NOVA SCOTIA COURT OF APPEAL

Citation: *Marsh Canada Ltd. v. Grafton Connor Property Inc.*, 2017 NSCA 54

Date: 20170615
Docket: CA 444276
Registry: Halifax

Between:

Marsh Canada Limited, a body corporate

Appellant
Respondent on Cross-Appeal

v.

Grafton Connor Property Incorporated, a body corporate, c.o.b. Grafton-Connor Group, Beaufort Investments Incorporated, a body corporate, c.o.b., North End Beverage Room and Sean Murphy, in his capacity as Attorney in Fact in Canada for Lloyd's of London Underwriters

Respondents
Appellants on Cross-Appeal

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: October 12 and 13, 2016, in Halifax, Nova Scotia

Subject: **Insurance Law. Interpretation of Insurance Policies. Material misrepresentations entitling an insurer to deny coverage. Recklessness in providing particulars of the property to be insured. Standard of Care of an Insurance Broker. Imputation of Knowledge to a Corporation.**

Summary: The North End Pub was destroyed by fire on March 7, 2007. The building was owned by Beaufort Investments Inc. and insured with Lloyd's of London Underwriters. Beaufort Investments is part of the Grafton Connor Group of Companies. Grafton Connor, in its application for insurance, represented that the pub was of masonry construction and sprinklered. Neither was true. The insurer denied liability. Grafton Connor sued its broker, Marsh Canada Limited, and Lloyd's. Marsh cross-claimed against Lloyd's and Lloyd's counterclaimed against Grafton Connor.

After an 18-day trial the trial judge found that the policy was void as a result of material misrepresentations on the part of Grafton Connor. He dismissed the claim of Grafton Connor against Lloyd's, allowed the counterclaim by Lloyd's against Grafton Connor and dismissed the cross-claim of Marsh against Lloyd. He found that Marsh was 50% contributorily negligent to Grafton Connor for the losses suffered in the fire.

Marsh appeals, Grafton Connor cross-appeals, Lloyd's also cross-appeals and filed a Notice of Contention.

Issues:

1. Whether the trial judge erred in failing to interpret and apply the provisions of the Policy to find coverage in favour of Grafton Connor; (Marsh's Appeal, Grafton Connor's Cross-Appeal)
2. Whether the trial judge erred by failing to attribute to Grafton Connor the actual knowledge of Gary Hurst concerning the construction and sprinklering of the North End Pub; (Marsh's Appeal)
3. Whether the trial judge erred in formulating the standard of care to be met by Marsh and by attributing liability to Marsh; (Marsh's Appeal)
4. Whether the trial judge erred by interpreting the Policy as a "blanket" and not a "scheduled" policy; (Lloyd's Cross-Appeal)
5. Whether the trial judge erred by failing to apply the co-insurance provisions of the policy against Grafton Connor; (Lloyd's Cross-Appeal)
6. Whether the trial judge's decision can be affirmed on the basis that Grafton Connor was "reckless" in relation to its placement of insurance with Lloyd's; (Lloyd's Notice of Contention)
7. Whether the trial judge erred by finding that Marsh did not cause Grafton Connor's loss by failing to provide Lloyd's with a copy of the TRS Report; (Grafton Connor's Cross-Appeal) and

8. Whether the trial judge erred in his apportionment of liability as between Grafton Connor and Marsh (Grafton Connor's Cross-Appeal).

Result:

Appeal of Marsh allowed, in part. The trial judge erred in his formulation of the standard of care of Marsh in these circumstances. His determination that it was 50% contributorily negligent was set aside.

Marsh's and Grafton Connor's appeal against Lloyd's was dismissed. The trial judge did not err in finding that Lloyd's was entitled to void the policy.

Grafton Connor's cross-appeal against Lloyd's and Marsh was also dismissed, again, based on the finding the trial judge did not err in allowing Lloyd's to deny liability.

Grafton Connor's claim against Marsh failed because of the finding that Marsh was not contributorily negligent for its loss.

Lloyd's Notice of Contention was allowed. It was found that Grafton Connor was reckless in its provision of information to Lloyd's.

Lloyd's cross-appeal was dismissed. The trial judge did not make any error in interpreting the policy to find that it was a blanket policy and that the co-insurance clause was not triggered.

Costs were awarded to Lloyd's in the amount of $40,000, $20,000 of which would be payable by Marsh and $20,000 by Grafton Connor. Marsh was awarded $20,000 in costs payable by Grafton Connor.

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Respondents
Appellants on Cross-Appeal

Judges:	Farrar, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	October 12 and 13, 2016
Held:	Marsh's appeal against Grafton Connor allowed, in part; Marsh's appeal against Lloyd's dismissed; Lloyd's appeal against Grafton Connor dismissed; Lloyd's Notice of Contention allowed; Grafton Connor's cross-appeal dismissed. Costs awarded to Lloyd's payable by Marsh and Grafton Connor; Costs awarded to Marsh payable by Grafton Connor per reasons for judgment of Farrar, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring.
Counsel:	Christopher C. Robinson, Q.C., Kevin Gibson and Ian Dunbar, for the appellant/respondent on cross-appeal Marsh Canada Limited Geoffrey A. Saunders and Selina Bath, for the respondents/appellants on cross-appeal, Grafton Connor Property Incorporated and Beaufort Investments Incorporated Michael S. Ryan, Q.C., for the respondent/appellant on cross-appeal, Lloyd's of London Underwriters

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Reasons for judgment:

1 Overview

[1] The North End Beverage Room or North End Pub, as it has been referred to, was destroyed by fire on March 7, 2007. The building was owned by Beaufort Investments Incorporated, part of a group of companies that has been referred to as the Grafton Connor Group of Companies. Beaufort Investments is a named insured under the policy of insurance at issue. I will sometimes refer to the Grafton Connor Group of Companies and Beaufort Investments collectively as Grafton Connor. That is how the parties in their submissions to this Court and the court below have referred to them. When the context requires, I will refer to Beaufort Investments individually.

[2] At the time of the fire, the North End Pub was insured by Lloyd's of London Underwriters under a policy of insurance which was effective from July 1, 2006 to July 1, 2007. In a summary provided to Lloyd's when placing the insurance, the North End Pub was described as being of masonry construction and 100% sprinklered. In the course of investigating the fire, Lloyd's discovered that the North End Pub was neither sprinklered nor was it entirely of masonry construction. It denied coverage.

[3] The denial spawned a lawsuit by Grafton Connor against Lloyd's and Marsh Canada Limited, Grafton Connor's insurance broker. In turn, Marsh cross-claimed against Lloyd's for any amount it might be required to pay to Grafton Connor. To round out the pleadings, Lloyd's counterclaimed against Grafton Connor for the amount it paid for debris removal before it denied coverage.

[4] After an 18-day trial in the summer and fall of 2014, Justice Arthur J. LeBlanc, found that the policy was void as a result of material misrepresentations on the part of the insured. He dismissed the claim of Grafton Connor against Lloyd's, allowed the counterclaim by Lloyd's against Grafton Connor, and dismissed the cross-claim of Marsh against Lloyd's. He found that Marsh was 50% contributorily negligent to Grafton Connor for the losses suffered in the fire (reported 2015 NSSC 195).

[5] Marsh appeals. Grafton Connor cross-appeals. Lloyd's also cross-appeals and filed a Notice of Contention. I will set out the issues arising from the appeals, cross-appeals and Notice of Contention later.

[6] For the reasons that follow, I would allow the appeal by Marsh, in part, setting aside the finding that it was 50% contributorily negligent for the damages of Grafton Connor. I would dismiss Marsh's appeal against Lloyd's. I would also dismiss Grafton Connor's cross-appeal against Lloyd's and Marsh. I would allow Lloyd's Notice of Contention and dismiss its Cross-appeal. I would award costs to Lloyd's in the amount of $40,000.00, inclusive of disbursements, half of which is to be payable by Marsh and half by Grafton Connor. I would award costs to Marsh in the amount of $20,000.00, inclusive of disbursements, payable by Grafton Connor.

2 Background

[7] The North End Pub was a longstanding fixture in the North End of Halifax. Before it was destroyed it consisted of two integrated buildings. The original building, which housed the North End Diner, was a century old. The second building, which housed the pub business, was constructed in 1950. Neither structure was sprinklered.

[8] Gary Hurst was the president and owner of the Grafton Connor Group of Companies at the time of the fire. At one time, Ed Raymond and John O'Hearn along with Mr. Hurst had ownership interests in some of the Grafton Connor companies. In 2001, Mr. Raymond and Mr. O'Hearn sold their ownership interests to Mr. Hurst. The purchase price was paid out over several years with Mr. Raymond continuing to be involved in the business until 2003. Mr. Raymond and Mr. O'Hearn never had an ownership interest in Beaufort Investments.

[9] In addition to the North End Pub, Grafton Connor operated and insured a number of businesses in Nova Scotia. The businesses are set out in detail in the trial judge's decision (¶36). It is not necessary to list them here.

[10] Until 1996 Mr. Hurst was responsible for placing insurance for the Grafton Connor properties. In 1996 he delegated responsibility for placement of insurance to Mr. Raymond. Mr. Raymond's primary contact for assistance on insurance matters was Charlotte Henderson, an assistant comptroller with Grafton Connor. Mr. Raymond was responsible for placing the insurance until 2003, when he delegated the task to Steve McMullin.

[11] In 2003, Mr. McMullin held the position of Comptroller at Grafton Connor. He was named Vice-President of Finance in 2004.

[12] Mr. Hurst has a Bachelor of Commerce degree from Dalhousie University in 1963 and completed a law degree in 1966. Mr. Raymond was a law classmate of Mr. Hurst and a partner in McInnis Wilson and Hallett. At the time of leaving the practice of law in 1980 or 1981, he had been named a Queen's Counsel.

[13] Mr. Raymond began his relationship with Gary Hurst in 1979, five years after Mr. Hurst purchased the North End Pub on his own through Beaufort Investments. Beaufort Investments' only director was Mr. Hurst.

[14] During the years Mr. Raymond was responsible for placing insurance on the Grafton Connor properties, several brokers, including Marsh, were soliciting Grafton Connor's business.

[15] Blake Miller began working for Marsh as an account executive in 1996. At that time, Marsh was launching its national Molson Customer Care Program in Nova Scotia, an insurance package designed specifically for the hospitality industry. Mr. Miller first approached Mr. Raymond in 1997 in an attempt to obtain Grafton Connor's business. He was unsuccessful.

[16] In 1999, Marsh was successful in obtaining Grafton Connor's property insurance business. From 1999 until 2003 it placed the property insurance with various insurance companies.

[17] In May 2003, Marsh became aware that the insurer on the Grafton Connor account would not be renewing the property coverage for the 2003-2004 year. At that time, the account was being managed for Marsh by Eric Bourque, who had taken over from Blake Miller in 2002.

[18] Mr. Miller had transitioned into the role of Risk Placement Specialist dealing primarily with the account executives in the office who advised him of their account needs. The Risk Placement Specialist goes to the market to get renewal terms or obtain new alternative quotes and has no direct contact with the insured.

[19] Mr. Bourque informed Mr. Miller that the Grafton Connor account needed a new insurer. Mr. Miller contacted Marsh's affiliate, Marsh UK in London, England, to determine whether it would quote insurance for the Grafton Connor account. In an email which he forwarded to Marsh UK, Mr. Miller attached three documents:

1. a Location Details Summary;

2. a risk summary; and

3. a claims history.

The Location Details Summary took the form of a 7-column spreadsheet pertaining to nine properties owned by various Grafton Connor entities. For each location, the summary included information on construction type, monitored alarms, hydrants, sprinklers, building values, content values and business interruption. For the North End Pub, the Location Details Summary indicated that the property was of masonry construction and 100% sprinklered.

[20] Marsh UK was an accredited Lloyd's broker and as such was entitled to place insurance with Lloyd's of London Underwriters. Shortly after receiving Mr. Miller's correspondence, Marsh UK approached Lloyd's with a copy of Mr. Miller's email and the documents attached in order to obtain a quote for coverage.

[21] Martin Pope was the lead underwriter at Lloyd's who dealt with the Grafton Connor application. He reviewed the documents and proposed two coverage options to Grafton. Grafton Connor accepted one of the options presented and coverage was bound effective July 1st, 2003.

[22] Eric Bourque left Marsh in early 2004. After his departure, Andrew Timmons took over as account executive for the Grafton Connor account. He was responsible for renewing coverage with Lloyd's for 2004-2005. In that year, Grafton Connor added two new locations to the Policy – the Riverside Pub and the Esquire. The Riverside Pub, like the North End Pub, was listed in the Location Details Summary as being of masonry construction and 100% sprinklered. The Esquire was listed as being a framed construction, 100% sprinklered and having no monitored alarms. Neither the Riverside Pub nor the Esquire were sprinklered.

[23] Lloyd's renewed the Policy from July 1 to July 1 for the years 2005-2006 and 2006-2007, the year of the North End Pub fire.

[24] The Certificate of Insurance refers to the "Grafton Connor Group and as more fully defined herein". The named insureds refers specifically to "Beaufort Investment".

[25] Lloyd's denied coverage for the fire on the basis that the insured had materially misrepresented the risk by indicating the North End Pub was sprinklered and of masonry construction when it was not. The underlying lawsuits resulted and ultimately this appeal.

[26] To the extent necessary, I will add additional facts when addressing the various issues raised by the parties on this appeal.

3 Issues

[27] The appeal, cross-appeals and notice of contention raise a number of issues. I will address them in this order:

1. Whether the trial judge erred in failing to interpret and apply the provisions of the Policy to find coverage in favour of Grafton Connor; (Marsh's Appeal, Grafton Connor's Cross-Appeal)
2. Whether the trial judge erred by failing to attribute to Grafton Connor the actual knowledge of Gary Hurst concerning the construction and sprinklering of the North End Pub; (Marsh's Appeal)
3. Whether the trial judge erred in formulating the standard of care to be met by Marsh and by attributing liability to Marsh; (Marsh's Appeal)
4. Whether the trial judge erred by interpreting the Policy as a "blanket" and not a "scheduled" policy; (Lloyd's Cross-Appeal)
5. Whether the trial judge erred by failing to apply the co-insurance provisions of the policy against Grafton Connor; (Lloyd's Cross-Appeal)
6. Whether the trial judge's decision can be affirmed on the basis that Grafton Connor was "reckless" in relation to its placement of insurance with Lloyd's; (Lloyd's Notice of Contention)
7. Whether the trial judge erred by finding that Marsh did not cause Grafton Connor's loss by failing to provide Lloyd's with a copy of the TRS Report; (Grafton Connor's Cross-Appeal) and
8. Whether the trial judge erred in his apportionment of liability as between Grafton Connor and Marsh (Grafton Connor's Cross-Appeal).

[28] I will address the standard of review when addressing the individual grounds of appeal.

4 Issue #1 Whether the trial judge erred in failing to interpret and apply the provisions of the Policy to find coverage in favour of Grafton Connor (Marsh's Appeal, Grafton Connor's Cross-Appeal)

Standard of Review

[29] This ground of appeal involves the interpretation of Endorsement 10 of the Policy. In their facta, Marsh and Grafton Connor argue that the trial judge erred in the selection of the principles by which he approached the task of interpreting Endorsement 10, or alternatively, that he failed to properly apply those principles or failed to consider a required element of the applicable legal test. Both cite *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:

> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[30] Between the time of the parties filing their facta and the hearing of this matter, the Supreme Court of Canada released its decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37. At the hearing of this matter, the parties argued that Endorsement 10 falls within the exception in *Sattva* as identified by the Supreme Court of Canada in *Ledcor* where it held:

> [4] … Where … the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[31] On my review of the record, there is very little evidence that the factual matrix was a significant factor in the formation of the wording of Endorsement 10. Unlike standard contractual interpretation, the exception set out in *Sattva* and particularized in *Ledcor*, relies upon the idiosyncrasy of the insurance world in which agreements (specifically, standard form agreements) go undiscussed by the parties. When this happens, assessing specific facts regarding the relationship,

particularly negotiation on the terms, is of little assistance to the Court (*Ledcor*, ¶27).

[32] Justice Wagner in *Ledcor* notes, commenting upon Justice Cromwell's concurring decision, that some surrounding facts will still remain relevant. The market at issue, the roles of the parties, the type of insurance, etc. may all be useful to the reviewing court. He notes, however, that these will not be specific to the parties but will be based upon market or industry norms and are, therefore, not "inherently fact specific" (*Ledcor*, ¶31-32 and *Sattva*, ¶55).

[33] I am satisfied that Endorsement 10 falls within the exception identified in *Ledcor* and *Sattva* and this ground of appeal will be reviewed on a correctness standard.

Analysis

[34] Endorsement 10 to the Policy provides as follows:

> 23. ERRORS AND OMISSIONS
>
> Any unintentional error or omission made by the Insured shall not void or impair the insurance hereunder provided the Insured reports such error or omission as soon as reasonably possible after discovery by the Insured's Home Office Insurance Department and further provided that in the event of any error or omission including a declaration of the Insured's total insurable values being less than (80%) eighty percent of the actual insurable values at the time of declaration, any loss payable in respect of the property involved or other insurable interests in the loss shall be reduced in the proportion that the said actual insurable value bears to the declared insurable value provided that this provision shall only apply when the actual building(s) or individual property(ies) or other insurable interests involved in the loss are the subject of an incorrect declaration of values.
>
> ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

[Emphasis added)

[35] Both Grafton Connor and Marsh, on this appeal, and before the trial judge below, say that any misrepresentations regarding the construction of the North End Pub and the presence of sprinklers therein were excused pursuant to the first part of Endorsement 10. Like the trial judge, I disagree.

[36] The logical starting point is the findings of fact made by the trial judge. He found:

> [124] Having considered all of the evidence, I am satisfied that the misrepresentations by Grafton Connor, when taken together, were objectively and subjectively material. …
>
> [125] I accept that if Underwriters had been informed that the North End Pub was of mixed construction and lacked a sprinkler system, it would have charged a higher premium for coverage. As a result, Underwriters is entitled to void coverage under the Policy with respect to the Pub.
>
> …
>
> [145] That is not the situation here. Underwriters did not deny coverage on the basis of a failure by Grafton Connor to disclose information that Underwriters knew was material to its assessment of the risk but chose not to ask about. It denied coverage on the basis that the information provided by Grafton Connor, upon which it relied in determining a premium, turned out to be false.

[37] The trial judge concluded the policy was void under Statutory Condition 1 of the Policy.

[38] Statutory Condition 1 in the Policy provides as follows:

> **Misrepresentation**
>
> 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.

[39] Grafton Connor and Marsh argue the material misrepresentations were "unintentional errors" within the meaning of the Endorsement and, therefore, did not void or impair the insurance. To accept this argument, Statutory Condition 1 would have to be written down or varied to apply only to intentional precontractual material misrepresentations to void or impair the insurance contract. The trial judge rejected this argument. So do I.

[40] Before undertaking his analysis, the trial judge correctly set out the interpretative principles. I will repeat what he said:

> [61] The "overriding concern" when interpreting insurance policies and other commercial contracts "is to determine 'the intent of the parties and the scope of their understanding'": *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] SCJ No 53 at para 47, citing *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21, [2006] 1 SCR 744, at para 27 *per* LeBel J. To accomplish this, the court "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": *Sattva*, at para 47.

[62] In *Sattva*, Rothstein J. for the Court, explained the justification for considering the surrounding circumstances:

> 47 … 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*, 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… As stated by Lord Hoffman 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]

[63] Rothstein J. elaborated on the role of surrounding circumstances in contractual interpretation:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement … The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement …
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It

> does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract … that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [64] In searching for the intent of the parties, the court should avoid an interpretation that would bring about "a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted": *Consolidated-Bathurst Export Ltd v Mutual Boiler and Machinery Co*, [1980] 1 SCR 888 at p 901. In other words, "the interpretive process should begin with an effort to construe an insurance policy in a commercially reasonable fashion which harmonizes all of its different parts": Geoff Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham: LexisNexis Canada, 2012) at p 207.

[41] He then referred to *Highlands Insce v. Continental Insce*, [1987] 1 Lloyd's Rep. 109 (Com. Ct.) and *Pan Atlantic v. Pine Top Insurance*, [1993] 1 Lloyd's Rep. 496 which considered Error and Omissions Clause(s) albeit with different wording than the wording in this case.

[42] In *Highlands* the clause was as follows:

> The insured hereunder <u>is not to be prejudiced</u> by an unintentional and/or inadvertent omission error incorrect valuation or incorrect description <u>of the interest, risk or property</u>, provided that notice is given to the Company as soon as practicable upon the discovery of any such error or omission.

[Emphasis added]

[43] In *Pan Atlantic* the wording of the clause was:

> It is hereby declared and agreed that any inadvertent delays, omissions or errors made in connection with this Reinsurance <u>shall not be held to relieve either of the parties hereto from any liability</u> which would have attached to them hereunder if such delay, omission or error had not been made, provided rectification be made upon discovery, and it is further agreed that in all things coming within the scope of this reinsurance the re-insurers shall share to the extent of their interest the fortunes of the reinsured.

[Emphasis added]

[44] As is the case here, the error in *Highlands* and the omission in *Pan Atlantic* were held to be material. In both instances, the Court held that the Error and Omissions Clause, properly construed, did not relieve the insured of its obligation to accurately report all material matters in the application for insurance. In *Highlands* the insured was prejudiced by a material misrepresentation. In *Pan Atlantic* a material omission relieved the insurer of its liability to indemnify. In both instances the coverage was held to be void because of an unintentional material error (*Highlands*) or omission (*Pan Atlantic*).

[45] After a thorough review of those cases the trial judge here concluded:

> [75] I recognize that the wording of the clauses considered in *Highlands* and *Pine Top* is not identical to that used in Endorsement 10. I also note that the *Pine Top* decision involved an omission, not a misrepresentation. I am satisfied, however, that the reasoning is equally applicable in this case. When one considers the contract as a whole and the surrounding circumstances, the interpretation proposed by Grafton Connor and Marsh is commercially unreasonable.
>
> [76] The terms and conditions of an insurance contract are the product of the underwriter's assessment of the risk, calculated using the information provided by the insured. To interpret the word "error" in the Endorsement as including misrepresentations would mean that, after coverage is bound, an insurer who learns of an unintentional misrepresentation that materially increases the risk would have no means of increasing the premium, nor any right to void the insurance policy. Yet the same insurer, pursuant to Statutory Condition 4, would have the right to increase the premium or void the contract if it learned from the insured of a material change to the risk occurring after coverage was bound. I do not accept that this result was contemplated by either party to the insurance contract.
>
> [77] While it may be possible, as Marsh suggests, for an insurer to vary its statutory right to avoid a contract for unintentional misrepresentation, I find that the contract would have to include clear and unequivocal language to that effect. The use of the word "misrepresentation" would be an appropriate starting point.

[46] I agree and adopt the analysis of the trial judge. I would add there is an important distinction between the wording of the Errors and Omissions Clause and Statutory Condition 1. The Errors and Omissions Clause makes reference to "Any unintentional error or omission made by the Insured". In my view, the use of the

word “insured” in that clause is significant. It is intended to address errors and omissions which are made once the policy is in place. Contrast that with the Statutory Condition 1 which provides:

> If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstances that is material …
>
> [Emphasis added]

[47] Statutory Condition 1 is intended to address those misrepresentations that are made when applying for insurance. It does not address issues once the insurance is in place. This is made clear by Statutory Condition 4 which deals with material change in the risk. Once again, the terminology used in Statutory Condition 4 refers to “the insured” as contrasted with “person” in Statutory Condition 1. It provides:

> **Material Change**
>
> 4. Any change material to the risk and within the control and knowledge of the insured avoids the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent, and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within fifteen days of the receipt of the notice, pay to the insurer an additional premium, and in default of such payment the contract is no longer in force and the insurer shall return the unearned portion, if any, of the premium paid.
>
> [Emphasis added]

[48] The difference between Statutory Condition 1 and Statutory Condition 4 are evident on their face, that is, Statutory Condition 1 applies before the insurance is put in place; Statutory Condition 4 applies once the insurance is in place. Similarly, the use of the word “insured” in Endorsement 10 supports the interpretation it was intended to apply to errors or omissions that occur once the insurance is in place. Endorsement 10 does not apply to precontractual material misrepresentations made in the course of applying for insurance as was the case here (see *Highlands*, p. 117).

[49] Marsh seeks to distinguish the two cases based on different wording in those clauses and Endorsement 10: “prejudice” and “held to relieve … from any liability” (*Highlands* and *Pan Atlantic*) and “void” (Endorsement 10). With respect, this is a distinction without a difference. The import of the clauses in each of the cases is the same. The insurer is entitled to deny liability under the policy of insurance as a result of the material misrepresentation.

[50] The trial judge also found that the interpretation suggested by Grafton Connor and Marsh was commercially unreasonable as there was no provision in the clause to increase the premium (¶55 and ¶76). A similar conclusion was reached in *Highlands* where the Court held:

> …Significantly, the clause contains no provision for an additional premium. That may be commercially acceptable in relation to formal errors, e.g., the address of the insured premises. It is, however, quite inconceivable that it was intended to apply to a risk which was materially misrepresented. No doubt, as was submitted on behalf of Highlands, there are a number of other answers to the reliance placed on this provision. It is sufficient, however, to record that I am quite satisfied it does not apply to precontractual material representation, which entitled the re-insurers to void on the grounds of misrepresentation. Inevitably, this argument must fail.

[51] Again, I agree with the trial judge’s conclusion.

[52] Marsh argued that it is possible to vary the statutory condition to preclude the voiding of the contract for material misrepresentation and that is what the parties agreed to in this case. Such was the case in *HIH Casualty and General Insurance Limited v. Chase Manhattan Bank*, [2003] UKHL 6, relied upon by the appellants. However, the clauses in *HIH* are markedly different from Endorsement 10. They provide:

> "[6] the Insured will not have any duty or obligation to make any representation, warranty or disclosure of any nature, express or implied (such duty and obligation being expressly waived by the insurers) and
>
> [7] shall have no liability of any nature to the insurers for any information provided by any other parties and
>
> [8] any such information provided by or nondisclosure by other parties including, but not limited to, Heath North America & Special Risks Ltd (other than Section I of the Questionnaire) shall not be a ground or grounds for avoidance of the insurers' obligations under the Policy or the cancellation thereof".

[53] The context in which this clause was created is entirely removed from this case. In *HIH* the insured, Chase, had been enticed into investing in the development of films. Not being experts in film-making, Chase was relying on its broker/agent, Heath for the information. The entire scheme to have banks invest in films had been developed by Heath as a middle person. They provided the expertise and the banks provided the funds.

[54] Chase insured against potential loss with the underwriter, HIH, on the understanding that the risks were not something Chase could disclose. Heath was the expert and not Chase. In fact, Chase had no useful information for the insurer at all. In light of this, Chase required indemnification for the information provided by Heath or they would have never entered the investment opportunity or the insurance contract. In that circumstance, unlike here, the insured was not in a superior position to the insurer as regards of risk to be insured. As a result, the drafting of the clause and the commercial reality of the agreement in *HIH* are completely different than the present case and does not assist the appellants.

[55] I am satisfied, taking into consideration the wording of the policy, the circumstances of the parties and commercial realities, that Endorsement 10 was never intended to relieve the insured of its obligations under Statutory Condition 1.

[56] I would dismiss this ground of appeal.

5 Issue #2 Whether the trial judge erred by failing to attribute to Grafton Connor the actual knowledge of Gary Hurst concerning the construction and sprinklering of the North End Pub (Marsh's Appeal)

[57] Although the parties address this issue as an attribution to Grafton Connor of Mr. Hurst's knowledge, I think it is more appropriately framed as the attribution to Beaufort Investments of Mr. Hurst's knowledge. As noted earlier, Grafton Connor is used to refer to a group of companies. Although there is a Grafton Connor Property Inc., it was not the owner of the North End Pub. Grafton Connor, as referred to by the trial judge and the parties, is not a separate corporate entity. As a result, when addressing this issue I will refer to Beaufort Investments as it is the relevant entity.

[58] There are two distinct issues arising under this ground of appeal. The first is whether Marsh is entitled to raise the argument that Mr. Hurst's knowledge

concerning the construction and sprinklering of the North End Pub ought to be attributed to Beaufort Investments. Grafton Connor argues that the issue was not raised before the trial judge and, therefore, we should not entertain it.

[59] The second issue, if we entertain the argument, is whether Mr. Hurst's knowledge should be attributed to Beaufort Investments.

5.1 Should this Court entertain Marsh's Argument on this Appeal?

[60] In order to answer this question, some further background is necessary. Often, in lengthy cases like this one, the pleadings get forgotten or ignored. On this issue, it is important to go back to the pleadings and the submissions of the parties to determine what was in issue before the trial judge. I will start with the Originating Notice (Action) and Statement of Claim which was filed on March 7, 2008. It states:

> 5. By written memorandum dated July 22nd, 1999, Blake Miller forwarded to the Plaintiffs copies of the Molson Business Edge policy of insurance covering the Premises along with eight copies of the application form on which particulars had been filled out. The Plaintiffs were instructed to sign and return the applications to Blake Miller at Marsh and did not notice the applications, as filled in by Marsh, had stated in error that the premises were 100% sprinklered, and that the construction of the Premises was "Masonry".
>
> [Emphasis added]

[61] The Statement of Claim does not say the Plaintiffs did not know of the true state of the construction and sprinklering at the North End Pub but rather they "did not notice" the error.

[62] The Statement of Claim was amended on May 9th, 2012, four years after the original Statement of Claim and well into the litigation. There was no change made to paragraph 5.

[63] The Statement of Claim was further amended on November 4th, 2014. Again, no change to paragraph 5.

[64] In its pre-hearing brief filed on May 27, 2014, Grafton Connor says the following:

> 39. It is acknowledged that the property was not sprinklered and accordingly the description in the Location Details Summary was incorrect. Nevertheless, it is the position of Grafton Connor that the misdescription was unintentional and is forgiven by Endorsement No. 10 and did not entitle Lloyd's to void the policy. …
>
> 40. There will be no evidence to suggest the description was intentional.

[65] In its extensive post-trial submissions dated September 5, 2014, Grafton Connor did not deny that it had knowledge of the true state of the construction of the North End Pub. The issue focused on whether Lloyd's was entitled to void the policy and whether Marsh ought to have taken steps to ensure the information provided was correct.

[66] In Marsh's pre-trial brief dated May 26, 2014, it says:

> … The law allows an insurance broker to rely upon the accuracy of the information it is provided by its client. The evidence at trial will also disclose that Gary Hurst, the President of Grafton Connor, knew at all relevant times that the North End Pub was not sprinklered and was not of masonry construction. Marsh's client was Grafton Connor, and through Mr. Hurst, Grafton Connor knew whether the North End Pub was sprinklered and of masonry construction. Marsh is not required to inform Grafton Connor of information that it already knows, and that Grafton Connor had simply failed to accurately disclose through its own carelessness. Accordingly the claim against Marsh must be dismissed with costs.
>
> [Emphasis added]

[67] To put this statement into the context of Beaufort Investments, Marsh was saying that its client was Beaufort Investments and through Mr. Hurst, Beaufort Investments knew whether the North End Pub was sprinklered and of masonry construction.

[68] Later in that same brief Marsh makes the following submissions:

> However, there is no basis in law for the contention that a broker in the position of Marsh is under a duty to independently verify the representations of an insured, particularly where knowledge of the correct state of affairs is within the actual knowledge of the insured making the representations. …
>
> [Emphasis added]

[69] In its post-hearing brief dated October 3rd, 2014, Marsh, again, raises the issue of the knowledge of Beaufort Investments with respect to the representations:

> 46. Regardless whether Endorsement 10 operates to provide coverage to the Plaintiffs, there is no basis for the contention that a broker in the position of Marsh owes a duty to its client to independently verify the representations of an insured where knowledge of the correct state of affairs is within the actual knowledge of the insured making the representations. The Plaintiffs themselves have offered no authority to support that contention, which is also contrary to common sense. …
>
> [Emphasis added]

[70] There is no ambiguity in Marsh's submissions; it made it clear that in the formulation of the standard of care the trial judge had to consider the knowledge of the insured.

[71] A review of the pleadings, the pre and post-trial submissions reveal Beaufort Investment's knowledge of the true state of affairs was never really in issue. It only becomes an issue as a result of the findings in the trial judge's decision where he focuses on Mr. Raymond's personal knowledge:

> [314] … I am satisfied that an insurance broker of reasonable competence, taking on a client like Grafton Connor in 1999, would have made inquiries of Mr. Raymond to satisfy himself that he was capable of completing the application forms accurately. He would have asked if there had been inspections done on the properties in the past from which Mr. Raymond could glean the relevant information. If not, he would have discussed the benefit of inspections with the client, and the consequences of a failure to provide accurate information. I find that Marsh's failure to make these inquiries constituted a breach of its duty to provide appropriate counsel and advice.
>
> …
>
> [316] If Mr. Miller had asked Mr. Raymond about his experience placing property coverage and his ability to provide accurate answers to the questions on the application, Mr. Raymond would have realized that he could not rely on Mr. Miller to compile the information for him. …
>
> [317] Whether the standard of care will require the insurance broker to make inquiries of the nature described above will depend on the complexity of the risk. The decisions in *Biggar*, *O'Connor*, *Wolfe*, *Goodbrand*, and *Edwards* involved basic life, home and auto insurance applications. The information required to obtain these types of coverage would be within the personal knowledge of the applicant, regardless of his or her experience with the placement of insurance. In such a situation, there would be no obligation on the broker to make inquiries as to the applicant's ability to accurately respond to the questions being asked.

[Emphasis added]

[72] As can be seen from the above passage, the trial judge is making a distinction between the duty of care in the situation where the information is within the personal knowledge of the applicant and where it is not. By the applicant in this case, he is referring to Mr. Raymond. He did not turn his mind to whether the insured, Beaufort had knowledge of the true state of affairs, as argued by Marsh.

[73] Grafton Connor says the following in its factum:

> 69. At trial, there was no focused inquiry with respect to Grafton Connor's directing mind and, in particular, who that individual might have been with respect to placing insurance. The answer to that question is one of mixed law and fact and Grafton Connor did not have an opportunity to present any evidence to challenge Marsh's new assertion that the role was fulfilled by Hurst. As such, it would be clearly prejudicial to allow argument on the issue based on the Trial Record.

[Emphasis added]

[74] With respect, there was no focused inquiry with respect to Grafton Connor's (Beaufort Investments) directing mind as Grafton Connor did not take the position at trial that it did not have knowledge of the true state of affairs.

[75] At no time was it pleaded or suggested that the knowledge of Mr. Hurst was not the knowledge of Beaufort Investments. Nor did it deny that Beaufort Investments had knowledge of the true state of the construction and sprinklering of the building. Contrary to the submissions of Grafton Connor, it would be unfair to Marsh not to address the issue on this appeal.

[76] It is clear Beaufort's knowledge in placing the insurance was a live issue at trial and it is, therefore, necessary to consider what was its knowledge and what, if any impact, that knowledge had on the formulation of the standard of care of Marsh. I find it is not only appropriate to consider what Beaufort Investments' knowledge would have on the formulation of the standard of care, it is necessary to address the issues on appeal.

[77] On the basis of the pleadings, the pre-hearing and post-hearing briefs alone, I would conclude that Mr. Hurst's knowledge that the building was not of masonry construction and not sprinklered should have been attributed to Beaufort Investments. Simply because it was never an issue that Beaufort had that

knowledge. However, I will go further and consider whether Mr. Hurst's knowledge ought to be attributed to Beaufort Investments based on the applicable legal principles.

5.2 Mr. Hurst's Knowledge

[78] As noted, Mr. Hurst was the owner of the North End Pub. His direct evidence of his knowledge on the sprinklering of the North End Pub is as follows:

> Q. All right. At the time prior to the fire at the North End Pub, had you been aware of whether either portion of that building had been sprinklered?
>
> A. I knew that they were that neither were sprinklered.
>
> Q. Why did you know that?
>
> A. Well, because of the age of the building. There are no buildings of this era built in the early '50s that are sprinklered in Nova Scotia because there were no requirements for sprinklers. …
>
> A. …And anyone with rudimentary knowledge of sprinkler requirements and fire protection should have known that.

[Emphasis added]

[79] Later in cross-examination the following exchange took place between Mr. Hurst and Lloyd's counsel:

> A. I don't agree with the inference that I walked in the sense that I abandoned the representation of our company and our insurance matters to somebody who didn't have the ability or the knowledge or the skill to handle the job.
>
> Q. If you find the way I put the question offensive, let me rephrase it. All you did after Raymond took over all you did in relation to insurance the extent of your interest, the extent of your involvement was discussions with him and perhaps others about whether there were liability coverages available, whether they were adequate, and how much you were going to pay for the premiums. Correct?
>
> A. I take you up on your offer. I don't think that accurately represents what I did or my state of mind. I thought I was convinced then, as I am now, that the matter was left in good hands with Ed Raymond, as I did with Steve McMullin. They're both very skilled guys and they take their jobs very they take their jobs seriously, and I have the highest regard for their integrity.
>
> …

Q. You did not look at one single application for insurance on all of these properties from when nineteen ninety what year was it? When did Ed Raymond take it over?

A. I think six, '96.

Q. 1996. From that point in time until after the fire, you never looked at one application for coverage, did you?

A. I delegated the work to Ed Raymond, just the same way as people delegate CEOs and other people delegate jobs to others. But I mean, there was nothing unusual about it.

Q. Mr. Hurst, put the notion of delegation aside. Let's just put that out in the corridor for a minute, and just answer my question. Did you look at any applications for insurance from nineteen ninety whatever it was forward to 2007? Do you understand the question?

A. Yes.

Q. What's the answer?

A. No.

Q. Thank you. Did you have any dealings whatsoever with anybody at Marsh Canada from whenever Raymond took over until after the fire in March of 2007? Yes or no?

A. No. Didn't feel the need to.

[Emphasis added]

[80] The evidence establishes that Mr. Hurst, in or around 1996, delegated the responsibility for placing insurance on the North End Pub to Mr. Raymond. He had confidence in Mr. Raymond and, later Mr. McMullin, to do the job appropriately. He delegated the work to Mr. Raymond just as a CEO would do with respect to any number of tasks. Between 1996 and 2007 he personally did not review any of the information submitted on the insurance applications nor did he have any interaction with Marsh.

[81] I will now turn to the testimony of Mr. Raymond and his relationship to Beaufort Investments:

Q. And this proceeding involves a series of properties that were covered by insurance. You've seen the identity of the properties or the operations that are involved in this lawsuit. Were you involved in all of those?

A. No, I wasn't. And, in fact, Beaufort Developments, which owned the property in question for this case, was a company that I never had any interest in,

> ownership interest. I was a director of that company as a convenience to Gary for a number of years. I think I resigned in 1995. I've never had any financial interest in Beaufort.
>
> Q. In the other properties you were
>
> A. The other properties? A number of them I did have an interest. I don't know if I can name them all but I can refer to some of them, The Five Fishermen Limited, Cornwallis Properties, which owed Lawrence of Oregano, we owned Alfredo Weinstein and Ho, the Grafton Dinner Theatre, we got involved with Dooly's at a later date and owned a couple of those. I may not have included everyone but that's a number of them.
>
> …
>
> Q. What was your function in the years that you were there? What were your responsibilities?
>
> A. Well, I would be a general manager of specific locations, such as My Apartment or Five Fishermen, the dinner theatre, Alfredo's, and I would work with the operating manager on those locations. As a matter of interest, I never was the general manager of Beaufort or the North End Pub.
>
> [Emphasis added]

[82] Mr. Raymond mistakenly refers to Beaufort Developments. In this context, he clearly meant Beaufort Investments (There is no Beaufort Developments in the Grafton Connor Group of Companies). Mr. Raymond had no ownership interest in Beaufort Investments. He had an interest in some of the other entities covered under the insurance policies. He acted as general manager of some specific locations but never was the general manager of Beaufort or the North End Pub.

[83] What we are left with is that Gary Hurst, the sole director and owner of the North End Pub with actual knowledge that the pub was not of masonry construction nor sprinklered. He delegated responsibility to individuals who he felt were competent to ensure that the insurance was placed appropriately.

5.3 **In these circumstances is the knowledge of Mr. Hurst the knowledge of Beaufort Investments?**

[84] I agree with the submissions of Beaufort that who may be a directing mind of a corporation, and for what purposes, are fact-specific questions. The answers will largely depend on the specific circumstances.

[85] Both Marsh and Beaufort cite Sweet & Maxwell, *MacGillivray on Insurance Law*, 12th ed. (Thomson Reuters (Professional) UK Limited: 2012) at pp. 477-478, although to different ends. I will reproduce the section in full:

> **Actual knowledge of natural and corporate assureds.** Whether a material circumstance is known by a natural assured is simply a question of fact—"he knows what he knows." Thus a proposer for life or sickness insurance need not disclose the existence of a medical condition of which his doctors have not told him, so long as he is genuinely ignorant of it and is not shutting his eyes to the truth. The knowledge of a corporate assured is more complex. It depends upon the identification of those persons whose actual knowledge is to count as the knowledge of a company for the purpose of the disclosure rule imposed upon all proposers for insurance in order to enable insurers to make an informed assessment of the risks presented to them. There is little authority on this question, which in practice arises when the director or manager responsible for arranging the company's insurances is ignorant of a fact known to another director or employee.
>
> It is submitted that the knowledge of those who represent the directing mind and will of the company, and who control what it does, is to be identified as the company's knowledge, whether or not they are responsible for arranging the insurance cover in question. This class of persons usually consists of directors and officers of the company. It can include non-directors to whom the exercise of the company's powers has been delegated by the board of directors, whether generally or in relation to a particular business activity. It has been said in *obiter* that the knowledge of a person responsible for arranging the insurance cover should count as the company's knowledge even if not identifiable as part of its directing mind and will, but it is submitted that corporate knowledge is restricted to the knowledge possessed by the company's directing minds, and that the knowledge of employees and agents is not the actual knowledge of the company, although it may be deemed to know what they know on other grounds. Section 18(1) of the Marine Insurance Act 1906 provides that in certain circumstances a corporate insured is deemed to know what its agents and employees know, and this appears to be based on the imputation of such knowledge to the persons who embody the directing mind of the company. The courts have interpreted the deemed knowledge provision in s.18(1) restrictively, and, if the actual knowledge of employees below the status of director is too readily identified as the actual knowledge of the company, there is a risk that the limitations placed on the imputation of their knowledge, qua agents, to the directing minds of the company will be circumvented. The nature and terms of the particular insurance policy may also make it inappropriate to attribute the knowledge of one or more directors to a corporate assured.
>
> [Footnotes omitted, emphasis added.]

[86] "Attribution" then is dependent on the identification of the natural persons whose knowledge and will are to be attributed to the corporation. While employees and agents may be so identified, *MacGillivray* suggests this should be done restrictively. There is some combination of practicality and policy in this suggestion. The "identification" of the directors, whether or not involved in the insurance negotiation, satisfies concerns arising from a lower level identification:

- To identify at the level of the agent would, otherwise, permit directors to claim ignorance of what they should know.
- A director with knowledge unknown to the agent should not be able to avoid their responsibility to the insurer by simply not sharing the relevant information.
- *Uberima fides* should require the corporate insurance seeker to take all the steps a natural person seeking insurance is required to take. If this requires investigation, discussion, etc., because of the size or number of assets, this is squarely the responsibility of the insured. Attribution to directors places ultimate responsibility for this undertaking upon those specifically designated by shareholders and the corporation itself with management of such issues.

[87] Beaufort is, therefore, arguing against what would seem to be a logical and basic principle: a director will be the identified source of corporate knowledge, absent some exceptional scenario. The intrusion of an agent or employee into the mix does not disrupt this, but rather places an obligation on the director to satisfy his role as director by sharing all relevant knowledge to and through his agent.

[88] *Jetivia SA v. Bilta (U.K.) Ltd.*, [2015] UKSC 23, finds the same principle in its analysis of *Meridian Global Management Asia Ltd. v. Securities Commission Co. (New Zealand)*, 1995 UKPC 26:

> [67] …The primary rule of attribution is that a company must necessarily have attributed to it the state of mind of its directing organ under its constitution, ie the board of directors acting as such or for some purposes the general body of shareholders. …

[89] In *Jetivia*, Lords Toulson and Hodge discuss the attribution of knowledge in the civil sphere and identified three different contexts in which it arises:

1. when a third party is pursuing a claim against the company arising from the misconduct of a director, employee or agent;

2. when the company is pursuing a claim against a director or an employee for breach of duty or breach of contract; and
3. when the company is pursuing a claim against a third party. (¶204)

[90] The third circumstance is this case.

[91] Lord Sumption in *Jetivia* also cites *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378, in which a "one man" company is held liable for the knowledge/actions of the one man. This is attribution at its most direct.

[92] In *Jetivia*, after outlining the three contextual circumstances where attribution arises, Lords Toulson and Hodge give an example of the third context:

> 207. In the third case, where the company claims against a third party, whether or not there is attribution of the director's or employee's act or state of mind depends on the nature of the claim. For example, if the company were claiming under an insurance policy, the knowledge of the board or a director or employee or agent could readily be attributed to the company in accordance with the normal rules of agency if there had been a failure to disclose a material fact. …
>
> [Emphasis added]

[93] The example given is precisely the situation which we have before us. Beaufort Investments, in placing insurance, made a material misrepresentation of a fact which was within the knowledge of Mr. Hurst, its owner and sole director.

[94] If Gary Hurst is not the directing mind of Beaufort and his knowledge is not attributed to Beaufort, Beaufort had no knowledge of its own assets. This result cannot be acceptable.

[95] Mr. Hurst's situation is similar to that which arose in *373409 Alberta Ltd. (Receiver of) v. Bank of Montreal*, 2002 SCC 81. The Supreme Court of Canada found that a sole shareholder, director and officer of the numbered company was the only person capable of acting as the corporation's directing mind. It held:

> 19 There can be no doubt that Lakusta's act of directing the Bank to deposit the proceeds of the cheque into Legacy's account can be attributed to and considered authorized by 373409. See *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 (H.L.), *per* Viscount Haldane L.C., at p. 713:
>
> > ... a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be

> sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself... .
>
> 20 Here, Lakusta was the sole shareholder, director, and officer of 373409. He was the only person capable of acting as the corporation's directing mind, and he formed the entire "ego" and "personality" of the corporation. In his capacity as sole shareholder and director of the corporation, he had the full capacity to delegate authority to the corporation's agents. He was the sole officer of the corporation, and its only agent. Consequently, any act which he undertook as 373409's agent must be deemed authorized by the corporation. The only conclusion available on the evidence was that Lakusta, *qua* shareholder and director, authorized Lakusta, *qua* officer, to deposit 373409's funds into Legacy's account.

[Emphasis added]

[96] While this case is referring to a situation involving an issue of fraud, the concept of primary attribution is useful. There is no other person "within Beaufort" who could be its directing mind or its "ego" as referred to by the Supreme Court of Canada. As a result, when Hurst was acting *qua* Beaufort, (in earlier years when he placed insurance or later when delegating) he was the corporation.

[97] Earlier I set out the testimony of both Mr. Hurst and Mr. Raymond with respect to their relationship with Beaufort Investments. It is clear from that testimony that Mr. Hurst was the directing mind of the company who delegated the responsibility for placing insurance to Mr. Raymond. Mr. Raymond had little, if any, relationship to Beaufort other than to place the insurance.

[98] I have no hesitation finding in these circumstances that Hurst's knowledge ought to be attributed to Beaufort. I agree with Blair, J.A.'s comments in *Livent Inc. (Receiver of) v. Deloitte & Touche*, 2016 ONCA 11, that attribution is not the end of the analysis, but rather, a step in determining the legal consequences of the knowledge or state of mind (¶103).

[99] It was Mr. Hurst who was the directing mind and will of the company and he controlled what it did. Under these circumstances, his knowledge is the knowledge of the company.

[100] I will now turn to what impact that knowledge has on the formation of the standard of care.

6 Issue #3 Whether the trial judge erred in formulating the standard of care to be met by Marsh and by attributing liability to Marsh (Marsh's Appeal)

Standard of Review

[101] The formulation of the standard of care is a question of law and will be reviewed on the standard of correctness (*Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2011 NSCA 43. See also *Gwynne-Timothy v. McPhee*, 2005 NSCA 80, ¶33).

Analysis

[102] As I had mentioned earlier in these reasons, Mr. Hurst was responsible for the placing of insurance for Beaufort Investments and the other Grafton Connor companies until 1996; between 1996 and 2003 Mr. Raymond was responsible for placing insurance; from March 2003 until the fire Mr. McMullin was the party responsible for placing insurance. The judge reviewed, in considerable detail, the evidence of the various witnesses at trial (see ¶147-266 of trial decision). After reviewing the evidence he made certain findings of fact relating to Marsh's liability to Grafton Connor. I will summarize the findings of fact made in the trial judge's decision:

- Mr. Raymond and Mr. McMullin were both successful professionals. However, neither was sophisticated with respect to the placement of commercial property insurance. Mr. Raymond and Mr. McMullin were both aware of the importance of providing accurate information to an insurer underwriting coverage.
- Mr. Hurst was aware that the North End Pub was of mixed construction and was not sprinklered.
- When Mr. Hurst asked Mr. Raymond to assume responsibility for placing property insurance he provided no instructions to Mr. Raymond nor did he review the features of any of the properties with Mr. Raymond, including the North End Pub.

- Neither Mr. Raymond nor Mr. McMullin knew whether the North End Pub was sprinklered. Nor did either of them ask Mr. Hurst or any employee of the pub whether the property was sprinklered.
- The misrepresentation that the North End Pub was of masonry construction and sprinklered originated with Marsh on the 1999 application form.
- When Mr. Raymond reviewed the 1999 application form he agreed with the description and adopted it as his own.
- In 1999, the forms were filled out by Mr. Miller with the assistance of Charlotte Henderson, an assistant comptroller with Grafton Connor.
- When Mr. Raymond reviewed the forms he believed the information thereon had been gathered by Blake Miller. He relied upon Mr. Miller to complete the forms accurately. However, he did not tell Mr. Miller that he was relying on him, nor did he ask Mr. Miller or Ms. Henderson how the information on the forms had been acquired.
- The error on the 1999 form was the product of the conflation by Marsh of information pertaining to the North End Pub and Tomorrow's Lounge.
- Each year Grafton Connor was given the opportunity to review and update the information being submitted to the insurer in order to renew coverage.
- The representations that the North End Pub was of masonry construction and 100% sprinklered appeared on the forms each year and remained uncorrected.
- In 2003, Mr. Raymond delegated responsibility for insurance to Mr. McMullin. He gave no instructions and did not review the various kinds of coverage with him.
- The first time Mr. McMullin saw the Locations Details Summary was in 2003. Marsh did not discuss the individual categories listed on the Locations Details Summary, other than the business interruption which Mr. McMullin was shown how to calculate.
- When Mr. McMullin was asked to update the Locations Details Summary, he assumed the information in the construction and

sprinklering comments was accurate because it was historical information and he had no reason to doubt its veracity.

- There were two inspection reports prepared by a company named Technical Risk Services Inc. (TRS). It performed inspections on the Grafton Connor building and the North End Pub in November 2002.
- Mr. Burke of Marsh Adjustment knew of the inspections and received a report for the Grafton Connor building but he did not receive a copy of the inspection report for the North End Pub.
- Mr. Burke did not provide the TRS inspection report for the Grafton Connor building to Marsh UK.

[103] The trial judge made other findings of fact, however, those outlined above are the findings applicable to his analysis of the standard of care of an insurance broker. One finding that is absent from the trial judge's decision is the status of the TRS inspection report on the North End Pub. That report is attached to a letter dated January 16, 2003, and is addressed to the then General Manager of the North End Pub, Harvey Warren. In that report there are two statements that clearly showed the North End Pub was not sprinklered. On page 3 of the report the author states:

> The contact stated they are currently getting a price on installing a sprinkler system.

On the next page he says:

> There is currently no automatic sprinkler system. The insured is in the process of getting a quote to have the building sprinkler protected.

[104] It does not appear that this report was received or reviewed by anyone at Grafton Connor.

[105] Whether it was received by Grafton Connor is a bit of an aside because no one is suggesting the information relating to the sprinklers is inaccurate. To the contrary, Grafton Connor relies on its accuracy in its claim against Marsh.

[106] I mention this evidence as it appears to me to be somewhat important for the issues that were before the trial judge. In ¶329 of the trial judge's decision he says:

> [329] … Mr. Hurst appears to have been the only person at Grafton Connor who was aware that the North End Pub was mixed construction and had no sprinklers. …

[107] This document certainly calls into question his finding that Mr. Hurst was the only person at Grafton Connor who was aware that the North End Pub had no sprinklers. The best that can be said from the evidence at trial was that as between Mr. Raymond, Mr. McMullin and Mr. Hurst, only Mr. Hurst had that knowledge.

[108] It certainly begs the question of whether Mr. Warren who, by Mr. Hurst's account, was the General Manager of the North End Pub for two to three years in the late 1990s, would have knowledge that the property was not sprinklered. Particularly in light of Mr. Hurst's evidence that I had referred to earlier that "anyone with rudimentary knowledge of sprinkler requirements and fire protection should have known" that the North End Pub was not sprinklered. It defies logic that Mr. Warren, the general manager working in the pub, would not have known that.

[109] With this factual backdrop, I will now turn to the trial judge's formulation of the standard of care of Marsh.

[110] With respect, it is my view that the trial judge's formulation of the duty of care owed by Marsh to Grafton Connor is both legally and factually flawed. Particularly where the trial judge failed to consider that Grafton Connor had knowledge that the pub was not sprinklered and of mixed construction.

[111] The relationship between an insured and an agent is well-established. In *Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Co. of Canada*, 2005 NSCA 53, this Court found that it is the insured's duty to provide correct information to its agent and it is the agent's duty to deliver a policy which provides the appropriate coverage. Freeman, J.A. stated:

> 42 The customer's duty is to provide accurate information respecting the risk, and to pay the premium. The customer is entitled to rely on the skill and expertise of the agency to obtain and deliver a policy which provides the insurance coverage his premium has paid for during the coverage period. If a material change in the risk occurs during the coverage period it is the duty of the customer, the insured, to notify the agency or the insurer. …

[112] The relationship has also been discussed in the *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191 in which Justice Wilson, adopted the

reasoning of the majority in the seminal case of *Fine's Flowers Ltd. et al. v. General Accident Assurance Co. of Canada* (1977), 17 O.R. (2d) 529 (C.A.) as follows at p. 216:

> In my view, *Fine's Flowers* stands for the proposition that private insurance agents owe a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs. I note that Professor Snow has summarized the effect of *Fine's Flowers* in "Liability of Insurance Agents for Failure to Obtain Effective Coverage: *Fine's Flowers Ltd. v. General Accident Assurance Co."* (1979), 9 Man. L.J. 165, in the following terms, at p. 169:
>
> > The implication of this case and many others like it in recent years seems clear. Consumers who place their faith in insurance agents holding themselves out as competent and find their faith misplaced, will frequently be able to find recourse against the agent. ... [T]he extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, as set out in this case, is a fairly stringent one for the agent. Moreover, given the general situation of the principal relying very heavily on the expertise of the agent, it does not seem to be an unreasonable burden for an insurance agent to bear. [Emphasis added.]
>
> The duty of care owed by an insurance agent was further elaborated in *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.* (1983), 1 C.C.L.I. 34 (Ont. H.C.) (conf. on appeal (1984), 4 C.C.L.I. xxxvii (Ont. C.A.)). It was held in that case that where the customer adequately describes the nature of his or her business to the agent, the onus is then on the agent to review the insurance needs of the customer and provide the full coverage requested. Should an uninsured loss occur, the agent will be liable unless he or she has pointed out the gaps in coverage to the customer and advised him or her how to protect against those gaps.

[Emphasis added]

[113] Although the trial judge references the above-noted cases, in my view, he failed to properly apply them or to explain why he was deviating from the well-settled law on the respective duties of the parties.

[114] His deviation from the normal duties of the parties seems to arise from his characterization of Mr. Raymond and Mr. McMullin as unsophisticated clients and the risks to be insured as significantly complex. At ¶312 he says the following:

> [312] As Marsh points out in its submissions, the content of a broker's duties will vary depending on the sophistication of the client. According to Marsh, Ed

> Raymond, a former lawyer, and Steve McMullin, an accountant, were sophisticated clients, and Marsh was therefore entitled to assume that they needed little in the way of counsel and advice. I have heard no evidence, however, that a representative of Marsh ever made inquiries of either man to ascertain his experience placing commercial property insurance, or the degree of confidence each had in his respective ability to provide accurate answers to the questions required to secure coverage. That such inquiries were never made of Mr. Raymond is patently obvious, since he believed, despite multiple meetings with Blake Miller, that Mr. Miller had gathered all of the information for the initial application and ensured its accuracy.
>
> [Emphasis added]

[115] To put the trial judge's statement into context, he would require agents in the position of Marsh to make inquiries of their clients as to whether or not they had the necessary sophistication to determine whether or not the North End Pub was sprinklered and of masonry construction. With respect, this appears to be an attempt by the trial judge to do an end-run around the well-settled law which requires a customer to provide accurate information to its agent. Stated another way, it is imposing upon an agent a requirement to verify the information which is in the knowledge of the insured. This would be a significant departure from the law as it presently exists.

[116] The trial judge then goes on to speak in terms of the complexity of the risk:

> [317] Whether the standard of care will require the insurance broker to make inquiries of the nature described above will depend on the complexity of the risk. The decisions in *Biggar*, *O'Connor*, *Wolfe*, *Goodbrand*, and *Edwards* involved basic life, home and auto insurance applications. The information required to obtain these types of coverage would be within the personal knowledge of the applicant, regardless of his or her experience with the placement of insurance. In such a situation, there would be no obligation on the broker to make inquiries as to the applicant's ability to accurately respond to the questions being asked.
>
> [318] Where the risk is significantly more complex, the broker must make additional inquiries, *before* the application form is completed or the information otherwise compiled, to ensure that the applicant either has the necessary skill to provide accurate information, or is aware of the options available, including property inspections, to obtain it. Once this obligation has been fulfilled and the information reduced to writing, the cases cited by Marsh will apply, and the applicant will be responsible for reading it over and correcting any inaccuracies.

[Emphasis added]

[117] There are a number of other problems with this reasoning:

- The trial judge references the fact that Marsh had not made inquiries of either Mr. McMullin or Mr. Raymond to ascertain their experience in purchasing commercial property insurance. He does not explain why this would be necessary in this case. There is no suggestion or evidence that Mr. Raymond and Mr. McMullin did not know that they had to provide accurate information as to the property to be insured. In fact, they both acknowledged it in their evidence and the trial judge so found. They also testified they were aware the description of the property was an important factor for the insurer.
- Although the trial judge found as a fact that the misrepresentation with respect to the masonry construction and the sprinklering originated with Marsh, he also found when Mr. Raymond reviewed and signed the application form he agreed with the description and adopted it as his own. Reviewing the application form and determining if the information was accurate was not complicated and does not require sophistication.
- Whether the North End Pub was sprinklered and of masonry construction was not complicated. The question could be answered very simply. As Mr. Hurst said, and I have quoted it here on a couple of occasions, anyone with a rudimentary knowledge of construction and sprinklering would have known the pub was not sprinklered.
- The trial judge failed to turn his mind to the fact that Beaufort itself actually had knowledge of the true state of affairs.
- The trial judge confuses the risks to be covered with the description of the property. The insurance broker is to advise the insured of what risks are covered, what risks are not covered and what coverage an insured may need (*Fine's Flowers, supra*, ¶54-55). There was no issue here with the risks to be covered. The issue was with respect to the property description. The North End Pub was, but for the misrepresentations, covered for the risks under the policy.
- There was no evidence that the risks, as that term is used in *Fine's Flowers*, were complex.

[118] In ¶317, the trial judge distinguished a number of cases on the basis that the information required to obtain these types of coverage would be within the personal knowledge of the applicant, regardless of his or her experience with the placement of insurance.

[119] I will not refer to all of the cases but, in my respectful view, they are indistinguishable. In *Goodbrand v. Pearson Insurance Broker Ltd.*, [2001] O.J. No. 1522 (Sup. Ct. J.), the court adopts the reasoning in *Wolfe v. Western General Mutual Insurance*, [2000] O.J. No. 2673 (Sup. Ct. J.). After quoting from *Wolfe* at length, Mossip, J. concluded:

> 14 As to the obligation of the insured to read the application and ensure its accuracy, I find that *Wolfe et al*., above,. and *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. et al.* (1997), 34 O.R. (3d) 1, stand for the proposition that it is the insured's responsibility to read and ensure the accuracy of both the application for insurance, and the insurance policy itself. It is simply no defence to an inaccurate application and subsequent inadequate policy, for the person seeking to escape the provisions of the contract, to allege that they did not read it.

[120] The trial judge seems to be suggesting that because neither Mr. McMullin nor Mr. Raymond had personal knowledge of the true state of affairs at the North End Pub, Beaufort Investments somehow gets a pass because of that lack of knowledge. As I went into some detail earlier in these reasons, the applicant for insurance in this particular circumstance is Beaufort Investments. Beaufort had the knowledge that the property was unsprinklered and not of masonry construction. There was nothing to distinguish the line of cases referred to by the trial judge.

[121] Finally, there was no evidence from anyone at Grafton Connor that the issues with respect to the description of the North End Pub (or the other properties for that matter) were complicated. There was no suggestion that they did not understand the application. This aspect of the placement of insurance is not complex at all. Representatives of Grafton Connor were asked to review the application forms for their accuracy and to sign them. The end result was they signed application forms which contained false information.

[122] In conclusion on this point, the ability of Beaufort in making its application for insurance to know and correctly represent whether its building was of masonry construction, and whether that building contained sprinklers, did not require any sophistication of its designated representatives in matters of insurance. Marsh, in

keeping with established case law, should be entitled to rely upon the applicant's ability to represent such basic information correctly without further investigation.

[123] Finally, I will refer to one other part of the trial judge's decision which I also find troubling:

> [319] In my view, Marsh's opportunity to avoid the losses that occurred in this case was likely limited to the initial three years of coverage. Once Steve McMullin took over responsibility for the insurance and Ed Raymond left Grafton Connor, questions by Marsh about Mr. McMullin's ability to provide accurate information about the properties may not have changed the outcome. Mr. McMullin would have no reason to doubt the accuracy of the pre-existing information. He would have assumed that Marsh had done its due diligence in dealing with his predecessor. That said, if Marsh had reviewed the file and advised Mr. McMullin that the previous information should be verified by an inspection, I am confident that he, like Mr. Raymond, would have followed this advice.

[124] The trial judge earlier had concluded that if Marsh's representative had asked Mr. Raymond about his experience placing property coverage in 1999, Mr. Raymond likely would have arranged for property inspections if it had been recommended. He goes on to find that if the inspections had been conducted, proper coverage would have been in place for the North End Pub at the time of the fire. In this portion of his decision, the trial judge places the cause of Grafton Connor's loss to a course of dealing between Marsh and Grafton Connor in 1999, seven years before the period of the policy in issue in the action below and suggests, that even if the question had been asked of Mr. McMullin, it would not have changed the outcome.

[125] Nothing turns on it in this appeal but to the extent that the trial judge's decision may be interpreted as saying that at some point in time the insured's responsibility to provide all facts material to an insurer's appraisal of the risks ceases or is exhausted by the initial provision of information, it is incorrect. An insured's duty to disclose material facts is an ongoing obligation.

[126] For all these reasons, it is my view that the trial judge erred in his formulation of the standard of care. I would allow this ground of appeal and reverse the trial judge's finding that Marsh was 50% liable for Grafton Connor's damages.

7 Issue #4 Whether the trial judge erred by interpreting the Policy as a "blanket" and not a "scheduled" policy (Lloyd's Cross-Appeal)

Standard of Review

[127] This issue was raised by Lloyd's on its cross-appeal and relates to the interpretation of the policy and the meaning of the words used in the policy. It is an extricable question of law that is reviewable on a standard of correctness. (*Garden View Restaurant Ltd. v. Portage La Prairie Mutual Insurance Company*, 2016 NSCA 8, ¶14, *Ledcor*, *supra*).

Analysis

[128] The application for insurance coverage submitted by Grafton Connor included a Location Details Summary table containing information about its various properties. In 2006, as it had done previously, Marsh prepared a renewal proposal document containing the information, which it then forwarded to Marsh UK to use when approaching the Lloyd's market for insurance for Grafton Connor. This market proposal contained the Location Details Summary of April 2006 as well as other information regarding insurance requirements and limits. The North End Pub was listed on the Location Details Summary as having a declared building value of $650,000, and contents value of $180,000. Lloyd's took the position at trial that these declared values represented the limit of its liability even if coverage were found under the Policy in favour of Grafton Connor. It now argues the same position on its cross-appeal.

[129] The trial judge expressly rejected Lloyd's argument that coverage for the North End Pub was limited to the amount declared in the Location Details Summary. In his decision, the trial judge found that the coverage provided by the Policy was "blanket" coverage, as it did not limit coverage to the declared value of a location in the event of a loss involving that location. After reviewing the positions of the parties and the authorities cited by each party, the trial judge interpreted the words of the Policy as follows:

> [368] In deciding whether the Policy provides scheduled or blanket coverage, I am satisfied that I must consider the policy wording as a whole in order to determine whether the parties intended the contract to be a scheduled or a blanket policy. The first page of the Policy, under the heading "THE SCHEDULE", lists, *inter alia*, the policy number, named insured, address of insured, premium,

> inception date, expiry date, and limits of liability. The limit of liability is described as follows:
>
> **LIMITS OF LIABILITY:** CAD 17,616,000 any one Occurrence and in the annual aggregate in respect of Earthquake and Flood/Sewer back-up separately.
>
> [369] There is no breakdown of the individual locations covered by the Policy, or their respective values. The Policy makes no reference to the Location Details Summary or any other schedule of values. There is nothing about the format or the content of the Location Details Summary to suggest that it was intended to form part of the Policy. For these reasons, I conclude that the Policy is a blanket policy.

[130] As appears from the above passage, the trial judge based his decision that the Policy provided "blanket" coverage, as opposed to "scheduled" coverage, entirely on the clear and unambiguous words of the Policy. In my view, he was correct in concluding that the Policy provided "blanket" coverage and the plain words of the Policy do not lead to any other conclusion.

[131] In *Royal & Sun Alliance Insurance Company of Canada v. Snow*, 2016 NSCA 7, this Court summarized the principles relevant to the interpretation of insurance policies as follows:

> [13] … I do not intend to do a comprehensive review. I will, however, summarize the relevant principles:
>
> (a) The primary interpretative principle is that where the language of the policy is unambiguous, effect should be given to the clear language of the policy reading it as a whole;
>
> (b) Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. Interpretations that are consistent with the reasonable expectations of the parties should be preferred, so long as the interpretation can be supported by the text of the policy. Interpretations that would give rise to an unrealistic result or were not in the contemplation of the parties are to be avoided;
>
> (c) The rules of interpretation are intended to resolve ambiguities. They are not intended to create ambiguities where none exist;
>
> (d) Courts should strive to interpret similar policies consistently;
>
> (e) When the contractual rules of construction fail to resolve the ambiguity courts will construe the policy *contra proferentem*. Under the *contra proferentem* rule, coverage provisions are interpreted broadly; exclusions narrowly.

[132] As appears from the above passage, whether the policy provides "scheduled" or "blanket" coverage should be determined, if possible, based on the "primary interpretative principle" that where the language of the policy is unambiguous, effect should be given to that clear language.

[133] Section 3 – Limits of Liability specifically states that Lloyd's liability for any loss thereunder will not exceed the "Limits of Liability shown in the Schedule" (p. 2):

> 3. LIMITS OF LIABILITY
>
> The Underwriters shall not be liable for more than their proportion of the Limits of Liability stated in the Schedule.
>
> …
>
> The Underwriters' total liability for any loss or losses sustained by any one or more of the Insured's under this insurance will not exceed the Limits of Liability shown in the Schedule. The Underwriters shall have no liability in excess of the Limits of Liability whether such amounts consist of insured losses sustained by all of the Insured or any one or more of the Insureds from the same occurrence.

[134] The Schedule referred to in the above section precedes the text of the Policy. It is attached to and forms part of the Policy. Page 1 of the Policy specifically states:

> **NAMED INSURED**
>
> …AS STATED IN THE SCHEDULE ATTACHING TO AND FORMING PART OF THIS POLICY, HEREAFTER TERMED "THE SCHEDULE", AND ITS AFFFILIATED, SUBSIDIARY, AND ASSOCIATED COMPANIES …

[135] The Schedule also contains the following clauses governing limits and sub-limits on liability:

LIMITS OF LIABILITY	CAD 17,616,000 any one Occurrence and in the annual aggregate in respect of Earthquake and Flood/Sewer back-up separately.
SUB-LIMITS	As per schedule attached.

[136] As appears, the Policy has a global limit of $17,616,000 per occurrence, with sub-limits as specified in the "schedule attached". The "schedule attached" is not the location details summary but the "Schedule of Sub-Limits" which sets out a series of sub-limits for specific types of losses. There is no mention in either the

Schedule or the Schedule of Sub-Limits of any further limitation which would restrict the per occurrence coverage of $17,616,000 to a lesser limit for a loss in relation to only one insured location.

[137] In its factum, Lloyd's argues that the parties intended the Policy to be a "scheduled" Policy with sub-limits for each location based on the declared replacement cost in the Location Details Summary, as opposed to a "blanket" Policy with an overall global limit. Lloyd's does not claim that intention is found in the words of the Policy, but instead claims it is found in the fact that Lloyd's saw and "scratched" the Location Details Summary in the course of issuing the Policy. By "scratched" Lloyd's means that it reviewed and relied on the values in the summary when accepting the risk and setting the premiums. Lloyd's argues that the trial judge erred by basing his decision on only the words of the Policy and not the "full factual matrix" which Lloyd's submits should include what it saw and "scratched".

[138] The Policy has only one limit on liability, which is the $17,616,000 global limit for "any one Occurrence". The Policy does not mention the declared replacement cost for each insured location or the Location Details Summary at all, let alone that those values constitute a sub-limit on the coverage available under the policy. The unambiguous terms of the policy cannot be varied by what Lloyd's saw and "scratched". The trial judge therefore decided correctly that he should give effect to the clear language of the policy and proceed no further with his analysis.

[139] Even if it would have been appropriate or necessary for the trial judge to review the underlying "factual matrix" in order to interpret the policy, such a review would not have supported the conclusion that Lloyd's now urges this Court to adopt. There is no evidence that Lloyd's and Grafton Connor held a common intention to limit coverage to the values declared in the Location Details Summary in the event of a loss.

[140] The policy contains a sub-limit on coverage in Section 12 – Valuation which specifies that real and personal property are to be valued at replacement cost. The amount payable for a loss therefore cannot exceed the actual replacement cost of the affected property. To interpret the policy in the manner argued by Lloyd's, I would have to read the word "replacement cost" in Section 12 of the Policy, not as actual replacement cost, but as the declared replacement cost specified in the Location Details Summary. In the absence of any evidence that the parties

mutually intended those words to bear that strained interpretation, I decline to do so.

[141] Lloyd's also argues that the declared values listed in the Location Details Summary must be interpreted as limits on coverage given the significant total coverage of $17,616,000 available under the Policy, far exceeding the replacement cost of Grafton Connor's most expensive building. That argument ignores the fact that valuation of a loss at a single location is based on its actual replacement cost as prescribed by Section 12 of the Policy. The Schedule states that $17,616,000 is the upper limit of liability per occurrence. The limit of the insurer's liability for an occurrence only affecting one building would be the actual replacement cost of that building and its contents pursuant to Section 12 of the Policy. Only in the case of an occurrence affecting multiple properties would the global limit of liability of $17,616,000 be engaged. In effect, the Policy provides coverage for actual replacement cost, subject to a global upper limit of $17,616,000. There is no error in that interpretation, whether that interpretation is based solely on the text of the Policy, or also considers the surrounding factual matrix.

[142] For these reasons, I would dismiss this ground of appeal.

8 Issue #5 Whether the trial judge erred by failing to apply the co-insurance provisions of the policy against Grafton Connor (Lloyd's Cross-Appeal)

Standard of Review

[143] There was no dispute between the parties as to the proper interpretation of the co-insurance clause in this case (Trial Decision, ¶410). The only issue to be determined by the trial judge was whether the co-insurance clause was triggered by applying the facts of this case to the co-insurance clause. This is an issue of mixed law and fact and will be reviewed on the palpable and overriding error standard.

Analysis

[144] The co-insurance provision of the Policy is found in the second half of Endorsement 10:

> … in the event of any error or omission including a declaration of the Insured's total insurable values being less than (80%) eighty percent of the actual insurable values at the time of declaration, any loss payable in respect of the property

> involved or other insurable interests in the loss shall be reduced in the proportion that the said actual insurable value bears to the declared insurable value provided that this provision shall only apply when the actual building(s) or individual property(ies) or other insurable interests involved in the loss are the subject of an incorrect declaration of values.

[145] The total insurable value declared by Grafton Connor in 2006 was $17,596,263. After the fire, Grafton Connor retained Tudor Valuations to perform replacement cost valuations for each of the other properties.

[146] The trial judge found:

> [410] … Based on these valuations and the SPEC valuation of the North End Pub, the actual insurable value of the properties in 2007 was $19,705,018.16. Dividing the declared insurable value by the actual insurable value in 2007 yields a result of 89 percent.

[147] The trial judge went on to find that the co-insurance provision was not triggered in these circumstances (¶433).

[148] Lloyd's appeals arguing that the trial judge's reliance on the Tudor appraisals was ill-founded. It argues that the Tudor appraisals were never proven and, although Mr. McMullin identified the appraisals in his testimony, no evidence was led to prove the truth of their contents. It follows, Lloyd's says, absent the Tudor appraisals, there was no evidence upon which the trial judge could base his decision. The argument boils down to this: Grafton Connor failed to prove the 2006 values of its properties and to show that the stated replacement cost values were at least 80% of their actual values. Lloyd's argues that Grafton Connor had the burden to prove this in order to avoid the co-insurance penalty.

[149] Putting aside what use the trial judge could have made of the Tudor appraisals, I agree with Grafton Connor that if Lloyd's wished to rely on the co-insurance clause, it was for them to show how and to what extent Grafton Connor's claim was to be reduced. This issue was addressed in *Jauvin v. Prévoyants du Canada*, 1986 CarswellOnt 753 (S.C. (H. Ct. J.)):

> 76 … The purpose of a co-insurance provision is to limit the liability of the insurer and must therefore be seen as included for its benefit. The burden of proof, in my opinion, rests with the insurer to satisfy the court how, and to what extent, the insured's claim is to be reduced. Under the relevant clause, this burden has not been met here and therefore no effect is to be given to this clause.

[Emphasis added]

[150] The same is true here, if Lloyd's was relying on the co-insurance clause to reduce the insured's claim, it had to show how and to what extent.

[151] Lloyd's provides no authority for its position that it was Grafton Connor's onus to prove the co-insurance clause was not triggered.

[152] It is not necessary to comment on whether the trial judge erred in relying on the Tudor appraisals. Failure by Lloyd's to show that the co-insurance clause was triggered in these circumstances is sufficient to dispose of this ground of appeal.

9 Issue #6 Whether the trial judge's decision can be affirmed on the basis that Grafton Connor was "reckless" in relation to its placement of insurance with Lloyd's (Lloyd's Notice of Contention)

Standard of Review

[153] The trial judge did not address this issue because he found that Endorsement 10 did not excuse unintentional material misrepresentations:

> [79] Having concluded that the Endorsement does not apply to excuse unintentional material misrepresentations, I need not consider the argument by Underwriters that the misrepresentations by Grafton Connor were made recklessly.

[154] As a result, there is no standard of review with respect to this issue.

Analysis

[155] In its Amended Defence, Lloyd's pleaded in the alternative as follows:

> 9E The Plaintiffs negligently or recklessly misrepresented the materials of which the building was constructed and whether and to what extent the building was sprinklered. As a result, the Plaintiffs cannot rely on Endorsement 10, which in any event does not offer relief from these circumstances. The particulars of the said negligence are recklessness are as pleaded in paragraphs 3 and 4 of Marsh's Amended Statement of Defence and Crossclaim, which Underwriter's repeat and adopt, and such other negligence or recklessness as may appear.

[156] In its Notice of Contention, Lloyd's asks this Court to affirm the decision of the trial judge on the basis that both Marsh and Grafton Connor were reckless in relation to the placement of insurance.

[157] Clause 9E of the Amended Defence, which I have set out above, does not allege that Marsh was reckless, nor did Lloyd's argue Marsh was reckless before the trial judge. As a result, and appropriately, the trial judge did not address whether Marsh had been reckless. However, the trial judge also failed to address Lloyd's argument Grafton Connor acted recklessly.

[158] Recklessness is a question of mixed fact and law and is properly viewed as an inference that may be drawn if the facts meet the legal definition. Since the trial judge did not decide whether an inference of recklessness against Grafton Connor should be made in this case, this Court is entitled to consider whether it should draw the inference sought.

[159] *Civil Procedure Rule* 90.48 expressly confers that jurisdiction:

> **90.38 (1)** Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the *Judicature Act* or any other legislation the Court of Appeal may do all of the following:
>
> …
>
> (b) draw inferences of fact and give any judgment, allow any amendment, or make any order that might have been made by the court appealed from or that the appeal may require;

[160] Such inferences must be drawn only from facts as found by a trial judge, agreed upon by counsel, or clearly established on the record. This was clearly stated by Matthews, J.A. in *Pentagon Investments Ltd v, Canadian Surety Company.*, [1992] N.S.J. No. 402 (C.A.):

> Inferences can only be drawn by our Court from facts as found by a trial judge or agreed upon by counsel or clearly established on the record. Here the trial judge found no facts either by agreement or otherwise upon which the requested inferences could be drawn favouring the appellant. There are none on the record. With deference the appellant wishes us to try the case again. That is not our function. …

[161] I find that this is a proper case for this Court to review the facts as found by the trial judge, along with the evidence on the record, in order to determine

whether they are sufficient to draw an inference of recklessness on the part of Grafton Connor.

[162] A finding of recklessness would negate Grafton Connor's argument that its misrepresentations with respect to the North End Pub were unintentional (even if Endorsement 10 applied to unintentional, pre-contractual errors and omissions).

[163] The most often-cited description of fraudulent misrepresentation comes from Lord Herschell in *Derry v. Peek*, [1889]UKHL 1:

> … fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[Emphasis added]

[164] This Court has adopted this description in several cases including *Walsh v. Unum Provident*, 2013 NSCA 124. That was an appeal by the insured from a decision that dismissed his action for damages under a disability insurance policy and declared the policy was void from the outset. The trial judge found that the insured failed to disclose material facts on its insurance application and the application was a false representation made knowingly without belief in its truth or in the alternative, they were void for recklessness. In upholding the trial judge, MacDonald, C.J. adopted the trial judge's reasoning including, his reliance on *Derry*:

> [15] However, because the contract was in effect for over two years, a finding of material misrepresentation would not be enough to void the policy. Instead, Unum would have to go further and establish that the representations were fraudulent. As the judge explained, this could be established by Unum proving either intent or recklessness.
>
> …

> ¶71 The test for fraud was considered in *Kruska v. Manufacturers Life Insurance Company* (1984), 54 B.C.L.R. 343, 1984 CanLII 888 (B.C. S.C.) affirmed at 1985 CanLII 464 (B.C.C.A.)), at paras. 37 and 38:
>
> > 37. The accepted test of actual fraud in a civil case derives from *Derry v. Peek* (1889), 14 A.C. 337 (H.L.). There must be a false representation, made knowingly, without belief in its truth, or recklessly, without care whether it is true or false. Nothing less than this will suffice for the defendant to succeed in this case. Conduct without fraudulent intent which, before the statute, might have been characterized as fraud will no longer so qualify. The effect of the statute is that the insured is still bound by her duty of utmost good faith until the incontestability clause takes effect. After that time she will be held covered if her material misrepresentation or non-disclosures were made innocently, or negligently. The incontestability clause protects her from false representations of that kind. But it will not protect her if she has the fraudulent mind described in *Derry v. Peek*. Then the law will deprive her, or her beneficiaries, of the proceeds of the contract.
>
> [emphasis added]
>
> …
>
> [16] On the facts as he found them, the judge found the misrepresentations to be intentional, or alternatively reckless:
>
> …
>
> > [78] … Alternatively, I conclude that he was reckless, as it stretches the imagination to believe that he would not recall these numerous medical conditions, tests and attendance at specialists. There was no evidence as to why this information would not have been disclosed other than that the plaintiff had forgotten. …

[165] An intention to lie or deceive is not required to prove recklessness. In *Carreau v. Turpie*, [2006] O.J. No. 4224 (S. Ct. J.), Justice Linhares de Sousa made the following comments:

> 18 I do not find the conclusions of the Trial Judge that the Appellant, Mr. Turpie, was a sincere and honest man, but that the answers he and his wife gave in the Disclosure Statement amounted to fraudulent misrepresentation to be inconsistent. The Trial Judge stated correctly the legal definition of "fraudulent misrepresentation" as stated by Leitch J. in *Moriani v. McCormack* [1999] O.J. No. 1697, as approved by the Supreme Court of Canada in *Redican v. Nesbitt*, [1924] S.C.R. 135 (S.C.R.). One may be liable for fraudulent misrepresentation without necessarily intending to cheat or injure the person to whom the misrepresentation was made. Answers that were made with recklessness of their

truth or falsity also qualify which is what the Trial Judge found happened in this case.

[166] I also find the comments of Feehan, J. instructive in *Opron Construction Co. v. Alberta*, [1994] A.J. No. 224 (Q.B.):

> 634 Ever since *Derry, supra*, courts have distinguished between fraudulent recklessness and negligence. As Fawcus, J., said at p. 200 in *K.R.M. Construction, supra*, "neither bungling, ineptitude nor gross negligence establishes fraud."
>
> 635 However, being oblivious to the truth equates with fraud. *Chitty on Contracts*, vol. 1, 25th ed. (London: Sweet & Maxwell, 1983) at p. 227 states:
>
> > The requirement of proof of the absence of honest belief does not, however, mean that the plaintiff must prove the defendant's knowledge of the falsity of the statement. It is enough to establish that the latter suspected that his statement might be inaccurate, or that he neglected to inquire into its accuracy, without proving that he actually knew that it was false.
>
> …
>
> 638 In *Nesbitt, Thomson & Co. Ltd. v. Pigott*, [1941] S.C.R. 520, the frame of mind of the representor of "indifference" as to whether his statements were true or false was sufficient for liability, when the facts were proven to be false.
>
> 639 While the absence of reasonable grounds for the defendant's belief is not determinative of the question, it can provide some evidence of recklessness. In *Derry, supra*, Herschel, L., acknowledged the evidentiary utility of the absence of reasonable grounds, and said at p. 375:
>
> > The ground upon which an alleged belief is founded is a most important test of its reality... [A]lthough means of knowledge are, as was pointed out by Lord Blackburn in *Brownie v. Campbell*, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false. [emphasis added]
>
> …
>
> 642 Therefore, the plaintiff need not prove that Alberta Environment's employees and agents who reviewed the tender package had in their minds, at the time the packages were sent out, their knowledge of other information that was inconsistent with that in the package. It is sufficient proof of recklessness that this other information was actively in their minds at some prior time, and that no steps were taken to review the accuracy and completeness of the tender package.

[Emphasis added]

[167] This case law provides the principles for determining whether recklessness exists in any given situation. They may be summarized as follows:

- Representation must be made without regard whether it is true or false;
- An intention to lie or deceive is not required to prove recklessness;
- Being oblivious to the truth equates to recklessness or fraud;
- Indifference as to whether statements were true or false may amount to recklessness;
- The absence of reasonable grounds for the belief is not determinative of the question but the lack of a reasonable belief can provide some evidence of recklessness.

[168] With these principles in mind, I will review the findings of fact made by the trial judge to determine whether the inference sought by Lloyd's is warranted in these circumstances.

[169] I will start by repeating some of the trial judge's findings of fact which I had referred to earlier.

[170] I will start with the obvious – the information provided to Lloyd's that the North End Pub was sprinklered and of masonry construction was false. Other findings of the trial judge material to this issue are:

- Mr. Hurst was always aware that the North End Pub was of mixed construction and had no sprinklers.
- Both Mr. Raymond and Mr. McMullin were aware that it was important to provide accurate information to an insurer underwriting coverage.
- Mr. Hurst provided no instructions to Mr. Raymond before asking him to assume responsibility for placing property insurance. He did not review the features of any of the properties with Mr. Raymond.
- When Mr. Raymond reviewed the completed application forms he was of the view that the information had been gathered by Blake

Miller, Marsh's employee. He relied on Mr. Miller to complete the forms accurately. Mr. Raymond did not tell Mr. Miller that he was relying on him, nor did he ask Mr. Miller or Ms. Sanderson (who assisted Mr. Miller in filling out the forms) how the information on the applications had been acquired.

- Neither Mr. Raymond nor Mr. McMullin knew whether the North End Pub was sprinklered and neither asked Mr. Hurst nor any employee of the pub whether the property was sprinklered.
- Although the misrepresentation that the North End Pub was of masonry construction and sprinklered originated with Marsh, when Mr. Raymond reviewed the 1999 application form he agreed with the description and adopted it as his own.
- Each year Grafton Connor had the opportunity to review, update and confirm the information being submitted to the insurer in order to renew coverage.
- The representations that the North End Pub was of masonry construction and 100% sprinklered appeared on the application forms every year after 1999 until the fire.
- Mr. Raymond, when he delegated responsibility for insurance to Mr. McMullin, gave him no instructions.
- Mr. Raymond, although he stated he relied on Marsh for the accuracy of the information, made no inquiries of Marsh as to how the information had been acquired nor did he advise Mr. Miller that he was relying on Marsh.

[171] In addition to these facts, I had earlier found that Mr. Hurst's knowledge should be imputed to Beaufort Investments. Therefore, the insured knew the information was false.

[172] I will now turn to the record and, in particular, the testimony of the relevant individuals on this issue.

[173] I will start with the evidence of Mr. Hurst which I referred to earlier. For ease of reference I will repeat it here. In direct examination he said the following:

> There was no way that the North End Pub would have been sprinklered. And anyone with rudimentary knowledge of sprinkler requirements and fire protection should have known that.

[174] Mr. Hurst also gave evidence as to how easily it would have been to determine whether the North End Pub was sprinklered. At trial, on cross-examination by Mr. Ryan, the following exchange took place:

> Q. Mr. Hurst, you always knew that the North End Pub was unsprinklered. Correct?
>
> A. That's correct.
>
> Q. You knew it from the time you purchased the pub – or Beaufort did – for the reasons you've explained. Correct?
>
> A. Yes.
>
> Q. Is this room sprinklered, Mr. Hurst?
>
> A. Yes, it is.
>
> Q. How can you tell that?
>
> A. You can see the sprinklers in the contrast with the acoustic tile ceiling.

[175] Finally, Mr. Hurst did not look at any insurance applications after 1996. He delegated responsibility to Mr. Raymond to place the insurance. He did so because he felt that both Mr. Raymond and subsequently, Mr. McMullin, were very skilled and he left insurance matters “in good hands”.

[176] Obviously, this confidence proved to be ill-founded which becomes apparent in both the evidence of Mr. Raymond and Mr. McMullin. Mr. Raymond gave the following evidence at trial in his direct examination with respect to the construction material:

> Q. And it's got a dot in "Masonry (masonry, concrete, walls, wood, deck, roof)". Do you recall noting that answer when you first saw this application?
>
> A. I do. In fact, this particular section is why I remember reading this application form, because I do recall focusing on that section and I saw the term "(masonry concrete, wood, deck, roof)" and I thought to myself, "Is that accurate?" I can remember doing that. And I thought, "Well" my thought process was, you know, I've been there a few times, I've driven by, I've seen the exterior brick, I've seen the concrete, I've seen the cinderblock, I've been in the basement, I've seen the stone, and, of course, I saw the roof.

[Emphasis added]

[177] As can be seen by this passage, Mr. Raymond actually turned his mind to whether the description of the property was accurate. However, despite his questioning himself on that issue, he never took steps to confirm that the information was correct. It was not like the answer was not at hand. A simple phone call or question to Mr. Hurst would have solved any issue. Instead, he confirmed the information which turned out to be false.

[178] With respect to sprinklers, Mr. Raymond's evidence is that he did not know if there were sprinklers and he never asked anyone. The following exchange took place between Mr. Raymond and Lloyd's counsel, Mr. Ryan in cross-examination:

> Q. You didn't know there were sprinklers -- that the building was not sprinklered?
>
> A. I did not. I did not know until after the fire, until this insurance was denied.
>
> Q. You never asked the question? You never asked the question, Mr. Raymond?
>
> A. No, I to who? Who
>
> Q. Anybody.
>
> A. To anyone?
>
> Q. Anybody.
>
> A. No, I don't think I never asked no, I didn't ask that question.
>
> Q. Did you know which of the other locations were sprinklered?
>
> A. Some.
>
> Q. You knew some were sprinklered?
>
> A. Yes.
>
> Q. You knew that some were not sprinklered?
>
> A. No.
>
> Q. How did you know that there were sprinklers in some locations?
>
> A. My office was in one building and it had sprinklers.
>
> Q. So?
>
> A. And I worked in that building and I was in that building numerous times and I was quite aware it was sprinklered.
>
> Q. You were quite aware of it because you could see the sprinkler heads in the ceiling, correct?
>
> A. That's about the only way I could determine there were sprinklers. I have to see it.

Q. Sure. Just as you could see sprinkler heads in this Courtroom?

A. I haven't seen them yet.

Q. Well, look up.

A. Do you want me to look?

Q. Please. Do you see them?

A. Are those yeah, I guess they are.

Q. You're asking me whether they're sprinkler heads?

A. I think they are, yeah.

[179] The exchange also reiterates what I had indicated earlier in referring to Mr. Hurst's evidence – it would have been very easy to determine whether the North End Pub was sprinklered by simply looking at the ceiling. Mr. Raymond's excuse for not knowing that the North End Pub was not sprinklered, despite having been there between six and twelve times over a 25-year span, was he simply failed to notice and he was not an observant person. The following exchange also took place in cross-examination:

Q. How can it be that whether you were there 6 or 12 times over a quarter of a century that you didn't notice that the place wasn't sprinklered? How can that possibly be, Mr. Raymond?

A. Well, to be truthful ---

Q. You're under oath so you will be truthful and I know that.

A. Sorry. I am not someone that is very good at observing things. There's no question about that. My family and others have made fun of me for years. If I may, I could tell you one situation where I was filling out a form and it asked me for the color of my eyes and I had to ask somebody what color they were. It doesn't surprise me in the least that I had no knowledge whatsoever or I didn't observe that there was sprinklers or there wasn't sprinklers.

Q. Because you ---

A. It's something that I would look for.

Q. Because you're not an observant person?

A. Well, that's one reason and I didn't observe it is the other reason.

Q. And you were there about an hour on each visit -- weren't you?

A. I can't say for sure but that's a pretty good estimate.

Q. And so you were in that pub between 6 and 12 hours and during that period you never observed whether there was sprinklers -- that's your evidence?

A. That's my evidence.

[Emphasis added]

[180] Mr. McMullin also gave evidence with respect to the information relating to the sprinklers and construction material and his knowledge that it was material to Lloyd's. Again referencing the transcript, Mr. McMullin testified as follows:

Q. You always knew that the presence or absence of sprinklers in a building would be relevant to an underwriter in deciding whether to insure against the risk of fire? You always knew that?

A. Correct.

Q. And you always knew that the composition of the building would be relevant to the underwriter in deciding whether to insure? Whether it was wood or stone or what have you?

A. Correct.

Q. Year after year you saw the pub described in these location detail summaries as masonry, correct?

A. Correct.

Q. You looked at that word year after year and you had no question about it?

A. No.

Q. Marsh never told you that they had physically inspected the pub and determined that it was masonry?

A. Correct.

Q. You've been there 15 times -- I think your evidence is about 12 times with the family in the diner and three times in the pub over the years?

A. Correct.

Q. And you knew that there was wood in that building?

A. No.

Q. You didn't know there was any wood?

A. No.

Q. You didn't know one way or another did you?

A. No.

Q. You didn't know and you didn't ask?

A. Correct.

Q. Did you give any consideration whatsoever to what the word "masonry" meant in the location detail summaries?

A. No.

Q. Why not?

A. I had no reason to doubt its accuracy.

Q. You had no reason to doubt that it was 100 percent masonry? Is that your evidence?

A. It didn't say 100 percent masonry.

Q. It said masonry didn't it?

A. Correct.

Q. And the reason you didn't doubt it was because you thought that Marsh or somebody on behalf of Marsh had inspected it, correct?

A. No.

Q. Anybody from Marsh tell you that they've been there in the pub and looked at it?

A. No.

Q. Well why did you think it was accurate, masonry?

A. Historical information. I had no reason to doubt its accuracy.

Q. Historical back to 2002 as best you could tell from your file review?

A. Correct.

Q. That wasn't ancient history was it? I mean that was a year before you took over.

A. Correct.

Q. Now you're a skilled professional. You're a college graduate. You're a senior accountant. You've got a fairly responsible position as the Vice-president of this large company. Why were you taking this information at face value?

This information you didn't (inaudible).

A. I had no reason to doubt its accuracy.

Q. You realize the importance of the accuracy of the information to Underwriters. You knew it was going to them, correct?

A. Correct.

Q. You know that they would decide to insure on the strength of the accuracy of this information?

A. Correct.

Q. You knew that they would rely on this information?

A. Correct.

Q. And the only reason you relied on the information was because it was historical?

A. It was bound coverage from 2002.

Q. Pardon me?

A. It was bound coverage from 2002.

Q. What does that mean?

A. The information that was there that I'm calling historical was bound by the insurance company, the Underwriters ---

Q. Yes.

A. --- in 2002.

Q. All right. I'll accept that but I'm missing you, Mr. McMullin, the fact that it was bound in 2002, what does that have to do with the actual accuracy of that information?

A. It gave me confidence that it was accurate.

Q. And so the reason why you didn't check on the accuracy of this information is because of the 2002 coverage, correct?

A. I had no reason to doubt its accuracy.

Q. Because of the 2002 coverage?

A. Correct.

Q. That could be the only reason -- and I don't want to go back over everything we talked about the last five minutes. Can you think of any other reason why?

A. No.

Q. The only reason you didn't check, the only reason you didn't put up your hand was because Underwriters had bound cover in 2002 on the same information. That's your evidence isn't it?

A. That's correct.

[Emphasis added]

[181] The only reason Mr. McMullin thought the information about sprinklers and construction material was accurate was because an insurer had previously bound coverage in 2002 and for no other reason. He made no inquiries to determine the accuracy of the information. What is particularly telling from a review of the transcript is that Mr. McMullin did not even know what the word “masonry” meant

and does not recall making any inquiries to determine its meaning. The following exchange took place with Mr. Ryan:

> Q. And the first entry, the first dash says "Masonry??" with two question marks. You don't know what that means? Why did you write that?
>
> A. He mentioned the word masonry and I didn't know what it meant.
>
> Q. You didn't know what masonry meant?
>
> A. No.
>
> Q. You got to be kidding. You did not know what masonry meant?
>
> A. Correct.
>
> Q. And did you ask him?
>
> A. I can't recall.

[182] Perhaps even more indicative of Mr. McMullin's lack of knowledge and failure to make inquiries is Mr. McMullin's emphatic response in direct examination to the question of whether he knew whether the North End Pub was sprinklered:

> Q. Did you know in the years 2003 to 2007 whether the North End Pub Diner was sprinklered [or] not?
>
> A. Absolutely not.
>
> Q. Did you have any discussions with anyone at Grafton Connor Group in those years concerning those two items of construction and sprinklered?
>
> A. No.

[183] Despite being "absolutely not" aware of the facts he was attesting to, he took no step to ascertain if they were correct.

[184] I have set out this testimony in some detail to show the depth of the indifference of the individuals responsible for placing insurance on whether the information provided was accurate.

[185] Mr. Raymond's excuse for not checking on the accuracy of the information was that he was relying on Marsh. Yet he never told Marsh he was relying on them nor did he advise them he was relying on them for the accuracy of the information. Further, Mr. Raymond never asked Ms. Sanderson, his assistant comptroller, whom he identified as his primary person responsible for insurance

issues, whether the information was correct. The trial judge found that it was her and Marsh's representative who prepared the Location Details Summary.

[186] Mr. McMullin's evidence is that he did not rely on anyone else, other than the materials on file, for the information that was contained on the application form; he did not make any inquiry; he did not seek any confirmation; nor did he rely on his own personal knowledge. Oblivious to the facts he simply confirmed that the information contained on the application forms was accurate.

[187] Although somewhat tangential to the issues with respect to the North End Pub, but indicative of the lack of attention to detail with respect to information provided to the insurer, Mr. McMullin at one point indicated that the Riverside Pub, another of the Grafton properties, was now sprinklered. That turned out to be false. He did so based on information from an individual whose name he cannot recall, who he says should have known that information. He never independently verified the information but simply passed it along to Marsh to be provided to Lloyd's.

[188] The evidence also shows that Mr. McMullin did not know prior to May, 2007 that the Esquire Restaurant also had no sprinklers, yet it was represented to Lloyd's that it was.

[189] I will refer to one other piece of evidence on the record which I had also referred to earlier, that is, the TRS Inspection Report prepared on the North End Pub dated November 2002. Although it does not appear that this document was ever received by Marsh or by anyone at Grafton Connor, the accuracy of its contents is not seriously in dispute insofar as it relates to the sprinklering of the North End Pub. What is apparent from that report is not only was the North End Pub not sprinklered, but that the writer's contact at the North End Pub indicated that she/he was getting a quote for a sprinkler system.

[190] It follows that other people within Grafton Connor were aware that the pub was not sprinklered. The ability to avoid the misrepresentations that gave rise to this litigation could have been easily solved by someone at Grafton Connor simply paying attention to what it was presenting to Lloyd's.

[191] In light of this evidence, I have no hesitation in concluding everyone at Grafton Connor involved in the placing of insurance was aware of the importance of the information to Lloyd's when determining whether to accept the risk. Despite this, they were oblivious to the truth. They were indifferent. They did not

know if the information they were providing to the insurer was correct yet nevertheless approved it being sent to Lloyd's knowing full well that Lloyd's would be relying on it for determining if it would accept the coverage or determining the premium. They did not have a reasonable basis to believe the information was true.

[192] The inescapable conclusion, based on the findings of fact of the trial judge and the record, is that Beaufort Investments was reckless in providing information to the insurer. As a result, even if my conclusion that unintentional, precontractual misrepresentations are not excused by Endorsement 10, the Policy is also void for this reason.

[193] I would allow the Notice of Contention and also confirm the trial judge's decision on this alternative ground.

10 Issue #7 Whether the trial judge erred by finding that Marsh did not cause Grafton Connor's loss by failing to provide Lloyd's with a copy of the TRS Report (Grafton Connor's Cross-Appeal)

Standard of Review

[194] This issue relates to the causation of Grafton Connor's loss and, as such, is a question of fact to be reviewed on a palpable and overriding error standard: *Cherubini supra*, ¶85).

[195] The definition of "palpable and overriding error" was set out by Beveridge, J.A. in *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33 to be "clear and so serious as to be determinative":

> [32] An error is said to be palpable if it is clear or obvious. An error is overriding if, in the context of the whole case, it is so serious as to be determinative when assessing the balance of probabilities with respect to that particular factual issue. Thus, invoking the "palpable and overriding error" standard recognizes that a high degree of deference is paid on appeal to findings of fact at trial. …

Analysis

[196] The trial judge carried out an extensive review of the evidence relevant to the TRS Report (¶242 to 266).

[197] Following his review of the evidence related to the TRS Report, the trial judge made the following specific findings of fact at paragraph 267 of his Decision:

- Mr. Bourque (Marsh's account manager) was aware in 2003 that TRS inspected the Grafton Connor Building and the North End Pub.

- Mr. Bourque received a copy of the TRS inspection report for the Grafton Connor Building from ECI on May 28, 2003. He did not follow up and ask ECI whether it had other Grafton Connor inspection reports in its possession.

- Mr. Bourque never received a copy of the TRS inspection report for the North End Pub.

- Mr. Bourque did not provide the TRS inspection report for the Grafton Connor Building to Marsh UK.

[198] The trial judge proceeded to find, at ¶322, that a reasonably prudent broker would have taken the necessary steps to obtain the TRS Report for the North End Pub and forward it to Lloyd's. He concluded, however, that Mr. Bourque's failure to do so did not cause any loss to Grafton Connor. More specifically, the trial judge was not satisfied that the sprinkler and masonry misrepresentations would have both been avoided if Lloyd's had been in possession of the TRS Report. His decision on this point is entitled to considerable deference from this Court.

[199] In its factum, Grafton Connor claims that the trial judge erred by focusing only on the premium that Lloyd's would have charged for a sprinklered building as opposed to the "impact of Underwriters having received" the TRS Report. I disagree.

[200] The trial judge carefully and thoughtfully reviewed the most likely impact if Lloyd's had received the TRS Report prior to the 2006 renewal. Specifically, he found that the misrepresentation with respect to masonry construction would have continued even if the sprinkler misrepresentation had been discovered (¶323). He reached that conclusion based on the evidence before him of Martin Pope, who was the Lloyd's underwriter at the time, who testified that he believed the

"masonry" description in the Location Details Summary aligned with the description of the North End Pub in the TRS Report (¶92). Mr. Pope would, therefore, have perceived no conflict between the Location Details Summary and the TRS Report on the issue of building construction.

[201] The trial judge concluded that the correct description for the North End Pub was "mixed" and not "masonry" (¶96). The trial judge, therefore, concluded that even if Mr. Pope had identified the conflict between the TRS Report and the Location Details Summary with respect to sprinkler coverage, the "masonry" misrepresentation would have persisted.

[202] I am not satisfied that the trial judge made any palpable and overriding error in reaching the conclusion which he did. He was entitled to review the facts before him to determine the outcome he believed was most likely. In the end, he was not satisfied that even though Marsh breached its standard of care by failing to obtain the TRS Report for the North End Pub and provide it to Lloyd's, that the breach caused the loss. In doing so, he did not commit any palpable and overriding error.

[203] I would dismiss this ground of appeal.

11 Issue #8 Whether the trial judge erred in his apportionment of liability as between Grafton Connor and Marsh (Grafton Connor's Cross-Appeal)

[204] As is apparent from my earlier reasons, I am of the view that the trial judge erred in formulating the standard of care which was owed by Marsh to Grafton Connor. As a result, Marsh is not liable to Grafton Connor for any portion of the loss. It follows that this ground of appeal must be dismissed.

12 Costs

[205] The parties did not make detailed submissions on costs, however, in light of complexity and the number of issues and the length of the record a significant costs award is warranted. Lloyd's has been the most successful party. Although losing its cross-appeal, it resisted an appeal by both Marsh and Grafton Connor and was successful on its Notice of Contention. An award of $40,000 inclusive of disbursements is warranted in these circumstances. Of that $40,000, $20,000 shall be paid by Marsh and $20,000 by Grafton Connor.

[206] Marsh has also been successful in having the finding of liability against it set aside. I would award costs in the amount of $20,000 to Marsh payable by Grafton Connor. This is also inclusive of disbursements. Lloyd's was unsuccessful on its cross-appeal, however, in light of the other findings on this appeal, the dismissal of the cross-appeal is of little consequence. Therefore, I would not award any costs against Lloyd's.

13 Conclusion

[207] I would allow the appeal by Marsh, in part, setting aside the finding that it was 50% contributorily negligent for the damages of Grafton Connor. I would dismiss Marsh's appeal against Lloyd's. I would also dismiss Grafton Connor's cross-appeal against Lloyd's and Marsh. I would allow Lloyd's Notice of Contention on the issue of Grafton Connor's recklessness in providing the information to it. I would award costs to Lloyd's in the amount of $40,000, half of which is to be payable by Marsh and half by Grafton Connor. I also award costs to Marsh in the amount of $20,000 payable by Grafton Connor.

Farrar, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.