

CANADA / JUDGMENT

Schellenberg v. Wawanesa Mutual Insurance Company

2020 BCCA 22

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 22 Schellenberg v. Wawanesa Mutual Insurance Company

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Schellenberg v. Wawanesa Mutual Insurance Company,

2020 BCCA 22

Date: 20200122

Docket: CA45965

Between:

William Robert Schellenberg and Linda Rose Schellenberg

Appellants

(Plaintiffs)

And

Wawanesa Mutual Insurance Company,

Hub International Canada West ULC doing business as

Hub International Barton Insurance Brokers and John Doe

Respondents

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated February 19, 2019 (Schellenberg v. Wawanesa Mutual Insurance Company, 2019 BCSC 196, Vancouver Docket S172147).

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Place and Date of Hearing:

Vancouver, British Columbia

November 19, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 22, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

Summary:

This appeal arises from the dismissal of the appellants' action for damages against the respondents with respect to the appellants' homeowner's insurance policy, following a fire that damaged their property. The appellants sought damages against the respondent insurance

company, Wawanesa Mutual Insurance Company ("Wawanesa"), for wrongfully voiding their insurance contract based on the appellants' failure to notify of a material change in risk; namely, the existence of a medical marijuana grow operation. The appellants also sought damages against their insurance broker, Hub International Canada West ULC ("Hub"), for breach of contract and negligence, arguing that Hub failed to ensure they had adequate insurance coverage. On appeal, the appellants argue the judge misapplied the legal tests for: (1) determining material risk pursuant to statutory condition 4 set out in s. 29 of the Insurance Act, R.S.B.C. 2012, c. 1; and (2) for establishing the standard of care of an insurance broker. Held: Appeal dismissed. The judge applied the correct legal test for finding a material change in risk in the circumstances of this case. Accordingly she was not required to decide whether the insured's knowledge regarding a material risk had to be established by the insurer on a subjective or objective basis. She also made no reviewable error in concluding the appellants had not shown that Hub breached the standard of care owed to them.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. INTRODUCTION

- [1] On January 21, 2014, an outbuilding located on a property owned by the appellants was damaged by fire. At all material times, the property was insured pursuant to a homeowner's policy (the "policy") underwritten by the respondent, Wawanesa Mutual Insurance Company ("Wawanesa"), which had been obtained by the appellants' insurance broker, Hub International Canada West ULC ("Hub").
- [2] This appeal arises as a result of Justice Fleming's dismissal of the appellants' action for damages against Wawanesa for voiding the policy based on the appellants' failure to notify it of a material change in risk; namely, the existence of a licensed marijuana grow operation. The appellants also sought damages against Hub for breach of contract and negligence on the basis that it had failed to ensure they had adequate insurance coverage.
- [3] On appeal, the appellants argue the judge:
- misapplied the legal tests for determining what constitutes a material risk and for establishing the standard of care of an insurance broker; and
 - made palpable and overriding errors of fact, in particular, in finding the appellants knew that the presence of the marijuana grow operation and the changes made to the property's electrical system were material to the policy and ought to have been disclosed by them to Wawanesa through Hub.
- [4] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

- [5] The appellants own property in Chilliwack, British Columbia, which originally contained only their residence. In 2004 and 2005, utilizing the services of Hub, they purchased a standard homeowner's insurance policy underwritten by Wawanesa.
- [6] From 2004/2005 until 2014, Hub was the insurance broker that assisted the appellants with their home insurance needs, including the renewal of their insurance policy each year.
- [7] The property consisted of a large home as well as a large, two-storey outbuilding. The home and outbuilding were constructed by the appellant, Mr. Schellenberg, over a number of years, with construction of the outbuilding being completed in 2011 or 2012. The lower storey of the outbuilding was concrete, and was separated from the upper storey, which was wood-frame construction, by a suspended concrete slab.
- [8] At some point before building the outbuilding, Mr. Schellenberg had the electrical service to the house increased from 125 to 200 amps. Later, he upgraded it to 400 amps in order to supply the outbuilding with 200 amps (the "electrical upgrade").
- [9] In 2012, as a result of serious injuries sustained by their son, the appellants started a licensed medical marijuana grow operation in the outbuilding. They did so for therapeutic reasons relating to their son's pain management, having obtained the necessary licenses from Health Canada.
- [10] Each year, before the appellants' policy expired, Wawanesa sent renewal documents to their home. Hub also sent its customers a standard reminder letter advising them that they should have received the renewal documents and asked them to review their policy limits to ensure the coverage was adequate in the event of a loss ("Reminder Letter"). The Reminder Letter also included the following paragraph:

We have also attached "Some Coverage Notes and Recommendations", as further information on how your coverage may be affected by any changes throughout the policy term. We would be pleased to discuss any questions or concerns you may have.

- [11] The attachment titled "Some Coverage Notes and Recommendations" read in part:

4) Let us know about any changes!

If a "Material Change" arises during the policy period, this must be reported to our office immediately. Failure to do so may result in voiding of the Insurance Policy involved. A "Material Change" is something important enough to change the original agreement between the insurance company and the policyholder.

Some examples of "Material Changes" which would require that you notify your insurer would include:

- Starting a home-based business/farm use

- Using an auxiliary wood heat source without the insurers knowledge
- Renovations or Alterations to the building
- Changes in occupancy - renting to another party or adding a second family.

"Material Change" can be found in the Statutory Conditions portion of your policy.

[12] The appellants' evidence was that they did not read the renewal documents sent by Hub.

[13] The parties agreed that Mr. Schellenberg phoned Ms. Koehn of Hub after he had completed construction of the outbuilding. Neither could remember exactly when the conversation took place.

[14] Ms. Koehn, whose evidence was accepted by the judge, testified that the conversation took place in 2012 or 2013. At that time, Mr. Schellenberg told her that he was using the building as a shop to work on cars, and that he had a hoist for that purpose. She asked whether it was for personal use, and he replied that it was only for his and his son's personal use. Ms. Koehn knew from assisting the appellants with their vehicle insurance that working on cars was a hobby for Mr. Schellenberg and his son.

[15] Ms. Koehn's evidence was that she was not advised of the electrical upgrade or the grow operation. Mr. Schellenberg's evidence differed between his examination for discovery and trial as to whether he had advised Ms. Koehn about the electrical upgrade, although he did confirm that Hub was never advised of the grow operation.

[16] On January 21, 2014, a fire occurred in the upper storey of the outbuilding. An independent adjuster retained by Wawanesa, Robert Orr, attended at the property the following day. He learned that the appellants were operating a licensed marijuana grow operation of approximately 300 plants on the lower level of the outbuilding. According to Wawanesa and Hub, this was the first time they were made aware of the electrical upgrade and the grow operation.

[17] On May 15, 2014, Wawanesa notified the appellants that it was voiding the policy as of February 1, 2011, the date it allocated for the change in use of the property, on the basis that had it known of the change in use, it would have "declined to endorse the policy".

[18] Section 29 of the Insurance Act, R.S.B.C. 2012, c. 1 sets out the statutory conditions that are deemed to be a part of every insurance contract. Statutory condition 4 provides:

Material change in risk:

4. (1) The insured must promptly give notice in writing to the insurer or its agent of a change that is
 - (a) material to the risk, and
 - (b) within the control and knowledge of the insured.

- (2) If an insurer or its agent is not promptly notified of a change under subparagraph (1) of this condition, the contract is void as to the part affected by the change.
- [19] At trial, Wawanesa argued that it had met the test for voiding the appellants' policy under statutory condition 4, by proving that: (1) there was a change material to risk; (2) the change was within the appellants' control; (3) they had knowledge of the change; and (4) they did not notify Wawanesa or Hub.
- [20] The appellants admitted that the change itself was within their knowledge and control and they had not notified Wawanesa or Hub, but argued they were not aware the change was material to risk.

III. REASONS FOR JUDGMENT

Credibility

- [21] The reasons for judgment, which are indexed as 2019 BCSC 196 (the "Reasons"), contain a comprehensive review of the evidence.
- [22] In the section of the Reasons entitled "Credibility", the judge set out the parameters of her analysis of this issue at para. 30:

Although many of the facts in this case are not disputed, credibility is a contested issue. Most significantly, Mr. Schellenberg and Hub's representative, Brenda Koehn, provided conflicting evidence about the conversation they had after the outbuilding was completed. The Schellenbergs rely upon his version to assert Ms. Koehn should have asked additional questions and her failure to do so is what lead to inadequate coverage.

- [23] She then reviewed the evidence and indicated that, for several reasons, she had concerns with the credibility of the appellants' testimony.
- [24] First, she noted that significant aspects of Mr. Schellenberg's evidence had changed between direct and cross-examination, and during the cross-examination itself. Second, the judge considered much of both of the appellants' evidence to be unreasonable, if not implausible. Accordingly, where their evidence conflicted with that of Ms. Koehn, she preferred the latter, noting that Ms. Koehn's testimony was reasonably consistent and better aligned with the contents of the policy.

The Claims against Wawanesa, Statutory Condition 4 and Findings of Fact

- [25] Wawanesa's personal lines underwriting manager, Liz Strocel, testified that Wawanesa would not insure any property with a marijuana grow operation, whether legal or illegal. Jonathan Willoughby, an underwriting expert, opined that the presence of a cannabis grow operation on a residential property would be considered material to an underwriter because of multiple increased risks.
- [26] The appellants did not lead any expert evidence at trial with respect to materiality.

- [27] On the issue of materiality, the judge was "entirely satisfied" that the presence of the grow operation in the outbuilding was a material change in risk: Reasons at para. 69.
- [28] In light of the appellants' submission that, pursuant to statutory condition 4, it was for the insurer to prove that the insured knew, or ought to have known, that the change was material to the insurer, the judge reviewed certain conflicting cases on the point.
- [29] First, the judge noted that no legal authority in British Columbia had specifically considered whether statutory condition 4 required an insured to know the change in risk was material. The judge noted that, unlike statutory condition 1 (which deals with misrepresentations in applications for insurance), statutory condition 4 does not use the term "fraudulently". Thus, statutory condition 4 appeared to require a higher standard of disclosure with respect to material changes during the term of an insurance contract. She also noted that the statutory conditions have been held to be remedial in nature.
- [30] The judge then discussed *Aviva Insurance Company of Canada v. Thomas*, 2011 NBCA 96, in which Chief Justice Drapeau, for the New Brunswick Court of Appeal, declined to definitively answer the question as to whether the knowledge requirement included knowledge of materiality. She also referred to *Violette v. Wawanesa Mutual Insurance Company*, 2012 NBQB 47, which decided that the insured's subjective knowledge of materiality was relevant, and *Wolfe v. Western General Mutual Insurance*, [2000] O.J. No. 2673 (S.C.J.), which found that the insurer was not required to prove the insured's subjective belief regarding materiality of the change of risk to the insurer.
- [31] Following the modern approach to statutory interpretation, the judge noted that statutory condition 4 likely required objective knowledge of materiality but she expressed concern about requiring an insurer to prove subjective knowledge: Reasons at para. 97.
- [32] The judge found, however, that it was not necessary for her to decide this issue, finding at paras. 98-101 of the Reasons, that Mr. Schellenberg actually had known the changes in question were material to his insurance. In reaching this conclusion, she made the following findings of fact:
- Mr. Schellenberg knew he had an obligation to notify Hub or Wawanesa of significant changes to the property or its use because changes in risk could affect both the appellants' premiums and their coverage;
 - Ms. Koehn did not tell Mr. Schellenberg that the coverage on the outbuilding was \$300,000;
 - Mr. Schellenberg did not tell Ms. Koehn about the upgrade to the electrical system from 200 to 400 amps;
 - the grow operation was likely in place when Mr. Schellenberg spoke with Ms. Koehn, and, in any event, the judge had "no doubt" that by that time the grow operation had been planned for some time and steps had been taken to obtain licenses from Health Canada;

- after Mr. Schellenberg's conversation with Ms. Koehn, the appellants did not notify either Hub or Wawanesa of the grow operation, despite having received the Renewal Letter and other renewal documents once, if not twice, prior to the fire;
- had they read the Renewal Letter and the examples of material change listed therein, the appellants would have been alerted to the need to notify Hub or Wawanesa of the grow operation;
- the magnitude and complexity of the grow operation constituted a significant change from an ordinary use of the property, and certainly more unusual than the presence of a shop, which Mr. Schellenberg did disclose; and
- it was not believable that Mr. Schellenberg never considered the grow operation to be relevant to the appellants' insurance, particularly given its nature/size and the fact that the appellants were concerned about theft and/or robbery if others became aware of it.

[33] At paras. 100-101 of the Reasons, the judge stated:

[100] In all of these circumstances, it seems clear to me Mr. Schellenberg mislead Ms. Koehn by disclosing the shop but not the grow operation or the upgrade to the electrical system during their phone call. Although he may well have disclosed the grow operation or the upgrade to the electrical system if asked directly about either one, I do not accept that if he had been asked only about the upgrade and then for an explanation, his answer would have included the presence of the grow operation, based on his evidence denying any awareness of risk and his evidence denying the upgrade was due to the grow operation. The other explanation for never later telling Hub or Wawanesa about its presence- the Schellenbergs' practice of not telling anyone willingly - was also unpersuasive. The evidence of both established this practice was rooted in a fear of being the target of crime or perhaps unwanted attention. Neither explained how notifying Hub or Wawanesa could possibly lead to either consequence.

[101] To reiterate, I find that Mr. Schellenberg knew the presence of the grow operation and the upgrade to the electrical system were changes in risk relevant, if not significant, to their insurance coverage or premiums which he failed to disclose, first to Ms. Koehn in 2012 or 2013 and then Hub or Wawanesa afterwards.

[34] Having found that Wawanesa had met the other requirements for statutory condition 4, the judge determined that it had properly voided the policy and dismissed the appellants' claim for indemnity.

[35] At para. 104 of the Reasons, the judge noted:

The Schellenbergs have not pleaded or submitted they should be relieved of the consequences of their breach of statutory condition 4, pursuant to s. 32 of the Insurance Act, which allows the court to find a condition not binding if held to be unjust or unreasonable. I will therefore say no more about this.

The Claims Against Hub

- [36] With respect to the negligence claim against Hub, the judge noted that the nature of an insurance broker's duty of care was to provide advice to a customer about the coverage available to meet the customer's needs, including gaps in coverage and how to protect against these gaps: *Beck v. Johnston, Meier Insurance Agencies Ltd.*, 2011 BCCA 250, aff'g 2010 BCSC 719. However, relying on *495793 Ontario Ltd. (Central Auto Parts) v. Barclay*, 2016 ONCA 656 at para. 57, she found that expert evidence was required to establish the standard of care of a reasonable insurance broker in the circumstances, disagreeing with the appellants' submission that this could be determined based on case law and other evidence. In her view, neither of the two exceptions considered in the jurisprudence--where the breach of the standard is egregious, or where the standard relates to non-technical matters within the knowledge and experience of the ordinary person--applied. She stated at paras. 119-121:
- [119] Here, I am also satisfied that expert evidence is necessary. Neither of the two exceptions apply. The Schellenbergs have not suggested Hub's alleged breach or breaches were egregious and therefore obvious. What inquiries a reasonable and prudent broker would have made and what information if any he or she would have provided about coverage and potential gaps in coverage, at the time, in this context, is far from straightforward. In other words, the standard of care is not within the every day knowledge of the average person.
- [120] At issue is whether Hub failed to exercise reasonable care and skill during the discussion between Ms. Koehn and Mr. Schellenberg in 2012 or 2013 and when the Schellenbergs' insurance was renewed after the undisclosed material changes in risk occurred including the presence of the grow operation and the upgrade to the electrical system. In addition to being critical of Hub's failure to include a grow operation as an example of material change in the attachment to the Renewal Letter, the Schellenbergs argued that upon being told about the shop in the bunker and a change in the electrical system, Ms. Koehn should have asked about a marijuana grow operation. But Mr. Schellenberg did not tell Ms. Koehn about the change to the electrical system. That leaves the Schellenbergs' further argument that Ms. Koehn should have asked about the electrical system and what else might be going on in the shop, bunker and or outbuilding. Upon being asked about the electrical system, as I mentioned, they suggest Mr. Schellenberg would have told her about the upgrade. If asked to explain it, he would have disclosed the grow operation. I have already declined to draw this last inference for the reasons stated. Aside from the facts he did and did not disclose to Ms. Koehn during their conversation and then to Hub or Wawanesa later, a range of other circumstances may well be relevant to determining the requisite standard of care such as the Schellenberg's annual receipt of the Renewal Letter and its attachment.
- [121] On the assumption the Schellenbergs should have at the very least adduced evidence of the industry standard or customary practice of brokers regarding their approach to making inquiries and providing advice about material changes in risk to prove the standard of care, they did not. Ms. Koehn's testimony indicating that it was not her standard practice to ask a

client about marijuana during the renewal process, although she was aware that Wawanesa would not underwrite grow operations, and she could have, not should have asked about the electrical system is the only indication.

- [37] In the event that her conclusion was wrong that the appellants had failed to establish the breach of the requisite standard of care, the judge went on to state that the installation of a grow operation was not reasonably foreseeable in the sense that it would occur to the mind of a reasonable insurance broker in Hub's position. She was of the view that it was not reasonable to impose an obligation on Ms. Koehn to ask Mr. Schellenberg about changes to the electrical system or the presence of a grow operation, in light of the information he did provide and the surrounding circumstances. She also reiterated that she was not satisfied that Mr. Schellenberg would have disclosed the grow operation if Ms. Koehn had asked him directly about changes to the electrical system.
- [38] Accordingly, the claim in negligence was dismissed. The claim against Hub in contract was dismissed on the same basis. The judge found that expert evidence, or, at the very least, evidence of the industry standard and practice, was also required to establish the content of the alleged implied term of the appellants' contract with Hub that required Hub to exercise reasonable care, skill and diligence.

IV. THE APPEAL

- [39] The appellants raise several grounds on appeal.

Did the Judge Err in Finding that the Grow Operation and the Electrical Upgrade were Changes Material to the Risk?

- [40] A change material to the risk is one that if disclosed would have caused a reasonable insurer to decline the risk or stipulate a higher premium: Reasons at para. 60, citing *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720 at 726-727.
- [41] The appellants allege that the judge erred in fact, in law and on questions of mixed fact and law. Essentially, they submit that the judge made a reversible error of law in respect of the test for materiality by failing to consider whether statutory condition 4 required an insurer to prove an insured knew, either objectively or subjectively, that a change in risk was material to the insurer as a precondition to voiding the policy.
- [42] They further take issue with the judge's findings of fact that Mr. Schellenberg knew that the existence of the grow operation and the electrical upgrade were material changes to the risk.
- [43] I will first deal with the judge's findings of fact since they ground her conclusion that she was not required to decide the applicable test regarding knowledge of materiality in relation to statutory condition 4.

- [44] As I have outlined at paras. 32 and 33 above, the judge made numerous findings of fact in support of her conclusion with respect to Mr. Schellenberg's knowledge of materiality. It is well settled that the standard of review for findings of fact is that they are not to be reversed unless it can be established that the trial judge made a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.
- [45] A palpable and overriding error is one that is "so obvious that it can easily be seen or known": *Housen* at para. 5. The error must go "to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error": *Swiss Reinsurance Company v. Camarin Limited.*, 2015 BCCA 466 at para. 62, citing *Waxman v. Waxman* (2004), 186 OAC 201 at para. 297, and *Schwartz v. Canada*, [1996] 1 S.C.R. 254.
- [46] In my view, the evidence at trial amply supported the judge's finding that the grow operation was material to the risk. Furthermore, the evidence, both documentary and viva voce, together with the findings on credibility, provided a sound basis for the findings of fact made in relation to the appellants' subjective knowledge that the existence of the grow operation and the electrical upgrade were material to the risk and ought to have been disclosed to Wawanesa and/or Hub.
- [47] The appellants cannot demonstrate that the judge made a palpable and overriding error in finding that the appellants ought to have known--and that Mr. Schellenberg actually did know--that the presence of the grow operation was a risk material to the insurer.
- [48] Given the conclusion that the appellants subjectively believed that the grow operation and electrical upgrade ought to have been disclosed, there was no need for the judge to then embark on a theoretical analysis as to whether statutory condition 4 required the insurer to prove the appellants' subjective knowledge of materiality and thus resolve the conflicting case law.
- [49] Accordingly, I would not accede to this ground of appeal.

Did the Judge Err in Concluding that the Material Change in Risk does not Need to be Causally Related to the Loss?

- [50] The appellants submit that since the fire was not caused by the grow operation, there should be coverage.
- [51] The applicable authorities are clearly contrary to this argument. For example, in *Marche v. Halifax Insurance Co.*, 2005 SCC 6, the insured had purchased a house and then moved away to find work. The house remained vacant for some time before a tenant moved in. The home was later destroyed by fire and the insurer denied the claim on the basis that the vacancy was a material change in risk that the insured failed to report to the insurer. Regarding the causal connection issue, Justice McLachlin (as she then was) stated, at para. 42:

On the other hand, the insurer might argue that lack of notification of a change cost it an opportunity to cancel the contract before the loss. Moreover, it is not essential that a statutory breach be causally connected to the loss: see *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720, in which coverage was denied where the insured had not disclosed the fact that she suffered from clinical depression, and was later killed in an unrelated car accident.

[Emphasis added.]

[52] While dissenting in the result, Justice Bastarache, agreed with the majority at para. 88 that no causal connection between the breach and the cause of the loss is required. I would not accede to this ground of appeal.

Should the Appellants be Granted Relief Pursuant to Section 32 of the Insurance Act?

[53] Section 32 of the Insurance Act provides:

Unjust contract provisions

32 If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 33 (1) or established by section 34 (2) or (3), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

[54] The appellants acknowledge that the relief they seek pursuant to this section of the Insurance Act is a new argument advanced on appeal, but note that the issue was raised by the judge in her Reasons.

[55] Relying on *Mah v. Wawanese Mutual Insurance Company*, 2012 ABQB 577, rev'd on another point at 2013 ABCA 363, the appellants argue that Wawanese voiding the policy due to the discovery of the legal grow operation, which was not causally connected to the loss, is an unreasonable application of statutory condition 4. In *Mah*, the trial judge stated the following at para. 30:

It is generally unjust and unreasonable for a court to give affect to a breach which is not causily connected to the loss: *Marche v. Halifax Insurance Co.*, 2002 NSSC 62, [2002] 202 N.S.R. (2d) 345, (N.S.S.C.).

[56] The authority cited for this proposition of law is the trial judgment in *Marche*, which was appealed to the Supreme Court of Canada, where, as set out above, the majority held that it is not necessary for a breach to be causally connected to the loss. Furthermore, it is notable that the trial judge in *Mah* relied on this proposition to justify allowing the defendant insurer to act upon the breach of statutory condition 4, as the loss in that case was causally connected to the breach of the policy. The Court of Appeal overruled the decision on the basis that the respondent insurer had received actual notice of the change material to the risk, albeit through a third-party, and therefore, it could not rely on the insured's non-

disclosure as a defence. For these reasons, I do not find Mah compelling authority for the appellants' argument.

- [57] Wawanesa accepts that although the issue was not raised in the court below, no new evidence is required to consider the application of the section and no procedural unfairness would result to any of the parties for it to be considered on appeal. It submits that unlike the situation in *Marche*, there was no rectification of the policy of insurance in this case. In fact, the material changes and their non-disclosure continued at the time of the loss.
- [58] In my view, it would be contrary to the principles of *uberrima fides* that is utmost good faith as set out in the seminal case of *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.) at pages 1909-1910 to apply s. 32 of the Insurance Act in the circumstances of this case. That is because the findings of fact to which I have referred, which include deliberate concealment by the appellants from the respondents of material changes to the risk, do not justify what, at its core, is equitable relief.
- [59] Accordingly, I would not accede to this ground of appeal.

Did the Judge Err in Concluding that the Claims Against Hub Should be Dismissed?

- [60] The basis for the appellants' appeal on this issue relates to the judge's conclusion that expert evidence was required to provide the evidentiary basis for the content of Hub's standard of care.
- [61] They argue that although it was Ms. Koehn's evidence that she did not, as a matter of course, make general inquiries about upgrades in electrical supply to a property, the facts of this case, and in particular, the disclosure of the shop in the outbuilding, ought to have resulted in her making further inquiries. Had she done so, the appellants say they would have disclosed the existence of the grow operation.
- [62] I would not accede to this ground of appeal for several reasons.
- [63] First of all, the question of whether expert evidence is required to establish the standard of care is one of fact, reviewable on the standard of palpable and overriding error: *Bergen v. Guliker*, 2015 BCCA 283 at para. 130; *Firman Sales & Service Ltd. v. Winnipeg Building and Decorating Ltd.*, 2017 MBCA 120 at para. 4. As I have noted at paras. 36-37 of these reasons, the judge carefully reviewed this issue and decided that expert evidence was required. In my view, no palpable and overriding error has been demonstrated.
- [64] Second, even if expert evidence was not required, the judge made a finding of fact that, contrary to his evidence, Mr. Schellenberg would not have disclosed the existence of the grow operation had Ms. Koehn made the inquiries, which the appellants argued ought to have made.
- [65] In my view, this finding is fatal to the appellants' arguments on this issue.

V. CONCLUSION

[66] I am not persuaded that the trial judge made any error of principle or any palpable and overriding error in her assessment of the case.

[67] She correctly identified the applicable legal tests, and made no reversible errors in her analysis. She comprehensively reviewed and discussed the evidence, and her findings of fact and conclusions were supported by that evidence.

[68] Accordingly, I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Butler"

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