SUPREME COURT OF NOVA SCOTIA

Citation: *Van Delft v. The Dominion of Canada General Insurance Company*, 2019 NSSC 304

Date: 20190708
Docket: 476343
Registry: Halifax

Between:

Dilly van Delft

Plaintiff

v.

The Dominion of Canada General Insurance Company, St. Paul Fire and Marine Insurance Company (Canada Branch), Travelers Insurance Company of Canada, known as Travelers Canada, WCL Bauld (1975) Limited

Defendants

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	February 26 and July 8, 2019, in Halifax, Nova Scotia
Counsel:	David G. Coles, Q.C., for the Plaintiff Shelley Wood and Ibrahim A. Badawi, for the Defendants Joseph Burke, for WCL Bauld (1975) Limited

By the Court:

[1] The plaintiff, Dilly van Delft, moves for a determination of a question of law pursuant to Civil Procedure Rule 12. If she succeeds on that issue, she further seeks summary judgment on the evidence pursuant to Rule 13.04.

Background

[2] In 2012, Dilly van Delft began insuring her residential property at 4269 Chester Road in Windsor with the defendant, The Dominion of Canada General Insurance Company, St. Paul Fire and Marine Insurance Company (Canada Branch) and Travelers Insurance Company, known as Travelers Canada (collectively, "Travelers"). The policy was renewed each year for the next several years. In 2016, Ms. van Delft began construction of a new home at 264 Silver Birch Drive, in Hubley. Upon completion of the Silver Birch property, Ms. van Delft, through her insurance broker WCL Bauld (1975) Limited, purchased a policy from Travelers containing "Principal Residence" coverage for the Silver Birch property, and "Additional Location" coverage for the Windsor property. The policy came into effect on July 15, 2017. Its expiry date was February 16, 2018 at 12:01 am. Paragraph 24 of the policy provided:

> **When You Vacate**
>
> These changes in Coverages A and B apply <u>when you remove your personal property from the described premises, leaving it vacant</u>:
>
> …
>
> b) coverage ceases after 30 consecutive days of <u>vacancy</u> with respect to all other causes of loss or damage, unless at the time of loss we had granted permission for vacancy beyond 30 days.
>
> [*Emphasis added*]

[3] Ms. van Delft moved into her new home in September 2017, leaving the Windsor property unoccupied. Her daughter occasionally spent the night at the property when she was in the area for work, but she had stopped doing so by November 2017. In December 2017, Ms. van Delft had a plumber drain the pipes to prepare the Windsor property for the winter.

[4] In January 2018, Travelers mailed Ms. van Delft a renewal of her policy. The effective date of the renewal policy was February 16, 2018. The cover letter accompanying the policy stated:

> ***Terms and conditions are changing for your policy***
>
> The written agreement that outlines our commitment to you is what we call our policy wording; please read your updated policy wording and the definitions of coverage attached.
>
> A few key changes to note:
>
> …
>
> - Your policy now includes a definition section, which provides the specific meaning of words used throughout your policy – such as surface water, flood and vacancy.
>
> We encourage you to speak with your insurance broker to understand what these changes will mean for you or if you have questions.

[5] The policy provided in special condition 23:

> **Vacant Dwellings**
>
> Once the described premises are both unoccupied and vacant,
>
> …
>
> (b) coverage ceases after 30 consecutive days of both non-occupancy and vacancy for all other perils insured under Coverage A and B.

[6] Under "Definitions", the policy included the following:

> **Vacant or vacancy** means <u>regardless of the presence of any personal property</u>:
>
> - in the case of your principal, seasonal or secondary residence, all persons have moved out with no plan to return to live in the dwelling and no new occupant is living in the dwelling; or
> - in the case of your newly acquired residence, or your newly constructed dwelling, no insured has moved in and is living in the dwelling.
>
> [*Emphasis added*]

[7] Ms. van Delft did not read the policy documents or contact WCL Bauld to discuss any changes to the terms and conditions.

[8] In March 2018, Ms. van Delft phoned John Collins, a realtor with the Benedict Group – Royal LePage Atlantic, and asked him to visit the Windsor property to assess its current market value. Mr. Collins first visited the property between March 5 and March 15. He entered the house but could not open the door to access the basement due to a rusted latch. After calling Ms. van Delft and obtaining permission to break the latch, Mr. Collins returned to the property

between March 12 and March 16 with Jonathon Benedict, the Benedict Group team lead. As soon as Mr. Collins got out of his car in the driveway, he could smell fuel oil. He entered the house and went down into the basement, where he found a substantial furnace oil spill. After leaving the property, Mr. Collins made several attempts to contact Ms. van Delft by phone and by email, but did not actually connect with her until March 21. Immediately after speaking with Mr. Collins, Ms. van Delft reported the spill to a representative at WCL Bauld, who advised her to contact Travelers.

[9] On March 23, 2018, Ms. van Delft was advised that Travelers was denying her claim on the basis that neither she nor her broker had ever notified Travelers that the Windsor property was vacant. On March 26, Travelers informed Ms. van Delft that it was cancelling her insurance coverage, effective April 11, 2018.

The positions of the parties

[10] The plaintiff brings a motion under Civil Procedure Rule 12 for the preliminary determination of a question of law. She frames the relief sought as follows:

> A determination that the 30-day consecutive period which an insured property under the policy is vacant and unoccupied such that oil spill insurance coverage will not apply must be calculated from, or after, the effective date of the in-force insurance policy.

[11] The plaintiff's position is as follows. There is no dispute that the defendant changed the definition of vacancy in the renewal policy from the absence of personal property to non-occupancy. Since the plaintiff still had some personal property in the Windsor house at the time of the oil spill, she submits that the property would not have been "vacant" under the previous policy. She says it would therefore be unjust to allow the defendant to rely on any period of non-occupancy occurring before February 16, 2018, the effective date of the renewal policy, to deny coverage under the 30-day exclusion clause. The plaintiff adds that if the defendant's interpretation of the exclusion clause prevails, she would have paid for a policy that was void from inception. That result, she says, would be unreasonable.

[12] According to the plaintiff, a determination that the 30 days must be calculated from the renewal date forward will reduce both the length and expense of the proceeding. She further submits that a favourable ruling from the court on this issue would obviate the need to continue her claim against WCL Bauld.

[13] The plaintiff also moves for summary judgment on the evidence under Rule 13.04. She says there is no genuine issue with respect to the following material facts:

1. The oil spill occurred within 30 days from or after the effective date of the in-force insurance policy; and,
2. The plaintiff advised WCL Bauld that the Windsor property would be vacant and unoccupied prior to the renewal policy being put in place.

[14] The defendant asks the court to dismiss both motions. It says this litigation is in its early stages and the motions are premature. Travelers has just amended its defence, document production was only undertaken in the fall, and no discoveries have taken place. The defendant says it would be fundamentally unfair to deny it the opportunity to discover the plaintiff and others about the vacancy of the Windsor property and the circumstances of the spill, as well as the chance to retain an expert to examine the oil tank, should this be necessary.

[15] In addition to arguing that the motions are premature, the defendant says there are material facts in dispute that preclude the court from granting either form of relief sought by the plaintiff. According to the defendant, the date on which the oil spill occurred is in dispute. There is also a dispute as to what WCL Bauld knew about the vacancy, and when. If the oil spill began before the effective date of the renewal policy, the answer to the question of law put forward by the plaintiff would be irrelevant. Furthermore, if the plaintiff failed to disclose the vacancy to her broker, and the undisclosed vacancy constituted a material change in risk, there may not have been a valid insurance policy in force at the time of the oil spill. The defendant says these material facts can only be determined at trial.

[16] In reply, the plaintiff says the evidence proves that the oil spill occurred within 30 days after February 16, 2018, and submits that the defendant has offered no evidence to the contrary. The plaintiff says the WCL Bauld file notes establish that she met any obligation to disclose that the Windsor property would be unoccupied once she moved into her new home. In the alternative, the plaintiff says, she was under no obligation to notify her broker or her insurer of any material change in risk because the defendant failed to print the list of statutory conditions on the policy, as required by s. 167(2) of the *Insurance Act*, R.S.N.S. 1989, c. 231. The effect of this omission, according to the plaintiff, is that she is not bound by any of the statutory conditions set out in the Act.

Rule 12

[17] The plaintiff moves under Civil Procedure Rule 12 for the preliminary determination of a question of law. The Rule provides as follows:

> **Scope of Rule 12**
>
> 12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
>
> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.
>
> **Separation**
>
> 12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain in issue after the determination.
>
> **Determination**
>
> 12.03 (1) A judge who orders separation must do either of the following:
>
> (a) proceed to determine the question of law;
>
> (b) appoint a time, date, and place for another hearing at which the question is to be determined.
>
> …

[18] The Nova Scotia Court of Appeal, *per* Fichaud J.A., discussed the ambit of Rule 12 in *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31:

> [15] Under Rule 25.01 of the former Civil Procedure Rules, the practice was that the chambers judge could decide a preliminary issue of law only if the parties filed an agreed statement of fact: e.g. *Seacoast Towers Services Ltd. v. MacLean* (1986), 75 N.S.R. (2d) 70 (S.C.A.D.), paras. 18-23, and various other authorities.
>
> [16] The new Rule 12 does not require an agreed statement for the determination of a preliminary question of law. This is clear from Rule 12.01(1) -

a party may "in limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".

[17] Rule 12.02 recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a Rule 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.

[18] So the first step with Rule 12 is to identify the pure legal question to be determined. Rule 12.01(1) permits a motion for determination of "a question of law". Rule 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. The Rule does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under Rule 12.02(a) as I have discussed.

[19] The second step is to identify all the facts that are necessary to determine that question of pure law. Nothing in Rule 12 permits a judge to decide facts that are unnecessary to determine the question of pure law in the motion. A party who wishes an assessment of evidence on other matters, leading to a judgment by interlocutory ruling, should make or join a summary judgment motion under Rule 13.04 ("Summary judgment on evidence").

[20] The third step under Rule 12 is to decide whether all those facts necessary to determine the issue of pure law in the motion "can be found without the trial or hearing".

[21] This third step generates the question - What does Rule 12.02(a) mean that those facts "can be found without the trial or hearing"? In my view, it does not mean that a judge under Rule 12 can assess evidence in the same fashion as in a motion for summary judgment on the evidence under Rule 13.04. Under Rule 13.04, a responding party must "put his best foot forward" with evidence or risk a determination that there is no genuine issue of material fact requiring trial, or that its claim or defence has no real chance of success, and a consequent dismissal of the action or defence: *Aylward v. Dalhousie University*, 2011 NSCA 20, para. 11, affirming *Dalhousie University v. Aylward*, 2010 NSSC 65, paras. 20-25; *Ristow v. National Bank Financial Ltd.*, 2010 NSCA 79, paras. 5-9; *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, para. 173. Rule 12 does not give the chambers judge that power. A judge under Rule 12 may not determine contested facts that might hinge on testimony at a trial. That is the point of Rule 12.02(a)'s condition that "the facts...can be found without the trial".

[*Emphasis added*]

[19] In *Burgess v. Yellow Pages Group Co.*, 2012 NSSC 390, Rosinski J. noted that on a motion under Rule 12, "the burden to present all the necessary facts that scaffold a pure question of law is on the moving party": para. 59.

Rule 13.04

[20] If the plaintiff is successful on her Rule 12 motion, she further seeks summary judgment of her claim against the defendant. Rule 13.04 states:

> 13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[21] In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, Fichaud J.A., for the Court, identified five questions to be answered on a motion under Rule 13.04:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton*'s first step.
>
> A "material fact" is one that would affect the result. A dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).
>
> The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
>
> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.
>
> • **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**
>
> If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.
>
> • **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**
>
> Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.
>
> • **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**
>
> If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.
>
> …
>
> • **Fifth Question: If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?**
>
> [*Emphasis in original*]

[22] Justice Fichaud also reiterated the longstanding principle that the parties are required to put their "best foot forward" and tender evidence on all live issues:

> [36] "Best foot forward": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); Burton, para. 87.

[23] Justice Bryson, for the Court, elaborated on this obligation in *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50:

> [15] Putting one's best foot forward is an important obligation of parties to a summary judgment motion. A respondent to a summary judgment motion "must lead trump or risk losing" (*Goudie v. Ottawa* (City), 2003 SCC 14 at ¶ 32). Assuming there has been adequate time for disclosure, an absence of evidence cannot be overcome by arguing that something might turn up in the future. The Supreme Court emphasized the obligation of the parties in *Canada (Attorney General) v. Lameman*, 2008 SCC 14:
>
> > [19] We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence

> that might be adduced, or amendments that might be made, if the matter were to go to trial. ***A summary judgment motion cannot be defeated by vague references to what may be adduced in the future***, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.
>
> [*Justice Bryson's emphasis*]

[24] In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61, Justice Farrar, for the Court, discussed the prohibition on weighing evidence on a motion for summary judgment:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] …
> >
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, **or the appropriate inferences to be drawn from disputed facts**.
> >
> > 11. **Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility**.
> >
> > [*Justice Farrar's emphasis*]
>
> [26] The law is clear that judges on summary judgment motions under Rule 13.04 are not permitted to weigh evidence; but what does "weighing the evidence" mean?
>
> [27] *Black's Law Dictionary*(10th ed.) defines weight as follows:
>
> > **weight of the evidence**. (17c) The persuasiveness of some evidence in comparison with other evidence <because the verdict is against the great weight of the evidence, a new trial should be granted>. See BURDEN OF PERSUASION.

> *Black's Law Dictionary*, 10th ed, sub verdo "weight of the evidence"

[28] *Wigmore on Evidence* explains the distinction between admissibility and weight at §12:

> Admissibility, then, is a quality standing between relevancy, or probative value, on the one hand, and proof, or weight of evidence, on the other hand. Admissibility signifies that the particular fact is relevant and something more, - that it has also satisfied all the auxiliary tests and extrinsic policies. Yet it does not signify that the particular fact has demonstrated or proved the proposition to be proved, but merely that is received by the tribunal for the purpose of being weighed with other evidence.
>
> [*Justice Farrar's emphasis*]
>
> John Henry Wigmore, *Evidence in Trials at Common Law*, 3rd ed, Vol 1 (Toronto: Little, Brown and Company, 1983)

[29] The *Canadian Encyclopedic Digest*, volume 24, Title 62, also addresses the issue:

> 52. Admissibility is always a question of law for the trial judge. Questions of admissibility should not be confused with questions of weight, which is the emphasis placed upon the evidence once admitted. Evidence is often admissible, yet afforded no weight by the trier of fact. So long as it is admissible, the strength of the evidence, and the use to which it is put, is a question of fact, and not one of law.
>
> [*Justice Farrar's emphasis*]
>
> [30] Weighing the evidence is to determine what use can be made of the evidence or the persuasiveness of it on a matter in issue in the proceeding once it is admitted.

[25] I will now review the evidence.

The evidence

[26] In addition to her own two affidavits, Ms. van Delft filed affidavits from John Collins, David Michael Reynolds, Ryan Burris, and Steven Hart. The defendant filed affidavits from Jason Purdy, Kevin Burgher, and Barb Villeneuve, Only Ms. van Delft and Mr. Collins were cross-examined.

Dilly van Delft

[27] Dilly van Delft has owned the property at 4269 Chester Road in Windsor since 1999 or 2000. She began insuring the property with Travelers in 2012. The policy was obtained through her broker, WCL Bauld, and was effective from

February 17, 2012, until February 16, 2013. The policy was renewed annually over the next several years.

[28] In 2016, Ms. van Delft decided to build a new home at 264 Silver Birch Drive in Hubley. Construction took almost a year. During that time, Ms. van Delft continued to reside at her Windsor property, which was insured under the policy with Travelers. The Silver Birch property was insured under a builder's risk or "dwelling under construction" policy with a different insurer. In July 2017, when construction of her new home was completed, Ms. van Delft, through WCL Bauld, acquired a new policy from Travelers that insured both her new principal residence in Hubley and her secondary residence in Windsor. That policy was effective on July 15, 2017, and expired on February 16, 2018.

[29] According to Ms. van Delft, she had consistently advised WCL Bauld that she would be moving out of her home in Windsor – possibly as early as mid-June 2017 – and selling that property as quickly as possible. She attached as an exhibit to her affidavit a WCL Bauld memo-to-file that purports to have been entered by "Dawn Marie Penney" on May 9, 2017, at 12:53pm. It states:

> DM called Dilly to see how much is left to do on the home that is covered currently under a builders risk.
> she said they have to put up the wood walls, paint next week, and then do the kitchen and flooring. she said it would be mid-end of June before they can move in.
> I asked her the plans of the current home 4269 Chester Road and she said move out and sell it as quick as possible.
> It will be vacant and for sale once they move to the new home.
> I told her I would get back to her, but it looks like we will have to have the DUC extended as Travelers won't. [*sic*] Insure it as comp home policy until owner occupied.
> I will call Sean to let him know to get rate for extension.
>
> [*Emphasis added*]

[30] Ms. van Delft also attached WCL Bauld's notes of other conversations with her where she advised that she planned to move into her new home. A note dated July 14, 2017, and entered by Ms. Penney at 2:54 pm, states:

> Call to cell # July 14 – 2:50pm
> Home is one story with walkout basement
> 3200 ft on 2 levels.
> Cedar siding
> Mainly hardwood flooring inside. 2.5 bath.

> no alarm.
> adding to the home as comp form for July 15th. Daughter moving in right away.
> Dilly sorting out the other home to sell and move.

[31] A second note, also dated July 14, 2017, and entered by Ms. Penney at 3:15 pm, states:

> just completed home.
> ezitv $600,600
> electric heat and minisplit heat pumps in every room.
> no wood or oil.
> no alarm.
> mortgage is with RBC 278 Lacewood drive Halifax.
> mainly hardwood floors inside and cedar exterior.
> full walkout basement both levels finished total 3200 ft.
> well and septic.
>
> other home will be listed for sale right away.

Ms. van Delft agreed on cross-examination that she never actually listed the Windsor property for sale.

[32] In her rebuttal affidavit, Ms. van Delft stated that these WCL Bauld notes do not represent the only conversations she had with her broker regarding her intention to immediately move into her new home. She said she never told WCL Bauld that she would remain in her old residence until that property sold, but rather, she had made her broker aware on numerous occasions while the July 15, 2017 – February 16, 2018, policy was in effect that she planned to start living in her new home as soon as possible.

[33] Ms. van Delft said that after she moved into her new home, her daughter occasionally stayed overnight at the Windsor property when she was traveling for work. She said the last time her daughter stayed at the property was in November 2017. Ms. van Delft agreed that from November until the oil spill was discovered four months later, the Windsor property was unoccupied. In December, she had a plumber drain the pipes to prepare the property for the winter. She did not attend the property with the plumber. Ms. van Delft agreed that she did not have the oil tank drained.

[34] Ms. van Delft said she received the policy renewal documents from Travelers in early January 2018. She did not read them, and did not contact WCL Bauld to discuss the renewal policy.

[35] Ms. van Delft stated that her neighbour, Steve Hart, entered the property in the last week of February, and that he did not report any evidence of an oil spill to her.

[36] Ms. van Delft said she asked John Collins, a realtor she had chosen from the phone book, to visit and assess the market value of her property. She said that she first learned of the oil leak when she spoke to Mr. Collins by phone on March 21, 2018. She stated that he had previously left her a telephone message, and had sent her an email on Thursday or Friday. Ms. van Delft did not produce the email. She said she tried to call Mr. Collins back over the weekend, but was unable to reach him. Upon learning of the spill on March 21, Ms. van Delft immediately called WCL Bauld, who told her to call Travelers. Ms. van Delft agreed that when she spoke to the Travelers representative on March 21, she reported that the oil spill was discovered by the realtor "today", rather than several days earlier.

[37] Ms. van Delft said that after she reported the oil spill, she had someone come to drain the oil tank. She also went to the property with Travelers' adjuster Jason Purdy, and Walter Tingley, an individual assisting Mr. Purdy. Ms. van Delft said she cooperated fully with Travelers, allowing them to inspect and photograph her property. She stated that on March 23, 2018, she was informed by WCL Bauld that Travelers was denying her claim based on misrepresentation as to how the home was being used. Ms. van Delft denied that she misrepresented anything to anyone. She said Travelers later cancelled her insurance coverage on the property and has refused to explain why.

John Collins

[38] John Collins is a licensed real estate agent with the Benedict Group – Royal LePage Atlantic. He obtained his real estate license around 2017. Mr. Collins did not recall precisely when he was contacted by Ms. van Delft about going to see her property in Windsor, or the specific dates of his subsequent visits. He was certain, however, that his first visit took place between March 5 and March 15, 2018. When he arrived, Mr. Collins walked around the exterior of the house before going inside to check out the main floor and the upstairs. He was unable to access the basement due to a rusted door latch. Not wanting to suggest a listing price without seeing the basement, Mr. Collins called Ms. van Delft and obtained permission to return to the home with a hammer and break the latch.

[39] Mr. Collins said he returned to the property between March 12 and March 16. He was accompanied by Jonathon Benedict, the Benedict Group team lead,

who had more experience than Mr. Collins in assessing market value. According to Mr. Collins, when they got out of their cars in the driveway, they could both smell fuel oil. Mr. Collins entered the house, broke the latch, and went down into the basement. When he reached the bottom of the stairs, he discovered that the floor under the oil tank was covered with a layer of fuel oil. He estimated that the oil spill covered an area of approximately 12' by 10', or 10' by 10'.

[40] Mr. Collins said he tried calling Ms. van Delft on two occasions after he discovered the spill. He left at least one voicemail, and also sent her an email. He did not produce the email. When asked about its contents, Mr. Collins said he thought he just asked her to give him a call. He said he did not mention the oil spill. He finally spoke with Ms. van Delft by phone on March 21, 2018, and informed her of the spill.

[41] During cross-examination, defence counsel expressed surprise that Mr. Collins did not mention the oil spill in the voicemail or email. The following exchange then took place:

> **Ms. Wood:** And you don't know if oil was still leaking out of the tank at this point?
>
> **Mr. Collins:** At that … when I went in there was no more oil leaking out of the tank, it looked like it was been there…for… I don't know how long but there was no oil still coming out of the tank.
>
> **Ms. Wood:** Did you look under the tank, Mr. Collins?
>
> **Mr. Collins:** I looked at the tank, I was trying to figure out where it would come from, and I said you know it has to come from the tank and there was no dripping, there was no… anything, it was just there. And that's when I called her. I had no idea if it was from the pipe leading to the oil tank, if it was the specific oil tank, I had absolutely no idea. I didn't really look into it too much, I just saw the oil, looked at the tank, noticed it wasn't leaking and then left.

And later:

> **Ms. Wood:** And you don't know if that oil was still leaking in the tank?
>
> **Mr. Collins:** I can't, I'm not a technician of any sort, I came down, I didn't see any more oil coming out, it looked like a stagnant spill, I went, I left, I called her, didn't get a call back, thought about it a couple days later, called her again, I believe I sent an email, and then she finally called and that's.. and then that's when I told her "look there's oil in the basement", and she went from there.

[42] There was no re-direct examination.

David Michael Reynolds

[43] David Michael Reynolds is a plumber by trade and the owner of Reynolds' Plumbing & Heating Limited. His evidence was that he went to Dilly van Delft's house in December 2017, at her request, to shut off the flow of water to prepare the house for winter. He said that he did not detect any smell of fuel oil while he was inside or outside the house.

Ryan Burris

[44] Ryan Burris is a self-employed general contractor. He stated in his affidavit that he was advised by Ms. van Delft that he could go to her property to take possession of her daughter's bed for his own use. He said he was unable to recall the specific date that he entered the premises, but that it would have occurred between December 1, 2017, and the end of February 2018. He said that he did not detect the smell of fuel oil while inside or outside the house.

Steven Hart

[45] Steven Hart is a mechanic and Ms. van Delft's neighbour. His evidence was that his friend Laura Goodhew had been looking for a place to stay until she could move to her new residence. To that end, Mr. Hart and Ms. Goodhew went to look at Ms. van Delft's house during the last week of February 2018. Ms. Goodhew decided not to stay in the home. Mr. Hart said there was no smell of fuel oil while they were inside or outside of the house.

Jason Purdy

[46] Jason Purdy is a Claim Professional with Travelers. He was the adjuster assigned to investigate a loss at Ms. van Delft's Windsor property. Mr. Purdy said he first learned of the claim on March 21, 2018, when he returned a call to Ms. van Delft. During that conversation, he received permission to enter the premises with a site professional and gather details about the loss.

[47] Mr. Purdy contacted Kevin Burgher at EFI Global to attend the property with him. They went to the site on March 22, 2018. Mr. Purdy took several photographs while at the property which he included as an exhibit to his affidavit. Mr. Purdy stated that he observed oil pooled on the floor of the basement and oil dripping slowly from the bottom of the tank.

[48] Mr. Purdy subsequently contacted Ms. van Delft to let her know that he had been to the property with a site professional. His notes of the conversation are attached as an exhibit to his affidavit. The notes state:

> call to insured, advised that I had attended the loss with site professional. she confirmed that she moved out of the house in sept and moved to the new location on the policy she had the water drained but still had electricity on. she did not let the broker know that she moved out but she said they knew that she has another house and feels that should be fine I advised that coverage could be in question and that we will have to have someone meet with her to discuss and get details . I also advised that she should have the tank pumped out as the oil is leaking from the tank. I also advised that we would have to notify the ministry of this spill (she was aware of this)
>
> -Jason Purdy (03/22/2018 11:52 AM)
>
> [*Emphasis added*]

[49] Mr. Purdy also attached a copy of an email he received from Amanda Baker, Personal Lines Account Manager, at WCL Bauld. The email, dated March 22, 2018, states:

> Hi Jason,
>
> Most of the conversations with Dilly were through phone, not email. July 14th, 2017 2:50pm
>
> - Adding second home, daughter moving in right away. Dilly sorting out the other home, preparing to sell
>
> She did not advise that the home was vacant until yesterday when she called to advise of the claim
>
> Dawn Marie's direct line is … if you would like to discuss further with her.
>
> Thanks!

[50] On March 26, 2018, Mr. Purdy and Walter Tingley, an adjuster with Crawford & Company, met with Ms. van Delft to obtain a statement from her. A transcript of the conversation between Mr. Tingley and Ms. van Delft was attached as an exhibit to Mr. Purdy's affidavit (and also to Ms. van Delft's affidavit). During that conversation, Ms. van Delft advised that the oil tank had last been filled in March 2017 with 820 liters of oil. She said that she normally kept the thermostat on 55 degrees. She further advised that when the tank was pumped out after the spill, the contractor removed 430 liters of oil. Mr. Purdy said that Travelers was unable to ascertain the volume of oil that leaked out. He further

stated that Travelers had not yet had the opportunity to have the tank examined by an independent expert.

Kevin Burgher

[51] Kevin Burgher is Vice President of EFI Global Canada and has been employed with EFI Global for 22 years. In his affidavit, Mr. Burgher stated that EFI Global was retained by Travelers to investigate a furnace fuel oil leak at a residence in Windsor. Mr. Burgher visited the site with Jason Purdy on March 22, 2018. During that visit, he took photographs of the site, which he attached as exhibits to his affidavit. Photographs 8, 9 and 10 were taken in sequence. Photograph 8 shows no dripping of oil. Photograph 9 shows a small drip. In photograph 10, no drip is visible. Mr. Burgher stated in his affidavit that:

> Close observation of the domestic tank revealed a slow leak (which was ongoing) from the bottom of the tank nearest to the foundation wall. The tank gauge read approximately half full. …

[52] He concluded his affidavit as follows:

> In my experience, an independent expert or experts could possibly, on examination of the tank in conjunction with an additional site visit, draw some conclusions about the approximate time period of the spill.

[53] Mr. Burgher was not qualified as an expert, and I put no weight on the above statement of opinion.

Barb Villeneuve

[54] Barb Villeneuve is employed with Travelers in the underwriting department. In her affidavit, Ms. Villeneuve reviewed Ms. van Delft's history with Travelers, beginning with the 2012 policy. Ms. Villeneuve stated that as of July 15, 2017, 264 Silver Birch Road was listed as Ms. van Delft's principal residence and the Windsor property became insured as an additional location. She said that neither Ms. van Delft nor WCL Bauld ever advised Travelers that the Windsor property would be left unoccupied or vacant. Ms. Villeneuve attached a copy of the broker notes contained in Travelers' system as an exhibit to her affidavit. Those notes indicate:

> ADD 254 SILVERBIRCH DR – BRAND NEW BUILD. DAUGHTER LIVES IN 1 LOCATION – MOM LIVES IN OTHER. WINDSOR LOCATION WILL BE SOLD.

[55] Ms. Villeneuve stated that had Travelers known before March 2018 that the Windsor property was vacant or unoccupied, it would have re-underwritten the property to determine whether it continued to meet the underwriting criteria. She said that information would have been material to Travelers' decision to insure the property.

Analysis

[56] The court's first step on a motion under Rule 12 is to identify the pure legal question to be determined. That question can be stated as follows:

> For the purpose of the exclusion clause in the renewal policy, are the 30 days calculated from the effective date of the policy, or from the date upon which the property became "vacant" within the meaning of the policy?

[57] The next step is to identify all the facts that are necessary to determine that question of law. Those facts are:

1. A furnace oil spill occurred in the basement of Dilly van Delft's property at 4269 Chester Rd. in Windsor within 30 days after February 16, 2018, at 12:01 am.

2. At the time of the spill, Ms. van Delft's property was insured under a policy with Travelers that included a clause excluding coverage after 30 consecutive days of both non-occupancy and vacancy.

3. The previous policy, effective from July 15, 2017, until February 16, 2018 at 12:01 am, contained a clause excluding coverage after 30 consecutive days of vacancy, but defined vacancy as the absence of personal property.

4. Prior to obtaining the July 15, 2017 – February 16, 2018 policy, Ms. van Delft disclosed to WCL Bauld that she would be moving into her new home and the Windsor property would be left vacant and unoccupied while it was listed for sale.

5. The Windsor property was unoccupied from November 2017 until the date of the spill.

[58] The third step is to decide whether the moving party has established that all those facts necessary to determine the issue of pure law in the motion "can be

found without the trial or hearing". If any of the facts identified above is contested and might hinge on testimony at trial, the Rule 12 motion must fail.

[59] It is uncontested that the July 15, 2017 - February 16, 2018 policy defined vacancy as the absence of personal property and said nothing about non-occupancy. There is also no dispute that the Windsor property was unoccupied from November 2017 onward. The plaintiff says there is no dispute as to the timing of the oil spill, which in turn determines which of the two insurance policies applies. She points primarily to the evidence of John Collins, who reported that there was no smell of fuel oil on his first visit, between March 5 and March 15, 2017, but that there was a strong oil smell when he returned between March 12 and March 16. Ms. van Delft submits that this evidence, along with Steven Hart's evidence that there was no smell of oil during the last week of February, proves that the spill occurred after the last week of February and before March 16. In my view, however, the evidence that the spill may have started earlier is sufficient to conclude that the timing of the spill is a contested fact that might hinge on testimony at trial.

[60] Both Jason Purdy and Kevin Burgher gave evidence that the oil was leaking slowly from the bottom of the tank, one drop at a time. John Collins testified that when he examined the tank, he saw no oil dripping at all. He attributed his lack of urgency in reaching Ms. van Delft to his belief that the spill was stagnant. Mr. Burgher said that on March 22, 2017, the gauge showed that the tank was still approximately half full. Ms. van Delft told Walter Tingley that the tank was last filled in March 2017 with 820 litres of oil, and that she normally kept the thermostat on 55 degrees. She further advised that the contractor removed 430 litres of oil from the tank after the spill. All of this evidence suggests that the oil was leaking slowly from the tank, which raises the possibility that the leak began earlier than Ms. van Delft posits. Ms. van Delft submits that the defendant has not proven that an expert could help determine when the leak began. However, the burden on a Rule 12 motion to satisfy the court that the necessary facts can be found without a trial or hearing lies with the plaintiff. I cannot conclude, without any evidence on the point, that expert evidence would be of no assistance in this case. Accordingly, I find that the determination of when the oil leak began might hinge on testimony on trial, including potential expert evidence led by one or both parties. As a result, the motion must fail.

[61] Even if the date of the oil spill was not contested, however, there is also a dispute as to what Ms. van Delft disclosed to WCL Bauld in relation to the vacancy or non-occupancy of the Windsor property. As Ms. van Delft points out,

there is a note by Dawn Marie Penney at WCL Bauld on May 9, 2017, stating that the Windsor property "will be vacant and for sale once they move to the new house." However, a subsequent note dated July 14, 2017, states, in relation to the new home on Silver Birch:

> adding to the home as comp form for July 15th. Daughter moving in right away. Dilly sorting out the other home to sell and move.

[62] There is also a note by Jason Purdy, dated March 22, 2018, at 11:52 am, summarizing a phone conversation he had with Ms. van Delft. It states, among other things, that "she did not let the broker know that she moved out but she said they knew that she has another house and feels that should be fine". Mr. Purdy was not cross-examined. Finally, there is an email to Mr. Purdy from Amanda Baker at WCL Bauld, dated March 22, 2018, at 12:21 pm, stating that "[m]ost of the conversations with Dilly were through phone, not email". That statement is consistent with Ms. van Delft's own evidence. The email further states that Ms. van Delft "did not advise that the home was vacant until yesterday when she called to advise of the claim". It is possible, based on the evidence, that Ms. van Delft advised WCL Bauld in May that the home would be vacant while it was up for sale, but subsequently told them otherwise. This fact cannot be determined without hearing from WCL Bauld employees at trial.

[63] Before moving on, I will comment on the plaintiff's argument that it does not matter whether she advised her broker or the insurer that the property would be vacant and unoccupied because Travelers failed to print the statutory conditions on either of the relevant policies. It follows, she says, that she is not bound by the statutory condition requiring her to disclose any material change in risk. The plaintiff failed to provide the court with any cases on this point. Further, according to Ms. van Delft's own evidence, in July 2017, when her broker was arranging for the purchase of a new policy, Ms. van Delft had already decided that she would move into her new home as soon as possible and leave the Windsor property unoccupied. As such, if she misrepresented or failed to disclose that information to her broker while the contract was being negotiated, she may be in breach of the common law duty of disclosure. A breach of that nature could entitle the insurer to avoid both policies. In any event, without authority on the point, I am not prepared to conclude that any potential failure to disclose on the part of Ms. van Delft is irrelevant to the proposed question of law.

[64] The plaintiff's motion under Rule 12 must fail because all the necessary facts cannot be determined without a trial. So too must the motion for summary

judgment under Rule 13.04. Summary judgment on the evidence will only be granted where there are no genuine issues of material fact. That is clearly not the case here. I dismiss both motions.

Conclusion

[65] The plaintiff's motions are dismissed.

[66] I encourage the parties to attempt to agree on costs. If they are unable to do so, I will accept brief written submissions within 30 days of the release of this decision.

McDougall, J.