Reid Lester
Laishley Reed LLP
Email: rlester@laishleyreed.com
Toronto Tel: 416.981.9415
Vancouver Tel: 604.684.3112

Does a Duty of Good Faith Mean There is a Duty to Disclose?

Two recent decisions of the ONCA considered whether a duty of good faith in certain contractual relations creates an obligation on the part of the stronger party to disclose helpful information to the other, weaker party, outside of the strict terms of the existing contract. One of these cases[1] concerned the possible renewal of a maintenance contract, and the issue was whether the principles in the recent SCC case of ***Bhasin v. Hrynew***[2] created a duty, on those facts, for the one party to advise in a timely fashion, once it had decided not to renew. The other case[3] concerned an insurer's duty of utmost good faith, and whether this duty created an obligation on the part of the insurer to warn its insured about the impending expiry of the limitation period (in which to sue the insurer for coverage). In both cases, the ONCA held that there was no duty to disclose in those circumstances.

In ***Bhasin v. Hrynew,*** the SCC held that parties have a duty of good faith in their contractual relations as "a general organizing principle in the common law of contract". The SCC also held that there is a duty of honest performance "which requires the parties to be honest with each other in relation to the performance of their contractual obligations." The SCC was careful to emphasize that the concepts of good faith and honest performance were not to be applied to undermine long standing contract law principles, lest that create commercial uncertainty. Nor were these duties to be used by judges to "veer into a form of *ad hoc* judicial moralism" or to be used as a pretext for scrutinizing the motives of contracting parties. Nor did the duties impose some kind of duty of loyalty. Rather, the SCC held only that these duties meant that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of a contract. Of course, clever lawyers will always try to push the envelope to help their clients.

In ***CM Callow Inc. v. Zollinger***, Callow provided summer and winter maintenance services to some condo corps pursuant to two different maintenance contracts, summer and winter. The winter contract ran from November 2012 – April 2014 and contained a provision allowing for termination on 10 days' notice by the condo corps. As it turned out, the condo corps decided in March of 2013 to terminate the winter contract, but did not provide notice until September 12, 2013. The condo corps delayed because they did not want to jeopardize completion of the summer contract which was ongoing during the summer of 2013. There was more to it, though. Callow was clearly of the view that the contract would likely be renewed and he performed extra "freebie" landscaping work in the hope that this would encourage the condo corps to renew. Further, the condo corps led him on, and continued to represent to Callow that the winter contract was not in danger. Callow sued for breach of contract and the trial judge found in his favour, holding that the

---

1 ***CM Callow Inc. v. Zollinger 2018 ONCA 896***

2 2014 SCC 71

3 ***Usanovic v. Penncorp Life Insurance*** **(2017) 138 O.R. (3d) 462**

condo corps breached their "duty of honest performance" by 1) withholding the fact that they intended to terminate; and 2) actively leading Callow to believe that they would renew.

The ONCA reversed and held in favour of the condo corps. The court held that while the condo corps may not have acted honourably, the duty of honest performance required only that the parties be honest with each other concerning matters directly linked to the contract, that is, the winter contract then in effect. It did not limit the parties' freedom concerning contracts not yet negotiated or entered into. Moreover, the ONCA stated that it "is clear from **Bhasin** that there is no unilateral duty to disclose information relevant to termination." Even though the condo corps may have misled Callow about the proposed new contract, the duty of honest performance did not preclude the condo corps from exercising their right to terminate. The moral of this story is two-fold. First, the duties of good faith and of honest performance in contractual performance are fairly narrow and exist only within an existing contractual relationship. You should not expect someone with whom you are negotiating a contract to look out for your interests and they have no obligation to do so. Second, "get it in writing" and if people do not respond to you in a clear and unambiguous way about their intentions, perhaps they are not to be trusted.

The ONCA's decision in ***Usanovic v. Penncorp Life Insurance*** is a bit different since it relates not to a "new" duty of good faith and/or honest performance in contractual relations but to the age-old duty of utmost good faith that insurers and insureds owe to one another. Does this duty create an obligation on the part of an insurer to warn its insured about a soon-to-be-expired limitation period? This issue comes up fairly regularly, in my experience. In ***Usanovic***, the respondent insurer terminated the appellant's disability benefits in January of 2012. The appellant insured commenced his action against the insurer in April of 2015, more than two years after the termination of benefits. The insured was relatively unsophisticated and he testified that if only the insurer had warned him about the limitation period when it denied his claim, he would have brought an action earlier. He complained that the duty of utmost good faith extended to an obligation to warn about an expiring limitation period.

The court rejected this argument and found that an insurer's duty of good faith does not require it to give notice of a limitation period to its insured. While the legislatures of some provinces have imposed a statutory obligation to that effect, there is no such requirement in Ontario. One might have thought that the Court would try to help out the unsophisticated insured, but in this case, the ONCA avoided any discussion of what might be "fair" or "equitable" in the circumstances. Instead, it focused its review on the provisions of the ***Limitations Act, 2002*** ("the Act") and expressed its intention to ensure that its decision did not conflict with the clear provision in the Act. Thus, the Court noted that for the courts to impose a notice requirement on the insurer would effectively judicially overrule the provisions of the Act by making notice given by an insurer to an insured the trigger for the limitation period, rather than discoverability of the underlying claim. The court held that this would defeat the purpose of the statute and bring ambiguity, rather than clarity, to the process. Bottom line here is that a duty of utmost good faith in an insurance relationship reflects the duty that an insured has to be honest in the way he provides information to the insurer, both with respect to the risk, and with respect to any claim, and the duty that an insurer has to treat each claim fairly, without prejudgment, and without bias. Such a duty does *not*, however, move into the realm of a *fiduciary* duty where a "trustee" (i.e., the insurer) would have an obligation to put the interests of the beneficiary (the insured) *ahead* of its own interests. So again, the moral of the story is trust yourself, and don't expect anyone to help you. They *might* help you, but don't count on it.

R. Lester July 2019