THE NAVIGATOR

IN THIS ISSUE

Commercially Reasonable Best Efforts – Contextual Interpretation of Contracts

The British Columbia Court of Appeal recently had to interpret what the phrase "commercially reasonable best efforts [to obtain the necessary regulatory approvals] as soon as possible" meant in a purchase and sale agreement. The appeal in *Sutter Hill Management Corporation v. Mpire Capital Corporation*, 2022 BCCA 13, concerned the interpretation of certain terms in an agreement for the purchase and sale of a care home in Abbotsford, B.C. that required the respondent purchaser, as a condition precedent, to apply for and obtain necessary approvals from the Fraser Health Authority ("FHA"). It focused primarily on the question of whether the purchaser had used "commercially reasonable best efforts" (a phrase that the chambers judge described as likely the result of "overdrafting") to satisfy the condition precedent "as soon as possible".

The parties had entered into an agreement on January 14, 2016, and by late November 2017 the FHA had still not given the required approvals. The vendors maintained that the purchaser was in breach of the condition precedent and gave notice of default. When this default was not remedied, the vendors took the position that the contract was at an end, and that the purchaser's deposit was forfeited. That deposit, in the amount of $300,000, was what this particular contest was about. The vendors commenced action and applied for judgment against the purchaser in that amount, together with a declaration that the deposit was forfeited.

The Court of Appeal reviewed the law with respect to the interpretation of contracts. The Court referred to the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53. The Court noted:

> [30] In *Sattva* at para 47, the Court endorsed a "practical, common-sense approach" to the interpretation of contracts, "not dominated by technical rules of construction":
>
> > [47] …The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit*

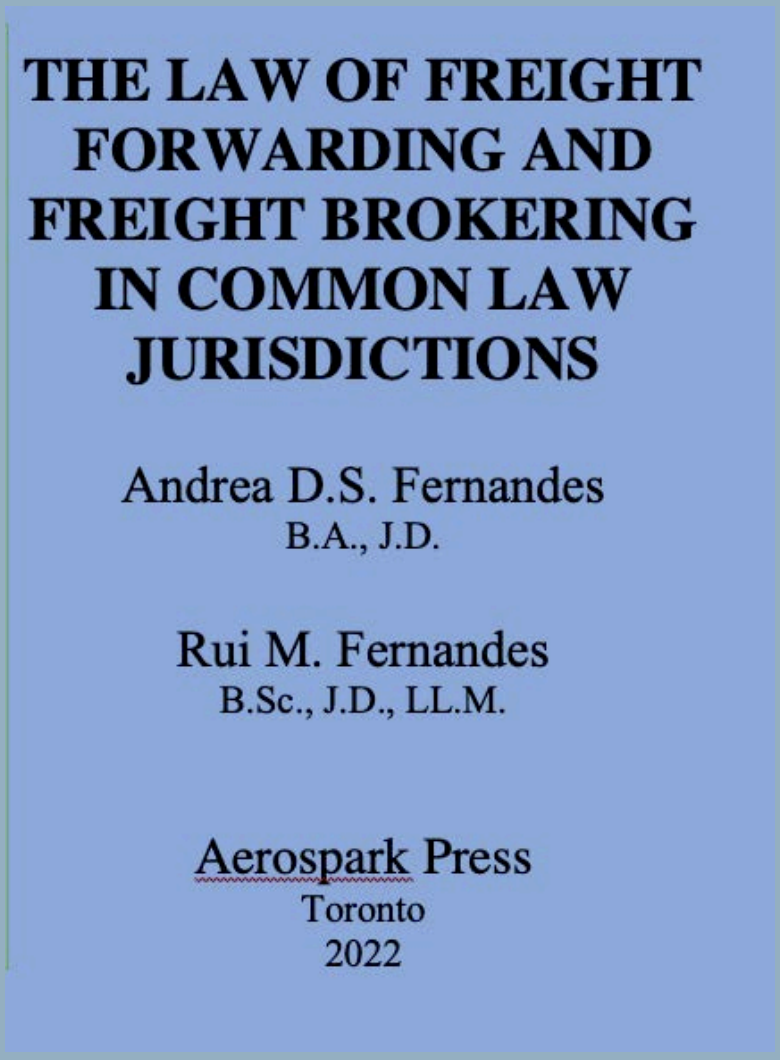
FIRM AND INDUSTRY NEWS

- Aerospark Press has just published the legal text *"The Law of Freight Forwarding and Freight Brokering in Common Law Jurisdictions"* by **Andrea Fernandes** and **Rui Fernandes.**

- **Gordon Hearn** will be representing the Firm at Globalaw's *Americas Regional Meeting* taking place March 27-29 at Miami, Florida

- **Kim Stoll** will be attending Wista Canada's International Women's Day Event in her capacity as VP- Wista Canada Central Region on March 8 (virtual)

- **Gordon Hearn** will be participating in the "*Innovating Your Freight Brokerage Against Potential Risk*" panel discussion at the *Transportation Intermediaries Association* Capital Ideas 2022 Conference on April 8, 2022 in San Diego, California



Fathers of Upper Canada v. Guardian Insurance Co. of Canada, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.), at p. 574], per Lord Wilberforce).

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]. Emphasis added]

[31] In my respectful opinion, the chambers judge deviated from this approach at the outset of his consideration of the interpretation issue when he said this:

> [47] As above s. 2.5 of the July 2017 agreement states that the defendant will use "commercially reasonable best efforts" to satisfy the condition precedent of obtaining, as soon as possible, the approval of the FHA for the transfer of the care home from the plaintiffs to the defendant. I will discuss the "commercially reasonable best efforts" standard in this section and will address the impact of the phrase "as soon as possible" later in these reasons. [Emphasis added]

…

[33] The judge then turned to consider the meaning of the phrase "commercially reasonable best efforts", following an approach based on what other cases

> concluded about similar words, instead of taking a contextual approach to discerning what the parties intended in this particular situation. In doing so, I consider that the judge again erred in law.

The Court of Appeal looked at the surrounding circumstances leading to the agreement and to the amendments of the agreement. The Court of Appeal concluded that the surrounding circumstances supported the conclusion that the parties were concerned that FHA approval be obtained as soon as possible, always bearing in mind that neither party could control how fast the FHA moved. What they could control was how fast they moved, and accordingly they set a standard for the required degree of effort that included not only "commercially reasonable", but also "best", and "as soon as possible".

Looking at the contract as a whole, and considering the surrounding circumstances, the Court of Appeal concluded that by the condition precedent, the parties intended that the purchaser would do everything it reasonably could to obtain the necessary approvals as soon as possible, excepting only such steps as would be commercially unreasonable. If there was delay on the part of FHA, so be it. But there should be no delay on the part of either party. The Court noted (at para. 42):

> This interpretation focuses the enquiry on the effort taken by the purchaser to avoid unnecessary delay, which in my view is consistent with the parties' intention taking into account the contract as a whole and the surrounding circumstances. This contrasts with the judge's conclusion at para 56 of his reasons, quoted above after para 33, that the clause obliged the purchaser to pursue approval to the point where it became commercially unreasonable to proceed further. The question was not when it became reasonable to abandon the pursuit of approval, but how that pursuit was to be undertaken.

The Court of Appeal found that the chambers judge took the wrong approach to contract interpretation, which amounted to an error of law. Specifically, the judge erred by:

1. interpreting the phrases "commercially reasonable best efforts" and "as soon as possible" separately, when they were part of the same clause; and

2. interpreting the clause based on previous case law and his own view of the words, instead of viewing the contract through the parties' eyes.

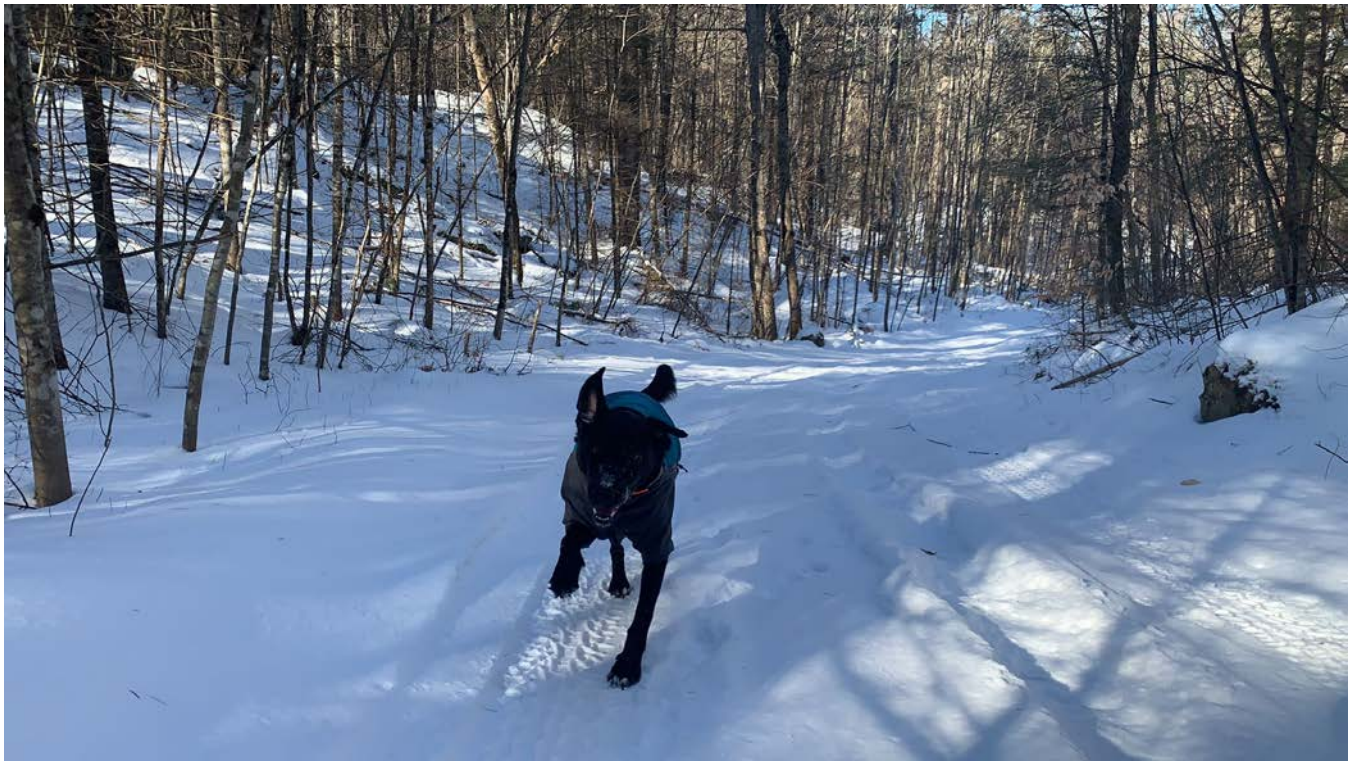
Justice Grauer, writing for the Court of Appeal, took pains to emphasize the contextual nature of contract interpretation. The point is to discern the parties' intentions at the time they entered into the contract. Justice Grauer noted that the piecemeal approach to interpretation as taken by the chambers judge by splitting the clause up into its component parts or phrases ignored the requirement to view the contract as a whole. This approach was also contrary to the principle in *Sattva.*

On the facts, the Court of Appeal found the purchaser had breached the contract by failing to use commercially reasonable best efforts to obtain the FHA approvals. The Court held that the chambers judge erroneously found that, in advising the purchaser to find another lawyer to review the agreements on November 20, the purchaser's counsel had withdrawn. In the chambers judge's view, any delay attributable to the purchaser's counsel and his subsequent withdrawal was no fault of the purchaser. The Court of Appeal disagreed, noting that the purchaser's counsel otherwise continued to act as their solicitor. As such, his delays - at least from a legal perspective - lay at the purchaser's feet.

In addition, the purchaser allowed the FHA agreements to sit on their lawyer's desk for two weeks without follow-up, from November 8-20. Though the need to obtain additional counsel may have justified some delay, a further two and a half weeks passed without progress after November 27, when the vendors delivered their notice of default.

This case reinforces the principles of contract interpretation set out in *Sattva.* It speaks to the parties' intentions at the time they entered into the contract as being of paramount importance. The case also illustrates that clients should select their counsel carefully. The clients may be responsible for the actions of their lawyers.

Rui M. Fernandes



2. Increased *Family Law Act* Damages Awarded by Judge

Zarei v Iran 2021 ONSC 8569 (CanLII)
Moore v. 7595611 Canada Corp., 2021 ONCA 459

In December 2021, the Ontario Court of Appeal confirmed a new high-water mark for *Family Law Act* damages in jury decisions.

By way of review, a category of compensation in personal injury claims is directed to those who have lost family members or who suffered a loss of care, guidance and companionship resulting from the fault of a third party. Such category is found in Section 61 of the *Family Law Act*, R.S. O. 1990 as amended (and similarly s. 4 of the *Marine Liability Act R.S.C. 2001)*) which states that specified individuals whose family member (*1) has died or been injured as a result of the fault or neglect of another, can claim compensation for "loss of care, guidance and companionship" as well as pecuniary loss that they would have received from the family member had the incident in question not occurred. There are similar categories of compensation in most provinces. (*2)

To measure "loss of care, guidance and companionship;", a court considers evidence of the deceased or injured person's relationship with the family member claimants before the incident, including the quality of the relationship and evidence of the impact that the person's death/injury has had on the family. The type of evidence is not exhaustive and differs from family to family. Case law has developed a range of damages available.

The claims can also include pecuniary loss in respect of:

(a) Reasonable expenses actually incurred, such as funeral expenses
(b) Lost Income – for example an unpaid leave of absence from work or use of sick leave or vacation credits or financial loss
(c) Dependency Losses - loss of financial support

Moore v. 7595611 Canada Corp., 2021 ONCA 459 ("Moore")

Alisha Lamers died due to a fire in her basement apartment in the morning hours of November 20, 2013. Ms. Lamers was trapped and unable to escape because the interior staircase was blocked, the windows were barred, and there was only one exit which was blocked by smoke and fire. Ms. Lamers was rescued but died a few days later in hospital. She had suffered third-degree burns over half of her body, went into cardiac arrest on more than one occasion and her parents ultimately decided to remove her from life support. The parents presented extensive evidence at trial about their claims for loss of care, guidance and companionship.

Ms. Lamers' parents commenced an action against the landlord and his company alleging negligent conduct that led to the death of Ms. Lamers. The matter went to trial before a judge and jury.

The jury awarded damages for loss of care, guidance and companionship of $250,000 for each parent. The defendant landlord's appeal was dismissed.

Although the previous high-water mark damages had been approximately $100,000 (or about $160,000 as adjusted for inflation) for *Family Law Act* claims, the Court of Appeal would not interfere with the jury award unless it considered the award one that would "shock the conscience of the Court" or that was so "inordinately high" to be "wholly erroneous".

Per the Court of Appeal in *To v. Toronto Board of Education* (*3), the Court of Appeal went on to confirm that there is, in fact, no legislated upper limit on such dependent claims. Osbourne A.C.J.O. had stated in *To v. Toronto Board of Education*, at para 29, that "each case must be given separate consideration" and that there was no legislative cap in Ontario in determining such damages. At para. 27 of the *Moore* decision, the Court of Appeal stated simply, "…there is no neat mathematical formula that can be applied to determine the correct amount.", but rather each case must be considered in light of the evidence material to the guidance, care and

companionship claims in that case and in light of the particular family relationships involved in that case.

The case added about another $100,000 on to the high end damage award for *Family Law Act* claims. The circumstances in *Moore* were, however, extreme and awarded by a jury.

Zarei v Iran 2021 ONSC 8569 (CanLII) (*"Zarei")*

The *Zarei* decision is the first Canadian decision to award damages for loss of life caused by terrorism.

In December 2021, Justice Belobaba of the Ontario Superior Court of Justice, however, also awarded increased *Family Law Act* damages for loss of care, guidance and companionship.

In January of 2020, a Ukraine International Airlines flight was shot down by two missiles launched by Islamic Republic of Iran's Islamic Revolutionary Guard Corps killing all 167 passengers and nine crew members. Responsibility was admitted by the Islamic Revolutionary Guard Corps and the families of five of the deceased passengers sued the Islamic Republic of Iran, which did not defend and was noted in default. The families were then granted Default Judgment.

Belobaba J. had rendered a May 2021 liability decision in which His Honour noted that foreign states, while immune from the jurisdiction of any Court in Canada per the *State Immunity Act* RSC 1985 c. S-18, faced certain specific exceptions including that found in section 4(1) of the *Justice for Victims Terrorism Act*, SC 2012, c. 1. Such exceptions provide for a cause of action against foreign states, such as Iran, identified as supporters of terrorism for acts or omissions considered terrorism offences under Canada's *Criminal Code*, RSC 1985 c. C-46.

Justice Belobaba found that the missile attacks had been intentional and that missile attack on Flight PS 752 constituted terrorist activity within the meaning of the *Criminal Code*.

In December 31 2021, the Court rendered a decision on damages. The families sought damages for (1) in respect of the Estates of the deceased passengers, pain and suffering prior to death along with punitive damages; and (2) damages suffered by the families for loss of care, guidance, and companionship regarding the deceased passengers as described above. They also made a claim for damages for intentional infliction of mental distress.

Justice Belobaba awarded damages for loss of care, guidance and companionship to four of the five plaintiffs.

The high-water mark as noted above was about $160,000 for *Family Law Act* awards made by judges. Justice Belobaba awarded C$200,000 to each of the four plaintiffs eligible to recover damages under the *Family Law Act*, with an additional C$200,000 to the plaintiff who had lost both his spouse and son. The total award for *Family Law Act* damages was $1 million dollars.

While mental distress damages are available in US terrorism lawsuits, Belobaba J. found that damages for intentional infliction of mental distress and aggravated damages for mental distress were not available to the plaintiffs as surviving family members.

The plaintiffs, as estate representatives, were each awarded 1 million dollars for pain and suffering prior to death. Justice Belobaba noted that American judges "uniformly" award this amount to victims of terrorism for physical suffering as well as the mental anguish of knowing death is imminent.

Punitive damages are awarded to punish, deter and denounce bad actors and only awarded in exceptional cases. Justice Belobaba identified this case as an exceptional case justifying punitive damages.

Justice Belobaba did not apply the "three times multiplier" approach adopted by American courts where the quantum of damages is determined by tripling the amount that the defendant country spent on funding terrorism. Rather, the Court assessed the damages in keeping with the rule of

proportionality and followed factors including the defendants' blameworthiness, the plaintiffs' degree of vulnerability, the level of harm, the need for deterrence, advantage gained by the defendant as well as other penalties and sanctions imposed.

The Court awarded 100 million dollars to all five plaintiffs bringing the total damages award to 107 million dollars. This is a very high overall damage award in respect of loss of life for a Canadian case.

Finally

In conclusion, the high-water mark for general damages for loss of care, guidance and companionship is now higher for judge alone decisions and not just jury cases ($100,000 corrected for inflation is about $160,000 in 2021 and the new high-water amount is $250,000 for jury cases and $200,000 for judge rendered cases). This will also impact on any Dependents' Claims under the *Marine Liability Act*.

Kim E. Stoll
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Endnotes

(*1) Under the *Family Law Act* R.S.O. 1990 c F.3 , s. 61 claimants can include children, grandchildren, parents, grandparents, brothers and sisters of the injured or deceased person. *Marine Liability Act*, s. 4, claimants can include a son, daughter, stepson, stepdaughter, grandson, granddaughter, adopted son or daughter, or an individual for whom the injured or deceased person stood in the place of a parent; a spouse, or an individual who was cohabiting with the injured or deceased person in a conjugal relationship having so cohabited for a period of at least one year; or a brother, sister, father, mother, grandfather, grandmother, stepfather, stepmother, adoptive father or mother, or an individual who stood in the place of a parent.

(*2) Motor vehicle accidents also apply another layer of benefits and claims under Statutory Accident Benefits or similar depending on the province and which are beyond the scope of this article.

(*3) *To v. Toronto Board of Education* 2001 CanLII 11304 (ON CA)

3. Honest Misunderstanding Of One's Rights Does Not Amount To Bad Faith

The Court of Appeal recently provided some helpful guidance on the contractual duty of good faith in *2161907 Alberta Ltd. v 11180673 Canada Inc*. (*1).

2161907 Alberta Ltd. ("216") was the holder of the rights to the 'Tokyo Smoke' cannabis brand. 216 entered into a series of agreements with 11180673 Canada Inc. ("111"), which included: 1) a licence agreement to operate a cannabis store under the Tokyo Smoke brand which included an up-front branding fee worth roughly $2 million; 2) a sublease agreement with respect to the store premises; and 3) a loan agreement by which 216 would provide 111 with about $1.5 million to cover start-up costs.

Shortly before the store was to open, a dispute arose as to whether 216 was obligated to fund the payment of 111's rent for the month of the store opening. 111 wished to draw on the loan to cover its first month rent of approximately $105,000. 216 mistakenly, but honestly, believed that the loan did not cover the first month's rent.

In response, 111 told 216 that it would be laying off its staff and not opening the store. That evening, 216 called 111 to advise that 216 would pay the branding fee shortly and seek a deferral of the first month's rent. However, the following day, 216 reviewed the licence agreement and took the position that 111's threat to not open the store constituted a "threat to cease to carry on business". After obtaining legal advice, 216 terminated its relationship with 111 based on 111's threat. 111 however did open the store as previously planned and began carrying on business.

216 commenced legal proceedings seeking a declaration that it had validly terminated the relationship, that the branding fee was not payable, and requiring 111 to vacate the store. 111 counterclaimed for payment of the branding fee and a declaration that 216 wrongfully terminated the agreements and breached the duty of good faith, specifically the duty of honest contractual performance.

The Ontario Court of Appeal upheld the lower court's decision that 216 wrongfully terminated the relationship but overturned the lower court's finding of bad faith.

With respect to 216's wrongful termination of the relationship (breach of contract), the Court of Appeal noted that deference is owed to the lower court's finding on this point as it was a question of mixed fact and law and there was no basis to interfere. The lower court had held that 111's threat was "an emotion response to being given incorrect information at a critical time" (*2), and not objectively credible enough to trigger default under the agreement (*3).

With respect to the finding of bad faith, the Court of Appeal held that 216 had not acted in bad faith because it had honestly misunderstood its rights and acted on a mistaken belief when it terminated the relationship. 216 did not actively mislead 111 but simply changed positions in light of new information.

The Court of Appeal stated:

> "A party is not prevented from exercising a right of termination simply because it wishes to bring its relationship with the other party to an end. Nor should a party be prevented from ending a relationship because it will deprive the defaulting party of a payment that it would have received had the relationship continued. Where a party is anxious to end a relationship, and a valid reason to do so presents itself, that party is not, in the absence of some other relevant fact, prevented from "pouncing" on it." (*4)

Although 216's basis for terminating the relationship ultimately proved invalid, its decision to do so was not unreasonable, capricious or arbitrary to warrant a bad faith finding.

This decision confirms that even when a party is found to have terminated an agreement invalidly,

that does not, in and of itself, mean that it violated its good faith contractual obligations when doing so. On the other hand, a party who deliberately manufactures an artificial reason to justify terminating a contract and avoid its obligations under the agreement will likely be found to have done so in bad faith.

Andrea Fernandes

Endnotes
(*1) 2021 ONCA 590.
(*2) *Ibid* at para. 19.
(*3) *Ibid* at para. 31.
(*4) *Ibid* at para. 57.

4. The Ontario Court of Appeal Revisits Extrinsic Evidence and the Duty to Defend Involving Allegations of Misrepresentation

In a recent decision the Ontario Court of Appeal has revisited the duty to defend by insurance companies and the role played by extrinsic evidence in deciding such matters. In *IT Haven Inc. v. Certain Underwriters at Lloyd's, London* (*1), the Court revisited an earlier decision and its application by the New Brunswick Court of Appeal to provide a list of factors by which to analyze the duty to defend where an insurer alleges misrepresentations or breach of conditions on the part of the insured. The Court of Appeal in this matter signaled its strong disapproval of the creeping size of duty to defend applications, coming down against the use of extrinsic evidence in such proceedings.

Facts

IT Haven Inc. was an information technology business with one employee – the owner Ryan Hunt. In 2016, the company obtained an errors and omissions and comprehensive liability policy from Certain Underwriters at Lloyd's, London ("Lloyd's"). The Policy covered, among other things, intellectual property infringement. In response to specific questions, IT Haven informed Lloyd's that 100% of its revenue was derived from Canada, that it did not provide any services to the electronic games industry, that it did not incorporate any software designed by others into its own designs, and that it had written procedures to safeguard against infringing on the copyrights of others. A clause permitted Lloyd's to void the Policy in the event either that IT Haven had provided inaccurate or misleading information in the written materials or they failed to inform Lloyd's of a material change in the circumstances described in the written materials.

In mid-2019, IT Haven's owner Ryan Hunt and another entity, Global++, were sued in Federal Court in California by Niantic Inc. IT Haven was subsequently added to the suit in 2020. The suit alleged that Hunt and IT Haven, along with Global++, profited from illegal derivative versions of Niantic Inc.'s mobile applications incorporating portions of its copyrighted computer code (*2). Lloyd's refused to defend IT Haven and Mr. Hunt against the claims alleging that they had made misrepresentations about the nature of their business when they applied for the Policy in 2016 and failed to inform Lloyd's of material changes in their business and so breached the conditions of the policy. IT Haven successfully brought an application for a declaration that Lloyd's was required to provide a defence and to reimburse its costs to date in the US action.

Extrinsic Evidence

At the motion, Lloyd's sought to introduce extensive extrinsic evidence to support its contention that the claim was excluded due to material misrepresentations made by IT Haven in their application for coverage. This evidence included:

- statements made by Hunt to Lloyd's coverage counsel;
- a transcript of the cross-examination of Hunt on his affidavit filed in this application;
- communication between IT Haven's insurance agent and Lloyd's insurance manager;
- an affidavit from a representative of Lloyd's stating that IT Haven did not disclose the full nature of their activities and that such information would have been material to Lloyd's; and
- an affidavit and expert report from an underwriting expert, who states that IT Haven's US business and involvement in the US gaming industry were material facts that would have influenced a prudent insurer in determining whether to issue the policy, the nature of the coverage offered and the premium to be charged (*3).

Based on the Supreme Court's rulings in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* 2010 SCC 33 and *Monenco Ltd. v. Commonwealth Insurance Co.*,

2001 SCC 49, the motion judge outlined the principles applicable to duty to defend cases. The basic principles being that an insurer owes a duty to defend where there is a mere possibility that a claim falls within the insurance policy and that this determination should be made based on a consideration of the allegations against the insured and the language of the policy.

With respect to extrinsic evidence, the motion judge reiterated that extrinsic evidence explicitly referred to in the pleadings in the main action may be considered to ascertain the substance and true nature of the claims but the court cannot look to evidence that would require findings to be made before trial that would affect the underlying litigation. Extrinsic evidence not meeting this criterion should not be considered in such applications (*4).

The Court of Appeal upheld the motion judge's decision but not due to the application of the pleadings rule (*5). Lloyd's argued that Niantic Inc.'s pleadings in the American court, so far untested, supported their proposition that they did not owe IT Haven a defence. The Court of Appeal determined that the issue of material misrepresentation by IT Haven was a factual question that could not be determined merely by reference to the American pleadings. Lloyd's attempt to introduce expert evidence on the issues meant that such issues could not be dealt with effectively in a summary disposition (*6).

The Duty to Defend

On the question of the duty to defend involving allegations of misrepresentation, the Court of Appeal turned to its decision in *Longo v. Maciorowski* (2000), 50 O.R. (3d) 595 (C.A.) for the proposition that there is no hard and fast rule for determining whether an insurer is obliged to provide a defence where a breach of condition is alleged but should adopt a flexible approach instead. To this, the Court of Appeal added the analysis from the New Brunswick Court of Appeal in *Drane v. Optimum Frontier Insurance Co.*, 2004 NBCA 52, 272 N.B.R. (2d) 241 ("*Drane")* in which they identified a lengthy, but ultimately non-exhaustive, list of factors informing the flexible approach taken in *Longo*, including:

- Is the breach of condition contested and, if so, on what basis? Is the existence of the breach in serious dispute?
- Is it reasonable to expect that the question of the breach of the condition can be dealt with summarily, on an expedited basis? If so, what are the facts supporting such an expectation?
- Despite a clear breach of statutory condition, are there circumstances that militate in favour of relief from forfeiture under the *Act*? Are such circumstances in serious dispute?
- What is the status of the main action against the insured? Has discovery been held? Has a trial date been secured? If not, when is the main action likely to be heard?
- What is the nature of the conflict between the insured and the insurer? For example, what are the specific reasons that prompted the insurer to deny indemnity and to apply to be added as a third party under the *Act*?
- Is the language used in the third party defence filed by the insurer congruent with the language of the statement of defence filed by the insured on his or her own behalf?
- If the conflict between the insurer and the insured is not apparent on the face of the third party defence, is the conflict such as to require, in any event, separate and independent counsel to represent the interest of the insured? If so, why?
- What is the particular financial position of the defendant? Is he or she capable of assuming the costs of independent counsel until the issue of the breach of condition is resolved? (*7).

Though concerned with a breach of condition, the Court of Appeal determined that the factors from *Drane* were equally applicable to a

misrepresentation case and decided the matter in reference to them. Based on these factors, the Court of Appeal determined that the motion judge had correctly decided the issue and that Lloyd's had a duty to defend IT Haven in the circumstances. Ultimately, the Court determined that in cases of misrepresentation the issue was whether the actions of the insured have invalidated the coverage that would otherwise be applicable on the face of the policy given the nature of the claim in the underlying litigation (*8).

Conclusion

The Court of Appeal had demonstrated a hostility to attempts to employ extrinsic evidence in defeating a duty to defend. While the Court in *IT Haven* noted that this matter went beyond a typical duty to defend case given the allegations of misrepresentation, it was clear that the courts in Ontario will not tolerate applications of this nature turning into trials in all but name. Insurers should limit their attempts to introduce extrinsic evidence in such applications. In future, we should also expect to see duty to defend cases make increasing reference to the factors in *Drane* to inform the flexible approach in determining whether a duty exists.

Conal Calvert

Endnotes

(*1) *IT Haven Inc. v. Certain Underwriters at Lloyd's, London*, 2022 ONCA 71 ("*IT Haven*").
(*2) *IT Haven* at paras 15-18.
(*3) *IT Haven* at para 20.
(*4) *IT Haven* at para 22.
(*5) *IT Haven* at para 32.
(*6) *IT Haven* at paras 40-45.
(*7) *IT Haven* at para 52.
(*8) *IT Haven* at para 56.

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