

THE QUEEN'S BENCH
WINNIPEG CENTRE

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BETWEEN:)	Mr. G. Clay,
)	for the Claimant
DOUGLAS BANNERMAN, OPERATING)	
AS BANNERMAN & ASSOCIATES LTD.))	
Claimant,)	Mr. A. Loewen,
)	for the Defendant
- and -)	
)	
AVIVA INSURANCE COMPANY)	
OF CANADA,)	
)	Judgment delivered
Defendant.)	October 14, 2009

DEWAR, J. (Orally)

I did have a chance to think a little bit about this over the weekend, but also there were some things that were said this morning that put a somewhat different complexion on some of the facts that we heard last week. I am going to give you my judgment now, orally.

The plaintiff claims from the defendant, Aviva, the sum of \$5,750 made up of his adjusting fees of \$3,750, plus \$2,000 which he paid for legal costs to collect the balance of his fees from a Joy Boucher.

The plaintiff is an independent adjuster, in this case hired by Ms. Joy Boucher to act on her behalf in adjusting her claim against Aviva, arising from the loss of her home by fire. At the outset of his retainer, the

1 plaintiff entered into an agreement with Ms. Boucher
2 wherein he would be paid ten percent of any recovery, plus
3 expenses. The plaintiff, at no time, acted for the
4 defendant.

5 The plaintiff was retained by Ms. Boucher in May
6 2006. The fire loss had occurred in August, 2004.
7 Ms. Boucher testified that she retained Mr. Bannerman
8 because she was getting the run-around from Mr. Nixon, who
9 was an adjuster retained by Aviva.

10 Following his retention, Mr. Bannerman
11 communicated initially with Mr. Nixon. However,
12 Mr. Bannerman, although obtaining some information from
13 Mr. Nixon, felt that Mr. Nixon (these are my terms) was not
14 being very cordial with him. Accordingly, Mr. Bannerman
15 complained to Aviva about his contact with Mr. Nixon.

16 Mr. Mark Royko, in 2006, was a claim specialist
17 employed by Aviva. It was to him that Mr. Bannerman
18 complained about Mr. Nixon. In order to move the matter
19 forward, and given Mr. Bannerman's expressed refusal to
20 talk further to Mr. Nixon, Mr. Royko decided to negotiate
21 the claim directly with Mr. Bannerman, using Mr. Nixon only
22 as a resource.

23 Negotiations did occur. Evidence was led by
24 Mr. Royko that on July 10th, 2006, he made a written offer
25 to Mr. Bannerman to settle the claim for an additional
26 \$232,420.59. I say additional because there had been
27 advances made earlier, before Mr. Bannerman's involvement.

28 This sum was also net of an amount of \$37,375.09
29 payable to the Receiver General, which was provided by
30 Aviva to Mr. Bannerman on July 10th, 2006, and which was
31 paid to satisfy an outstanding demand by Revenue Canada
32 against Ms. Boucher.

33 The amount being offered by Aviva on July 10th
34 was not the amount that Mr. Bannerman was recommending that

1 Ms. Boucher accept. However, further communications
2 between Mr. Royko and Mr. Bannerman resulted in a
3 settlement of Ms. Boucher's insurance claim against Aviva
4 for the all-inclusive sum of \$246,000.

5 In order to signify the settlement to Aviva,
6 Ms. Boucher was required to complete a final proof of loss
7 for that amount. This amended final proof of loss was
8 prepared by Mr. Bannerman and sworn by Ms. Boucher before
9 Mr. Bannerman. The amount of the proof of loss is
10 \$246,000, as I've said.

11 There is a part of the proof of loss which
12 contains the following wording. The part is entitled
13 "Payment Authorization and Release. It reads: "Payment of
14 this claim ... to Joy Boucher, Royal Bank of Canada, Saro
15 Customs, and Bannerman and Associates Ltd., is hereby
16 authorized, and in consideration of such payment, the
17 insurer is discharged forever from all further claim by
18 reason of the said loss or damage. All rights to recovery
19 from any other person are hereby transferred to the insurer
20 which is authorized to bring action in the insured's name
21 to enforce such rights. All rights, title, and interest in
22 any salvage is hereby assigned to the insurer."

23 The proof of loss is dated July 12th. On that
24 date, Mr. Bannerman attended at Aviva, spoke to Mr. Royko,
25 and exchanged the completed proof of loss for a letter,
26 Exhibit 1-4, and a cheque, Exhibit 1-6, payable to Joy
27 Boucher and Royal Bank of Canada and Saro Custom and
28 Bannerman and Associates Ltd.

29 I find Mr. Bannerman was accompanied by
30 Ms. Boucher to the Aviva office. However, Ms. Boucher was
31 not involved in the communication with Mr. Royko that day,
32 having remained in the lobby.

33 Having obtained the cheque, Mr. Bannerman, along
34 with Ms. Boucher and a representative of Saro Builders,

1 attended at the Royal Bank, main branch at Portage and Fort
2 to cash the cheque. The main branch refused to cash the
3 cheque. There are differences in the recollections of the
4 witnesses as to why the Royal Bank main branch refused to
5 cash the cheque.

6 Mr. Bannerman testified that the explanation
7 given to him was that the bank did not know the amount of
8 the outstanding mortgage and therefore would not cash the
9 cheque. Ms. Boucher testified that she was told that she
10 had to go to her own branch in Lac du Bonnet to cash the
11 cheque because there were too many payees.

12 Mr. Royko said that he received a telephone call
13 from the Portage and Main branch asking who Mr. Bannerman
14 was and indicated that because Ms. Boucher's account was in
15 Lac du Bonnet they would not process it in Winnipeg.

16 I accept that the reason expressed by the bank as
17 to why it would not cash the cheque centred around the fact
18 that Ms. Boucher's own account was in Lac du Bonnet. This
19 is consistent with the statement subsequently made by the
20 bank to Mr. Royko, and by the evidence of Ms. Boucher and
21 Mr. Royko of a call subsequently received from the Royal
22 Bank in Lac du Bonnet. I do not understand why the bank
23 would make such a call unless Mr. Bannerman had either
24 attended or communicated with it.

25 Whatever the case, on July 12th, after
26 Mr. Bannerman and Ms. Boucher had received the \$246,000
27 cheque, a discussion occurred between Mr. Bannerman, Ms.
28 Boucher and the Saro representative as to the amount to
29 which Mr. Bannerman was entitled from the \$246,000 cheque.
30 Mr. Bannerman testified that he reached an agreement that
31 day with Ms. Boucher whereby he agreed to accept \$20,000
32 for his fee. Ms. Boucher indicates that he had made that
33 agreement earlier in a discussion at her house and supports
34 her recollection with Exhibits 8 and 11, which reference a

1 reduced fee of \$20,000 being agreed to by Mr. Bannerman
2 when an earlier offer was being discussed. Although the
3 evidence is not clear as to when exactly that arrangement
4 was made, I do accept the evidence of Ms. Boucher that on
5 July the 12th she understood that Mr. Bannerman had already
6 agreed to reduce his fee to \$20,000.

7 For some reason, on July 12th Mr. Bannerman was
8 not prepared to accept \$20,000 for his fees. Ms. Boucher
9 testifies that the representative from Saro provided
10 Mr. Bannerman with a cheque for \$20,000 (which Mr.
11 Bannerman did not keep) after it became apparent on July
12 12th that the main branch of the Royal Bank of Canada would
13 not cash the cheque.

14 I can infer that Mr. Bannerman was unhappy with
15 the fact that the Aviva cheque, which was to be the
16 source of payment for his fees, could not easily be
17 negotiated. Further, I believe that the cheque for \$20,000
18 was proposed by the representative from Saro to induce Mr.
19 Bannerman to take his money on the basis that a bird in the
20 hand is worth two in the bush. Mr. Bannerman, however, was
21 not so inclined, and retained possession of the \$246,000
22 cheque. I further conclude that Mr. Bannerman either then
23 attended or communicated with the Lac du Bonnet branch of
24 the Royal Bank and attempted to discuss the negotiation of
25 the cheque with them, without success.

26 He also attended at the Selkirk branch Royal Bank
27 of Canada to attempt to negotiate the cheque. The bank
28 refused, and a discussion ensued both at the bank and at a
29 local restaurant between Mr. Bannerman, Ms. Boucher, and
30 the Saro representative to arrive at a settlement of
31 Mr. Bannerman's account. Mr. Bannerman claimed more than
32 \$20,000. Ms. Boucher did not budge from \$20,000.

33 In order to try and once again obtain payment,
34 Mr. Bannerman attended at the Aviva office to speak with

1 Mr. Royko. I believe this occurred on the 17th of July.
2 During that conversation, Mr. Bannerman returned the four-
3 payee cheque for \$246,000 to Mr. Royko and asked that
4 Mr. Royko issue two new cheques, one in the amount of
5 \$24,600 payable to Bannerman and Associates Ltd., and the
6 balance to Ms. Boucher and the Royal Bank of Canada.

7 Mr. Bannerman says that Mr. Royko agreed to do so
8 and thus surrendered the \$246,000 cheque. Mr. Royko says
9 that he told Mr. Bannerman that he would need to talk to
10 Ms. Boucher before he could provide payment in the form
11 Mr. Bannerman was requesting. Mr. Royko says that he never
12 committed to issue the second set of cheques, nor did
13 Mr. Bannerman impose any conditions upon Mr. Royko when he
14 returned the first four-payee \$246,000 cheque.

15 I prefer Mr. Royko's recollection over
16 Mr. Bannerman's. It is consistent with a conservative
17 approach to payment by a property insurer. It is the
18 insured who drives the payment.

19 It is also consistent with how the insurer acted,
20 since Mr. Royko then contacted Ms. Boucher. Ms. Boucher
21 expressed concern about Mr. Bannerman's attempt to obtain
22 payment in the amount of \$24,600. She indicated that this
23 was extortion, and that she may go to the police in regards
24 thereto.

25 As a result of his discussion with Ms. Boucher,
26 Mr. Royko forwarded a cheque for \$246,000 to Royal Bank in
27 Lac du Bonnet payable to the bank and Ms. Boucher.

28 Mr. Royko read the proof of loss as simply
29 authorizing payment in the manner suggested. It did not
30 operate as a binding direction to pay. The proof of loss I
31 referred to is the one that was filled out on July the
32 12th. There never was a subsequent proof of loss sworn.

33 Mr. Royko considered that the only parties with a
34 recorded interest with Aviva for the insurance proceeds

1 were the insured as claimant and Royal Bank of Canada as
2 mortgagee. Aviva felt itself at liberty to delete
3 Bannerman and Associates Ltd. and Saro Custom, since that
4 is what the insured wanted. Mr. Royko, by letter of July
5 19th, 2009, Exhibit 12, advised Mr. Bannerman accordingly.

6 Having not been able to obtain payment of his fee
7 from the proceeds of insurance, Bannerman engaged
8 solicitors who commenced an action against Ms. Boucher for
9 \$27,799.51, namely, the full amount of his unpaid fee which
10 he was claiming.

11 He did not make Aviva a defendant in the action.
12 He subsequently settled the action with Ms. Boucher for the
13 all inclusive sum of \$14,800, additional to a sum of \$1,450
14 which he had earlier received from her or on her behalf.

15 The release has been marked as Exhibit 1-7, and
16 although it only releases Joy Boucher, it contains the
17 following language: This release is executed for the
18 purpose of making a full and final compromise in connection
19 with any and all claims stated herein, including without
20 limiting the generality of the foregoing, any claims
21 relating to an agreement purported to be made on May 12th,
22 2006, and any matters encompassed by Queen's Bench suit
23 number CI06-01-49145.

24 On the basis of the facts which I have just
25 related, I find against the plaintiff. I do so for the
26 following reasons:

27 I agree with the interpretation of the proof of
28 loss placed on the document by the defendant. The proof of
29 loss is not an assignment, except to the extent that the
30 insured assigns her rights to salvage to the insurer, and
31 possibly the subrogation rights for any third party action
32 to occur.

33 The only parties to whom Aviva was legally
34 obligated to pay the proceeds of insurance (subject to what

1 I later say about Exhibit 2) were the insured, Ms. Boucher,
2 and the mortgagee, Royal Bank of Canada.

3 Ms. Boucher was entitled to countermand the
4 parties in the payee section of the proof of loss as
5 regards Mr. Bannerman's company. Since Aviva had the
6 authorization of Ms. Boucher to do so, it was able to
7 replace the four-payee check with a two-payee cheque.

8 Its failure to obtain a further amended proof of
9 loss does not give Mr. Bannerman a cause of action. That
10 failure might have increased the risk to Aviva that
11 Ms. Boucher might subsequently claim she had given no
12 authority to delete Mr. Bannerman's company, but that's
13 all. If Aviva wanted to make a payment on the basis of an
14 oral amendment to the proof of loss, it was able to do so.
15 And I say, subject to the comments that I make about
16 Exhibit 2. And here are those comments.

17 Mr. Bannerman had obtained an assignment of sorts
18 from Ms. Boucher. It is found at Exhibit 2, and it reads,
19 in part: "In consideration of such services, in connection
20 therewith, I/we hereby irrevocably assign to the said
21 Bannerman and Associates Ltd. the amount as agreed upon to
22 be deducted if necessary, from payment of such loss or
23 grow, do by reason of such loss under any and all policy or
24 policies."

25 I learned in today's evidence from Mr. Royko that
26 he was aware of this document and had been from close to
27 the outset of Mr. Bannerman's retainer. I suppose there
28 might be some basis for arguing that the language in the
29 document is too uncertain to enforce it, but for today's
30 purposes, assume it to be valid.

31 What does it give to Mr. Bannerman's company?
32 Only the rights which Ms. Boucher had against Aviva. And
33 CED 4th Edition, at paragraph 936, Kirkby et al v. Canadian
34 Indemnity Company, [1933] 3 W.W.R. 272, at page 273; and

1 Manitoba Public Insurance Corp. v. R.W. From Ltd. and
2 Juenke (1981), 12 Man.R. (2d) 27.

3 The assignment itself would only relate to a
4 claim against Aviva under the insurance contract. There is
5 a statutory condition in the insurance contract which is
6 fatal to the assignee in this case, namely Section 14 that
7 imposes a two-year limitation period. That's Section 14 of
8 the statutory conditions. In short, if the assignment was
9 valid, Mr. Bannerman is beyond the date to enforce the
10 rights which the assignment purported to give him.

11 As I have earlier said, I do not accept that
12 Mr. Royko agreed to substitute two cheques for the four-
13 payee cheque, one of which two cheques would be to
14 Mr. Bannerman. I consider Mr. Bannerman's impression of
15 that conversation to be hopeful thinking, but there was no
16 commitment made by Mr. Royko at that time.

17 Furthermore, the fact that Mr. Bannerman did not
18 name Aviva as a party defendant when he sued Ms. Boucher
19 for the payment of his full commission suggests to me that
20 he did not intend that his case would be based upon this
21 assignment.

22 Finally, upon further reading of the statement of
23 claim which was issued against Ms. Boucher and the release
24 which was issued in Ms. Boucher's favour, there was no
25 reservation expressed such that Mr. Bannerman intended to
26 sue Aviva. He made a full settlement with Ms. Boucher. It
27 was less than what he had claimed. He agreed to release
28 the debt. In my view, he extinguished the debt.

29 Even if he had some form of assignment, and I
30 have some difficulty understanding how he can proceed
31 against both Ms. Boucher and the insurance company if there
32 was a valid assignment, he can't resurrect a debt which he
33 has released in full. Either the proceeds were assigned to
34 Mr. Bannerman or not, and Ms. Boucher was either

1 responsible or Aviva was responsible, Mr. Bannerman chose
2 to pursue Ms. Boucher and released her. He is effectively
3 treating Aviva in these proceedings as a guarantor, even
4 though there is no factual basis to treat Aviva as a
5 guarantor. Once the prime debtor is released, so also
6 would be the guarantor.

7 For those reasons, the claim is dismissed.

8

9 (SUBMISSIONS AS TO COSTS)

10

11 THE COURT: The big cost in this case is that
12 both parties went out to get lawyers. Aviva started it,
13 and in this particular forum, although people are quite
14 able to bring their lawyers to the forum, they can't count,
15 even if they are successful, in being compensated for their
16 lawyers. I also think that, not so much with the proof of
17 loss, but with Exhibit 1-2, since it was on the Aviva file,
18 they made the payment with a risk. It turns out nothing
19 can be done about it at this point in time. So, it is not
20 as Mr. Loewen says, all Mr. Bannerman's fault why we are
21 here.

22 Having said that, it took a day and a half and I
23 am going to award costs in the amount of \$300, plus
24 disbursements. The disbursements I have listed,
25 Mr. Loewen, \$38.44 is what?

26 MR. LOEWEN: Attendance fee in respect of a
27 subpoena.

28 THE COURT: And \$20 is the ...

29 MR. LOEWEN: Fee paid to the Court of Queen's
30 Bench to have a subpoena issued.

31 THE COURT: And the \$125 is service?

32 MR. LOEWEN: Yes.

33 THE COURT: And there is no other filing fees for
34 you? There is a \$50 Xeroxing charge that you are ...

1 MR. LOEWEN: Yeah, well, and that -- I mean we
2 presented a number of exhibits, a number of authorities.
3 That's just, to be blunt, an estimate.

4 THE COURT: Not \$50 worth.

5 MR. LOEWEN: Well, \$25 maybe. Whatever Your
6 Lordship thinks appropriate. There is some entitlement to
7 some disbursements in that regard.

8 THE COURT: Yes, there is. I will fix that at
9 \$25. So, that makes the total what? Let's not walk out of
10 here until we know exactly what we are dealing with.

11 MR. CLAY: I believe that will be \$508.44.

12 MR. LOEWEN: \$508.44?

13 THE COURT: I have \$508.44.

14 MR. CLAY: That is correct.

15 THE COURT: I take it, Mr. Clay, you will accept
16 Mr. Loewen's comments about the bills? He doesn't have to
17 file the bills so that we have a record, apart from the
18 Xeroxing?

19 MR. CLAY: No, I don't think -- we don't need
20 their bills. He's asking whether we want copies of the
21 bills. No, we're satisfied with that, My Lord.

22 THE COURT: Well, then, bottom line is that the
23 claim is dismissed and Mr. Bannerman is ordered to pay
24 costs to Aviva in the amount of \$508.44.

25 Does that complete everything here?

26 MR. CLAY: It does, My Lord. Thank you.

27 MR. LOEWEN: Yes, thank you.

28

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

**DOUGLAS BANNERMAN OPERATING AS
BANNERMAN & ASSOCIATES LTD.,**

(Claimant) Appellant,

- and -

AVIVA INSURANCE COMPANY OF CANADA,

(Defendant) Respondent.

**REASONS FOR JUDGMENT
OCTOBER 14, 2009**
