

NEW WESTMINSTER

Citation: ☼

APR 20 2016

Date: ☼

File No:

C15681

Registry: New Westminster

REGISTRY

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Civil Division)

BETWEEN:

**WAYMING LOUIE,
MARY LOUIE & ALLAN DE LA PLANTE**

CLAIMANTS

AND:

BCAA INSURANCE CORPORATION

DEFENDANT

**REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE H.R. WALTERS**

Counsel for the Claimants:

D. Creighton & N. Auld

Appearing for the Defendant:

D. Frenette

Place of Hearing:

New Westminster, B.C.

Date of Hearing:

July 3 & 4, 2014; September 30, 2014

Date of Judgment:

April 20, 2016

INTRODUCTION

[1] This case involves a claim by the claimants for monies allegedly owed to them by the defendant pursuant to a contract in the form of a policy of insurance.

ISSUE

[2] The main issue in this case concerns the validity and applicability of a special limitation provision in the Comprehensive Insurance Policy limiting the defendant/insurer's liability for loss of camera equipment to the amount of \$3,000.00.

BACKGROUND

[3] In addition to the viva voce evidence called on this trial the parties, through their counsel, entered two (2) exhibits as evidence in the trial. Exhibit 1 was an Agreed Statement of Facts. Exhibit 2 was a Joint Book of Documents. In Exhibit 1 the parties agreed that of the three named claimants, only Wayming Louie and Mary Louie were actual parties to the contract and were the named insureds under the Habitational Insurance Policy issued by BCAA. The Policy was issued in respect of Mr. and Mrs. Louie's residence at 7375 Burris Street in Burnaby, BC.

[4] The parties agreed that at all material times Mary Louie resided at the residence as did her son-in-law, the third claimant, Allan De La Plante and his wife and their three children. Mr. Wayming Louie did not reside at the residence. It was agreed that Mary and Wayming Louie have purchased home insurance for the residence from BCAA every year since 1988. By letter dated February 11, 2013 BCAA mailed to the residence of Mary Louie a renewal letter concerning the policy. The letter stated that the policy was due for renewal and that BCAA had updated and amended policy

wording as a result of the new B.C. Insurance Act and that enclosed with the renewal letter was a booklet (the "2013 Policy Booklet") containing the complete policy wording which the insureds were encouraged to review carefully.

[5] Among other things the 2013 Policy Booklet, under the heading "Special Limits of Insurance" and sub-heading "Applicable to All Perils Insured" sets-out in clear language that the policy has a special limit of \$3,000.00 for claims concerning the loss of camera equipment.

[6] The parties agreed that similar renewal letters were sent to Wayming and Mary Louie in previous years and that in the years February 2005, April 2004 and April 1996, in particular, the policy wording booklet included the same camera coverage limitation as appears in the 2013 Policy Booklet.

[7] On or about March 4, 2013 Mary Louie and Allan De La Plante attended at a BCAA office in New Westminster to renew the policy. Mary Louie completed a Habitational Insurance Application for the policy. Under the rubric "Remarks", the application form states "Coverage and exclusions discussed". The application also states at the top of pages 2 and 4:

"Your complete policy is made up of the Application, Policy wording Booklet and Declaration Pages Provided to you".

[8] In the result, on March 4, 2013 Mary Louie signed the Application form and together with the agent for BCAA, renewed the insurance policy for the residence at 7375 Burris Street for the period March 25, 2013 to March 25, 2014. The claimant Allan

De La Plante was not a party to the contract nor was he, his wife or his children named as an insured in the insurance policy.

[9] The parties further agree that Mr. De La Plante concluded an Equipment Loan Agreement with Sony Canada dated March 13, 2013 which agreement was to be in effect from that date until May 13, 2013. Under the agreement Sony loaned Mr. De La Plante approximately \$7,100.00 worth of camera equipment and Mr. De La Plante in turn agreed to reimburse Sony for the value of that equipment in the event of loss or damage to it.

[10] In their Agreed Statement of Facts the parties agree that on April 18, 2013 a burglary occurred at the premises of the claimants' residence. Stolen from Mr. De La Plante's motor vehicle was the Sony camera equipment loaned to him and which was valued at \$7,099.97. Also stolen from Mr. De La Plante's motor vehicle was his personal photographic equipment which was owned by him and which is described as items (b) through (h) of paragraph 29 of the Agreed Statement of Facts. That equipment was valued at approximately \$3,203.94. And finally, the above-mentioned burglary involved the theft of a Delta chop saw owned by Mr. De La Plante and valued at \$249.00. The chop saw was stolen from the carport of the residence.

[11] On or about April 22, 2013 Mr. De La Plante made a claim to BCAA for the total value of the property stolen in the burglary. By letter dated April 29, 2013 BCAA's adjuster informed Mr. De La Plante that BCAA would not seek to apply the Business Limitation term to limit his recovery of the camera equipment but that they would invoke

the application of the Special Limit Provision in order to limit recovery to \$3,000.00 for the camera equipment pursuant to the terms of the insurance policy. In addition to paying this amount (i.e. \$3,000.00) to Mr. De La Plante, BCAA also offered to pay him \$261.45 for the chop saw.

[12] It is agreed between the parties that Sony reduced from \$7,099.97 to \$4,027.52 the amount it is seeking as reimbursement from Mr. De La Plante for the missing camera equipment that was on loan to him. As of September 30, 2014 Mr. De La Plante had not yet reimbursed Sony for the value of the Sony camera equipment. Therefore, deducting the sum of \$3,261.45 that BCAA paid to the claimant at the start of the trial, the remaining outstanding balance in issue at this trial is the claimant's claim for \$4,531.43.

THE EVIDENCE

[13] Both sides to this litigation called evidence at the trial. As already mentioned, the parties adduced evidence in the form of an Agreed Statement of Facts and a Joint Book of Documents. These were marked as Exhibits #1 and #2 respectively. The claimants called Mr. De La Plante to give viva voce evidence. He was the sole witness for the claimants and his was the only evidence adduced by the claimants other than Exhibits #1 and #2.

THE EVIDENCE OF ALLAN DE LA PLANTE

[14] Mr. De La Plante described himself as a man who was going to turn 69 years of age on September 8, 2014. He is the husband of Angela Louie who is the mother of their three (3) children and the daughter of Wayming Louie and Mary Louie. Angela

Louie is employed full-time with Fraser Health. In 1996 Mr. De La Plante retired from his occupation as a full-time photographer. He testified that in 2006 he, his wife and their 3 children moved into the residence at 7375 Burris, Burnaby BC, which is owned and occupied by Wayming and Mary Louie. In order to facilitate this living arrangement a large extension was added to the Louie's house. Mr. De La Plante stated that at the present time he was mostly retired but was in the process of writing his third novel and was taking care of family business which included looking after Mary Louie who suffered a stroke in late January 2013. In the five years prior to that Mr. De La Plante was working part-time at Home Depot. He said that in the autumn of 2012 he decided to reinvent himself as a professional photographer. To that end, in November of 2012 he purchased a Chevy HHR and advertised himself by putting a wrap on the vehicle which publicized his name and telephone number.

[15] With respect to the Sony camera equipment that was stolen from Mr. De La Plante on or about April 18, 2013 and which equipment represents, by far, the largest portion of the claimants' insurance claim that is the subject of this lawsuit, he testified that because of his reputation and experience as a photographer, Sony employees would sometimes lend him cameras, lenses and related photographic equipment for the purpose of customer evaluation and generally to test and try-out the equipment.

[16] Mr. De La Plante testified that around July of 2012 Wayming Louie had to be removed from the family home and placed in a care facility due to his declining health. In addition, in late January 2013 Mary Louie suffered a stroke. He stated that even before Mary Louie's stroke it was the practice for the mail to come to his side of the residence and he would go through it to make sure that everything that was pertaining

to Mary and Wayming Louie was set aside and brought over to Mary. He said that after Mary's medical issue it became more important that he open their mail and look at it to ensure that anything that was of urgency could be explained to Mary and taken care of right away.

[17] Mr. De La Plante said that was how it came to be that he received the BCAA renewal letter dated February 11, 2013 which was addressed to Wayming and Mary Louie. He testified it was a simple letter in an envelope and it did not have attached to it or included in the envelope a booklet or other form of document with the policy wording.

[18] Mr. De La Plante stated that because he realized the insurance needed to be renewed he took Mary Louie to the New Westminster office of BCAA on March 4, 2013 to renew the policy. He said she was assigned a broker and that he sat off to one side because Mary likes to conduct her own business affairs if at all possible. He testified that he did not hear the broker discuss with Mary Louie the terms of the policy being renewed. Mr. De La Plante only intervened when Mrs. Louie needed some assistance when answering the broker's questions about when the roof was replaced and when the new addition to the house was built. He also identified in his evidence the signature of Mary Louie on the Habitational Insurance Application executed on March 4, 2013. He agreed that the document has on the top of page 1 the words "This Policy Contains a Clause Which May Limit the Amount Payable". As well, he agreed that on the top of page 2, the document has the words "Your Complete Policy Is Made Up Of The Application, Policy Wording Booklet And Declaration Pages Provided To You". And lastly, Mr. De La Plante agreed that page 3 of the Application document, under the heading "Remarks" bears the words "Coverage and exclusions discussed".

[19] Mr. De La Plante then went on in his testimony to describe what is referred to above, namely that on April 18, 2013 he took Mary Louie to do her grocery shopping. He stated that when he brought her home his cameras and equipment were right behind him tucked between the driver's seat and the back seat. He stated that he took Mary Louie into the house and took all the groceries in as well. He said when he went back out he did not see his cameras there but it did not really hit him at that time that his cameras and equipment were gone. He said it was his fault that he just assumed that he had already brought them into the house. He testified that it was not until early the next morning that he noticed that his cameras were definitely gone. He said he immediately called the insurer and the Burnaby RCM Police. Mr. De La Plante stated that he later realized that a chop saw had also been stolen. He said that was not in his vehicle with his camera equipment but rather was taken from the carport.

[20] Mr. De La Plante said that after BCAA advised him that the loss was covered but that there was a \$3,000.00 special limitation under the policy for coverage of camera equipment, he was very disappointed and annoyed and on May 15, 2013 filed the Notice of Claim that commenced this lawsuit.

THE EVIDENCE OF GINA IULIANO

[21] Ms. Iuliano was a witness called by the defendant. She stated her position with BCAA is Manager of the Corporate Fulfillment Centre which manages all the back end administrative processes for the organization. She testified that she has held her current position for four (4) years and that she has been employed for twenty-three (23) years with BCAA.

[22] Ms. Iuliano's evidence was that quality control systems and processes were in place to ensure that renewal packages were sent to each BCAA insured, including the Named Insureds. She testified that each package contained a renewal letter, a declaration page, a policy working booklet and a financial statement. Ms. Iuliano gave evidence that the quality control systems and processes were followed in the case at bar. She said that documents (a) to (g) at Tab 16 of exhibit 2, the Joint Book of Documents, were physical evidence of their record showing that a renewal package as described above was prepared and delivered to Canada Post to be mailed to the Named Insureds (i.e. Wayming and Mary Louie), in respect of the Policy. The defendant relies on this evidence to counter the claimants' suggestion that BCAA failed to draw to the attention of the insureds the existence of exclusions and/or special liability limitations.

THE EVIDENCE OF PATRICIA STIRLING

[23] Ms. Stirling was a defence witness who has been the Director of Underwriting for BCAA for four (4) years and an employee for a further six (6) years before that during which time she was the Chief Policy Underwriter and then Manager of Underwriting. She said she has worked in the insurance industry for about forty (40) years.

[24] Ms. Stirling's evidence goes to the issue of prior knowledge by Wayming and Mary Louie and/or Mr. De La Plante concerning the 'Special Limit'. Ms. Stirling testified about renewal letters from BCAA to Mr. and Mrs. Louie in previous years including February 2005, February 2008 and February 2009 (Tabs 12, 11 and 10 respectively in exhibit 2). Ms. Stirling also testified about policy wording booklets that had been provided to the Named Insureds in several previous years.

[25] As with Ms. Iuliano's evidence, the defendant relies on Ms. Stirling's evidence to show a history of prior practice and dealings between the Named Insureds and BCAA that contradicts the claimants' contention that the defendant insurance company failed to bring the insureds' attention to the existence of exclusions and special limits and that the Named Insureds had no knowledge of these limiting provisions in the insurance policy.

THE EVIDENCE OF PAUL BACHIN

[26] Mr. Bachin is an employee of BCAA. He said he was the insurance agent who dealt with Mary Louie and Mr. De La Plante on March 4, 2013. He said that over the twenty-two (22) years of his employment with BCAA he has dealt with hundreds of new policy applications and thousands of policy renewal situations. His dealings with Mary Louie on March 4, 2013 were in the latter category. Mr. Bachin agreed that he had little recollection of his precise dealings with Mrs. Louie and Mr. De La Plante on the policy renewal visit but he believed he followed his usual, standard and normal practice on policy renewals.

[27] Mr. Bachin explained in his testimony how he distinguishes between what he does regarding a new policy and what he does on a policy renewal. For a renewal he said he reviews the application and makes inquiries concerning any changes that need to be made. With Mrs. Louie he said he made updates concerning a hot water tank or electrical and followed up on an underwriting request for changes to the policy. He also recalled that he reviewed with Mrs. Louie and Mr. De La Plante the declaration form and obtained Mrs. Louie's signature on the Application for Renewal which form refers to policy limitations. Mr. Bachin also identified the Declaration page which bears the

words, in large, bold printing at the top of the document "This Policy Contains a Clause Which May Limit the Amount Payable". Mr. Bachin testified that Mrs. Louie did not ask any questions about limitations or exclusions coverage nor did he recall her having any questions generally concerning her insurance coverage during the renewal transaction. Mr. Bachin stated that he believed the entire time he spent with Mrs. Louie and Mr. De La Plante was about fifteen (15) minutes. It is noteworthy that he was never questioned about Mrs. Louie having obvious cognitive impairments or difficulties from a medical event like a stroke. Mr. Bachin made no mention of, and he was not asked about Mary Louie presenting with a drooping left side of her face, slurred speech and obvious physical and cognitive impairment.

DISCUSSION

[28] At this point it is helpful to remember that in a civil lawsuit the burden of proof is not on the defendant. Rather, it is the claimants' burden to prove, by legally admissible evidence, that on a balance of probabilities the claim has been established.

[29] As mentioned above, the main issue in this case is whether the special limitation term in the Habitational Insurance Policy was valid and applicable. Central to the inquiry on this point is Mr. De La Plante's assertion that the Named Insureds (Wayming and Mary Louie) had no knowledge of the policy exclusions and special limits. I emphasize "Mr. De La Plante" because the Court did not receive any evidence during the claimants' case from either of the actual named insureds. While reference to Wayming Louie's advanced age and general infirmity might go some way to explain the absence of testimony from him, no satisfactory explanation was given to account for the absence of evidence from Mary Louie. Indeed counsel for the defendant points out that

at the Settlement Conference it was indicated that both Mr. Louie and Mary Louie would be called as witnesses for the claimants. He even received "will-say" statements of their anticipated evidence. The Court was told that it was only on the morning of the first day of trial that claimants' counsel advised that Mary Louie would not be called to give evidence. The absence of evidence from Mary Louie ----- and to a lesser extent Mr. Louie ----- is very important because much of the claimants' case depends on the state of her actual knowledge concerning the existence of the exclusion clause and special limits in the insurance policy that was renewed on March 4, 2013. It goes without saying that, as a matter of the law of evidence, only Mary Louie and no one else can say what was in her mind. Any evidence given by Mr. De La Plante touching upon the state of Mary Louie's state of mind or what knowledge she possessed or did not possess is a matter of speculation or, in the alternative, inadmissible hearsay evidence.

[30] Even with respect to Mr. De La Plante's evidence concerning what he saw and what he did, the Court is left with some difficulties as to the weight that should be given to that evidence. While the Court finds that Mr. De La Plante was a basically honest witness who tried to give his evidence in a truthful way, the Court was left with considerable concerns about the reliability, and hence the credibility of that evidence. It often seemed that due to the passage of time or the relative insignificance of certain events when they actually transpired, that Mr. De La Plante was struggling to recall accurately that which he was testifying about. He seemed to be creating memories of events as opposed to recalling and remembering them. There was clear uncertainty in his evidence about events and actions that were not themselves memorable when they happened and which were even more ephemeral when he was trying a year and one-

half later to recount them in Court. In short, Mr. De La Plante's evidence seemed like an attempt, albeit an honest attempt, to reconstruct events and memories in a way that supported his preferred narrative. Like so many witnesses who are faced with a predicament of recalling unmemorable events, there is a natural human tendency to create memories or reconstruction events in a way that is self-serving and partial to one's own interests. The upshot of this assessment and evaluation of Mr. De La Plante's evidence is that the Court is not able to give much weight to his testimony concerning whether or not Mary Louie received a policy wording booklet in the mail along with her renewal letter of February 11, 2013.

[31] Nor is Mr. De La Plante's evidence able to carry much weight concerning the state of Mary Louie's knowledge of her insurance policy and what information was imparted to her or what information and knowledge she contemporaneously possessed about exclusions and special limits in her policy when she renewed it with Mr. Bachin on March 4, 2013.

[32] Even if the Court did not have the difficulties it does have concerning the absence of compelling and convincing evidence in the claimants' case, the other evidence before the court on this trial would preclude a finding that the claimants have proved their case to the requisite legal standards. The evidence of the defendant's witnesses was credible and substantial. The testimony of Gina Iuliano and Patricia Stirling proved to the Court's satisfaction that, even if not established to an absolute certainty, the clear probability is that Mary Louie had received from BCAA by mail, along with her renewal letter, other documentation including the policy wording booklet that brought to her notice the exclusion and special limit terms of her Habitational Insurance

Policy. Indeed the Court is satisfied on the whole of the evidence, that by virtue of long experience and on-going practice of doing business with BCAA Insurance over many years, that Mary Louie, probably if not certainly, had actual and current knowledge of the impugned provisions of her home insurance policy.

[33] With respect to the claimants' argument that the wording of the Special Limit is ambiguous, the Court agrees with and accepts the defendant's position that this claim cannot succeed in the absence of any evidence from the Named Insureds, Wayming and/or Mary Louie. There is, on the evidence, nothing that supports a finding of fact that Mr. and Mrs. Louie did not know of the Special Limit or, if knowing of it, did not understand it due to ambiguity or complexity. Furthermore, the Court finds as a fact that when the jurisprudence and case law, touching upon principles of interpretation of insurance policies is applied, the language in the insurance policy in the instant case is clear, certain, and without ambiguity.

CONCLUSION

[34] For the reasons set-out above, the Court holds that the claimants have failed to prove their claim and their case on a balance of probabilities and therefore this action is dismissed.



Judge R. Walters