IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Eurosport Auto Co. Ltd. & Others***
2004 BCSC 164

Date: 20040206
Docket: C986378
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Eurosport Auto Co. Ltd., Hwang Trading Co. Ltd., Frederick Ngok Hwang, Patti Sze Ping Hwang, and Frederick Ngok Hwang and Patti Sze Ping Hwang doing business as Hwang Porsche Parts, Hwang Trading Porsche Parts and Hwang Trading Glass

Defendants

And:

Bill Goble

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Parrett

Reasons for Judgment

Counsel for the plaintiff and defendant by way of counterclaim:	F.G. Potts
Appearing On their own behalf and on behalf of all other defendants:	F. Hwang and P. Hwang, In Person
Date and Place of Trial:	April 17-20, 23-27, 30 May 1-4, 22-25, 28-31 June 1, 2001 Vancouver, B.C.

INTRODUCTION

[1] The plaintiff in this action (ICBC) seeks to recover damages, special damages and punitive and/or exemplary damages from the defendants. The plaintiff alleges that between January 3, 1996 and February 8, 1998, the defendants Frederick Ngok Hwang (Fred Hwang) and Patti Sze Ping Hwang (Patti Hwang) wrongfully and maliciously conspired together to defraud and injure the plaintiff by causing the corporate defendants (Eurosport and Hwang Trading) and the proprietorships (Hwang Porsche Parts, Hwang Trading Porsche Parts and Hwang Trading Glass) to submit fraudulent documents and make false and/or fraudulent representations to the plaintiff for the purpose of obtaining payments they were not entitled to.

[2] These allegations arise in relation to billings or contracts between ICBC and Eurosport for automotive body shop repairs. The repairs were all to be done on vehicles insured by ICBC and were paid for by ICBC.

[3] Eurosport was, at the material times, by written agreement between itself and ICBC, an accredited and registered vendor and held an ICBC Vendor Number. Under the agreements Eurosport was entitled to directly bill ICBC for automotive body repairs of vehicles insured by ICBC. This arrangement avoided the process of each individual insured having to pay for the repairs and then seek reimbursement from their insurer.

[4] In August of 1996, Eurosport was also accredited (on their application) under ICBC's c.a.r. Shop Collision Repair accreditation program. The formal written accreditation agreement is dated August 26, 1996, and was executed on behalf of Eurosport by Fred Hwang.

[5] In September and October 1997, after concerns had surfaced about Eurosport's activities, a series of letters were exchanged, eventually leading to a written notice of termination dated

January 19, 1998. On February 9, 1998, the accreditation agreement was terminated.

[6] The defendants, in their pleadings, deny any such conspiracy to defraud the plaintiff or that any of them fraudulently advanced claims for parts and/or services to the plaintiff as alleged. They say that any errors in their documentation were simple mistakes. They also say, in response to the claim, that Eurosport and Hwang Trading purchased and maintained an inventory of new and used parts, particularly Porsche parts, which were utilized from time to time in the repair of vehicles.

[7] The defendants go on to plead that all work for which payment from the plaintiff was claimed was performed by them and that the parts utilized were authorized by the plaintiff.

[8] In their counterclaim, the defendants seek damages, punitive and aggravated damages, and special costs for the plaintiff's refusal to pay Eurosport for a series of completed repairs. A second claim for defamation was severed from the present action and stayed by an order of May 5, 2000.

BACKGROUND

[9] This is an action which was brought to trial because of two diametrically opposed points of view. Mr. Potts, on behalf of the plaintiff ICBC, opened this trial by advising the court that his client did not want to be here. He went on to observe that:

> . . . it is readily apparent to even the most obtuse observer in looking at the court file that the legal costs involved in this are grossly disproportionate to the amount in dispute. . . . On the other hand my client also doesn't want to be defrauded, as the custodian of public monies it can't allow itself to be defrauded.

[10] Mr. Potts went on to submit that there are a small number of individuals or companies in the auto-body industry who utilize schemes to take $20 here and $40 there in the belief that the costs involved in dealing with this type of fraud are prohibitive and that, as a result, nothing will be done about it.

[11] The plaintiff, he submits, seeks two things in this action. Firstly, that the public and like-minded individuals will know that action will be taken; and secondly, an award of punitive damages sufficient to make sure that this message is clear.

[12] The defendants, on the other hand, submit that the plaintiff deliberately and maliciously set out on a course of action calculated to make an example of them. They submit that these actions by the plaintiff were wrongful. They submit that the plaintiff used their power and strength to break the defendants by holding press conferences, directing and encouraging claimants not to use the defendants' services, and by withholding payment and altering payment arrangements with the intention of "breaking" the defendants financially.

[13] It is these two competing "pictures" of the events underlying the present action that was the canvas on which this trial was painted.

THE PARTIES

[14] The plaintiff ICBC is a statutory body created and continued pursuant to the ***Insurance Corporation Act***, R.S.B.C. 1979, c. 201, and R.S.B.C. 1996, c. 228. It carries on business as an insurer of motor vehicles in the Province of British Columbia pursuant to this legislation and the ***Insurance (Motor Vehicle) Act***, R.S.B.C. 1979, c. 204 and R.S.B.C. 1996, c. 231, and the various regulations passed pursuant to this legislation.

[15] The defendant Eurosport was incorporated on November 13, 1985, under incorporation number 0300385 and carries on business as an automobile body repair and paint shop at 235 E. 1st Avenue in Vancouver. These same business premises are shared by the second corporate defendant Hwang Trading.

[16] The defendants Frederick Ngok Hwang and Patti Sze Ping Hwang are husband and wife and the sole officers, directors and shareholders of Eurosport and Hwang Trading as well as the operators and guiding minds of the proprietorships Hwang Porsche Parts, Hwang Trading Porsche Parts and Hwang Trading Glass.

THE ISSUES

[17] The issues before me for determination include the following:

(a) allegations that the defendants defrauded ICBC by

(i) billing ICBC for a new part and supplying an invoice for a new part while the repair was carried out using a used part obtained from a different source;

(ii) billing ICBC for parts “from stock” supported by an invoice from one of their companies or proprietorships;

(iii) billing for labour and/or parts not authorized by ICBC;

(iv) billing for wheel alignments which were not performed or for which no printouts were provided or retained;

(b) determination of the plaintiff's entitlement to punitive and/or exemplary damages;

(c) determination of the defendants’ counterclaim for damages arising from the plaintiff’s refusal to pay them for work done on various claims.

THE LAW

[18] It is important in considering the evidence in the present case to recognize the standard or burden of proof that ICBC must meet given the serious nature of the allegations of fraud. It is equally important to recognize that the allegations advanced by the defendants in opposition to these claims are also very serious, alleging, in turn, a range of conduct that is itself criminal or quasi-criminal in nature.

[19] The standard required to establish fraud in a civil case is, as with all civil cases, proof on a balance of probabilities. In ***Continental Insurance Co. v. Dalton Cartage Co. Ltd. et al*** (1982), 131 D.L.R. (3d) 559 (S.C.C.), Laskin C.J.C., in giving the decision of the court, observed at p. 563:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mutual Ins. Co.* (1963), 36 D.L.R. (2d) 718, [1963] 1 C.C.C. 321, [1963] S.C.R. 154. There Ritchie J. canvassed the then existing authorities, including especially the judgment of Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 at p. 459, and the judgment of Cartwright J., as he then was, in *Smith v. Smith and Smedman*, [1952] 3 D.L.R. 449 at p. 463, [1952] 2 S.C.R. 312 at p. 331, and he concluded as follows (at p. 736 D.L.R., p. 164 S.C.R.):
>
> > Having regard to the above authorities, I am of opinion that the learned trial Judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the “balance of probabilities”.
>
> It is true that apart from his reference to *Bater v. Bater* and to the *Smith and Smedman* case, Ritchie J. did not himself enlarge on what was involved in proof on a balance of probabilities where conduct such as that included in the two policies herein is concerned. In my opinion, Keith J. in dealing with the burden of proof could properly consider the cogency of the evidence offered to support proof on a balance of probabilities and this is what he did when he referred to proof commensurate with the gravity of the allegations or of the accusation of theft by the temporary driver. There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial Judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater, supra,* as follows [at p. 459]:
>
> > It is true that by our law there is a higher standard of proof in criminal cases that in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
>
> I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that proof on a balance of probabilities has been established.

[20] There are four main elements of the tort of deceit. These are conveniently summarized in Salmond and Houston on the *Law of Torts*, 20th edition, at p. 382:

> a) There must be a false representation of fact.
>
> b) The representation must be made with knowledge of its falsity.
>
> c) It must be made with the intention that it should be acted on by the plaintiff, or by a class of persons which include the plaintiff, in the manner which resulted in damage to him.
>
> d) It must be proved that the plaintiff has acted upon the false statement, and has sustained damage by so doing.

[21] The classic statement of the elements of deceit is found in the speech of Lord Herschell in ***Derry v. Peek*** (1989), 14 App. Cas. 337 at p. 374:

> I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, 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.

[22] In ***Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd.*** (1990), 4 C.C.L.T. (2d) 59 (B.C.C.A.), Anderson J.A., in giving the court's decision, said at p. 68:

> In my opinion, once the plaintiff has proved a false representation of material fact, the evidentiary burden shifts to the defendant to clearly show that the plaintiff was not induced by the false representation.

[23] This view of the burden of proof was accepted and applied by the majority of the Supreme Court of Canada in ***Barron v. Kelly*** (1918), 56 S.C.R. 455, 41 D.L.R. 590, and applied when the reasoning in ***Redgrave v. Hurd*** (1881), 20 Ch. D. 1, was specifically approved in the unanimous decision of the Supreme Court of Canada in ***Baker v. Guarantee Savings and Loan Association (1930)***, [1931] 1 D.L.R. 938.

[24] A differing line of authority advancing the proposition that the legal burden of proving all of the elements of fraudulent misrepresentation rests on the plaintiff are found in ***Smith v. Chadwick*** (1884), 9 A.C. 187 at 196 (H.L.) and ***L.K. Oil & Gas Limited v. Canalands Energy Corp*** (1989), 68 Alta. L.R. (2d) 269 (C.A.).

[25] Our Court of Appeal considered these competing lines of authority in ***Sidhu Estate v. Bains***, [1996] B.C.J. No. 1246. Finch, J.A., as he then was, concluded for a unanimous court at para. 42 that:

> I think the preferred view of the law in Canada is that once intention, materiality and causation of loss are proven, the burden of proving non-reliance shifts to the defendant. The antecedent elements are not in question in this case. The burden of proving that Ms. Sidhu did not rely on the statements therefore shifts to the defendant, as it did in *Parallels Restaurant*.

THE CONTRACTUAL RELATIONSHIP

[26] On April 11, 1983, the defendant, Eurosport, applied for an ICBC Vendor Number , describing the business it carried on as a body shop. On September 30, 1986, it applied to vary this relationship describing its business as an independent body shop and an "auto mechanical repair shop as well". Further applications were made from time to time as details of their operation and ownership changed. On August 12, 1996, Fred Hwang signed, as president of Eurosport, the company's application for accreditation under the ICBC c.a.r. shop Accredited Collision Repair Program. Their application was approved on August 26, 1996.

[27] The accreditation agreement between ICBC and Eurosport is dated, for reference, the same date and provides, in part:

> 1. Definitions

1.1 The following terms shall have the following meaning in this Agreement:

. . .

(h) "ICBC Vendor" means a collision repair shop which has applied for and received a vendor number from ICBC;

(i) "Manuals" means any specification, standard or operating procedure or rule pertaining to the Program prescribed by ICBC, the ICBC Material Damage Manual or the ICBC Vendor Policy and Procedures Manual;

. . .

6. Termination

6.1 The Accredited Collision Repair Shop shall be deemed to be in default under this Agreement, and ICBC may, at its option, terminate this Agreement and all rights granted herein effective immediately, without notice or prior opportunity to cure the default if the Accredited Collision Repair Shop:

(a) makes material false statements in the Application;

(b) uses the Proprietary Marks in a manner which is not consistent with ICBC's guidelines;

(c) commits a fraud on ICBC or any of its customers;

(d) fails to complete repairs required to make a vehicle roadworthy.

. . .

10. Program Materials

10.1 In order to protect the reputation and goodwill of ICBC and to maintain uniform standards of operation under ICBC's Proprietary Marks, the Accredited Collision Repair Shop shall conduct its business in accordance with the Manuals, one copy of which the Accredited Collision Repair Shop acknowledges having received on loan from ICBC for the term of this Agreement. The Manuals shall at all times remain the sole property of ICBC and, upon termination of this Agreement for any reason or otherwise upon the request of ICBC, the Accredited Collision Repair Shop shall return the Manuals to ICBC. The Accredited Collision Repair Shop expressly acknowledges and understands that ICBC is the owner of the Manuals and the Program Materials.

10.2 The Accredited Collision Repair Shop shall at all times treat the Manuals, Program Materials and all supplements and revisions thereto and any other manuals created for or approved for use in the operation of the Program and the information contained therein as confidential and shall use all reasonable efforts to maintain such information as secret and confidential. The Accredited Collision Repair Shop shall not at any time without ICBC's prior written consent copy, duplicate, record or otherwise reproduce the foregoing materials in whole or in part or otherwise make the same available to any unauthorized person, including, without limitation, any person not actively involved in the operation of the Business. An ICBC customer shall be deemed to be an authorized person with respect to information relating solely to the repairs of that person's vehicle.

[Emphasis added]

THE CL-14 PROCEDURE

[28] Under the agreements in place, Eurosport could bill ICBC direct for the repair work it carried out. The vendor agreement governed the overall relationship and, in most cases, the repairs were carried out after receiving a form called a CL-14.

[29] This procedure sees an insured, who has taken their damaged motor vehicle to ICBC for inspection; receive from ICBC a form known as the "CL-14 Claim Estimate Sheet" (the CL-14). This form sets out the description of ICBC's estimate of the work necessary to complete repairs to the vehicle, including the materials (parts) to be used and the time required to perform the work.

[30] The insured takes his damaged motor vehicle, together with the CL-14 to the repair shop of his or her choice. If the selected repair shop identifies other damage not included in the CL-14

or questions the estimates themselves they can request a further inspection by ICBC. If after re-inspection ICBC concludes that additional work or parts are necessary a CL-14 supplement to that effect is issued which becomes a part of the CL-14.

[31] The completed CL-14 is, in law, an offer by ICBC to contract with any repair shop for the repair of the particular vehicle on certain terms and conditions set down in certain manuals issued by ICBC (Policies, Procedures and Vendor Responsibilities and Material Damage Procedures Manual).It is, of course, central to this whole process that ICBC retains the right to authorize and approve work it will be paying for.

[32] If additional work or parts are required, an ICBC roadman, or a road estimator, after inspection, amends and approves the original CL-14 by means of a supplement, typically approved in green ink. Upon approval, the supplement forms a part of the CL-14.

[33] Where, as in the present case, the operator of the repair shop had a vendor number, the CL-14 together with any approved supplements effectively serve as an offer and an authorization for the body shop to perform the work and then claim payment for the authorized work directly from ICBC.

[34] Upon completion of the authorized repairs, the body shop returns the CL-14, together with copies of all receipts for parts and supplies, after obtaining the insured's signature on the CL-14 and completing the certification.

[35] The certification in each case consists of an authorized signature from the body shop under the following certification:

> CERTIFICATION OF REPAIR
>
> I, _____, _____, of the firm identified, certify that all parts have been supplied, services rendered, and the insured's portion collected as outlined in this account. This repair account also complies with the terms and conditions on the reverse of the vendor's copy.
>
> NAME POSITION
>
> _____ _____
> Signature Date

[36] Details of the procedures were set out in two manuals prepared by ICBC and supplied to vendors. These manuals, **The Vendor Requirements Manual** and **The Material Damage Procedures Manual**, were amended and updated from time-to-time to keep information current.

[37] The vendor requirements manual imposed the following obligations on the vendor [Eurosport]:

> The CL-14 is an estimate/invoice on which the ICBC estimator lists the items to be repaired or replaced and the time allowed to perform each operation.
>
> . . .
>
> When repairs have been completed, the vendor's responsibility is to complete the CL-14, with parts prices and mathematical calculations.
>
> . . .
>
> It is the vendor's responsibility to ensure that the payment requisition is an accurate accounting of the work done.
>
> . . .
>
> When the CL-14 is submitted for payment, invoices for parts and sublet items must be attached. Submission of invoices for parts not used or services not performed may constitute fraud and result in the withholding of payment, loss of a vendor number, and/or prosecution.
>
> . . .
>
> To bill ICBC directly for repairs to claimants' vehicles:
>
> - All repair work resulting from the claim must be completed in accordance with ICBC labour and material rates and times as authorized by ICBC on the CL-14, Claim Estimate Sheet, or supplement form.
>
> - No separate or additional charges or surcharges of any type relating to the claim repair may be charged to the vehicle owner/customer - except for

> deductibles, depreciation, tax or upgrading, as authorized by ICBC on the CL-14, Claim Estimate Sheet, or supplement form.
>
> . . .
>
> If a repair facility does not comply with the above conditions, it must make separate arrangements for the collection of the entire repair account from the owner of the vehicle. ICBC will not pay to a repairer any amounts for repairs if there have been additional charges levied.
>
> To ensure Quality Customer Service, every vendor must notify the Claim Office when back-ordered part(s) cause delays in repairs.
>
> It is also the vendor's responsibility to ensure that all parts are installed when received, or that the vehicle owner is reimbursed the outstanding amount if the parts remain unavailable. Any part on back-order (not received and installed) by the vendor at the time the CL-14 is submitted for payment may be priced on the CL-14 and marked as being back-ordered (b/o). A note should be attached if further explanation is necessary.
>
> Back-ordered parts may be deleted from the CL-14 before submission and arrangements made between the repair shop and Claim Office to prepare a separate CL-14 when the part is received.
>
> . . .
>
> It is the responsibility of the vendor to ensure that any changes made to the CL-14 are approved by the Claim Office.
>
> . . .
>
> Before it is submitted for payment, the CL-14 must be signed by the vehicle owner or their representative, signifying that the repairs are satisfactory. An officer or employee of the repair firm shall not sign on behalf of a vehicle owner or representative.
>
> An officer or employee of the repair firm who is responsible for the quality of the repair and the accuracy of the invoice must also sign, certifying that all repair procedures listed have been completed and that all itemized parts have been installed.
>
> . . .
>
> Before submitting CL-14s, vendors should ensure that:
>
> • Any changes to the original CL-14 have prior approval by the Claim Office;
>
> • The form is accurate, complete, and legible;
>
> • Invoices for parts and sublet items are included;
>
> • The form is completed and signed by:
>
> - the vehicle owner or representative;
>
> - an officer or employee of the vendor responsible for the quality of the repair and the accuracy of the invoice.

[38] For reasons which will become apparent I will deal with the issue of whether or not the defendants had possession of, or access to, these manuals later in these reasons. For now, it is sufficient to note that this is disputed in this action.

THE RELATIONSHIP OF THE PARTIES

[39] In late 1997 concerns arose at one of ICBC's claim centres with respect to a number of claims handled by the defendant Eurosport. The concerns were eventually assigned to ICBC's special investigation unit (S.I.U.). Melvin Gordon Carter, a member of that unit, with 22 years experience in the RCMP, was named as the file coordinator and assigned to oversee the investigation that followed.

[40] A preliminary review of data in the possession of the plaintiff revealed that the defendant, in 1996, handled some 696 claims and was paid some $983,563.89 by ICBC. In 1997 they handled 651 claims and were paid $1,106,509.52

[41] The investigators initially selected a random sample of these files by selecting every seventh claim, and then applying certain minimum values, eventually reducing the claims to be examined to some 300 files. After examining these files the investigators proceeded with the investigation with respect to some 175 claims.

[42] Mr. Carter first met with the defendant Fred Hwang on May 5, 1998, and reviewed with him their concerns. During that first conversation Mr. Hwang was told that ICBC was concerned that they had been billed for parts subsequently returned for credit.

[43] During the course of this interview, and a second one June 2, 1998, they discussed Eurosport's repair of a 1975 Porsche 911 owned by a Ted Meyer. The CL-14 certified by Fred Hwang on September 10, 1997, was for total repairs of $15,279.59 and included a rear windshield for $1,300.00. Mr. Hwang acknowledged that Eurosport had not installed the rear windshield included in the CL-14 but had converted the car to a convertible. He also acknowledged that the bill for parts in this case was "not legitimate".

[44] Mr. Hwang, in his evidence, maintained that they frequently had to buy parts two or three times before they got the correct part; that he disliked paperwork and was lazy about it; and that these factors led to errors; but that was all they were.

[45] He went on to assert that there was a conspiracy at ICBC to put him out of business and that ICBC cancelled his vendor number giving him "not even one day notice". He described ICBC's actions as criminal. He went on to assert that he didn't think ICBC had treated him fairly and while conceding that he had made mistakes, he insisted that ICBC had used their powers to discriminate against him.

[46] The difficulty with this 'perception' of events is that it, insofar as it purports to reflect the facts, distorts and misrepresents them. Mr. Hwang's evidence concerning these events, as with most of his evidence, is completely inaccurate and unreliable. I will deal with this more fully when I deal with the issue of credibility, but in terms of the sequence of events leading to the cancellation of Eurosport's vendor number, Mr. Hwang and Eurosport were given repeated opportunities to answer ICBC's concerns. They did not do so.

[47] After Mr. Carter's initial meetings with Fred Hwang on May 5 and June 2 of 1998, he again met with him on July 9 and July 21 of 1998.

[48] On the first of these last two meetings, Mr. Carter gave Fred Hwang a list of the wheel alignment claims ICBC was concerned about and a letter dated July 8, 1998 (Exhibit 12). On the second meeting, he was handed a letter dated July 20, 1998, which included a list of claims for which ICBC specifically asked him to review and provide ICBC " . . . with any and all invoices pertaining to new parts involved in the repair of each listed claim".

[49] On July 31, 1998, Fred Hwang contacted Carter and advised him that the information they wanted was ready. The material provided fell far short of any adequate explanation.

[50] The events were far from unexpected by Eurosport, for the difficulties giving rise to the investigation in late 1997 were themselves the subject of correspondence and ongoing contact between ICBC and the defendants.

[51] On October 6, 1997, Fred Hwang responded to an earlier discussion and letter concerning a specific complaint. His response was as follows:

> This letter is a response to your letter dated 26 September 1997.
>
> 1. This situation occurred because at that time the body shop was not being looked after by me, but the former shop manager. He was responsible for the operation of the body shop because I was relying on his expertise of autobody repair. Having found out that this shop manager is not reliable after several months before this discussion, I fired him. I admit my negligence on this issue and would like to pay for any resulted cost.
>
> 2. I can give you absolute guarantees that will ensure this will never happen again because I am now the body shop manager, and am responsible for the operation of the shop. My personal guarantee is what I can give you.
>
> 3. Eurosport Auto Centre has built up a good relationship with I.C.B.C. since we became the vendor. Also, Eurosport Auto Centre has earned good reputation in the auto business. This situation occurred owing to my negligence, and being the body shop manager and being responsible for the operation of the shop from now on, I can guarantee that this will never happen again. Therefore, I hope that I.C.B.C. can give us a chance and we can maintain our accreditation/vendor status.
>
> Thank you for your consideration.

> Best regards,
>
> Fred Hwang

[52] The upshot of these discussions, and the correspondence, is yet another meeting between ICBC and Fred Hwang, and further correspondence dated October 28, 1997, in which ICBC specifically identified their concerns, their request for explanations and their advice that an investigation is ongoing:

> This will confirm our discussion at the 5th and Cambie Claim Centre where we identified many issues of concern surrounding workmanship, safe repairs, items billed for but not placed on the vehicle, and claims where parts have been returned for credit having not been put on the vehicle and presented by the estimate sheet (CL-14) or supplemental sheet (CL-14D).
>
> We are seeking a full explanation in writing from you regarding these issues of concern by November 10, 1997. Based upon your response to these issues of concern we will be making a decision as to what relationship you will have with the Insurance Corporation of British Columbia, if any. So that you are fully aware, some of these issues will be investigated to determine if any other actions are warranted.
>
> Yours truly,
>
> John Henrickson
> M.D. Technical Supervisor
> 5th and Cambie Claim Centre
>
> JH/dr
>
> cc. Derek Vettese, Manager, M.D. Technical Services
> cc. David Rhodes, Manager, M.D. Research and Technical Services
> cc. Margaret Warmington, Manager, 5th and Cambie Claim Centre
> cc. Dave Barnes, Manager, Accreditation Program
> cc. Richard Green, Manager, Quality Control
> cc. Keith Jones, M.D. Manager, 5th and Cambie Claim Centre
> cc. Mac Fish, Automotive Retailers Association, Bodyshop Division, 1-8980 Fraserwood Court, Burnaby BC V4J 5H7
>
> [Emphasis added]

[53] The contents of this letter and the list of people copied with it could have left no-one in any doubt as to the seriousness of the situation; nor could their request for "a full explanation in writing . . .".

[54] Other correspondence was directed from ICBC to Fred Hwang and Eurosport on November 13, 1997, November 21, 1997, and December 1, 1997. In each case, ICBC confirmed in writing various steps being taken and the status of their ongoing review of information provided by Fred Hwang and Eurosport.

[55] On December 11, 1997, Eurosport was advised, by certified mail, that:

> ICBC hereby gives notice that you are in default of section 6.2 of the Accreditation Agreement. In particular, as previously communicated to you, ICBC has concerns regarding the following:
>
> 1) quality and workmanship of repairs;
>
> 2) safety of repairs;
>
> 3) non-compliance with the mandatory trade certification as set out by the Ministry of Skills & Labour;
>
> 4) failure to staff an acceptable ratio of apprentices to journeyman technicians; and
>
> 5) billing inconsistencies.
>
> The information that you provided in your correspondence of November 12, 1997 does not adequately address these defaults. If you do not provide ICBC with a satisfactory explanation for and rectification of these defaults within thirty (30) days of the date of your receipt of this notice, then ICBC will have no option but to issue notice of termination in accordance with section 6.4 of the Accreditation

Agreement. You may:

a) accept such notice in which event the Accreditation Agreement will immediately terminate; or

b) appeal such notice to the Accreditation Committee under section 7 of the Accreditation Agreement pending which decision you may continue to operate as an Accredited shop under the terms of the Accreditation Agreement.

If you have any questions on this process, please feel free to contact me directly.

Yours truly,

INSURANCE CORPORATION OF BRITISH COLUMBIA

Phil Mills, Accreditation Coordinator
Accreditation Programs

[Emphasis added]

[56] On January 19, 1998, this was followed by ICBC's notice of termination, again by certified mail:

Further to our letter of December 11, 1997, you have failed to remedy the following:

1) quality and workmanship of repairs;
2) safety of repairs;
3) Non-compliance with the mandatory trade certification as set out by the Ministry of Skills & Labour now known as the Industrial Trades Advisory Committee (I.T.A.C.)
4) Failure to staff an acceptable ratio of apprentices to journeyman technicians; and
5) Billing inconsistencies.

Accordingly, ICBC hereby issues notice of termination pursuant to section 6.4 of the Accreditation Agreement. You may:

a) accept such notice in which event the Accreditation Agreement will immediately terminate. If you wish to accept this termination, please sign the enclosed copy of the letter and return to the Manager, Accreditation Programs at the address given below; or

b) appeal such notice of the Accreditation Committee under section 7 of the Accreditation Agreement pending which decision you may continue to operate as an Accredited shop under the terms of the Accreditation Agreement. If you wish to appeal this notice, you must send a notice in writing to the Accreditation Committee stating the reasons for the appeal. The Chairman of the Committee must receive that notice at the address given below within twenty-one (21) days of the date you received this letter.

The Chairman of the Accreditation Committee is the Manager, Accreditation Programs and can be reached at the address given below:

Dave Barnes, Manager
Accreditation Programs
5th & Cambie Claim Centre
456 West 5th Avenue
Vancouver BC
V5Y 3Z3

If you have any questions on this process, please feel free to contact me directly.

Yours truly,

INSURANCE CORPORATION OF BRITISH COLUMBIA

Phil Mills, Accreditation Coordinator
Accreditation Programs

[57] On February 9, 1998, Fred Hwang, as President of Eurosport, executed the following

document:

> Eurosport Autoco Limited hereby wishes to terminate the ICBC c.a.r. shop accreditation agreement between the Insurance Corporation of British Columbia and Eurosport Autoco Limited. Such termination will be immediately effective upon receipt of this notice [sic] ICBC.
>
> _____"Fred Hwang" "PRESIDENT"_____
> Name and Title of Authorized Signatory
>
> _____"Feb. 9. 1998"__
> Date

[58] It is difficult to see after reviewing the evidence and, in particular, the documentary evidence how Mr. Hwang could seriously suggest that his vendor number was cancelled on less than one day's notice. That evidence is plainly and unequivocally untrue in two respects - firstly, there is absolutely no doubt that Mr. Hwang and Eurosport were advised, at least by September 26, 1997, that they potentially faced a loss of accreditation and vendor status, a warning that was repeated in subsequent correspondence; and secondly, although ICBC, on January 19, 1998, did issue notice of termination, Eurosport itself signed a termination notice on February 9, 1998. Far from treating the defendants badly, the plaintiff, over a course of many months, gave the defendants repeated warnings, both orally and in writing. Their efforts to obtain proper explanations were largely ignored.

[59] In many respects the factual circumstances here parallel those outlined in ***I.C.B.C. v. Blue Mountain Collision***, 2002 B.C.S.C. 670 at paras. 20-26.

CREDIBILITY

[60] In the course of this trial, and in final submissions, counsel for ICBC submitted that one of the key issues is the credibility of the defendants, Frederick Ngok Hwang and Patti Sze Ping Hwang. He submits that these two defendants are liars and that they cannot be believed about anything.

[61] This credibility issue is central to the entire trial. A careful review of the evidence as a whole reveals that Fred Hwang disputed virtually every detail of each claim advanced by ICBC, but was rarely specific in his evidence, instead consistently resorting to generalities. The repeating refrain included his assertions --

a) I didn't do anything wrong;

b) I am really bad with English;

c) I do not have a full understanding of things in this courtroom;

d) I signed some documents that I didn't fully understand;

e) The books I don't understand very well and as a result I made mistakes; and

f) There is a conspiracy at ICBC to put me out of business.

[62] For reasons that will become readily apparent, I find that each of these assertions is incorrect.

[63] Mr. Hwang described his pride and satisfaction in his work insisting that he never tried to deceive anybody but only to make his customers happy. In essence, he claimed that all work was done with the knowledge of the parties but that ICBC's procedures, the limited education of his employees, the parts industry's inability to supply the proper parts, and his lack of knowledge of Eurosport's accounting system and his indifference to paperwork, all conspired to create the mistakes and the difficulties in which he found himself.

[64] He went on to assert that he was "trying to put everything together two years later" and that as a result of ICBC's actions he was unable to afford a lawyer or to properly deal with the matter in a complex process leading to this trial. It is these factors, he submits, which explain his various mistakes.

[65] With respect, nothing could be further from the truth.

[66] Frederick Ngok Hwang was born in Hong Kong in 1945. He left Hong Kong and emigrated to Canada in 1968, settling initially in London, Ontario. While in Ontario he completed a post-secondary college course at Fanshaw College, obtaining a diploma as an electronic technician. All courses he took at this college were taught in English. He then went on to Massachusetts where he obtained an undergraduate degree in mathematics before obtaining his master's degree in

computer engineering.

[67] Mr. Hwang was born and grew up in Hong Kong. The evidence does not deal with the languages he spoke prior to his departure from Hong Kong in 1968, but as of the trial date, he had spent over thirty years in North America; completed three post-secondary degrees or diplomas, including a master's degree; and had spent nearly 20 years working in a body shop and running a business with gross annual billings of something in the order of $1,000,000.00.

[68] I simply don't accept Mr. Hwang's evidence that he has significant difficulty with the English language; doesn't understand his company's books; and had difficulty with the court procedures. Mr. Hwang is an intelligent, educated man who uses that intelligence and his feigned lack of understanding of the language and procedures to frustrate the process and further his own interests. In addition, the fact is that for much of the litigation the defendants were represented by counsel from Davis & Co., he had access to other legal advice, and he was warned of ICBC's concerns in a timely manner and given specifics of the concerns they wanted addressed.

[69] I will now turn to a series of examples which, although they are far from exhaustive, will serve to illustrate the true nature of Mr. Hwang and his manipulation of this process.

(1) His Application for an Interpreter

[70] On April 17, 2001, the opening day of this trial, Mr Hwang sought to have the court order the attendance of a Cantonese interpreter on the basis that he and his wife had some problems with English. Interestingly enough the application was not made at the opening of the trial but after the direct evidence of the first witness had been completed and as Mr. Hwang's cross-examination of that witness was about to begin. Mr. Hwang initially advised the court that both he and his wife required an interpreter. On April 18, 2001, he advised the court that although he didn't need an interpreter, his wife did.

[71] Mr. Hwang, over the course of time preceding the commencement of the trial, attended numerous pre-trial conferences before me and never once did he, or the counsel appearing with him from time-to-time, indicate there was a need for an interpreter.

[72] Mr. Hwang attended numerous examinations for discovery, including those in which he himself was examined on August 23, 1999; August 24, 1999; June 13, 2000; June 14, 2000; June 29, 2000; and July 4, 2000. Mr. Hwang conceded in cross-examination that on none of those occasions nor on other occasions in which he had been involved in the court process did he request an interpreter.

[73] At his first examination for discovery in this proceeding he gave the following evidence at p. 2, questions 4 to 6:

4	Q	Are you fluent in English?
	A	I would say it's pretty good.
5	Q	And can you read English?
	A	For most technical terms, yes.
6	Q	All right. Do you wish a translator, sir, for the purpose of this discovery?
	A	I don't think it is necessary.

[74] On December 7 and 8, 1998, Mr. Hwang was a defendant in an action before Burnyeat, J., ***Lai Bing Wan Administrator of the Estate of Hap Wan Chan v. Frederick Ngok Hwang also known as Fred Hwang and Hwang Trading Co. Ltd.***, Vancouver Registry No. C974271.

[75] A Cantonese interpreter was present throughout that trial for the benefit of the plaintiff. Neither Mr. Hwang, nor his wife, resorted to the interpreter in that proceeding yet both testified during the course of that trial.

[76] Eurosport and Fred Hwang were also charged with and convicted of contravening s. 42.1(2)(b) of the ***Insurance (Motor Vehicle) Act***, R.S.B.C. 1996, c. 231, by "making a statement or representation to the corporation [ICBC] that the person knew or ought to have known was false or misleading in order to obtain payment for goods or services". The accused were charged on a 14 count information and Fred Hwang was convicted on counts 2,6,8,10,12 and 14 and fined $10,000.00 on each count. The accused Eurosport was convicted on counts 1,5,7,9,11 and 13 and fined the same amount on each count.

[77] At the trial in Provincial Court, before her honour Judge Godfrey, both Fred Hwang and his wife Patti Hwang testified during the 8 day trial. Mr. Hwang conceded in his cross-examination that neither of them had asked for an interpreter during the trial or their evidence.

[78] The whole of this evidence, together with my own observations of the Hwangs throughout the

trial, and their evidence, leads me to conclude that the application for the interpreter was a tactical attempt to delay or frustrate the trial process with no valid language concern at the root of the application.

(2) Legal Advice

[79] It is readily apparent from the procedural efforts and the form and structure of various applications made by Mr. Hwang at various points during this trial that the defendants, and Mr. Hwang, had access to legal advice prior to, during the course of, and after the trial concluded as the defendants pursued various applications including applications to re-open the trial.

[80] Without being exhaustive, these applications included the application to appoint an interpreter (April 17, 2001); an application to strike the plaintiff's claim for failing to deliver legible copies (April 20, 2001); an application to prohibit Davis & Co. from disclosing information to counsel for the plaintiff and to prohibit Lindsay Kenney from continuing to act for the plaintiff (April 23, 2001); an application under R. 40(5) for an order that the plaintiff supply to the defendants a certified transcript on a daily basis (April 26, 2001); a non-suit motion under R. 40(8) and R. 40(9) at the close of the plaintiff's case (May 2, 2001); a motion for judgment under R. 44 (May 28, 2001); and a motion seeking an order that the plaintiff was *estopped* from alleging that the defendants had repudiated or breached their contract with the plaintiff (June 1, 2001).

[81] This final application is of particular interest for it was filed on May 31, 2001, on the day evidence was completed and counsel for the plaintiff began his final submissions. Mr. Hwang, at first, sought an adjournment to prepare argument, and when that was refused, sat throughout Mr. Potts' submissions, which concluded early on June 1, 2001, and then delivered his own closing submissions for the defendants.

[82] At the close of Mr. Potts' reply, Mr. Hwang rose, late on June 1, 2001, and presented this motion binder. No notice had been given to the plaintiff or the court of the defendants' intention to bring forward that application. This timing is of some significance in light of the repeated directions and instructions given Mr. Hwang throughout the trial. I have no doubt whatsoever that Mr. Hwang knew and understood what the proper procedure was and what he should do. Despite that he, in my view, deliberately withheld the motion he had prepared and filed until the argument was complete.

[83] During the course of his cross-examination, Mr. Hwang confirmed that throughout the litigation he had access to and the assistance of various counsel and that he had legal advice during the trial. In addition, Al Mansukh, the principal of Blue Mountain Collision Ltd., attended the trial, on a daily basis, providing Mr. Hwang with assistance and advice.

[84] In conclusion, although it appears on the surface that the defendants were representing themselves at this trial without the benefit of counsel, such an impression is not complete or accurate.

[85] I referred earlier to the form and structure of the defendants' applications as being indicative of the defendants' access to legal advice and/or their ability and facility with the English language.

[86] The beginning of the defendants' written submissions entitled "[Defendants'] Rebuttal to Plaintiff's Response to June 1, 2002 Motion" illustrates the point. It begins:

> May it please the Court
>
> A. GENERAL ESTOPPEL
>
> 1. It is well established that the issue of estoppel must be pleaded if a party intends to raise it as a defence. These Defendants have done so.
>
> B. ESTOPPEL BY CONDUCT
>
> 2. The Defendants' position, which is supported by the evidence, is that the Plaintiff tolerated the practice of inaccurate billing by their conduct of paying inaccurate invoices regularly, without complaint, and over a lengthy period of time.

[87] At this stage I will touch on one of the other applications. On January 23, 2002, the defendants, with the assistance of counsel retained for that purpose, filed a motion which sought to re-open the trial to have - -

> 1. the evidence given on the examination for discovery of Christopher Fairbridge on August 19 and 20, 1999 be admitted in evidence in the trial of this action.

[88] In support of this application, Mr. Hwang's affidavit attested to the following:

> 2. On January 14, 2002 I obtained from Davis & Company discovery transcripts for an examination for discovery conducted of Christopher Fairbridge by my previous counsel, Dale Sanderson, of Davis & Company on August 19 and 20, 1999. I have been unable to have Davis & Company release these transcripts prior to January 14, 2002 as Davis & Company is owed money by me and would not release the transcripts to me. I was told by Kathryn Denhoff of Davis & Company that Davis & Company was exercising a lien on my file including the transcripts. I have finally reached an agreement with Davis & Company in January 2002 for release of these transcripts. Attached hereto as Exhibit "A" to this my affidavit is a copy of a letter from Davis & Company addressed to me dated January 21, 2002 confirming that I received from Davis & Company on January 14, 2002 transcripts from the examination for discovery in this action.
>
> 3. I wish to have these transcripts put into evidence in this action. I believe that these transcripts aid me and the other defendants substantially in my and the other defendants' defence in this action. I believe that a fair trial and fair consideration of this case by Mr. Justice Parrett will be assisted by a consideration by Mr. Justice Parrett of these discovery transcripts.

[89] Christopher Fairbridge was called as a witness at the trial. He testified for five days beginning on April 18, 2001 and concluding on April 24, 2001. This time included nearly two and one-half days of cross-examination by Mr. Hwang.

[90] What is significant is that Mr. Hwang knew the transcripts existed and was both given access to them and, at times, availed himself of that access. In an affidavit responding to the defendants' motion, Katherine Robinson attested to the following:

> 2. I am informed by Bradley T. Martyniuk, an associate lawyer at Lindsay Kenney, and verily believe that on April 16, 2001, prior to the commencement of the trial of the proceedings herein on April 17, 2001, the Defendants herein, Frederick Ngok Hwang ("Fred Hwang") and Patty [sic] Sze Ping Hwang ("Patty Hwang") attended at the offices of Lindsay Kenney, and met with Mr. Martyniuk and F.G. Potts, counsel for ICBC, at which meeting, Fred Hwang and Patty Hwang were advised that with the exception of those documents over which ICBC was claiming privilege, all other documents in ICBC's possession, including all Discovery transcripts, and in particular the Discovery transcripts of Chris Fairbridge were available for [sic] at our offices for their review, should they so wish, but that copyright laws precluded the provision of copies of the Discovery evidence being provided to them.
>
> 3. I am informed by Mr. Martyniuk and verily believe that on April 19, 2001, at the commencement of the 3rd day of trial of the proceedings herein, Mr. Martyniuk confirmed to the Court that Fred Hwang and Patty Hwang had previously been informed that all documents, including the transcripts of the Examinations for Discovery of Patty Hwang, and Chris Fairbridge, were available for review at the offices of Lindsay Kenney. Attached as Exhibit "A" to this my Affidavit are copies of notes taken by a Court Reporter on April 19, 2001 at the trial of the proceedings herein.
>
> 4. On May 29, 2001 at 4:30 p.m., during the trial of the proceedings herein, Fred Hwang and Patty Hwang attended at the offices of Lindsay Kenney, at which time they reviewed the two volume transcript of the Examination for Discovery of Patti Hwang, and the four volume transcript of the Examination for Discovery of Chris Fairbridge. Attached as Exhibit "B" to this my Affidavit is a copy of my handwritten memo to file dated May 29, 2001 in respect of Fred Hwang's and Patty Hwang's attendance at the offices of Lindsay Kenney.

[91] I make three points with respect to the defendants' motion. Firstly, Mr. Hwang's affidavit is selectively incomplete. Secondly, that the submissions made on behalf of the defendants ignored the defendants' opportunity and right to order further copies of the transcripts in advance of Mr. Fairbridge testifying. And thirdly, the issue was not raised, nor was an adjournment sought, when Mr. Fairbridge testified.

(3) Eurosport's ICBC Manuals

[92] As a part of the defence presented by Mr. Hwang for the defendants he advised the court that he did not have the ICBC manuals at the relevant times. He went on to say that although he had manuals in 1986 when he signed his vendor's agreement they were never updated thereafter. Mr. Hwang went so far as to seek, by application, an order to have ICBC produce all the manuals because he didn't have them.

[93] Despite these positions articulated by Mr. Hwang with sincerity and force, I am satisfied that on February 10, 1995, Eurosport purchased two copies of the manuals which were mailed to them on February 13, 1995 (Exhibit 52) and, as Mr. Hwang conceded during cross-examination, they received the updates to the manuals and the bulletins after 1995.

[94] I am equally satisfied that throughout the trial Mr. Hwang, despite his submissions and his application, had access to the manuals. Indeed, Exhibits 39 and 40 are extracts from the Material Damage Manual tendered by the defendants and Exhibit 38 is one of the Material Damage

Bulletins issued by ICBC on August 12, 1998.

[95] Quite apart from these difficulties on August 12, 1996, Mr. Hwang, as president of Eurosport, signed an application to be accredited under ICBC's c.a.r. shop program (Exhibit 9, Tab 7) and on August 26, 1996, his application was approved. The accreditation agreement, again signed by Mr. Hwang, at s. 10.1 acknowledges receipt of a copy of the manuals defined in s. 1.1 (Exhibit 9, Tab 8).

[96] When confronted with this evidence during his cross-examination, Mr. Hwang resorted to advising that although he had signed the agreement he didn't read it personally but had Brian Martin, his body shop manager, read it for him.

[97] When pressed he conceded that at the time he signed the accreditation agreement he got copies of the manuals. He then went on to concede that after August 1996 they did have copies of the manuals and received regular updates but that they were returned when their accreditation was terminated.

[98] Mr. Hwang then went on to testify that he had told the court that he only got one in 1986 because he had returned it and had forgotten that he had the manuals.

[99] As Mr. Hwang's evidence continued to evolve he announced that although he had forgotten he had them, in any event, he never read them. After giving this evidence Mr. Potts confirmed with Mr. Hwang that his evidence was that he didn't ever recall referring to or reading the manual.

[100] Mr. Potts then put to Mr. Hwang a portion of his sworn evidence from his examination for discovery on June 13, 2000. At p. 510, questions 2927 to 2931:

> 2927 Q Sure. Were there occasions, sir, that Eurosport would have disputes with ICBC about the correct amount or type of payment in respect of a particular job?
>
> A Dispute, that means not agree, right?
>
> 2928 Q Yes, right.
>
> A Yes.
>
> 2929 Q And I am talking, sir, about disagreements other than the ones that are listed in the schedule of transactions we have been talking about?
>
> A Right.
>
> 2930 Q In respect of any of those disputes, sir, did you ever have occasion to refer to either the Vendor Requirements manual or the Material Damage Procedures manual?
>
> A I believe I read through the Material Damage Procedure manual.
>
> 2931 Q Okay. And you would have done that to try and figure out what was supposed to have happened in respect of a particular dispute.
>
> A Exactly.

[101] Mr. Hwang was then cross-examined about the fact that during his examination for discovery he produced copies of the manuals that were marked as exhibits. Mr. Hwang acknowledged that he did but then announced that he had borrowed those manuals from friends and that he could not now say which ones he had at the time.

[102] This issue illustrates the fluid nature of Mr. Hwang's sworn evidence; the tendering of mutually contradictory sworn answers which cannot, in my view, co-exist; and his facility at recognizing difficulties in his evidence and providing new responses which are usually difficult, if not impossible, to respond to with precision.

(4) The Financial Health of Eurosport

[103] In an affidavit sworn by the defendant Fred Hwang on June 11, 1999, and filed in support of various applications in this action, Mr. Hwang attested, in part, that:

> 6. The publicity surrounding this litigation, which was fostered and encouraged by ICBC, has severely and likely irreparably damaged my repair shop. Before this, my business was quite successful and was doing approximately $2,000,000.00 of sales per year, approximately $1,000,000.00 per year accounted for by ICBC claims. The allegations by ICBC have destroyed the ICBC claim part of my business, and have also

> greatly reduced the number of customers who are willing to come to my shop. I estimate that the shop is now losing approximately $30,000.00 to $50,000.00 per month. I cannot sustain the current rate of losses, but there is no prospect of the situation improving while this litigation is ongoing.
>
> (Exhibit 112, Tab 1)

[104] Mr. Hwang placed similar sworn evidence before the court in an affidavit sworn April 26, 2000 (Exhibit 112, Tab 4):

> 5. The publicity surrounding this litigation, which was fostered and encouraged by ICBC, has severely and irreparably damaged the Defendants' business. Before the allegations were raised, Eurosport Auto Co. Ltd ("Eurosport") was quite successful and was doing approximately $1,000,000.00 per year of business in ICBC claims alone. After the claim was commenced and Eurosport's ICBC billing number was taken away, the ICBC claim portion of Eurosport's business was completely destroyed, and the number of private customers willing to deal with Eurosport was also greatly reduced.
>
> 6. Eurosport sustained losses of more than $400,000.00 in 1999. In January 2000, I was forced to lease Eurosport, including the equipment and premises at 235 East 1st Avenue, Vancouver, (the "Premises") to Platinum Collision Ltd. and Technik Motorwerks Ltd.

[105] When the first of these extracts was put to Mr. Hwang in cross-examination, he immediately qualified the answer by saying that the sales were only $1.6 million to $1.8 million, not $2,000,000.00, but confirmed his evidence that the business was quite successful and that the thrust of both affidavits was to lead the court to believe that it was "quite successful".

[106] Mr. Hwang then flatly denied the suggestion that Eurosport was, at the time, in financial trouble and had lost over $1,000,000.00 in the four years before December 1998.

[107] Mr. Hwang was then confronted with the fact that he had given evidence before Burnyeat J. on December 7, 1998, in a separate action, ***Lai Bing Wang Administrator of the Estate of Hap Wan Chan v. Frederick Ngok Hwang also known as Fred Hwang and Hwang Trading Co. Ltd.*** Mr. Hwang was specifically confronted with the following passage of his evidence from that trial (Exhibit 99, page 16, lines 19 to 29):

> Q All right. You will agree with me, sir, that since January 1996 Ms. Wan has been asking you for repayment of the one hundred and fifty thousand dollars; isn't that right?
>
> A Oh, yes, she did.
>
> Q And you told her that you would, but you simple [sic] didn't have the money for it.
>
> A Exactly.
>
> Q Why have you not repaid it, sir?
>
> A The money is in bad trouble. Like I said, from four years, I mean, I've lost more than a million dollars.

[108] Mr. Hwang immediately responded that what he meant to say was that he had invested more than a million dollars.

[109] The action before Burnyeat J. was one in which the estate was seeking to recover $150,000.00 paid by the deceased to Hwang Trading Co. Ltd. for 20% of the shares of that company, which in turn, it was alleged, held a 50% interest in Eurosport Auto Co. Ltd.

[110] During the course of his opening before Burnyeat J., Mr. Hwang's counsel said, in part:

> . . . Mr. Chan had accomplished what he wanted that is he wanted to gain immigration status in Canada for himself and his family and that had been achieved. Shares in Eurosport and Hwang Trading are worthless.
>
> The financial statement for each company indicates that both companies from 1993 to the present have significant liability operated at a deficit and a negative shareholder deficit.
>
> . . .
>
> . . . Even if the defendants are guilty of any misrepresentation or any breach of

> warranty it will be submitted that the plaintiff cannot and has not shown any loss. The one hundred and fifty thousand dollars had to be invested. It was invested in the company and the shares were worthless.
>
> [Emphasis added]

[111] When Mr. Potts put these passages to Mr. Hwang, he responded by saying he wasn't there that day but was called a few minutes later as the first defence witness. Part of his evidence was as follows:

> Q Okay. Now, did you have any discussions with Mr. Hap Wan Chan before he died concerning the share certificate?
>
> A Yeah, after I found out he was sick and I remember at one time a telephone conversation, okay, he did mention about how is the shop doing. I just told him terrible.
>
> Q When was this approximately?
>
> A Towards the end of 1996.
>
> Q Okay.
>
> A I don't recall what month.
>
> Q And then what happened?
>
> A And he said he is going to give me the shares back because to him -- he didn't want to get involved because I told him if you keep it might cost you.
>
> Q Pardon me?
>
> A I mentioned that if you want to keep it, it might cost you.
>
> THE COURT: I still -- I still can't hear.
>
> A If you want to keep the shares it might cost you.
>
> THE COURT: Let me suggest something. If you sit up straight. You are trying to talk into the mike. It doesn't need it. I'm having difficulty hearing you when you are hunched over. Can I get you to repeat your --
>
> A Okay. I mentioned about if you want to keep the shares it might cost you.
>
> MR. LEDRESSAY:
>
> Q What were you referring to when you said that?
>
> A Well, because actually the company is losing big money.
>
> Q Okay. Now, has the company's performance changed in any way since 1996?
>
> A I would say since 1993.
>
> Q How has the company --
>
> A Because I have a commitment to help Mr. Chan so one of the instructions for the money to be invest in the company I have to spend, okay, for expansion and also I had to hire extra workers and everything have to show in the payroll and even I don't need extra people I still have to hire extra bodies to fulfill that -- much better overhead, but the business didn't increase the company lost money.
>
> (Exhibit 99, Page 63, line 23 to Page 64, line 18)

[112] In the case before Burnyeat J. it was in Mr. Hwang's interest to minimize the value of the company and, in his evidence, he sought to do so. In the present case it was in his interest to maximize the value and, in both his affidavits and his evidence, he sought to do so. Burnyeat J., in his reasons for judgment, found in part, that:

> 34 The testimony of Mr. and Mrs. Hwang regarding the circumstances of the resignation of Mr. Chan as an Officer and Director of Eurosport and the transfer of

> the shares of Mr. Chan in that company are also indicative of the lack of candor and credibility that I find in the testimony of Mr. and Mrs. Hwang. I find that Mr. Chan did not sign any of the documents which are now produced by Mr. and Mrs. Hwang to show that Mr. Chan resigned as a shareholder, director and officer of Eurosport. . . .
>
> . . .
>
> 35 The plaintiff testified that her husband could not speak or read English, that he had a [sic] education equivalent to grade 10 education in Canada, that she was with him all the time that he was sick, that he was in the hospital, and that she was certain he received no documents from the defendants or from Eurosport. The mother of Mrs. Hwang was not produced as a witness. In the circumstances, I accept the testimony of the plaintiff and reject the testimony of Mr. and Mrs. Hwang. I am satisfied that the signatures of Mr. Chan on the resignation and transfer forms were signatures created by or on behalf of Mr. and Mrs. Hwang. I am satisfied that the production of the forged documents is part of an attempt by Mr. and Mrs. Hwang to divert an investment in HT to an investment in Eurosport and to then have Mr. Chan give up that investment in Eurosport. . . .

[113] The findings of credibility in another case are not relevant to similar issues that emerge in the present case. The evidence, however, in so far as it has been adopted in the present case, forms a part of the evidence as a whole.

(5) Document Disclosure by the Defendants

[114] Document disclosure was a recurrent theme both in the pre-trial management of this action and at the trial. Their own inability to locate and produce documents was among the explanations put forward as defences by the defendants as one of the reasons for their "mistakes". On the other hand, the defendants repeatedly suggested that ICBC was not producing documents and information within their control as part of their overall allegation that the plaintiff was "out to get them".

[115] In his affidavit sworn June 11, 1999, Fred Hwang also addressed the document disclosure issue (Exhibit 112, Tab 1, para. 8):

> 8. From the statement of Claim, it is apparent that ICBC is alleging fraud on 113 repair jobs that my shop did. I have not committed any fraud. <u>After an exhaustive review of my records, in some cases having to go back four years, I have been able to find explanations showing no fraud was committed for approximately one-half of the repairs which ICBC has made allegations</u>. However, it is impossible from ICBC's Statement of Claim to ascertain on approximately half of the repairs what problem ICBC is referring to. For example, repair number one on Schedule "A" to the Statement of Claim refers to two repairs to the same vehicle in which $263.34 in parts, allegedly, were ordered from the parts supplier and not installed on the vehicle. Attached as Exhibit "C" to this Affidavit are the CL 14 Repair Forms which are prepared by ICBC and the auto body shop. It is impossible to determine from the CL 14 Forms which parts ICBC is referring to. In addition, I cannot find some of the credit notes on this repair to which ICBC refers to in Schedule "A" to the Statement of Claim. Finally, with respect to the allegations that certain labour was not performed on this repair, it is impossible for me to determine from the CL 14 Forms which labour ICBC is referring to.
>
> 9. <u>In summary, I cannot ascertain the basis for ICBC's allegations of fraud against me. The List of Documents of ICBC is critical to the Defendants in ascertaining the basis for the allegations of fraud by ICBC</u>.
>
> 10. I am confident, given my experience with the allegations ICBC has made which I can identify, that with respect to the allegations I cannot identify there are explanations which prove that no fraud was committed. However, my inability to identify the parts to which ICBC refers which were not installed, the exact work which ICBC alleges was not authorized, or the labour which ICBC alleges was not done, makes it impossible for me to determine what that explanation is.
>
> [Emphasis added]

[116] On July 20, 1999, Fred Hwang swore the affidavit found at Exhibit 112. Tab 2 includes the following evidence about Mr. Hwang's state of knowledge and the extent of his disclosure:

> 2. The Defendants in this action produced a List of Documents on May 11, 1999. <u>In the course of preparing the documents for this List of Documents, my lawyers informed me that the Defendants had to produce every single document which they had in their possession which related to the repairs on Schedule "A" to the Plaintiff's Statement of Claim</u>.
>
> 3. <u>I and my employees made a thorough search of all of the records of the</u>

> Defendants. We have produced every single document related to the repairs listed on Schedule "A" of the Plaintiff's claim which we can find at this time. We have been unable to find all of the documents related to the repairs that are the subject of the Plaintiff's claim. This is because the Plaintiff's claim relates to repairs which in some cases were done over four years ago.
>
> 4. The Defendants' inability to find all of the documents which relate to the Plaintiff's claim has made it impossible for me to be able to understand all of the allegations which the Plaintiff is making in this action. The Plaintiff is well aware of this, as I have instructed my lawyers to obtain the documents of the Defendant [sic] in order to better understand the Plaintiff's claim. I have also instructed my lawyers to obtain particulars from the Plaintiff, but my lawyers inform me that the Plaintiff has refused to provide these particulars.
>
> 5. My lawyers have advised me that should I find any further documents related to the repairs that are the subject of the Plaintiff's claim, I should immediately give them to my lawyers so that they can be disclosed to the Plaintiff. I have informed my lawyers that I cannot find any further documents related to the repairs on Schedule "A" to the Plaintiff's Statement of Claim as the documents I have already produced are the result of an exhaustive search of my records. However, should I find any further documents, I will certainly give them to my lawyers so that they may be produced to the Plaintiff.
>
> [Emphasis added]

[117] On July 22, 1991, Master Bolton, after hearing the applications, directed that:

> THIS COURT ORDERS that the Defendant Eurosport Auto Co. Ltd. (hereafter referred to as "Eurosport") provide a supplementary list of documents (hereafter referred to as the "List of Documents") to the Plaintiff and Defendant by way of Counterclaim, including all source documents that are in any way relevant to Eurosport's financial statements from January 1, 1994 to the present and all accounting records relating to the particular repairs in issue in this litigation and, in particular, any credit memoranda relating to the repairs in issue in this litigation;
>
> THIS COURT FURTHER ORDERS THAT Eurosport provide an Affidavit (hereafter referred to as the "Affidavit" to the Plaintiff and Defendant by way of Counterclaim, setting out any documents that would otherwise be subject to inclusion in the List of Documents that are no longer in the possession or control of Eurosport, and further specifying what documents are normally kept by Eurosport that are no longer in Eurosport's possession or control, and a reasonable explanation from Eurosport as to what happened to those documents and as to the efforts made by Eurosport to locate those documents, including efforts made to obtain duplicates of those documents;
>
> THIS COURT FURTHER ORDERS THAT the List of Documents and the Affidavit shall be delivered to counsel for the Plaintiff and Defendant by way of Counterclaim by the close of business on August 10, 1999;
>
> THIS COURT FURTHER ORDERS THAT costs are payable to the Plaintiff in any event of the cause.

[118] In compliance with the order of Master Bolton and after filing the affidavits quoted above detailing their "exhaustive" and "thorough" search resulting in the production of "every single document . . . which we can find at this time . . .", Fred Hwang, on August 10, 1999, filed a supplementary list of documents and a further affidavit (Exhibit 112, Tab 3). After repeating his knowledge of his obligation "to produce every single document", he goes on to offer the following:

> 3. In the normal course of Eurosport Auto Co. Ltd.'s ("Eurosport") business, Eurosport keeps all documents related to the repairs it performs on vehicles for the Plaintiff. This includes all CL 14 documentation, and all supplier invoices and credit notes for parts used in the repairs of vehicles. In some cases, Eurosport uses parts from its inventory on repairs. In that case, Eurosport might have no record of a supplier invoice because many of the parts in Eurosport's substantial inventory were acquired over a long period of time from many different sources.

[119] I note in passing that Mr. Hwang makes no attempt to identify the "many different sources" even generally despite ICBC's obvious concern and questions about where those parts came from. He continues:

> 4. Supplier invoices and credit notes are normally filed in folders under a particular supplier's name. In cases where only few parts are ordered from a particular supplier, invoices from that supplier are unlikely to be filed separately, and are likely to be filed as miscellaneous invoices.

5. Eurosport is located in a large building. The main business is conducted on the ground floor, where there are offices. Some records, particularly more recent ones, are kept in offices on this level. Records which are not recent are kept on the second floor in a large storage area. There are numerous storage boxes in this storage area, containing records of Eurosport and Hwang Trading Co. Ltd. going back over ten years. These boxes contain hundreds of thousands of documents.

6. The list of documents the Defendants have produced in this action are missing some invoices and credit notes from suppliers, based on a review of the Plaintiff's claim and their documents, and the CL 14 documentation associated with the repairs. The missing documents relate only to a small number of the 113 repairs which are the subject of the Plaintiff's claim; with respect to the vast majority of the claims, Eurosport has produced all the relevant documents. Eurosport has been unable to locate these documents. I do not know whether these documents are no longer in the possession and control of Eurosport.

7. Eurosport conducted an extensive search to locate and produce all the documents relevant to the Plaintiff's claim. I instructed the office assistant, Sandi Hwang, to drop all her current duties to work solely in finding relevant documents. All Eurosport's old documents from storage were retrieved, and the office assistant reviewed the repairs which are the subject of the Plaintiff's claim, and attempted to locate and remove all the corresponding invoices for each of the 113 repairs. Afterward, she went over each claim individually and matched it up with the specific invoices related to that claim in order to ensure accuracy. The office assistant kept notes during this process. When time permitted, Patti Hwang also assisted in going through the documents to locate the relevant ones.

8. When this process was completed, the documents were passed on to me, and I checked the work which had been done to ensure completeness and to attempt to understand the claims the Plaintiff is making. The absence of relevant documents makes it difficult to understand the Plaintiff's claim, and so it was important to be very thorough in locating documents. In some cases, it was necessary to review the Plaintiff's documents, which we did not receive until the end of June, in order to understand the Plaintiff's claims. Any documents missing from the Defendant's list are in the possession of the Plaintiff, and have been listed by the Plaintiff.

9. There was simply not enough time to contact suppliers in order to attempt to get copies of missing invoices. Locating and retrieving the documents in Eurosport's possession took a significant amount of time. Eurosport is not a large organization and only has a limited number of employees who can dedicate time to locating documents without hurting its business. My lawyers inform me that at the end of April counsel for the Plaintiff was demanding the Defendants' list of documents be produced and refused to set down discoveries until the list had been produced. The Plaintiff conducted a lengthy investigation of Eurosport, and consequently had time to contact all my suppliers to obtain invoices and credit notes.

10. It is not surprising to me that some of the documents relevant to this action cannot be found by Eurosport. Some of the repairs which are part of the Plaintiff's claim were done over four years ago. Simply through the passage of time, documents may be lost or become difficult to find. In addition, it is not uncommon for documents related to repairs to be misfiled. For example, supplier documents could be filed under the wrong supplier's name. In some cases, Eurosport might not have received all the supplier invoices or credit notes due to a supplier error, or those invoices or credit notes might reference the incorrect repair. Finally, invoices and associated repair documentation might be misplaced by anyone handling them.

11. My lawyers have advised me that should I find any further documents related to the repairs that are the subject of the Plaintiff's claim, these should be disclosed to the Plaintiff. Although the documents produced by the Defendants are the result of an exhaustive search of Eurosport's records, should I find ay further documents I will give them to my lawyers so that they can be produced to the Plaintiff.

[Emphasis added]

[120] I make the following observations about this affidavit –

(1) The affidavit draws no distinction between the "thorough" and "exhaustive" search resulting in the defendants' first list of documents and that apparently carried out in response to Master Bolton's order. I presume they are different searches but, if so, how they are different is not identified.

(2) No mention is made of Eurosport's sophisticated computerized accounting system or the accounting procedures in place, described by several of the witnesses, to reconcile suppliers' invoices and particularly credit memos on a monthly basis.

(3) No specific mention is made of the monthly statements received from suppliers which are used in these reconciliations.

(4) In para. 8, the defendant appears to say clearly and unequivocally that all relevant documents have been accounted for because, although the defendant is missing some documents in relation to a small number of the claims, "any documents missing from the Defendants' list are in the possession of the Plaintiff and have been listed by the Plaintiff". This was Mr. Hwang's sworn evidence in response to Master Bolton's order and after the extensive search and review he describes.

[121] Turning to the details of the defendants' document disclosure, in their list of documents signed on May 11, 1999, the defendants listed 2,248 items or documents. In their 1st supplemental list of documents, filed in response to Master Bolton's order and dated August 10, 1999, they list a further 10,286 documents.

[122] If this was the end of the matter it would be a concern given the contents of Mr. Hwang's affidavits; but this was far from the end of the matter. After August 10, 1999, and the search described in Mr. Hwang's affidavit of the same date, the following additional document lists were produced by the defendants:

List	Date	# of Documents
2nd Supplemental List	Sep 27, 1999	332
3rd Supplemental List	Mar 21, 2000	922
4th Supplemental List	Mar 24, 2000	51
5th Supplemental List	May 16, 2000	411
6th Supplemental List	Sep 13, 2000	15

[123] All of these lists and the affidavits referred to were produced while the defendants were represented by Davis & Company. They reflect the production of an additional 12,017 documents after the thorough and exhaustive search described in Mr. Hwang's earlier affidavits.

[124] On September 14, 2000, I made an order that included the following provision:

> THIS COURT ORDERS that the Defendant Frederick Ngok Hwang, on his own behalf, and on behalf of all the other Defendants, save Patti Hwang, and Patti Hwang on her own behalf, each provide to the Plaintiff on or before October 30, 2000, a sworn Affidavit verifying that all documents within the said Defendants' possession, control, or power related to these proceedings have now been either produced to the Plaintiff, or listed on a List of Documents provided to the Plaintiff herein, and further deposing that to the best of each's knowledge, all documents are or may be relevant to the matters at issue herein, save for documents in respect of the Counterclaim relating to defamation, have now been listed and/or produced to the Plaintiff, and further, if documents related to these proceedings are not in their possession, control, or power, when they ceased to be within their possession, control, or power, and what has become of such documents.

[125] On October 30, 2000, Patti Hwang, in purported compliance with the order, filed an affidavit which contained the following three paragraphs:

> 1. I am a Defendant in the herein action and as such I have personal knowledge of the matters and facts hereinafter deposed to.
>
> 2. On my own behalf as well as on behalf of Patti Hwang, all documents within my possession, control or power related to these proceedings have now been produced to the Plaintiff, or listed on a List of Documents provided to the Plaintiff, or provided to my previous counsel, and to the best of my knowledge, all documents that are or may be relevant to the matters at issue herein, save for documents in respect of the counterclaim for defamation have now been listed in a List of Documents or produced to the Plaintiff, or produced to my previous counsel.
>
> 3. I make this Affidavit in compliance with the Order of the Honourable Mr. Justice Parrett dated September 14, 2000, and for no other or improper purpose.
>
> [Emphasis added]

[126] On November 3, 2000, I ordered the defendants were not entitled, without leave of the court, to use or rely upon any documents unless they were listed in a list of documents delivered to the plaintiff prior to October 30, 2000.

[127] Despite this sequence of events, the defendants, during the trial, produced something on the order of 200 additional documents, most of which did not have a stamped number relating them to one of the list of documents.

(6) The Criminal Charges

[128] Eurosport, Fred Hwang and Patti Hwang were charged with a total of 14 counts of contravening s. 42.1 of the ***Insurance (Motor Vehicle) Act*** by "making a statement or representation to the Insurance Corporation of British Columbia that the person knew, or ought to have known, was false or misleading in order to obtain payment for goods or services". The 14 counts covered seven discrete incidents which correspond to transactions which are included within the present action. The correlation is as follows:

Counts	Transactions
1 and 2	82
5 and 6	46
7	51
8	51
9 and 10	50
11 and 12	54
13 and 14	41

[129] At the conclusion of an eight day trial that began on January 10, 2001, Godfrey P.C.J. acquitted Patti Hwang but found Eurosport and Fred Hwang guilty on all counts, except counts 3 and 4. The allegations were that the accused had billed ICBC for parts that had not been installed at all in three cases; and had billed for more expensive parts than had actually been installed in the other four cases. The defence advanced in the case before the Provincial Court directly parallels that in the present case, namely, that given the volume of billings and documents, these were consistent with being mistakes rather than fraud.

[130] Extracts from her honour's reasons delivered March 16, 2001, include the following findings:

> [8] The first transaction relates to the repair of a Porsche. The car arrived as a vehicle with a damaged Taiga bar and a glass back window and left the shop as a convertible. ICBC was billed for the Taiga bar and glass that were not installed. The owner went and found the convertible top and paid $2000 U.S. for it and brought it to the shop to have it installed. The bar and glass billed to ICBC were still in the shop when the investigator came to talk to Mr. Hwang. I have considered the argument that I should have a reasonable doubt based on a line on the cl 14 asking the body shop to call the estimator after the damage had been priced. I have considered the argument that the owner asked the estimator about whether ICBC would authorize a conversion. The fact remains that ICBC was billed for items that clearly were not installed. I am satisfied there was no authorization for the conversion or it would have been reflected on the cl 14. Probably the clearest evidence comes from the mouth of the accused himself when the investigator from ICBC went to ask Mr. Hwang about the Porsche, and his answer was "It was not legitimate". I find Mr. Hwang and the Company guilty on this transaction, reflected in counts 1 and 2.
>
> [9] The next count that deals with parts billed but not installed, is the BMW referred to in counts 13 and 14. What was authorized by ICBC and billed by Eurosport were repair parts for one model and what were actually installed were parts that upgraded it to, what appears to be in the video, a fancier model. When the investigator either saw the car or found out that all the parts billed to ICBC had in reality been returned for credit by way of credit memos, Mr. Hwang then produced the invoices for the parts he had actually installed. Mr. Hwang would appear to have made a minimal profit on this vehicle repair. The point is he was actively deceiving ICBC, presumably in order to keep the customer happy. I find him and the Company guilty on the counts related to this incident, counts 13 and 14.
>
> [10] The method by which this was accomplished was to bill ICBC for the parts as ordered on the original invoices and as authorized on the cl 14, and then return those parts for credit without mentioning this to ICBC, and proceed to install different parts.
>
> [11] Counts 5 and 6 relate to the repair of a door handle. Again ICBC was billed for a part that I am satisfied was not put on the vehicle. It was returned for credit with a resulting profit to Eurosport of $85.00. Mr. Hwang had detailed day to day involvement in this operation. It is clear he was very much a "hands on" manager. I am satisfied he knew or ought to have known about this and I find both Mr. Hwang and the Co. guilty relating to counts 5 and 6.

[131] Godfrey P.C.J. then moves to the other counts, concluding, in part, that:

> [12] Counts 7 and 8 relate to a Plymouth Voyageur. Bumper parts were ordered for the long wheel base vehicle, billed to ICBC and then returned for credit. There is an invoice for the short wheel base parts dated the same day the long wheel base parts were returned for credit. On re inspection some four months later, the correct, i.e. short wheelbase parts were present on the car. The only rational conclusion to all of this is that Eurosport ordered the long wheel base parts, billed the long wheel base parts to ICBC but actually installed the short wheel base parts. That resulted in a $50 odd profit to Eurosport. I should note that there was also an

> issue about repairing rather than replacing rebar, but I am not satisfied beyond a reasonable doubt that there was a repair. The issue on these counts then, revolves around billing for the one set of parts and actually installing the other. The issue is whether I can conclude beyond a reasonable doubt that Mr. Hwang knew or ought to have known of this fact, given there was no discussion with Mr. Hwang as there was with respect to the BMW and the Porsche.
>
> [13] A similar fact pattern repeats itself in the incidents regarding the Caravan, Counts 9 and 10, and the Rav4, Counts 11 and 12.

[132] In addressing the issue of intent, the court considered the evidence and, in particular, that of Brian Martin, a witness called in the present trial:

> [16] In deciding the issue of whether the Crown has satisfied me that Mr. Hwang knew or ought to have known, the evidence of Brian Martin is of significance. Mr. Martin worked for Mr. Hwang as the body shop manager in the year prior to these incidents; Mr. Martin had worked for ICBC earlier and was quite familiar with cl14s and associated invoices. Mr. Martin said he had words with Mr. Hwang about the fact that ICBC was being billed for parts that were not installed and Mr. Martin refused to sign any further cl14s on behalf of Eurosport. Mr. Martin's evidence was that Mr. Hwang told him not to worry about it, that ICBC had lots of money.
>
> [17] Mr. Martin is a man with a criminal record for falsehood. I am alert to the frailties of such a witness, and I must scrutinize his evidence with the greatest of care. Nonetheless I am satisfied that the part of his evidence that was reduced to writing by the ICBC investigator is believable. He said he was on probation, that ICBC had tracked him down through his Probation Officer and that he was scared, certainly initially and it makes sense that he might be more inclined to tell the truth in those circumstances especially as it related to documents being signed for ICBC payment. A second factor that inclines me to the conclusion that he was telling the truth is the effort Mr. Hwang put into reaching him to discuss the statement, a copy of which Mr. Hwang had obtained from his lawyers. Mr. Martin also gave evidence of a not so thinly veiled threat from Mr. Hwang as he was leaving Eurosport, the night of the discussion about whether Mr. Martin could change his statement.
>
> [18] When I couple that evidence of Mr. Martin with the evidence of Mr. Hwang's actions in relation to the BMW and the Porsche and my conclusion that he was very much a "hands on" manager, I can reach no other conclusion [than] that he knew of these fraudulent billings relating to the Rav4, the Voyageur and the Dodge Caravan. I find Mr. Hwang guilty of Counts 8, 10 and 12; and Eurosport guilty on Counts 7, 9 and 11.
>
> [19] Defence has urged on me that I should conclude from Mr. Martin's evidence that it was common in the industry to bill ICBC for one item and do something else. Certainly the evidence from the ICBC witnesses is that it never was acceptable. And it was Mr. Martin himself who refused to sign cl14 forms that billed for parts that were not installed. If substitution on the scale of the Porsche and the BMW was common in the industry, then that may be an issue on sentence, but I cannot conclude on this evidence that it affords a defence to Mr. Hwang.

[133] I should at this point state the obvious. In reaching the conclusions she did on the evidence before her, the learned Provincial Court judge was bound to and in fact applied the criminal standard of proof; not the standard applicable to the present proceedings.

[134] An appeal was launched by Eurosport and Fred Hwang, and on July 25, 2002, Warren J., in ***R. v. Eurosport Auto Co.***, 2002 B.C.S.C. 1109, found that s. 42.1 was *ultra vires* the province. He overturned the convictions. An appeal of that decision was taken by the Crown. The Court of Appeal in ***R. v. Eurosport Auto Co. Ltd.***, 2003 B.C.C.A. 281, reversed that decision, finding that s. 42.1 was in fact *intra vires* the province. On November 27, 2003, the accused's application for leave to appeal to the Supreme Court of Canada was dismissed.

[135] The evidence at the present trial, as it touched on these convictions, had another aspect that bordered on the bizarre. In para. 17 of her reasons, Godfrey P.C.J. refers briefly to Mr. Hwang's efforts to reach Mr. Martin to try and get him to change his statement to ICBC and Mr. Hwang's "thinly veiled threat" to Mr. Martin.

[136] In cross-examination Mr. Hwang acknowledged that he was in court the day the reasons were given and that about 20 minutes later he had telephoned Mr. Martin's son. When it was put to him that he had issued another threat he gave evidence that he phoned because the son had asked Mr. Hwang to let him know what happened.

[137] He then went on to testify that he had "just mentioned" that he had been convicted on 12 of 14 and that his father should be happy because he had lied and the judge believed him. Mr. Hwang then agreed that he had tape recorded the conversation because he " . . . just got the feeling it was necessary because I had some doubt about how believable his son was . . .".

(7) Brian Martin and Other Employees from Eurosport

[138] During the course of this trial, four former employees of Eurosport were called as witnesses by the plaintiff. The first three, Celia Chang, Miranda Lee and Sally Sui Fong Ho, worked at various times in the front office at Eurosport. The fourth, Brian Elliot Martin, was the body shop manager for Eurosport from April 24, 1996 until March 7, 1997.

[139] The first three of these witnesses described their duties and office and accounting procedures in place at Eurosport. Ms. Chang testified that the computer system maintained a computer file on each claim and that when you brought up a particular job it gave details of that job, including suppliers' invoices, and she believed credit memos. She also testified that they kept files for each supplier which included very detailed descriptions of all transactions with a particular supplier.

[140] Miranda Lee was hired as a bookkeeper at Eurosport in May 1997 and remained there until January 1998. Ms. Lee testified that much of her work consisted of data entry, entering suppliers' invoices, credit memos, and other expenses into their computer system. She went on to testify that suppliers sent detailed monthly statements and that it was a part of her job to check the monthly statements and ensure that Eurosport had been credited for the various credit memos issued for returned parts.

[141] She went on to testify that she believed all transactions with a particular supplier were available on computer and that there was a separate file for each claim.

[142] Ms. Lee testified that Eurosport kept a hard copy file of a supplier's credit memos and that she also posted them to the computer system.

[143] Ms. Ho testified that she was employed as a bookkeeper with Eurosport in 1995 and remained until May or June 1997.

[144] She testified that, in addition to data entry, she cross-checked invoices against supplier's monthly statements to verify the charges, and that the invoices and credit memos would be in the supplier's file. She did not recall there being a separate file for each customer.

[145] The evidence of these three witnesses establish the existence at Eurosport of a sophisticated computer accounting system, providing access to details of the suppliers' accounts and individual claim files. In addition, they establish procedural cross-checks over the accounts payable designed specifically to ensure that Eurosport was not charged for parts it didn't receive and credited for those it returned.

[146] The details of these capabilities and procedures is at considerable odds with Mr. Hwang's repeated assertions that he did not understand or pay attention to the paperwork. This is particularly difficult to accept given Mr. Hwang's post-graduate training in the computer field.

[147] Brian Martin is a witness of considerable importance; he gave evidence which, if accepted, constituted direct evidence of fraud by Fred Hwang and Eurosport. Mr. Martin has a criminal record consisting of convictions, on May 30, 1993, on five counts of false pretences for which he received suspended sentences, together with a $100.00 fine and a $300.00 fine. In addition, he admitted to a September 25, 1997 conviction for theft over $5,000.00 for which he was sentenced to a 5 month conditional sentence and 18 months of probation.

[148] Mr. Martin testified that as manager of the body shop he received the CL-14's and ordered the necessary parts. He went on to testify that when a part was returned they would receive a credit memo which was placed in the file for that particular claim.

[149] He went on to testify that Eurosport received parts outside of regular office hours in circumstances that raised concerns for him about where they were coming from. He testified that they came outside of office hours and without invoices. Mr. Martin testified that he told Fred Hwang he was concerned about it and was told that Fred ". . . had it under control".

[150] He went on to say that a number of questions were raised by ICBC about charges to CL-14's that he had signed. He described checking the files and finding that changes had been made to CL-14's after he had completed them. When he spoke to Fred Hwang he testified that he told him that he wouldn't do that, that it was illegal and it could get ugly. He testified that Fred Hwang told him that it didn't matter and that ICBC had lots of money.

[151] Mr. Martin went on to testify that –

(1) he saw parts being returned for credit yet being included on the CL-14's;

(2) he observed Mr. Hwang adding additional items to CL-14's; and,

(3) he saw Mr. Hwang whiting-out lower prices and inserting higher prices in CL-14's.

[152] On September 4, 1998, Mr. Martin was contacted and met with an investigator for ICBC. After speaking to him he provided a statement to him. Throughout the summer of 1999 Fred Hwang repeatedly tried to contact Martin, finally resorting to calling Martin's son. When Martin met with Fred Hwang, he testified that Mr. Hwang had a copy of his statement and wanted him to sign a statement saying it was wrong. When Martin resisted, Hwang told him that if he didn't change it he would take recourse in his own way.

[153] As a result of his concerns with what was going on at Eurosport, Mr. Martin testified that he told Fred Hwang he would not sign CL-14's and did not do so after that. The records available confirm that aspect of Mr. Martin's evidence.

[154] I accept Mr. Martin's evidence. In my view, despite his criminal record, Mr. Martin appeared both candid and forthright in his evidence concerning the matter. In addition, the available documents support his version of events and Mr. Hwang, during his cross-examination, admitted that Mr. Martin refused to sign the CL-14's.

[155] It strikes me as being very unusual that the body shop manager, whose responsibility it is to co-ordinate repairs and to ensure that they are properly completed, would refuse to certify that the work was done and the parts supplied; yet, from the documents, that is indeed what happened. Mr. Martin's explanation for that refusal stands alone; no other explanation was offered.

(8) Admissions Through Counsel

[156] On March 31, 2000, Brenda Brown of Davis & Company, counsel for the defendants, wrote a seven page letter to counsel for the plaintiff (Exhibit 101) which begins:

> The following are the Defendants' responses to outstanding requests for information made at the discovery of Frederick Hwang on August 23, 1999.

[157] When this letter was produced to Mr. Hwang during his cross-examination, he advised that he had never seen it before.

[158] This response is to be contrasted with his response when a letter from Derek Miura, dated September 13, 2000, (Exhibit 102) was put to him. This 14 page letter is in virtually the same form and contains responses to requests outstanding from examinations for discovery. In this case, Mr. Hwang testified he saw and reviewed the letter before it was sent out and that the answers were correct.

[159] On page 2 of the letter, the following admissions are found:

> 4. Question 2540, page 434
>
> The Defendants admit that Eurosport overcharged ICBC for the following parts. An asterisk indicates that the part has already been discussed at Mr. Hwang's examination for discovery.

Incident No.	Amount	Description/Comment
1	$15.96	high beam and low beam bulbs (incorrect price written in)
	$286.60	difference between headlamps and lens & housing, less the cost of high beams, low beam, fog lamp, and park lamp bulbs as shown in Mitchell Manual, Plaintiff's documents 3; however, it is possible the lens & Housing was not available at that time
2*	$38.99	ignition lock
3*	$71.72	dash finish
4	$13.27	door moulding
5	$125.62	air conditioning evacuation/recharge (but estimator put on estimate and supplement in error)
7	$36.74	0.6 hours labour; proper time for upper control arm is 1.5 hours (on CL 14 at Defendants' document 715); only the 0.6 given at Defendants' document 716 was overcharged
9	$118.56	upper tie bar extension

12	$61.55	fan blade
13	$12.55	0.2 hours labour for headlamp assembly (headlamp assembly quicker to install than lens and housing, but lens and housing were not available at time of order)
17*	$69.49	door seal
20	$104.81	rad support assembly (difference between parts charged and parts actually purchased)
25*	$50.56	hood
28	$57.11	right engine splash shield (but two parts were squeezed onto one line, so ICBC also made error in paying Eurosport)
29*	$6.18	wheel cover
33*	$43.83	door moulding (but ICBC was undercharged $4.79 for ¼ flare)
37	$168.40	difference between valance and air deflector
42	$5.18	one of two amber HL bulbs was not necessary but was put on car to ensure lamp colors matched on both sides
43*	$16.07	wiper switch
44*	$30.41	windshield washer bottle
45*	$49.52	engine mount
48*	$120.92	air filter intake duct (but see Question 1 above; Eurosport undercharged overall for this vehicle)
51*	$74.10	rear bumper cover, nerf strip, retainers
53*	$1.14	right front door handle
	$31.93	difference between console front reinforcement and braces invoiced at Plaintiff’s document 1038, page 5
54*	$82.87	exhaust manifold shield
55	$21.66	licence plate cover; but road estimator made mistake by approving this part on supplement if already included in impact strip
58*	$67.15	right park lamp assembly (but road estimator also made error by approving part on supplement that was already on estimate)
65*	$79.91	window moulding
96*	$61.23	1 hour spoiler labour
113	$12.82	right side retainer

[160] It is perhaps easy to look at the 29 transactions referred to in this portion of the defendants’ admissions and the amounts involved and question their importance. It must be recognized that each of these parts was listed on a CL-14 certified by the defendants and submitted by them for payment. In addition, these particular CL-14’s represented only a small portion of the claims submitted by Eurosport which totalled 696 claims in 1996 and 651 in 1997.

(9) Altered Documents

[161] During the course of his evidence Mr. Hwang produced a series of documents as part of his explanations for particular transactions. As examples of some of this evidence:

(a) Transaction 46

[162] Mr. Hwang testified that in this case the back door handle was back-ordered and that they waited for the seat they needed to come before they installed the handle. In support of this evidence he tendered two invoices which were marked as Exhibit 83. The first of these is an

invoice from Richmond Plymouth Chrysler Ltd., dated August 20, 1997. The second item on the invoice is a handle that is indeed back-ordered. The second page of Exhibit 82 is an invoice, #409107, from Grand Touring R.V. Manufacturers Inc., apparently dated September 17, 1997 with the notation on it "Pickup Tuesday Sept 17/97".

[163] Exhibit 103 was entered during the cross-examination of Mr. Hwang. It is a copy of invoice #409107. A comparison of the two documents makes it clear that the copy tendered by Mr. Hwang had been altered changing the date of the invoice from August 29, 1997 to September 17, 1997, and the pickup date from Sept 2 to Sept 17/97; Mr. Hwang offered no explanation for the alteration.

(b) Transaction 40

[164] In this case ICBC disputes the defendants' claim that they installed a Mag wheel for $641.00. They support their claim with the credit memo showing the wheel being returned for credit three weeks after it was purchased.

[165] Mr. Hwang, in his evidence, testified that Eurosport purchased the wheel and then discovered that the vehicle had custom wheels on it. He went on to testify that they returned the wheel and repaired and re-chromed the wheel. In support of this evidence, Mr. Hwang produced Exhibit 82 which included two invoices from Panther Precision Machine Ltd. Both invoices (#021755 and #019801) are for the cleaning repair and re-chroming of a wheel for a Lexus.

[166] The difficulties with Mr. Hwang's explanations in this case include the following –

(i) the date apparently originally written on invoice #021755 was Dec 31/97. The first part of this date has been crossed out and Mar 1 is written in over top of it;

(ii) the make and model written in on invoice #021755 is Lexus LS400 with no year written in. On invoice #019801 the vehicle is identified as a '92 Lexus SC400, although something has been crossed out in the model box;

(iii) the purchase orders are different on both invoices;

(iv) transaction 40 relates to a claim that occurred when a 1992 Lexus SC400 coupe, owned by Yvonne Mah, was damaged in a motor vehicle accident on June 18, 1997. The claim was estimated on July 14, 1997 and the CL-14 was certified by Frederick Hwang on August 18, 1997.

[167] The fact is, that whether the correct date on invoice #012755 is December 31, 1997 or March 1, 1997, it simply cannot relate to the repair of the vehicle in transaction 40. If the correct date is December 31, 1997 (as one would expect if the suppliers' invoices are numbered consecutively) then it was delivered over four months after the repairs were completed to this vehicle. If the correct date is the altered date of March 1, 1997, then the repair and re-chroming was done nearly four months before the accident occurred.

[168] Even if Mr. Hwang's evidence were credible about this transaction, and in my view it is not, the CL-14 is not accurate.

(c) Transaction 75

[169] In one part of this claim the plaintiff questions the supply of parts from stock. The CL-14 was accompanied by a Eurosport invoice and ICBC was charged $81.95 plus $11.47 for a total of $93.42 for a battery. The Eurosport invoice describes the battery as an "interstate battery".

[170] During the course of his cross-examination, Mr. Hwang conceded that the invoice produced for this battery at trial was the third one he had put forward during this litigation as being the one that went into this claim.

(d) Eurosport's Letter of November 5, 1997

[171] In late October 1997 Mr. Hwang attended a meeting with ICBC officials at the 5th and Cambie claim centre. During the course of this meeting ICBC reviewed with Mr. Hwang their concerns about his handling of claims.

[172] When asked about this meeting in cross-examination he testified that he was told not to charge for parts he didn't provide but denied that there was any mention of credit memos.

[173] On October 28, 1997, ICBC wrote to the defendants. The body of the letter reads:

> This will confirm our discussion at the 5th and Cambie Claim Centre where we identified many issues of concern surrounding workmanship, safe repairs, items billed for but not placed on the vehicle, and claims where parts have been returned for credit having not been put on the vehicle and presented by the estimate sheet (CL-14)

> or supplemental sheet (CL-14D).
>
> We are seeking a full explanation in writing from you regarding these issues of concern by November 10, 1997. Based upon your response to these issues of concern we will be making a decision as to what relationship you will have with the Insurance Corporation of British Columbia, if any. So that you are fully aware, some of these issues will be investigated to determine if any other actions are warranted.
>
> (Exhibit 9, Tab 12)
> [Emphasis added]

[174] Mr. Hwang was then asked about his undated letter which responded to the meeting. This letter is the first two pages of Exhibit 9, Tab 13. After being examined about this undated letter at his examination for discovery, Mr. Hwang produced a copy of the letter which bears the date Nov. 5, 1997 (Exhibit 9, Tab 13, pages 3 and 4).

[175] When asked about that during his cross-examination, Mr. Hwang testified that after his discovery he went back and looked through it and typed the date on it, but told no-one he had done so.

[176] I said at the start of this section on credibility that I would give some examples from Mr. Hwang's evidence and that is what these are. They are far from exhaustive but, rather, representative of some of the difficulties with his evidence.

[177] Two other transactions will round out this portion of these reasons and add an additional dimension to the character and conduct of Mr. Hwang.

(e) Transaction 26

[178] In this transaction, Siu Lung Derek Wong owned a 1994 Honda Accord. The vehicle was damaged in a motor vehicle accident on March 10, 1997. The CL-14 was certified by Frederick Hwang on May 6, 1997 and submitted to ICBC for payment. Included with the CL-14 claim was an invoice from Hwang Trading Porsche Parts to Eurosport for a Toyo tire for $330.00 plus G.S.T. for a total of $353.10. This invoice was submitted as part of the claim to persuade ICBC that a tire for that price had been supplied to Eurosport as part of the repair.

[179] In fact, as Mr. Hwang admitted in both direct and in his cross-examination, no such tire was ever supplied by Hwang Trading Porsche Parts or by Eurosport. Mr. Hwang testified that the tire was not available so he prepared the invoice and sent it in to ICBC and he gave the owner $300.00 cash instead of replacing the tire.

[180] Mr. Hwang admitted that he supplied the invoice to ICBC so they would think the tire had been replaced and " . . . to speed up the CL-14 . . .". He went on to admit that he knew the correct procedure but that he didn't want to do that because it would slow the process down.

(f) Transaction 82

[181] This transaction involved a 1975 Porsche 911 Carera owned by Thedors Martin Meyer. It was heavily damaged in a motor vehicle collision. The repairs outlined on the CL-14 certified by Frederick Hwang on September 10, 1997, totalled $15,279.59. In this case, parts from stock accounted for some $3,825.25 of the parts required for the repair and were invoiced by Eurosport to itself. This invoice included a $1,300.00 charge for the rear glass (or windshield) which was damaged and had to be replaced.

[182] It is beyond question that the rear glass was never installed on this vehicle as indicated in the CL-14 for, rather than performing the repairs as described and authorized on the CL-14, the defendants converted Mr. Meyer's Porsche from a targa model to a convertible, as shown in the photographs which form a part of Exhibit 3, Tab 82, at page 735.

[183] In his direct evidence Mr. Hwang testified that he was asked by the owner to do the conversion and that he told him he would have to get authorization from ICBC. He went on to testify that he told John Kinney (the ICBC estimator) about the conversion. According to Mr. Hwang, John Kinney told him as long as it didn't go over the estimate he didn't care. Mr. Kinney was called as a witness and denied having any such conversation with either Mr. Hwang or Mr. Meyer. He also denied ever authorizing the conversion.

[184] Mr. Hwang went on to testify that nothing was changed on the CL-14 because " . . . it wasn't 100% go ahead from the owner . . .". He went on to say that when the job was finished, he completed the CL-14 documents and gave Mr. Meyer a cheque for $2,000.00 "to buy the glass back from him". The cheque, dated September 19, 1997 and signed by Patti Hwang, is filed as Exhibit 9, Tab 27.

[185] Mr. Hwang's evidence concerning this transaction is, to be blunt, patently and utterly unbelievable. If the conversion work had been authorized then there was no need whatsoever to

certify and forward a CL-14 that authorized the original repair work. His explanation for the $2,000.00 payment to Mr. Meyer is equally incredible. Mr. Meyer, when called by the defendants, said that he had been given a cheque as a "refund for some of the parts". Mr. Hwang's explanation is that he supplied a rear windshield he had in stock but didn't use in the repair, charged ICBC for supplying it, and then bought it back from Mr. Meyer for $2,000.00.

[186] None of this can possibly explain Mr. Hwang's certification of the CL-14 which includes his certification that all parts were supplied and services rendered. In this case that included not simply the cost of the back glass but the labour to install it, as well as his "refund" of $2,000.00 to Mr. Meyer.

[187] The final matter I wish to touch on before concluding the credibility section of these reasons involves Mr. Hwang's communications with this court.

[188] On May 5, 2000, Ms. Denhoff, then counsel for the defendants, applied for an order staying the defamation portion of the counterclaim in this action. In support of that application, Mr. Hwang swore an affidavit on April 26, 2000 (Exhibit 112, Tab 4). In paragraph 14 of that affidavit, Mr. Hwang said:

> 14. If there is a finding by the Court that fraud took place, I do not plan to pursue a counterclaim for defamation or loss of business, either on my own behalf or on behalf of the other Defendants.

[189] During the course of his cross-examination, Mr. Hwang was reminded of the fact that on January 23, 2001, and again on February 8, 2001, Mr. McLean, counsel for the defendants, appeared and spoke to the defendants' application to adjourn the commencement of the present trial.

[190] The transcript of proceedings on January 23, 2001, is Exhibit 123 and records, in part, the following submissions:

> MR. POTTS: My lord, I arranged for this pre-trial conference in the naïve expectation we could today talk about documents and admissions, and so on. I was advised by my friend a short time ago that he has some new instructions from Mr. Hwang and I propose to let him discuss what they are.
>
> MR. MCLEAN: Yes, my lord, my instructions are to seek an adjournment of this matter. There is a criminal matter that is ongoing. The subject is pretty much the same as this particular action. Mr. Tom Doust is counsel for Mr. and Mrs. Hwang in that matter. It is scheduled to proceed on the 14th of February, then on the 28th of February in the afternoon only, on the 2nd of March for a full day, on the 5th of March for a full day, and on the 29th of March in the morning only. I spoke with Mr. Doust this morning. He has advised me that he hopes the criminal trial will be completed on those dates although he cannot say –
>
> THE COURT: I'm sorry, give me a hint. What is the criminal charge and who is it against?
>
> MR. MCLEAN: It's the same subject matter as the civil action. It is – I don't know the particular information itself, but my understanding is that the information is relating to the submission of allegedly fraudulent invoices by the defendants which is the same subject matter as the civil matter. So the defendants' position is that should they be convicted at the criminal trial, then the civil trial is essentially moot, given the higher burden of proof obviously that the Crown has to meet at the criminal trial. I don't think my friend will take any issue with the fact that the subject matter of the criminal charges and the civil claim are essentially the same.
>
> So we are looking at a three-week trial and the preparation for that, and if the – Mr. and Mrs. Hwang are convicted at the criminal matter, then obviously that's going to change their instructions vis-à-vis the civil matter because, I mean, once convicted, if convicted at the criminal trial then, I mean, there may be a point to proceeding, but I fail to see it, and my instructions right now are to seek an adjournment on the basis of there will be no point in proceeding should they be convicted.
>
> . . .
>
> . . . My instructions are clear; to seek an adjournment on the basis that should they be convicted at the quasi-criminal trial, it will change the manner in which they proceed in the civil matter. And I don't think that my friend is going to take issue with that necessarily in the sense that it would for all intents and purposes be moot to proceed with the civil matter if they were to be convicted. So the position of my clients is essentially, "Don't put us through the expense and the time of going forward with the civil matter when we are in the middle of the quasi-criminal matter and should we be convicted, the game is almost over." That is the sole reason for seeking an adjournment.

[Emphasis added]

[191] Similar submissions were made by Mr. McLean on February 8, 2001, (Exhibit 110). When Mr. Hwang was reminded of these submissions in cross-examination he testified that regardless of whether he was convicted or not, it was his intention to proceed with this trial. When the specific passages quoted above were put to Mr. Hwang, he flatly denied that he had given those instructions to Mr. McLean.

[192] In the unusual circumstances, I granted the plaintiff's application to call Bruce McLean in rebuttal. Mr. McLean testified that he had reviewed the transcripts of the court proceedings on January 23, 2001, and February 8, 2001, and that of Mr. Hwang's evidence concerning them given in this trial on May 28, 2001. He went on to confirm the accuracy of the transcripts of his submissions to the court.

[193] Mr. McLean testified that those submissions were based on specific instructions given to him by the defendant Frederick Hwang and that if he had ever been aware that it was the defendant's intention to proceed in any event he would have never made those submissions.

[194] I have taken pains to set out in particular detail a good many details of evidence and conduct of Mr. Hwang. I have done so because of the conclusions I have reached. Those conclusions cannot be reached lightly, whatever the temptation, but only after a careful review of the evidence and consideration of the implications and possible explanations.

[195] The defendant, Frederick Ngok Hwang, is, in my view, a man whose evidence at this trial is entirely unworthy of belief. I recognize that this is a civil trial but one in which serious allegations are made and in which the evidence should be considered with commensurate care. Whether I apply the ordinary civil standard, the more serious civil standard, or the criminal standard, my conclusions about Mr. Hwang's credibility remains unchanged.

[196] This is a witness who, regardless of whether he has taken an oath (as he did on the affidavits filed in this proceeding and in the trial before Burnyeat J.) or is affirmed (as he was in the present trial and during his examination for discovery) remains unencumbered by any need or desire to tell the truth. Mr. Hwang is prepared to, and has, told any story he felt would advance his position, altered documents and incorporated them within his revised evidence, sought to manipulate and abuse the process of the court, and sought, above all, to hide his activities behind a charade of explanations related to language and lack of understanding.

[197] In plain and simple terms Mr. Hwang is a liar and I believe not a word of his evidence when it conflicts with any other witness or source of information. To be more specific, I do not accept Mr. Hwang's evidence that would have me conclude that (a) Burnyeat J. was wrong in his findings in the case before him; (b) Godfrey P.C.J. was wrong in her conclusions about Mr. Hwang and the convictions she directed; (c) Melvin Carter was wrong when he testified that Mr. Hwang had told him he knew the one transaction was not legitimate; (d) John Kinney was wrong when he testified that he had not authorized the conversion of the Meyer Porsche; and, (e) Brian Martin lied in most of his evidence and, in particular, about his conversations with Fred Hwang.

PATTI SZE PING HWANG

[198] Mrs. Hwang, as the evidence reveals, ran the front office of Eurosport and was in overall charge of the bookkeeping and secretarial staff. The reality is, however, that she gave little evidence that touched directly on the individual transactions which are the substance of the plaintiff's case.

[199] Mrs. Hwang was educated at St. Margaret's Girls School in Victoria, and then at Mt. Ida College in Massachusetts where she studied business administration.

[200] She has worked for Windermere Lodge where she handled the collection of rent and patient's trust accounts. After leaving that job in 1976 for maternity leave, she started work for the Bowmac auto dealership in 1980. In that job she handled payroll and benefits in their payroll department. In 1994 she was employed by a restaurant where she handled the bookkeeping and accounts payable. From 1988 on she worked part-time at Eurosport handling accounting matters generally and in 1995 she went into that position full time. In addition, at different times, she worked for two different banks.

[201] Mrs. Hwang, in her direct evidence, tended to minimize her own role in the handling of CL-14's, essentially describing a process in which she would open a work file and pass it on to the body shop. Once the work was done and the CL-14 signed, she testified they would add it up and total it.

[202] In her cross-examination Mrs. Hwang again tended to minimize her role testifying that she didn't do the trial balances but passed that work on to their accountants. She went on to testify that her job did not involve her analyzing the bank statements or dealing with cheques.

[203] On this point her evidence was immediately challenged. Mrs. Hwang acknowledged that she

had given the following evidence at her examination for discovery and that it was true:

84	Q	I want to understand a little more clearly what exactly, I mean you indicated bookkeeping. What exactly did you do for Hwang Trading, what were your duties?
	A	My duties were just make out cheques.
85	Q	So you wrote cheques?
	A	Yes.
86	Q	And did you do anything else?
	A	And the bank statement
87	Q	What would you do with the bank statements?
	A	Analyze.
88	Q	You analyzed the bank statement?
	A	Yes.
89	Q	Were you responsible for anything else?
	A	Cash flow.

[204] As her cross-examination continued it became readily apparent that for at least some period of time Mrs. Hwang had done data entry, processing all the invoices into the accounting system and that on a monthly basis she reconciled the invoices with suppliers' statements.

[205] The reconciliation was accomplished through core accounts for a particular supplier which tracked invoices and credits. According to Mrs. Hwang, Eurosport purchased approximately $600,000.00 worth of parts per year and something on the order of $120,000.00 worth of these were wrong parts that were returned. Eurosport's procedures were set up to track these and ensure that credits were properly given through the reconciliation process each month.

[206] What emerged from the evidence of Mrs. Hwang was an attempt to minimize her knowledge of the accounting system and of her husband's activities generally. Little was volunteered if she judged it to be against the defendant's interest.

DISCUSSION

[207] The plaintiff's efforts to investigate and bring this case to trial have been massive. They have been hampered in those efforts by an equally massive volume of documentation and the dogged determination of the defendants, and Mr. Hwang in particular, to frustrate their efforts at every stage.

[208] Those efforts of the defendants included applications and actions calculated, in my view, to delay these proceedings and to make the costs of these proceedings as expensive as possible for the plaintiff. Applications in this category include, but are not restricted to, the defendants' attempt to force the plaintiff to provide them, at the plaintiff's expense, with certified daily transcripts, the application to adjourn a scheduled trial date on the basis, according to Mr. Hwang, of false representations and submissions, the attempt to force plaintiff's counsel to withdraw and the attempts to re-open this trial after it was concluded.

[209] In his opening, Mr. Potts submitted that the costs of these proceedings were totally disproportionate to the amount in issue but that the underlying issue is too important for the plaintiff not to proceed. I agree.

[210] In the end, evidence at this trial touched on 122 separate transactions or claims and the underlying details of the repairs carried out. During the course of the proceedings, and the trial itself, some of the specific claims were abandoned, not because the plaintiff was satisfied with explanations given but because of difficulties with proof and the cost of presenting some of the evidence.

[211] The final claims are presented in a detailed and revised Schedule A originally filed as a part of the statement of claim, and then as Exhibit 34 in these proceedings. Their final claims are set out in the revision of that schedule dated May 31, 2001. The final claims, as presented, in Schedule A total $51,039.68 and are broken down into the following categories –

PARTS CREDITED	$ 6,681.37
LABOUR	$13,163.67
WHEEL ALIGNMENT	$ 3,423.05
PARTS FROM STOCK	$18,968.24
OVERCHARGE PARTS	$ 3,737.74
UNAUTHORIZED PARTS	$ 4,103.38
PARTS NO DOCUMENTATION	$ 720.25
PARTS NOT REPLACED	$ 241.98
TOTAL	$51,039.68

[212] The difficulties encountered in investigating this case and bringing it before the court arise in no small measure from the size of the plaintiff corporation and their operations throughout the Province. ICBC pays out on an annual basis something on the order of $500,000,000.00 in claims related to damage to motor vehicles. There are quite literally thousands upon thousands of claims and, judging from the evidence in this case, likely millions

of parts utilized in the repairs of damaged vehicles.

[213] In the present case, the allegations are not of a single or a few major incidents of fraud but, rather, a systematic process whereby small amounts are taken here and there by a variety of schemes which, on the one hand make them difficult to detect, and on the other, extraordinarily expensive to investigate and present in court.

[214] At the heart of the plaintiff's concern about the present defendants is the source of the parts in stock. ICBC's concern about these parts is primarily twofold – (1) the quality of these parts and whether they constitute a safety hazard when used in a repair; and (2) whether they have, in fact, originated illegally by theft or some other means.

[215] At no time during the course of these proceedings or this trial was any adequate explanation given for the source of the stock of parts beyond Mr. Hwang's bare evidence that they had purchased some of them from businesses that had gone out of business or had some parts left over from other jobs.

[216] In contrast to this evidence, aside from the difficulties I have found exist in the evidence of Mr. Hwang, there is the evidence of Brian Martin. Mr. Martin described parts being delivered to Eurosport after hours and without accompanying invoices. Whatever else Mr. Hwang had to say about Mr. Martin, he never contradicted that evidence but, in effect, confirmed it. Testifying in part of his evidence on May 24, 2001, that he did in fact buy parts for cash and outside of business hours but only from people he knew. This evidence is a far cry from establishing legitimacy in the operation of a company where Mr. Hwang, by his own admission, issues false invoices from one of his companies in order to represent to ICBC he had paid for and provided a tire that never existed.

[217] The schemes utilized in the present cases include –

(1) Parts Returned for Credit

[218] In these cases, parts needed for a repair were purchased and the supplier's invoice was attached to the CL-14 and submitted to ICBC for payment; but the part was then returned for credit.

[219] This occurred in the cases of transactions 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 23, 24, 26, 27, 28, 29, 32, 33, 34, 35, 36, 38, 39, 40, 43, 44, 46, 47, 48, 50, 53, 55, 56, 57, 61, 63 and 85.

[220] In my view the plaintiff has proven in these cases that parts certified as having been installed as part of the repair were returned for credit. I do not accept the defendants' explanations for these transactions or Mr. Hwang's evidence that they were simply errors. Eurosport used a very sophisticated computerized accounting system to track the expense side of their business. They had detailed monthly accounting procedures in place to reconcile their suppliers' accounts to ensure that they received the credits they were entitled to and only paid for parts they used. I simply cannot accept the suggestion that these types of systematic errors, in their favour and against ICBC, could occur except by design.

(2) Premium Parts

[221] This is an adjunct of the first category and was implemented by ordering multiple parts of different quality and prices. The invoice for the higher priced part was sent in with the CL-14 but a lower priced part was used.

(3) Work Not Done

[222] In some cases work was not done at all or parts were not provided but cash was given to the insured. This, or some variation of it, occurred in the case of transactions 26,45,51,59 and 82.

(4) Parts from Stock

[223] The nature of these claims and concerns have already been canvassed. This occurred in the case of transactions 2, 6, 7, 26, 59, 61, 64, 66, 67, 69, 70, 75, 79, 81, 82, 83, 86 and 87.

(5) Parts Overcharged

[224] In these cases, again, invoices were submitted with the CL-14's but part of the items, or some of the items, were returned for credit. This occurred in the case of transactions 2,3,12,13,25,37,43,44,45,51,54,59,62,68,69,71,85 and 113.

[225] In my view, there is simply no doubt at the end of the day that representations in the various CL-14's relied upon by the plaintiff were false, with one exception that I will deal with

separately. The exception is the matter of wheel alignments.

[226] There is equally no doubt that the defendants intended ICBC to rely on the representations made by them in each of the CL-14's they certified.

[227] These constitute three of the four elements of deceit. The only element about which there was any real dispute is the second of the four elements of deceit; namely

> The representation must be made with knowledge of its falsity.

[228] In my view, the state of the defendants' knowledge emerges in a variety of ways. Mr. Hwang knows and was able to articulate a reasonably precise definition of fraud. He knew and was able to articulate his obligations to ICBC. The pattern of dealings emerging from the evidence in this case -- the defendants' acquisition of parts in unusual circumstances and his specific dealings with the owner in transaction 26 and his payment to him of $300.00, while providing an invoice for a tire to ICBC; and, his dealings with Mr. Meyer in the case of transaction 82 in the conversion of his Porsche to a convertible and the payment to the owner of $2,000.00 as a refund of parts, lead to only one conclusion.

[229] I find the defendants, in this case, submitted false CL-14's to ICBC intending that they be acted upon and received payments on the basis of those CL-14's. I find that the defendants did so with full knowledge that some of the representations in those CL-14's were false.

(6) Wheel Alignments

[230] Of the primary claims advanced by the plaintiff, $3,423.05 of these sums related to the defendants charging for wheel alignments where no printouts or specifications were provided.

[231] The manuals provided to Eurosport by ICBC clearly require such printouts to be provided and retained by the vendor who performs them.

[232] In each case where a CL-14 was provided to ICBC, it was immediately obvious that the printout was not attached yet, until this investigation was launched, no complaint was ever made. Daniel Ronald Bergen testified during the course of this trial. He has worked at Eurosport since 1987 and he did the wheel alignment work. He testified that prior to September 1997 he was never asked to provide a printout and he never did, but that in each case he did the work. I am not satisfied on the whole of the evidence that fraud has been established in relation to the wheel alignment claims.

[233] The rationale for the findings of fraud in relation to the other claims against Eurosport and Fred Hwang are obvious from these reasons. In the case of Patti Hwang, more must be said. I agree with the submissions of counsel for the plaintiff. Mrs. Hwang and her evidence falls precisely within the reasoning applied by Melnick J. in ***Doan v. Killins***, [1996] B.C.J. No. 3091, at para. 25 to 26, where he writes:

> [25] Even when the defendants ultimately communicated information concerning encroachments to the plaintiffs, they did so in such a manner as to shroud the full extent of the problem. They disclosed what can only be described as half-truths so as to understandably lead the plaintiffs to believe that any encroachment on City property was not a particularly significant one. Moreover, they disclosed this information only after making the contract.
>
> [26] In *C.R.F. Holdings Ltd. v. Fundy*, etc. (1980), 21 B.C.L.R. 345 (S.C.), varied (1981) 33 B.C.L.R. 291 (C.A.), Mr. Justice Taylor made the following observations with respect to "half-truths" at p. 352:
>
> > The law with respect to deceit by half-truth has its foundation in the colourful dictum of Chambre J. in *Tapp v. Lee* (1803), 3 Bos. & P. 367, 127 E.R. 200 at 203:
> >
> > > An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the Defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood.
> >
> > In *Peek v. Gurney* (1983), 6 L.R.H.L. 377 (H.L.), Lord Chelmsford observes (at p. 391) that while mere concealment will not suffice to give rise to a right of action in deceit, so that there must be "something actively done to deceive [the other party] and draw him in to deal with the person withholding the truth from him", this may well be accomplished by a half-truth. He observes (at p. 392) that half a truth will sometimes amount to a "real falsehood", and may

> contain "a positive misrepresentation". The law is summarized in Spencer Bower on Actionable Misrepresentation, 3rd (Turner) ed. (1974), at p. 94, in this passage:
>
> To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a 'lie', and one of the most dangerous and insidious forms of lie.

[234] This passage aptly describes Mrs. Hwang's evidence at this trial.

[235] In ***Huff v. Price*** (1990), 51 B.C.L.R. (2d) 282 at 295, our Court of Appeal considered the burden of proof in cases of fraud:

> Not only are damages for fraud and breach of fiduciary duty the same for the purposes of calculation, they are also the same for the purposes of the treatment they should receive in relation to the issues of causation and remoteness and they are the same with respect to the discharge of the burden of proof. Once the fraud or breach of fiduciary duty is shown, then the court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant who has been found to have been fraudulent or in breach of fiduciary duty. Reference should be made to *Howard v. Cunliffe* (1973), 36 D.L.R. (3d) 212 (B.C.C.A.); *Jacks v. Davis*, 39 B.C.L.R. 353, [1983] 1 W.W.R. 327, 22 C.C.L.T. 266, 141 D.L.R. (3d) 355 (C.A.), particularly at pp. 332-33; *London Loan & Savings Co. v. Brickenden*, [1934] 2 W.W.R. 545, [1934] 3 D.L.R. 465 (P.C.), particularly at pp. 550-51; *Ruxton v. Kelly, Peters & Assoc. Ltd.*, 58 B.C.L.R. 317, [1985] 1 W.W.R. 66 (S.C.); and *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.).
>
> The principle is much the same as the principle discussed in the reasons of Mr. Justice Sopinka, for the Supreme Court of Canada, in *Snell v. Farrell,* [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 110 N.R. 200, that all the circumstances should be considered, and that if the circumstances justify it a very slight amount of evidence led on the part of the plaintiff will shift the evidentiary burden to the defendant. In a case where fraud or breach of fiduciary duty has been established, the burden of proof in relation to causation and damages will readily be discharged, at least in a prima facie way, by the plaintiff.
>
> [Emphasis added]

[236] In the present case, the plaintiff has established fraud and their loss. With the exception of the wheel alignment claims, the defendants have failed to provide an explanation that disproves the loss claimed. The plaintiff will recover damages of $47,616.63 against the defendants.

INVESTIGATIVE COSTS

[237] The plaintiff also seeks to recover the identifiable costs of the investigation of these claims. Such a result was specifically recognized by our Court of Appeal in ***ICBC v. Sanghera***, [1991] 4 W.W.R. 714.

[238] In my view, such a claim is appropriate in the circumstances of this case.

[239] The affidavit of Joan Koonts (Exhibit 54) sets out the applicable pay rates of the key investigators involved in these claims.

[240] In his final submissions, Mr. Potts calculated the identifiable costs by taking the total investigative hours recorded by Melvin Carter as 1,068 hours. He then calculated the applicable hourly rates for Christopher Fairbridge (278 hrs at $28/hr = $7,784.00), Matthew Macelli (60 hrs @ $36/hr = $2,160.00) and Keith Knoblauch (60 hrs @ $30/hr = $1,800.00) and the remaining 670 hours at the lowest hourly rate for ICBC staff (670 hrs @ $25.19 = $16,877.30).

[241] These sums total $28,621.30. The plaintiff will recover that sum from the defendants.

PUNITIVE DAMAGES

[242] The plaintiff also seeks in this case an award of punitive damages. In part they seek this award on the basis that the claims advanced and proven in this case should be viewed as a representative sample and not the whole of the loss suffered by the plaintiff in their dealings with the defendants. Central to this submission is the plaintiff's assertion that these claims were not isolated incidents but part of an ongoing systematic pattern of fraud.

[243] The purpose of an award of punitive damages was reviewed in ***Huff v. Price***, *supra*, at pp. 299-300:

> Punitive damages, by contrast, are a separate award against the defendant designed to impose a punishment on the defendant and to set an example to others who might seek to act in a similar way. Punitive damages are measured by the degree of moral culpability of the defendant. They are not designed to compensate the plaintiff and they are not measured by an assessment of the plaintiff's suffering. An element of wilfulness or recklessness such as would underlie a finding of guilt in a criminal act is likely to be present before punitive damages will be awarded. But the defendant's conduct need not be criminal. Mr. Justice McIntyre used such words to describe the conduct that would give rise to a claim for punitive damages as "harsh, vindictive, reprehensible and malicious" but Mr. Justice McIntyre acknowledged that he had not exhausted the available adjectives. The anomaly, of course, about punitive damages is that they are paid to the plaintiff and not to the state, even though the plaintiff should have been fully compensated by his award of compensatory damages, pecuniary, non-pecuniary and aggravated.
>
> . . .
>
> Accordingly, the best course is to assess the plaintiff's damages for pecuniary losses first and the plaintiff's damages for non-pecuniary losses second. The damages for non-pecuniary losses may be awarded or augmented on the basis of an assessment of the harm suffered by the plaintiff as a result of the high-handedness, or the wilful or reckless indifference to the plaintiff's rights, of the defendant. If such an award or augmented award is made for non-pecuniary losses then it is correct but not essential to refer to and to classify that award as aggravated damages.
>
> It is only after those two steps have been taken that consideration should be given to making an award of punitive damages. The reason why punitive damages should be assessed third is that the degree of punishment inflicted on the defendant by having to pay compensatory damages, including pecuniary, non-pecuniary, and aggravated damages, must first be determined before it is possible to consider whether any further penalty, by way of punishment, should be imposed on the defendant and, if so, the additional amount that is required. So the third step is to consider whether the conduct of the defendant should be punished over and above the requirement that the defendant pay compensatory damages, pecuniary, non-pecuniary and aggravated. An award of punitive damages should take into account the moral culpability of the defendant, the amount he has already had to pay, and the profits, if any, that he has made from his wrongful acts. (He should not be permitted to retain profits from his wrongful acts: see *Austin v. Rescon Const. (1984) Ltd.* (1989), 36 B.C.L.R. (2d) 21, 48 C.C.L.T. 64, 57 D.L.R. (4th) 42 (B.C.S.C.).) The award of punitive damages should not try to do again what has been done by the compensatory damages, including the aggravated damages. But if some measure of further punishment is still required then the amount assessed should be consistent with the concept that it is punishment that is being imposed and not restitution that is being exacted. The award should not be inconsistent with the principles that underlie the imposition of criminal penalties. And, of course, if a criminal penalty has been imposed then that should be taken into consideration. In *Vorvis*, Madam Justice Wilson said this, at p. 1131:
>
> > Anderson J.A. would have allowed the appeal on the punitive damages issue and awarded the appellant punitive damages in the sum of $5,000. The quantum that Anderson J.A. would have awarded is, I believe, a reasonable one and in keeping with the Canadian experience in the award of relatively modest punitive damages. When the purpose of the award is to reflect the court's awareness and condemnation of flagrant wrongdoing and indifference to the legal rights of other people, the award does not need to be excessive.

[244] The present case is an appropriate case for the award of punitive damages. This is a case where the defendants defrauded ICBC. As was pointed out by Southin J.A. in ***ICBC v. Sanghera***, *supra*:

> The Corporation is by statute the insurer of all British Columbian motorists. Fraud on the Corporation is, in reality, fraud on all the motorists of British Columbia and deserves such punishment as the civil courts can properly administer.

[245] I have considered the convictions of Eurosport and Fred Hwang on several of the transactions which form a part of the claims in this case and the penalties imposed. The stigma of the criminal convictions referred to in the authorities has been imposed by means of the convictions and sentences. In addition, I have considered the systematic nature of the frauds in the present case, the difficulty in detecting them and the high cost of investigating and prosecuting claims in relation to them.

[246] I accept the submission that the random way in which files were selected does tend to establish that this was a sample rather than an exhaustive claim.

[247] I am troubled by what I perceive to be different approaches from the Supreme Court of

Canada in ***Vorvis v. ICBC***, [1989] 1 S.C.R. 1085, and ***Whiten v. Pilot Insurance Co.***, [2002] 1 S.C.R. 595, but in my view this is a case which by its nature requires a significant measure of punishment and a clear expression of disapproval from the court, but nevertheless these are parties who have been charged, convicted and sentenced in relation to these events.

[248] Quite apart from the underlying conduct giving rise to the claims themselves, Mr. Hwang, on behalf of himself and the other defendants, persisted in allegations of criminal or quasi criminal conduct against the plaintiff and allegations of unprofessional conduct against their counsel.

[249] Those allegations I will not dignify by repeating. It is sufficient to say that they are unfounded and entirely without merit.

[250] In the case of Mr. Potts, I must go so far as to say that he conducted himself throughout this action in a way that did he and his client nothing but credit. In the face of what must have been overwhelming temptation, he was scrupulously fair and balanced in his dealings with the defendants.

[251] In my view, taking into consideration the respective roles of the principal defendants, I award as punitive damages the sum of $50,000.00 against the defendant Eurosport, the sum of $50,000.00 in punitive damages against the defendant Frederick Hwang, and the sum of $15,000.00 in punitive damages against the defendant Patti Hwang.

DEFENDANTS' COUNTERCLAIM

[252] The final issue to be addressed in these reasons is the defendants' counterclaim. The defendants' claim that the plaintiff withheld monies owed to them as security for payment of the costs of other repairs. The plaintiff has admitted that portions of these claims total $82,016.95. This amount will be offset against the damages awarded to the plaintiff. In my view, the defendants' evidence does not establish any claim above that admitted. As for the allegations that the termination of Eurosport's accreditation was wrongful, or that the payments were wrongfully withheld, these are based on allegations of the defendant which are wholly unfounded.

[253] I find the defendants to be jointly and severally liable for the damages, other than the punitive damages.

COSTS

[254] As requested, costs may be spoken to.

"W.G. Parrett, J."
The Honourable Mr. Justice W.G. Parrett