

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: NEW TRIAL ORDERED WHERE MISREPRESENTATIONS WRONGLY CONSIDERED AS OMISSIONS

New trial ordered after trial judge mischaracterized misrepresentations as omissions and erred on credibility.

Insurance law – Homeowner’s insurance – Misrepresentation – Material change in risk – Fraud – Practice – Appeal

Nagy v. BCAA Insurance Corp., [2020] B.C.J. No. 1563, 2020 BCCA 270, British Columbia Court of Appeal, October 7, 2020, M.E. Saunders, E.A. Bennett and J.C. Grauer JJ.A.

The insurer appealed a summary trial decision that found it liable to indemnify the insureds for the complete loss of their home in a December 4, 2016 fire. The insurer was new to the risk, having first insured the home beginning on March 8, 2016. At the summary trial, the insurer argued the insureds’ failure to disclose that the previous policy had been lapsed for claims frequency and frequent changes in occupancy, as well as the insureds’ failure to disclose the extent of previous claims were misrepresentations or omissions which voided the policy. There was no dispute this information was material. However, the insureds argued they had cured any misrepresentation or shown any omission was not fraudulent by mailing an addendum detailing the previous losses and a copy of the letter from their broker concerning the previous policy lapse on March 9, 2016. The insured further argued he had called the insurer and confirmed its receipt of those documents on April 29, 2016. The insurer argued it did not receive this information. Credibility was at issue. The trial judge largely accepted the insureds’ evidence and found the insurer had failed to demonstrate the insureds’ omissions were fraudulent. On this basis, the policy was not void. On appeal, the issues included whether the insureds’ incomplete and inaccurate answers on the application and in response to questions from the insurer were misrepresentations or omissions and whether the trial judge erred in her findings related to the delivery of the missing information.

Regarding the first issue, the insureds answered “No” in response 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?” on the application form. The Court of Appeal noted this was objectively false, not an omission or half truth, and found the trial judge erred in characterizing it as an omission instead of a misrepresentation. The distinction was important because the trial judge only considered the response from the point of view of an omission, which placed the burden on the insurer to show it was fraudulent, whereas no such burden arises in relation to a misrepresentation. As a result, the policy would be void unless the insureds could show the misrepresentation was cured because the insurer in fact received the addendum information.

Resolving the second issue hinged heavily on findings of credibility, made more difficult by the summary trial evidence being entirely by affidavit, without cross-examination. The trial judge had largely found in the insureds' favour by determining that the insurer had failed to prove the April 29, 2016 call confirming receipt of the addendum information did not occur, and her determination that the insureds had included the letter from the broker concerning the previous policy lapse with the addendum information because the insureds considered it ambiguous. The Court of Appeal noted both of these findings were not supported by the evidence and found the trial judge had incorrectly relied on the rule in *Browne v. Dunn* to justify making the unsupported findings. The combined effect of these errors on key findings went to the core of the case, discredited the summary trial result, and justified a new trial.

This case was digested by [Michael J. Robinson](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Michael J. Robinson at mrobinson@harpergrey.com.