IADC COMMITTEE NEWSLETTER

INSURANCE AND REINSURANCE

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IN THIS ISSUE

The British Columbia Court of Appeal in Nagy v. BCCA Insurance Corporation, 2020 BCCA 270 provides an analytical framework for distinguishing misrepresentations and fraudulent omissions. Guidance is also provided on the standard of proof, evidentiary issues, and the perils of summary trials on affidavit evidence.

Drawing Lines Between Insurance Misrepresentations & Fraudulent Omissions

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In the beginning, or say in the year 1766, the concept of utmost good faith, or *uberrimae fidei*, was articulated by the House of Lords in England as the bedrock of the law of insurance and the relationships between insureds and insurers. Lord Mansfield put it in these terms in *Carter v. Boehm* (1766), 3 Burr 1905, 97 ER 1162 at p. 1164:

> First. Insurance is a contract upon speculation.
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> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.
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> The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because of the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

In simple terms, the insured had a duty of utmost good faith to honestly disclose all matters relevant to the risk whether asked by the insurer or not. Such reflected the insurance industry at that time when underwriters were arranging coverage for shipowners and their cargoes in circumstances where the only source of information was the insured and there was no way for the underwriter to verify the information disclosed or withheld. As such, there was little distinction between misrepresentations or omissions. Inaccurate representations or possibly innocent withholding of relevant information material to the risk, omissions, would entitle the insurer to void the insurance. Omissions were not required to be proven to be fraudulent. Omissions were considered to be constructive fraud or fraud at law.

One might say that all was good on land and at sea and so it remained for generations. This, of course, could be a harsh and rigid rule for insureds, who had no intention to deceive by omission, and fortunes could be and were lost.

Over the years, there were legislative changes to the rules of disclosure in certain classes of insurance in many of the common law jurisdictions in the world to ameliorate the potential for injustice and to promote some consumer protection. In most of Canada, *Carter v. Boehm* remained the law of the land until in or about 1924, when distinctions were drawn between misrepresentations and omissions. After a number of amendments, the current relevant Statutory Condition, required by law to be deemed a part of every insurance

contract (apart from life insurance, accident and sickness insurance, and contracts of reinsurance) is Statutory Condition 1, Insurance Act, RSBC 2012, c. 1:

> Misrepresentation
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> 1. If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.
> [Emphasis added.]

Notwithstanding these changes, it is sometimes most difficult and challenging to distinguish between true misrepresentations and fraudulent omissions. Clarification in analysis was provided by the British Columbia Court of Appeal in *Nagy v. BCCA Insurance Corporation*, 2020 BCCA 220, a decision handed down by a unanimous court on October 7, 2020. Some of the relevant facts can be summarized as follows:

1. The insureds, at the relevant time in 2016, owned three properties, two in British Columbia, and one in Port Roberts, Washington.
2. Over the years, they had made various claims for insurance coverage for fire, theft, and roof damage.
3. His prior broker advised him that his former insurer, Wawanesa, would not be renewing the existing policy as a result of claims frequency and changes in occupancy.
4. The insured then sought coverage on his own with BCCA, a company of which he was a member. Information was given over the phone, BCCA agreed to provide coverage, an application was sent to the insured who signed it, scanned it, and returned it to BCCA. The Policy was bound that day based on the information in the application.
5. In the phone conversation and the application, the insured was asked to list all previous losses for 10 years. Only one such loss was disclosed. The insured was also asked whether any prior insurer had cancelled, declined, refused, or imposed any special conditions. The insured answered no.
6. A fire loss occurred at one of their properties. BCCA declined coverage, alleging the policy was void as a result of misrepresentations, omissions, or a material change in risk.
7. The parties proceeded to a summary trial on affidavits and judgment was granted to the insureds by reasons published at 2019 BCSC 930.

8. BCCA appealed. They did not take issue with the material change of risk issue. They alleged the trial judge made errors in relation to the misrepresentations and omissions.

The main issues on appeal then were whether the admitted inaccuracies regarding the prior losses and the declination of insurance coverage from the prior insurer were misrepresentations or omissions. Whether they were either, the insured alleged they were cured by addendums and attachments sent electronically to BCCA after the policy was issued, and confirmed in a telephoned conversation with BCCA, according to the insured. BCAA maintained that it never saw any addendum or confirmed receipt in a telephone conversation. The trial judge accepted the evidence of the plaintiff saying there was a heightened level of scrutiny required in order to determine fraud.

The court held that the trial judge was clearly wrong in saying that there was a heightened level of scrutiny required to prove fraud. The trial judge was not provided with the leading Supreme Court of Canada decision in *FH v. McDougall*, 2008 SCC 52 which held that "there is only one rule and that is that in all cases, evidence must be scrutinized with care by the trial judge." The Court of Appeal stated that the concept of "heightened scrutiny should now be locked away in the vault of discarded phrases."

Further, the judge erred in applying the rule in *Browne v. Dunne* (1893) 6 R. 67. (H.L.):

> [42] The question of whether the rule in Browne v. Dunn was engaged, however, does not complete the analysis. While case law and commentaries have expressed the rule in various ways, the description of it in Paciocco and Stuesser, The Law of Evidence, 7th, ed. (Toronto: Irwin Law, 2015) at 472 is simple and accurate:
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> > A party who intends to impeach an opponent's witness must direct the witness's attention to that fact by appropriate questions during cross-examination. This is a matter of fairness to the witness. If the cross-examiner fails to do so, there is no fixed consequence; the effect depends upon the circumstances of each case. The court should first see if the witness can be recalled. If that is not possible or appropriate, or such evidence may be rejected in favour of the testimony of the opponent's witness.

In short, the judge held that BCAA failed to confront the plaintiff that his evidence of addendum to BCAA and his alleged subsequent telephone conversation with them were fabricated was unfair thus supporting the plaintiff's evidence as a matter of judicial fairness. The problem here was that this was a summary trial on affidavit evidence. There were clear and obvious issues of credibility from the outset. Cross

examination was not available given the summary nature of the proceedings. The Court of Appeal concluded on this issue as follows:

> [91] With respect, without attempting to define in what circumstances the rule in Browne v Dunn can properly be applied in a summary trial proceeding, I am satisfied that the rule was not applicable in the circumstances of this case.
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> [92] The difficulty in part arises from the position BCAA took before the trial judge. The summary trial application was brought by BCAA. The respondents opposed it. But BCAA maintained that the case was suitable for determination by summary trial, and the judge ultimately agreed. This was notwithstanding the judge's recognition at para 15 of her reasons that "credibility is a critical factor".
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> [93] Here, any problem of trial fairness, given that credibility was a critical factor, arose from the procedure followed, in which neither party sought to cross-examine on the affidavits, and in which cross-examination was not available in the trial process given its summary nature; see Mayer v Mayer, 2012 BCCA 77 at paras 78–83.
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> [94] The reality is that both sides were well aware that credibility was a critical factor. That is why the respondents opposed conducting the trial summarily.
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> [95] By taking the position from the outset that the respondents had fraudulently omitted to disclose facts, as well as misrepresenting them, BCAA put their honesty clearly in issue. It could have been no surprise to the respondents to hear BCAA argue that the evidence concerning the mailing of the addendum and the making of the April 29, 2016, call should be rejected. That evidence was the foundation of the respondents' position that any omission had not been fraudulently made. That is presumably why they adduced so much evidence about it, including the very focused evidence of Ms. Shariff.
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> [96] As I see it, then, this is a case like Drydgen, where the argument concerning the reliability of the witness, here Mr. Nagy, should have surprised no one, and there was no realistic possibility that the closing arguments caught the witness by surprise (see Drydgen at para 18). Trial fairness, in my view, did not demand that the respondents be permitted to give further evidence that what they had already sworn was true was not a lie. It was surely a given that that was their position, just as it was clear throughout trial that it was BCAA's position that an addendum was never

> received and that there was no telephone call confirming its receipt.
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> [97] Moreover, the rule in Browne v Dunn applies to the weighing of evidence and cannot justify making findings of fact unsupported by the evidence where those findings are an essential part of what is to be weighed. That is what effectively occurred here.
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> [98] In my respectful view, the judge's use of the rule in Browne v Dunn to "give less weight to BCAA's submissions that the totality of the evidence supports a finding the April 29 Call did not occur", was, in the circumstances, wrong in law.

We then return to the crux of the case. When the insured responded to the question "State all losses or claims. . .in the past 10 years" with the answer "One theft claim", when in fact there were two more, was this a misrepresentation or omission? What was said was true, it suggested there were no other claims, which was false.

The court explained the distinction between the two in part as follows at paragraphs 45-46 as follows:

> [45] A false representation of fact, an assertion that something is so when it is not, or that something is not so when it is, constitutes a misrepresentation. As Professor Boivin put it, misrepresentations are active in operation, whereas omissions are passive: Denis Boivin, Insurance Law (Toronto: Irwin Law, 2004) at 116. Misrepresentations are words, writings or gestures that communicate misinformation and can be judged objectively by comparing them to the truth. But as Professor Billingsley noted, the delineation is not always clear, particularly in the case of half-truths: Barbara Billingsley, General Principles of Canadian Insurance Law, 2nd ed (Markham: LexisNexis Canada Inc, 2014) at 105 [Billingsley]. See, for instance, the analysis of Goepel J, as he then was, in Lohse v Sovereign General Insurance Co, 2002 BCSC 50.
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> [46] Accordingly, distinguishing a misrepresentation from an omission becomes problematic where the statement is literally true, but practically false, and therefore misleading—not because of what it said but because of what it left unsaid: Bruce MacDougall, Misrepresentation (Toronto: LexisNexis Canada, 2016) at 178, citing R v Lord Kylsant, [1934] 1 KB 442.

The courts further analysis included the following:

- A positive statement that is untrue is a misrepresentation.
- A half-truth is generally an omission.
- To characterize a half-truth as a misrepresentation does not assist in the analysis.

- The failure to refer to other losses, as here, was found by the trial judge as an omission, and it would only void the policy if fraudulently made.
- The failure to disclose that his prior insurer had declined to renew was not an omission, or half-truth, it was a positive representation that was false.
- Based on the errors made by the trial judge regarding the burden of proof and "heightened scrutiny", the conflation between misrepresentations and omissions, the trial judgment could not stand.

In view of the errors made by the trial judge, the court set aside the order of the trial judge and remitted the case to the Supreme Court for a new trial.

The analysis of the Court of Appeal should be of assistance to the insurance industry and the legal profession in general in the years to come. In my view, it also highlights some of the perils of summary trial where credibility is clearly in issue. It has been my experience that summary trials are seldom cheaper, faster, and better unless the issues and evidence are clearly suitable for summary determination. Insurers are sometimes eager to attempt a summary trial in the hopes that there will be significant cost savings. They are often wrong.

One would be advised to consider the wisdom of Justice Bouck in *Chu v. Chen*, 2002, BCSC 906, referring to Rule 18A, which is now Rule 9-7 of the Supreme Court Civil Rules:

> [38] A conventional trial does not necessarily result in perfect justice. Given humanity's inherent weaknesses, it is the best we can do. On the other hand, a Rule 18A summary trial is a far less perfect trial than a conventional trial. This is because Rule 18A allows counsel to present the evidence in affidavit form and the affidavit's deponents seldom are cross-examined before the Rule 18A judge to test their credibility.
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> [39] In a conventional trial, the trial judge rules on the admissibility of evidence. On a Rule 18A summary trial, the parties present the evidence in affidavit or written form without a judge first ruling on the admissibility of statements contained within the affidavits. These affidavits probably do not reflect the deponent's exact words. For practical reasons they usually are the affidavit drafter's best interpretation of the deponent's words. Without objection from counsel for the other party, drafters often insert into the affidavits inadmissible argument dressed up as evidence or they may add explicit or disguised hearsay. During the later research and writing component of a Rule 18A summary trial judges must sift out these inadmissible words and find the necessary facts from the admissible evidence that remains.

[40] . . . I do not mean to imply that affidavit drafters intentionally decide to ignore the rules of evidence. Rather, they easily may have forgotten those rules because they have been under-exposed to conventional trials. Arguably, Rule 18A has a negative effect on counsel's conventional trial skills of presenting evidence, cross-examining witnesses and persuading juries. Judges' conventional trial skills can suffer in a similar way.

[41] From the point of view of trial court efficiency, in many Rule 18A summary trials the presiding judge often cannot tell whether the issues are suitable for a just disposition under the rule until long after the hearing is over. This is because counsel want to compress the Rule 18A hearing into the shortest time possible. The longer a Rule 18A hearing takes, the more likely it is the application will be dismissed as being unsuitable for resolution.

[42] However, a Rule 18A hearing that takes counsel little time to present does not necessarily result in fewer hours of judicial research and writing time. A Rule 18A hearing judge must still examine all the affidavits and all the authorities, including those that counsel may have just mentioned in passing. This may often require many hours, days, weeks and sometimes even months of research and writing by the Rule 18A judge.

[43] In the end, if a Rule 18A judge decides not to resolve the issues because of unsuitability or unjustness, the judicial time spent hearing the application and explaining the reasons for its dismissal is wasted. It can also result in considerable extra expense to the parties because the dispute must then wait in line for disposition at a future conventional trial.

[44] A Rule 18A hearing effectively excludes the public from the process; few ordinary citizens possess the necessary patience and boredom threshold to sit in the gallery listening to counsel and the court debate dry questions of law based on material the observers never see. Rule 18A tends to distance the public from the justice system to the disadvantage of our democracy.

[45] Another weakness of Rule 18A arises where there is an appeal from the hearing judge's decision dismissing the application. If the Court of Appeal upholds the hearing judge by dismissing the application that does not end the dispute. It must still be tried at a future conventional trial. Again an added expense to the parties in what is already an overly expensive exercise.

> [46] Rule 18A can provide the parties with three trials instead of one conventional trial. First, there is a Rule 18A summary trial application before a hearing judge in the trial court where the judge may dismiss the application because of unsuitability. Second, there is another "trial" in the Court of Appeal. While it is called an appeal, it is in fact a trial because the Court of Appeal decides the issues on the identical written material that was before the Rule 18A hearing judge. Third, if the Court of Appeal upholds the Rule 18A hearing judge's ruling of unsuitability, there is then a conventional or real trial before a judge or a judge and jury.
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> [47] No one can say for certain that the result of a Rule 18A summary trial would be the same if the dispute were tried by a judge or a jury at a conventional trial. For all these reasons, a conventional trial is a first rate trial when compared to a Rule 18A trial. An impartial observer might ask: "Why should the . . . rules offer a second rate trial to the public? Should not those rules pursue excellence and shun mediocrity?"

In my respectful view, the defence in *Nagy* fell into strategic error in presenting its case as suitable for summary trial. They knew full well that credibility was a central issue. The plaintiff properly opposed summary trial, but was overruled by the trial judge, notwithstanding her recognition that "credibility is a central factor." Obviously, there were no cost savings here.

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