DECISION

of the

GENERAL INSURANCE COUNCIL OF MANITOBA

("Council")

respecting

C. JOHN MCDONALD ("Licensee")

INTRODUCTION

The General Council of Manitoba ("Council") derives its authority from *The Insurance Act* C.C.S.M. c. I40 (the "*Act*") and the *Insurance Councils Regulation 227/91* ("*Regulation 227/91*").

Following the receipt of a consumer complaint that the Licensee had failed to add business interruption coverage to their policy, which resulted in an uninsured loss in a subsequent claim, an investigation was conducted pursuant to sections 375(1) and 396.1(7)(e) of the *Act* and section 7(2)(e) of *Regulation 227/91.* The purpose of the investigation was to determine whether the Licensee had violated the *Act,* its *Regulations,* its *Rules* and/or the General Insurance Agent Code of Conduct ("*Code of Conduct*"). During the investigation, the Licensee was given an opportunity to make submissions with respect to Council's concerns.

THE INVESTIGATION

In the course of its investigation, Council learned that:

1. At all material times, the Licensee was a Level 3 general insurance agent representing the Agency.

2. On November 2, 2015, the Licensee's colleague, (the "Colleague"), provided a quote for the Complainants' business. This quote included: Building - $500,000.00 limit, Replacement Cost Basis, 90% co-insurance, and a $1,000.00 deductible. Included was a Loss of Income, Profits form – Actual Sustained Loss.

3. Complainant A noted that when they first arranged the coverage she asked, *"The quote u* [sic] *gave us are we able to shave it down…..Maybe take wage loss off and replacement at $400k*".

4. According to Complainant A, when the Colleague explained business interruption at the time they purchased their first policy, she understood it to be wage loss. As the

Complainants were not taking wages, they did not believe that they needed the coverage.

5. In September 2016, the Colleague met with the Complainants at their business to discuss the coverage for the upcoming renewal. According to the Complainants after further explaining business interruption coverage, the Complainants agreed to have business interruption coverage added at the time of the upcoming policy renewal (December 3, 2016), and the Colleague confirmed that he would add it to the policy. At the time, the Complainants advised that an alarm system had been installed.

6. On November 2, 2016, the Complainants received an email from the Licensee requesting information for the renewal. Included in the email was: "*6) Any changes required to limits or operations*". In a November 24, 2016 email to the Agency's Marketing Broker answering the questions posed in the November 2, 2016 email, the Licensee advised "*6) No changes in operations*" but he did not address the issue of the limit of coverage for property damage.

7. This was followed by another email from the Licensee on November 22, 2016. Although the email had indicated "*There is a question regarding BI coverage*", Complainant B did not recall a discussion of business interruption with the Licensee at that time. Complainant A believed that the Colleague did tell the Licensee to add the coverage because of the email. Later, after the loss, when Complainant A contacted the Colleague regarding the fact that there was no business interruption coverage, the Colleague stated that it had just slipped his mind.

8. Between November 22, 2016 and December 2, 2016, the Licensee and Complainant A held several telephone discussions regarding live bands. She remembered saying to the Licensee that they had to add coverage for wages and bills in a loss, and he corrected her with the term business interruption.

9. During the first week of December 2016, Complainant A stated that she confirmed by telephone that coverage was in place, and the amount of the bill. As the bill was slightly higher, Complainant A assumed the coverage had been placed for business interruption.

10. The Complainants suffered a water damage loss to their business premises on January 5, 2017. They were advised by the adjuster that they did not have business interruption coverage.

11. The week following the loss, business interruption coverage was added. No forms were completed by the Complainants for this endorsement. Additional coverage for the property was added effective the following month.

12. On February 24, 2017, the Complainants forwarded a statement of their loss to the Agency for the period between January 5, 2017 and April 30, 2017, the expected date of

reopening, for an amount of $34,919.71 plus $5,000.00 total profit lost. The Complainants received no response.

13. The Agency's CEO advised Complainant A that during a review of the previous policy, it was noted that the Complainants had declined business interruption and there was no coverage. He suggested a liability claim be made against the Agency.

14. On August 22, 2017, the Complainants received a call from the adjuster advising them that they did not meet the requirements of the 90% co-insurance clause for replacement cost and would be penalized $21,857.65 toward the rebuild.

15. The Complainants provided information to the Agency's E&O carrier but were advised in a letter dated September 6, 2017 from the carrier's legal representative that there was no negligence on the part of the Agency.

16. The Complainants believed that the Colleague failed to advise the Licensee to add the business interruption and/or the Licensee failed to add that coverage.

The Licensee's response – January 2, 2018

17. The Licensee noted that the Complainants were a client of his Colleague. The Licensee assisted his Colleague's clients when the Colleague was unavailable. The policy renewal date was December 3, 2016. The Colleague was out of office. The Licensee was the contact person.

18. The Licensee advised Council that the Colleague did not advise him of the discussions between the Colleague and the Complainants regarding adding business interruption coverage.

19. The Licensee stated that he did not discuss building limits with the Complainants nor did he discuss co-insurance issues with the Complainants.

20. The Licensee's recollection of business interruption discussions with the Complainants was that they had spoken with his Colleague and they were considering adding business interruption coverage. The Licensee was aware that the Complainants had been offered a policy that included business interruption in 2015 and had declined at that time to purchase the coverage.

21. The Licensee's advice to the Complainants was that it was important coverage to have and that they would have to decide the limits of coverage. He advised the cost of the coverage would be dependent upon the limit of coverage they required. He referred to business interruption coverage in his email of November 22, 2016.
22. In response to the November 22, 2016 email, Complainant B contacted the Licensee to provide information that had been requested by the insurance company as set out in the

email of November 22, 2016. Council was advised that the Licensee did speak with the Complainants to ask whether they had decided if they required business interruption coverage and the amount they required.

23. The Complainants failed to provide instructions to place coverage for business interruption or on the amount of coverage they would require. If either of the Complainants had provided instructions that they wanted to move forward and have the business interruption coverage added, the Licensee would have provided them with the insurer's required forms for completion.

24. The Licensee believed that their last conversation regarding renewal occurred on November 30, 2016 or December 1, 2016. The conversation was in respect to live music in the venue. Although there was no note made by him, the Licensee believed he asked Complainant A on that date about business interruption. Again, there were no instructions given to add business interruption. The policy was therefore renewed without business interruption coverage.

25. In emails from the Licensee to the Complainants dated November 2, 2016 with a follow-up on November 22, 2016, the Licensee requested information for the renewal policy underwriting. The email of November 22, 2016 at 7:32 a.m. specifically noted there was a question regarding business interruption coverage and that failure to provide the information requested in the email would result in a lapse of the policy on the evening of December 2, 2016.

26. On November 24, 2016, the information regarding receipts for other revenues was provided to a Marketing Broker at the Agency.

27. Between November 29, 2016 and December 1, 2016, an additional question with respect to live bands was asked and answered.

28. In an email dated January 18, 2018, it was confirmed that there were no cover letters to the client for either the 2015 or the 2016 policies.

INTENDED DECISION AND HEARING

On February 28, 2018, during a meeting of Council, the evidence compiled during the investigation was presented and reviewed. Upon assessment of the evidence, Council determined its Intended Decision. Pursuant to section 375(1) of the *Act* and *Regulation 227/91,* Council determined that the Licensee had violated section 375(1)(e) of the *Act* and section 2 (Competence), section 3 (Quality of Service) and section 4 (Advising Clients) of the *Code of Conduct.*

It determined that the violations aforesaid, and sections 375(1) and 375(1.1) (c) and (d) of the *Act* and sections 7(1) and 7(2) of *Regulation 227/91*, justified an order that:

1. The Licensee be fined $500.00 and assessed partial investigation costs of $550.00.

The Licensee subsequently exercised his right to dispute Council's Intended Decision and requested a hearing before Council. The hearing occurred on September 26, 2018. At that time, the Licensee, who was not represented by counsel, gave evidence and made representations to Council. The hearing was adjourned to afford Council the opportunity to carefully review the remarks made and evidence submitted by the Licensee.

ISSUE

Has the Licensee provided sufficient particulars, through evidence or argument, to show why the Intended Decision should not be implemented, either in relation to any of the violations which were determined on a preliminary basis to have occurred, or with respect to the contemplated Order?

THE SHOW-CAUSE HEARING

At the show-cause hearing on September 26, 2018, the Licensee testified under oath. The main thrust of the Licensee's submission related to his lack of involvement with the Complainants' policy renewal in 2016. He explained that his Colleague had met with the Complainants to discuss the 2016 policy renewal during which time business interruption coverage was discussed and that his Colleague had simply forgotten to tell him before he left for his vacation that the Complainants wanted to add business interruption coverage. The Licensee indicated that he had not taken over the Complainants' file but had simply undertaken to get the required information concerning the Complainants' sales numbers. The Colleague had given him a task assignment. He had completed that task.

The Licensee stated that he sent a request for information regarding sales numbers to the Complainants on November 2, 2016 and that he called the Complainants multiple times during the month of November 2016 to discuss the policy renewal. He indicated that it was during the process of seeking information from the Complainants that he decided to familiarize himself with the Complainants' file and noticed that they had declined business interruption coverage. As a result, he asked the Complainants about business interruption coverage and explained the nature of the coverage to them. Although the Complainants responded to the Licensee's initial request for sales numbers, they never provided him with any instructions concerning business interruption coverage. In the absence of any instructions from the Complainants, the Licensee proceeded to renew their policy without business interruption coverage.

The Licensee indicated that the bulk of these discussions were telephone conversations and that he created no notes and sent no confirming emails to the Complainants regarding these discussions. Upon further questioning by Council, the Licensee admitted that he had not adequately recorded or noted the telephone conversations between himself and the Complainants.

Upon being asked whether the Complainants were ever advised of the significant consequences of being underinsured, the Licensee indicated that he was "quite confident" that his Colleague had explained the consequences but that he had never discussed them with the Complainants. He reiterated that his task was limited to obtaining the Complainants' sales figures and that he considered everything else with respect to their renewal as having already been taken care of by his Colleague. When directed to his November 22, 2016 email where he states that "*there is a question regarding BI coverage*", the Licensee confirmed that he knew business interruption coverage was a live issue at the time but that the Complainants had never given him instructions to add business interruption coverage.

DECISION AND ORDER

Section 375(1)(e) of the *Act* provides that a holder or former holder of a licence violates the *Act* if he or she demonstrates incompetency or untrustworthiness in transacting the business of insurance agency.

In accordance with section 2 (Competence), section 3 (Quality of Service) and section 4 (Advising Clients) of the *Code of Conduct*, an agent owes a duty to his or her client to be competent and to provide competent guidance based on sufficient knowledge of the specific risks entailed. He or she must serve his or her clients in a conscientious, diligent and efficient manner and be candid and honest when advising clients.

The Licensee sought to minimize his role and his responsibilities with respect to the Complainants and their 2016 policy renewal. In particular, he suggested that he was tasked only with obtaining sales figures from the Complainants and that, that task being completed, everything else was taken care of and he owed no further duty to the Complainants. If the Licensee believed as much, it is to be wondered why, in his email of November 22, 2016, he flagged business interruption coverage as being a live issue for the Complainants' consideration and why he attempted to explain business interruption coverage to the Complainants over the course of multiple telephone conversations with them during the month of November 2016.

What was discussed in the course of these telephone conversations between the Complainants and the Licensee remains unclear since there are no file notes, correspondence, cover letters or emails outlining the discussions between them. As such, it is not clear whether there was a sufficient explanation of business interruption coverage and its importance. What is clear is that the Licensee broached the topic of business interruption coverage with the Complainants and that the Licensee renewed the policy without clear instructions from the Complainants on the issue of business interruption coverage being added or not. What is also clear is that an email confirming their discussion and the Complainants' instructions to place or not to place business interruption coverage in advance of the policy renewal date on December 3, 2016 would have cleared up any confusion under which the parties were operating at the time and would have made clear what coverage was to be included in the policy renewal.

While Council appreciates that the Licensee inherited the file from his Colleague while the latter was on vacation and that the lack of documented evidence of his Colleague's conversations with the Complainants in September 2016 likely contributed to the confusion in November 2016, this does not relieve the Licensee of the duties he owed to the Complainants. Whether the file was his own or whether he had temporarily taken over the file in his Colleague's absence, the Licensee's duty to the Complainants remained the same, namely to be clear, conscientious and diligent in his dealings with them and to provide them with competent guidance based on sufficient knowledge of the specific risks entailed. If the Complainants' understanding of business interruption coverage seemed muddled, it was the Licensee's duty to explain that coverage and its importance so that clear instructions could be obtained.

The Licensee says that he regarded his duty as having been defined by his Colleague's instructions. But discussions between his Colleague and the Licensee did not constrain or limit the Licensee's duty to the Complainant.

In the present case, Council is satisfied that the Licensee failed to meet the standard of care owed by a general insurance agent and violated section 375(1)(e) of the *Act* and section 2 (Competence), section 3 (Quality of Service) and section 4 (Advising Clients) of the *Code of Conduct.*

PENALTY AND DECISION

Council's Decision dated on October 25, 2018, was delivered by registered mail to the Licensee on November 1, 2018. The Decision outlined the foregoing background, analysis, and conclusions. Having regard to the determination of the violations aforesaid, and pursuant to sections 375 (1.1) (c) and (d) of *the Act* and section 7 (2) (e) of Regulation 227/91, the following penalties are imposed on the Licensee, namely:

1. The Licensee be fined $250.00 and assessed partial investigation costs of $275.00.

As part of its Decision, Council further informed the Licensee of his right to request an Appeal to dispute Council's determinations and its penalty/sanction. The Licensee did not to pursue a statutory Appeal, thus, accepting the Decision.

The Decision is therefore final. In accordance with Council's determination that publication of its Decisions is in the public interest, this will occur, in accordance with sections 7.1(1), (2) and (3) of *Regulation 227/91*.

Dated in Winnipeg, Manitoba on the 17th day of January, 2019.