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## COURT OF APPEAL CONFIRMS REPLACEMENT COST AVAILABLE WITHOUT REBUILD

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In most contexts, insureds will only be entitled to replacement cost value (“RCV”) under a property insurance policy if in fact they rebuild. However, in the context of a legal action that is not always the case. The Court of Appeal’s recent decision in *Alvaro v. InsureBC (Lee & Porter) Insurance Services Inc.*, 2021 BCCA 96 (“*Alvaro*”), affirms that in appropriate circumstances insureds may be entitled to RCV even when they don’t rebuild. The decision also serves as a reminder to brokers of the risks involved at the time of policy placement or renewal and that homeowners can be found contributorily negligent for failing to read their policy.

### THE FACTS

The appellant homeowners (the “Homeowners”) owned a number of rental properties, which they insured through the defendant broker. They evicted a tenant from one of the properties without informing the broker. The dwelling on that property was destroyed by fire when it was vacant and undergoing renovations. The insurer denied coverage on the grounds of a vacancy exclusion in the insurance policy (the “Policy”).

The subject property had been insured through the same broker and insurer for at least six years prior to the fire. The insurance coverage was renewed annually and last renewed approximately eight months prior to the fire. While renewing the Policy, the broker learned that the property was being used as a rental property but failed to advise the Homeowners that the Policy contained a vacancy exclusion. The Homeowners were not sophisticated and had experienced difficulty understanding the terms of the insurance coverages obtained for them. They did not read the Policy wordings and were therefore not aware of the vacancy exclusion. They claimed they would have rebuilt the dwelling had there been coverage afforded under the Policy.

The Homeowners sued the broker for failing to bring the vacancy exclusion in the Policy to their attention.

### THE RULING

The trial judge found the broker breached its duty by failing to specifically inform the Homeowners of the vacancy exclusion at the time of the Policy renewal, particularly given the broker knew the properties in





question were rental units which implied periods of vacancy between tenants. On the issue of damages, the trial judge turned to the provisions of the Policy to determine what position the Homeowners would have been in had effective coverage been obtained. The trial judge noted that under the Policy, the Homeowners could only choose RCV if they actually rebuilt, otherwise they would be entitled to the actual cash value (“ACV”) of the destroyed property. The trial judge found that because the Homeowners did not rebuild, they were only entitled to the ACV of the property, which in this case was approximately \$100,000 less than the RCV. The trial judge dismissed the claim of contributory negligence against the Homeowners on the basis that their failure to read the Policy did not cause their loss; he found they would not have understood the coverages and/or lack of coverage even if they had read the Policy.

The Homeowners appealed alleging the trial judge erred in his assessment of damages based on ACV. The broker cross appealed alleging the trial judge erred in dismissing the argument the appellants were contributorily negligent.

The Court of Appeal allowed the appeal on the damages issue finding that the trial judge committed a legal error in his damages analysis because he asked the wrong question. The Court ruled that where, as in this case, insureds do not have effective coverage, the simple fact they have not replaced the property does not disentitle them from seeking to be indemnified by the agent responsible for the loss of the right to opt for RCV. The Court noted that, as in all contract cases, the court must examine the evidence to determine what position the insureds would have occupied had they obtained that for which they bargained. The Court found the evidence adduced at trial by the Homeowners was sufficient to show that they would have opted to replace the dwelling if they had effective coverage. The fact that they chose not to rebuild without coverage was immaterial. Accordingly, the damages award at trial based on ACV was set aside and the Court substituted a significantly higher award based on RCV.

In dismissing the broker’s cross-appeal, the Court confirmed that insureds may be found at fault for failing to read an insurance policy, but noted that will more likely be found where the problem arises from inadequate values rather than gaps in coverage. The Court upheld the trial judge’s ruling on the basis that he was in the best position to assess the parties’ relative responsibility based on hearing and weighing the evidence of their comparative experience, sophistication and knowledge of insurance.

#### PRACTICAL CONSIDERATIONS

*Alvaro* serves as an important reminder to insurance brokers of the risks involved at the time of policy placement and renewal. To mitigate against these risks, brokers should:

1. Obtain all of the necessary facts from clients that could affect the coverage they require;





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2. Review key insurance policy wordings with clients before placement and upon each renewal; and
3. Obtain written confirmation from clients that they are aware of and understand the contents of the policy and any relevant exclusions.

*Alvaro* is also a reminder that in claims brought against brokers a contributory negligence argument is always open where the insureds fail to read or understand the policy wordings. In such cases, it is important to investigate the personal circumstances <https://www.rbs.ca/members/sohani/es> of the insureds at an early stage to determine the relative strength of that argument.

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