



SUPREME COURT OF CANADA

CITATION: Trial Lawyers
Association of British Columbia
v. Royal & Sun Alliance
Insurance Company of Canada,
2021 SCC 47

APPEAL HEARD: May 17, 2021
JUDGMENT RENDERED:
November 18, 2021
DOCKET: 38949

BETWEEN:

Trial Lawyers Association of British Columbia
Appellant

and

Royal & Sun Alliance Insurance Company of Canada
Respondent

- and -

Ontario Trial Lawyers Association
Intervener

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and
Kasirer JJ.

JOINT REASONS FOR JUDGMENT: Moldaver and Brown JJ. (Wagner C.J. and Côté, Rowe and
Kasirer JJ. concurring)
(paras. 1 to 53)

CONCURRING REASONS: Karakatsanis J.
(paras. 54 to 81)

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Trial Lawyers Association of British Columbia

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v.

Royal & Sun Alliance Insurance Company of Canada

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2021: May 17; 2021: November 18.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance — Motor vehicle insurance — Promissory estoppel — Third party claim — Insured killed in motorcycle accident — Insured had alcohol in his system at time of accident in breach of insurance policy — Insurer becoming aware of

insured's policy breach three years after accident and after having defended insured's estate in lawsuits relating to accident — Insurer ceasing to defend insured's estate and denying coverage — Third party injured in accident seeking to recover judgment against insured's estate from insurer — Whether insurer estopped from denying coverage by its conduct before it had actual knowledge of material facts that constituted breach.

D died in a motorcycle accident. His insurer, Royal & Sun Alliance (“RSA”), proceeded to defend his estate in two lawsuits started by B and another claimant, both injured in the accident. Three years after the accident, and over a year into litigation, RSA learned that D had consumed alcohol immediately prior to the accident, putting him in breach of his insurance policy. RSA promptly ceased defending D’s estate and denied coverage. Nearly three years later, the other claimant’s action proceeded to trial, resulting in a judgment against D’s estate and against B, and a judgment for B on his cross-claim against D’s estate. B sought a declaration of entitlement to recover judgment against RSA on the basis that RSA waived D’s breach or was estopped from denying coverage to D’s estate. The trial judge granted the declaration and found that RSA had waived its right to deny full coverage by failing to take an off-coverage position and by providing a defence to D’s estate as the litigation progressed. Having found waiver by conduct, the trial judge did not consider the estoppel argument. The Court of Appeal allowed RSA’s appeal, holding that, at that time, Ontario’s *Insurance Act* precluded recognition of waiver by conduct and with respect to estoppel, that RSA’s conduct could not amount to a promise or assurance

which was intended to affect the parties' legal relationship, as RSA lacked knowledge of D's policy breach when it provided him with a defence. B sought to appeal the decision, but after being granted leave, he reached a settlement agreement with RSA and discontinued his appeal. Trial Lawyers Association of British Columbia asked and was permitted to be substituted as the appellant.

Held: The appeal should be dismissed.

Per Wagner C.J. and **Moldaver**, Côté, **Brown**, Rowe and Kasirer JJ.: Waiver by conduct was precluded by statute at the relevant time. With respect to promissory estoppel, RSA could not have intended to alter its legal relationship with B because it lacked knowledge of the facts which demonstrated D's policy breach.

Promissory estoppel requires that (1) the parties be in a legal relationship at the time of the promise or assurance; (2) the promise or assurance be intended to affect that relationship and to be acted on; and (3) the other party in fact relied on the promise or assurance. In the insurance context, estoppel arises most commonly where an insurer, having initially taken steps consistent with coverage, then denies coverage because of the insured's breach of a policy term or its ineligibility for insurance in the first place. To prevent the insurer from denying coverage, the insured will attempt to show that the insurer is estopped from changing its coverage position based on its prior words or conduct.

To ground promissory estoppel, the requirement that a promise or assurance be intended to affect the parties' legal relationship signifies that the promisor must know of the facts that are said to give rise to that legal relationship, and of the alteration thereto. The significance of intention depends entirely on what the promisor knows. A promisor cannot intend to alter a relationship by promising to refrain from acting on information that it does not have. Constructive knowledge arising from a breach of a duty to investigate is not enough, and to hold otherwise would be to unwisely and unnecessarily undermine the existing duty on insurers owed to insureds to investigate liability claims fairly, in a balanced and reasonable manner. However, where an insurer is shown to be in possession of the facts demonstrating a breach, an inference may be drawn that the insurer, by its conduct, intended to alter its legal relationship with the insured — notwithstanding the fact that the insurer did not realize the legal significance of the facts or otherwise failed to appreciate the terms of its policy with the insured.

The proposed duty to investigate thoroughly and diligently is rejected. It is at odds with the duty owed to the insured to investigate fairly, in a balanced and reasonable manner. There is no basis in law for a third-party claimant to be able to ground an estoppel argument in any alleged breaches of an insurer's duty to its insured. The duty to investigate fairly, in a balanced and reasonable manner, is owed only to the insured, not third parties. Were such a duty owed to third parties, it would sit uneasily, and indeed would undermine the duties of utmost good faith and fair dealing that govern the relationship between the parties to insurance contracts. The obligations

between the insurer and the insured are reciprocal; while the insurer has a duty to investigate fairly, in a balanced and reasonable manner, the insured is also under a reciprocal duty to disclose facts material to the claim. To allow third-party claimants to piggy-back onto the relationship between insurer and insured would effectively mean that a contract of liability insurance provides greater protection to, and imposes fewer (indeed, no) obligations upon, third parties than it provides to and imposes upon the first-party insured.

In the instant case, RSA, the promisor, could not intend to alter a relationship by promising to refrain from acting on information that it did not have. If RSA is to be taken, by having furnished a defence, as having intended to affect a relationship with B by extending coverage notwithstanding D's breach, it must be shown to have known of the facts which demonstrate that breach. However, RSA lacked knowledge, at the time it provided a defence to D's estate, of D having breached the policy by consuming alcohol. This is fatal to the argument that RSA is estopped from denying coverage. As for imputed knowledge, had RSA known of the fact that demonstrated D's breach (that he had consumed alcohol prior to the accident) but failed to appreciate its legal significance (that this was a breach), knowledge of that legal significance could have been imputed to RSA. But when RSA defended D's estate, it did not know of the fact of his consumption of alcohol prior to the accident. Knowledge of the facts demonstrating D's breach cannot be imputed to RSA, and RSA therefore cannot be taken to have intended to assure D's estate, or B, or anyone else, that it would not be relying upon that breach to deny coverage. While RSA was under a duty to D to

investigate the claim against him fairly, in a balanced and reasonable manner, RSA was under no additional duty to B or other third-party claimants to investigate policy breaches at all, much less on a different and more rigorous standard than that owed to its insured.

Per Karakatsanis J.: There is agreement that the appeal should be dismissed and with much of the majority's legal analysis. However, there is disagreement that the element of promissory estoppel that requires an intention to vary legal rights requires the promisor's actual knowledge of the facts underlying the legal right.

The jurisprudence has long established that the intent of the promisor in promissory estoppel must be interpreted objectively, based upon their words or conduct: a promise is intended to be binding when it would be reasonable for the promisee to interpret it as such. The objective approach considers whether, viewed objectively in light of the full context and including all the facts that the promisor knew or reasonably can be taken to have known, the promisor intended to alter legal rights. There are important doctrinal reasons to focus on the reasonable interpretation of the promisor's conduct, and not on their subjective intent or actual knowledge. Promissory estoppel responds to inequity and reliance. Inequity is found where the promisor acted in such a way that the promisee reasonably interpreted the words or conduct as a promise and the promisee changed their position as a result. The person who relies on

the promisor's words or conduct should be able to rely on the entire context, including what the promisor could reasonably be assumed to know.

A promisor cannot resist promissory estoppel by claiming that they only had knowledge of the facts but not their legal rights. The jurisprudence imputes knowledge of legal rights precisely because it would be inequitable for the promisor to resile where their conduct can reasonably be interpreted as an intention to change legal relations.

Given that the analysis does not focus on the subjective intent of the promisor, there is no absolute requirement that the promisor have knowledge of their legal rights or the underlying facts giving rise to those rights in every case. Instead, knowledge is relevant because it is part of the context informing the objective interpretation of the promisor's words or conduct. Because the intention of the words or conduct must be assessed objectively, both what the promisor knew and what they reasonably ought to have known are relevant.

In the instant case, there is agreement with the majority that RSA's conduct cannot be interpreted as an unequivocal assurance that RSA would continue to provide coverage even if the policy was void. RSA's continued coverage did not signify any intent to change legal relations. B cannot succeed in establishing promissory estoppel because RSA did not make a promise or assurance that can be reasonably interpreted as intending to alter legal relations.

Cases Cited

By Moldaver and Brown JJ.

Applied: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; **distinguished:** *Western Canada Accident and Guarantee Insurance Co. v. Parrott* (1921), 61 S.C.R. 595; *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142, aff'd 16 C.C.L.I. (2d) 226; *The Commonwell Mutual Assurance Group v. Campbell*, 2019 ONCA 668, 95 C.C.L.I. (5th) 344, aff'g 2018 ONSC 5899, 95 C.C.L.I. (5th) 328; **referred to:** *Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 S.C.R. 171; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Page v. Austin* (1884), 10 S.C.R. 132; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; 702535 *Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490; *Parlee v. Pembridge Insurance Co.*, 2005 NBCA 49, 283 N.B.R. (2d) 75; *Fellowes, McNeil v. Kansa General International Insurance Co.* (2000), 22 C.C.L.I. (3d) 1; *Gilewich v. 3812511 Manitoba Ltd.*, 2011 MBQB 169, 267 Man. R. (2d) 40; *Gillies v. Couty* (1994), 100 B.C.L.R. (2d) 115; *Federal Insurance Co. v. Matthews* (1956), 3 D.L.R. (2d) 322; *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459; *Personal Insurance Co. v. Alexander Estate*, 2012 NWTSC 19, 30 M.V.R. (6th) 282; *Snair v. Halifax Insurance Nationale-Nederlanden North America Corp.* (1995), 145 N.S.R. (2d) 132; *Rowe v. Mills* (1986), 72 N.B.R. (2d) 344; *Hassan*

v. Toronto General Insurance Co. (1960), 22 D.L.R. (2d) 360; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622; *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1990] 2 S.C.R. 549; *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932; *Atlantic Steel Buildings Ltd. v. Cayman Group Ltd.* (1982), 50 N.S.R. (2d) 609; *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551; *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801; *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754; *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439; *Conwest Exploration Co. v. Letain*, [1964] S.C.R. 20; *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84.

By Karakatsanis J.

Referred to: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50; *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439; *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459; *Freeman v.*

Cooke (1848), 2 Ex. 654, 154 E.R. 652; *Birmingham and District Land Co. v. London and North Western Railway Co.* (1888), 40 Ch. D. 268; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616; *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754; *Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 S.C.R. 171; *Waltons Stores (Interstate) Ltd. v. Maher* (1988), 164 C.L.R. 387; *Grundt v. Great Boulder Pty Gold Mines Ltd.* (1937), 59 C.L.R. 641; *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776; *Western Canada Accident and Guarantee Insurance Co. v. Parrott* (1921), 61 S.C.R. 595; *Peyman v. Lanjani*, [1985] 1 Ch. 457; *Parlee v. Pembridge Insurance Co.*, 2005 NBCA 49, 283 N.B.R. (2d) 75; *The Commonwell Mutual Assurance Group v. Campbell*, 2018 ONSC 5899, 95 C.C.L.I. (5th) 328, aff'd 2019 ONCA 668, 95 C.C.L.I. (5th) 344; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Harvison Young and Thorburn JJ.A.), 2019 ONCA 800, 148 O.R. (3d) 161, 439 D.L.R. (4th) 115, 96 C.C.L.I. (5th) 68, [2020] I.L.R. I-6194, 53 M.V.R. (7th) 25, [2019] O.J. No. 5047 (QL), 2019 CarswellOnt 15936 (WL Can.), setting aside a decision of Sosna J., 2018 ONSC 4477, [2019] I.L.R. I-6085, [2018] O.J. No. 4072 (QL), 2018 CarswellOnt 12536 (WL Can.). Appeal dismissed.

Ryan D.W. Dalziel, Q.C., and Esher V. Madhur, for the appellant.

David A. Tompkins and Mark A. Borgo, for the respondent.

Gavin MacKenzie, for the intervener.

The judgment of Wagner C.J. and Moldaver, Côté, Brown, Rowe and Kasirer JJ. was delivered by

MOLDAVER AND BROWN JJ. —

I. Overview

[1] Steven Devecseri died in a motorcycle accident. His insurer, Royal & Sun Alliance Insurance Company of Canada (“RSA”), proceeded to defend his estate in two lawsuits started by others injured in the accident, including Jeffrey Bradfield. Three years after the accident, and over a year into litigation, RSA learned Mr. Devecseri had consumed alcohol immediately prior to the accident, putting him in breach of his insurance policy. RSA promptly ceased defending Mr. Devecseri’s estate and denied coverage. This reduced the value to Mr. Bradfield (and another third-party claimant) of Mr. Devecseri’s policy from the policy limits of \$1,000,000 to the statutory minimum coverage of \$200,000. Nearly three years later, one of the actions proceeded to trial, resulting in a judgment against Mr. Devecseri’s estate and Mr. Bradfield, and a judgment for Mr. Bradfield on a cross-claim against the estate.

[2] In enforcing his judgment against Mr. Devecseri’s estate, Mr. Bradfield rejected RSA’s position that its exposure on behalf of the estate was confined to the statutory minimum of \$200,000. He advanced two grounds: first, waiver by conduct, and secondly, promissory estoppel. The trial judge agreed that RSA had waived its right to deny full coverage. The Court of Appeal rejected both grounds. Of particular significance, it found that RSA’s conduct could not amount to a “promise or assurance which was intended to affect [the parties’] legal relationship and to be acted on” because RSA lacked knowledge of Mr. Devecseri’s policy breach when it provided him with a defence (see *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at p. 57). In so concluding, it saw no basis to fix RSA with imputed knowledge of the policy breach, even though the parties agreed that a coroner’s report, available

shortly after the accident — and approximately three years before RSA took an off-coverage position — would have provided RSA with evidence of the breach. Mr. Bradfield appealed to this Court, advancing both waiver by conduct and promissory estoppel arguments.

[3] We would dismiss the appeal. The appellant now concedes, correctly in our view, that waiver by conduct was precluded by statute at the relevant time. With respect to promissory estoppel, we agree with the Court of Appeal that RSA could not have intended to alter its legal relationship with Mr. Bradfield because it lacked knowledge of the facts which demonstrated (or otherwise put RSA on notice) of Mr. Devecseri's policy breach. Nonetheless, even if this obstacle could be overcome, we would still harbour serious reservations about the availability of any estoppel argument on the facts of this case. A third-party claimant like Mr. Bradfield faces additional hurdles in establishing a successful estoppel argument against an insurer, given the nature of their statutory relationship. Whether and to what extent Ontario's *Insurance Act*, R.S.O. 1990, c. I.8, permits third parties like Mr. Bradfield to assert estoppel arguments, including on behalf of a first-party insured, raises a number of issues that were not fully or satisfactorily argued but which warrant comment.

[4] A preliminary issue also arises. Mr. Bradfield discontinued his appeal after this Court granted leave to appeal because he and RSA reached a settlement agreement. This Court then granted the request of the Trial Lawyers Association of British Columbia to be substituted as the appellant. Although the appeal is moot, Trial Lawyers

argues that we ought to exercise our discretion to hear it on the merits in accordance with *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. We agree.

II. Background

[5] On May 29, 2006, Mr. Bradfield, Mr. Devecseri and several others were riding motorcycles when Mr. Devecseri rode into oncoming traffic, colliding with a car being driven by Jeremy Caton. The collision killed Mr. Devecseri and injured both Mr. Caton and Mr. Bradfield. At the time, Mr. Devecseri had alcohol in his system, in contravention of his motorcycle license and thereby in breach of his standard motor vehicle insurance policy.

[6] RSA appointed an adjuster to investigate the accident. He interviewed Mr. Bradfield, who — despite having accompanied Mr. Devecseri prior to the accident — did not mention that Mr. Devecseri had been drinking alcohol. Nor was this fact revealed by the police report which had been provided in a redacted form to the adjuster. The adjuster's report to RSA concluded that, while speed was a factor in the collision, further investigation would be required to know whether drugs or alcohol played any role. The adjuster also expressed confusion about who would normally be responsible for obtaining a coroner's report, although RSA's initial instructions to the adjuster listed a coroner's report as a potential avenue of investigation. Neither he nor anyone else at RSA took steps to obtain a coroner's report.

[7] On October 7, 2007, Mr. Bradfield sued Mr. Devecseri's estate. On May 27, 2008, Mr. Caton sued the estate, as well as Mr. Bradfield and another motorcyclist in the group. Pursuant to its insurance policy with Mr. Devecseri, RSA responded to these claims on behalf of the estate. RSA retained counsel and filed a statement of defence in each action on March 5, 2009.

[8] On June 25, 2009, examinations for discovery of Mr. Bradfield and the other motorcyclist occurred. The other motorcyclist testified that he had seen Mr. Devecseri and Mr. Bradfield consuming alcohol at a restaurant shortly before the accident. Mr. Bradfield testified that he was at a restaurant with Mr. Devecseri, but said he could not recall if Mr. Devecseri was drinking alcohol. A coroner's report, dated August 29, 2006, was then obtained, confirming that Mr. Devecseri had a modest quantity of alcohol in his system when he died.

[9] On July 8, 2009, RSA advised all parties that it was taking an off-coverage position. This change in position meant that if their claims were to succeed, Mr. Bradfield and Mr. Caton would be collectively entitled to no more than the statutory minimum coverage of \$200,000 (*Insurance Act*, s. 251(1)), rather than the \$1 million that would have been available under Mr. Devecseri's full policy.

[10] Almost three years later, in May 2012, Mr. Bradfield settled his action against Mr. Devecseri's estate. As part of the settlement, RSA paid him \$100,000 plus costs, representing half its statutory minimum coverage, while paying the other half to

Mr. Caton. The settlement also included a payment to Mr. Bradfield by his own insurer of \$750,000 in underinsured coverage.

[11] In June 2012, Mr. Caton obtained a judgment for \$1.8 million against Mr. Devecseri's estate and Mr. Bradfield. While each was jointly liable to Mr. Caton, several liability was apportioned 90 percent against Mr. Devecseri and 10 percent against Mr. Bradfield. In the same proceeding, Mr. Bradfield also obtained judgment on a cross-claim for contribution and indemnity against Mr. Devecseri's estate.

[12] Following the trial, Mr. Bradfield sought a declaration of entitlement to recover judgment against RSA on the basis that RSA waived Mr. Devecseri's breach or was estopped from denying coverage to Mr. Devecseri's estate. The trial judge granted the declaration, finding that RSA waived its right to deny coverage by failing to take an off-coverage position and by providing a defence to Mr. Devecseri's estate as the litigation progressed (2018 ONSC 4477). Having found waiver by conduct, the trial judge did not consider the estoppel argument.

[13] The Court of Appeal allowed RSA's appeal (2019 ONCA 800, 148 O.R. (3d) 161). It rejected Mr. Bradfield's waiver argument, in part because, at that time, s. 131(1) of the *Insurance Act* precluded recognition of waiver by conduct. Likewise, Mr. Bradfield's promissory estoppel argument failed because RSA lacked knowledge of the policy breach, such knowledge could not be imputed to RSA, and Mr. Bradfield was unable to establish detrimental reliance.

III. Issues

[14] Commencing with waiver, the parties before this Court agree that s. 131(1) of the *Insurance Act*, as it read at the relevant time, required that waiver be given in writing and that RSA did not waive any rights in writing.¹ Accordingly, promissory estoppel is the sole issue before us: was RSA estopped from denying coverage because it responded to the claims against Mr. Devecseri's estate long after it could have discovered evidence of Mr. Devecseri's policy breach?

IV. Analysis

[15] Promissory estoppel is an equitable defence whose elements were stated by Sopinka J. for this Court in *Maracle*, at p. 57:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position. [Emphasis added.]

The equitable defence therefore requires that (1) the parties be *in a legal relationship* at the time of the promise or assurance; (2) the promise or assurance be *intended* to affect that relationship and to be acted on; and (3) the other party in fact *relied* on the

¹ Although s. 131(1) has since been amended to allow for recognition of waiver by conduct, the parties agree that the prior legislation applies to deciding this appeal.

promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee's detriment.

[16] Promissory estoppel seeks to protect against the “inequity of allowing the other party to resile from his statement where it has been relied upon to the detriment of the person to whom it was directed” (*Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 S.C.R. 171, at p. 202). In the insurance context, estoppel arises most commonly where an insurer, having initially taken steps consistent with coverage, then denies coverage because of the insured's breach of a policy term or its ineligibility for insurance in the first place. To prevent the insurer from denying coverage, the insured will attempt to show that the insurer is estopped from changing its coverage position based on its prior words or conduct.

[17] Although the nuances of the relationship between promissory estoppel and other forms of estoppel were not argued before us in this appeal, we observe that Trial Lawyers' arguments may be better framed as supporting estoppel by representation rather than promissory estoppel (see *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 5; *Page v. Austin* (1884), 10 S.C.R. 132, at p. 164). While the latter doctrine prevents the promisor from reneging on an assurance to alter the parties' legal relationship, the former doctrine prevents a promisor from denying the truth of a prior representation (see, generally, B. MacDougall, *Estoppel* (2nd ed. 2019), at §§ 5.33 to 5.45). Given the similarities between the doctrines, however, we resolve this appeal applying only the principles of promissory estoppel upon which Trial Lawyers relies,

while noting that similar reasoning would apply if the claim were grounded in estoppel by representation.

[18] As we will explain, Trial Lawyers' estoppel argument must fail, primarily because RSA gave no promise or assurance intended to affect its legal relationship with Mr. Bradfield. RSA lacked knowledge, at the time it provided a defence to Mr. Devecseri's estate, of Mr. Devecseri having breached the policy by consuming alcohol. This is fatal to Trial Lawyers' position. Further, and *even if* constructive knowledge of the facts demonstrating a breach were sufficient for purposes of estoppel (which, as we will explain, it is not), RSA cannot be fixed with constructive knowledge of such facts in the circumstances of this case. RSA was under a duty to Mr. Devecseri to investigate the claim against him "fairly", in a "balanced and reasonable manner" (*Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 63, citing with approval *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29). It did so. RSA was under no additional duty to Mr. Bradfield or other third-party claimants to investigate policy breaches at all, much less on a different and more rigorous standard than that which it owed to its insured.

[19] These points are sufficient to dispose of this appeal. As indicated, however, we propose to canvass some additional difficulties that a third-party claimant like Mr. Bradfield must contend with in raising a successful estoppel argument against an insurer.

A. *Intention*

[20] The parties agree that, for three years — from the date of the accident in May 2006 to discoveries in June 2009 — RSA was ignorant of Mr. Devecseri’s alcohol consumption. The issue is whether, *that ignorance notwithstanding*, RSA can be held to an assurance, by words or conduct, that it would not deny coverage on the basis of this policy breach. In our view, RSA’s lack of knowledge is fatal to Trial Lawyers’ estoppel argument.

[21] To ground promissory estoppel, the requirement stated in *Maracle* that a promise or assurance must be *intended* to affect the parties’ legal relationship signifies that the promisor must *know* of the facts that are said to give rise to that legal relationship, and of the alteration thereto — in this case, that Mr. Devecseri would be covered to the full policy limits *despite his having breached the policy*. We acknowledge that the jurisprudence from this Court speaks of *intention*, not knowledge (*Maracle*, at pp. 57-59; *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, at p. 615). But the significance of *intention* depends entirely on what the promisor *knows*. A promisor, such as RSA, cannot *intend* to alter a relationship by promising to refrain from acting on information that it does not have. If RSA is to be taken, by having furnished a defence, as having intended to affect a relationship with Mr. Bradfield by extending coverage *notwithstanding* Mr. Devecseri’s breach, it must be shown to have *known of the facts* which demonstrate that breach.

[22] As we explain below, the requirement that RSA be shown to have known *of the facts* demonstrating a breach leaves a narrow role for *imputed* knowledge in this context. Trial Lawyers seeks to broaden this role, arguing that *constructive* knowledge arising from a breach of a duty to investigate is enough. We disagree. As we explain below, to hold otherwise would be to unwisely and unnecessarily undermine the existing duty on insurers owed to insureds — and not to third-party claimants like Mr. Bradfield — to investigate liability claims fairly, in a balanced and reasonable manner.

[23] It is this simple: RSA lacked knowledge of the facts demonstrating Mr. Devecseri's breach. This alone is dispositive of Trial Lawyers' appeal.

(1) Imputed Knowledge

[24] As we have explained, promissory estoppel requires that an insurer know the facts demonstrating a breach in order to be bound to any promise to cover, notwithstanding that breach. To be clear, that is all that is required: knowledge of *the facts*. Had, therefore, RSA known of *the fact* that demonstrated Mr. Devecseri's breach (specifically, that he had consumed alcohol prior to the accident) but had failed to appreciate *its legal significance* (specifically, that this *was a breach*), knowledge of that legal significance could have been imputed to RSA. The leading authority from this Court and the jurisprudence developed in lower courts support this view. But, as will be seen, this jurisprudence does not assist Trial Lawyers here.

[25] In *Western Canada Accident and Guarantee Insurance Co. v. Parrott* (1921), 61 S.C.R. 595, an employee was injured while working at her employer's unguarded laundry machine. The employer, whose insurance policy required that all the machines be equipped with a safety guard, sent the insurer a report of the accident that implied that the machine in question was not guarded. Further, two of the insurer's agents either saw or were told that the machine was unguarded. Justice Idington held that, upon reading the employer's report alone, it would be "inconceivable" that the insurer did not turn its mind to the breach (p. 598). It followed that the insurer was in possession of the relevant fact that demonstrated the breach. While the contention that the insurer did not understand the legal significance of this fact was rejected by Idington J. as *unbelievable* (at p. 600), it was also *irrelevant*: because the insurer knew of the relevant fact, the knowledge of its legal significance could be imputed to the insurer. In separate reasons, other members of this Court agreed that the insurer was taken, by its knowledge of *the fact* of the unguarded machine, to have full knowledge of its rights to deny coverage (at p. 601, per Duff J.; at pp. 602-3, per Anglin J.; at pp. 606-7, per Mignault J.), and the insurer was therefore estopped from denying coverage after having defended the action.

[26] *Parrott* demonstrates the narrow operation of imputed knowledge in this context. Where the insurer is shown to have known of the fact demonstrating a breach but has failed to appreciate its legal significance (that is, failed to discern that it indeed demonstrated *a breach*), a trier of fact may infer the insurer knew of its right to withhold coverage while intending to assure the insured that it would not act thereon (see

Maracle, at p. 59; *John Burrows*, at p. 616). The employer's reliance on the insurer's conduct — in providing a defence and taking the matter to trial — as an assurance of coverage was reasonable in view of the insurer having actual knowledge of the fact of the unguarded machine.

[27] This view finds support in the lower courts. In *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.), aff'd 16 C.C.L.I. (2d) 226 (Ont. C.A.), the very nature of the claim — that a solicitor was aware that a property he was dealing with was over-mortgaged — fell outside the scope of the insurance policy. Again, however, while the insurer knew of the solicitor's awareness, it failed to appreciate its significance as demonstrative of a policy breach. And as in *Parrott*, that did not matter: it was taken, by virtue of its knowledge of *the fact*, as appreciating its significance (p. 156). Whether the insurer actually did appreciate the significance of the fact was irrelevant. In this sense, estoppel differs from waiver, which requires knowledge of the legal significance of the facts (*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at p. 500). In *Rosenblood Estate*, the reliance of the solicitor's estate on the insurer providing a defence as an assurance of coverage was reasonable in light of the insurer having actual knowledge of the mere fact that brought the claim outside the scope of the policy.

[28] This was echoed recently at the Court of Appeal for Ontario in *The Commonwell Mutual Assurance Group v. Campbell*, 2019 ONCA 668, 95 C.C.L.I. (5th) 344, aff'g 2018 ONSC 5899, 95 C.C.L.I. (5th) 328, at paras. 38 and 40, where,

again, the nature of the claim itself fell outside the scope of coverage. The insurer thus had knowledge of facts supporting a denial of coverage from the moment it received a statement of claim. It was irrelevant that the insurer did not turn its mind to the applicable exclusion, and it was estopped from relying on that exclusion later to deny coverage.

[29] This point — that the provision of a defence by an insurer, despite its knowledge of a fact demonstrating a breach, supports an inference that the insurer intended to alter its legal relationship with the insured — is widely accepted in our law (see, e.g., *Parlee v. Pembridge Insurance Co.*, 2005 NBCA 49, 283 N.B.R. (2d) 75, at para. 12; *Fellowes, McNeil v. Kansa General International Insurance Co.* (2000), 22 C.C.L.I. (3d) 1 (Ont. C.A.), at para. 69; *Gilewich v. 3812511 Manitoba Ltd.*, 2011 MBQB 169, 267 Man. R. (2d) 40, at para. 42; *Gillies v. Couty* (1994), 100 B.C.L.R. (2d) 115 (S.C.), at paras. 5 and 8; *Federal Insurance Co. v. Matthews* (1956), 3 D.L.R. (2d) 322 (B.C.S.C.), at p. 345; see also *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459 (Ont. C.A.), at p. 467). Also widely accepted is the proposition that, where an insurer knows of the facts demonstrating a breach, a failure to appreciate their legal significance *as such* — that is, as demonstrative of a breach — is irrelevant, so that such an appreciation may be imputed to the insurer, and the insurer estopped from denying coverage (see, for instance, *Personal Insurance Co. v. Alexander Estate*, 2012 NWTSC 19, 30 M.V.R. (6th) 282, at paras. 33-35 and 41-42; *Snair v. Halifax Insurance Nationale-Nederlanden North America Corp.* (1995), 145 N.S.R. (2d) 132 (S.C.), at para. 62; *Rowe v. Mills* (1986),

72 N.B.R. (2d) 344 (Q.B.), at para. 12; *Hassan v. Toronto General Insurance Co.* (1960), 22 D.L.R. (2d) 360 (Ont. H.C.J.), at pp. 368-69).

[30] In sum, where an insurer is shown to be in possession of the facts demonstrating a breach, an inference may be drawn that the insurer, by its conduct, *intended* to alter its legal relationship with the insured — notwithstanding the fact that the insurer did not realize the legal significance of the facts or otherwise failed to appreciate the terms of its policy with the insured.

[31] Here, it is undisputed that, when RSA defended Mr. Devecseri's estate, it did not know of the fact of his consumption of alcohol prior to the accident, which fact, if known, would have demonstrated his policy breach. This is not a case where RSA knew of Mr. Devecseri's consumption of alcohol but failed to appreciate it as putting him in breach. On that basis, *Parrott*, *Rosenblood Estate* and *Campbell* are readily distinguishable. Knowledge of the facts demonstrating Mr. Devecseri's breach cannot be imputed to RSA, and RSA therefore cannot be taken to have intended to assure his estate, or Mr. Bradfield, or anyone else, that it would not be relying upon that breach to deny coverage.

(2) Constructive Knowledge

[32] Trial Lawyers urges us to find that RSA *constructively* knew of Mr. Devecseri's breach, and is thus taken to know what it ought to or should have known. This submission is premised on what Trial Lawyers says is RSA's breach of a

duty to diligently investigate the claim against its insured. We would reject Trial Lawyers' argument, and with it the possibility of recognizing constructive knowledge arising from a breach of a duty to investigate as grounding promissory estoppel, for two reasons.

[33] First, this argument entails a significant — and, in our view, unwise and unnecessary — modification of the obligation an insurer owes to the insured in the context of a liability claim. This duty exists because insurers have strong economic incentives to deny coverage, which this Court has sought to moderate in the public interest. As claims arise under a policy of liability insurance, insurers are bound by a duty to the insured to investigate each claim “fairly”, in a “*balanced and reasonable manner*”, and not engage in a relentless search for a policy breach (*Fidler*, at para. 63, citing *702535 Ontario Inc.*, at para. 29). The point bears reiteration: this Court has sought to *temper* the incentives of insurers in order to protect the interests of insureds, who are vulnerable when insurers act with “wilful tunnel vision” to look for policy breaches where there is “nothing to go on” (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 102-3).

[34] The duty owed to the insured to investigate fairly, in a balanced and reasonable manner, as recognized by this Court is at odds with the duty to investigate “thoroughly” and “diligently” urged upon us by Trial Lawyers (A.F., at paras. 121 and 123). Apparently relying on *Coronation Insurance Co. v. Taku Air Transport Ltd.*, [1991] 3 S.C.R. 622, Trial Lawyers submits that the insurer is bound by a duty to “know

the things that were within [its] grasp” (transcript, p. 24; see also A.F., at para. 124; *Coronation Insurance*, at p. 640). But *Coronation Insurance* is of minimal assistance here. First, the standard set in that case and in *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1990] 2 S.C.R. 549, related to insurers’ presumed knowledge of their own files and of issues of public notoriety. The coroner’s report at issue in this case was neither in the possession of the insurer nor notorious. More fundamentally, those cases concerned an insurer’s assessment of the risks associated with a prospective insured *before even entering into an insurance contract*. At that pre-contract stage, this Court’s concern was to temper the insurer’s incentives to enter into a contract while turning a blind eye to the risks posed by the insured, only to then use the non-disclosure of those risks as a basis for denying coverage as claims arose. The incentives operate differently where, as here, we are concerned with claims under an existing contract. At that stage, the insurer has every incentive to search for breaches in relation to a given claim. We fear that, far from tempering these incentives, Trial Lawyers’ submission would *augment* them, pushing insurers to go the extra mile to find policy breaches. For this reason, the submission must be rejected.

[35] Secondly, there is no basis in law for a third-party claimant such as Mr. Bradfield to be able to ground an estoppel argument in any alleged breaches of an insurer’s duty to its insured. In other words, the duty to investigate fairly, in a balanced and reasonable manner, is owed only to the insured, not third parties. Were such a duty owed to third parties, it would sit uneasily, and indeed would undermine, the duties of utmost good faith and fair dealing that govern the relationship between the parties to

an insurance contract — in this case, between RSA and Mr. Devecseri. This is because the obligations between the insurer and the insured are reciprocal; while the insurer has the aforementioned duty to investigate fairly, in a balanced and reasonable manner, *the insured is also* under a reciprocal duty to disclose facts material to the claim (*Whiten*, at para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Q.B.), at paras. 84-85; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 55).

[36] This reciprocity of obligation is worth stressing. This Court has taken care to strike a careful balance in stating and developing the duty of utmost good faith and fair dealing between insurer and insured with a view to facilitating the honest, fair, and expeditious resolution of insurance claims. Here, RSA owed Mr. Devecseri a duty to investigate the claims against his estate fairly, in a balanced and reasonable manner, and without being zealous or relentless in its search for policy breaches. Had he survived, Mr. Devecseri would have owed a reciprocal duty to disclose any information in his possession which might have voided his coverage — in particular, that he had consumed alcohol. If, after having received this disclosure, RSA had continued to provide a defence, Mr. Devecseri could have relied on that continued defence as an assurance of coverage that could prevent RSA from later changing positions. Had, however, Mr. Devecseri failed to disclose to RSA the fact of his having consumed alcohol, the breach of his duty to disclose would foreclose any later assertion by him and against RSA of estoppel.

[37] Trial Lawyers asks that we allow third-party claimants to piggy-back onto the relationship between insurer and insured, characterized as it is by mutual duties of utmost good faith and fair dealing, but in a way that strips the new relationship between an insurer and third-party claimants of all such mutuality. So, while Mr. Bradfield claims he does not recall whether Mr. Devecseri consumed alcohol, it is worth bearing in mind that, *had he known*, he would be under no obligation to RSA to disclose that fact. And yet, Trial Lawyers would have this Court burden RSA with a duty *to Mr. Bradfield* to discover that selfsame fact. We see no justice in impressing RSA with such a duty while Mr. Bradfield owes no corresponding obligation. Further, and in any event, we note that promissory estoppel requires that the party seeking the aid of equity come with clean hands, which may also entail an obligation to disclose material facts, particularly in contexts such as insurance where parties are bound by reciprocal duties of utmost good faith (see, e.g., MacDougall, at §§ 5.289 to 5.292).

[38] Viewed in light of the reciprocity of obligations between the actual contracting parties — the insurer and the insured — there is a certain absurdity to Trial Lawyers' position. It would effectively mean that a contract of liability insurance provides greater protection to, and imposes fewer (indeed, no) obligations upon, third parties like Mr. Bradfield than it provides to and imposes upon the first-party insured. This result effectively runs contrary to the clear expression of legislative intent in s. 258(11) of the *Insurance Act*, which provides that an insurer is entitled to assert any defences against the claimant as it could raise against the insured.

[39] For these reasons, we must reject Trial Lawyers' argument that RSA can be fixed with constructive knowledge of Mr. Devecseri's policy breach.

B. *Further Issues*

[40] Trial Lawyers says it can assert estoppel on behalf of both Mr. Devecseri's estate and Mr. Bradfield, based on assurances to each, and based on detriment suffered by each. This submission is extraordinary. While these issues were not satisfactorily argued by the parties and we therefore leave their resolution to another day, we highlight below some of the difficulties that Trial Lawyers would face in asserting estoppel in the manner it proposes, given the third-party nature of its claim and the relevant statutory context.

(1) Limits of the Statutory Relationship

[41] Promissory estoppel generally requires that the promisor and promisee already have a legal relationship (*Maracle*, at p. 57; *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932, at p. 938; *Atlantic Steel Buildings Ltd. v. Cayman Group Ltd.* (1982), 50 N.S.R. (2d) 609 (S.C. (App. Div.)); see also MacDougall, at § 5.92). Trial Lawyers says that Mr. Bradfield, as a third-party claimant relative to Mr. Devecseri's insurance policy, was in a legal relationship with RSA by virtue of s. 258 of the *Insurance Act*. The relevant provisions of s. 258 of the *Insurance Act* read as follows:

Application of insurance money, 3rd party claims, etc.

258 (1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract and may, on the person's own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

Defence where excess limits

(11) Where one or more contracts provide for coverage in excess of the limits mentioned in section 251 [i.e. the \$200,000 mandatory insurance minimum], . . . the insurer may,

(a) with respect to the coverage in excess of those limits; and

(b) as against a claimant,

avail itself of any defence that it is entitled to set up against the insured

[42] Trial Lawyers submits that this statutory language creates the requisite legal relationship allowing Mr. Bradfield to assert a right of coverage as against RSA, both on his own behalf and by “stand[ing] in the shoes” of Mr. Devecseri’s estate (A.F., at para. 102). We agree that s. 258 creates a legal relationship between Mr. Bradfield and RSA. It grants third-party claimants under an insurance policy a cause of action directly against an insurer, thereby bypassing the insured. In this way, and to that extent, it ousts the common law rule of contractual privity which would otherwise bar a third-party claimant from suing an insurer on an insurance contract to which the claimant is not a party. Absent s. 258, the third-party claimant’s ability to recover funds from an insurer would be “entirely dependent upon the extent to which the insured [here, Mr. Devecseri’s estate] chooses to or is able to enforce its contractual rights

against the insurer [here, RSA]” (B. Billingsley, *General Principles of Canadian Insurance Law* (3rd ed. 2020), at p. 295). All other provinces and territories have enacted provisions similar in effect to s. 258.

[43] We are, however, far from persuaded that Trial Lawyers accounts correctly for the nature of this relationship or of the rights and responsibilities flowing therefrom, and their implications for the estoppel analysis. This is because the precise nature of this legal relationship, as determined by the statutory text, permits a claimant to sue the insurer only “upon recovering a judgment” against the insured. On the facts of this case, this restriction is significant because RSA abandoned its defence of Mr. Devecseri in 2009, three years before Mr. Bradfield obtained his cross-claim judgment against RSA. This is the first obvious difficulty with Trial Lawyers’ position: it relies on conduct by RSA that predates the existence of the relevant legal relationship.

[44] The difficulties do not end there. It is unclear to us, based on the text of the statute, whether Mr. Bradfield can assert an estoppel argument on behalf of Mr. Devecseri’s estate, as Trial Lawyers proposes. Section 258(1) permits Mr. Bradfield to bring his claim only on his “own behalf and on behalf of all persons having such judgments or claims . . . against the insured”, which would appear to foreclose claims in which Mr. Bradfield “steps into the shoes” of Mr. Devecseri’s estate and asserts an estoppel on that basis. We note, on the other hand, that s. 258(1) states that it applies to judgments against the insured that are “covered by the contract”, which language contemplates a judicial determination of whether the first-party insured is,

indeed, “covered”, in the sense that the insured could estop the insurer from denying coverage.

[45] Accordingly, without fuller submissions than we received, we would refrain from definitively concluding whether s. 258(1) allows the type of claim that Mr. Bradfield advanced. But we nevertheless emphasize that these questions require clear answers before a claim like Mr. Bradfield’s could succeed.

(2) Assurance Regarding Coverage

[46] Even accepting for the purposes of argument that s. 258 operates as Trial Lawyers suggests — by permitting Mr. Bradfield to assert estoppel based on RSA’s conduct predating the cross-claim judgment, whether on his own behalf or on behalf of Mr. Devecseri — there are further difficulties to resolve. We are of the view that Trial Lawyers has not identified any conduct by RSA that could amount to a “clear and unequivocal” or “unambiguous” assurance that it would refrain from denying coverage based on a later-revealed policy breach (*Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at pp. 646-47, citing *Halsbury’s Laws of England* (4th ed.), vol. 16, at para. 1514).

[47] Trial Lawyers relies exclusively on RSA’s fulfilment of its various statutory obligations and its duty to defend as such an assurance. At the initial stages of the litigation, Ontario’s insurance legislation required RSA to advise plaintiffs of the existence of a policy covering Mr. Devecseri, the liability limits under that policy, and

“whether the insurer will respond under the policy to the claim” (*Insurance Act*, s. 258.4). In answering the latter question, RSA had to determine whether its duty to defend Mr. Devecseri required it to respond under the policy. Importantly, RSA’s duty to defend Mr. Devecseri was triggered *not* by RSA being satisfied that Mr. Devecseri was not in breach, but simply by the receipt of a claim against the insured alleging facts which, “if proven to be true, would require the insurer to indemnify the insured for the claim” (*Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 19; see also *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 29; *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 74-78; *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11). Put simply, and absent a known policy breach, at the initial stages of a liability dispute the insurer may decline to defend the insured only where it is clear that the true nature of the facts as pleaded fall outside the scope of the policy (*Scalera*, at paras. 50-55), or the claim is expressly excluded.

[48] Where, therefore, an insurer responds to a claim against its insured by defending, it is communicating — to the insured *and* to the third-party claimant — only that the claims against its insured are of a type that fall within the terms of coverage. In no sense can such a limited communication, without more, be taken as a promise *to indemnify* the claimant if the insured is found at fault, irrespective of any later-revealed or later-occurring policy breaches. Trial Lawyers, in short, seeks to imbue RSA’s

provision of a defence to Mr. Devecseri's estate with greater significance than RSA's conduct in fact signified.

[49] Lastly, even were it possible to construe the insurer's assumption of a defence on behalf of its insured as a promise not to deny coverage, the third-party context of this case raises yet more problems for Trial Lawyers. In cases of questionable coverage, insurers often rely on reservation-of-rights letters or non-waiver agreements to preserve their right to deny coverage upon investigating the claim (see, generally, N. P. Kent, "Preventive Paperwork: Non-Waiver Agreements, Reservation-of-Rights Letters and the Defence of Claims in Questionable Coverage Situations" (1995), 17 *Advocates' Q.* 399). It is unclear to us how and whether a third party would ever obtain knowledge of a rights-reserving instrument of this kind, and in the absence of such knowledge, the third party could conceivably argue an estoppel unavailable to the insured. In this way, Trial Lawyers' submission once more appears to give more to the third party than to the first-party insured.

(3) Detrimental Reliance

[50] The final hurdle for Trial Lawyers would lie in establishing detrimental reliance. While we need not decide whether detrimental reliance is made out on the facts of this case, we note that the parties advanced arguments on the extent to which detrimental reliance can be presumed in cases where litigation has progressed to an advanced stage (see *Rosenblood Estate*, at pp. 156-57). This Court has never opined on such a presumption of prejudice and we decline to do so here, but we nevertheless

highlight that the cases upon which Trial Lawyers relies involved claims by the first-party insured, not third-party claimants. This distinction requires careful consideration in a future case.

[51] We also affirm that detrimental reliance by the promisee must be shown to assert promissory estoppel. The Court in *Maracle* did not refer to the requirement of detrimental reliance because the detriment in that case was self-evident: the promisor allegedly stated it would not act on an expired limitation period and the promisee then allowed the limitation period to expire before bringing an action. Detrimental reliance has, however, always been a requirement for asserting promissory estoppel, or for that matter any form of estoppel. This is because, being an equitable doctrine, its goal is to address unconscionable, unjust, or unfair conduct (*Ryan*, at paras. 68 and 74; *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, at paras. 20 and 28). And what makes it unconscionable, unjust, or unfair to resile from a promise or assurance is that the promisor has, by intention and effect, induced the promisee to change its position in reliance thereon, *to its detriment*. For that reason, asserting promissory estoppel requires evidence of prejudice, inequity, unfairness or injustice before courts will give hold a promisor to its promise or assurance (see *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439 (H.L.), at p. 448, aff'd in *Conwest Exploration Co. v. Letain*, [1964] S.C.R. 20, at pp. 27-28, per Judson J.; *Fort Frances*, at p. 202, and *Ryan*, at para. 51, citing *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122).

V. Disposition and Costs

[52] We would dismiss the appeal.

[53] Trial Lawyers says costs should not be awarded against it because it is a public interest litigant and because RSA was not obliged to participate in this appeal. The latter suggestion we find highly unrealistic, given the obligation Trial Lawyers sought to have imposed on insurers in this case. Nevertheless, and while this is a close call, we are of the view that the parties should bear their own costs on the appeal and the motion to substitute Trial Lawyers as a party. Our order in this regard should not be taken as a suggestion to other similarly situated groups that they may in future take up and prosecute appeals arising out of settled litigation without the risk of exposure to a costs order.

The following are the reasons delivered by

KARAKATSANIS J. —

[54] I have read the reasons of Moldaver and Brown JJ. and I agree that the appeal must be dismissed. I also agree with much of their legal analysis. However, in my view, they have added an unnecessary gloss to an element of promissory estoppel, inconsistent with the jurisprudence and inconsistent with the underlying principles of

equity. By doing so, they have undermined the protection that this equitable doctrine provides.

[55] As my colleagues note, the elements of promissory estoppel were stated by this Court in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, and are well established in the jurisprudence. A basic requirement is that the promisor “has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on” (*Maracle*, at para. 57). Justices Moldaver and Brown interpret this requirement — an intention to vary legal rights — as requiring the promisor’s actual knowledge of the facts underlying the legal right. They reason that the promisor cannot intend to affect the legal relationship unless they have actual knowledge of the facts underlying that relationship (para. 21). Nevertheless, because they accept that the jurisprudence does not require actual knowledge of the legal significance of the facts, they conclude that knowledge of the legal significance may be imputed.

[56] I cannot agree that actual knowledge is required precisely because the promisor’s intent must be analyzed objectively. Subjective intent is unknowable to anyone other than the promisor and is not the appropriate lens for this equitable doctrine. The jurisprudence has long established that the intent of the promisor must be interpreted objectively. A promise is intended to vary legal relations when it would be reasonable for the promisee to interpret it as such. The objective approach is grounded

in our jurisprudence — going back to the origins of the doctrine — and aligns with the fundamental purpose of promissory estoppel: preventing inequity.

[57] As I shall explain, under an objective approach, knowledge is relevant because it informs the interpretation of the promisor's conduct in the full factual context. The objective approach considers whether, viewed objectively in light of the full context and including all the facts that the promisor knew or reasonably can be taken to have known, the promisor intended to alter legal rights.

[58] Because knowledge of the underlying facts is an important part of the context in which an objective assessment is made, my colleagues' additional requirement of actual knowledge may have little practical effect on the result in many cases. As my colleagues observe, even if constructive knowledge were sufficient for the purposes of promissory estoppel, it would not be available on the facts of this case and the appeal could be dismissed on that basis. However, my colleagues' addition of an absolute requirement of actual knowledge of the facts distracts from the true inquiry and unduly constrains the flexibility inherent in equity.

I. Analysis

[59] Confusion over the role of the promisor's knowledge in this appeal stems from a failure to properly apply an objective analysis of the promisor's intent. There is no dispute in our jurisprudence that promissory estoppel requires a promise or assurance that was intended by the promisor to alter legal relations and that the promise

or assurance must be clear and unequivocal. Importantly, the jurisprudence indicates that the promisor's conduct is analyzed *objectively*. The promisor's intent is discerned from their words or conduct and their knowledge is relevant to the extent that it illuminates how the words or conduct can be reasonably interpreted.

[60] Whether the promisor intended the promise to be binding is often the contentious question in promissory estoppel cases (A. Robertson, "Knowledge and Unconscionability in a Unified Estoppel" (1998), 24 *Monash U.L. Rev.* 115, at pp. 127-28). This requirement of intention did not appear in *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439 (H.L.), the case often credited as the source of the modern doctrine. It was Lord Denning's summary of the principle in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, that added the requirement that the promise be "intended to be binding, intended to be acted upon and in fact acted upon" (p. 134).

[61] The interpretive issue is how this intent should be judged: objectively or subjectively (i.e. according to the subjective perspective of the promisor).

[62] This issue was addressed by the Court of Appeal for Ontario in *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), 26 O.R. (2d) 459. The Court of Appeal concluded that "a promise, whether express or inferred from a course of conduct, is intended to be legally binding if it reasonably leads the promisee to believe that a legal stipulation, such as strict time of performance, will not be insisted upon" (p. 465). The Court of Appeal held that intent does not require a direct statement

to that effect and determined that “[k]nowledge by the promisor that the promisee is likely to regard the promise as affecting their legal relations constitutes an appropriate basis from which the inference of the existence of a sufficient intent can be drawn” (p. 467 (emphasis added)). As Professor McCamus explains, “the court [in *Owen Sound*] clearly indicated that the fact the contractor may not have intended to signal a willingness to ignore the time limit was irrelevant” (*The Law of Contracts* (3rd ed. 2020), at p. 313).

[63] One of the earliest endorsements of this objective analysis was that of Parke B. in *Freeman v. Cooke* (1848), 2 Ex. 654, 154 E.R. 652, who wrote:

[I]f whatever a man’s real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth [p. 656]

(See also *Birmingham and District Land Co. v. London and North Western Railway Co.* (1888), 40 Ch. D. 268 (C.A.), at p. 287, per Bowen L.J.; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616 (C.A.), at p. 623, per Denning L.J.)

[64] In addition to the jurisprudence, an objective interpretation of the promisor’s words or conduct is strongly supported by commentators. In his treatise, Professor McCamus writes: “The test for whether the undertaking was given is . . . objective” (p. 313). Professor MacDougall similarly concludes, “a promise or assurance, whether express or inferred from a course of conduct, is intended to be legally binding if it reasonably leads the promisee to believe that a right or other legal

stipulation . . . will not be insisted upon” (*Estoppel* (2nd ed. 2019), at § 5.195). Professor Manwaring has observed that, “[s]ubjective intention is unknowable and intention can only be inferred from words and actions or, in other words, the objective manifestations of intent” and that the “case law clearly supports the view that the intentions of the promisor are to be discovered through an objective analysis” (“Promissory Estoppel in the Supreme Court of Canada” (1987), 10 *Dal. L.J.* 43, at p. 64).

[65] There are important doctrinal reasons to focus on the reasonable interpretation of the promisor’s conduct, and not on their subjective intent or actual knowledge. Promissory estoppel responds to unconscionability (or inequity or unfairness) and reliance, which are closely linked concepts (see *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, at paras. 15-16). As Moldaver and Brown JJ. acknowledge in this appeal, “[p]romissory estoppel seeks to protect against the ‘inequity of allowing the other party to resile from his statement where it has been relied upon to the detriment of the person to whom it was directed’” (para. 16, quoting *Fort Frances v. Boise Cascade Canada Ltd.*, [1983] 1 S.C.R. 171, at p. 202). However, inequity is found where the promisor acted in a manner that the promisee reasonably interpreted as a promise and the promisee changed their position as a result. As expressed by Mason C.J. and Wilson J. in *Waltons Stores (Interstate) Ltd. v. Maher* (1988), 164 C.L.R. 387, “equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has ‘played such a part in the adoption of the assumption that it would

be unfair or unjust if he were left free to ignore it” (p. 404, quoting *Grundt v. Great Boulder Pty Gold Mines Ltd.* (1937), 59 C.L.R. 641, at p. 675, per Dixon J.).

[66] In my view, the role of knowledge in promissory estoppel flows from the nature of this objective analysis, which focuses on whether it was reasonable in the circumstances to interpret the promisor’s words or conduct as an intent to change legal relations. Subjective intent — which is unknowable to the promisee — is not the appropriate focus for promissory estoppel. For the same reason, promissory estoppel does not require *actual* knowledge in every case.

[67] Proprietary estoppel — unlike promissory estoppel — initially did require the defendant’s actual knowledge (of both the existence of the right and the claimant’s mistaken belief as to their legal right). The House of Lords in *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, followed by this Court in *Cowper-Smith*, removed the explicit knowledge requirement and endorsed an objective interpretation. Lord Scott of Foscote described the objective analysis as follows:

If it is reasonable for a representee to whom representations have been made to take the representations at their face value and rely on them, it would not in general be open to the representor to say that he or she had not intended the representee to rely on them It could not be thought reasonable for a representee to rely on a representation that, objectively viewed, was not intended by the representor to be relied on. [para. 17]

[68] Because equity is concerned with addressing unfairness, the application of the doctrine must be fair to *both* parties and must consider the context from both

perspectives. Equity is not just concerned with the subjective intention or the actual knowledge of the promisor. The person who relies on the promisor's words or conduct should be able to rely on the entire context, including what the promisor could reasonably be assumed to know. And the impact of any words or conduct must also be assessed from the perspective of what the promisor could reasonably assume the promisee knew. Therefore, in order to determine whether, viewed objectively, the words or conduct convey an intention to vary legal rights, the fact-finder must look at the entire context, including what the promisor knew or can be taken to have known.

[69] As an illustrative example, if it were industry practice to immediately obtain a police report after a motor vehicle accident, and this practice was generally known or the insurer knew that the person relying on the promise had knowledge of this practice, then it would be reasonable to interpret the insured's conduct in light of an assumption that they were aware of the contents of the police report. The fact that an insurer, through mistake or negligence, actually failed to obtain the report would not be decisive to an objective interpretation of their conduct unless the insured knew that the insurer had not obtained the report.

[70] For this reason, the objective lens does not mean that there is no role for the knowledge of the promisor (and promisee). *Western Canada Accident and Guarantee Insurance Co. v. Parrott* (1921), 61 S.C.R. 595, illustrates the role that knowledge plays in the promissory estoppel analysis. The insurance company's conduct could be reasonably interpreted as a promise intended to alter legal relations

precisely because it was clear in the context that they knew they had the option to void the policy but chose not to. As Duff J. wrote, the insurance company's conduct in the circumstances provided "ample evidence to support the inference, and that I think is the right inference, that the company agreed to assume responsibility under the policy" (p. 601). Actual knowledge of the facts supported the inference that the promisor intended to change legal relations; but it does not follow that actual knowledge is therefore a requirement of promissory estoppel. *Parrott* did not, therefore, create a unique promissory estoppel test for the insurance context that *requires* knowledge.

[71] Importantly, knowledge plays this role *not* because there is a bright-line rule that the promisor must have knowledge of the underlying facts in every case. Knowledge is simply part of the context that informs the reasonable interpretation of the promisor's conduct. There is only one test for promissory estoppel in Canadian law, and the jurisprudence confirms that it is based on an objective interpretation of the promisor's conduct.

[72] My colleagues accept that imputed knowledge can be sufficient for promissory estoppel so long as the promisor is aware of the underlying facts; it does not matter if the promisor lacks knowledge about the legal significance of those facts. In other words, a court can "impute" knowledge of legal significance of the facts to the promisor. However, my colleagues reject the idea that "constructive knowledge" arising from a breach of a duty to investigate is sufficient. I find this distinction unhelpful. Again, promissory estoppel does not depend on a rigid categorization of

different types of knowledge, but on the objective assessment of how the promisor's conduct can be interpreted.

[73] It is well established that a promisor cannot resist promissory estoppel by claiming that they only had knowledge of the facts but not their legal rights (see *Peyman v. Lanjani*, [1985] 1 Ch. 457 (C.A.), at p. 495, per May L.J.; *Parlee v. Pembridge Insurance Co.*, 2005 NBCA 49, 283 N.B.R. (2d) 75, at para. 12; *The Commonwell Mutual Assurance Group v. Campbell*, 2018 ONSC 5899, 95 C.C.L.I. (5th) 328, at paras. 38 and 40, aff'd 2019 ONCA 668, 95 C.C.L.I. (5th) 344). This is significant because the knowledge that is relevant *to an intention to change legal relations* is knowledge of legal rights. In other words, if the promisor does not realize the legal significance of the underlying facts, they cannot intend to change legal relations at all. As Professor Manwaring writes: "If the promisor can easily discover what her legal rights are, it would be inequitable to allow her to act without making a reasonable effort to do so" (p. 63). Equity's goal of preventing inequitable conduct is engaged where the promisor could easily have discovered their legal rights, chose not to, and then, through words or conduct, reasonably led the promisee to believe that the promisor would not enforce the legal rights.

[74] The jurisprudence "imputes" knowledge of legal rights precisely because it would be inequitable for the promisor to resile where their conduct can reasonably be interpreted as an intention to change legal relations. The same objective analysis

applies where the promisor can be *taken to have knowledge of the facts*. What matters is whether the context supports the inference of intent.

[75] The objective approach also maintains the proper distinction between waiver — a common law doctrine — and promissory estoppel. Waiver, which requires “full knowledge of rights” and “an unequivocal and conscious intention to abandon them”, imposes this strict test because there is no consideration for the promise (*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at p. 500). Further, unlike promissory estoppel, waiver does *not* require detrimental reliance. Waiver requires a *conscious intention*; full knowledge is necessary. By contrast, promissory estoppel — which is rooted in equity — does not impose a strict knowledge requirement, but requires detrimental reliance. Equity relieves against the harsh consequences of the application of common law rules.

[76] Therefore, whether the promisor has made a promise or assurance with the intent to change legal relations is a factual determination that must be made in light of the full context. A promise or assurance is intended to be legally binding where it would be reasonable for the promisee to rely on it.

[77] I agree with my colleagues that in this case, Royal & Sun Alliance Insurance Company of Canada’s (RSA) conduct cannot be interpreted as an unequivocal assurance that RSA would continue to provide coverage even if the policy was void. A coroner’s report that *none* of the parties had accessed is not relevant to the objective interpretation of RSA’s conduct. RSA’s continued coverage did not signify

any intent to change legal relations: the motor vehicle accident report included no reference to alcohol; none of the motorcyclists told the police about alcohol consumption; Mr. Bradfield never told RSA's investigators or his own insurer about alcohol consumption; and the Durham Regional Police Collision Investigation Unit report did not mention alcohol.

[78] I would also reject the idea that RSA is estopped simply because three years passed before it took an off-coverage position. The length of time is not determinative here. Ultimately, there is nothing unique in RSA's conduct to suggest that RSA promised that it would not void coverage if it failed to discover breaches after a specific period of time.

[79] Therefore, Mr. Bradfield cannot succeed in establishing promissory estoppel because RSA did not make a promise or assurance that can be reasonably interpreted as intending to alter legal relations. This is sufficient to dispose of this appeal.

II. Conclusion

[80] In my view, the promisor's intent in promissory estoppel must be interpreted objectively based upon their words or conduct: a promise is intended to be binding when it would be reasonable for the promisee to interpret it as such. Given that the analysis does not focus on the subjective intent of the promisor, there is no absolute requirement that the promisor have knowledge of their legal rights or the underlying

facts giving rise to those rights in every case. Instead, knowledge is relevant because it is part of the context informing the objective interpretation of the promisor's words or conduct. Because the intention of the words or conduct must be assessed objectively, both what the promisor knew and what they reasonably ought to have known are relevant.

[81] I would dismiss the appeal.

Appeal dismissed.

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