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• CHANGES IN "OCCUPANTS" FOUND NOT TO BE A MATERIAL CHANGE IN RISK FOR THE PURPOSE OF VOIDING A HOME INSURANCE POLICY •

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The British Columbia Supreme Court in *Dubroy v. Canadian Northern Shield Insurance Co.*, 2021 BCSC 352, held that a home insurance policy was not rendered void because there was no material change in risk arising from a change in occupants. The Court further found that, even if there was a material change in risk, the insured was protected by the principles of relief from forfeiture under s. 32 of the *Insurance Act*, R.S.B.C. 2012, c. 1 (the "*Act*").

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BRIEF FACTS

In April 2016, the plaintiff spoke with a mortgage broker about taking out a mortgage on a home owned by the plaintiff (the "Property"). On the mortgage application, the plaintiff stated that the Property was not her principal residence, that it was to be used as a rental, and that it was her intention to occupy the Property. One of the conditions of the mortgage was that the plaintiff would obtain insurance for the Property.

On May 19, 2016 the plaintiff and the plaintiff's brother signed the insurance policy application and the defendant granted the policy on this date. In June 2016, the plaintiff received a copy of the policy that had a cover letter attached to it which asked the plaintiff to notify the defendant if the dwelling was left vacant, unoccupied or if there were any other change in occupancy. In August 2016, the plaintiff's son and daughter-in-law moved in and in October 2016, the plaintiff's brother moved out.

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On April 12, 2017 and March 28, 2018, the defendant sent out policy renewal documents to the plaintiff and her brother. These documents asked the plaintiff to inform the defendant if there had been any change in occupancy and that failure to inform the defendant could affect or void the policy. The plaintiff acknowledged that she needed to call the defendant to let them know of the change in occupancy and that she wrote herself a reminder note, but she ultimately forgot to inform the defendant of the change.

In June 2017 and May 2018, the plaintiff's grandchildren and a roomer moved into the Property, respectively. On January 20, 2019, a fire destroyed the Property.

The defendant voided the policy on the basis that the plaintiff had failed to inform the defendant of material changes in risk that arose after the policy had been issued. Specifically, after the policy was issued, the plaintiff's brother, who was a named insured, moved out and the plaintiff's son, daughter-in-law, and a roomer moved in. The plaintiff at no point informed the defendant that these changes had taken place. It was the defendant's position that these changes amounted to a "material change in risk" and that the policy was void in accordance with statutory condition 4 of the *Act*.

ANALYSIS

Material Change in Risk

The Court analyzed the legal principles related to a material change in risk and stated that to successfully argue that the policy was validly voided, the defendant had to prove the following:

1. there was a material change to the risk;
2. the change was within the plaintiff's control;
3. the plaintiff had knowledge of the change; and
4. the plaintiff did not notify the defendant promptly and in writing of the change.

The Court held that the real issue in this case was whether there was a material change in risk from the inception of the policy to the date of loss. There was a misunderstanding between the defendant and the plaintiff as to whether the Property was the primary

residence of the plaintiff; however, the Court found that this did not affect the validity of the policy. Regardless of this misunderstanding, the policy was valid at inception, even though it was not the primary residence of the plaintiff. The Court held that the risk insured by the defendant at the inception of the policy and at the date of loss was the same, namely, that the Property was a private dwelling whose primary residents were family members of the plaintiff.

While the Court found that it was important for the plaintiff to inform the defendant of any changes in occupancy of the Property, the changes were in "occupants" as opposed to changes in "occupancy." The primary residents continued to be family members of the plaintiff and the Property was not the plaintiff's primary residence.

The defendant argued that if they had known that the plaintiff's brother had moved out and the new residents had moved in, they would not have renewed the policy. In response, the Court held that statutory condition 4 does not allow an insurer to void a policy for inaccurate information in a renewal notice. This condition only allows a policy to be voided on the basis of a failure to inform the insurer of a material change in risk.

The Court found that the policy was valid, the risk was the same at the date of inception as it was at the date of loss, and there was no basis to void the policy. In other words, there was no material change in risk.

Relief From Forfeiture

The Court held that even if it was wrong and the plaintiff had failed to disclose a material change in risk, the plaintiff was entitled to relief from forfeiture of her insurance policy under s. 32 of the *Act*.

The Court stated that provisions like s. 32 are to be given wide scope to provide relief where the result would otherwise be unjust or unreasonable. Relief from forfeiture is a purely discretionary equitable remedy and when deciding whether to exercise its discretion and grant the equitable relief, a court must consider these factors:

1. the conduct of the applicant;
2. the gravity of the breach; and
3. the disparity between the value of the property forfeited and the damage caused by the breach.

The Court found that the plaintiff's conduct had been imperfect, but reasonable. The plaintiff had acted honestly and the breach was a result of an unfortunate misunderstanding. The plaintiff did not take steps to correct the breach but that was because she reasonably did not appreciate that there had been a material change in risk.

The Court found that the breach was serious. Based on the underwriting guidelines, if there had not been a breach, it is highly likely that the defendant would have reasonably declined to renew the policy.

The defendant admitted that even if they would have declined to renew the policy, the insurance broker could have found other ways to insure the Property. The Court contended that it is impossible to say what would have happened if the plaintiff had informed the defendant that the plaintiff's brother had moved out and that other family members had moved in. As a result, the Court considered the disparity factor to be neutral.

The defendant acknowledged that the reasonableness of the plaintiff's conduct was the most important factor. The Court weighed all the elements and concluded that the plaintiff acted imperfectly, but reasonably, which tipped the scales in favour of granting relief from forfeiture under s. 32 of the *Act*.

The Court ordered that the plaintiff have judgment against the defendant plus pre-judgment interest.

PRACTICAL CONSIDERATIONS

It is imperative to review the specific facts surrounding material changes in risk in order to determine if a reasonable insurer would have declined the risk at the time of the policy's inception. Even if a Court finds that a policy is void as a result of a material change in risk, relief from forfeiture provisions in the *Act* may provide a remedy to the insured.

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• OSFI ISSUES FINAL IFRS 17 REGULATORY FORMS AND INSTRUCTIONS FOR FEDERALLY REGULATED INSURERS •

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The International Financial Reporting Standard 17 – *Insurance Contracts* ("**IFRS 17**") will become effective for annual reporting periods of federally regulated insurers and insurance holding companies ("**FRIs**") beginning on or after January 1, 2023. As such, the Office of the Superintendent of Financial Institutions ("**OSFI**") has undertaken a number of initiatives to reflect the changes required pursuant to the new IFRS 17 reporting standard.

On April 30, 2021, OSFI released a letter[1] to all FRIs advising that it has issued the final IFRS 17 Regulatory Forms and Instructions (the "**Returns**") which FRIs will be required to use starting January 1st, 2023 (for December fiscal year end filers) or November 1st, 2023 (for October fiscal year end filers):

- 2023 IFRS 17 Life Insurance Return[2]
- 2023 IFRS 17 P&C Insurance Return[3]
- 2023 IFRS 17 Mortgage Insurance Return[4]

The following updates have been made to the Returns in order to coincide with the implementation of IFRS 17:

- Life Insurance Return: The existing Life Quarterly (10Q) and Annual Supplement (10A) returns have been decommissioned. New Quarterly and Annual Returns (Life Core Financial Statement Return (LF1), Life Supervisory Quarterly Return (LF2), Life Supervisory Annual Supplement Return (LF3) and Life Provincial Return (LFPROV)) have been created to be effective as of Q1 2022.
- P&C Insurance Return: The existing P&C Quarterly (1Q) and Annual Supplement (1A) returns have been decommissioned. New Quarterly and Annual Returns (P&C Core Financial Statement Return (PC1), P&C

Supervisory Quarterly Return (PC2), P&C Supervisory Annual Supplement Return (PC3) and P&C Provincial Return (PCPROV)) have been created to be effective as of Q1 2022. The capital related return pages have also officially been removed from the P&C return, and new Minimum Capital Test (MCT) (PC4) Return and Instructions have been created and posted to OSFI's external website.

- Mortgage Insurance Return: The existing MI Financial Quarterly (MI1) and Annual Supplement (MI2) returns have been decommissioned. New Financial Quarterly and Annual Returns (MI Core Financial Statement Return (MI3), MI Supervisory Quarterly Return (MI4), MI Supervisory Annual Supplement Return (MI5) and MI Provincial Return (MIPROV)) have been created to be effective as of Q1 2022.

Users are encouraged to fully review the 2021 updated instructions, and the 2022 edition of the quarterly and annual return filings.

These updates follow the public consultation[5] that took place between November 2019 and August 2020, whereby OSFI sought views from FRIs on the following draft IFRS 17 regulatory forms and instructions:

- Life/P&C/Mortgage Insurers Core Financial Statement Return;
- Life/P&C/Mortgage Insurers Supervisory Quarterly Statement Return;
- Life/P&C/Mortgage Insurers Supervisory Annual Supplement Return;
- Life/P&C/Mortgage Insurers Provincial Statement Return; and
- The corresponding instructions and validation rules template for each regulatory form.

OSFI received over 700 comments from various stakeholders, and all comments received were taken into consideration in finalizing the Returns. The annex to the OSFI letter summarizes the material comments received and OSFI's responses to those comments.

In reviewing the consultation comments and issuing the final Returns, OSFI continues to emphasize that the changes made will ensure FRIs continue to report their financial statements in accordance with GAAP, as required by subsections 331(4) and 887(4) of the *Insurance Companies Act*. The delivery of the final Returns represents a major deliverable under OSFI's IFRS 17 project and allows FRIs time for implementation and systems modifications before the pending transition to IFRS 17.

This article originally appeared on McMillan.ca.

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** The authors would also like to acknowledge the contributions of* ***Shahnaz Dhanani*** *to this article.*]

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[1] https://www.osfi-bsif.gc.ca/eng/fi-if/rtn-rlv/fr-rf/ic-sa/Pages/irpc_irfs17_let_21.aspx.

[2] https://www.osfi-bsif.gc.ca/Eng/fi-if/rtn-rlv/fr-rf/ic-sa/lic-sav/Pages/life_irfs17.aspx.

[3] https://www.osfi-bsif.gc.ca/Eng/fi-if/rtn-rlv/fr-rf/ic-sa/pc-sam/Pages/pc_irfs17.aspx.

[4] https://www.osfi-bsif.gc.ca/Eng/fi-if/rtn-rlv/fr-rf/ic-sa/mi-ah/Pages/mi_irfs17.aspx.

[5] https://www.osfi-bsif.gc.ca/Eng/fi-if/rtn-rlv/fr-rf/ic-sa/Pages/irpc_irfs17_let.aspx.

• ARE COSTS NOT JUSTIFIED FOR A SUCCESSFUL PARTY – ONE WITH INSURANCE? •

Sudevi Mukherjee-Gothi, Partner, Pallett Valo LLP

Sudevi Mukherjee-Gothi

A trial judge has the discretion to award or not to award costs. However, the decision regarding costs can be set aside on appeal, if there has been an error in principle or if the costs award is wrong.

In *Przyk v. Hamilton Retirement Group Ltd.,* leave was obtained from the Court of Appeal and an appeal launched to set aside the trial decision on costs.

The respondent, Przyk, slipped and fell on a sidewalk at the retirement home where she resided.

She sued the appellant, Rushdale, the owner of the retirement home, for negligence and breach of the *Occupiers' Liability Act*. Damages were agreed to in advance of the trial.

At trial, **the jury found no liability on Rushdale and the action was dismissed.** Rushdale, as the successful party, sought an award of partial indemnity costs and was denied for 3 reasons by the trial judge:

1. Since Rushdale was insured by a major insurer, the case was a "David and Goliath situation";
2. There was concern that the insurer for Rushdale never offered a settlement to Przyk, other than a dismissal of the action on a without costs basis. The trial judge found this approach unfair and inconsistent with the insurer's "social responsibility'; and
3. The action required expert evidence, which demonstrated that the law of negligence needed to adapt to the growing area of elder care.

Zarnett J.A., writing for the Court of Appeal panel, agreed that the costs decision reflected "certain errors in principle". Nevertheless, the Court of Appeal upheld the decision on costs finding that the case demonstrated a novel law approach.

DAVID AND GOLIATH

The Court of Appeal concluded that costs should not have been denied because Rushdale was insured and defended by its insurer. The insurer did not use this "resource advantage" to engage in any practices or misconduct, during the litigation or at trial to the Plaintiff's disadvantage. Zarnett J.A. found that there is no case law to support the position that was taken by the trial judge.

Quite justifiably, the Court of Appeal references contingency fee arrangements, third party litigation funding and adverse costs insurance, all of which benefit and protect a Plaintiff, when pursuing an action such as this one. Ultimately, it was found that there was no "mis-match" of resources. There was no conduct justifying the denial of costs.

In fact, Przyk did have adverse cost insurance and the request for costs was only for that covered under the adverse cost insurance policy. No monies were being sought as against Przyk personally.

There was no conduct by Rushdale, that lengthened the trial, such as extensive delays, or taking unreasonable positions regarding litigation strategy, that would justify not awarding costs. Accordingly, the Court of Appeal found that the trial judge erred in principle in citing insurance as a basis for denying costs to a successful party.

SETTLEMENT OFFERS

Rushdale argued that it should not be sanctioned by a denial of costs because it decided not to make a financial offer to settle, based on the evidence and given that it's position was reinforced by the jury.

This discussion of the "hardball approach" is discussed in the paper, "The Cost Consequences of Playing Hardball"[1] by my colleague Dan Waldman. That paper deals with the trial judge's decision in finding split costs in *Teglas v. City of Brantford,* where mention again was made of the defendants having insurance and how that may have impacted the strategy adopted by the defendants and in their offer to settle approach.

In *Przyk,* Zarnett J.A. references the 1994 Court of Appeal decision of *Bell Canada v. Olympia & York Developments Ltd.* and states "in *Bell Canada*, this court held that it is an error in principle to rely on the failure of a successful defendant to have offered a payment to an unsuccessful plaintiff as a ground to deny costs." He references *Bell:*

> There are many reasons not to offer settlement, and they should remain the private preserve of the litigants. In a libel suit, for example, vindication may be a legitimate consideration for either party, standing above recovery or payment of money… A defendant may not be in a position to pay a settlement and, even if wealthy, may have a better business use for the money pending trial. None of these litigants should fall from grace in the eyes of the trial judge if they succeed on the merits.

Although *Przyk* made mention of the insurer's general approach to all of its litigation, it was found that conduct outside of this case should be not considered.

NOVEL ISSUE

However, curiously, the Court of Appeal did decide to uphold the trial judge's cost decision on the basis that it addressed an underdeveloped area of law and raised important and novel issues. On this basis, the Court of Appeal upheld the costs decision.

The trial judge stated

> …demographically, eldercare is a burgeoning area in our society. Coincidental with such growth is a need for the law of negligence to apply in new situations involving our elderly. Both sides treated this particular case seriously. Engineers and a biomechanical engineer were witnesses. This was not a case solely dependent on upon [sic] the evidence of the parties.

As was held by the Court of Appeal in *Childs v. Desormeaux*, "A novel issue that involves the public interest can support a no costs order as an exception to the general approach that a successful party will receive their costs".

The Court of Appeal refused to analyze whether a slip and fall case, involving an elderly person, in front of a retirement home, was justified as being deemed as "novel" and stated that the only analysis required was whether the trial judge relied on an erroneous principle or was plainly wrong. The Court of Appeal stated it was "unable to say that either occurred". The trial judge's decision was therefore entitled to deference and the no costs award was upheld.

With Canada's aging population, we have seen and will continue to see cases involving the elderly. But whether a slip and fall case involving someone elderly should be considered novel is a concerning rationale for the denial of costs, especially given success at trial. In this writer's opinion, the decision on costs, seems unfair and inequitable. I am concerned that it sets a dangerous precedent and I am certain that the rationale will be relied upon, in upcoming cases, which is concerning, to say the least. I sincerely hope that there is greater definition on what constitutes "novel", going forward.

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1 https://www.pallettvalo.com/whats-trending/the-cost-consequences-of-playing-hardball/.