heating which resulted in very limited air circulation. While there were exhaust fans in the kitchen and washrooms of each unit, many of the occupants refused to utilize them as it increased their hydro-electric costs. Similarly, when some of the units were furnished with dehumidifiers, they were often not used for the same reason.

[27] Some of the occupants used the clothes dryers more frequently, doing several loads of laundry in a day which resulted in the accumulation of humidity within the unit.

[28] All of the above factors resulted in many of the units having relative humidity levels in the 60% to 80% range which all who testified agreed was excessive. The high humidity condensed on the cold windows, especially during the winter, resulting in the windows leaking from the window sills onto the walls.

[29] The crawl spaces were not properly vented resulting in a build-up of humidity. The cardboard sonotubes as well as other debris provided the substrate on which the mould fed.

[30] In some of the attics, ice developed around the stacks as a result of insufficient insulation causing water to leak onto the attic insulation and in some cases where there was no vapour barrier, through the insulation onto the ceilings of the second story units.

[31] According to the Agreed Chronology, within the first two years after completion of construction, many of the humidity problems became evident. During the ensuing 12 years, various attempts were made to address the problems. Recommendations were received from a number of different sources. However, not all were accepted and ultimately, the issues of excess humidity and water seepage were never resolved.

[32] According to Nozick, and his evidence is undisputed in this regard, hundreds of thousands of dollars were spent on maintenance and repairs. Not only were specific

problems addressed as they arose, but overall improvements and modifications to the units and to the buildings within the Complex were effected.

[33] When the construction of the units was completed in 1977, a Certificate of Compliance was issued by LM Architectural Group (LM) regarding the inspection of the architectural portion of the Complex. Certificates of Compliance were issued by Crosier regarding the inspection of the structural portion as well as from AE Burstein and Associates Ltd. relating to the inspection of the electrical portion of the Complex. The firm of Klein & Dashevsky Ltd. (K & D), Consulting Engineers, provided a letter dated July 11, 1977 to LM certifying that they had inspected the mechanical portion of the Complex and that, to the best of their knowledge, the work performed was in accordance with plans and specifications approved by Canada Mortgage and Housing Corporation (CMHC), the mortgage company and the City of Winnipeg (City), and that it had been constructed in accordance with the applicable CMHC regulations and City building by-laws. The letter was under the signature of J.O. Klein (Exhibit 3).

[34] Several years later, on March 3, 1982, Stuart Allen (Allen) of K & D attended at the Complex to assess the cause of the high humidity in the units and the ice and frost conditions in the attic. He made a number of recommendations, the last of which was that the dryers in each unit be vented outside the building.

[35] Approximately 1½ years later, Jack Klein of K & D met with Nozick as reflected in Nozick's September 28, 1993 memo (Exhibit 28). Allen's earlier recommendation that the dryer units be vented outside could not be achieved with the type of dryer which

had been initially installed by K & D and it was therefore necessary to replace them with new dryers that could be vented outside. Nozick had purchased new dryers for one of the buildings and suggested that K & D pay for the replacement of the remaining dryers as he thought they were responsible for the humidity problems to which the dryers had contributed.

[36] Paragraph 2 in Nozick's memo states:

2. He indicates that about six months to a year prior to doing the drawings for the venting of the dryers, that he sent us a letter indicating ten to twelve points that they felt could be the cause of it. He says that all that happened was that Stewart was then asked to prepare a drawing for one building for changing the dryers and that they never said that the dryers were the main source of the problem, only that they were a contributing (and implicitly, a minor) factor. He says the understanding was that we would try one building and see how it worked. He admits that they made a mistake in the drawing because the dryers couldn't be vented but he says they should have been caught after one building because we were never going to do the rest of the buildings. As well this was not a recommended course of action, according to what Stewart has told him.

[37] In the Agreed Chronology, the following entry is found on page 4:

1983 09 28 Klein of Apple Meadows admits the mistake was made in the drawings for the venting of the dryers because they couldn't be vented. This should have been caught after one building was built. **[Exhibit 28]** (underlining added)

[38] Obviously, this entry in the Agreed Chronology was taken directly from Exhibit 28. However, it was incorrectly copied. As can be seen, the word "built" is nowhere to be found in Nozick's memo.

[39] The relevance of this seemingly minor discrepancy is that Sovereign refers to it as an admission by K & D that the initial design of the units (i.e. clothes dryers vented

internally) was defective. While the Agreed Chronology was filed by consent of both parties, it is clear that K & D never admitted to a defective design at the time the buildings were being constructed.

Health Concerns

[40] Admittedly, the Complex continued to experience problems associated with excess humidity and moisture which resulted in an ongoing regime of mould removal, repairs and upgrades. However, the first complaint of any health problem associated with those conditions appears to have occurred in 1992. Exhibit 42, which is a handwritten memo (author unknown), includes the following comment:

601 - Doctor has advised her to move out unless moisture problem is resolved.

[41] According to Nozick, no further information was received about the health of the tenant in 601 (the 601 in the memo refers to unit 601). If mould was present, it was removed. Nozick did not know whether the problem recurred. There was no evidence to indicate whether the tenant actually moved out of unit 601 or whether there was any actual medical problem associated with that tenant's occupancy of the unit.

[42] In early January 1993, severe moisture and mildew was found on the walls in unit 707. A Public Health Inspector with the Manitoba Environmental Operations Division wrote to Fairweather on January 29, 1993 advising of a complaint having been received in relation to unit 707. A January 27, 1993 inspection revealed black mould in the southeast bedroom from the floor to the ceiling in the corner joint and under the

window and also under the main entrance ceiling. The existence of that mould was defined as an "insanitary condition" under Manitoba Regulation 325/88R. Repairs to the unit were undertaken. There were no reports of any of the occupants of unit 707 experiencing any health problems as a result of the mould.

[43] In a November 18, 1998 memo (Exhibit 69) from Sharon Abgrall (Sharon), the on-site manager for the Complex to Carol Marshall (Carol), the second-in-command to Nozick, she reported the toilet in unit 702 overflowing into the hallway and over the carpets. That problem was remedied. However, she also reported that water was coming in from the patio doors.

[44] The Agreed Chronology at page 12 includes the following entry:

1998 11 18 Water continues to enter through the patio door of Unit 702. Severe water damage is still visible March 31, 1999, repairs were conducted April 15, 1999. Problems in this unit were ongoing into 2000, including the health problems experienced by tenant and family. **[Exhibit 69]**

[45] Exhibit 69 makes no reference to any health problems experienced by the tenant and family. The entry in the Agreed Chronology provides no further information relating to the nature of the health problems experienced by the tenant and family including the nature of any illness or its cause.

[46] On pages 14 and 15 of the Agreed Chronology, under the date February 1, 2000, it appears that the tenant in unit 702 made a formal complaint to the Residential Tenancy Branch identifying a build-up of mildew underneath the windows and expressing concerns of "health hazards". Unit 702 had a long history of water problems

and mould growth. Minox made various attempts to address those problems. However, apart from the vague reference to "health hazards" by the tenant in February 2000, there did not appear to be any identifiable health problems associated with the conditions of that unit.

[47] The next reference in the Agreed Chronology to potential health problems was found at page 13 in the following entry:

1999 An inspection was conducted on Unit 803. The consultant expressed concern: "the tenant is expecting her first child in approximately six weeks. I'm concerned for their well being because the mould/mildew smell is very strong in their suite. It even made me sick when I cleaned up the rotten carpet, drywall and baseboard heater." It was acknowledged that no steps were taken at that time to determine whether there was a health risk at that stage in Unit 803. **[Exhibit 86]**

[48] Exhibit 86 which is a handwritten memo dated August 26, 1999 from Sharon to Carol includes the following remarks:

... Have you authorized the work to be done in Apt. 803. This unit is occupied and the tenant is expecting her first child in Approx. 6 weeks. I'm concerned for their well-being because the [mould]/mildew smell is very strong in their suite. It even made me sick when I cleaned up the rotten carpet, drywall & baseboard heater."

Also:

... the tenants in Apt. 803 are [sick] in inhaling all the bacteria from this rotten wall. ...

[49] The Agreed Chronology also contains this entry at page 13:

1999 ...
There was never any confirmation that the tenant in Unit 803 ever became sick.

[50] Here again, other than a general reference to health concerns, there was no evidence of any actual illness or condition associated with the condition of the unit.

[51] An Inspection Report from Crosier dated May 15, 2001 (Exhibit 197) contained a reference to health problems, as set out at page 23 of the Agreed Chronology, as follows:

2001 04 26 ...
4. The tenant in Unit 705 complained of chronic health problems since living in his unit, however no mould was found in this suite.
...

[52] At page 24 of the Agreed Chronology, the following entry references the first occasion of a tenant's illness requiring medical treatment:

2001 06 Health concerns were raised in Unit 301 as the babysitter was rushed to the hospital on two separate occasions. This was apparently the first time that they had some evidence of someone becoming ill. As a result, air quality tests were conducted in order to measure the quality of air, the types of mould, and to find out if they had a risk problem. **[Exhibits 162-164]**

[53] Exhibit 162 which is an internal memo from Carol states:

...

The (new) tenants in 301 just came by to advise us that they have all been ill since they moved into the apartment at the beginning of May. Their babysitter, who has asthma, also gets ill when she has been in the suite for any length of time.

The tenants have been to their doctor who suggested that they call the Health Dept. The tenants are not interested in taking this step. They are happy with their suite at Apple Meadows and they don't want to move. They are satisfied that we are going to do everything necessary to remedy this situation.

...

[54] Exhibit 163 is a June 7, 2001 letter from Carol to the tenants in unit 301. It begins as follows:

In response to the concerns you expressed in my office yesterday regarding the health of your family, and the possibility that current health problems might be associated with mould in your suite, we have taken some immediate steps.

...

[55] The aforementioned steps included the taking of air samples for analysis.

[56] The letter concluded:

We have no idea whether there is anything in the suite that could affect the air quality in your suite. And we have no idea whether your babysitter's asthmatic response is due to anything in the suite, or whether it might be attributed to other causes. Nonetheless, we wish to afford you peace of mind until we are sure.

While we are testing, we would like to immediately move you and your family (and furniture) into another 3-bedroom suite at Apple Meadows. We appreciate that this may be inconvenient for you. Nevertheless, particularly since our telephone conversation this morning considering your babysitter's asthma problem, and notwithstanding your earlier having declined to do so, we strongly recommend that you agree to move to this alternate suite either on a temporary or a permanent basis. We will not have full test results for at least three or four weeks.

...

[57] By memorandum dated June 21, 2001 (Exhibit 175), Crosier provided Carol with the preliminary results of air samples and bulk samples taken in unit 301 and the crawl space below unit 301. They were as follows:

...

Air samples give a snap shot of the conditions within a given area at a given time. The preliminary results of the air samples taken from the crawlspace below Unit 301 indicate elevated levels of a toxigenic mould species. The bulk samples taken in the crawlspace also indicate elevated levels of the same species. This seems to confirm that there is a source of toxigenic mould spores within the crawlspace. Preliminary testing within the master bedroom, however

indicates only moderate levels of toxigenic mould species. The levels are thus far lower than the air sample taken outside.

Although it has been proven that pathogenic and toxigenic fungi can cause disease, the health risks associated with a given measured level are, for the most part, unknown. Therefore, sampling is used to determine the presence of an indoor amplifier, rather than trying to identify a health risk. A confirmed source of toxigenic mould has been located in the crawlspace. In addition, moderate levels of the same species were identified within the master bedroom. Due to the sensitivity of the occupants within Unit 301, we recommend that the unit occupants be relocated until such a time that the source can be eliminated.

...

[58] A June 22, 2001 memo from Crosier to Nozick (Exhibit 176) included the following information:

The results of the mould sampling referred to in Laurie McLeod's memorandum forwarded today, are preliminary at present. They are based on a review of the cultures which not fully developed at the time of the observations by Pinchin personnel. The information was obtained verbally by Laurie McLeod on June 21, after she requested interim findings. Final culture sample testing has not been completed, and a written report has not been issued to this point.

The interim findings indicate that elevated levels of stachybotris chartarum and aspergillus, both toxigenic moulds, were found in the air samples taken within the crawlspace. A small amount of toxigenic moulds was also found in an air sample taken in the master bedroom. However, the amount of toxigenic mould in the air sample taken in the bedroom was less [than] the amount of toxigenic mould found in an air sample taken outside of the building.

...

ANALYSIS

1. Is the damage caused by mould a risk covered under the policy, i.e. are the losses fortuitous or inevitable?

[59] Sovereign issued an all-risk policy number SOV78963553 (the policy), insuring numerous of Minox's properties including the Complex. It was in force for the times losses were claimed in both proofs of loss. In fact, the first such policy of insurance

issued by Sovereign was in 1993 and it was renewed from year to year. The policy that was in force until December 31, 2001 to December 31, 2002 was filed as Exhibit 16.

[60] The policy contains provisions describing the coverage extended as well as the exclusions to that coverage.

[61] Exhibit 16 describes the coverage extended as follows:

4. PERILS INSURED

This Form, except as herein provided, insures against all risks of direct physical loss of or damage to the property insured.

[62] Sovereign argues that coverage is not extended to damage caused by mould as mould is a condition resulting from the normal use and occupation of the property and is not a risk or peril. It contends the mould was caused by continuous moisture conditions which became apparent within two years of the completion of construction of the Complex and which continued to recur resulting in the development of mould. Sovereign says the continuous moisture conditions were caused by a variety of factors including faulty building design, construction errors, and the failure to address and abate the causes which resulted in the continuous moisture conditions.

[63] Sovereign offers the decisions in *Don-Rich Foods Ltd. (c.o.b. Morden Dairy Queen) v. Citadel General Assurance Co.*, 2003 MBQB 231, 5 C.C.L.I. (4th) 53 (Man. Q.B.), and *Chandra v. Canadian Northern Shield Insurance Company*, [2006] I.L.R. I-4516 (B.C.S.C.), in support of its position.

[64] In *Don-Rich*, MacInnes J. (as he then was), identified the following guidelines to be followed in determining a case of this nature (para. 53):

- ...
1. An insurance contract (policy) is like any other contract in the sense that effect must be given to the intention of the parties to be gathered from the words they have used.
 2. Coverage provisions should be construed broadly and exclusion clauses narrowly.
 3. All risk coverage provides, *prima facie*, coverage against any possible risk of loss unless the insurer can show that the risk is expressly excluded.

4. The insured must simply show that the loss was a result of a fortuitous event, not an inevitable event. The onus then falls to the insurer to show that the event causing the loss or damage is clearly within in the language of the exclusion relied upon.
5. The issue of exclusion is a matter of contractual interpretation. Where there is an ambiguity in the language, the exclusion is to be included narrowly and generally in favour of the insured (*contra proferentum*).
6. Where there are concurrent causes of the loss, one of which is excluded and the others not, all coverage is not ousted. If the insurer wishes to oust coverage in cases where covered perils operate concurrently with excluded perils, the insurer must expressly state it in the policy.

[65] The facts in *Don-Rich* were contentious and MacInnes J. discounted the evidence of the main witness for the plaintiff which evidence formed the underpinning for the opinions provided by the plaintiff's experts. MacInnes J. made findings of facts contrary to those which the plaintiff attempted to establish, namely, that the movement of the building in question had occurred for a number of years prior to the commencement of the policy and the loss. At para. 57, he stated:

[57] I am satisfied on the evidence of Mr. Friesen and of Mr. Knight that the cracking and lifting of floor tiles within the Building was an ongoing problem that began well before the commencement of the Policy and continued thereafter to and including January 2, 2000. ... The evidence is overwhelming as to ongoing movement within the Building for many years prior to the commencement of the Policy and prior to any evidence of water leaking within the crawl space of the Building.

[66] MacInnes J. rejected the submission that the undermining of the building foundation was caused by water escaping from a ruptured pipe or earlier water leaks from ice cream machines. He then concluded at para. 69:

[69] While I am sympathetic to the plaintiffs' circumstances, the evidence clearly satisfies me that the loss was not caused by the water leak discovered on January 2, 2000 or by any water leak or escape of water. Moreover, it was not caused by a fortuitous event but was the inevitable result of the foundation movement caused by the combination of the foundation design and construction

of the Building (different foundation designs, built at different times and joined together as one) upon a site with random fill which was less than suitable when dry and wholly unsuitable when wet, the wetness being within the soil and resulting from the natural incidence of runoff and underground moisture. As well, I conclude that the loss and damage was one which had been ongoing for many years, originating prior to the commencement of the Policy.

[67] In *Chandra*, a decision of the British Columbia Supreme Court, plaintiffs suffered damage to their home as a result of a sewer backup. They were advised there was continuous seepage into their basement. Replacing the drain tile system did not end the seepage. A second claim for damage from seepage and mould was made one year later. The court dismissed the plaintiffs' claim, ruling that the continuous leak causing the damage was not a "fortuitous loss bearing upon the plaintiffs" (para. 52):

[52] I should also add that another general principle of insurance contract interpretation also comes to the forefront on the facts of this case. That is, that the continuous leak here is not a fortuitous loss bearing upon the plaintiffs. The evidence is clear that the plaintiffs had ample, verbal, written and photographic warning of the continuous leak. This demonstrates that insurance coverage for it could not have been reasonably expected by the parties at the time they entered into the all-risk insurance policy. The importance of a loss being fortuitous is discussed in similar circumstances in *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada*, [2003] O.J. No. 2019, at para. 125, where Lang J. stated:

An insurer is not obliged to provide coverage solely because an insured did not, whether subjectively or objectively, anticipate the cause of a loss. An "all risks" policy provides coverage against all fortuitous losses, unless the loss is specifically excluded. It is a first principle of insurance law that coverage is not available if the loss was not fortuitous. It does not follow that because the event was fortuitous, coverage must be provided. While an insurer attempting to exclude coverage may argue the event was non-fortuitous, the insured is not automatically entitled to coverage for every fortuitous event. Chubb agreed that this loss was fortuitous. This does not guarantee coverage, it just means that the loss is not automatically excluded.

[68] Unlike *Don-Rich*, the evidence before me is essentially non-contentious to the extent that the parties were able to compile a 32-page Agreed Chronology. There is no dispute that the Complex experienced numerous problems over the years and that Minox attempted to address those problems in a variety of ways. There is no dispute that the underlying problem of excessive moisture persisted and that mould developed in many of the units as well as in all of the crawl spaces. As the mould developed, it was removed and the damage to walls, carpets, patio doors, etc., was repaired. There was no evidence the mould was toxigenic until Minox received the complaints emanating from unit 301. Prior to that, Minox never made a claim against Sovereign or any other insurer for damages including costs of removing mould or repairing otherwise damaged areas within the Complex.

[69] Minox refers to and relies upon the following dictionary definitions:

- **fortuitous** - "that is due or produced by chance" - *Shorter Oxford English Dictionary*, 5th Ed., Vol. 1 (Oxford University Press)
- **inevitable** - "**1 a.** unavoidable; sure to happen, **b.** that is bound to occur or appear." - *Canadian Oxford Dictionary* (Oxford University Press, 1998)
- "**1** Unable to be avoided; unavoidable... **2** Bound or sure to occur or appear." - *Shorter Oxford English Dictionary*, *supra*
- **certain** - "... **2** Sure; inevitable; unfailing; wholly unreliable." - *Shorter Oxford English Dictionary*

[70] In arguing that the growth of mould is fortuitous and not inevitable or certain, Minox reminds that of the 72 units in the Complex, less than half had occurrences of mould, toxigenic or otherwise, over a period of 25 years. There are no differences in

the plans, design, or manner of construction of the nine buildings containing the 72 units. The clothes dryers were all vented identically. All of the windows and patio doors were of the same manufacture and quality. All of the units experienced excessive moisture at one time or another and if the growth of mould was inevitable as a result of the existence of the excessive moisture, all of the 72 units would have been similarly infected.

[71] Sovereign produced Margaret Joan Paterson (Paterson), a claims supervisor with Sovereign, for examination for discovery. The following questions and answers are taken from pages 39 and 40 of the transcript of her April 5, 2004 examination for discovery (Exhibit 249):

109 Q You on the claim side have learned that not all mould, for example, is toxigenic and cause a risk to the health of humans?

A Right.

110 Q You on the claim side have learned that not all mould can cause property damage and needs to have remediation construction?

A No I haven't learned that.

111 Q Is it the position of the insurer in this case that the mere presence of moisture inevitably results in the presence of mould?

Mr. Edmond

A No, and the experts would have to speak to this, but certainly our understanding is it's a moisture ... it's a combination of moisture and in the right conditions, the right heating conditions, and the lack of air movement, but a combination of factors. There could be a number of different water events, if we can call it that, that may lead to the build-up of mould. Once you have a mould problem, it is more difficult to get rid of it.

By Mr. Hill

112 Q Do you adopt that answer of your counsel?

A Yes.

113 Q So I take it from what your counsel has just said that Sovereign admits that the mere presence of moisture in a structure does not inevitably result in mould; is that correct?

A Yes.

[72] Both Malik and Wylie agreed that the presence of mould is not inevitable, even given the moisture problems experienced at the Complex from 1978 - 2002. Both agreed those conditions would "likely" or even "highly likely" result in the recurrence of mould but that it was not certain or inevitable. Where literature on the subject indicated that "mould will reoccur if the underlying problem, i.e. moisture is not removed", both agreed that the word "will" implies a certainty or inevitability with which they could not agree.

[73] Unlike the conclusions that were reached in *Don-Mills* and *Chandra*, weighing the evidence before me, I find that the growth of mould in the Complex, notwithstanding the various problems resulting in conditions of excessive moisture and humidity, was not inevitable. The growth of mould, either toxigenic or non-toxigenic, was a fortuitous event and therefore a risk covered under the policy.

2. Is mould excluded from coverage under the policy?

[74] Sovereign submits the following exclusions are clear and unambiguous and that coverage should be excluded under any or all of them. They are:

5.B. PERILS EXCLUDED

This Form does not insure against loss or damage caused directly or indirectly:

...

- (c) (i) by seepage, leaking or influx of water derived from natural sources through basement walls, doors, windows or other openings, therein, foundations, basement floors, sidewalks, sidewalk lights, or by the backing up of sewers, sumps, septic tanks or drains, unless concurrently and directly caused by a peril not otherwise excluded in Clause 5.B. hereof;
- (ii) by the entrance of rain, sleet or snow through doors, windows, skylights or other similar wall or roof openings unless through an aperture concurrently and directly caused by a peril not otherwise excluded in Clause 5.B. hereof;

...

- (e) by dampness or dryness of atmosphere, changes of temperature, freezing, heating, shrinkage, evaporation, loss of weight, leakage of contents, exposure to light, contamination, pollution, change in colour or texture or finish, rust or corrosion, marring, scratching or crushing, but this exclusion does not apply to loss or damage caused directly by "Named Perils", rupture of pipes or breakage of apparatus not excluded under paragraph (m) of Clause 5.A. hereof, theft or attempt theft thereat or accident to transportation conveyance. Damage to pipes caused by freezing is insured provided such pipes are not excluded in paragraph (m) of Clause 5.A. hereof;

...

NOR DOES THIS FORM INSURE:

- (m) wear and tear, gradual deterioration, latent defect, inherent vice, or the cost of making good faulty or improper material, faulty or improper workmanship, faulty or improper design, provided, however, to the extent otherwise insured and not otherwise excluded under this Form, resultant damage to the property is insured;

[75] Sovereign relies on the uncontroverted evidence that the moisture build-up which was an essential element of the formation of mould was caused by seepage, leakage or influx of water derived from natural sources through basement walls, doors,

windows or other openings or through foundations, basement floors, or sidewalks. They say the moisture build-up was also the result of the entrance of rain, sleet, or snow through doors, windows, skylights or other similar wall or roof openings and that the excessive condensation on the inside of windows was caused by dampness or dryness of atmosphere, changes of temperature, freezing, heating or shrinkage. The accumulation of moisture and the excessive humidity was also caused by wear and tear, gradual deterioration, latent defect, inherent vice, the use of faulty or improper material, faulty or improper workmanship or faulty or improper design of the buildings.

[76] Sovereign places reliance on several cases where coverage was denied as a result of exclusions identical to the aforementioned.

[77] In *Tomko v. Wawanesa Mutual Insurance Co.*, 2007 MBCA 8, [2007] 3 W.W.R. 642, the Manitoba Court of Appeal upheld the trial judge's decision that the insurer was entitled to rely on exclusion clauses which excluded coverage for settling, expansion, contraction, moving, bulging, cracking or the falling of ceiling or wall plaster. In that case, plaintiff alleged that the installation of sewer lines by the municipality approximately nine years earlier ultimately resulted in structural damage to the house as a result of the foundation of the house shifting. The trial judge, relying on engineering reports, concluded that the damage to the basement floor was the result of poor drainage on the exterior of the house, possible compromise of the weeping tiles under the floor with the resulting moisture causing the clay to swell which in turn

caused the floor to heave. In upholding the trial judge's decision, the Court of Appeal concluded at para. 19 that:

[19] ... the damage to the Tomko property did indeed arise from normal wear and tear and natural causes, such as too much rain given the surrounding drainage characteristics, leading to clogged weeping tiles and damage resulting from the buckling and cracking of the basement floor.

[78] While the evidence clearly establishes that "seepage, leakage or influx of water derived from natural sources through basement walls, doors, windows or other openings, therein, through foundations, basement floors, sidewalks", or that the "entrance of rain, sleet or snow through doors, windows, skylights or other similar wall or roof openings", or that "dampness or dryness of atmosphere, changes of temperature, freezing, heating, shrinkage" all contributed to the excessive humidity and moisture in the units, I have found the occurrence of mould did not inevitably follow. In addition to the moisture, spores, a source of food, and the appropriate acidity of the water were factors that needed to be present in the right combination to produce mould. Whether or not the mould would or would not be toxigenic was a further uncertainty. I am unable to conclude that the excessive moisture was either a direct or indirect cause triggering the occurrence of mould. My conclusion is the same relative to the "ordinary wear and tear" exclusion.

[79] Sovereign also argued that exclusion was warranted based on the "inherent vice" exclusion clause in the policy. In support, they offer the case of *University of Saskatchewan v. Fireman's Fund Insurance Co. of Canada*, [1998] 5 W.W.R. 276

(Sask. C.A.). There, the defendant insurer denied coverage on essentially the same basis as did Sovereign in this case.

[80] The facts in *University of Saskatchewan, supra*, were that exterior cladding made from Tyndal stone panels bonded to pre-cast concrete slabs were breaking away from a building on the university campus and falling to the ground.

[81] The trial judge decided in favour of the University of Saskatchewan. In overturning his decision, and with specific reference to the exclusion for inherent vice or latent defect, the Saskatchewan Court of Appeal stated at para. 53:

[53] The same may be said of the exclusions for inherent vice and latent defect. There is no real dispute over the meaning of these terms. An inherent vice is a condition inherent in the property insured which causes it to be damaged when it is exposed to normal conditions. A latent defect is a defect which is not discoverable on an examination by a reasonably skilled person. In this particular case, the stone cladding on the building was not adequate to stand up to normal Saskatchewan weather because of the design error which led to the use of the galvanized steel pins. On the facts found by the trial judge, the damage in this case falls within the exclusions of inherent vice and latent defect unless the fact they resulted from a design error, something external to the building, takes them out of the exclusions.

[82] As with the "seepage" or "wear and tear" exclusions, on the basis of my previous findings, the "inherent vice" or "latent defect" exclusion are similarly inapplicable. Even if they caused the conditions of excessive moisture that were present, that did not result, either directly or indirectly, in the growth of mould for reasons previously expressed.

[83] Wylie opined that the lack of preventative maintenance in the buildings over the years was the cause of the occurrence of mould. He was referring to Minox's failure to

eliminate the various factors contributing to the excessive moisture. I preferred the evidence of Malik who said that moisture in itself did not result in the occurrence of mould but that other essential ingredients were necessary. Even then, the occurrence of mould was not inevitable. On that basis, I find the "wear and tear" exclusion to be inapplicable.

[84] Finally, Sovereign argues faulty or improper design as a basis for excluding coverage. In *Triple Five Corp. v. Simcoe & Erie Group* (1994), 159 A.R. 1 (Alta. Q.B.), affirmed [1997] 5 W.W.R. 1 (Alta. C.A.), and *Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada*, [1982] 3 W.W.R. 628 (Alta. Q.B.), there were either admissions or findings of design error. Sovereign points to what they say was a similar design error in this case in relation to the clothes dryers being vented into the interior of the units. I alluded to this earlier where I pointed out there was no such admission notwithstanding the entry in the Agreed Chronology. Moreover, the fact that the Complex was constructed in compliance with all of the existing specifications and building codes and that it was properly inspected and approved by various parties is undisputed. There was no other evidence presented to support the contention of faulty or improper design.

[85] The principle that the defendant insurer has the onus of proving the loss or damage falls within one of the exclusions is well established. Any ambiguities within the exclusion provisions are to be resolved in favour of the insured as it is the insurer's obligation to clearly define the perils which it intends to exclude.

[86] The policy contained no exclusion specifically relating to loss or damage caused directly or indirectly by mould. Such exclusion clauses are not uncommon in the industry. Nor is the development or existence of mould a risk with which an insurer would be unfamiliar. Minox contends that if Sovereign intended loss or damage caused by mould to be excluded, clear and specific language was required.

[87] When the policy was initially purchased, Sovereign did not ask for an application and none was provided. Further, throughout the duration of the coverage on the Complex, Sovereign never inspected the buildings nor did they ever attempt to terminate the coverage until these proofs of loss were filed. While there is no obligation on any insurer to require a formal written application or to conduct a site inspection, Sovereign may have been alerted to some of the existing problems within the Complex had they chosen to do so.

[88] It was only after the first proof of loss was filed and the cause of the loss or damage identified as mould that Sovereign considered the insertion of a mould exclusion in Minox's renewal policy. Karl Jaikaransingh's (Jaikaransingh), a Commercial Lines Underwriter with Sovereign, in a November 7, 2002 memo (Exhibit 230) advised Harley Boles (Boles), the agent with whom Minox had been dealing, that "A mould exclusion will be added to the property and liability coverage, ..." (emphasis original). The reference to the mould exclusion satisfied me that Sovereign was familiar with and had previously utilized that specific exclusion in other policies.

[89] In Jaikaransingh referencing a specific mould exclusion, I find it reasonable to infer that Sovereign considered mould to be a "peril" or a "risk" as the very purpose of an exclusion is to exclude coverage of a specific peril or risk.

[90] In ***British Columbia Ferry Corp. v. Commonwealth Insurance Co.*** (1985), 14 C.C.L.I. 216, the British Columbia Supreme Court, at para. 17, had this to say about exclusion clauses:

[17] ... Although the defendant did not draw the wording of the policy, it approved the wording and agreed to insure the plaintiff on the terms set out in the policy. The terms are that all risks are insured against, unless expressly excluded. It is for the defendant to show that the language of the exclusion applies to the loss in question, and removes it from the all embracing coverage of an all risks policy ... an all-risks coverage would be most unsatisfactory from a commercial point of view if an ambiguous exclusion were to be construed in favour of the insurer and against the insured. There would be incentive for the insurer to agree to unclear wording in exclusions and the insured will always be left in doubt as to the ambit of the coverage he had secured. An insurer who seeks to limit his exposure under an all risks policy by excluding losses due to certain specified perils, has the onus of specifying the peril clearly, and then of showing that the loss in fact suffered is within the excluding language.

[91] Sovereign had an opportunity to discover the existence of mould within the Complex and then to insert a mould exclusion or to terminate the policy. Having failed to do so, they must live with the consequences.

[92] Notwithstanding the fact that I have already deemed the exclusion clauses to be inapplicable for reasons specified, I have also considered several cases advanced by Minox which also rebut the various exclusion clauses.

[93] In ***Pavlovic v. Economical Mutual Insurance Co.*** (1994), 99 B.C.L.R. (2d) 298 (B.C.C.A.), a "seepage" exclusion was relied upon by the insurer to deny coverage.

[94] Briefly, the facts are that a line connecting the plaintiff's home to the city water main ruptured and water escaped into the foundation soils, causing subsidence and consequent settlement, distortion and damage to the building. The defendant denied coverage, relying on the exclusion for damage (para. 7)

[7] ... caused by seepage or leakage of water below the surface of the ground including through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other openings, unless the loss or damage resulted from escape of water from a public water main, swimming pool or equipment attached.

[95] The British Columbia Court of Appeal concluded that the loss was not caused by the "leakage of water below the surface of the ground" but that the leakage was an indirect cause of the loss and one of many other contributing causes. Applying those specific circumstances in that case, the court found the meaning of the exclusion clause ambiguous at best. Looking at the exclusion clause in the context of the policy as a whole, the court indicated an ordinary reader would understand it to mean that the insurer would not be responsible for loss or damage caused directly or approximately by the leakage or seepage of water.

[96] The reasoning in *Pavlovic* was adopted by the Manitoba Court of Appeal in *Rivard v. General Accident Assurance Co. of Canada*, 2002 MBCA 70, [2002] 7 W.W.R. 395.

[97] Given what I have found to be the facts in this case, I would similarly have concluded that the "seepage" exclusion was ambiguous and therefore not applicable.

[98] In response to Sovereign's claim that rain or snow froze against the patio doors or in the attic and later melted, causing water to seep through the attic insulation and into the ceilings and walls of the second floor units or through the patio doors into the walls and baseboards and carpets of both the first and second story units, Minox cites *Oakleaf v. Home Insurance Ltd.*, [1958] O.R. 565 (C.A.). There, the Ontario Court of Appeal concluded that the "rain" in the exclusion clause was limited to rain in droplet form which falls from the atmosphere. In para. 3, the court commented:

[3] The plaintiff also relies upon condition 3(c) of the supplemental contract, and claims that the water entering the basement was rain which entered the building through the aperture. The trial Judge decided that "rain is in drops and that those drops fall from the atmosphere". The liquid that flowed through the window was an unseparated mass of liquid and not rain in its ordinary sense and according to dictionary definitions. And the trial Judge held that this condition did not apply. I agree that for this reason the condition as to rain does not apply to this case.

[99] A similar interpretation could easily be applied to sleet or snow which would render that exclusion clause inapplicable on the basis of its ambiguity.

[100] In conclusion, I find that loss or damage from mould was not excluded coverage under the policy based on any exclusion clause.

3. Did the loss or damage occur within the policy period?

[101] Sovereign identifies the date of occurrence of the alleged loss or damage as the date on which moisture present in the buildings first resulted in mould or other damage. If that is the case, the loss or damage clearly occurred well before the first policy came into force in 1993. Mould was present in various areas of the buildings within the

Complex and there was an ongoing maintenance regime in effect to remove it and to try to prevent its recurrence.

[102] The Court of Appeal decision in *University of Saskatchewan* stands for the principle that it is not necessary to determine an exact date when damage occurred. If it occurred before the effective date of the insurance policy, then coverage must be denied.

[103] The question to be asked is whether it can be determined when the loss actually occurred. The trial judge in *University of Saskatchewan*, in considering this issue, relied on his interpretation of the “doctrine of reasonable expectations” which was to consider what a reasonable person in the position of the insured would understand the words of the policy to mean.

[104] The trial judge then embarked upon the process of determining when the loss occurred and in doing so, considered four theories. The “*manifestation theory*” holds that injury or damage does not occur until it becomes apparent or manifests itself. The “*exposure theory*” fixes the loss at the time the insured property becomes exposed to a peril insured against which then or later causes damage. In applying those theories against the facts of his case, the trial judge determined that under the manifestation theory, the loss would have occurred when the first fallen stone was discovered in May 1985, a date within the coverage. The exposure theory would determine a loss having occurred when the steel pins in the stone panels first came into contact with water and began to deteriorate. Under this theory, there was no way for the insured to know

exactly when that occurred and where to look for indemnity because its insurers changed from time to time. Applying the exposure theory to those circumstances would be to ignore the doctrine of reasonable expectations, i.e. to overlook the principle that insurance contracts be construed broadly with the aim of fulfilling their fundamental purpose which is to provide indemnification.

[105] The trial judge then considered two additional theories developed by the U.S. courts. The "*continuous trigger theory*" under which damage which develops over time represents a continuous series of new injuries triggering every policy into effect from the first exposure to the manifestation of the damage. The "injury-in-fact theory" requires a determination of the date damage occurred as a matter of fact.

[106] The trial judge concluded that no single theory had application to every insurance arrangement and that the theory that best accommodates the facts at hand should be applied in each individual case. He then went on to conclude that the loss occurred at the time the first fallen stone was discovered, i.e. the manifestation theory.

[107] In reviewing the trial judge's decision, the Saskatchewan Court of Appeal rejected the manifestation theory saying that it was contrary to the two fundamental concepts of risk and indemnity. If the loss has already occurred, it is no longer a risk but a certainty. The Saskatchewan Court of Appeal went on to describe additional reasons why the manifestation theory was inapplicable.

[108] In essence, the Court of Appeal applied the unique circumstances of the case and the trial judge's findings of fact to reject the manifestation theory as evidenced in para. 39:

[39] This is not, however, a case of impossibility of proof of the date of damage, due to the damage being hidden and occurring over a long period of time. On the judge's own findings of fact, all of the critical events occurred before the insurer came on the risk. The event giving rise to the damage (the design error) occurred before the building was erected. The damage began very soon after the building was erected, when the pins were wetted and began to corrode. And the judge found that by the time the insurer came on the risk and the damage was discovered with the falling of the first stone, all of the panels were unsafe and needed to be replaced. The damage occurred in its entirety before the insurer came on the risk.

[109] Sovereign seeks to have this court apply that decision to the facts in this case. They say that the damage or loss occasioned by the mould was present long before the insurer came on the risk and that it is not necessary to be concerned about specifying the precise time when the damage occurred. They say it is clear the damage long preceded the placement of insurance.

[110] Responding to Minox's contention that the risk first arose with the discovery or identification of toxigenic mould, Sovereign argues a distinction between toxigenic and non-toxigenic mould is irrelevant. Sovereign says the mould identified as toxigenic in June 2001 which is identified as the risk in the first proof of loss, was essentially of the same character and posing the same risk to the health of the tenants or the integrity of the building as the mould that had been in existence since the early 1980's.

[111] Both experts as well as Hearson and Snedden agreed it is impossible to determine the type of mould without conducting tests and subjecting the spores to

microscopic analysis. Sovereign points to failure by Minox to conduct any such tests or analysis and say they were warranted by virtue of reported health concerns raised by the tenants and their doctors as well as the Residential Tenancy Branch. Therefore, without such tests, they say it is impossible to determine when the loss occurred and that the only reliable evidence in that regard and as contained in the Agreed Chronology is the evidence of the existence of mould in the early 1980's.

[112] Sovereign's reference to reported health concerns raised by tenants and their doctors and by the Residential Tenancy Branch is accurate but only to a degree. In fact, prior to the acute health problems described by the tenants in unit 301 in the spring of 2001, there were no significant health issues raised by the tenants, their doctors or the Residential Tenancy Branch such as would cause Minox to anticipate or reasonably apprehend the mould at the Complex could result in serious health implications.

[113] Moreover, there is no evidence confirming the presence of toxigenic mould prior to 2001. Sovereign would argue that this court could reasonably infer the existence of toxigenic mould based on the existence of mould within the Complex over an extended period of time. However, in my view, there is no evidentiary basis from which that inference could be drawn. At best, the experts stated they could not opine on that very question. In my view, a more reasonable inference would be that absent any serious health complaints which are generally associated with the presence of toxigenic mould, it is reasonable to infer that it did not exist prior to the spring of 2001.

[114] Sovereign further argues against the distinction between toxigenic and non-toxigenic mould on the basis that the 2000 New York Protocol and the 2001 Manitoba guidelines or the community of occupational hygienists generally agree that both should be treated equally in the remediation process. Sovereign says there is no evidentiary basis for the distinction.

[115] I disagree with their synopsis of that evidence. Firstly, it ignores the 1993 New York Protocol which focuses on toxigenic mould and deals with its remediation. That is the guideline followed by both Crosier and Pinchin upon whose recommendations Minox relied. There is no evidence that either Crosier or Pinchin were aware of the 2000 New York Protocol at that time.

[116] The 2000 New York Protocol expanded the guidelines set out in the 1993 New York Protocol for the following reasons (Exhibit 258, pages 1 and 2):

...

- Many fungi (e.g., species of *Aspergillus*, *Penicillium*, *Fusarium*, *Trichoderma*, and *Memnoniella*) in addition to SC can produce potent mycotoxins, some of which are identical to compounds produced by SC. Mycotoxins are fungal metabolites that have been identified as toxic agents. For this reason, SC cannot be treated as uniquely toxic in indoor environments.
- People performing renovations/cleaning of widespread fungal contamination may be at risk for developing Organic Dust Toxic Syndrome (ODTS) or Hypersensitivity Pneumonitis (HP). ODTS may occur after a *single heavy* exposure to dust contaminated with fungi and produces flu-like symptoms. It differs from HP in that it is not an immune-mediated disease and does not require repeated exposures to the same causative agent. A variety of biological agents may cause ODTS including common species of fungi. HP may occur after repeated exposures to an allergen and can result in permanent lung damage.

- Fungi can cause allergic reactions. The most common symptoms are runny nose, eye irritation, cough, congestion, and aggravation of asthma.

...

[117] In his November 1, 2004 report, Malik agreed the term "toxigenic mould" was common in 1999. As he stated in his subsequent January 26, 2009 report (Exhibit 257) at page 2:

... The word "toxigenic" was predominantly used when little was known about the health effects of different types of mould. In my opinion there is no distinction between "toxigenic" and "other" types of mould because all mould spores are allergenic and can be toxigenic depending on the underlying condition and vulnerability of the person exposed, the duration of exposure and the intensity of exposure. On a relative scale some mould types may be more toxic than others.

[118] The distinction that had initially been drawn between toxigenic and non-toxigenic mould slowly evaporated as more was learned about mould. The fact remains that when Crosier and Pinchin did their inspections as a result of the health problems experienced in unit 301, their recommendations were based on the presence of toxigenic mould and the need for its immediate remediation as referenced in the 1993 New York Protocol. Those were the standards of which they were aware. It would be inappropriate to apply today's standards or knowledge regarding mould and its potential harmful facts to the circumstances which existed in the years 2000 and 2001.

[119] In his March 16, 2000 report (Exhibit 100), Hearson made the following distinction between strains of mould at page 1:

As you may be aware, some strains of mould are toxigenic, and have been associated with respiratory diseases, allergies, and immune suppressive disorders. As a result, the specific conditions which were observed must be fully addressed in our opinion. ...

[120] Hearson also agreed that the situation in unit 301 was of particular concern due to health issues.

[121] I have already alluded to the references to toxigenic mould in Hearson's June 22, 2001 report (Exhibit 201).

[122] In the July 6, 2001 Pinchin report (Exhibit 178), the moulds found were described as either toxigenic or non-toxigenic. In fact, Snedden corrected a sentence contained on page 4 of that report which stated, "No toxigenic species of mould were recovered from the outdoor air sample." He pointed out that *aspergillus versicolor* which was found in the outdoor sample is a toxigenic species.

[123] In his December 19, 2002 report, Snedden distinguished between types of mould contamination which could result in a variety of effects including allergic, trauma hypersensitivity, pneumonitis or toxic effects. Even though this report was prepared approximately two years after the 2000 New York Protocol, the earlier Protocol was referenced throughout. He did acknowledge in direct examination that the 2000 New York Protocol represented the more current guidelines and that they were less focused on toxigenic moulds.

[124] In short, the experts upon whose recommendations were being relied by Minox clearly distinguish between toxigenic and non-toxigenic moulds and relied on the 1993 New York Protocol as a guideline for remediation. I should add that Minox's reliance on that information was not unreasonable in the circumstances.

[125] Wylie agreed that both toxigenic and non-toxigenic moulds are treated the same way for remediation purposes. He pointed out the main difference between the 1993 and 2000 New York Protocols was that the earlier one addressed the *stachbotrys* species of mould while the latter extended to all types of fungi. His evidence focused on the likely existence of mould in the Complex in the early 1980's and described what steps he thought should have been taken in remediation.

[126] Wylie's report dated September 2, 2008 (Exhibit 277) confirms that a distinction was made between toxigenic and non-toxigenic mould in earlier years. The following excerpt from page 4 of the report illustrates this point of view:

Toxigenic mould is mould that produces toxins (specifically mycotoxins) while non-toxigenic moulds do not produce toxins so there is that technical difference between the two types.

Although the difference sounds ominous, there is no significant or meaningful difference between the two types in terms of the hazard they represent or the type or scope of remediation efforts required when found in a building.

Hazards presented by moulds that may produce mycotoxins should be considered the same as other common [moulds] which can grow in your house. There is always a little [mould] everywhere - in the air and on many surfaces. There are very few reports that toxigenic [moulds] found inside homes can cause unique or rare health conditions such as pulmonary hemorrhage or memory loss. These case reports are rare, and a causal link between the presence of the toxigenic [mould] and these conditions has not been proven. A common-sense approach should be used for any [mould] contamination existing inside buildings and homes. The common health concerns from [moulds] include hay fever-like allergic symptoms. Certain individuals with chronic respiratory disease (chronic obstructive pulmonary disorder, asthma) may experience difficulty breathing. Individuals with immune suppression may be at increased risk for infection from [moulds]. For the most part, one should take routine measures to prevent mould growth in a building or home.

There was a time when the two different types of mould were treated differently. However, as knowledge of moulds grew and more data became available, this

difference was deemed unnecessary. The term "toxigenic" mould lingers in the media much more than in the science.

Mould testing was performed in the middle of 2001 and so it would be prudent to look at the current understanding of the science at the time the testing was performed and the issues of the Property came to the forefront.

...

[127] Apart from having made a distinction between toxigenic and non-toxigenic moulds, Wylie's recommendations were based on the information available in mid-2001, i.e. the 2000 New York Protocol. Although that information was available, there is no evidence that either Crosier or Pinchin was aware of it. They referred to the 1993 New York Protocol throughout in their reports.

[128] Because Wylie focused on the guidelines set out in the 2000 New York Protocol as well as the 2001 Manitoba guidelines, he ignored the distinctions between toxigenic and non-toxigenic mould. He was not asked whether in his opinion toxigenic mould was present within the Complex prior to 2001. If he had, I would have expected him to be unable to answer that question as it is common that types of moulds are visually unidentifiable and can only be distinguished by species by microscopic inspection.

[129] Having assessed all of the evidence and considered the applicable principles, I conclude that the risk associated with toxigenic mould did not arise until the spring of 2001. As there is no evidence to substantiate the existence of toxigenic mould prior to that time period, and as there were no health problems reported such as would normally be associated with the presence of toxigenic mould, I consider it reasonable to infer there was none present prior to that date and I so find. The first proof of loss

deals with the loss or damage occasioned by the presence of toxigenic mould in unit 301. The second proof of loss deals with the loss or damage occasioned by toxigenic and other mould throughout the Complex. The remediation recommendations contained within the 1993 New York Protocol include the removal of all mould and the second proof of loss therefore relates to the remediation process associated with the removal of all mould throughout the Complex. On that basis, I find that the loss or damage occurred within the policy as both proofs of loss were filed while the last of the renewal policies was in force.

4. If the losses are otherwise excluded, has Sovereign waived its right to rely on the exclusions by reason of its failure to make inquiries as to the condition of the building?

[130] Having concluded that Minox's loss falls within the provisions of the policy and is not excluded by any of the exclusion clauses, it is unnecessary for me to consider the issue of waiver. Nonetheless, in the interest of addressing each of the issues raised, I will deal briefly with the issue of waiver.

[131] Minox argues by analogy to the principles set out in *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1990] 2 S.C.R. 549. There the insured failed to disclose material facts within its knowledge relating to health risks associated with the inhalation of asbestos fibers. In defence, the insured admitted it had certain medical research papers dealing with that issue but that the insurer was aware or at least had access to the same information. The Trial Court disagreed but was overruled by the Quebec Court of Appeal. The Supreme Court agreed with the Quebec Court of Appeal.

In essence, the Supreme Court said that under normal circumstances, an insurer may not have to inquire or investigate beyond the preliminary gathering of basic information as long as the material facts are available through the insured's representations or through public character and notoriety. If additional detail is desired, the insurer may wish to make further inquiries but is not required to do so, but it then cannot fault the insured for not providing such details in the first place. This is so in a case even where the insured had never insured a particular type of risk.

[132] By analogy, Minox is asking this court to declare that Sovereign has waived its rights by virtue of its failure to take an application and/or inspect the property from the time the policy was first put in force in 1993 until it was terminated in 2003. Had it done either, says Minox, Sovereign would have been made aware of the existence of mould within the Complex and could have either refused to extend coverage or insist on a specific mould exclusion.

[133] This argument fails on several fronts. Firstly, Minox's position throughout has been that it is the discovery of toxigenic mould that gives rise to the claim and that no claim is being or has ever been advanced relative to the remediation of non-toxigenic mould. At the time the insurance coverage was placed in 1993, Minox was unaware of the existence of toxigenic mould and a visual inspection of the Complex by Sovereign would not have uncovered that information.

[134] The principle enunciated in *Canadian Indemnity, supra*, does not go so far as to create a duty on the insurer to require an application or to conduct an inspection.

Obviously, without having taken an application, an insurer would be estopped from relying on a defence such as failure to disclose a material fact.

[135] The most that can be said is that Sovereign deprived itself of the opportunity to deny coverage initially or to include a mould exclusion by its failure to require an application or to conduct a visual inspection either prior to extending insurance to Minox or during any of the renewal years.

[136] I am supported in my understanding of the law by the following excerpt from Barbara Billingsley's, *"General Principles of Canadian Insurance Law"*, 1st Ed., (2008) LexnisNexis Canada Inc., where, at p. 210 she writes:

Waiver applies to alleviate an insured from its strict contractual obligations where there is, on the part of the insurer, "something said or done, some agreement made or assumed to have been made, subsequent to the condition or warranty, whereby the performance or observance of the condition of warranty need not be carried out, made nor proved".

[137] Further support is found in the following passage in paras. 19 and 20 in ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 S.C.R. 490:

[19] Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell and Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. S.C.A.D.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 (waiver of a limitation). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at page 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be

inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

[20] Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[138] In conclusion, if this issue was still alive, I would have found Minox unsuccessful in using it to rekindle the flame which the exclusion clauses had otherwise extinguished.

5. Is the loss or damage absolutely barred pursuant to the two-year limitation in *The Insurance Act*, R.S.M. 1987, c. I40?

[139] Having determined that the loss occurred within the policy period, it is clear that both proofs of loss were filed within the required two-year limitation period which was agreed to be the appropriate limitation period by Sovereign.

6. If the losses are covered under the policy, what is the amount recoverable?

[140] The policy includes a Replacement Cost Endorsement which includes the following definitions:

2. In this endorsement,
- (a) "replacement cost" means the - cost of replacing, repairing, constructing or reconstructing (whichever is the least) the property on the same site with new property of like, kind and quality and for the like occupancy without deduction for depreciation; and
- (b) "replacement" includes repair, construction or reconstruction with new property of like kind and quality.

[141] Minox has quantified its claim as follows:

(a)	paid Akman and Son Ltd. (Akman)	
	re: building remediation	\$436,408.41
(b)	paid Crosier re: consulting fees	\$47,058.60
(c)	paid Pinchin re: consulting fees	\$25,776.30
(d)	paid re: labour to replace baseboard heaters	\$1,234.62
(e)	paid Hydro at cite office	\$145.71
(f)	paid vacancy expenses re: cite office	\$1,839.00
(g)	credit from Manitoba Hydro re: new windows	<u>-\$36,345.57</u>

Total claim \$476,117.07

[142] Sovereign acknowledges that replacement cost betterment is not an issue but maintains the windows could and should have been repaired rather than replaced. According to Malik, mould cannot grow on glass or aluminum and thus could not damage the glass windowpanes or aluminum frames of the windows within the complex. While mould can grow on dust or other cellulous material which collects on windows and window frames, it can be removed safely without damaging the windows. Moreover, while Pinchin testified that the cost of replacing the windows would have been virtually the same as the cost of repairing the existing windows, he did not make any cost analysis in that regard. Sovereign also says the windows selected were of superior quality to the existing windows which amounted to Minox having chosen a "Cadillac" option.

[143] Finally, Sovereign points to Hearson's evidence that the replacement of windows would not eliminate the problem of high humidity within the units which was the primary source of the problem.

[144] In response, Minox points to Crosier's December 19, 2002 report (Exhibit 231) whose recommendations they say were followed. Crosier makes the following recommendation regarding the windows at page 9:

- 8.5.1 The windows and patio doors in this facility are of a type commonly used in the era of construction of this complex. However, they do not serve very well in an environment of high interior humidity when combined with Winnipeg's low temperatures. It follows then that the windows must be replaced to eliminate or minimize condensation both on the surface of the

glass, and the frame components, therefore mitigate the potential for the establishment of mould in the future.

As the Pinchin report indicates, it is possible to clean the windows of exposed mould. However, due to the fact that mould is known to exist within the wall assembly surrounding the windows and patio doors, this is not recommended.

Removal of the windows, abatement of the mould, and reinstallation could be given consideration. However, given the humidity levels that exist in the majority of the suites, the conditions which promoted the growth of mould in the past will exist again. New windows will decrease the incidences of potential mould growth, as a lower dew point and therefore reduced condensation will occur on the windows themselves.

...

[145] In his December 19, 2002 report (Exhibit 232), Hearson made the following general recommendations regarding remediation (pages 10 and 11):

5. CONCLUSION

Based on the findings of our investigation, it is concluded that the presence of mould on the backside of the drywall around the windows and the patio doors, the attics in Buildings 100, 600 and 800 and the crawlspaces in each building is well established.

It is further concluded, that the scope of the original work, should be expanded to include the removal of all mould-contaminated materials.

In consideration of the above, it is inevitable that the implementation of Type 2 and Type 3 Mould Precautions will be required to conform to existing regulations and good practice. These measures would guard against the spread of airborne spores and the possible cross-contamination of any tenant owned articles, furniture, general contents, etc. The implementation of a carefully and well thought-out design will also go a long way towards the elimination of any concerns raised by the vast majority of the buildings' tenants. As has been the case on numerous other projects, it is entirely reasonable to expect that this work can also be safely co-ordinated and completed while adjoining areas of each building remain fully occupied and that the evacuation of the buildings are not necessary.

...

[146] Further, on the issue of whether the windows should be repaired or replaced, Hearson stated (page 11):

... Based on our findings, it is likely that the framing surrounding the windows and patio doors will be affected with mould growth. Although the windows are constructed with materials that would not directly host significant mould growth, the units will require decontamination as a part of the remediation process. Our experience has shown that although the units may be able to be cleaned, the level of effort required will likely outweigh the practical approach of discarding the units.

[147] Based on the advice received from Pinchin and Crosier, which advice was not undermined or contradicted at trial, I find it reasonable for Minox to have replaced rather than repaired the existing windows throughout the Complex. While it is true that some of the units were not contaminated with mould, the experts recommended the replacement of all windows throughout the Complex which was not unreasonable under the circumstances. It should be noted as well that both Crosier and Pinchin were following the remediation guidelines set out in the 1993 New York Protocol.

[148] While the replacement windows were of a better quality, they were certainly not the best windows that could have been purchased. The nature of their design was likely to reduce the amount of condensation which would normally form on the inside of windows particularly during winter months. Ultimately, Minox received and credited Sovereign with the substantial rebate received from Manitoba Hydro. There was a further discount received by Minox and credited to Sovereign by virtue of the fact that the windows they ultimately received were somewhat less in quality than those ordered.

[149] Finally, while Pinchin did not undertake a cost analysis of replacement versus repair, he testified that on the basis of his considerable experience, he was satisfied with his conclusion that the difference in costs would be minimal. That evidence was not challenged in cross-examination and accordingly I find it supports his recommendation to Minox to have the windows replaced rather than repaired.

[150] There was no serious issue taken with any of the other remediation costs as invoiced by Akman other than mention of the fact by Sovereign that one of the recommendations to improve the air exchange within the units was not followed. The potential cost of that recommendation was approximately \$110,000.00. The fact that it wasn't followed meant that Sovereign wasn't required to reimburse Minox in that amount. Further, the evidence adduced was that the steps taken by Minox to remediate the mould seemed to have been successful.

[151] Sovereign initially challenged the consulting fees charged by Crosier and Pinchin. Since that challenge wasn't vigorously pursued in oral argument, I came to the conclusion that it had been abandoned.

[152] Minox explains that the reimbursement for consulting fees was not being sought under the professional services provision but rather under statutory condition number 9(2) of the policy which provides:

9(2) The insurer shall contribute pro rata towards any reasonable and proper expenses in connection with steps taken by the insured and required under subparagraph (1) of this condition according to the respective interests of the parties.

[153] I find Minox to be entitled to the amounts claimed on that basis.

CONCLUSION

[154] Judgment is awarded in favour of Minox in the amount of \$476,117.07 together with appropriate pre-judgment and post-judgment interest.

COSTS

[155] If counsel cannot agree on costs, I am prepared to hear their submissions in that regard.

_____ J.