COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Oraniewicz v. Intact Insurance Company,* 2024 BCCA 186

Date: 20240514
Docket: CA48988

Between:

Janusz Oraniewicz

Appellant
(Plaintiff)

And

Intact Insurance Company

Respondent
(Defendant)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated March 16, 2023 (*Oraniewicz v. Intact Insurance Company*, 2023 BCSC 400, Kamloops Docket 52522).

The Appellant, appearing in person:	J. Oraniewicz
Counsel for the Respondent:	D.J.E. Bilkey, K.C. C. Manning
Place and Date of Hearing:	Kamloops, British Columbia April 16, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 14, 2024

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Madam Justice Fenlon

Summary:

The appellant seeks an order reversing the dismissal of his action against the respondent insurance company arising out of an insurance policy that had been engaged after a fire damaged the appellant's business premises. The appellant submits that (1) the trial judge erred in law by misinterpreting material terms of the policy, and (2) the trial judge made palpable and overriding errors of fact in finding that the respondent did not breach its duty of good faith and fair dealing.

Held: Appeal dismissed. The trial judge interpreted the insurance policy correctly in finding that the respondent had properly dispensed insurance proceeds to the appellant's mortgagee pursuant to its rights as the first loss payee. Furthermore, the trial judge reached the conclusion that the respondent did not breach its duties to the appellant on facts that were based in the evidence and not grounded in error.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction and Background

[1] This appeal arises from a judgment, indexed at 2023 BCSC 400, dismissing the appellant's action against Intact Insurance Company ("Intact") arising out of a policy of insurance (the "Policy").

[2] Mr. Oraniewicz, the appellant, owned and operated a restaurant and hotel known as the Mozart House Inn in the City of Kimberley, British Columbia. On May 14, 2015, a fire damaged Mr. Oraniewicz's business premises. The fire caused extensive damage to the building and necessitated the removal of most of the interior walls and ceilings. Additionally, almost all of the chattels, fixtures, and equipment were damaged by smoke and water. After the fire, Mr. Oraniewicz was unable to carry on business, and incurred a resulting loss of profit.

[3] Mr. Oraniewicz had taken out the Policy before the fire and was covered by his insurance at the relevant time. Under the Policy, Intact agreed to indemnify Mr. Oraniewicz for:

a) loss and damage to the building from which Mr. Oraniewicz operated his business (the "Building Loss");

b) loss and damage to the equipment, stock and contents located within business premises ("Loss of Contents"); and

c) loss associated with business interruption (“Loss of Profits”).

[4] At the time Mr. Oraniewicz took out the policy, he was indebted to two lenders: National Holdings Ltd. (“National Holdings”), which had registered a debenture against the business premises on October 5, 2011; and Pioneer West Mortgage Investment Corporation (“Pioneer West”), which had registered a second mortgage against the business premises, also on October 5, 2011.

[5] As a result of Mr. Oraniewicz’s lending arrangements at the time he contracted with Intact, National Holdings was identified as a first loss payee under the Policy, while Pioneer West was identified as a second loss payee. Additionally, the Policy included language to the effect that the Standard Mortgage Form G010 (“Standard Mortgage Form”) included in the Policy applied to the Building Loss only.

[6] A central issue in the action was whether National Holdings was entitled to receive insurance proceeds under the Policy covering losses arising from the Loss of Contents and Loss of Profits in addition to the Building Loss. As noted, National’s entitlement to insurance proceeds, if any, arose because the Policy named National Holdings as the first loss payee as well as identifying it as the loss payee of Building Loss proceeds under the Standard Mortgage Form.

[7] Beginning shortly after the fire, and continuing for some months, Intact paid Mr. Oraniewicz a total of $24,131 in insurance monies for Loss of Profits. (This payment was arguably a payment to which National Holdings was entitled, if it was entitled as a first loss payee to all losses.)

[8] On May 19, 2015, Intact addressed a letter to Mr. Oraniewicz containing general information about the claims process, along with a blank proof of loss form. At trial, Mr. Oraniewicz claimed that he did not receive this letter. Another copy of the proof of loss form was sent to Mr. Oraniewicz in a letter dated August 18, 2015. The trial judge found that Mr. Oraniewicz received the second letter.

[9] Intact did not receive a proof of loss from Mr. Oraniewicz for some time. In response, Intact gave written notice of its intention to engage the dispute resolution

process by a letter dated March 27, 2016. Intact made the notice effective upon the delivery of a proof of loss. Mr. Oraniewicz delivered his proof of loss to Intact over a year later on April 12, 2017.

[10] The dispute resolution process did not run entirely smoothly, but it did eventually result in agreement on the value of the insured loss. Intact's representative confirmed the agreement in writing by a letter dated February 17, 2021, to the representative for Mr. Oraniewicz. Both representatives signed the letter indicating their agreement to the settlement figures.

[11] The agreed upon value of the insured loss was as follows:

Building Loss (net of a $1,000 deductible):	$151,902.81
Loss of Contents (including chattels):	$51,346.91
Loss of Profits:	$46,241.00
TOTAL:	**$249,490.72**

[12] Under its interpretation of the Policy, Intact settled a claim with the Canada Review Agency, and provided the remaining funds to National Holdings to settle its claim as first loss payee. By that time, Intact had paid out more for the loss than the agreed upon value, as follows:

Loss of Profits paid directly to Mr. Oraniewicz:	$24,131.00
Canada Revenue Agency:	$25,513.29
National Holdings:	$224,486.71
TOTAL:	**$274,131.00**

[13] Based on the values established by the dispute resolution process, Mr. Oraniewicz received no additional funds from the Policy after the completion of the process. Furthermore, neither Intact nor National Holdings pursued a claim against Mr. Oraniewicz for the Loss of Profits that had been paid directly to him following the fire.

[14] At trial, Mr. Oraniewicz argued that National Holdings' only right to insurance proceeds was for Building Loss and nothing else. He argued that he was entitled to the rest of the insurance proceeds arising from the fire; namely, the proceeds from Loss of Contents and Loss of Profits. As we shall see, the judge disagreed, interpreting the Policy to confer on National Holdings an entitlement to all proceeds in respect of all losses up to the value of Mr. Oraniewicz's indebtedness to it.

[15] Mr. Oraniewicz also alleged that Intact breached its duty of good faith in its dealings with him arising from the fire. As I understand it, he argued at trial:

1) that he did not receive the proof of loss form from Intact until almost a year after fire, and only after he had initiated litigation;
2) that Intact did not communicate with him about his choice between accepting a cash payout and rebuilding, and instead dealt only with National Holdings; and
3) that Intact unreasonably delayed the settlement of his claim by engaging the dispute resolution process.

Mr. Oraniewicz submitted that these breaches caused him additional damages, largely because they delayed the timely and proper resolution of his claims to insurance proceeds. The judge rejected these claims on the facts and, on appeal, Mr. Oraniewicz contends the judge was wrong to do so.

Trial Reasons

[16] The judge identified the issues at trial as being:

> [19] ...
>
> a) whether the insured values established by the dispute resolution process are binding on Mr. Oraniewicz and, if not, what is the appropriate value;
> b) whether Intact overpaid National Holdings under the first loss payee provision of the Policy;
> c) whether Intact caused the lengthy delay in resolving the insurance claim and, if so, whether the delay caused Mr. Oraniewicz additional loss; and

d) whether Intact breached its duty of good faith and fair dealing and, if so, what damages flow from that breach.

[17] The judge began by explaining the dispute resolution process under the *Insurance Act*, R.S.B.C. 2012, c. 1, to resolve disagreements about the value of losses. This process is invoked by a written demand and the delivery of the proof of loss to the insurer, at which point representatives of the parties attempt to reach agreement on the matters in dispute.

[18] The judge found the agreement on the value of the loss to be a final agreement binding on both Intact and Mr. Oraniewicz. He concluded the process followed had been proper and there was no basis to set the agreement aside.

[19] The judge then examined whether Intact had acted in a way that delayed the final resolution of the insurance claim. He rejected Mr. Oraniewicz's contentions that Intact did not provide him with a proof of loss in a timely manner; did not explain his options with respect to repairing the building or taking the actual cash value; and prolonged the process of settlement by invoking the dispute resolution process.

[20] Specifically, the judge found that Mr. Oraniewicz received a copy of the proof of loss form no later than August 18, 2015 (if not earlier), and that there was no delay in the process or prejudice to Mr. Oraniewicz. He accepted that Mr. Oraniewicz was properly advised, in August 2015, of his options to either take a cash settlement based on actual cash value or repair the building. In support of his conclusions, the judge referred to a number of communications dealing with these issues and Mr. Oraniewicz's failure to respond. The judge concluded that the information provided by Intact was sufficient for Mr. Oraniewicz to decide which option he preferred, request further information, or try to negotiate more favourable terms. The judge concluded that any delay that was associated with a failure to choose between repair costs or actual cash value was a delay caused by the inaction of Mr. Oraniewicz.

[21] In respect of the unfolding of the dispute resolution process itself, the judge concluded:

> [88] There is no evidence from which I can conclude that Intact improperly initiated the dispute resolution process, or that any of its representatives conducted themselves improperly during the process at all, let alone to the prejudice of Mr. Oraniewicz.
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> [89] The dispute resolution process is a mandatory process required by Statutory Condition 11. The dispute resolution process could not begin until Mr. Oraniewicz submitted his proof of loss. Mr. Oraniewicz did not submit his proof of loss until April 2017.
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> [90] Following the delivery of his proof of loss, the actions of Mr. Oraniewicz delayed and prolonged the process. Mr. Oraniewicz generally refused to engage in the dispute resolution process. He did not respond to Intact's requests to nominate an umpire and he replaced his representative twice during the process. The inaction of Mr. Oraniewicz prompted Intact to apply for court orders compelling Mr. Oraniewicz to engage in the process. All of these actions caused delays in resolving the value of the insured loss.
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> [91] There is no evidence that any delays were caused by the conduct of Intact during the dispute resolution process.
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> [92] Based on the foregoing, I find that Intact did not materially contribute to any delays in resolving the question of value through the dispute resolution process.

[22] The judge also rejected Mr. Oraniewicz's complaints about the payout to National Holdings. Mr. Oraniewicz contended that Intact should not have paid insurance funds for Loss of Contents and Loss of Profits to National Holdings since the Standard Mortgage Form is "applicable to the Buildings Only".

[23] The judge did not give effect to that argument because, in his view, Intact could not refuse to pay National Holdings for Loss of Profits and Loss of Contents as National Holdings was a loss payee entitled to all insurance proceeds pursuant to an "open loss payable clause", in addition to being a loss payee under the Standard Mortgage Form for Building Loss only. I will return to this issue below.

[24] The judge also rejected an argument that Intact paid more to National Holdings than was payable under his loan. The judge rejected this argument on the

facts, as summarized at paras. 50–54, pointing in part to a lack of evidence to support Mr. Oraniewicz's contentions. Here the judge reasoned:

> [50] The second complaint by Mr. Oraniewicz is that Intact paid more to National Holdings than was payable under his loan. Mr. Oraniewicz submits that his debt to National Holdings was less than $224,486.71 because:
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> a) his initial borrowing from National Holdings was $342,000;
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> b) the court approved the sale of his business premises for $174,000 in the foreclosure proceeding; and
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> c) National Holdings received insurance monies from Chubb Insurance for losses caused by a second fire.
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> [51] I am not satisfied that Mr. Oraniewcz's indebtedness to National Holdings was less than the settlement amount.
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> [52] While the initial borrowing was $342,000, the loan history delivered by National Holdings to Intact shows that by June 3, 2016, Mr. Oraniewicz's indebtedness had grown to $403,513.73.
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> [53] Further, there is no evidence from which I can determine the amount of the net sale proceeds applied to Mr. Oraniewicz's debt after the sale of the premises. The sale price may have been $174,000, but the net amount available to apply to the indebtedness is the relevant figure in this analysis. Without this figure, Mr. Oraniewicz has not satisfied me that Intact paid more than the amount he owed to National Holdings.
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> [54] Similarly, with respect to the Chubb Insurance proceeds, Mr. Oraniewicz has not presented any admissible evidence to establish the nature of the interest insured by Chubb Insurance, the amount of the insurance proceeds paid to National Holdings and the treatment of those insurance proceeds by National Holdings. Without this evidence, Mr. Oraniewicz has not fulfilled his onus to prove that Intact paid more to National Holdings than he owed.

[25] Finally, and in part based on his earlier findings of fact, the judge rejected a claim that Intact and National Holdings had acted dishonestly or unfairly. On this point, the judge found that Intact had acted properly and communicated in a timely manner. Furthermore, he noted that Intact had properly dealt directly with National Holdings owing to its entitlement under the Policy.

[26] In the result, the judge concluded that Mr. Oraniewicz had not established any of the claims that he made in the action and dismissed it.

Appellate Review

[27] Before turning in detail to the issues arising on appeal, it is helpful to reiterate what the Chief Justice explained to Mr. Oraniewicz at the beginning of his appeal.

[28] An appeal is not a second trial. An appellate court can interfere with a trial judgment only if the judge made a material legal error. Trial judges have the responsibility to assess the evidence, to weigh and evaluate it, and to make findings of fact based on their assessment and the inferences they draw from the evidence. As an appellate court, we must respect and defer to the judge's findings of fact unless they result from legal error. In other words, an appeal court can only interfere with those findings if the judge has made palpable and overriding errors in his assessment of the evidence or the inferences drawn from the evidence: see *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 19–25.

[29] Palpable errors are obvious errors in the judge's assessment of the evidence, such as when a judge finds a fact for which no evidence exists. Overriding errors are those critical to the result such that the result would be different if the error had not been made. Subject to these parameters, appellate courts must defer to the findings of fact reached by a trial judge. In our justice system, trial judges are the decision makers who have the responsibility to analyse, weigh, and evaluate the evidence. That responsibility sits with trial judges because they have the advantage of hearing the evidence first hand and seeing the witnesses appear before them in the courtroom. In fact, a court of appeal itself commits a legal error if it interferes with findings of fact where it has not been demonstrated the trial judge made a palpable and overriding error.

[30] On the other hand, an appellate court may interfere with a trial judgment if it rests on an error of law. Judges must get the law right, and if they make an error of law (and not an error of fact or mixed fact and law), an appeal court may correct it: see *Housen* at paras. 8–9. To the extent that the judge's interpretation of the Policy raises an issue of law, we can ask whether the judge was correct to conclude that

National Holdings was entitled to all of the proceeds and not just those arising from the Building Loss.

[31] The Chief Justice also explained that appeals are conducted on the record that was before the trial judge. As a general rule, we do not admit evidence that was not before the trial court. Rare exceptions to this rule are made if the party looking to admit new or fresh evidence can meet the test laid out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In this case, Mr. Oraniewicz included some evidence in his appeal book that had not been before the trial judge. I will address this issue later in my reasons.

[32] The appeal was also made more challenging because we did not have access to the trial transcripts, which would have allowed us to review the evidence and the rulings made by the judge about the admissibility of evidence. Mr. Oraniewicz had applied for, and was granted, an order dispensing with the requirement to file transcripts because of their cost and on his representation that they were unnecessary and he did not intend to refer to them. In granting that order, Justice Skolrood informed Mr. Oraniewicz of the risk he was taking in not putting the evidentiary record before the Court, saying:

> [14] In the circumstances, I am prepared to grant the order sought dispensing with the trial transcripts. In doing so, I want to make it clear to the appellant that the burden in the appeal is on him to establish that the trial judge erred in coming to the conclusions that he did. Given the factual nature of the dispute, absent the transcripts, it is likely that the appellant will have a difficult task in meeting that burden. That is the risk he assumes in proceeding without the transcripts.

[33] As will be explained next, most of the issues Mr. Oraniewicz raises involve his disagreement with findings of fact, as found by the trial judge. In order to provide a basis for us to interfere with those conclusions, Mr. Oraniewicz must show that the judge made palpable and overriding errors. On these issues of fact, it is not enough to say that the judge should have reached different conclusions. The only issue on appeal to which a correctness standard applies is the judge's interpretation of the loss payee clause.

[34] In this case, the trial lasted some 17 days. It is apparent from a review of the reasons for judgment that the judge carefully considered the evidence and the conclusions he should reach based on it. Many of the concerns raised by Mr. Oraniewicz during his argument are reflected in the reasons for judgment and were evaluated by the judge. Moreover, it is clear that the judge made special efforts to identify the issues of concern to Mr. Oraniewicz and found ways to articulate those concerns as legal complaints that required analysis.

On Appeal

[35] On appeal, Mr. Oraniewicz alleges errors that align closely with the issues he argued at trial, set out in paras. 14–15 above. In essence, he alleges that the judge misinterpreted the Policy and erred in concluding that National Holdings was entitled to all of the insurance proceeds as a first loss payee, and not just to the Building Loss. He also disagrees with the judge's findings that Intact handled his claim properly without breaching its duties to him.

The Interpretation of the Policy

[36] I proceed on the basis that the language of the Policy reflects relatively standard language in insurance contracts and, accordingly, I propose to review the judge's analysis on a standard of correctness. In short, in my view, the judge interpreted the Policy correctly.

[37] The relevant language in Mr. Oraniewicz's Policy is as follows:

Loss, if any Payable to:	Loss Payee/Payable	National Holdings Ltd. 1090 West Georgia Street Suite 850 Vancouver, BC V6E 3V7 1stly Standard Mortgage Form G010 is applicable to Buildings Only

[38] The judge found the wording of the clause to clearly establish that National Holdings is a loss payee under the Policy in two separate capacities. First, as a loss

payee pursuant to an “open loss payable clause” which identifies the party who may collect insurance proceeds. And second, as a loss payee pursuant to the Standard Mortgage Form which is applicable to the insurance proceeds from the “Buildings Only”.

[39] Following case law, the judge concluded that the language “Loss, if any Payable to: Loss payee/payable … National Holdings Ltd. … 1stly” stood alone, and was effective to assign to National Holdings any monies owing to Mr. Oraniewicz under the Policy. In other words, National Holdings is simply an assignee of Mr. Oraniewicz’s rights under the Policy, and is subject to the equities or other legal obligations running between him and Intact. If Mr. Oraniewicz were to have conducted himself so as to deprive himself of an entitlement to the proceeds, then, as an assignee of his rights, so too would National Holdings be deprived.

[40] By contrast, the Standard Mortgage Form grounded a separate contract between the mortgagee, National Holdings, and the insurer, Intact. The Standard Mortgage Form was effective to preserve the validity of the insurance policy as it applies to National Holdings’ claim to the Building Loss, regardless of any act or omission on the part of Mr. Oraniewicz. In other words, because the Standard Mortgage Form is a separate contract, it is not similarly subject to the rights running between Intact and Mr. Oraniewicz. The judge found the effect of the clause to be that Intact could not deprive National Holdings of its rights to receive Building Loss proceeds.

[41] Importantly, the Standard Mortgage Form does not purport to limit the rights of National Holdings as a first loss payee and serves to provide, in effect, additional security to National Holdings beyond what it otherwise has under the Policy. This interpretation of the standard mortgage clause is supported by the wording of the Standard Mortgage Form referred to in the Policy. The substantive clause in the Standard Mortgage Form is as follows:

> **BREACH OF CONDITIONS BY MORTGAGOR OWNER OR OCCUPANT** - The insurance and every documented renewal thereof – AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN – is and shall be in

> force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk: …

[42] The judge referred to persuasive authority from Nova Scotia in his analysis, but there is authority closer to home and binding on us. In *Canadian Imperial Bank of Commerce v. Insurance Corp. of Ireland Ltd.* (1990), 51 B.C.L.R. (2d) 341 (C.A.), Cumming J.A. had the following to say about the open loss payable clause, quoting with approval from John Alan Appleman & Jean Appleman, *Insurance Law and Practice*, revised vol. 5A (St. Paul: West Publishing Co., 1970):

> There are several different types of common loss payable or mortgage clauses. The open loss payable clause simply states that 'loss, if any is payable to B as his interest shall appear', or uses other equivalent words, merely identifying the person who may collect the proceeds. …
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> [At 351, emphasis added.]

[43] I take this to be substantively the same as the passage from *Trans Canada Credit Corp. Ltd. v. Royal Insurance Co. of Canada* (1983), 149 D.L.R. (3d) 280 (N.S.C.A.), cited by the trial judge. In *Trans Canada*, the Court described the open loss payable clause "as an assignment of the right to receive the policy moneys", but not a contract that would turn the assignee (in this case National Holdings) into the insured. The practical effect of the open loss payable clause is that, as an assignee, National Holdings would have no claim to insurance proceeds in the case that Mr. Oraniewicz acted in a way that made the insurance contract a nullity, as there would be no proceeds to 'assign' to it in the first place.

[44] So far as the mortgage clause is concerned, in *General Principles of Canadian Insurance Law*, 3rd ed. (Toronto: LexisNexis, 2020) at 290, Barbara Billingsley writes the following:

> The Supreme Court of Canada has definitively established that a mortgage clause creates a separate insurance contract between the mortgagee and the insurer of the secured property. This is so even though the mortgagee is not a signatory to the insurance contract and even though the mortgagor arranges for and pays for the mortgage clause.
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> [Emphasis added.]

[45] The Supreme Court decision referred to by Billingsley is *Caisse Populaire des Deux Rives v. Société mutuelle d'assurance contre l'incendie de la Vallée Richelieu*, [1990] 2 S.C.R. 995, where Justice L'Heureux-Dubé, writing for the Court, said the following:

> The appellant and the respondent put forward two different interpretations of the hypothecary clause. In the appellant's submission, the hypothecary clause is part of the insurance contract purchased by the hypothecary creditor's debtor. The clause is thus a stipulation for a third party of the right to the insurance indemnity, under which all defenses the insurer can invoke against the hypothecary *debtor* may be set up against the hypothecary *creditor*. In the respondent's submission, the hypothecary clause is actually a second contract between the insurer and the hypothecary creditor, a contract which is separate and apart from that purchased by the hypothecary debtor. This second contract would then have been purchased from the insurer by the hypothecary debtor as mandatary for his hypothecary creditor. It follows, the respondent argues, that the completely independent contractual link means that the fault of the hypothecary debtor cannot be invoked against his creditor. I am of the view, for the reasons which follow, that we have to recognize that the latter interpretation more adequately reflects the intent expressed by the parties to the insurance contract and is consistent with the general scheme of insurance law as it is practised in North America, as well as being in keeping with the rules of Quebec civil law as a whole.
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> [At 1005, emphasis by italics in original, emphasis by underlining added.]

[46] The result of the mortgage clause creating a separate contract has two consequences, summarized by Billingsley as follows:

> First, the insurer cannot rely upon the mortgagor's acts, omissions or defaults of the main contract in order to deny coverage to the mortgagee under the collateral contract. This means, for example, that the mortgagee gets paid, even if: the mortgagor breaches its duty of good faith by making misrepresentations on the insurance application form; the mortgagor breaches the policy by intentionally causing the loss; or the loss falls within a policy exclusion clause, which conflicts with the standard mortgage clause. In short, "[t]he mortgagee's interest is still protected despite a voided policy".
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> Second, the insurer has a limited subrogation-like right against the mortgagor; that is, the insurer can recover from the mortgagor proceeds paid by the insurer to the mortgagee where the mortgagor breached its obligations under the main contract.
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> [At 291–92, quoting *Royal Bank of Canada v. Canadian Northern Shield Insurance Co.*, 2014 BCSC 1422 at para. 25.]

[47] In Mr. Oraniewicz's case, neither consequence of the Standard Mortgage Form is relevant because they are both premised on a situation where the insurer

relies on a mortgagor's act, omission or default to deny coverage to the mortgagee. Here, Intact did not rely on a breach under its main contract with Mr. Oraniewicz to deny payment to National Holdings. It follows that the judge interpreted the Policy correctly, and National Holdings was entitled to all insurance proceeds under the open loss payable clause.

Factual Issues

[48] As I have observed, Mr. Oraniewicz alleges multiple errors in the judge's findings of fact. I do not intend to reiterate all of the specific complaints because they all suffer from the same fundamental problem. That is, Mr. Oraniewicz has not demonstrated any errors in the judge's understanding or evaluation of the evidence. He has, rather, expressed his disagreement with the judge's conclusions. He does not agree, for example, with the judge's assessment of Intact's conduct in processing the claim and engaging in dispute resolution. But, in the absence of palpable and overriding error, it is not for us to revisit the judge's conclusions.

[49] As I referred to above, Mr. Oraniewicz has the burden of demonstrating error: a task made difficult by the absence of transcripts that would allow us directly to compare the evidence before the judge with his findings of fact. But, as I was listening to his argument, I was able to compare what he asserted to us with how the judge described Mr. Oraniewicz's argument before him. It was evident to me that Mr. Oraniewicz was repeating to us his argument to the trial judge. Moreover, the judge reproduced the details of Mr. Oraniewicz's argument and explained the reasons why he rejected those assertions based on the evidence before him at trial. Mr. Oraniewicz has not persuaded me that the judge made any errors in his findings of fact that would permit us to interfere with them. Fundamentally, Mr. Oraniewicz thought the judge got it wrong and wanted the chance to reopen his case and reargue it.

[50] I turn to two final points.

[51] First, as I understand it, one argument in support of his view that National Holdings received more than he owed it is based on the fact that National Holdings

received insurance proceeds from Chubb Insurance ("Chubb") relating to an unrelated fire loss that occurred after the fire on May 14, 2015. The judge had rejected this aspect of the claim saying "Mr. Oraniewicz has not presented any admissible evidence to establish the nature of the interest insured by Chubb Insurance, the amount of the insurance proceeds paid to National Holdings and the treatment of those insurance proceeds by National Holdings. Without this evidence, Mr. Oraniewicz has not fulfilled his onus to prove that Intact paid more to National Holdings than he was owed": at para. 54.

[52] Mr. Oraniewicz included in his appeal book documents that were not before the trial judge. He suggested these documents demonstrated that the judge got the facts of Chubb's payment wrong. This requires us to determine whether to admit the evidence as fresh evidence on appeal. In my view, we should not. It may well be, as Intact submits, that the application, if we accept it as such, fails the *Palmer* test on several grounds. But, more importantly, I fail to understand how the proposed evidence establishes any damage or prejudice suffered by Mr. Oraniewicz caused by Intact. The Chubb insurance monies were for a different fire loss, not the one before the Court, and were paid after the settlement by Intact of National Holdings' claim. Any complaint that Mr. Oraniewicz might have had with regard to these monies did not lie against Intact, but rather laid against National Holdings and/or Chubb Insurance. To put it in *Palmer* terms, the admission of the documents would not affect the result of the trial, nor provide any basis to reopen the trial.

[53] Second, throughout his submissions, Mr. Oraniewicz repeatedly suggested that he had been misled throughout the process of dealing with Intact by Intact's counsel. At or about the end of the trial, Mr. Oraniewicz started an action against counsel based on these allegations. That action was struck by order of the court. In other words, the issue of whether Intact's counsel acted improperly by misleading Mr. Oraniewicz was determined in the court below in a separate proceeding, and is not before us on this appeal. For that reason, Mr. Oraniewicz's attempt to reintroduce those allegations in his appeal is an abuse of process and we should not, in my opinion, entertain those arguments. There is, in any event, no evidence

before us of any improper conduct by counsel for Intact. The allegations appear to be without foundation, and they are inconsistent with the judge's findings that Intact did not deal with Mr. Oraniewicz improperly or breach any duty it owed to him.

[54] For all of these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Chief Justice Marchand"

I agree:

"The Honourable Madam Justice Fenlon"