

CANADA / JUDGMENT

Nagy v. BCAA Insurance Corporation

2020 BCCA 270

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 270 Nagy v. BCAA Insurance Corporation

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Nagy v. BCAA Insurance Corporation,

2020 BCCA 270

Date: 20201007

Docket: CA46203

Between:

Zoltan Nagy, Margaret Kuhn

Respondents

(Plaintiffs)

And

BCAA Insurance Corporation

Appellant

(Defendant)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated June 11, 2019 (Nagy v. BCAA Insurance Corporation, 2019 BCSC 930, New Westminster Docket S194841).

Counsel for the Appellant, appearing via videoconference:

S. Sidhu

Counsel for the Respondent, appearing via videoconference:

D. K. Magnus

Place and Date of Hearing:

Vancouver, British Columbia

July 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 7, 2020

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Bennett

Summary:

Following a summary trial proceeding, the appellant challenged an order by the judge finding it liable under an insurance policy issued to the respondents. The respondents' claim arose from a total loss fire to their home. The appellants denied the claim on the basis that the insurance policy was void due to material change in risk, and to misrepresentations and omissions made by the respondents at the time the insurance policy was issued. At trial, the judge found coverage under the policy, concluding in relation to the alleged misrepresentations and omissions that these were omissions that the appellants had failed to demonstrate were fraudulently made. On appeal, the appellants argued that the trial judge erred in her characterization of the missing information as omissions rather than misrepresentations, thus applying heightened scrutiny to the evidence. In addition, the appellants argued that the summary trial judge made palpable and overriding errors of fact and subsequently erroneously applied the rule in *Brown v Dunne*. Held: Appeal allowed; order set aside. The judge erred in finding one of the respondents' answers on the application to constitute an omission rather than a misrepresentation, which error was palpable and overriding. This, together with further palpable and overriding factual errors

combined with a misapplication of the rule in *Browne v Dunn*, require this matter to be remitted for a new trial.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1.0 INTRODUCTION

- [1] After a summary trial, the appellant, BCAA Insurance Corporation ("BCAA"), was found liable under a homeowner's policy it issued to the respondents, who are common-law spouses, to indemnify them for the complete loss by fire of their house and its contents on Mayne Island, BC. BCAA issued the policy on March 8, 2016. The fire occurred on December 4, 2016.
- [2] BCAA had resisted the claim, alleging that the policy was void due to misrepresentations and omissions by the respondents at the time coverage was placed, and also on the basis of a material change in the risk arising out of occupancy issues.
- [3] The trial judge's reasons for judgment finding coverage under the policy are indexed at 2019 BCSC 930. On appeal, BCAA does not pursue the material change issue, but submits that the judge made errors of law and fact in relation to the alleged misrepresentations and omissions.
- [4] These allegations, as argued before us, concern two matters about which BCAA maintains it was left in ignorance at the time it agreed to provide the insurance. The first is the fact that the respondents' previous insurer, Wawanesa Mutual Insurance Company, lapsed the policy at the end of its term (March 8, 2016), refusing to renew it on the basis of "Claims Frequency & the Frequency of Change of Occupancy". The second is the extent of previous claims, of which only one had been disclosed.

2.0 BACKGROUND

- [5] The relevant facts may be briefly summarized as follows.

- [6] At the relevant time, 2016, the respondents owned three properties, a residence in Coquitlam, BC; the property on Mayne Island, BC, that was sometimes rented out; and the third at Point Roberts, Washington State. Over the years, they had made various insurance claims, including, for present purposes: a total fire loss at the Point Roberts property in March, 2008; a claim for damage to the roof of the Mayne Island property in January 2013; and a claim for theft at the Point Roberts property in December 2014.
- [7] The respondents had insured their Mayne Island property with Wawanesa. At the material time, their current policy was set for expiry and renewal on March 8, 2016. But, on February 10, 2016, the respondents' insurance broker, Eaton & Starr, wrote them to advise the following:

Re: Fire and E.C. (Including Rental Dwelling)

Policy No. HPC 186****

We are writing with regards to the captioned policy renewal.

Please be advised that the above noted policy will be lapsed on its expiry date of March 8, 2016, due to the following reasons. There will be no coverage in place through Wawanesa Mutual Insurance Company as of March 8, 2016 at 12:01AM.

Claims Frequency & the Frequency of Change of Occupancy.

We are working hard to obtain an alternate quote from different market, and we will keep you posted in this regards.

We would also suggest that you contact an alternate broker to arrange insurance coverage.

We trust you will find everything to be in order and thank you for your past patronage. If you have any questions, please contact our office.

[Emphasis original.]

- [8] Thereafter, Eaton & Starr submitted applications for coverage on the respondents' behalf (signed by Ms. Kuhn) to various insurers, but without success. Mr. Nagy decided to try to obtain coverage with BCAA, of which he was a member. Eaton & Starr could not do so on his behalf because only members could apply.
- [9] On March 8, 2016, the date the Wawanesa policy was set to expire, Mr. Nagy spoke with Ms. De Rose of BCAA, who agreed to provide coverage for the respondents' property. Ms. De Rose emailed an application form to the respondents that she had filled in based on her telephone conversation with Mr. Nagy. Time was short. Mr. Nagy and Ms. Kuhn were to sign, scan, and return it electronically. They did so, and BCAA bound coverage that same day.
- [10] In both the telephone conversation and on the application form, the respondents were asked for a list of previous losses within the past 10 years. In both instances, only one such loss was disclosed: the theft in December 2014. In fact, as noted above, there were two other

significant matters, including a total loss from fire in 2008. And in answer to the question "Has any insurer cancelled, declined, refused or imposed any special conditions on habitational insurance for the applicant in the past 10 years?" the respondents answered "No", both by telephone and on the application form.

- [11] Whether these admitted inaccuracies constitute misrepresentations or omissions is in issue. The trial judge considered them to be omissions that would void the policy only if fraudulently made. In this, BCAA argues, she erred.
- [12] But whether misrepresentations or omissions, the respondents maintain that they were cured (if misrepresentations), or shown not to be fraudulent (if omissions) by documents they say they supplied to BCAA after they submitted the electronic application on March 8, 2016. These documents comprised a copy of the signed application on which Mr. Nagy had set out in handwriting all of their previous losses over the past 10 years (the "addendum"), and a copy of their broker's letter of February 10, 2016 (the "Eaton & Starr letter"), concerning the lapse of the Wawanesa policy.
- [13] Mr. Nagy deposed that he mailed the addendum and attached Eaton & Starr letter to BCAA the next day, March 9, 2016. Consequently, the respondents maintain, although what they signed and returned electronically on March 8 did not contain complete information, all was fully disclosed by the addendum and attachment that Mr. Nagy mailed on March 9. Mr. Nagy further deposed that he confirmed BCAA's receipt of those documents by telephone on April 29, 2016. BCAA disputes this evidence.
- [14] If all of Mr. Nagy's evidence in this regard were accepted, then coverage would follow. This is because any misrepresentation or omission either would have been rectified, or would have been demonstrated to be immaterial by the fact that BCAA maintained coverage notwithstanding receipt of the information. This is not disputed. But BCAA maintained that it never saw any mailed addendum and attachment, and did not confirm receipt in any telephone conversation with Mr. Nagy.
- [15] On these points, credibility was very much in issue. Ultimately, as will be explored in detail below, the trial judge largely accepted Mr. Nagy's evidence. She did so in part on the basis of a *Browne v Dunn* analysis that led her to conclude there was a lack of trial fairness in the manner in which BCAA took the position that Mr. Nagy was not to be believed. As a result, she found that BCAA had failed to demonstrate that the respondents' omissions were fraudulent. It followed that the policy was not void.
- [16] On appeal, BCAA asserts that the trial judge made a palpable and overriding error in relation to a key finding of fact concerning the April 29, 2016, telephone call Mr. Nagy swore he made to BCAA to confirm its receipt of the mailed application, addendum and attachment. Moreover, BCAA contends, the judge erred in her findings relating to whether Mr. Nagy forwarded the addendum and attached Eaton & Starr letter, and compounded these errors by her (mis)application of *Browne v Dunn* (1893), 6 R 67 (HL), to the circumstances before her. It follows, in BCAA's submission, that the underpinning for the judge's conclusions on

credibility disappears, and her judgment cannot stand.

3.0 ISSUES AND STANDARD OF REVIEW

[17] The questions before us, then, are these:

[18] First, do the respondents' incomplete and inaccurate answers to the questions raised by BCAA in its telephone discussion with Mr. Nagy and on its application form constitute misrepresentations or omissions?

[19] BCAA submits that this is a question of law, while the respondents assert that it is a question of fact, relying on *Taylor v The London Assurance Corporation*, [1935] SCR 422 at 428. In my view, given the contextual difference between this case and *Taylor*, where what was said was very much in issue, the question as it arises here involves the application of a legal standard to a set of facts, and therefore is properly viewed as one of mixed fact and law. As such, the trial judge's findings are entitled to deference in the absence of palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33.

[20] Second, what follows from the distinction between the two? Though not considered by the judge given that she found only omissions, this is a question of law.

[21] Third, did the trial judge err in fact in relation to her findings that Mr. Nagy sent the addendum and the attached Eaton & Starr letter, and concerning the telephone call to BCAA on April 29, 2016, to confirm that BCAA had received those documents?

[22] As this issue concerns findings of fact, we must ask ourselves whether the judge made a palpable and overriding error.

[23] Fourth, did the trial judge erroneously apply *Browne v Dunn* in weighing the evidence? Whether the rule in *Browne v Dunn* applies is a question of law, reviewable on a standard of correctness: *Hamman v Insurance Corporation of British Columbia*, 2020 BCCA 170 at para 77; *R v Drydgen*, 2013 BCCA 253 at para 22.

[24] For the reasons that follow, I conclude that the judge below did err in a material way, and that her order must be set aside. I would therefore allow the appeal and remit the matter to the trial list.

4.0 DISCUSSION

4.1 Misrepresentation or omission: a palpable error?

4.1.1 Overview

[25] BCAA submits that the judge erred in characterizing the inaccuracies in the information supplied by the respondents as omissions rather than misrepresentations, and thereby required proof of fraud subject to a heightened scrutiny of the evidence.

[26] Historically, there was little difference between the two in the insurance context, in terms of their consequences. Contracts of insurance have always been considered contracts of utmost good faith (*uberrimae fidei*), obliging both the insurer and the insured to conform to high standards regarding disclosure. This was especially so, insofar as the insured was concerned, regarding disclosure of material facts concerning the risk.

[27] As Lord Mansfield put it in *Carter v Boehm* (1766), 3 Burr 1905, 97 ER 1162 at 1164:

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because of the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

[28] Accordingly, whether material facts were misrepresented or omitted, the policy was considered void at common law whether or not there was any actual fraudulent intent. Until 1924, this was reflected in a statutory condition that was incorporated by law into fire policies.

[29] Through subsequent amendments, we arrive at the present Statutory Condition 1, which is one of the conditions that, by section 29(1) of the Insurance Act, RSBC 2012, c 1, are now deemed to be part of every insurance contract. By Statutory Condition 1:

Misrepresentation

1. If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material.

[Emphasis added.]

[30] By statute, then, an omission of a material circumstance will void the contract only if fraudulent. A misrepresentation, however, will have that effect whether or not fraudulently made.

[31] Also relevant is section 17 of the Insurance Act:

17 (1) A contract is not rendered void or voidable by reason of any misrepresentation, or any failure to disclose on the part of the insured in the application or proposal for the insurance or otherwise, unless the misrepresentation or failure to disclose is material to the contract.

(2) The question of materiality is one of fact.

[32] It is not contested that the existence of previous claims, including a total fire loss, and a refusal by a previous insurer to renew the insurance, are matters that would be material to the contract.

[33] Similarly, as noted, it is not contested that if Mr. Nagy indeed made full disclosure via his mailed addendum and the attached Eaton & Starr letter, and if BCAA received these and yet maintained the coverage, then it could no longer be said that the initial inaccuracies were material to BCAA even if they constituted misrepresentations or omissions at the time they were made.

[34] What follows from whether the statement is characterized as an omission or a misrepresentation, then, comes down to this. If an applicant misrepresents circumstances material to the contract, it matters not whether that misrepresentation is innocent, negligent, or fraudulent. This is because it concerns a matter exclusively within the knowledge of the applicant that is, in the words of Statutory Condition 1, "material to be made known to the insurer in order to enable it to judge the risk to be undertaken", and the applicant will have provided information of that nature that simply was not true.

[35] If the insured omits to communicate a material circumstance (an omission), however, that omission must not only be material, but also fraudulently made if it is to void the contract.

[36] The trial judge recognized this important difference, and went on to characterize all of the inaccuracies of which BCAA complained as omissions rather than representations. She approached the question this way:

[74] At the hearing, I asked the parties for their positions on whether the Alleged Non-Disclosures constitute allegations of misrepresentations or omissions by the Plaintiffs. BCAA took the position the Alleged Non-Disclosures are misrepresentations by the Plaintiffs and, therefore, a heightened degree of scrutiny of the evidence is not required. BCAA argues the insurer can choose whether to treat a non-disclosure as a misrepresentation or an omission, however, I was not provided with any authority to support that position. I note that in its Summary Trial Application, BCAA used words such as "fraudulently omitted" and alleged Mr. Nagy "knowingly omitted" to provide information related to the Alleged Non-Disclosures.

[75] The Plaintiffs say the Alleged Non-Disclosures are omissions, and therefore BCAA must prove, based on clear and cogent evidence, the omissions were fraudulent in order to rely on Statutory Condition 1.

[76] BCAA relied on *Lee et al. v. Canadian Northern Shield Insurance Company et al.*, 2005 BCSC 866 to support its position that a distinction between misrepresentation and omission is not critical, including the following passage at para. 62:

Mr. Lee did not disclose to Ms. Phung or Mr. Kwan that he intended to rent out rooms in the house to unrelated tenants. He may have overlooked it, he may have considered it unimportant, or he may have intended to hold that information back. The distinction is not crucial since "[i]t is irrelevant whether the failure to disclose is deliberate or inadvertent": *Lafarge Canada Inc. v. Little Mountain Excavating Ltd.*, 2001 BCSC 218 at para. 25.

[Emphasis added by trial judge.]

[77] However, it does not appear that either Lee or Lafarge considered the legislative distinction drawn between a misrepresentation and an omission in the relevant Statutory Condition, both as it reads in the current Insurance Act and its predecessor.

[78] Statutory Condition 1 distinguishes between the nature of insured's intention required to render an insurance contract void for misrepresentation or for omission, which was acknowledged by BCAA in its Summary Trial Application. This statutory distinction "narrows the common law disclosure duty by making the insured's intentions relevant to the omission of the information": Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed. (Markham: Lexisnexis Canada Inc., 2014), at 104; *Taylor v. The London Assurance Corporation et al.*, [1935] S.C.R. 422. In order to render an insurance contract void, a misrepresentation does not have to be fraudulent, but an omission must be: *Bowes v. Fire Insurance Co. of Canada*, [1936] O.J. No. 109 (H.C.J.) at para. 20.

[79] I agree with the Plaintiffs that BCAA has alleged omissions and it must therefore prove the Alleged Non-Disclosures were fraudulent in order to rely on Statutory Condition 1. This conclusion is consistent with the language used by BCAA in its notice of application and written submissions presented at the hearing, which allege intentional fraudulent concealment by the Plaintiffs.

[37] It is evident from this passage that, after properly rejecting authorities submitted by BCAA, the judge did not go on to discuss in the context of the present case the distinction between a misrepresentation and an omission, as opposed to the difference in what had to be proved by way of intent. Instead, the judge appears to have based her conclusion that the inaccuracies in question amounted to omissions, rather than misrepresentations, principally on the manner in which BCAA presented its case. In this way, she was led into what, in my view, was a palpable error: without analysis of the relevant statements, she characterized both inaccuracies as omissions rather than misrepresentations, and reached a result that was plainly wrong.

[38] As a result of this approach, the judge put the onus on BCAA to prove fraudulent intent. Relying on *Bevacqua v. I.C.B.C.*, 1999 BCCA 553, and *Bolen v ICBC*, 2006 BCSC 1749 at para 18, the judge noted at para 39 that where fraud is alleged, while the standard of proof remains the civil standard of a balance of probabilities, "a heightened scrutiny must be applied" to the evidence.

4.1.2 Standard of proof and "heightened scrutiny"

[39] Before returning to the question of omissions versus representations, I propose to address the manner in which the judge approached the evidence and the standard of proof. In my respectful opinion, while the judge correctly stated that where fraud is alleged, the standard of proof remains the civil standard of a balance of probabilities, she erred in subjecting the evidence to a "heightened scrutiny" in order to determine whether it proved fraud. That approach is wrong in law.

[40] The authority upon which the judge relied was the 1999 decision of this court in *Bevacqua*, as applied in the 2006 decision of Madam Justice Fisher, then of the Supreme Court, in *Bolen*. In *Bevacqua*, this court stated at para 44:

It must be remembered that allegations of fraud against an insured are quasi-criminal in nature, and if proven could affect the insured's life well beyond the outcome of his insurance claim. Such serious allegations call for heightened scrutiny of the evidence by a trial judge, before being satisfied that an allegation of fraud has been proven on a balance of probabilities

[41] But *Bevacqua* and *Bolen* are no longer good law on that point. They were decided before the Supreme Court of Canada rendered its decision in *FH v McDougall*, 2008 SCC 53. In that case, Justice Rothstein, for the Court, said this:

[45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.

[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[Emphasis added.]

- [42] It does not appear that this decision was brought to the trial judge's attention. Nevertheless, it follows that it was an error for the judge to proceed on the basis that she was to apply a heightened scrutiny to the evidence in order to determine whether BCAA had proved fraud on a balance of probabilities. "Heightened scrutiny" should now be locked away in the vault of discarded phrases.
- [43] This appeal, however, does not turn on that point. I return to the question of whether the judge erred by characterizing as an omission what was in fact a misrepresentation by reviewing the two areas in which the respondents gave inaccurate or incomplete answers on the insurance application.

4.1.3 The previous claims

- [44] I look first at the respondents' disclosure of one theft claim in response to the question: "State all losses or claims by the applicant or other members of the applicant's household in the past 10 years". In fact, they had also had a total fire loss at the Point Roberts property, and roof damage at Mayne Island property. What they stated was literally true, but since it answered a request for disclosure of all losses, it suggested that they had no other claims, which was false. Was this an omission or misrepresentation?
- [45] A false representation of fact, an assertion that something is so when it is not, or that something is not so when it is, constitutes a misrepresentation. As Professor Boivin put it, misrepresentations are active in operation, whereas omissions are passive: Denis Boivin, *Insurance Law* (Toronto: Irwin Law, 2004) at 116. Misrepresentations are words, writings or gestures that communicate misinformation and can be judged objectively by comparing them to the truth. But as Professor Billingsley noted, the delineation is not always clear, particularly in the case of half-truths: Barbara Billingsley, *General Principles of Canadian Insurance Law*, 2nd ed (Markham: LexisNexis Canada Inc, 2014) at 105 [Billingsley]. See, for instance, the analysis of Goepel J, as he then was, in *Lohse v Sovereign General Insurance Co*, 2002 BCSC 50.
- [46] Accordingly, distinguishing a misrepresentation from an omission becomes problematic where the statement is literally true, but practically false, and therefore misleading--not because of what it said but because of what it left unsaid: Bruce MacDougall, *Misrepresentation* (Toronto: LexisNexis Canada, 2016) at 178, citing *R v Lord Kylsant*, [1934] 1 KB 442.
- [47] As the judge recognized, misrepresentation cases that fall outside of the context of Statutory Condition 1 are of limited utility in determining whether a misleading statement of this type is a misrepresentation or omission, because of the contextual distinction the statutory condition makes. This distinction "narrows the common law disclosure duty by making the insured's intentions relevant to the omission of the information": Billingsley at 104; see also Taylor at 425.

- [48] Taylor concerned a statement by the insured's wife to the insurer's agent. The property being insured comprised lumber camp buildings and equipment in the Township of MacBeth, District of Sudbury, Ontario. There were numerous forest fires in the district and, on the day in question, a fire had started in the adjoining Township of McNish. The agent asked, "are there any fires?", to which Mrs. Taylor was found to have answered, "yes, all over the country". She did not mention McNish. This was treated as an omission, and the case turned on whether it could be considered to have been fraudulently made within the meaning of Statutory Condition 1.
- [49] The Supreme Court concluded that there was no evidence of actual fraud, and this was not a situation where some lesser concept such as "fraud in law" would do. Consequently, the omission to mention the fires in McNish Township was innocent, and did not void the policy. Voiding the policy could only result if the statement could be characterized as a misrepresentation.
- [50] Chief Justice Duff, for the court, concluded that it could not, though he observed, at 428-29: If Mrs. Taylor's partial statement of the facts was calculated to mislead the person to whom it was addressed, then it might amount to a misrepresentation. But no such issue of fact was suggested by the respondents at trial.
- [51] From this, I take it that such a partial statement of the facts must generally be considered an omission. Only under particular circumstances might it amount to a misrepresentation. But whether it should be taken as such, in the context of Statutory Condition 1, is now open to question, as observed by Professor Billingsley (Billingsley at 103-105).
- [52] As noted above, it is clear that if a positive statement is made that is untrue, then it amounts to a misrepresentation. The focus is on the understanding of the insurer, who will necessarily have been misled. That is why it matters not whether the misrepresentation was innocent or intentional. This flows from the wording of Statutory Condition 1 itself, and from the status of an insurance contract in law as one requiring the utmost good faith. It is up to the insured to make sure that what he or she represents to the insurer is correct.
- [53] But if a true but incomplete statement is made (a "half-truth"), then, at least prima facie, it will amount to an omission within the meaning of Statutory Condition 1. To characterize such a half-truth as a misrepresentation where it is "calculated to mislead" does not advance the analysis in the context of how Statutory Condition 1 treats an omission. As Professor Billingsley noted, in relation to omissions but not misrepresentations, the statutory condition makes the insured's intention relevant: Billingsley at 104. It thus focuses on the intention of the applicant, not the state of knowledge of the insurer, presumably because what was communicated was true, albeit incomplete. Any "omission" that was calculated to mislead would presumably satisfy the requirement of fraud, and would void the policy. Characterizing it as a misrepresentation adds nothing. If it was a true misrepresentation, in the sense of a positive statement that was untrue, then whether it was calculated to mislead is irrelevant. The statutory condition does not require any examination of intent when it

comes to misrepresentation.

[54] On this analysis, the judge's finding that the 'previous losses' answer, which correctly reported a previous theft claim but neglected to mention other significant losses, was an omission is entitled to deference. As an omission, it would only void the policy if proven to have been fraudulently made.

[55] The judge went on to conclude that it had not been proven to be fraudulent, because, she found, Mr. Nagy made full disclosure of those other events when he prepared the addendum and mailed it to BCAA, or at least attempted to make full disclosure; in the judge's view, this defeated any suggestion that Mr. Nagy omitted the information fraudulently. The question is whether that finding can stand in view of the factual errors discussed below.

4.1.4 The previous policy

[56] The same analytical difficulty does not arise in relation to the matter of the lapse of the previous Wawanesa policy.

[57] For ease of reference, I set out again the contents of the Eaton & Starr letter of February 10, 2016:

Re: Fire and E.C. (Including Rental Dwelling)

Policy No. HPC 186****

We are writing with regards to the captioned policy renewal.

Please be advised that the above noted policy will be lapsed on its expiry date of March 8, 2016, due to the following reasons. There will be no coverage in place through Wawanesa Mutual Insurance Company as of March 8, 2016 at 12:01AM.

Claims Frequency & the Frequency of Change of Occupancy.

We are working hard to obtain an alternate quote from different market, and we will keep you posted in this regards.

We would also suggest that you contact an alternate broker to arrange insurance coverage.

We trust you will find everything to be in order and thank you for your past patronage. If you have any questions, please contact our office.

[Emphasis original.]

[58] The letter is awkwardly drafted, but its meaning is clear. On the question of renewal, the broker was advising that Wawanesa refused to renew the policy because of claims frequency and the frequency of change of occupancy. Accordingly, they would have to find coverage elsewhere. And that is just what they did.

[59] Mr. Nagy provided different explanations about this letter at different times; the judge concluded that he found it ambiguous. In fact, there was no admissible evidence that he found the letter ambiguous, as will be discussed in relation to the later issue. What matters for present purposes is that the answer "No" given to the question "Has any insurer cancelled, declined, refused or imposed any special conditions on habitation insurance for the applicant in the past 10 years?" can be objectively compared to the truth. It was untrue. The trial judge did not find otherwise. It follows that to characterize it as an omission, instead of a misrepresentation, was a palpable error. It was not an omission, or a half truth. It was a positive representation that no insurer had cancelled, declined, refused or imposed any special conditions on habitation or insurance in the last 10 years. That was false, however the respondents might have perceived it.

4.1.5 Consequences: the cure

- [60] What follows from the distinction? It is an important question in this case. What follows is a difference in what is required to cure the problem.
- [61] In the case of the straightforward, positive misrepresentation, as I conclude occurred here in relation to the Wawanesa policy, the only way to cure the misrepresentation is to provide the insurer with the correct information prior to the reliance on that information by the insurer: MacDougall at 125-26.
- [62] Here, then, if BCAA received the addendum prior to issuing the policy, the misrepresentation would be of no consequence. It seems exceedingly unlikely that BCAA could have received the correct information prior to relying upon the incorrect information the respondents had provided by telephone and by electronic return of the signed policy form on March 8, which was the date the BCAA issued the policy. Mr. Nagy testified that he mailed the addendum the next day. Nevertheless, even if BCAA received the correct information after issuing the policy, if BCAA took no steps to cancel or revise the coverage, then it would follow that it did not consider the misrepresentation to be material to the risk.
- [63] In either event, the same result would follow as that reached by the trial judge. But in the context of this case, this would require not just mailing a copy of the letter to BCAA, but also actual receipt by BCAA.
- [64] Why is this so? Because it is BCAA's state of knowledge that is important here, not the insured's. Only the insured knows that the information he gave was incorrect. Here, BCAA expected, and received, an electronically delivered scanned copy of the application form signed by the respondents. BCAA neither required nor expected anything more, and proceeded to issue the policy. Only the respondents knew that the information on the application form was incomplete and incorrect, and only the respondents were aware (if Mr. Nagy's evidence is accepted) that the correct information was "in the mail". BCAA had no expectation of further information, and indeed, one would expect any inquiry about delivery of the addendum to come from Mr. Nagy, not from BCAA. His evidence was that it did. (See, by analogy, Professor Waddams' analysis in relation to the communication of

offers and acceptance in S.M. Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at ¶69-71.)

- [65] But if it is a question of omission, then the focus is on fraudulent intent. Such an intention or calculation may be rebutted by evidence that the insured forwarded the complete and correct information to the insurer, even if there is no evidence that the insurer received it. This is because what is relevant is the insured's intention, not the insurer's state of knowledge. This was the path followed by the trial judge, and it was one open to her in relation to omissions, but not in relation to misrepresentations.
- [66] As indicated above, appellate interference can only be justified in relation to an error of fact where the error is both palpable and overriding. In short, the error must not only be obvious, but also one that is likely to have affected the result, or which discredits it: *HL v Canada (Attorney General)*, 2005 SCC 25 at paras 56, 69; *Benhaim v St-Germain*, 2016 SCC 48 at para 38.
- [67] This error would not be overriding, in the sense of affecting or discrediting the result, if the judge had found, as Mr. Nagy maintained, that BCAA had in fact received the addendum and the Eaton & Starr letter. This is because, as I just explained, that would be sufficient either to cure the misrepresentation or rebut its materiality, as well as indicate a lack of fraudulent intent in relation to the omission. But the judge did not make that finding; having found only omissions, it was unnecessary for her to do so. What she said was this:
- [91] According to Mr. Nagy the Addendum was sent to BCAA by mail. BCAA seems to want me to infer the Addendum not received. But even if I were to draw that inference, the evidence of the Plaintiffs and the evidence led by BCAA does not necessarily conflict. If BCAA did not receive the Addendum, it does not necessarily follow the Plaintiffs didn't mail it; things can and do get lost in the mail: *Owen v. Rocketinfo, Inc.*, 2008 BCCA 502 at para. 6; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company*, 1992 ABCA 204 at para. 65. Therefore it is not possible to determine the issue of whether the Addendum was fabricated by resolving a direct conflict in the evidence.
- [68] In the result, the judge placed the onus on BCAA to prove fraudulent intent and found that BCAA failed to meet that onus:
- [111] I find that the clear and cogent evidence needed to establish fraud is lacking. Based on the evidence before me, I conclude that BCAA has failed to prove on a balance of probabilities the Plaintiffs fabricated the Addendum. The Addendum contained all the Alleged Non-Disclosures BCAA asserts the Plaintiffs fraudulently failed to disclose. It follows, and I find, that BCAA has failed discharge its burden to prove its defence that the Policy is void ab initio as a result of fraudulent omissions by the Plaintiffs.

- [69] But in relation to a misrepresentation as opposed to an omission, no such burden arose. Only if the judge found that BCAA in fact received the addendum would the respondents avoid the consequences of material misrepresentation under Statutory Condition 1. As there was no such finding of receipt, the judge's conclusion of coverage cannot stand. The error was overriding.
- [70] That is sufficient to dispose of this appeal. It is not however, sufficient to support judgment in favour of BCAA in substitution for the order pronounced by the trial judge. This is because, having analyzed the issue as one of whether BCAA had demonstrated fraudulent intent in relation to an omission, the judge did not consider the question of receipt of the addendum and attachment in relation to a misrepresentation. In order to understand the difficulties that arise concerning the evidence about the addendum and the telephone call that allegedly confirmed its receipt, it is necessary to review the alleged errors of fact concerning the addendum and the telephone call of April 29, 2016.

4.2 The addendum and the confirming phone call

4.2.1 Overview

- [71] What Mr. Nagy did or did not do after he submitted the initial application electronically was crucial to the determination of what consequences flowed from any omission (as found) or misrepresentation. Resolving this question was heavily dependent on findings of credibility, a difficult process made all the more challenging when the evidence consists solely of affidavits. The two points of contention, as the trial judge observed, were whether Mr. Nagy in fact forwarded the addendum and attached Eaton & Starr letter to BCAA, and whether he telephoned BCAA and confirmed its receipt of the package.
- [72] As to the first, the judge was satisfied (as seen above) that Mr. Nagy prepared and forwarded the addendum and the Eaton & Starr letter. She made no finding about its receipt.
- [73] As to the second, the judge did not make a specific finding that Mr. Nagy in fact telephoned BCAA on April 29, 2016, and confirmed receipt of the package. She put it differently. She found that the evidence upon which BCAA relied was not sufficient to support a conclusion that Mr. Nagy was lying about the call so that fraud should therefore be inferred. In this, she relied upon the concept of trial fairness as exemplified by the rule in *Browne v Dunn* "to give less weight to BCAA's submissions that the totality of the evidence supports a finding the April 29 Call did not occur" (para 109).

4.2.2 The call of April 29, 2016

- [74] In support of his evidence that he telephoned BCAA on April 29, 2016, and spoke to Ms. De Rose, who, he said, confirmed receipt of the addendum, Mr. Nagy attached his telephone records. The judge observed at para 86 of her reasons that "Mr. Nagy's cell phone records for April 29 confirm a call to BCAA's Contact Centre lasting three minutes".

- [75] That turns out not to be the case. Mr. Nagy's telephone records do not show a call to BCAA on April 29, 2016.
- [76] Mr. Nagy's telephone record is put together in a way that is difficult to follow. At first glance, it appears that calls recorded as made on April 26 related to April 29, because the pages are not in sequence. This may explain why the trial judge appears to have misread it. But on a proper reading, there can be no doubt that what the record Mr. Nagy exhibited actually shows is a call to BCAA at 14:15 on Tuesday, April 26, not Friday, April 29. It shows no call from his phone to BCAA on April 29, 2016.
- [77] According to BCAA's records, a call from Mr. Nagy did come in to its call centre on April 26, 2016, and he left a request for a call back. In response, a voicemail was left. There was no direct contact. BCAA had no record of a call on April 29, 2016. Mr. Nagy's records were therefore consistent with BCAA's evidence, and inconsistent with his testimony.

4.2.3 The addendum

- [78] The call, of course, was significant because it purported to confirm BCAA's receipt of the addendum and attachment. Whether Mr. Nagy in fact ever forwarded those documents was very much in issue. Mr. Nagy and Ms. Kuhn had both been interviewed at length by BCAA's investigator, and had given evidence under oath in the process of submitting their claims. The questions of the disclosure of previous claims, and the import of the Eaton & Starr letter, were covered in detail. But in neither of those procedures did either of the respondents mention the addendum. At para 95, the judge agreed that this was "curious", but considered that it was not clear and cogent evidence that the addendum was fabricated.
- [79] In his affidavit, Mr. Nagy attached a copy of the Eaton & Starr letter, deposing that he did not recall seeing it before talking to BCAA on March 8, 2016 about obtaining coverage (notwithstanding that the letter is dated February 10, 2016). He went on to depose:

At all times, I believed that our policy with Wawanesa was expiring, not cancelled nor did I understand that our insurance was declined or refused.

- [80] BCAA argued that his decision to attach a copy of the Eaton & Starr letter to the addendum was inconsistent with his evidence that he understood it to mean only that the coverage was expiring. If that is all it was, why attach it? The judge said this at para 94:

It is worth noting, however, that even Mr. Willoughby [BCAA Senior Manager of Underwriting] acknowledged the language of the Eaton & Starr letter is ambiguous. I view his evidence as being supportive of the reasonableness and reliability of the Plaintiffs' interpretation of the Eaton & Starr letter and their evidence about why it was not initially disclosed. Mr. Nagy explained he included the Eaton & Starr letter in the addendum because it was ambiguous, presumably out of an abundance of caution. Ms. Shariff's evidence is supportive of that explanation.

[81] I have just quoted Mr. Nagy's evidence about the letter. He did not say he found it ambiguous. On the contrary, he said that at all times he understood just one thing, that the policy was expiring. Where did the notion of ambiguity come from?

[82] Ms. Shariff was a personal friend of the respondents whose children attended the same school as theirs. The respondents filed an affidavit from her in support of their position. Ms. Shariff deposed that, on March 10, 2016 (the day after Mr. Nagy deposed he mailed the documents), she ran into Mr. Nagy near the Starbucks in Port Coquitlam. He asked her for a stamp "for insurance documents he was planning to send to the Defendant". Ms. Shariff was able to provide him with one. She then reported a discussion they had about homeowner's insurance in which he told her that the policy was handled over the phone and, that once he received the policy, he realized there were things missing. With respect to the addendum, Ms. Shariff deposed:

He showed me a letter that he was sending with the policy documents to BCAA from Eaton Starr that was ambiguous. He was unclear about the wording. He asked me, referring to a sentence, "Claims Frequency & Frequency of Change of Occupancy", "What do you think this means". I said, "I'm not sure, as it was unclear to me."

[83] This evidence was admissible as narrative for the purpose of explaining how it was that Ms. Shariff was able to remember seeing the letter in question, but it was not admissible to prove that Mr. Nagy found the letter ambiguous or unclear. For that purpose, it was inadmissible hearsay.

[84] Nowhere in his own evidence did Mr. Nagy say that he found it ambiguous or unclear. His own affidavit makes no such assertion. There was evidence that Ms. Shariff found the letter unclear, but none that supported the judge's finding at para 94 that Mr. Nagy included the letter with the addendum "because it was ambiguous".

[85] Indeed, other evidence suggested the contrary. This includes, from the business records of Eaton & Starr, an insurance application signed by Ms. Kuhn on February 18, 2016, for coverage with Optimum West Insurance Co., that notes under the heading REMARKS: "refused to renewal [sic] by Wawanesa".

[86] What about Mr. Willoughby? Mr. Willoughby was dealing with the information the respondents had given in their interviews and examinations under oath. He deposed:

14. If BCAA were aware of the information arising from the Interviews and [examinations under oath] in advance of issuing the Policy, BCAA would not simply have charged increased premiums, but would have refused to have issued the Policy. Specifically,

a. The Plaintiffs' prior insurer for the Property "lapsed" their policy which to me indicates they were "declined" coverage;

[87] As I see it, this could not fairly be described as an acknowledgement by Mr. Willoughby that the language of the letter was ambiguous. The only person who seemed to find it so was Ms. Shariff, whose views on the matter were irrelevant. In short, there was no evidence to support the trial judge's finding that Mr. Nagy included the letter with his addendum because he considered it ambiguous.

4.2.4 Was the Rule in *Browne v Dunn* applicable?

[88] It follows from this review that two key facts that supported the judge's credibility findings were based on palpable error: that Mr. Nagy's telephone records showed a call to BCAA on April 29, 2016 (they did not), and that Mr. Nagy included the Eaton & Starr letter with the addendum because he considered it to be ambiguous (he gave no such evidence). This leads me back to the question of the judge's application of the rule in *Browne v Dunn*.

[89] As against Mr. Nagy's evidence about the April 29, 2016, call, there was evidence from Ms. De Rose that the judge admitted at the hearing. In responding to Mr. Nagy's diary note about his call with her on April 26, 2016, which he said was meant to be April 29, 2016, Ms. De Rose deposed that she had no recollection of the telephone call from Mr. Nagy "on or about April 26, 2016".

[90] The judge found that this did not conflict with Mr. Nagy's evidence that he spoke with her on April 29, 2016. She went on to say:

[103] This Court has held it can be unjust to use credibility to decide the issues without allowing for the right of cross-examination: see [*Mayer v Mayer*, 2012 BCCA 77] at paras. 78-83; *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at para. 61. The flipside of that fairness coin is the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). The principle arising from *Browne v. Dunn* was described by the Court of Appeal in *R. v. Podolski*, 2018 BCCA 96 at para. 145:

The rule in *Browne v. Dunn* requires a party who intends to impeach a witness to provide the witness with an opportunity to explain or address the point on which their evidence is to be challenged later in the trial. The rule is referred to more generally as "the confrontation principle". It is rooted in fairness. Its object is to prevent the "ambush" of a witness on an essential matter

[104] Typically the fairness or "confrontation principle" underpinning *Browne v. Dunn* is triggered when the opposing party leads evidence that contradicts a witness' evidence on significant matters, without having directed the witness' attention to that fact by appropriate questions during cross examination.

[105] In this case, BCAA did not lead evidence that directly contradicted the evidence of the Plaintiffs. Instead, BCAA asks this Court to find the Plaintiffs fabricated the Addendum and that there was no April 29 Call, contrary to Mr. Nagy's evidence, based on what they claimed to be suspicious circumstances.

- [106] I acknowledge suspicious circumstances can give rise to an inference of fraud in the absence of an explanation: *Re Fancy* (1984), 46 O.R. (2d) 153 (S.C.). However, in this case, the Plaintiffs have provided explanations. The evidence of Ms. Shariff, who appears to be an independent third party, supports the evidence of the Plaintiffs in several key respects. While BCAA argues the Addendum is "suspect", speculation of fraud is not sufficient: *Swales v. I.C.B.C.*, 1999 BCCA 767 at para. 27.
- [107] Further, if this had been a traditional trial with viva voce evidence, BCAA would have been precluded from arguing the Plaintiffs had fabricated the Addendum and lied about the April 29 Call if it had not put those allegations to them in cross-examination. The credibility of the Plaintiffs in this case was clearly a significant matter. BCAA could have sought to cross-examine the Plaintiffs on their affidavits pursuant to R. 12-5(61), but elected not to do so. As a result, BCAA's allegations that the Plaintiffs fabricated the Addendum and lied about the April 29 Call, which were raised by BCAA in argument, were never put to the Plaintiffs.
- [108] As noted by Justice Doherty in *R. v. Paris*, [2000] O.J. No. 4687 (C.A.) at para. 22, leave to appeal ref'd [2001] S.C.C.A. No. 124, the effect of the failure to challenge a witness's version of events on significant matters that are later contradicted in evidence offered by the opposing party is not controlled by a hard and fast legal rule, but depends on the circumstances of each case. That approach was endorsed by the British Columbia Court of Appeal in *R. v. Poole*, 2015 BCCA 464:
- [42] The question of whether the rule in *Browne v. Dunn* was engaged, however, does not complete the analysis. While case law and commentaries have expressed the rule in various ways, the description of it in *Paciocco and Stuesser, The Law of Evidence*, 7th, ed. (Toronto: Irwin Law, 2015) at 472 is simple and accurate:
- A party who intends to impeach an opponent's witness must direct the witness's attention to that fact by appropriate questions during cross-examination. This is a matter of fairness to the witness. If the cross-examiner fails to do so, there is no fixed consequence; the effect depends upon the circumstances of each case. The court should first see if the witness can be recalled. If that is not possible or appropriate, or such evidence may be rejected in favour of the testimony of the opponent's witness.
- [43] As *Paciocco and Stuesser* point out, there "is no fixed consequence" for an infringement of the rule. A trial judge enjoys broad discretion in determining the appropriate consequence. The goal must always be to ensure that, notwithstanding the breach of the evidentiary principle, the trial is a fair one: *R. v. Lyttle*, 2004 SCC 5 at paras. 64-65.
- [109] As noted, BCAA urges me to find the Addendum was fabricated and the April 29 Call did not take place, but it never put those allegations to the Plaintiffs. Those positions were advanced for the first time at the hearing before me. I find that BCAA's failure to put its allegations that to the Plaintiffs violated the fairness principle that the rule in *Browne v. Dunn* was designed to protect. In my view, fairness demands that the rule in *Browne v. Dunn* apply in this summary trial. In the particular circumstances of this case, it is my

opinion that the appropriate consequence is for me to give less weight to BCAA's submissions that the totality of the evidence supports a finding the April 29 Call did not occur.

- [110] I acknowledge it can be unjust to decide an issue by summary trial if there is evidence suggesting further evidence might be obtained at a full trial that would inform whether certain evidence should be believed: *Reilly v. Bissonnette*, 2008 BCCA 167 at paras. 45-46. However, as noted earlier, BCAA's position on suitability was that the evidence before me would be no different at trial.
- [111] I find that the clear and cogent evidence needed to establish fraud is lacking. Based on the evidence before me, I conclude that BCAA has failed to prove on a balance of probabilities the Plaintiffs fabricated the Addendum. The Addendum contained all the Alleged Non-Disclosures BCAA asserts the Plaintiffs fraudulently failed to disclose. It follows, and I find, that BCAA has failed discharge its burden to prove its defence that the Policy is void ab initio as a result of fraudulent omissions by the Plaintiffs.
- [91] With respect, without attempting to define in what circumstances the rule in *Browne v Dunn* can properly be applied in a summary trial proceeding, I am satisfied that the rule was not applicable in the circumstances of this case.
- [92] The difficulty in part arises from the position BCAA took before the trial judge. The summary trial application was brought by BCAA. The respondents opposed it. But BCAA maintained that the case was suitable for determination by summary trial, and the judge ultimately agreed. This was notwithstanding the judge's recognition at para 15 of her reasons that "credibility is a critical factor".
- [93] Here, any problem of trial fairness, given that credibility was a critical factor, arose from the procedure followed, in which neither party sought to cross-examine on the affidavits, and in which cross-examination was not available in the trial process given its summary nature; see *Mayer v Mayer*, 2012 BCCA 77 at paras 78-83.
- [94] The reality is that both sides were well aware that credibility was a critical factor. That is why the respondents opposed conducting the trial summarily.
- [95] By taking the position from the outset that the respondents had fraudulently omitted to disclose facts, as well as misrepresenting them, BCAA put their honesty clearly in issue. It could have been no surprise to the respondents to hear BCAA argue that the evidence concerning the mailing of the addendum and the making of the April 29, 2016, call should be rejected. That evidence was the foundation of the respondents' position that any omission had not been fraudulently made. That is presumably why they adduced so much evidence about it, including the very focused evidence of Ms. Shariff.
- [96] As I see it, then, this is a case like *Drydgen*, where the argument concerning the reliability of the witness, here Mr. Nagy, should have surprised no one, and there was no realistic possibility that the closing arguments caught the witness by surprise (see *Drydgen* at para

18). Trial fairness, in my view, did not demand that the respondents be permitted to give further evidence that what they had already sworn was true was not a lie. It was surely a given that that was their position, just as it was clear throughout trial that it was BCAA's position that an addendum was never received and that there was no telephone call confirming its receipt.

[97] Moreover, the rule in *Browne v Dunn* applies to the weighing of evidence and cannot justify making findings of fact unsupported by the evidence where those findings are an essential part of what is to be weighed. That is what effectively occurred here.

[98] In my respectful view, the judge's use of the rule in *Browne v Dunn* to "give less weight to BCAA's submissions that the totality of the evidence supports a finding the April 29 Call did not occur", was, in the circumstances, wrong in law.

4.2.5 What flows from these errors?

[99] In my view, the two factual errors, compounded by the misapplication of *Browne v Dunn*, had an overriding effect on the result.

[100] The trial judge recognized that credibility was critical, and observed at para 111 that BCAA had failed to prove that the respondents had fabricated the addendum. She concluded that what she found to be omissions had not been shown to have been fraudulently made because Mr. Nagy had prepared and forwarded the addendum and the Eaton & Starr letter, which disclosed the information that had initially been omitted. Her finding of credibility in this regard was supported by her conclusions about the April 29, 2016, phone call, which Mr. Nagy said was about the addendum. But the judge's use of both of these key factors, the addendum and the phone call, relied significantly on the two errors I have identified. This was compounded by the manner in which she weighed the evidence in favour of the credibility of the respondents on the basis of *Browne v Dunn*.

[101] The combined effect of these errors, in my respectful view, is to discredit the result. They go to the core of the case. That is not to say that the same result could not be reached otherwise, but what that leads to is the need for a new trial, rather than entering judgment in favour of the appellant.

5.0 DISPOSITION

[102] For these reasons, I would allow the appeal, set aside the order of the trial judge, and remit this matter to the Supreme Court for a new trial.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Bennett"

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