

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
JINZHOU KALLET TITANIUM)	<i>Yixin Wang</i> , for the Plaintiff
INDUSTRY CO. LTD)	
)	
)	Plaintiff
)	
– and –)	
)	
DAVID E. SHARPE)	<i>Chris Afonso, Thomas K. Alexander, and</i>
)	<i>Murray Stieber</i> for the Defendant
)	Defendant
)	
)	
)	HEARD: February 5, 6, 7, 10, 11, 12, 13,
)	April 10, 11, 14, 15, 16, and May 9, 2025

REASONS FOR DECISION

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Overview

[1] The issue in this case is whether the President and Co-Director of Mississauga Metals & Alloys (“MM&A”), the defendant, Mr. David Sharpe (“David”), is liable for fraudulent misrepresentation on the basis of recklessness.

[2] MM&A was a family-owned business. It would purchase scrap metal, process it, and sell it as refined metals and alloys. David Sharpe Sr. and Helen Sharpe owned 60% of the business together. Stacey Sharpe (“Stacey”) and David each owned 20%. During the relevant period, the company had approximately 20 employees, the majority of whom worked in the factory.

[3] David’s role was to look for and purchase the raw materials that were used in the production of goods that MM&A sold. He was also involved in sales of the final product.

[4] His sister, Stacey, was a Co-Director. She was responsible for coordinating the shipments.

[5] Jinzhou Kallet Titanium Industry Co. Ltd. (“Kallet”) is a corporation based in the city of Jinzhou, in the People’s Republic of China. Kallet manufactures, processes, and trades in titanium and ferro metals.

[6] Between July and November 2020, Kallet purchased metals and alloys (the “Products” or “Product”) from MM&A pursuant to written contracts (the “Contracts”).

[7] David negotiated the Contracts with Kallet through Cara Lyu (“Cara”) who was the Foreign Trade Manager.

[8] Pursuant to the Contracts, after production, the Products were to be shipped via ocean freight to China.

[9] Kallet paid a total of \$1,719,190.85 U.S.D. for the Products. It only received Products valued at \$281,495.76 U.S.D.

[10] MM&A filed for insolvency protection pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, on July 20, 2021, but was ultimately bankrupt as of August 21, 2021.

[11] As a result of the bankruptcy, Kallet has no recourse against MM&A.

[12] Kallet sues David, personally, for damages in the amount of \$1,437,695.09 U.S.D. for fraudulent misrepresentation. It alleges that David sent Cara emails attaching various shipping documents.

Decision

[13] For the reasons that follow, I find David liable for fraudulent misrepresentation in respect of some but not all the outstanding shipments. I have asked for further submissions on the damages.

Issues

- Issue 1: Did David make false representations of fact?
- Issue 2: If so, did David make these representations with an absence in belief in the truth of the statements or with recklessness as to their truth?
- Issue 3: Did David intend for Kallet to rely on the misrepresentations?
- Issue 4: Did Kallet rely on the misrepresentations?
- Issue 5: Did Kallet suffer a loss in doing so?
- Issue 6: Is there a basis for David to be personally liable as a director and officer of MM&A?

Analysis

I) The Test for Fraudulent Misrepresentation

[14] There is an issue as to the test for fraudulent misrepresentation.

[15] In *Amertek Inc. v. Canadian Commercial Corp.* (2005), 76 O.R. (3d) 241, 256 D.L.R. (4th) 287 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 439, at para. 63, the Court of Appeal applied the test from *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.) (also adopted in *Parna v. G & S. Properties Ltd.*, [1971] S.C.R. 306, at pp. 316-17) as follows: (1) the defendant made a false representation of fact to the plaintiff; (2) the defendant (i) knew the representation was false, (ii) had no belief in the truth of the representation, or (iii) was reckless as to the truth of the representation; (3) the defendant intended that the plaintiff should act in reliance on the representation; (4) the plaintiff did act on the representation; and (5) the plaintiff suffered a loss by doing so.

[16] In *Bruno Appliance and Furniture v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, the Supreme Court cited only four parts of the test as follows: (1) the defendant made a false representation of fact to the plaintiff; (2) some level of knowledge by the defendant of the falsehood whether through knowledge or recklessness; (3) the plaintiff relied on the false representation or it caused the plaintiff to act; and (4) the plaintiff suffered a loss by doing so.

[17] Subsequent courts have explained the discrepancy by stating that the *Parna* test was truncated but not changed. In *Midland Resources Holding Ltd. v. Shtaif*, 2017 ONCA 320, 135 O.R. (3d) 481, the Court of Appeal applied the five-part test from *Ameretek* at para. 162. See also *Naturale Science Inc. v. Ramm Pharma Corp.*, 2024 ONSC 6918, where Koehnen J. stated at para. 18:

There is currently some uncertainty in the law about whether fraudulent misrepresentation requires a fifth element, namely that the person making the fraudulent misrepresentation intended the claimant to rely on the statement. The uncertainty has arisen because, in *Bruno Appliance and Furniture Inc. v. Hryniak*, Karakatsanis J., writing for the court, did not discuss the fifth element. Courts have appeared to address this uncertainty by holding that proof of the representors' knowledge of the false representation is proof of intent. [Footnotes omitted]

[18] In the recent Court of Appeal decision, *Canadian Tire Corporation Limited v. Eaton Equipment Ltd.*, 2025 ONCA 720, at para. 13, the Court of Appeal set out the four elements from *Bruno Appliance*.

[19] Given what appears to be the uncertainty in the law, I have still applied the five-part test. Although the Court of Appeal did not list the fifth element, in *Canadian Tire Corporation* it nevertheless referenced the fact that the defendant intended the plaintiff to rely on the misrepresentations.

[20] At all times, the burden rests on Kallet: *Neilson v. Lam*, 2010 BCSC 1702, at para. 79.

II) Credibility of the Witnesses

Stacey Sharpe

[21] Stacey worked with Andrew Kim (“Andrew”), an Associate Manager at a shipping company, BNX Shipping Inc. (“BNX”), to arrange the shipments to Kallet.

[22] Stacey was initially on David’s witness list but shortly before trial he advised he would not be calling her. As a result, Kallet called Stacey as a witness by way of subpoena after a short adjournment.

[23] I did not find Stacey to be a credible or reliable witness for several reasons.

[24] As I will discuss further, she admitted to altering certain shipping documents. Her explanation for why she did this was not believable. As well, she gave other inconsistent and implausible evidence and was evasive. I will elaborate below.

[25] Although she expressed great difficulty recalling events when examined in chief by Kallet's lawyer, or understanding the questions asked, even when the questions were about communications that she had, when cross-examined by David's lawyer, she readily agreed to some things that required memory. Indeed, she agreed with most propositions put to her by David's lawyer. In my view, she was motivated to give evidence to assist her brother, David.

David Sharpe

[26] I also did not find David to be a credible or reliable witness. He gave evidence at his discovery which was helpful to Kallet in terms of what certain documents meant. Then he gave different answers at trial without having corrected his discovery answers. There were also additional significant discrepancies and inconsistencies in his evidence, as I will elaborate on throughout these reasons.

Jimmy Lee

[27] By the time of the trial, Andrew from BNX had passed away.

[28] Kallet subpoenaed Mr. Jimmy Lee ("Mr. Lee"), the Manager and Director of BNX. Mr. Lee provided general information on the way BNX works and its process for issuing its own bills of lading.

[29] Mr. Lee was independent, had no stake in the matters at issue, and I found him credible.

Cara Lyu

[30] Cara testified on behalf of Kallet.

[31] I do not have any concerns about her overall credibility or reliability. While there were some inconsistencies in her testimony, I did not find these material or significant. She testified in a straightforward manner and her evidence was generally consistent with the contemporaneous communications on the important issues. As well, unlike David and Stacey, when her inconsistencies were put to her, she was not evasive. She readily admitted to things. In my view any inconsistencies in her testimony did not reveal that she was hiding the truth or that she could not be trusted.

III) Documentary Evidence

[32] The parties agreed that the correspondence and certain other documents were admitted as having been prepared, sent, and received on or about the dates indicated. However, their agreement provided that the truth of the contents of specified bills of lading and booking notices and any

documents purporting to be shipping documents sent by David to Cara, were tendered by Kallet as fraudulent or inauthentic

IV) Missing Emails?

[33] As will be seen, the contemporaneous emails favour Kallet significantly as they show that Stacey was continually writing to Andrew to delay the pickup of the shipments, even after David had already sent Cara the shipping documents.

[34] I do not accept David's explanation that there are missing emails because he generally deleted his emails. David also testified that some of the productions came from searches on his laptop. Therefore, he did not delete everything. It is unclear why he deleted some, but not all, of his emails. He also gave no evidence that he deleted emails from his delete folder as well as his inbox.

[35] I also do not accept that there are material emails missing because Stacey's computer broke. As I will discuss below, Stacey gave nonsensical evidence in this regard.

[36] There is also no persuasive explanation as to why David and Stacey's various searches for documents on their computers only turned up results favourable to Kallet and why emails that might support David's narrative are missing. There is no plausible explanation for why any relevant communications between David and Stacey would be missing from both of their computers.

Issue 1: Did David Make False Representations of Fact?

I) The Contracts

[37] There were three Contracts dated July 31, 2020, October 13, 2020, and November 11, 2020. The first two Contracts were for Ferro Titanium and the third was for Titanium Ingots. Ferro Titanium is produced by MM&A, but Titanium Ingots are something it purchases already produced and then resells.

[38] All the Contracts required payment of a 15% deposit and then final payment within three days of the receipt of documents, specified in the Contracts to be a bill of lading ("BL"), Quality Certificate, Packing List, and Invoice.

[39] At a certain point, David began sending Cara Booking Notices which represented bookings on ocean liners in place of BLs.

[40] I will refer to the BLs and Booking Notices as Shipping Documents.

[41] Notably, as I will set out, the Statement of Claim only expresses misrepresentations with respect to the sending of Shipping Documents, Packing Lists and Invoices. It does not reference the Quality Certificates.

[42] I will refer to BLs, Booking Notices, Invoices and Packing Lists collectively as the Documents and reference them separately where required. Where required, I will refer to the Quality Certificates separately.

II) The Shipping Process

[43] BNX was the shipping company MM&A used to arrange shipments to Kallet.¹

[44] When asked to describe BNX's role, Stacey said that "they ship it from start to finish" including arranging passage on an ocean vessel. Throughout the trial the parties used the term "shipping" to reference the overall process of shipping that began with BNX.

[45] Stacey described the first step in the shipping process as BNX arranging for a shipping container (or empty rail car) to be brought to MM&A's factory from a rail terminal in Toronto. Each container had a number which allowed the shipping company or customer to track the container at any point in time.

[46] At the factory, MM&A would load the Product into the containers.

¹ BNX was referred to by the parties interchangeably as a shipping agent, freight forwarder or shipping company. It is important to appreciate that the parties considered BNX a shipping company because the pleading uses the terminology shipping company. And so, I provide the following examples where the parties called BNX a shipping company. It was referred to as a "shipping company" by the parties quite extensively both in their contemporaneous communications and at trial. For example, emails between Cara and David beginning December 5, 2020 (Exhibit 40); an email from David to Cara dated January 26, 2021; emails between David and Cara dated February 5, 2021 (Exhibit 45); WeChat communications between David and Cara dated November 20, 2020 (Exhibit 78); an email dated January 14, 2022 between Cara and David (Exhibit 44). See also Defendants closing submissions paragraphs 77 & 86 where it refers to BNX as a shipping company.

In plaintiffs opening statement plaintiff counsel referenced BNX as a "shipping company" without any objection from David. Cara also gave evidence that BNX was a "shipping company" multiple times in her evidence and was not cross-examined on this. Stacey also agreed that MM&A was trying to make arrangements with a "different shipping company" when cross-examined with reference to replacing BNX.

When David was examined in chief, he also answered questions that described BNX's role as being a shipping company and also specifically referred to BNX's replacement as a "shipping company." When cross-examined, David also answered questions where BNX's was referred to as a "shipping company" without suggesting this was a misdescription. He was asked: "You were telling her that once you sent the draft BL, it would mean that the container had departed your factory where it was given to the shipping company. Correct?". He answered: "Yes" There are also significant portions of David's Examination for Discovery read into the record where he referred to BNX as a "shipping company" and/or answered questions where BNX was referred to as a "shipping company" without suggesting this was a misdescription. It was also called a shipping company in David's closing submissions: para 86.

[47] After the container was loaded it would be sealed. The seal also had a specific number.

[48] MM&A assigned the seal numbers, but BNX provided the container numbers. Both Stacey and David were familiar with seals and what they looked like.

[49] After the container was loaded and sealed, it would be picked up by truck (also arranged by BNX) and brought back to the rail terminal in Toronto.

[50] At the rail terminal, the container would be loaded onto a train bound for Vancouver, British Columbia. At Vancouver, the container would be loaded onto an ocean vessel where it would travel to Dalian, China.

[51] It would generally take one day for the truck to bring the container to Toronto, ten days for the rail car to travel to Vancouver, and then 30 days for the ocean vessel to get to Dalian, China.

[52] One of David's principal defences is that shipping issues occurred due to COVID-19. He says that there were shipping disruptions including changes in ocean vessel bookings as well as container shortages that impacted the shipments in question.

[53] He referenced a Transport Canada document entitled "Canada's Freight Transportation System and Global Crisis in Container Shipping and Supply Chains", which referenced these issues. Stacey also gave this evidence.

[54] In my view, this submission by David is a red herring.

[55] Mr. Lee, who worked in the industry, agreed that such problems existed in general. However, his view was that the problem could not have had a significant impact on MM&A's shipping processes in 2020. While the issues began in 2020, they did not hit full force until 2021. The biggest problems occurred with containers coming to Canada, not those leaving the country.

[56] Further, even if there were general issues in international shipping, this is not why MM&A failed to deliver the shipments. As I will discuss further, the problem was that Stacey was continually delaying the pickup of containers and eventually asked Andrew to send her draft BLs without any containers being delivered at all.

[57] It is remarkable that within all the correspondence that Stacey and Andrew exchanged, there are very few references to problems securing containers or bookings on vessels. Most of the communications related to MM&A's request to delay the pickup of containers and Andrew's concerns about MM&A's delays.

III) The Parties' Contemporaneous Discussions

[58] Prior to the Contracts, David and Cara discussed the meaning of the BLs as part of their negotiation over payment terms. The things that David said to Cara in writing at the time are admissible to show the representations that David made to Cara.

[59] With respect to what Cara understood at the time, I am only taking into account her testimony at trial as her previous communications are prior consistent statements. However, they are still reflected in this decision because they are part of the narrative and necessary to understand the representations that David was making.

[60] On July 29, 2020, Cara sent David a draft contract which provided that Kallet would pay a 15% deposit upon signing the contract and then pay the 85% balance within three days of receiving the originals of various documents, including an Ocean Bill of Lading. This would mean that the 85% would be due after the Product was loaded onto a ship.

[61] On July 31, 2020, David emailed Cara requesting one change. He asked, “could you agree to make the 85 % payment within 3 days after receipt of the Bill of Lading documents and departure from our factory?” (Emphasis added).

[62] The parties had further WeChat communications on July 31, 2020:

David: Yes this is my email. Thank you.

Cara: BL documents you mean original BL

David: Please let me know your thoughts on this.

Cara: ?

David: Yes I can provide you with Original BL when leaves our factory.

Cara: After receiving the documents, I pay the rest 85% right?

David: Yes. (Emphasis added throughout.)

[63] The next day, August 1, 2020, Cara agreed to MM&A’s payment terms.

[64] At discovery, when David was asked what he meant by his July 31, 2020 communications, above, he said he had asked Cara for payment “within three days after receipt of the BL documents and departure from our factory?” (Emphasis added). When he was asked if it was his understanding that if the Product did not depart the factory, he would not expect or ask for payment of the 85%, he agreed this is what he meant.

[65] Cara testified that her understanding of David’s statement was that Kallet would make the payment as soon as the goods left the factory and the required documents, including a Bill of Lading, were received.

[66] In mid-October, Cara and David had some further clarifying communications about the BLs. This arose in the context of Cara following up on delays and David providing Cara with a detailed description of the shipping process which required delivery of the containers to the

railyard, ten days rail travel to Vancouver, and then 30 days by ocean vessel. This appears to be the first time they discussed all aspects of the required multimodal transportation. Cara lived in China not Canada and it appears she did not appreciate the geography of where the Product was being picked up or departing from MM&A's factory in relation to the ocean vessels. She appeared to believe that once it left MM&A's factory, it was immediately loaded onto an ocean vessel.

[67] On October 20, 2020, Cara wrote:

So the bill of lading you gave to me is not the real BL, it is more like cargo reservation, that means the goods leaving your factory to the Toronto port, wait for the rail, so when you give me the "bl" the goods have not on the train yet, then after few days, maybe more, the goods will be loaded onto the train, then, it will take another 10 days to send to the Vancouver port, and then they will finally be on board and before the ship arrive at Dalian port, you will pay the agent, after that, the bl will be tele-released, am I right? (Emphasis added).

[68] David responded "yes, that is correct" (Emphasis added). When David testified, he confirmed that his response meant that he agreed with everything she stated.

[69] At trial, when referred to the October 20, 2020, communication Cara gave the following evidence:

Q: Sure. So I'm referring—I'm taking you to the second paragraph starting with, "So the bill of lading you give it—you give to me is not the real BL", until the last sentence of this paragraph, could you—could you tell us what you're talking about here?

A: Well, at that time, I learn that the BL document that he gave me was not—or was different from a normal BL. This is more to me like a reservation of a container. ...

Q: And so what was your understanding of the reservation container?

A: Oh, that means the product were getting ready, and then he contacted a brokerage and then to reserve the containers.

Q: Okay. And here you mentioned, "It's more like the cargo reservation and it means the goods leaving your factory to Toronto" What'd you mean by that?

A: So how I understood this, is because I was just responding to his email he mentioned earlier. He was talking about the entire shipment process, and then so I am—I was just saying, okay, so the product would go—that means like the product would leave the factory and then it would ship to—it will arrive at the Port of Toronto. Then from Port of Toronto, it would get sent to the Port of Vancouver. From that moment on then, they would be going on the ocean vessel. So, therefore, when he gave me the BL document, those products were not in the vessels yet. (Emphasis added throughout)

[70] The BLs that MM&A sent had a specific place for a container number. This supports Cara's understanding above that delivery of the BL meant the reservation of a container. Indeed, the shipping process that Cara described, and David agreed to, in their October 20, 2020 communications, depended upon that.

[71] Even if she thought the BL meant that the Product was loaded onto a ship, she still understood that it had left MM&A's factory. She just previously thought that it was immediately placed on a ship. What she did not understand was all the intervening steps before it could be placed on the ship.

[72] The above communications are important because David takes the position in this lawsuit that as long as the Product had been produced and was sitting on the floor of MM&A's premises, sending the BL would not constitute a misrepresentation even if the Product had not, or indeed could not, depart for reasons associated with MM&A's inability to access containers or obtain vessel bookings.

[73] In that regard, when David was examined in chief at trial, he testified that sending the Documents, including the BL, only meant that the Product had been "produced." He said, "[a]nd then once the goods were produced, the documents are given to me ready to go and I submit them to her, she would pay the 85 percent within three days" and that Kallet would pay "three days from the documents presented when it was at the factory." He also said: "we had a general understanding that payment was supposed to be three days when goods were at our facility, on the documents that we'd provided." (Emphasis added).

[74] David's trial evidence is inconsistent with all of his communications to Cara and his discovery evidence.

[75] David's evidence also makes no commercial sense. A bill of lading is issued by the shipping company who makes the shipping arrangements. The shipping company has nothing to do with the production of the goods.

[76] If the arrangement was that Kallet would pay only once the Product had been produced and was sitting on the factory floor, MM&A could have simply sent the Quality Certificates, and Invoices. Stated simply, there is no reason to send Bills of Lading, Ocean Vessel Booking Notices, and Packing Lists that identify MM&A as the shipper, if the shipping process has not begun.

[77] Furthermore, Stacey repeatedly gave evidence that the BLs and other documents David sent to Cara meant that the product was leaving MM&A's factory. She said: "it was part of [MM&A]'s normal part of [their] terms with [their] customers that it was payment when the goods were sort of ready and left." Stacey said she would typically receive a communication from "the factory in terms of when shipments were ready, when they had left, all this type of stuff, again would be phone calls from them telling [her] okay, it's the container has left now." (Emphasis added).

[78] Stacey said that after David received the package of documents “he would obviously know that from that, okay, it’s time to send it to the customer, it’s because the goods have left and we should get paid now” and “[t]hat means it’s left” (Emphasis added).

[79] All of the above evidence supports the conclusion that when David sent the Shipping and other Documents, he represented that the Product had departed MM&A’s factory.

IV) The Documents

[80] The Invoice noted that a 15% deposit was due within three days, with the balance due within 3 days of receiving a copy of the Shipping and other Documents.

[81] The Quality Certificate set out the number of bags and the results of testing.

[82] The Packing Lists identified the invoice number, lot number, and ship date. It listed all of the bags to be shipped as well as their total weight.

[83] Cara understood that the Packing Lists were prepared once the Product was manufactured and packed into containers. Cara was the Foreign Trade Manager handling trade and as such, she would have an understanding of what a Packing List is in general. Cara testified before David and Stacey, and they provided no evidence to contradict her evidence in this regard. There was also no objection to Cara’s evidence on the basis it was not relevant to the pleaded issues, or that it took David by surprise.

[84] In written submissions David argued that the Packing List only meant that the Product was packaged into bags. He argued that although neither he nor Stacey gave specific evidence to contradict Cara’s understanding of a Packing List, Stacey made a distinction in her evidence between packaging the Product and loading it into containers.

[85] However, all of MM&A’s product was packaged into standard one tonne bags. As noted by David in supplementary written submissions:

There was nothing custom or special about the product prepared for Kallet. They were essentially 1-ton bags of rocks, and customers buying this product were getting the same material in the same bags. This is analogous to buying bags of soil or sand at a garden-centre. There may be properties a buyer is looking for, but any particular bag is interchangeable with another type of the same type.

[86] It is unclear why a Packing List would be required if all it meant was that Product was packaged into MM&A’s standard bags since the Quality Certificate already set out the number of bags.

[87] Considering the package of Documents and the information contained on the Packing List, in my view, the Packing Lists represented that all of the Product set out in the Invoice and Quality Certificate was packaged into containers in accordance with Cara’s understanding.

V) *What David was Copied On*

[88] Stacey and Andrew made the shipping arrangements via email. They copied David with all of their communications relating to shipping matters and delays except for communications related to Shipment 6 and emails related to MM&A's failure to pay BNX's account.

VI) *The Shipments*

a) Shipments 1 to 3: Invoices 19-405.1, 19-405.2, 19-405.3, 19-405.4, 19-405.5, and 19-405.6

[89] The first three shipments arrived in Dalian but were significantly delayed.

[90] The general process was that Stacey asked Andrew for containers to be delivered, Andrew advised that he had booked passage on a vessel, and he would send her BLs.

[91] The BLs identified MM&A as the shipper and contained a container and seal number.

[92] For example, for Shipment 1, the information on the BL looked like this:

CONTAINER NO/SEAL NO

FCIU5158215/UL7595764

HDMU2625257/UL7595750

[93] The BLs also had a "CLEAN ON BOARD" date which was the date the Product was supposed to be aboard an ocean vessel.

[94] Beginning on October 1, 2020, there were extensive communications between Stacey and Andrew, all copied to David, where they discussed delays respecting Shipments 1, 2, and 3, and the timing for BNX to pick these shipments up from MM&A's factory. The Subject line for these emails was "Regarding the first Dalian shipment" (Emphasis added).

[95] This means that even though David sent Cara the Shipping and other Documents for Shipments 1 on September 11, 2020, three weeks later, they were still discussing arrangements for BNX to pick Shipment 1 up from MM&A's factory.

[96] In these communications, Andrew continually followed up, asking when BNX could pick up the containers. For example, on October 5, 2020, Andrew advised Stacey that the cut-off day for the rail terminal was that day and that they had to arrange the pickup of the containers for Shipment 1. Stacey replied that she had checked with the factory, and they would not be ready.

[97] Another example is October 15, 2020, where Stacey advised Andrew that the containers were not ready.

[98] In these communications, Andrew pointed to the fact that certain containers had been at MM&A's factory for 19 days, and if they were not ready to be picked up, the vessel booking would have to be rolled or changed because they were overbooked. When asked why the containers had been in MM&A's factory for so long, Stacey said she had no idea, but there must have been circumstances that occurred. She did not recall what those circumstances were.

[99] On October 20, 2020, Andrew asked what time BNX could pick up containers and Stacey advised that one of their machines broke and they could not load the container.

[100] Stacey and Andrew further discussed the need to postpone the pick-up date to a later date because the date Andrew proposed fell on a weekend. Stacey said, "always on a weekend is there something happen[ing]" and that "the following Monday would be preferable."

[101] Andrew stated: "[i]f we pick up Monday we have to roll the booking another week once again. And HMM is really worried now. Even HMM HQ higher manager level is looking closely for these orders we are not returning the CNTRS so long. I think it's better if we try this Saturday."

[102] Stacey's response was that she would confirm times and touch base, but ultimately, she confirmed they could not load on the weekend. Andrew then told her they had to roll the booking.

[103] On October 23, 2020, they continued to correspond about the pickup of containers for Shipments 1 to 3. Stacey told Andrew that a machine was broken so the pickup would have to be postponed. Andrew reminded Stacey that she had said the container was ready and sealed up. He said if the machine was broken and they could not pick the container up that day, then BNX would pick up the empty container, return it to the rail terminal and arrange to send another container on a later date. He indicated that this would also require rebooking the ocean vessel. There would be a fee charged and an empty return fee from the ocean liner, HMM, along with detention fees. At trial, Stacey confirmed that when they did not return containers as required there were detention fees and there was evidence that MM&A had paid detention fees for some of these containers.

[104] In the October 23, 2020 email, Andrew also complained that this was the fifth time the Shipment 3 booking had to be changed because of MM&A's failure to get it ready. At trial, when Stacey was asked how many times the booking was changed, she was evasive. She attempted to answer this direct question by framing the answer in terms of what Andrew meant. She initially said that if Andrew said it was five, that is what he meant. When she was pressed for her own answer, she ultimately agreed that it was five times:

A. Well, if he says five, I'm assuming that's what he means.

Q. I know that's what he means. I'm asking. Your. Understanding. Yeah.

A. Five.

[105] In emails between October 27, 2020, and October 29, 2020, Andrew and Stacey continued to discuss arrangements for BNX to pick up containers for Shipments 1 and 3.²

[106] David argues that the contents of all of these emails are not admissible for their truth. However, the emails themselves are facts that show that Stacey was communicating to Andrew the need to delay the pickup of the containers because of MM&A's inability to have the Product ready for pickup for a variety of reasons.

[107] In any event, when asked about her recollection of events with reference to these emails Stacey ultimately admitted, that "[t]here were delays, there has been constant issues and we're not meeting the deadlines that the railyards need" (Emphasis added). She also said she had no reason to doubt the contents of any of the emails she sent.

[108] Despite considerable problems getting Shipments 1 to 3 out the door, David sent Cara BLs for later shipments without advising Cara that there were issues with the earlier shipments.

b) Shipment 4: Invoices 19-405.7 and 19-405.8

[109] Between September 25 and 28, 2020, Stacey and Andrew communicated about Shipment 4. Stacey communicated her desire for the Product to be part of Shipment 3, but Andrew advised her that there was no room on that vessel. He also advised that it would be difficult getting a container. This is indeed one example of an instance where the parties discussed a vessel and container problem. Nevertheless, the overall correspondence supports the conclusion that it was MM&A's requests to delay the pick-up of the containers that was the problem which was ultimately admitted by Stacey as set out above.

[110] Stacey asked whether BNX could provide a draft BL without containers.

[111] Andrew replied that he could make a draft BL, but because they did not have a booking yet, the container number and booking number would be blank. He stated that the vessel name, estimated time of departure, and other information could be changed later.

[112] Stacey responded that it would be great if BNX could insert the name of the ocean vessel they were trying to book as well as a booking number that they could later change. I emphasize here that Stacey was specifically directing Andrew to put a vessel name and booking number on the BL when she had just been told by Andrew that they did not yet have a booking.

[113] Even if the emails are not admissible for the truth, they are admissible to show what Stacey was directing Andrew to do.

² This is clear because the email reference these specific shipments and/or the seal numbers for the shipments.

[114] After Stacey provided Andrew with the seal numbers, Andrew sent Stacey a BL stating: “Okay, I put the CNTR # as TBD for now.” The BL was marked “DRAFT” in red right below the “CLEAN ON-BOARD OCTOBER 18, 2020” heading (which as noted was the sailing date) and also contained the following information:

CONTAINER NO/SEAL NO

TBD/UL6638746

TBD/UL6638717

[115] When shown this exact BL and email, Stacey testified that the container number did not exist yet because none had been assigned, so it had to be marked “TBD” or to be determined. David agreed that this was also his understanding.

[116] On September 28, 2020, Stacey forwarded an email to David attaching Packing Lists, Quality Certificates, and an Invoice, as well as a BL which looked like this:

CONTAINER NO/SEAL NO

UL6638746/UL6638717

[117] Stacey had replaced the “TBD” under “CONTAINER NO” with a seal number by moving it over. She had also deleted the “DRAFT” under the CLEAN ON BOARD Date on the BL.

[118] The Packing List showed the ship date to be September 28, 2020, even though Stacey had specifically asked Andrew to send her a BL without containers such that the Product could not have been packaged into a container or shipped out of MM&A’s factory on that date.

[119] On the same day, David sent Cara the Packing Lists, Quality Certificates, and Invoices, along with the altered BL and asked for payment.

[120] This is another consistent feature of the process. In emails where David sent these Documents, he also requested payment.

[121] Stacey agreed that when these Shipping and other Documents were sent to Cara, the Product had not been loaded into a container. When David was cross-examined, he agreed that when he sent Stacey the BL for Shipment 4, the Product had not been given to BNX nor departed from MM&A’s factory.

c) Stacey’s “Proofing” and “Correcting” of the BLs

[122] Stacey altered all the remaining BLs Andrew sent her by: (1) removing the word “DRAFT” under the “CLEAN ON-BOARD” heading; (2) removing the “TBD” marking under the

“CONTAINER NO” heading; and (3) moving one of the seal numbers to the space beneath the “CONTAINER NO” heading.

[123] I am attaching as Schedule “A” one complete set of the BLs sent by Andrew to Stacey, by Stacey to David and then by David to Cara to illustrate the changes that Stacey made.

[124] Stacey testified this was part of her “proofing” and “correcting” the BLs. She said she was generally the one who did this before she sent them to David, although she said it could have been Andrew. She also said that Andrew knew she was doing this.

[125] Stacey said she did this because it was important to correct all the information so that it was accurate when it was eventually copied onto the Ocean Bill of Lading.

[126] It is unclear how what Stacey did constitutes “proofing” and “correcting.” Stacey clearly placed a seal number under the “CONTAINER NO” heading and removed the “TBD” notation under the heading CONTAINER NO. As well, without the “DRAFT” mark under the CLEAN-ON-BOARD heading, there was nothing to alert the reader to the fact that the sailing date was not firm.

[127] At trial, when she was shown one of the altered BLs and was asked how what she did constituted a correction, she agreed that it was not a correction.

[128] As well, there is not a single contemporaneous document where Andrew made the changes and sent them back to Stacey. Similarly, there are no communications where Stacey asked Andrew to make the changes, where they discussed the concept of “proofing” and “correcting” the BLs, or where she sent him the altered BLs.

[129] When asked about allegedly missing emails, Stacey gave inconsistent answers. Initially, she said she provided the documents to David for this trial, and then she provided additional documents to David in December 2024 or January 2025 because she was asked to look for further emails. She also said that her computer broke, which is why she did not have any additional documents. Then, curiously, she said that she had not kept her computer because the business had gone bankrupt four years ago and there was no reason for her to hold onto it. If that was the case, then why did Stacey keep the computer until December 2024 or January 2025? If the computer broke only after she sent the second set of documents, why did she fail to produce emails discussing the “proofing” and “correcting” process with Andrew if any such emails existed?

[130] It is not believable that Stacey located hundreds of emails that show these documents going from Andrew to Stacey to David, with no intervening emails between Stacey and Andrew relating to the altered BLs or the concept of her “proofing” and “correcting” them.

[131] When Mr. Lee was asked about one of the BLs where the “DRAFT” mark was removed and a seal number was added under the “CONTAINER NO” heading, he said it looked like a BNX BL, but it was not because if BNX issued it, then the word “DRAFT” would appear under the

“CLEAN ON BOARD” heading. He also testified that the number that Stacey placed under the heading “CONTAINER NO” was a seal number.

[132] He was asked whether his answer was the same for each of these altered BLs and he agreed that it was.

[133] There is other evidence that supports Mr. Lee’s evidence that BNX would only issue a final BL once the Product was aboard a ship. With regards to the delayed shipments that ultimately arrived, BNX issued final BLs only without the “DRAFT” mark once the BL purported to show that the Products were loaded onto a ship.³ I note that Andrew was still alive at this time and was the one who sent these updated BLs to Stacey. The updated BLs Andrew sent Stacey only showed the removal of the “DRAFT” mark when the “CLEAN-ON-BOARD” date was after the date on the BL. This is inconsistent with Stacey’s evidence that Andrew knew she was pre-emptively removing the “DRAFT” marking. I will return to this again.

[134] There is no evidence that Cara was told that David was sending her “DRAFT” BLs. David said he did not recall ever discussing this with her. Further, the Contracts at issue did not specify that the BLs would be draft. Notably, Stacey was the one who prepared the Contracts and she would have known that the Contracts did not specify a “DRAFT” BL. Removal of the word “DRAFT” was significant.

d) Shipment 5: Invoices 19-405.9 and 19-405.10

[135] On October 7, 2020, Stacey emailed Andrew stating: “Can we obtain a house BL for shipment 5 please? We can base it on the booking we have for the 3rd shipment.” Again, she was directing Andrew to prepare a BL for Shipment 5 using the details from Shipment 3.

[136] Similar to Shipment 4, before Stacey sent David the Shipping and other Documents, (also on October 7, 2020), she removed the “DRAFT” mark and also moved the seal number to the heading “CONTAINER NO” simultaneously removing the notation “TBD”.

[137] At trial, when Stacey was shown the BL she altered by adding a seal number under the “CONTAINER NO” heading, she agreed that the Product could not have departed the factory because there were no container numbers.

e) Shipment 6: Invoices 19-405.11 and 19.405.12

[138] When Stacey asked Andrew for the draft BL for Shipment 6 on October 15, 2020, Andrew responded saying BNX could not make a new booking because of pending bookings and because the container return schedule kept being delayed. The container return schedule outlined the dates

³ See email of November 4, 2020.

by which the containers had to be delivered back to the railyard to be transported to Vancouver so they would arrive in time for the ocean liner booking. Andrew advised Stacey that it would be better for MM&A to send the containers it already had first.

[139] Stacey responded:

If we can please do a booking but not pull container same as previous. What I want to do going forward is ship 2 container and then do another booking for 2 containers. So next week I will load another 2 containers and this will help clear out some of the old bookings. (Emphasis added.)

[140] In another email the same day, also related to Shipment 6, she said:

Also, I need to issue up a booking for Shipment 6 please 2 containers. We do not need to pull the containers yet but if we can issue up paperwork today for a sailing in 2 weeks that would be great.

[141] At trial, Stacey confirmed that when she said BNX did not need to “pull” containers, that meant that BNX did not have to deliver containers immediately for loading.

[142] As part of these communications, Stacey also told Andrew that she needed to “just show a new 6th booking today”. (Emphasis added)

[143] Andrew then forwarded a BL, saying, “I just made it same vessel as the shipment 5 for now.”

[144] David sent the altered BL and other Documents to Cara on October 16, 2020.

[145] Stacey confirmed that the Product had not been loaded onto a container as of October 16, 2020. When cross-examined, David agreed that at the time he sent Cara the BL, the Product had not departed MM&A’s factory.

f) Shipment 7: Invoices 19-405.13 and 19-405.14

[146] On October 22, 2020, Stacey asked Andrew to prepare a BL for Shipment 7:

I will also need a new booking for 2 containers please we can put the same as we have for shipment # 6. We will not drop containers we can live load these as we get closer same as 4, 5, and 6. (Emphasis added.)

[147] Stacey testified that live loading meant that containers would be delivered and loaded on the same day as opposed to the containers being delivered one day and picked up at a later time. Similar to Shipment 6, Andrew said that the vessel details “will be changed later”.

[148] On October 26, 2020, David sent Cara an email attaching the altered BL, and other Documents. In the email, David stated, “please see attached the next shipments which have departed” (Emphasis added).

[149] When Stacey was shown this email in chief, she volunteered that she thought David made a typo when he said the Product had departed. She said that when they do shipments, they send a standard email that says, “see the paperwork your shipment has departed.” This was her attempt to explain why he may have said the Product had departed when it hadn’t, because it was her evidence that the Product had not been loaded into a container or departed as of that date.

[150] Then, when cross-examined, Stacey readily agreed with David’s counsel’s proposition that she could not say whether the shipment had departed, and that it is possible the product left and then was returned to the factory. (As I will further elaborate one of David’s theories, which I reject, was that the Product could have departed and then returned because there was no room on the ship.)

[151] Stacey’s agreement with David’s counsel when cross-examined is curious. If she was truly unsure as to whether the Shipment had departed, why did she volunteer that David had likely made a typo or mistake when he said the Product had departed? Why did she give clear evidence that the Product had not departed as at that date in chief, if she truly could not say for sure? She generally agreed with most things that David’s counsel said and, in my view, this was because of her motivation to help David.

[152] When David was examined for discovery, he said he believed that Shipment 7 never left the factory. When David was cross-examined at trial, he also testified that Shipment 7 had never departed the factory or been given to the shipping company.

g) Shipment 8: Invoices 19-405.15 and 19-405.16

[153] Stacey’s request of Andrew was made on October 27, 2020. Once again, Andrew sent Stacey a BL marked “DRAFT” with containers marked “TBD” and said that the details would have to be changed later.

[154] On October 28, 2020, David forwarded the altered BLs and other Documents to Cara.

[155] When she testified, Stacey confirmed that the Product had not been loaded into containers or departed as of October 28, 2020.⁴ When David was examined for discovery, he testified that he believed this shipment had not departed. When David was cross-examined at trial, he also agreed

⁴ The transcript says “indiscernible” to the question as to whether the product had been loaded into containers, but my notes of the trial show that Stacey gave the answer that it had not.

that Shipment 8 had never departed the factory or been given to the shipping company when he sent Cara the Shipping and other Documents.

h) Shipment 9: Invoices 19-405.17 and 19-405.18

[156] On October 30, 2020, at 1:00 pm, Stacey wrote to Andrew asking for a BL for Shipment 9.

[157] At 3:03 pm, Stacey followed up.

[158] At 3:08 pm, Andrew replied advising that due to the backlog of bookings, he had been directed by his manager to stop sending draft BLs. Mr. Lee confirmed he gave these instructions during his testimony. In the email, Andrew further stated that he was directed by Mr. Lee to only issue BLs after the containers were returned to the rail terminal. However, he could send a Booking Notice from HMM, the ocean liner, and “write” that it’s for that shipment, referencing the seal number, invoice number, and weight of the cargo.

[159] At 3:14 pm, only six minutes after Andrew said that he would not be able to provide a BL, David personally emailed Andrew, advising him that Stacey was on a conference call. David indicated that he needed the bookings for Shipment 9 that day.

[160] It is telling that David did not express surprise to Andrew’s statement that there was a backlog of bookings and issues relating to containers not being returned. In my view, David’s lack of surprise and failure to ask questions about why there was a backlog showed that he already knew. Indeed, David had been copied on all the previous correspondence cited above between Andrew and Stacey relating to delays. Had he not known about the previous delays, a reasonable response would have been something like, “Andrew, I’m confused. I did not realize there was such a significant backlog. Stacey is on a conference call, but I’m sure she will be able to clear things up when she is available.”

[161] At 3:22 pm, Andrew asked “[s]o, are we loading shipment # 1, 4 and 5 next week? If so, they would have to be live loaded.”

[162] At 3:28 pm, David, replied, “yes”, and again asked for the BL for Shipment 9.

[163] At 3:32 pm, Andrew said that he could only provide a Booking Notice, and that once the previous containers were loaded and returned to the rail terminal, he could provide a BL. A Booking Notice reflects a reservation made on an ocean vessel.

[164] At 3:52 pm, Stacey became involved and said it was imperative that they receive the BL for Shipment 9 that day or the shipment could be cancelled. At 4:03 pm, she said that she could lose all her business with Kallet because of this which is curious because there is no correspondence where Cara was complaining about the rate at which the shipments were being produced.

[165] When asked why she sent this email and needed the BL so urgently, Stacey implausibly said that it was because Andrew was slow and there was no other reason, but then she corrected herself and said she should not call him slow because it was during the COVID-19 pandemic. She also said that she was pushing because that is what she does to try to get the containers out, but again, the problem with getting containers out had nothing to do with receiving the BLs from BNX quickly. The problem, as admitted by Stacey, was that MM&A was not meeting the deadlines set by the railyard for the return of containers.

[166] At 3:57 pm, Andrew said that his manager was firm that they had to finish the remaining orders. He said that the Booking Notice would have all the same information and that he would “add it by hand”.

[167] At 4:03 pm, Stacey replied: “[p]lease send me what this will look like I need this today. I could loose all our business with this customer because of this” [sic].

[168] At 4:12 pm, David again personally emailed Andrew and asked for the BL, saying: “I do need this and I don’t want to book elsewhere. Please assist us we are doing very well together.”

[169] However, Andrew maintained that he could only send a Booking Notice.

[170] On October 30, 2020, Andrew sent David and Stacey the Booking Notice stating: “[a]s always, booking details will be changed once the shipment is ready....whenever we return the CNTR at the rail terminal, I can and will send you draft BL”.

[171] The Booking Notice provided by Andrew showed the following information:

A booking confirmation date of October 30, 2020 12:55 pin 2631

Booking number ONVB340813

Customer Reference Number: 81210

Gross Weight: 19000

ETD: 12/15/2020

ETA: 01/17/2021

Vessel: YM Totality

Booking Status: Accepted

[172] In the remarks section of the Booking Notice, which was at the end, it says that the shipper was MM&A, it identifies the Product, and it indicates that it is Shipment 9 with Container No. “TBD”. It also sets out the seal numbers as UL6638718 & UL6638738. This information was in

red font, different from the rest of the text on the Booking Notice. On this basis, I infer that this is the information Andrew said he would write in.

[173] On November 2, 2020, David sent Cara an email attaching the Packing Lists, Quality Certificates, Invoices, and the Booking Notice, saying: “[p]lease see the documents for the next 2 containers I look forward to your confirmation on payment.” He did not reference any of the conversation he had just had with Andrew or flag that he was sending a Booking Notice instead of a BL.

[174] Cara testified that she recognized the Booking Notice as a reservation on an ocean liner. She did not know why he sent this in place of the BL. However, she accepted it because given her understanding of the BL, which was corrected in their October 20, 2020 communications, a Booking Notice was equivalent to an BL. Recall, she said she understood that a BL meant that the Product was leaving MM&A’s factory.

[175] She saw the Booking Notice had a notation that the Booking Status was accepted. She checked the quantity of the containers which noted there were two on this particular Booking Notice and reviewed the notes at the bottom of the Booking Notice. She believed that as long as the goods were shipped, she would eventually receive them and took this Booking Notice to be the equivalent of the BL. David never told her that it was not or that it meant anything different than the BL.

[176] In chief, Stacey testified that as of November 2, 2020, Shipment 9 had not been loaded into a container or departed the factory. When David was examined for discovery, he indicated that the shipment had not been given to BNX at that time. When David was cross-examined at trial, he also agreed that Shipment 9 had never departed the factory or been given to BNX at the time he sent the Shipping and other Documents to Cara.

- i) Shipments 10 to 13: Invoices 19-405.19 and 19.405.20, 19-405.21 and 19.405.22, 19-405.23, 19.405.24, 19-405.25 and 19-405.26, 19-447.1 and 19-447.2

[177] For Shipments 10 to 13, David provided Cara only Booking Notices together with the other Documents.

[178] David sent these to Cara on November 5, 2020, November 6, 2020, November 12, 2020, and November 18, 2020, respectively.

[179] Unlike Shipment 9, for Shipments 10 to 13, there are no contemporaneous emails between Stacey and Andrew related to shipping arrangements for these shipments.

[180] This is surprising because for Shipments 1 to 9, as detailed above, there is a perfect record of emails. Andrew would send the BLs (and in the case of Shipment 9 the Booking Notice) to Stacey. Stacey would send the Shipping and other Documents to David, and then he would forward the Shipping and other Documents to Cara.

[181] Again, I do not accept the absence of such emails is because they were lost. Although David did not have access to MM&A's server, David and Stacey worked on their own computers at their homes and had their own email. They both gave evidence that they searched for the relevant documents on their laptops. As noted, Stacey was even able to search her computer in December 2024 or January 2025 to obtain more records.

[182] During this period of time, even though there are no emails between Andrew and Stacey relating to shipping arrangements for these shipments, there are many emails between Andrew and Stacey relating to BNX's unpaid account. These must have come from Stacey's computer because Kallet was not copied on these and neither was David. It is unclear why searches would have revealed emails related to unpaid accounts during this time period but not to shipping arrangements or obtaining Booking Notices.

[183] The HMM Booking Notices David sent Cara for Shipments 10 to 13 were identical to the Booking Notice for Shipment 9 in the following respects:

A booking confirmation date of October 30, 2020 12:55 pin 2631

Booking number ONVB340813

Customer Reference Number: 81210

Gross Weight: 19000

ETD: 12/15/2020

ETA: 01/17/2021

Vessel: YM Totality

Booking Status: Accepted

[184] They had some additional differences set out in the Remarks Section which cause more problems.

[185] For Shipment 10, although the Remarks section still only referenced Shipment 9, Invoice numbers 19-405.19 and 19-405.20 were added, which were the Invoice numbers for Shipment 10. Remarkably, even though there were two more containers, the total weight was the same as the weight in the Booking Notice for Shipment 9.

[186] For Shipment 11, the Remarks section in the Booking Notice still only referenced Shipment 9 and Invoice numbers 19-405.17, 19-405.18, 19-405.19, and 19-405.20. It did not reference the invoice numbers for Shipment 11 at all.

[187] For Shipments 12 and 13, the Remarks section contained no details referencing the Shipment number or invoice number or any of the details in the HMM Booking Notice for Shipment 9. There was nothing at all tying the Booking Notices to these shipments.

[188] All the Booking Notices have a booking confirmation date of October 30, 2020, even though the Packing Lists, Quality Certificates, and Invoices for Shipments 10, 11, 12, and 13 were dated November 4, November 5, November 11, and November 17, 2020, respectively. David testified that the Quality Certificates could not be prepared until the Product was produced. Therefore, on their face these Booking Notices purport to show that the booking was confirmed even before the Product was produced which makes little sense.

[189] I am attaching as Schedule “B” all of the Booking Notices to illustrate the discrepancies.

[190] As noted, David testified that he obtained all Documents that he forwarded to Cara from Stacey.

[191] David gave evidence that none of these shipments had departed the factory when he sent Cara the Shipping and other Documents.

j) Shipment 14: Invoices 19-447.3, 19-447.4, 19-447.5, 19-447.6, and 19.459

[192] With the exception of the Product referenced in invoice 19.459, Shipment 14 also never arrived.

[193] On November 26, 2020, David sent Cara an email attaching Packing Lists, Quality Certificates and Invoices. He did not attach an HMM Booking Notice or BL and asked for payment as he did with all the Shipping and other Documents he sent her.

[194] Like Shipments 10 to 13, there were no contemporaneous emails in evidence that show communications related to making shipping arrangements for Shipment 14 as of the date that David sent this email.

[195] Cara testified that she was not concerned there was no BL or Booking Notice because David said he would be using a different agent or broker and that he would be giving her a BL. Based on his email, she understood the goods had already been shipped.

[196] When examined for discovery, David again conceded that Shipment 14 (with the exception of 19-459) was not given to the shipping company. He also confirmed at trial that Shipment 14 had never departed their factory or been given to the shipping company.

[197] Notably, the Packing List had a ship date of November 25, 2020, which must have meant that the Product had been packaged up as of that date. Otherwise, it could not have been shipped or departed from MM&A’s factory at that time.

[198] Even though these Documents were sent to Cara on November 26, 2020, Stacey testified that the container for 19-459, the only container that did arrive from this batch, was loaded on December 23, 2020.

k) Shipment 15: Invoice 19-465

[199] On December 3, 2020, David sent Cara an email attaching only an Invoice for one container: 19-465. He did not provide a BL, Booking Notice, a Packing List, or Quality Certificate.

[200] David said that a Quality Certificate would not have been usual since MM&A did not produce titanium ingots. Rather, it bought and traded them.

[201] Again, there is no evidence of communications with any shipping company related to making the shipping arrangements for Shipment 15.

[202] When David was cross-examined at trial, he agreed that Shipment 15 had never departed the factory or been given to the shipping company.

VII) Communications Regarding Outstanding Payments Owed to BNX by MM&A

[203] BNX delivered an account on October 30, 2020 as one of the shipments was imminently arriving.

[204] Between November 10, 2020 and November 29, 2020, Stacey and Andrew had communications regarding MM&A's outstanding account to BNX for three invoices in the amounts of \$21,438, \$20,808, and \$3,458. She asked whether MM&A could prepay for shipments and indicated she had one container ready to go. Andrew said he could not proceed on that basis and continued to follow up for payment of three invoices.

[205] In some of these communications Andrew advised of BNX's right to hold any cargo that arrived in Dalian until it was paid. Andrew offered a ten-day extension and said that upon payment, BNX would be prepared to provide its full support to MM&A and proceed with pending orders. Stacey advised him that accounting was working on it.

[206] At trial, Stacey agreed that BNX was looking for its invoices to be paid. This is consistent with Mr. Lee's evidence that they were not being paid. I accept Mr. Lee's evidence.

[207] At trial, Stacey did not recall if the payment to BNX was ever made but David admitted that as of November 19, 2020, MM&A had still not paid BNX's account.

[208] Neither David nor Stacey indicated that MM&A was not paying because of any default on BNX's part.

[209] Kallet was an important new client. Based on the October 30, 2020 communications that David participated in, MM&A was trying to keep Kallet happy. It is odd then that BNX sent an

invoice and indicated it would be holding shipments at the port in Dalian unless it was paid and yet MM&A was delaying in paying its account. I infer in all the circumstances that MM&A did not have the funds to pay these bills because of significant cashflow issues that David not only admitted to at trial, but as will be seen, are referenced right in David's Statement of Defence: See paragraphs 10, 22, and 24.

VIII) The Alleged Fraudulent Misrepresentations in the Pleadings

[210] Fraud must be specifically pleaded with sufficient particulars: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 25.06(1); *Balanyk v. University of Toronto* (1999), 88 A.C.W.S. (3d) 1157 (Ont. S.C.), 1 C.P.R. (4th) 300, at para. 106; and *The Hershey Company v. Leaf*, 2023 BCCA 264, at para. 50.

[211] I set out most of Kallet's pleading because more than six months after closing submissions, David raised an issue as to whether the case had been properly pleaded after I asked for submissions on various legal and evidentiary issues. He argued that this was a trial in search of a pleading.

[212] This issue had not been raised in opening or closing submissions or at any point during the trial. If this had been the case, one wonders why this trial occurred over a period of 12 days without one suggestion that there were no misrepresentations pleaded with sufficient particularity or why this was not raised in opening or closing statements delivered in May 2025.

[213] Kallet's pleadings allege the following:

- Paragraph 8: "The Sales Contracts required a deposit to be paid by [Kallet] shortly after execution of the contract and the remaining amount to be paid within days after invoices, packing lists and shipping documents were presented to Kallet."

The July 31, Sales Contract

- Paragraph 9: "Whenever [David] presented invoices, packing lists and shipping documents to [Kallet] for payment, he represented that MM&A had already shipped the Products, or that the Products were ready for shipping immediately upon receipt of payment from [Kallet]."
- Paragraph 12: "From September 2020 to November 2020, on separate occasions, David presented invoices, packing lists and shipping documents representing that twenty-six (26) containers of the Product under the July 31 Sales Contract had been shipped to [Kallet] or would be shipped to Kallet upon receipts of payment from Kallet."
- Paragraph 13: "[David] knew that the representations made in relation to twenty (20) of the twenty-six (26) containers were false, in that MM&A did not pay a shipping company to ship those containers, that the Products were not available to be delivered to [Kallet], and that the Products were not shipped to [Kallet]."

- Paragraph 14: “[David] knew that [Kallet] would rely on the packing lists and shipping documents and would make payment on the invoices he presented to [Kallet].”
- Paragraph 15: “[Kallet] indeed did rely on [David’s] representations and made the payments according to the invoices received from [David], and wired approximately USD \$1,249,314.00 under the July 31 Sales Contract for twenty-six (26) containers.”
- Paragraph 16: “In the end, [Kallet] received only six (6) containers of Products in the value of USD \$236,003.00.”
- Paragraph 17: “Contrary to [David’s] representations, the other twenty (20) containers were never shipped to [Kallet].”
- Paragraph 18: “[Kallet] pleads that the packing lists and shipping documentations presented by Mr. Sharpe in relation to those missing twenty (20) containers were false. Mr. Sharpe knew that they did not reflect the reality of the missing Products.”

The October 13 Sales Contract

- Paragraph 21. “On November 18 and November 26, 2020, [David] presented invoices, packing lists and shipping documents to [Kallet] under the October 13 Sales Contract, representing that six (6) containers of Products had been shipped or were ready for shipment upon receipt of payment.”
- Paragraph 22: “[David] knew that the representations made in relation to the six (6) containers were false, in that MM&A did not pay a shipping company to ship those containers, that the Products were not available to be delivered to [Kallet], and that the Products were not shipped to [Kallet].”
- Paragraph 23: “[David] knew that [Kallet] would rely on his packing lists and shipping documentation and would make payment on the invoices he presented to [Kallet].”
- Paragraph 24: “[Kallet] indeed did rely on [David’s] representations and made the payments according to the invoices received from [David], and, within days after receiving the invoices from [David], wired approximately USD \$378,232.40 under the October 13 Sales Contract.”
- Paragraph 25: “To date, [Kallet] has not received any containers under the October 13 Sales Contract.”

The November 11 Sales Contract

- Paragraph 26: “On November 26 and December 3, 2020, [David] presented [Kallet] with invoices, packing lists and shipping documents, representing that two (2) containers of Products had been shipped or were ready for shipment upon receipt of payment.”
- Paragraph 29: “[David] knew that the representations made in relation to one of the two (2) containers were false, in that MM&A did not pay a shipping company to ship that container, that the Products were not available to be delivered to [Kallet], and that the Products were not shipped to [Kallet].”
- Paragraph 30: “[David] knew that [Kallet] would rely on his packing lists and shipping documentation and would make payment on the invoice he presented to [Kallet].”
- Paragraph 31: “[Kallet] indeed did rely on Mr. Sharpe's representations and made the payments according to the invoices received from [David], and within days after receiving the documents, wired a total of approximately USD \$79,921.59 under the November 11 Sales Contract, for two containers.”
- Paragraph 32: “To date, [Kallet] has received only one (1) container of Products under the November 11 Sales Contract, in the value of USD \$44,388.00.”
- Paragraph 33: “[Kallet] pleads that the packing list and shipping documentations presented by [David] in relation to those missing container were false, [David] knew that they did not reflect the reality of the missing Products.”

Fraudulent Conduct

- Paragraph 34: “In each case that [David] sent emails attaching packing list and shipping documents to [Kallet], representing to [Kallet] that the Products had been shipped or that they were ready for shipment upon receipt of payment, [David] intended that [Kallet] would rely upon his representations in making payments and wiring monies to the Account.”
- Paragraph 35: “[David] knew that MM&A never paid the shipping company for the containers that were never delivered to [Kallet], even though he presented the packing lists and shipping documents to [Kallet] causing it to pay the invoices in reliance on the packing lists and shipping documents presented by [David].”
- Paragraph 36: “[David] was never forthright with [Kallet] about the falsity of the representations that he had made to [Kallet]. Whenever confronted with the non-delivery of containers, he would give various excuses including but not limited to MM&A's cash flow issues and the need to redirect Products to other customers.” (Emphasis added throughout)

[214] In *Midland Resources Holding Limited v Shtaif et al*, 2017 ONCA 320, the court provided the following direction with respect to pleading of fraudulent misrepresentation:

[198] First, precision and particularity are necessary when pleading fraud. Rule 25.06(8) of the Rules of Civil Procedure requires any pleading of fraud or misrepresentation to contain “full particulars.” In *Hamilton v. 124125 Ontario Ltd.*, [2009] O.J. No. 3938, 2009 ONCA684, 84 R.P.R. (4th) 24, this court identified at para 35 the necessary elements for a plea of deceit:

The pleading, even of innocent misrepresentation, must set out with careful particularity the elements of misrepresentation relied upon, that is:

1. The alleged misrepresentation itself,
2. When, where, how, by whom and to whom it was made,
3. Its falsity,
4. The inducement,
5. The intention that the plaintiff should rely upon it,
6. The alteration by the plaintiff of his or her position relying on the misrepresentation,
7. The resulting loss or damage.

Of course, if deceit is alleged, then there must also be an allegation that the defendant knew of the falsity of his statement...Each of the defendants must know the case that it has to meet.

[215] In my view, the Claim provides sufficient particulars as follows: when David sent the Shipping Documents he represented that containers had already been shipped or were ready for shipment immediately upon payment; that these representations were false in that MM&A did not pay a shipping company to ship the containers; that the Products were not available to be delivered; that the Products were not shipped; that David made the representations, that David knew Kallet would rely on the Packing Lists and Shipping Documents; that Kallet did rely by making payments; and with respect to Contracts 1 and 3 that the Shipping Documents and Packing Lists were false.

[216] The dates of the emails were specifically set out with respect to Contracts 2 and 3.

[217] While it is true that the dates of the specific emails attaching the Shipping Documents in respect of Contract 1 were not specifically set out in the Statement of Claim, the date range was, as well as the number of communications that David made to Cara during that period.

[218] As I will set out in elaborate detail below, even though the dates of the communications with respect to Contract 1 were not set out, it was clear throughout the trial that David knew exactly the specific communications at issue.

[219] As well, even though the words BL and Booking Notice were not set out in the pleading, the parties understood these were Shipping Documents and conducted the entire trial on that basis.

[220] While it is also true that there is no specific reference in the Claim as to whom at Kallet David sent the Shipping and other Documents, again, it was clear that David knew exactly who the alleged misrepresentations were made to which is Cara.

[221] I requested a list of the detailed issues to be decided for trial which the parties submitted prior to the trial. It set out the issues as whether the test for fraudulent misrepresentation requires proof that the defendant intended that the plaintiff to rely on the representation, and then whether each of the elements was satisfied. There was no mention of any issue related to whether Kallet had properly particularized its claim so that David would know the case he had to meet.

[222] The Agreed Statement of Facts shows that David knew the exact communications that were at issue. There is a section entitled “The Details of the Shipments” where there is an agreement that each and every communication whereby David sent Cara the Shipping and other Documents occurred and referencing the location they appear in Kallet’s Affidavit of Documents. Notably, there are hundreds of communications (if not more) in the record and yet (with the exception of two communications related to the misunderstanding Cara had over what the BLs meant for a time) the only communications referenced in the Agreed Statement of Facts are those whereby David sent Cara the Shipping and other Documents. This shows that the parties both understood that the principal communications alleged to be fraudulent misrepresentations by Kallet were the emails attaching the Shipping and other Documents.

[223] In the Agreement as to Authenticity, Kallet submitted that all BLs, Booking Notices and any documents purporting to be Shipping Documents were tendered as fraudulent documents. There was no objection to this position as having been improperly pleaded and no surprise expressed about this position or argued either in opening or closing statements.

[224] David specifically led evidence in chief to address Kallet’s pleading that the emails that he sent Cara attaching the Shipping and other Documents constituted fraudulent misrepresentations. That is, his counsel referred him to virtually every email whereby David sent Cara these documents, referred him to the specific attachments, asked him questions about who he received them from and what knowledge he had about the information therein and whether he had any reason to doubt the veracity of the information in the attachments. He essentially went through the elements of fraudulent misrepresentation with respect to these emails. This also shows he knew the precise emails and misrepresentations that were at issue in this proceeding.

[225] For example, with respect to the email that David sent Cara attaching the Shipping and other Documents in respect of Shipment 4, David's counsel showed David the email and attachments and then asked him the following questions:⁵

Q. Okay. We can remove the side-by-side now and look at number, Exhibit Number 9.

A. Okay.

Q. And, and if you can review that and we'll show you the exhibits, sorry the attachments that went with this email.

A. Okay.

Q. Okay. And what's okay. That's oh, that, this is, that relates to another contract. Okay. So, then the, in terms of the, your information about, you know, how the document, the attachments came to be created, and who created them, and what the process was for getting them to you, I take it, or can you confirm, is your information the same as it would be for the, the previous Exhibits 5, 6, 7 that we just looked at? [Exhibits 5, 6, and 7 referenced in the questioning were the emails David sent Cara attaching Shipping and other Documents in respect of Shipments 1, 2, and 3 that had arrived and about which David gave evidence]

A. It would be. Yes.

Q. Okay. And again, do you have any specific recollection of writing this email or putting it together?

A. No. It was long ago. But I clearly sent it. I put it together and sent it to her.

Q. Right. And again. What was your process in terms of reviewing those attachments.

A. I didn't.

Q. Okay. And, what was, and what was your belief as to the accuracy of those attachments and the information in your email at the time you sent it?

A. I believed them to be accurate.

Q. And, why is that?

⁵ Transcript of Examination in Chief of David Sharpe dated April 16, 2025, page 46 ln. 14 to page 47, ln. 20.

A. Because Stacey has, as I said, been doing this for 25 years, and I trust, and she knows her job and does it correctly.

Q. At the time you sent this email was there any reason for you to doubt anything you were given was correct?

A. Not at all.

[226] David’s counsel followed the exact same process for virtually all the emails whereby David sent Cara the Shipping and other Documents and where he requested payment.

[227] The following Chart sets out where this questioning occurred during David’s examination in chief:

Shipment No.	Exhibit	Pages of David’s Examination in Chief conducted April 16, 2025
Shipment 4	Exhibit 9	p. 46, ln. 14 to p. 47 ln. 19.
Shipment 5	Exhibit 10	
Shipment 6	Exhibit 13	p. 49 ln 16 to page 50 ln 9
Shipment 7	Exhibit 19	p. 55, ln. 1 to ln. 20
Shipment 8	Exhibit 20	p. 55, ln 26 to page 56 ln. 16
Shipment 9	Exhibit 23	p. 56 ln. 17 to p. 59 ln. 30
Shipment 10	Exhibit 26	p. 61, ln. 7 to p. p. 62, ln. 30
Shipment 11	Exhibit 28	p. 67, ln. p. 68, ln. 5
Shipment 12	Exhibit 30	p. 69, ln. 19, to p. 70, ln. 4
Shipment 13	Exhibit 33	p. 70, ln. 6 to ln. 31
Shipment 14	Exhibit 34	p. 34, ln. 32 to p. 71 ln. 21
Shipment 15	Exhibit 38	p. 73 ln. 3 to p. 74 ln. 23

[228] The only email David’s counsel did not ask questions about was his email to Cara related to Shipment 5. This appears to have been an oversight because in the transcript he asked questions about Shipment 4 and then moved directly to Shipment 6 indicating that this was the next one.

[229] David’s main defence was that he relied on Stacey who provided him with the Shipping and other Documents, and that he had no knowledge as to what she was doing because this was her area and he relied upon her expertise.

[230] As will be seen, he also specifically led evidence that the Quality Certificates, Packing Lists, and Invoices, set out in each of the communications he sent Cara, were business records admissible for the truth of their contents to show that the Product was ready to ship when he sent Cara his emails attaching these documents.

[231] David also cross-examined Stacey and Cara on these issues as well and these particular communications.

[232] If David did not understand that the pleaded case related principally to the emails whereby he sent Cara the Shipping and other Documents, he would not have led this evidence and conducted these cross-examinations.

[233] Even at the conclusion of the trial, in both David’s initial written closing submissions and his oral closing submissions, David’s counsel did not raise any issue with the sufficiency of the pleading when he had before him the very arguments that Kallet was making.

[234] In that regard, Kallet’s written closing submission dated May 2025 made reference to all of the Exhibits above which set out the emails and identified them as false representations. The plaintiff’s submission provided the following general argument as to why these were false:

The BLs and other shipping documents that David sent for the undelivered products were false. Based on the prior communications between David and Cara, those documents were intended to—and did—convey the impression that the products had either departed from the factory or been given to the shipping company. David admitted that the undelivered products never departed the factory or were given to the shipping company...

[235] David’s written closing submissions dated May 2025 referenced the communications at issue:

In the plaintiff’s Statement of Claim, it is pleaded that “whenever Mr. Sharpe presented invoices, packing lists and shipping documents to [Kallet] for payment he represented that MM&A had already shipped the Products or that the Products were ready for shipping immediately upon receipt of payment from [Kallet]”...

The evidence before the court is that David either represented that the goods had left or were ready to leave, and these representations were not false. After, all we

either have photos or business records in the form of packing lists and quality certificates proving that, at a minimum, each shipment was ready when David sent shipping documents.

...the trial evidence was clear that Cara received David's impugned communications as evidence that the shipments either left his factory or that they were ready to leave.

[236] (I note here that there was only one photograph of the ready Product sent to Kallet and that only related to Shipment 19-459 which was a roll of Titanium ingot which had ultimately arrived.)

[237] In David's written closing submission delivered in May 2025, he then went through each of David's communications whereby he sent the Shipping and other Documents to Cara.

[238] The case *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528, 83 A.C.W.S. (3d) 480 (C.A.), referenced by David in his further submissions, is not at all similar to this case. In *Kalkinis*, a case was brought against an insurer on the basis that a policy of insurance was increased from \$500,000 to \$1,000,000. The trial judge concluded that the policy limit remained \$500,000. However, the trial judge went on to consider whether the insurance agent had breached a duty of care to the insured with respect to providing him with information as to the availability and suitability of coverage. In *Kalkinis*, the pleaded case was based in contract and then the trial judge proceeded to entertain an argument based upon negligence. This was an altogether different issue than what was pleaded.

[239] Similarly, *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74, 113 A.C.W.S. (3d) 68 (C.A.) and *TSP-INTL Ltd. v. Mills* (2006), 81 O.R. (3d) 266, 19 B.L.R. (4th) 21 (C.A.) involved the trial judge developing a theory of the case that was outside the bound of the pleading and that was also never referred to during the months of trial.⁶

⁶ In *Rodaro*, Mr. Rodaro borrowed money from RBC for a development project. The development got into trouble and the loan went into default. RBC assigned the debt to a company partly owned by it, Barbicon who demanded full payment. The lands were sold. Rodaro sued alleging that RBC and Barbicon took the project from him and deprived him of the potential for profit from the project. The trial judge held that RBC had improperly given confidential business information to Barbican in the course of the negotiations. This caused Barbican to lose an opportunity to sell his interest in the project at the same time as RBC assigned the debt. He held that if Rodaro had been given the opportunity to negotiate the sale of his interest in the project with Barbicon, the sale would have included the elimination of the debt owed to RBC and assigned to Barbicon. Therefore, the debt and security could not be enforced. The lost opportunity theory of damages developed by the trial judge was not supported by the pleadings, evidence or argument. In *TSP* the case was pleaded as a breach of fiduciary duty or breach of confidence. After the evidence the trial judge sought submissions on the duty of good faith in contractual performance and other theories of liability never pleaded.

[240] These cases do not apply because Kallet specifically pleaded the misrepresentation made by virtue of David sending the Shipping Documents as well as the falsity of the Packing Lists and Shipping Documents. This is not the court's theory; it was Kallet's.

[241] As noted in *Balanyk* at para. 29, "if any fact material to the establishment of a cause of action is omitted, the statement of claim is bad, and the remedy is a motion to strike the pleadings."

[242] There is no evidence that David ever brought a motion to strike. This is important because where a party brings a motion to strike, the case law holds that leave to amend will only be denied in the clearest of cases where it is plain and obvious that no tenable cause of action is possible on the facts as alleged. Had David brought any motion alleging insufficient particulars, in my view, based on the pleading as it was, if the court was inclined to agree that further particulars were required, Kallet would have been given leave to amend to assert them.

[243] A party cannot fail to bring a motion to strike, fail to make a demand for particulars, present evidence at the trial demonstrating it understands the case it has to meet, argue the case as if it understands the case it has to meet, and then in supplementary submissions more than half a year after the trial concluded suddenly raise the issue of the adequacy of the pleading. This is unfair trial by ambush by David, not the other way around. It is also unfair to the justice system to proceed to and argue a 12-day trial that a party then argues that there were no proper pleadings about.

[244] The requirements for particularity are not technical artificial requirements that exist for their own sake. They are there to ensure that the opposite party has fair notice of the case it has to meet so that it can defend. The point is not to permit a party to raise an argument six months after the fact when it is clear that they understood very well which alleged representations were at issue.

[245] In *Midland* at para 184 the defendant made a similar argument on appeal with reference to a claim of conspiracy which also requires full particulars because it relates to a state of mind. The court rejected this argument in part because the defendant had not challenged the adequacy of the pleading in his own pleading and instead had pleaded over and simply denied the allegations. As well, the defendant had responded fully to the allegations at trial which is also the case here.

[246] I am satisfied that Kallet's pleadings gave David notice of the case he had to meet which was that his emails attaching the Shipping and other Documents constituted misrepresentations and that the Shipping Documents and Packing Lists were false. He also actively defended these.

[247] Had the plaintiff needed to seek leave to amend to list the dates of the emails in respect of Contract 1 whereby David sent Cara the Shipping and other Documents as well as to identify Cara as the recipient of the emails, which are the only things missing, I would have granted it. There is no prejudice because David defended the case on the basis that the misrepresentations alleged related principally to these communications.

[248] Also late in the day, in response to questions from the court, in his further submissions provided in January 2026, more than six months after closing submissions, David argued that certain different emails represent the bounds of what Kallet may argue constituted

misrepresentations based upon an undertaking Kallet gave. David argues that Kallet “can only base its allegations of fraudulent misrepresentation on statements of present fact by David that are within this group of documents”.

[249] It is important to review the actual undertaking given which was:

Q: 132: To make reasonable efforts to provide particulars as to the assurances David gave Cara and in what format, with respect to the products being dispatched and upon which Cara relied, other than those statements in the covering emails from David to Cara attaching shipping documents and advising that the shipments had departed. (Emphasis added)

A: it is impossible to be exhaustive at this point because there are many emails from David to Cara. The following list some particulars.

Emails from David on: Sept. 11 (Sharpe’s AOD, Tabs 23-24); Oct. 14 (Jinzhou’s AOD, Tab 85); Oct. 20 (Sharpe’s AOD, Tab 53, Jinzhou’s AOD, Tab 85); Oct. 21 (Sharpe’s AOD, Tab 54); Nov. 2 (Sharpe’s AOD, Tab 95); Nov. 5 (Sharpe’s AOD, Tab 113); Nov. 19-Dec. 2 (Sharpe’s AOD, Tabs 139 and 140); Nov. 24 (Sharpe’s AOD, Tab 152); Dec. 5, (Sharpe’s AOD, Tab 158); Dec. 8 (Sharpe’s AOD, Tab 167); Jan. 8, 2021 (Sharpe’s AOD, Tab 193); Jan. 20-Feb. 9 (Sharpe’s AOD, Tab 207); Feb. 4-8, 2021 (Sharpe’s AOD, Tab 207); Feb. 9, 2021 (Sharpe’s AOD, Tab 217); Feb.18-March 11, 2021 (Sharpe’s AOD, Tab 228)

[250] It is also important to review the transcript where this undertaking was given:

Q: Can you just repeat the answer?

A: So let me explain. The majority of the time when I received the documents—I always received what David told me, the words that assured me that the goods had been dispatched. I believed whatever he said to me. So my attention was not on looking for errors on the documents. Now I see the problems. Hindsight is 20/20, but at the time he said things that assured me to make

[INTERPRETER EXPERIENCING TECHNICAL ISSUES]

THE INTERPRETER: I’m going to start from the beginning.

A: The majority of the time when I received the documents David would say things to assure me that the goods had been shipped. I trusted him. I believed everything he said.

So my focus was not on looking for errors in the documents. Now I found the problems but hindsight is 20/20. He said things to assure me. I believed whatever he said to me. I was not looking for errors. When I received the documents my first reaction was not whether he was lying, my first focus was on where the goods were.

Q: I would like particulars of what David said when—that you’re referring to in your last answer, when he said it, and in what format he said it. Was it a phone call? Was it—I’d like to get particulars of what specifically you’re referring to in your last answer.

MS. HUANG: Before—so, counsel, I want to make sure I understand the scope of your undertaking request. Your question was on David’s email to Cara on September 28, 2020, in relation to two shipments. Is the undertaking pertaining to these two shipments?

BY MR. STIEBER: No, the undertaking is I want clarity and particularity. Your client says, David told me—exactly what she was referring to in her last statement. I want to know particulars of anything, that she’s referring to, that David told her that led to her belief she had? When it was said? How it was said? So if it’s only before this then that’s the answer.

But if there are dates when David made utterances or statements to her that she relied on, that’s what I’d like particulars on. Because the answer we got is very general and—I can ask it here if she wants

MS. HUANG: You can ask here. I think it’s probably better here.

MR. STIEBER: I wasn’t asking for an undertaking, I was just asking a question.

MS. HUANG: I’m sorry. So I think, counsel, it’s fair for you to focus on these two shipments and this email, and you already put the September 28, 2020 email to her.

MR. STEIBER: What I’d like to do, in all fairness, with respect, is I want to know what she’s referring to. Because it seems to me that this is a broader answer that doesn’t necessarily apply, and I’m going to ask her about that.

So my question is, Cara, you mentioned that David made these statements to you and spoke to you. Were the statements made on the phone or were they made in writing?

A: For example, in this email he stated very clearly:

“Please see two additional shipments which departed last week.”

I refer to statements like this. “Shipment was made”, words assured me.

Q: So then just so we’re clear, when you’re making reference to the statements that were made to you, you are talking about, in this instance, of the covering email that advised you that the shipments had departed, which attached the shipping documents and other documents, correct?

A: I only used this statement as an example. He would say things to me from time-to-time to assure me, not just for this shipment.

How do I put it, when you do business with someone you gradually build trust; it's a process. And he said statements like this. It was not necessary for me to suspect. I never suspected him.

Q: I guess then I will ask for an undertaking. If there are statements, or conversations, phone calls, other than the covering emails with which the shipping documents were sent, it it's anything else I would like an undertaking to provide particulars of the date of the conversations, or if it's an email the email, or WeChat particulars of any conversation that you may have had, and production of any emails that have not already been produced.

I have the ones that are the covering emails, Rebecca, so I don't need you to send me that. Anything else, if there is anything else that's what I would like

MS. HUANG: So other than the covering emails.

MR. STIEBER: Yes. (Emphasis added throughout).

[251] The questioning was not seeking particulars of the pleaded allegation in the Claim related to the communications whereby David sent Cara the Shipping and other Documents. In fact, the pleaded allegations are not referenced once in the line of questioning. What happened was that Cara had given evidence about further assurances that David had given her apart from sending the Shipping Documents and she was asked to give particulars of these assurances that she testified about during her discovery.

[252] The carve out in the question "other than the covering emails with which the shipping documents were sent" shows that David well understood the basis of the case as it pertained to the emails attaching Shipping Documents. For this class of documents, David did not ask for particulars.

[253] Notably, no one at trial was referred to this undertaking or the answer. Rather, it was part of David's read ins which were marked as Exhibit 124 after the trial evidence concluded and then not even referenced in his written closing or oral argument.

[254] As well, most of the documents that Kallet provided in response to this undertaking that David now says is what the case is about were not even referenced in either party's written closing submissions which focussed on the emails attaching the Shipping and other Documents. While there was reference by David to further assurances given by David during oral submissions and how these could not constitute actionable misrepresentations, they were not even itemized. In that regard, there are multiple emails sent by David to Cara when she made inquiries representing that the Product was on its way when it clearly was not.

[255] David is trying to recast Kallet's case to be about these emails after the fact because most of these emails would not be actionable misrepresentations. Some contain only predictions as to when the Product would arrive which is a future estimate: *Peart v. SSA Ontario Corp*, [1996] O.J.

No. 4545, 67 A.C.W.S. (3d) 1083 (C.A.), at para 28; *Jasmur Holdings Ltd. v. Taynton Developments Inc.*, 2016 BCSC 1902, 68 C.L.R. (4th) 220. Furthermore, the Statement of Claim did not plead that Kallet suffered any damages by virtue of any misrepresentations that occurred after David sent the Shipping and other Documents where he provided assurances. Kallet could not have relied on emails providing such assurances to prove damages since it had already made payment when David provided these further assurances.

[256] I note in January 2026, in response to David’s submission that there were insufficient express or specific misrepresentations pleaded, Kallet’s Reply submissions states:

3. In response to the new issue concerning failure to identify specific misrepresentations, the plaintiff submits that Kallet has identified the emails containing the specific misrepresentations in its answers to its undertakings: See Exhibit 124.

4. In those emails, David made clear explicit written representations to Kallet that the products had been shipped and were en route to China. Those representations were false, as the products never departed from the factory nor were they given to the shipping company. (Emphasis added throughout)

[257] David’s lawyer argues that this is a significant concession. I do not take this to be any statement by Kallet that these are the only misrepresentations at issue in this proceeding. Rather it is a response to David’s submission that his emails attaching the Shipping and other Documents did not contain any express misrepresentations that the Product was on its way. This was Kallet’s attempt to address the argument made by David in January 2026 and to set out express misrepresentations.

[258] However, Kallet does not need to show an express misrepresentation that the Product was on its way because Stacey and David both gave evidence that when they sent the BLs, that meant that the Product was ready and on its way. This was also Cara’s understanding from the Documents David sent. It is trite that a misrepresentation does not have to be express. It can be implied by conduct and even from silence: *Midland*, at para 163

[259] In any event, it was clear that the trial proceeded on the basis that the emails attaching the Shipping and other Documents were the principal misrepresentations alleged. David actively defended this showing that he knew the precise case he had to meet and that these were the main alleged misrepresentations at issue.

[260] Also, in answers to further questions from the Court, David argued that there was an agreement set forth at trial that the list of emails set out in the answer to the above undertaking constituted the “only locations that the plaintiff pleads as containing misrepresentations.”

[261] This is inconsistent with the transcript referenced by David where this submission was made during the trial.

[262] In that regard, at trial there were documents marked as lettered exhibits and the issue of where these documents were in the record was discussed. It was clear that the issue was that the parties needed to ensure that there was a way to cross-reference documents in the Affidavit of Documents to documents in the Case Centre file.

C. Alfonso: Okay. So there, there's a number of references that, that I want. We of course have the documents on Case Lines now. Throughout the litigation, obviously parties didn't have it on Case Lines it. What I wanted to do was to make sure that we were on the same page about when certain documents are called tab whatever of whatever party's AOD, that we're in agreement about where they are in Case Lines.

I was going to go through a number of documents and have them marked as letter exhibits for now and then when we have to deal with them, we have that understanding that the parties are in the same page. Because what I didn't want to have happen later is have a disagreement about what a tab in an AOD, how it translates into Case Lines. Now, we do have the joint book index. It's on Case Lines, but really what I'm just concerned about for Your Honour's sake is later reviewing this and then trying to match up exercise rather than having the exercise be submitted to counsel, I thought we could do it through a witness, but I'm happy to do it different way.

The Court: No, no. Do you mean that there were documents marked at the discovery and when they were marked at the discovery, they were referred to as a tab of the AOD. And so what you're trying to do is cross reference that with Case Lines?

C. Alfonso: Yes. Not just transcripts, also answers to undertakings where the documents are referred to, but they're not actually provided.

The Court: And that is for the purpose of the read ins so that it's clear what documents you're talking about. Okay.

C. Alfonso: That's right.

[263] This issue of where the documents were had nothing to do with any agreement by the parties that established any limits on what constituted misrepresentations for the purpose of trial. It was simply to ensure that the documents marked at discovery could be cross-referenced to those referenced at trial later.

IX) Whether the BLs for Contract 1 were false: Shipments 4 to 8

[264] This allegation only relates to Shipments 4 to 8.

[265] Paragraph 18 of the Claim specifically pleads the falsity of the Shipping Documents with respect to Contract 1 which is the only Contract where the BLs were used.

[266] Again, the parties conducted the trial on the basis that BLs were Shipping Documents. As also noted, the Agreement on Authenticity stated that these were tendered as “fraudulent or inauthentic” documents with no position taken that this was outside the bounds of the pleading or that insufficient particulars had been provided for David to understand this pleading. The pleading, in the context of the Agreement on Authenticity clearly means and would have been understood by David to mean that these were not actually BNX BLs.

[267] In its opening statement Kallet also specifically took this position and said it would be leading Mr. Lee’s evidence to show that these were not BNX BLs and were forged. There was also no surprise expressed or objection.

[268] As well, in its initial written closing submissions in 2025, Kallet specifically argued that the Shipping Documents (which includes the BLs) were false without any argument in response that this was not pleaded with sufficient particularity. In my view it is self-evident that the pleading meant that the BLs were not in fact BNX BLs. I again reference *Midland* at para 184 with reference to David’s failure to raise any issue in respect of particularity in his own pleading.

[269] As set out above, there were five BNX BLs which Stacey altered by removing the “DRAFT” marking and replacing the “TBD” below the CONTAINER NO heading with a seal number.

[270] Stacey’s revisions rendered them false. In summary:

- Even though there are hundreds of email exchanges between Andrew and Stacey during this period, there is not a single email where they discussed “proofing” and “correcting” the BLs. Nor are there any emails where Stacey forwarded the “proofed” and “corrected” BLs to him or told him what the changes are.
- Mr. Lee, a director of BNX, testified that these altered BLs were not BNX BLs. While he did not have personal information relating to these bookings, he could testify on BNX’s processes, how it issues BLs and whether he could identify these as BNX BLs.
- As noted, Mr. Lee also said that BNX would only issue a final BL after the Product was aboard a ship. This is consistent with what BNX actually did. In that regard, on November 4, 2020, Andrew sent Stacey updated BLs for Shipments 1, 2 and 3. The BLs for the Shipments that the BL purported to show had set sail based on the Clean on-Board date, had the word “DRAFT” removed. The ones that had a Clean on-Board date that was after November 4, 2020 still had the word “DRAFT” on them. Therefore, Andrew’s actual practice, as documented in the email he sent, was consistent with Mr. Lee’s evidence about how BNX prepares its BLs.
- Notably, there was no objection when Mr. Lee testified on the basis that his evidence was not relevant to the pleadings or outside the bounds of what was

pleaded, which one would have expected if David did not understand what the falsity alleged was.

- Mr. Lee's evidence was also referenced in Kallet's initial written closing submissions delivered in May 2025 without any suggestion in David's May 2025 closing submission that the issue in respect of the falsity of the BLs had not been sufficiently pleaded for David to understand what the allegation was.

[271] I conclude on a balance of probabilities that these altered BLs were false.

X) Whether the Booking Notices Were False: Shipments 9 to 12

[272] Because Kallet only pleaded falsity of the Shipping Documents with respect to the First and Third Contract this alleged misrepresentation, with respect to the Booking Notices, can only relate to Shipments 9 to 12. It cannot apply to Shipment 13 because that was part of the Second Contract where the falsity of the Shipping Documents is not pleaded. It cannot apply to Shipments 14 and 15 because there was no HMM Booking Notice.

[273] As noted, beginning November 2, 2020, MM&A no longer sent BNX BLs, but rather documents that were represented to be HMM Booking Notices.

[274] As noted, there are no contemporaneous communications showing that MM&A made any bookings through a shipping company with respect to Shipments 10 to 12. It made all shipping arrangements in writing for all previous shipments.

[275] Again, what is odd about the absence of such communications is that during this time, there are multiple communications between Stacey and Andrew relating to other matters, such as MM&A's failure to pay invoices. Stacey also followed up with Andrew about vessel information for Shipments that had departed during the same period. It is implausible that while all these communications were available, for some reason, communications related to the alleged bookings with HMM through BNX or some other shipping company, were made but are missing.

[276] In his January 2026 written submission, David again referenced the fact that pursuant to r. 25.06(8), any pleading for fraud must contain full particulars.

[277] However, again, David never challenged the adequacy of the pleading in his Statement of Defence but simply pleaded over and denied the allegation: *Midland* at para 184.

[278] Again, the Agreement on Authenticity specifically provides that these Booking Notices, which are itemized individually were "false and inauthentic." The way that this is set out for example for one of them is as follows:

Document purporting to be a booking notice of HMM, with a booking confirmation date of October 30, 2020 which is located at Tab 1.078 of the Joint Book of Documents (Emphasis added)

[279] Again, the pleading of falsity in the context of the Agreement of Authenticity clearly means that the Booking Notices were not actually HMM Booking Notices.

[280] Again, in its May 2025 closing submissions Kallet also specifically argued all Shipping Documents (which includes the Booking Notices) were false and specifically referenced the fact that there are no written communications whereby these Booking Notices were arranged in that submission. In David's May 2025 closing submissions, there was no response that this was outside the bounds of the pleaded issues or that he had required particulars to understand what the pleading of falsity with respect to the Shipping Documents meant. Again, the pleading plainly meant and David understood that the claim was that these were not in fact HMM Booking Notices.

[281] I have also set out in detail evidence that shows that all these Booking Notices are virtually identical in ways that they would not be if they represented true separate bookings:

- The Booking Notice for Shipment 9 correctly references Shipment 9 and the invoice numbers.
- The Booking Notice for Shipment 10 correctly references the invoice numbers but still only references Shipment 9 and indicates that the weight for Shipment 9 and 10 together is the same as the weight for Shipment 9 alone.
- The Booking Notice for Shipment 11 is identical to the Booking Notice for Shipment 10 and makes no reference to Shipment 11. That is, it incorrectly references only Shipment 9 as well as the invoice numbers for Shipments 9 and 10, but not the invoice numbers for Shipment 11.
- The Booking Notice for Shipment 12 has nothing in the remarks section. There is nothing tying this Booking Notices to the shipment in question, or even to Kallet, apart from the fact that Dalian is the port of delivery.

[282] As well, all the Booking Notices have a booking confirmation date of October 30, 2020, even though the Packing Lists, Quality Certificates and Invoices for Shipments 10, 11, and 12 are November 4, November 5, and November 11, respectively. It is implausible that the bookings were allegedly made before the Packing Lists, Quality Certificates and Invoices were prepared.

[283] David argues that the court cannot make reference to these discrepancies because the details of the discrepancies in the Booking Notices were not specifically pleaded: *Kalkinis* at para 12. He also relies on law that holds that a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses; *Kaissieh v. Done*, 2022 ONSC 425 at para 20.

[284] This is to misunderstand the difference between a pleading of a material fact and the evidence that proves the material fact.

[285] Rule 25.06(1) sets out that:

25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence but not the evidence by which those facts are proven. (Emphasis added)

[286] In this case the material fact pleaded is that the Shipping Documents (which includes the Booking Notices) were false.

[287] The discrepancies in the Booking Notices are not material facts but part of the overall evidence that the court is entitled to weigh to assess the pleaded material fact that the Booking Notices were false. The court is entitled to review all the evidence at trial, whether the parties referred to it or not in argument; the court gave David an opportunity to make submissions on these discrepancies.

[288] As well, this claim was not only pleaded, but it was also advanced during the trial.

[289] Kallet sought to obtain certain information from Mr. Lee about discussions he had had with someone from HMM about the bookings and which he had used to make a chart. David objected to this on the basis that Mr. Lee did not have personal evidence about what HMM had done. I held a voir dire and agreed Mr. Lee could not give this evidence.

[290] During the examination in Chief of Mr. Lee that followed, Kallet's lawyer showed Mr. Lee three of the disputed Booking Notices (for Shipment 9, Shipment 10 and one other that did not note which shipment it was for) and asked him whether these were HMM Bookings.

[291] Mr. Lee did indicate his view that these had been issued by HMM because they showed that the booking status was accepted and the booking number was correct. There was no objection from David who had previously objected to Mr. Lee giving testimony about matters relating to HMM. If David did not understand that the legitimacy of the HMM Booking Notice was the issue, one wonders why he did not object to this particular line of questioning in respect of Mr. Lee's views as to whether these were legitimate.

[292] I do not find Mr. Lee's evidence that these were issued by HMM persuasive even though I found him to be a good and credible witness. He was not the one at BNX who made any arrangements with HMM and had no personal knowledge. This is also made plain by the fact that the HMM Booking Notices shown to Mr. Lee were only marked as lettered exhibits during his examination. He could not actually identify them and merely gave his opinion.

[293] Further, Mr. Lee was not shown the Packing Lists, Invoices and Quality Certificates that accompanied these Booking Notices which were dated after the booking date in the Booking Notices or any of the discrepancies that could have affected his view (such as it was) that these were legitimate HMM Booking Notices.

[294] Finally, David argues that reference to the inconsistencies in the Booking Notices violates the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) because in further submissions, Kallet argued that David reused booking details from earlier shipments to fabricate the booking information for

subsequent Booking Notices. The main problem with the plaintiff's attempt to use the discrepancies in this way is that Kallet already stated in its opening that it was not arguing intentional fraud, only recklessness.

[295] Kallet will be confined to its stated case that David was reckless and cannot after the fact argue that David fabricated these Booking Notices.

[296] With respect to the applicability of the rule in *Browne v. Dunn* to the discrepancies for the purpose of assessing the claim that the Booking Notices were false, the rule provides that if counsel is going to challenge the credibility of a witness for the opposing party by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence while he or she is in the witness box: *R. v. Henderson* (1999), 44 O.R. (3d) 628, 134 C.C.C. (3d) 131 (C.A.), at p. 636; *Jacobi v. Winner Merchants International LP*, 2022 ONSC 602 (Div. Ct.), at para 41.

[297] In the recent Court of Appeal decision, *Taylor v. Zents*, 2025 ONCA 662, Wilson J. explained:

[41] The rule in *Browne v. Dunn* is a confrontation principle that governs the impeachment of witnesses and it is a rule that is rooted in trial fairness. If one party wants to impeach another's witness, they must put the impeaching material to that witness in cross-examination to give them a chance to explain any contradiction: *Browne v. Dunn*, at pp. 70-71. The rule protects the witness whose credibility is attacked by alerting them that the other party intends to impeach their evidence. It protects the party whose witness is impeached by, among other things, giving them an opportunity to decide what—if any—evidence to lead in support of their witness's testimony. And it protects the truth-seeking function of the trial by ensuring that the trier of fact has the benefit of any explanation the impeached witness can offer: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at para. 77, leave to appeal refused, [2016] S.C.C.A. No. 203.

[42] *Browne v. Dunn* does not require that every possible shred of impeachment material be put to a witness. Counsel need only cross-examine the witness on matters of substance that the witness has not yet had a chance to explain. Counsel need only confront the witness with the nature of the impeachment evidence and its significant aspects, not its granular details: *Quansah*, at para. 81. The impeacher “need not descend into the muck of *minutiae* to demonstrate compliance with the rule”: *Quansah*, at para. 86.

[43] The rule in *Browne v. Dunn* is not hard and fast. It is flexible, and its application in any given proceeding is firmly “within the discretion of the trial judge after taking into account all the circumstances of the case”: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 65. The trial judge is in the best position to “take the temperature” of the trial and to assess whether a failure to cross-examine has resulted in unfairness to the other party: *Quansah*, at para. 90. A trial judge's decision about whether the rule has been breached is therefore entitled to significant appellate deference. (Emphasis added throughout)

[298] The Booking Notices were already in evidence when David testified and indeed, the parties have lived with these for years. Some of the details in the Booking Notices, that I have referenced, are specifically set out in the Agreed Statement of Facts including the Booking Numbers which were all identical, the ETA's which were all identical and the contents of the Remarks section: paragraphs 54, 58, 62, 66, and 70. As well, the booking date for all of these HMM Booking Notices, which is the identical date of October 30, 2020, is also set out in the Agreement on Authenticity for each of them.

[299] If these details were not relevant considerations for the court to consider in respect of the pleaded issues, why did the parties go to the trouble of setting them out in their agreements?

[300] David had a fair opportunity to give whatever relevant evidence he had about the details of the Booking Notices and their contents. Importantly, David did not even give any evidence about the Booking Notices other than to say that he got them from someone else. He repeatedly said he had no involvement in shipping matters. Therefore, the discrepancies in the Booking Notices do not impact his credibility or challenge any evidence he gave about them. It is noteworthy that while he raises a *Browne v. Dunn* issue, he did not seek to be recalled to give any evidence in respect of them. Had he done so, I would have permitted it. It is unclear what evidence he could have provided given his adamant position that he had no involvement in shipping matters other than to receive documents from others.

[301] Moreover, this is not a *Browne v. Dunn* issue. The court is permitted to weigh all the evidence before it when examining what facts to accept. This is the use that I have made of the discrepancies in the Booking Notices, not to impact David's credibility.

[302] In *Canadian Tire Corporation Limited v. Eaton Equipment Ltd.*, January 7, 2025, Toronto (unreported) aff'd, *Canadian Tire Corporation, Limited v. Eaton Equipment Ltd.*, 2025 ONCA 720, Black J. similarly examined the allegation that certain invoices were fictitious. In doing so, at para 93 he similarly took into account inaccuracies in the invoices and other problems which included spelling errors, identical processing time, and internal inconsistencies as part of his weighing of the evidence.

[303] Mr. Lee also gave some evidence about the bookings that had been made through BNX which I ultimately have not taken into account but which I must address for the sake of completeness.

[304] As noted, Mr. Lee was subpoenaed and arrived with the BNX file. He repeatedly indicated that he wanted to look at it to answer questions after the voir dire. I directed that I would hear submissions on this. Andrew had since passed away and there was no one who had direct evidence as to what BNX did and Mr. Lee could only give evidence based on his file review.

[305] It was a Friday and the parties were going to return to make submissions on the point on the Monday. I began discussing with them how the BNX file that Mr. Lee brought with him would

be produced to them. Then the parties returned to the courtroom and indicated that they did not need the file because Mr. Lee only wanted to use the notes that he had prepared based on the file.

[306] David's counsel stated:

And—I want to be clear of what my objection is on this point. If he was looking at his own business records...I'm saying just that—the other thing...that wouldn't be the problem. (Emphasis added)

[307] When the parties returned to address the matter the following week, they had arrived at an agreement that Mr. Lee could refer to his notes but this was without prejudice to any party making objections on the basis of admissibility at the conclusion of the case.

[308] Mr. Lee's notes contained information assembled from his review of the BNX file review as well as from conversations that he had had from someone at HMM. They were in different places. Clearly, the portion of his notes that related to conversations with HMM is not admissible. I had already made that ruling in the prior voir dire.

[309] However, using his notes, Mr. Lee gave evidence that BNX only received nine requests for shipment from MM&A and that three were delivered. Of the remaining six, there were only three bookings made by BNX. Of these three bookings, they were asked to provide a draft BL which they did. After that, the containers needed to be loaded to be shipped but the containers were not actually loaded. This was because MM&A continually said they would be loading but they did not give BNX any specific dates. As a result, the three bookings were cancelled by BNX. Mr. Lee's evidence here would mean that BNX did not arrange any bookings for MM&A with HMM beyond Shipment Six.

[310] First, David argued that this evidence could not be taken into account because it was given at the previous voir dire and evidence at a voir dire cannot be admitted. This is not accurate. The evidence that Mr. Lee gave about the bookings made by BNX was based upon his notes of the BNX file and was given after the voir dire during his examination in chief.

[311] Second, David also argued that Mr. Lee's evidence was not admissible pursuant to the principled exception to the hearsay rule because he was not testifying as to something that a deceased person had said but based on notes he made from the BNX file. Although he primarily based his evidence on the BNX file, I note that Mr. Lee also said that the processes were reported to him by Andrew at the time. Further, since business documents can be admitted on their own if they satisfy the test, it seems to me that a party informing themselves from business records is similar to being informed by another party.

[312] Third, he argued that Mr. Lee's evidence was not necessary because there were business documents in the BNX file that could have been used. I find this somewhat disingenuous since Mr. Lee brought his file and the parties agreed that he could testify using the notes he prepared from the BNX file and that any objections to admissibility would be dealt with in closing submissions.

[313] Nevertheless, I conclude that Mr. Lee's evidence is not admissible pursuant to the principled exception because there was no voir dire at which the test for the principled exception was considered with evidence on necessity and reliability. Although the parties agreed that the issue of admissibility could be dealt with in closing submissions, the Supreme Court has indicated that there must be a voir dire to address these aspects of the test: *R v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para 47.

[314] I note however, in the absence of the above caselaw, I would have concluded on the basis of the trial evidence that Mr. Lee's evidence was necessary and reliable. Andrew had passed away, Mr. Lee was the only party with the ability to give evidence as to what had happened from BNX's perspective, and they had agreed he could testify without the file being produced to them. Furthermore, his evidence was reliable because it was entirely consistent with the other evidence at trial.

[315] Overall, even without taking into account Mr. Lee's evidence, I conclude that the HMM Bookings for Shipments 10 to 12 are false based on the significant discrepancies and the complete absence of any contemporaneous communications whereby someone at MM&A made such arrangements. I note again that there is a perfect record of communications for Shipments 1 to 9 where Stacey sought to make arrangements with Andrew, he sent her documents and she forwarded them on but there are none for these shipments.

[316] I infer that MM&A never made these arrangements with HMM because there would have been written communications, where it made these arrangements, if it had.

[317] I do not make this conclusion with respect to Shipment 9 because there are some communications between Stacey and Andrew related to Shipment 9 and the same discrepancies do not exist for Shipment 9.

XI) Whether the Packing Lists Were False

[318] This allegation can only relate to Shipments 4 to 12 because this pleaded allegation only relates to Contract 1 and Contract 3. It cannot relate to Shipments 13 and 14 because they are part of Contract 2. Even though there is a pleading that the Packing Lists for Contract 3 were false, David never sent a Packing List with Shipment 15 and so this cannot apply to Shipment 15.

[319] As noted, Cara testified that she understood that the Packing Lists meant that the Product was packed into containers and David provided no evidence to contradict this. He did not object to this evidence or indicate that it took him by surprise as being outside the pleaded issues when the evidence was given. As also noted, I reject David's argument that the Packing Lists simply meant that the Product had been packed into bags for the reasons set out above.

[320] Since David concedes that in December 2020 MM&A was still waiting for containers, it could not have been packaged into containers at that time.

[321] David again references the adequacy of the pleading. However, the falsity was pleaded, and David never challenged the adequacy of the pleading in his Statement of Defence but pleaded over and simply denied the allegation: *Midland* at para 184.

[322] David also argues that the court may not take into account the features of the Packing List, like the fact that it set out a shipping date and listed the bags. I disagree. The material fact pleaded is that the Packing List was false. The features of the Packing List are evidence that the court may have regard to in considering whether it was false. I add that as noted above, David's closing submission specifically referenced the Packing List and what he argued it showed. David's position in this proceeding is apparently that he can make reference to what the Documents meant but Cara cannot, not even in response to his allegations.

XII) Did David Present Documents that Represented that the Product had already shipped or that the Products were ready for shipment immediately upon payment?

[323] Even if Kallet cannot succeed on the allegations that the BLs, Booking Notices and Packing Lists were false because of issues related to the sufficiency of the pleading, it can still succeed on this issue which is a separate pleading of falsity. That is, even without considering whether these documents were false, in the sense of not being what they purport to be, it can still be the case that David made misrepresentations by virtue of sending the Shipping and other Documents based upon what the parties understood delivery of these meant.

[324] As noted, the pleading with respect to all the Contracts is that whenever David presented Invoices, Packing Lists and Shipping Documents he represented that MM&A had already shipped "containers" or that the "containers" were "ready for shipping immediately upon receipt of payment from Kallet." It also uses language that he represented that "containers" had been shipped or "would be shipped upon payment". (Emphasis added)

[325] Given the wording which includes the words "immediately", "for shipping", "for delivery" and the word "containers" and "upon receipt of payment" this wording can only reasonably be interpreted to mean that MM&A was in a position to actually deliver or ship the Product immediately upon payment.

[326] As noted, in all the contemporaneous communications David told Cara that when he sent her the Shipping and other Documents, it meant that the Product had departed. His discovery evidence was similar. Nowhere in the contemporaneous communications did he tell her that when he sent her the Shipping and other Documents, it merely meant that the Product was produced and sitting on the factory floor. This is also an unreasonable interpretation of BLs and Booking Notices which have everything to do with the shipping of the Product and nothing to do with its actual production. Then David changed his evidence at trial to say that these documents merely meant that the Product was merely produced and sitting at the factory. As noted, I reject this changed evidence because it was inconsistent with the contemporaneous communications, the contents of the BLs and Booking Notices and also with his prior discovery evidence.

[327] I return to their October 20, 2020 communications.

[328] Cara wrote:

So the bill of lading you gave to me is not the real BL, it is more like cargo reservation, that means the goods leaving your factory to the Toronto port, wait for the rail, so when you give me the “bl” the goods have not on the train yet, then after few days, maybe more, the goods will be loaded onto the train, then, it will take another 10 days to send to the Vancouver port, and then they will finally be on board and before the ship arrive at Dalian port, you will pay the agent, after that, the bl will be tele-released, am I right? (Emphasis added).

[329] David responded “yes, that is correct.”

[330] Then at trial Cara testified that David was talking about the whole shipment process and, “oh, that means the product were getting ready, and then he contacted a brokerage and then to reserve the containers.”

[331] This is what readiness or availability for shipment or delivery means.

[332] David argues that Cara is not credible because her Norwich application was inconsistent with her trial evidence. I disagree. The Norwich Application tracked the wording in the Statement of Claim. In it she set out her dealings with David and her belief that she had been deceived.

[333] In any event, to the extent that anything in Cara’s affidavit filed on the Norwich application is inconsistent with this, David never referred Cara to it or asked her any questions about it. David’s counsel simply referred David to the Norwich Application and then marked it as a lettered Exhibit. Therefore, Cara’s evidence in the Norwich Application is not part of the evidence before me. It is also unfair to lead this evidence through David without putting Cara’s affidavit directly to her and giving her an opportunity to explain any inconsistency between her prior affidavit and her trial evidence. This is the definition of a *Browne v. Dunn* problem.

[334] The Norwich Notice of Application was merely a pleading to obtain documents with an affidavit attached that said it was sworn remotely while Cara was in China. There is no jurat that says it was translated as was her trial evidence. While she speaks some English, she was clearly more comfortable testifying with an interpreter.

[335] The trial evidence that Cara gave and which I accept was not merely an affidavit drafted by a lawyer sworn remotely. Her trial evidence persuasively showed that at least after October 20, 2020, she understood that the Shipping and other Documents she received meant that the Product had departed MM&A’s factory or was leaving and that she made the payment on the basis of this understanding.

[336] I find that Kallet has made out the allegation that the representation was made that when David sent Cara the Shipping Documents he represented that the Product had been shipped or was ready or available for shipment or delivery immediately upon payment.

XIII) Was the Representation False?

[337] Kallet pleads that the representations made by virtue of sending the Shipping and other Documents were false because MM&A did not pay a shipping company to ship the containers, the Product was not available to be delivered to Kallet and the Products were not shipped to Kallet. The falsity alleged must be read together with the pleaded representation which was that sending the Shipping and other Documents meant that containers were ready for shipping immediately upon payment or would be shipped immediately upon payment. Notably, the word “available” does not sit in Claim on its own but is modified by the words “for delivery.”

[338] David argues that:

David’s evidence was the MMA was experiencing space constraints on the factory floor. This indicates the product was packaged into one-tonne bags and stored on the factory floor prior to loading. Accordingly, the product was available for shipping because it had been produced, packed and stored on MMA’s premises.

[339] This is an unreasonable interpretation because the Claim does not use any language related to the production and storage of the Product at MM&A’s factory. As well, the Quality Certificates, which are the only documents related to the actual production of the Product, are not even mentioned in the Statement of Claim as part of the documents that conveyed the false impression.

[340] I specifically asked David whether the Statement of Claim could be read to include reference to the Quality Certificates and he stated:

No, the pleadings cannot be read to include the Quality Certificate as part of the documents referenced.

[341] David never requested particulars in respect of this pleading or challenged it as adequate, but merely pleaded over, denied it and is now taking an unreasonable position on what it means. David also actively defended the allegations in respect of the falsity of the Shipping Documents, which related to shipping arrangements. In my view, David’s position is nothing more than an attempt to wordsmith his way out of this.

[342] I agree with Kallet’s closing oral submission that:

The core essence of this case—is--about the status of the shipping—It’s not the status of the products because based on the communications the parties had, it was whether they were shipped not whether they were produced.

[343] I conclude that the representations made were false because the Product never departed the factory. The Products were also not available to be delivered because: there were no legitimate shipping arrangements in place in that MM&A continually requested BLs without containers, Stacey altered the BLs; the HMM Booking Notices did not represent legitimate bookings; and there were never any containers delivered for packing. The Product in no sense was available for delivery in these circumstances. Finally, no payments were made to a shipping company in respect of the disputed shipments. As noted, BNX stopped arranging shipments altogether because MM&A was not paying its account.

[344] David advanced a theory that the containers could have left and returned because of the unavailability of ships, but there was no evidence to support this. This was only speculation. Furthermore, David admitted that as of December 2020, MM&A was still waiting for containers. Therefore, it could not have been the case that any containers were sent out on the day the Shipping and other Documents were sent out to Cara and then returned.

[345] As noted, Cara misunderstood the BLs for awhile. Up until October 20, 2020 she believed that the BL meant that the Product was already on a ship but as I have noted, she still understood that the Product had left MM&A's factory. She simply thought that it was immediately placed on a ship. This does not impact the truth of the representation that David made, although it will impact whether Cara relied upon his representation during the time period that Cara had a mistaken view of the BL.

[346] In that regard, if someone represents that something is red but the person receiving the representation thinks that red is white, the representation is still false, but the recipient's misunderstanding may impact whether the misrepresentation is actionable.

XIV) Was the Product produced at the time David sent Kallet the Shipping Documents?

[347] In the event I am wrong, and in the event that Kallet can only succeed by proving that the product was not ready or available, in the sense of being produced, I assess this issue.

[348] I conclude that the Product was not even produced at the time MM&A sent the Shipping and other Documents.

[349] David relies on the Packing Lists, Quality Certificates, and Invoices as being admissible for the truth of their contents as business documents to show that the Product had been produced and therefore was available to be delivered when he sent the Shipping and other Documents.

[350] David delivered a Notice Pursuant to the *Evidence Act*, R.S.O. 1990, c. E.23. He testified that the Packing Lists, Quality Certificates, and Invoices were all made in the ordinary course of business.

[351] In this case, there are many reasons to be concerned that the Product was not produced despite the Packing Lists, Quality Certificates, and Invoices.

[352] Section 35 of the *Evidence Act* provides that lack of personal knowledge by the maker of a document can be taken into account in determining the weight to be given to the document:

Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility. R.S.O. 1990, c. E.23, s. 35 (4).

[353] David was the one who testified that these documents were made in the ordinary course of business and that they were made contemporaneously with the production process. He testified that Stacey would create the Packing List based on information she received from someone at the factory, as well as the Invoice. David testified that Ryan Ramos (“Ryan”) who worked at the factory, prepared the Quality Certificates at the factory. Ryan is Stacey’s husband. He was also an employee of MM&A. He was responsible for managing its production facilities.

Q. And then if we scroll down, what’s this document?

A. That’s the packing slip.

Q. Okay. And, and what’s your information about who would prepare this document.

A. Well the factory would give the information to Stacey, and she would make, she would make the packing slip.

Q. All right. And, and the next document, what is this?

A. The quality certificate.

Q. And who would make this document?

A. Ryan would do that at the factory.

[354] In another part of his testimony, he again said that Ryan created the Quality Certificate:

Q. Okay, and creating these quality certificates, I think you said it was Ryan Ramos who was responsible.

A. Yes.

[355] There is a signature of someone named Ryan Ramos on the Quality Certificates, but no one identified his signature.

[356] In contrast to David’s evidence, Stacey testified that usually she “prepared” the Packing Lists and Quality Certificates.

[357] Specifically, she was shown the attachments to the email for Shipment 1 and asked who prepared them.

Q: And do you know who prepared the documents in the attachments?

A: I don't recall who prepared it. Usually I prepare it.

Q: What did you prepare?

A: Bill of lading, packing list, and certificate of analysis.

Q: I see. And you say usually, who else would have---

A: Sometimes, I have somebody else in the office assist me if I'm very busy.

Q: I see. Ultimately, who prepared it?

A: I try—I don't know who prepared these, but I usually try to complete the documents. (Emphasis added)

[358] After I pointed out the inconsistency, David's counsel agreed that Stacey prepared both the Quality Certificates and Packing Lists based on information that the factory gave her based on testing done by the factory.

[359] To address the apparent inconsistency in David and Stacey's evidence, David's counsel referenced yet another part of David's testimony where David appeared to suggest that Stacey was the one who created the Quality Certificates:

Q. Okay. And you say that the documents tell you that the goods have been made. Why do the documents tell you that?

A. Because that's just our procedure. Like, the factory produces the materials. They send it up to Stacey. We have this ready. And then, Stacey generates the documents, does the shipments, and that's what we do.

[360] All this shows is that David was inconsistent in his own evidence as well as being inconsistent with Stacey's.

[361] In any event, the ultimate admission that Stacey prepared these documents is relevant for the purposes of s. 35(4).

[362] Stacey did not work at the factory where the Product was produced and where it would be analyzed and packed into containers. She worked from home, which was an hour away. Stacey did not do the analysis, nor did she testify that she had any expertise in this regard, nor did she see the Product packed into containers or the quality testing being done. Yet she prepared the Quality

Certificates and Packing Lists and the concession is that she did so based on information given to her by someone at the factory. As such, these business documents are double hearsay and s. 35(4) applies.

[363] I also note that there are no documents or communications where anyone at the factory sent Stacey the underlying data for her to prepare these documents. She also gave no evidence regarding the way this information would have been given to her from the factory or who gave it to her.

[364] I reject David's evidence that these documents meet the "best evidence rule". David cites the following from Sunny Handa, *Halsbury's Laws of Canada*, "Technology and Internet" (Toronto: LexisNexis Canada, 2024 Reissue), at THE-195:

The best evidence rule in respect of an electronic document is satisfied on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored or if an evidentiary presumption established by regulation applies.

[365] In Ontario, the following provisions apply as set out in the Ontario *Evidence Act*:

Presumption of integrity

34.1 (7) In the absence of evidence to the contrary, the integrity of the electronic records system by or in which an electronic record is recorded or stored is proved for the purposes of subsection (5),

(a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system;

(b) if it is established that the electronic record was recorded or stored by a party to the proceeding who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceeding and who did not record or store it under the control of the party seeking to introduce the record. 1999, c. 12, Sched. B, s. 7 (2).

[366] It is not clear to me that this section applies since these documents are not part of an electronic records system. Rather, they are documents created by someone on a computer that were then emailed. There is no suggestion that these are not the very documents that were created by Stacey and sent by Stacey to David.

[367] In any event, David led no evidence that related to the integrity of MM&A's electronic document system or Stacey's computer that would satisfy (a), above. David led no evidence that would satisfy (b), that the documents in question were recorded or stored by a party who is adverse

in interest to the party seeking to introduce it. This would have to be about Kallet's recording or storing of the documents. With respect to (c) while David led evidence as to the preparation of these Documents being in the ordinary course of business of MM&A, he led no evidence as to the recording or storing of the documents being in the ordinary course of business by Stacey in her computer or evidence related to MM&A's electronic processes.

[368] Finally, "integrity" which is referenced in s. 34.1(7) is not the same thing as "admissibility for the truth of its contents" in any event. Notwithstanding s. 34.1(7), s. 35 deals with the admissibility of business records, and s. 35(4) applies to the issue of the weight to be given to the business documents irrespective of s. 34.1(7).

[369] Further, if "integrity" meant "admissibility for the truth of its contents", it would not be set out in an entirely different section of the *Ontario Evidence Act*.

[370] In his supplementary submissions, David also complains Kallet had never taken any objection to these documents being tendered as business records.

[371] They did not have to.

[372] Even if s. 35(4) did not apply, the fact that these are business records admissible for the truth of their contents does not mean that the court must accept them as conclusive evidence. They become part of the evidence that the court weighs, just as the court weighs competing evidence of live witnesses or other documentary evidence. Kallet's lawyer maintained his position that the Product was not ready despite the Packing Lists and Quality Certificates: He said:

Other than the pack lists and the quality certificates, there's nothing indicating that they were ready

[373] And then he referenced the fact that David had failed to call Ryan who could have given direct evidence on the production of the Product.

[374] I reject David's argument that there is no contrary evidence to dispute the weight of the Invoices, Packing Lists and Quality Certificates being admissible to show that MM&A had produced the Product and packaged it into containers at the time these documents were created.

[375] In that regard, evidence can take many forms, not just direct evidence.

- a) What Happened to the Product if it had been Produced and was sitting on the factory floor when David sent the Shipping and other Documents?

[376] If the Products for all the disputed shipments had been produced at the time the Shipping and other Documents were sent to Cara, there is no plausible explanation for why the Product was never actually shipped to Kallet or what happened to it.

[377] David volunteered an explanation at trial in his evidence in chief that the Product was produced at the time he sent the Shipping and other Documents to Cara, but while they waited for containers, there was an issue with their furnace. As such, sometime in December 2020 they used some of the “materials” slated for Kallet to fill orders for other customers.

Well, what I understood was we had a lot of like space constraints and stuff like that and it was, you know, winter and everything else and stuff was outside, and stuff was everywhere so, while we were, while they were waiting for a, you know, containers or those rail appointments, are all stuff, that kind of stuff that was going on, they had to use, they had to use some of the materials to fulfill, I guess, some other orders. (Emphasis added)

[378] He said that Ryan made the decision to do so, and David did not know about it at the time.

[379] When asked when he learned about the issues at the factory, David said it was in mid-December after he learned about BNX’s lawsuit. He testified: “[i]t just, I guess everything came together after that letter, so it’s like mid-Dec, I guess after mid-December.”

[380] He went on:

And at that point, I, you know, I learned about what was actually going on and, you know, how, how bad the situation was with the shipments and stuff like that, and then how, you know, stuff was, you know, shipped. You know, it was, it was, yeah. Just everything was messy. It was, there was no ships. There was no rail, rail problems. There was, you know, like there was all kinds of different problems happened. I basically learned after that, after this lawsuit started, [the BNX lawsuit as referenced before this answer] that’s when I started really, you know, digging in and asking Stacey more questions as to what’s going on, I’m wondering what’s happening here, and that’s when, you know, I started to learn everything.

[381] When he was cross examined, he was taken through each of the various shipments and repeatedly said that he learned that these had not departed in or around December 2020.

[382] This was not consistent with his discovery evidence where he gave evidence related to a November 19, 2020 email he sent Cara with updated information about the departure of shipments 1 to 13. He said he was giving Cara “the details for the loads that hadn’t departed yet the facility.” He confirmed that he knew at that point that the goods had not left the facility. He said: “I knew at this point, yes, that those materials did not leave.”

[383] This is another example of inconsistencies that lead me to question his overall credibility, reliability and explanations regarding what happened to the Product. Conveniently, David’s trial evidence that he only learned about these issues in mid-December is after he sent Cara the last email asking for payment for Shipment 15 which was on December 3, 2020.

b) Was David's Explanation Pleaded?

[384] I note that the theory of the defence, as pleaded at the outset, was not that the Product was produced and sitting on the factory floor and that MM&A had diverted the Kallet Product to other customers.

[385] It is important to set out specifically what MM&A pleaded beginning with paragraph 10:

10. At the time the First Contract was negotiated, [July 31, 2020] MM&A made it clear to Kallet that it was experiencing cash flow issues due to shipping disruptions caused by the COVID-19 pandemic.

11. MM&A entered into agreements for the purchase of raw materials from its suppliers in the metal industry to fulfill Kallet's order.

12. Once MM&A entered into these agreements with its suppliers, it obtained bookings with shipping companies to transport the products to Kallet's facility. As per the terms of these bookings, the shipping companies did not require payment until shortly before the containers arrived at the destination port.

13. Upon receipt of booking confirmation from the shipping companies, MM&A presented Shipping Documents to Kallet.

14. Mr. Sharpe states that the aerospace market was severely impacted by COVID-19 which caused global production of titanium to decrease. This substantially reduced the supply of scrap titanium. Scrap titanium was MM&A's primary input for the Products purchased by Kallet.

15. David stated that MM&A's suppliers repeatedly failed to deliver the requisite quantity of raw materials to produce the products ordered by Kallet.

16. MM&A also experienced delays with shipping Products due to unavailability of shipping containers as well as booking cancellations by forwarders and shipping lines. Additionally, China's ports were also closed on numerous occasions due to Covid-19 and this caused major congestion and shortages worldwide.

17. At all material times, Kallet was kept fully apprised of the issues that MM&A was experiencing with its suppliers and the shipping companies.

18. On October 13, 2020, Kallet and MM&A entered into another sales contract to purchase six containers of Products (the "Second Contract").

19. Following the Second Contract, Kallet was advised that MM&A was experiencing issues due to the increased price of scrap metals in the market and that it would be difficult for MM&A to supply these Products at the contracted price due to market changes.

20. On November 11, 2020, Kallet and MM&A entered into another sales contract to purchase two containers of Products (the “Third Contract”).

21. At the time the Third Contract was entered into, Kallet was fully aware of the issues that MM&A had been experiencing with respect to fulfilling Kallet's order under the First and Second Contracts and that most of the containers had not shipped.

22. At all material times, MM&A was cooperative and communicated with Kallet about MM&A's cash flow constraints and difficulty fulfilling the outstanding shipments due to external market conditions. Kallet never requested or required that the funds provided by it be held in trust. The funds were put into MM&A's bank account, in accordance with its standard practice in dealing with deposits and payments by customers.

23. MM&A attempted to resolve the situation by offering either repayment to Kallet or by way of additional shipments with a repayment plan incorporated into the dealings.

24. Due to severe financial issues caused by market changes as a result of Covid-19, constrained cash flows and liquidity issues, MM&A was left with no viable alternatives and filed for insolvency protection pursuant to the Bankruptcy and Insolvency Act (Canada) ("BIA") by filing a Notice of Intention to make a Proposal on July 20, 2021 (the "NOI"). Upon filing the NOI, MM&A became subject to the oversight of a trustee (Richter Advisory Group Inc.) and could not make payments to Kallet or other creditors in respect of any claims arising prior to the NOI filing date as such claims were stayed pursuant to the BIA and making any payments to Kallet would have constituted an illegal preference.

25. MM&A was unable to make a proposal acceptable to its principal secured creditor, Scotiabank prior to the expiry of the 30-day stay of proceedings after its NOI filing pursuant to the BIA. Accordingly, MM&A ceased operations and was deemed to have made an assignment in bankruptcy on August 21, 2021 and ceased operations.

(Emphasis added throughout.)

[386] David’s position in his pleading at the outset of the case was that MM&A was having difficulty sourcing the raw materials to produce the Kallet Product in question. While he did plead that there were also issues with the availability of containers and vessel bookings, he did not plead that while they awaited the delivery of containers, the already produced Product was diverted to other customers.

[387] While he argues that this sale to other customers “was part of the narrative set out in David’s Statement of Defence that [MM&A] could not fulfill the contract for the plaintiff due to disruption in the international transportation market that did not affect the local, truck-based transportation market”, this alleged diversion is not reasonably inferred from the narrative.

[388] Indeed, Kallet pleaded in paragraph 36 that David had made “excuses” related to MM&A’s “need to redirect Products to other customers” and David denied that paragraph of the Claim altogether in his Statement of Defence.

[389] It is insufficient for a party to simply deny a pleading where it intends to plead a different version or an affirmative defence:

25.07(3) Where a party intends to prove a version of facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party’s own version of the facts in the defence.

[390] See also *Midland* at para 109 where the court sets out the reason for this which is to avoid trial by ambush.

[391] However, because Kallet did not object at the time and the evidence was lead. Kallet could have addressed it during the trial or sought an adjournment to do so. Therefore, I excuse David from the pleading issue as per *Midland* at para 111.

[392] I review all the reasons why I do not accept this evidence.

c) There is No Documentary Evidence to Support David’s Explanation

[393] There is not a shred of corroborative contemporaneous documentary evidence that shows that Products produced for Kallet were sent to other customers. David did not provide the name of these customers, when the Products shipped, where they were shipped to, which shipping company they used, or any other details.

[394] Just as there would have to be arrangements for the Kallet Products to be picked up and shipped to Kallet, there would have to be such arrangements if the Products were assigned to other clients. Just as Stacey has been able to locate hundreds of emails relating to arrangements to ship Product to Kallet, she should have been able to provide at least one contemporaneous email which shows the diversion of Kallet Products to other customers. She had the logistics communications for this material on her computer for the Kallet Product and I infer that she would have similarly had such documentation on her computer if it existed. No such documents were provided at trial and indeed David asked Stacey no questions about this alleged diversion.

[395] As well, if MM&A could not obtain containers to ship to Kallet, how could they have obtained containers to transport the finished products meant for Kallet to other customers?

[396] David’s further written submission indicates that the allegedly diverted Product was sold to local customers for overland shipping in trucks which did not require containers. The word “local” was not used in the Statement of Defence nor did David give any evidence that this diverted Product was shipped locally in trucks.

[397] Even if this was the case, there still should have been some documentary evidence of at least one or two arrangements to transport such products to other customers locally particularly given the amount of Product at issue, which would have filled 27 shipping containers.

- d) David's Explanation is Not Consistent With Much of His Own Contemporaneous Communications all of which were referenced during Cara's Examination and which he could have explained

[398] David's evidence and explanation at trial is also not consistent with contemporaneous emails he sent Cara where he provided a number of different explanations for the delays.

[399] On January 7, 2021, David told Cara that he was working with the factory and the shipping company to address the delayed shipments. He said the problem was caused by accounting issues with the shipping agent and issues with the shipping line which had been resolved and that they were getting all the Kallet shipments delivered to them as soon as possible. They had expected to get the product delivered by January, but the shipments would be arriving in February. He made no mention of having diverted the Product even though he said he knew about this by mid-December 2020.

[400] On January 15, 2021, Cara advised David that due to the ongoing delays she wanted the funds Kallet had paid for Shipments that never arrived returned to Kallet. David said he would try to provide her with a schedule for shipments and would speak to accounting about arranging a repayment schedule. David again blamed BNX in these exchanges. He said that they had to rebook with other carriers due to BNX canceling their bookings without notice. There is no documentary evidence of any communications with other shipping companies in respect of these alleged rebookings.

[401] David wrote to Cara on January 20, 2021, indicating that they had bookings in place, that two loads would arrive in February and the rest would arrive in March and April 2021. Again, there were no new shipping documents attached which would have been required for new bookings.

[402] In his January 20, 2021 email, David indicated that he appreciated the problems this was causing Kallet. However, he stated: "[w]e have already purchased the raw materials for these shipments and it is difficult to reimburse it back so quickly" (Emphasis added). Note that he does not say MM&A already paid to produce the Kallet Product or that it was ready or had ever been ready and sitting on the floor at MM&A's factory or premises.

[403] On January 26, 2021, David wrote apologizing again indicating that BNX had been very difficult. Here I remark that the evidence before me shows that it was not BNX who was being difficult. BNX had been trying to get the Shipments delivered and ran into roadblocks because of Stacey's ongoing requests to delay the pickup. It did not pay BNX for those that shipped and BNX had to sue.

[404] Then, on February 4, 2021, David wrote to Cara and stated that MM&A had a furnace outage that prevented them from operating for the last six weeks and that they expected to be operational before the end of that week. There was still no mention of the sale of the Kallet Product to other customers.

[405] Cara continued to express concern about what David was telling her.

[406] Finally, in an email on February 6, 2021, David ultimately took the position that he took at trial where he referenced “serious production issues”, “short term financial problems”, problems with MM&A’s furnace, and where he suddenly advised that MM&A had diverted the Kallet Product to other customers.

[407] I note that throughout these communications David continued to reference bookings for the shipments and arrival times in 2021 in circumstances where there is not a shred of evidence or contemporaneous communications that MM&A made any rebooking for any allegedly reproduced materials. If new Product was being produced for delivery, there should have also been new Quality Certificates and new Shipping Documents but there are none of these in evidence either attached to these emails David sent Cara advising that the Product would be delivered. Stacey should have had these on her computer just as she had them for the Kallet Product during the fall of 2020.

e) The Discrepancies in the Booking Notices, BLs and Packing Lists

[408] In considering whether the Quality Certificates, Packing Lists, and Invoices should be accepted as proof that the Product was produced when David sent Cara the Shipping Documents, and the weight to be given to them, the significant discrepancies in the BLs, Booking Notices and Packing Lists are also relevant. These discrepancies are relevant as part of the overall evidence before me irrespective of whether Kallet has properly made out a case of fraudulent misrepresentations in respect of them due to the insufficiency of the pleadings if I am wrong on that issue. That is, the discrepancies in other documents that Stacey created are relevant to whether or not the court should accept that other documents she created as business records admissible for the truth of their contents pursuant to s. 35(4) of the *Evidence Act*.

f) It is Implausible That All of This Alleged Product Was Stored in MM&A’s Significantly Decreased Factory for Months Without Any Communications to BNX or Another Shipping Company to Pick It Up

[409] The titanium ferro that never arrived based on the Agreed Statement of Facts weighed 1,056,000 kg. The disputed titanium ingot that never arrived weighed 18,000 kg. Together, these products were supposed to fill 27 containers.

[410] David testified that MM&A had a catastrophic fire at their factory in 2017. Materials ignited and they lost 95 per cent of the factory including equipment, inventory and the “whole facility.” David stated that they were “left with between 5 and 10 percent that they salvaged to

continue operations.” He went on: “[t]here was no building left. There was no offices. There was really nothing left, just one section of the factory was left.”

[411] Stacey provided the same evidence and also said they did not have a lot of space left at the factory.

[412] This is why David and Stacey worked from home.

[413] David specifically testified when cross examined that in general, “We needed to move materials out of the door, out, out, out of the factory and we had to keep, you know, we were producing and stuff needed to keep moving.”

[414] It is not believable that there was a mounting pile of loads, not in containers, stored in its factory with a reduced space, or possibly outside, and that there are no requests by MM&A for containers for these shipments, only BLs without containers. One would have thought they would have been frantically searching for a way to get this allegedly produced Product shipped and writing furiously to BNX about this problem that they needed to keep the Product moving out the door.

[415] To that end, I asked in supplementary submission for references to any communications in the record where Andrew and Stacey made arrangements to drop off and pick up containers for Shipments 4 to 15. There were no significant communications referenced in this regard. Many of the communications referenced requests by Stacey for BLs without containers. Some referenced were about Shipments 1 to 3. The references made by David fit within these categories.⁷ Kallet could only find a minor number of communications related to Shipments 4 to 6 some of which referenced the need to not “pull containers”. Kallet found no communications where they discussed dropping off containers for loading for Shipments 7 to 15. This is consistent with what I heard at trial.

[416] David argued that the court could not infer that no containers were dropped off because it wasn’t based on any evidence a witness gave. That is to miss the point. The point is that MM&A were not even seeking the delivery of containers for this Product they said was produced and

⁷ These are the Exhibits referenced by David: Exhibit 90 was email communications where Stacey asked for a BL for **Shipment 4 without containers**; Exhibit 94 was emails between Andrew and Stacey where they **discuss live loading for Shipment 6 which would mean that there was no request for a container at that time** or any attempt to make arrangements to drop it off or pick it up at that time. Stacey indicated that she just needed to show a new booking; Exhibit 96 related to the **first and third shipments and arrangements to pick them up**; Exhibit 97 was a request for a **BL for Shipment 6 where Stacey said they did not need to pull the containers**; Exhibit 98 relates to the **pick-up of earlier shipments and had the Re line “First Dalian Shipment”**; Exhibit 103 is a request by Stacey for a **draft BL for Shipment 9 and does not contain any request for or arrangements to drop off or pick up containers**. Exhibit 105 relates to arrangement **to pick up the containers for Shipment 1**. This is plain within the body of the email and the seal number referenced.

waiting at the factory that they needed to move out. I add that in any event, and again, David admitted that containers had still not been delivered as of December 2020. As such, there is no need to infer from the emails that the containers were never delivered; David gave this exact evidence. So did Stacey for the most part.

[417] Here David also argues in supplementary submissions that Kallet failed to tender any documents from BNX that may have revealed additional communications relevant to this issue. However, as noted Kallet subpoenaed Mr. Lee, he brought the BNX file. David could have had the entire file produced to him and I discussed making such an order, but the parties returned and said they did not want it. He cannot complain that Kallet did not provide these.

[418] David also references Stacey's evidence that she had many other communications with Andrew and that she did not necessarily keep everything. As noted, I did not find Stacey's explanation regarding the documents she found and allegedly missing ones credible.

g) David Had No Personal Knowledge of this Alleged Diversion

[419] David testified that he learned of this alleged diversion from someone else after the fact. He did not participate in it.

h) Ryan Ramos was not Called to Testify

[420] Kallet asks that I draw an adverse inference from the fact that Ryan Ramos was not called to testify. He worked at the factory and would have had first-hand knowledge related to this alleged diversion.

[421] In *Tri-Con Concrete Finishing v. Caravaggio*, [2002] O.J. No. 277, 121 C.L.R. (3d) 178 (S.C.), at para. 65, Wikins, J. noted that a failure to call a witness who would have knowledge of the facts amounts to an implied admission that the evidence of the absent witness would at least not support it.

[422] David argues that no adverse inference can be drawn by not calling Ryan because Ryan is not an employee of David or under his control. He argues that Ryan was equally available to be subpoenaed as a witness to Kallet.

[423] In *Parris v. Laidley*, 2012 ONCA 755, at para. 2, the Court of Appeal discussed the availability of adverse inferences in civil case:

Drawing adverse inferences from the failure to produce evidence is discretionary. The inference should not be drawn unless it is warranted in all the circumstances. What is required is a case specific inquiry into the circumstances including, but not only, whether there was a legitimate explanation for calling the witness, whether the witness was within the exclusive control of the party against whom the adverse inference is drawn, or equally available to both witnesses and whether the witness

has key evidence to provide or is the best person to provide the evidence in issue.
(Emphasis added)

[424] See also *R. v. Ellis*, 2013 ONCA 9, 113 O.R. (3d) 641, at para 46 where the Court of Appeal stated:

46 The cases seem to fall into two groups. In the first, an adverse inference may be drawn against a party for a failure to produce a witness reasonably assumed to be favourably disposed to that party. In the second, the inference may be drawn against a party who has exclusive control over a material witness but fails to produce his or her without regard to any possible favourable disposition of the witness towards the party: McCormick on Evidence, 6th ed., vol. 2 (St. Paul, MN: Thomson/West, 2006) at para 264. (Emphasis added)

[425] See also *R v. Lo*, 2020 ONCA 622, 152 O.R. (3d) 609, at para. 156 where the Court of Appeal restated the principle and emphasized that the adverse inference should only be drawn with the greatest of caution. See also *Osmani v. Universal Structural Restorations Ltd.*, 2022 ONSC 6979, at para. 277.

[426] In this case, Ryan, who is Stacey’s husband and who worked at MM&A, may not have been under David’s exclusive control, but he is his brother-in-law, worked in the family business and one could reasonably assume that he would have been favourably disposed to David. Stacey certainly was. David agreed when he testified that there was no reason why Ryan could not have been available to testify. He was even on David’s witness list but then he did not call him.

[427] David argues that Kallet could have subpoenaed Ryan just as it subpoenaed Stacey. In that sense, he was equally available to Kallet. However, David had failed to plead that the Product was produced but sold by Ryan to other customers. It is unfair to have expected Kallet to subpoena Ryan to address issues that David had not even pleaded.

[428] In my view, Ryan was not equally available to both parties in the sense that Kallet would not have known about the evidence that David intended to lead that the Product had been diverted by Ryan.

[429] Thus, to the extent that David has established a prima facie case that the Product was produced but diverted, I do draw an adverse inference in all the circumstances, that David did not call Ryan as a witness because he would not have provided favourable evidence.

i) The Admission Alleged by David is Not Relevant or Determinative

[430] Finally, with respect to all of the misrepresentations alleged by Kallet, I reject David’s argument that Kallet must fail in this lawsuit because when Cara was cross-examined, she was asked whether “she” had evidence of falsity of any representations or that David had not been truthful and said she did not.

[431] Most of these questions were phrased as to whether Cara had any evidence that David was intentionally lying and the case is not based on intentional falsehoods but recklessness. She did state in any event that she believed that he knew about the problems because he was the CEO but that she would not be able to prove it.

[432] Cara is not the plaintiff. She is Kallet's witness and was first to testify. The fact that she did not reference any such evidence is not an admission that it does not exist or that Kallet could not prove its case through the entire trial process.

[433] A party is entitled to prove its case through all of the witnesses that it calls, documents admitted as evidence and the cross-examination of the opposite party.

[434] What Cara did, as the first witness, is lay out the foundation for the case which related to her communications with David and the representations he made to her.

[435] Kallet then proved that the representations made were false through the Shipping Documents admitted into evidence, Mr. Lee's evidence that the BLs were not BNX BLs, Stacey and David's evidence that the Product had not departed at the time the Shipping Documents were sent, the documentary evidence that shows there were no containers assigned at the time the Shipping Documents were sent, and David's admission that the Product had not been loaded into containers as of mid-December.

[436] Frankly, fraud is a complex matter often proven through multiple documents, communications and witnesses and often requires inferences. It is a rare case where there is direct evidence of falsity that can be referenced by a single witness.

[437] Cara was quite right to leave that determination up to the court who was able to hear and assess all of the evidence.

[438] Again, I also reject the argument that anything in the affidavit Cara filed in respect of the Norwich order obtained casts doubt on her overall evidence or credibility because of any alleged conflict between her evidence at trial and what she swore to for the same reasons as above.

XV) Conclusion on Whether the Product Had Been Produced

[439] In summary, in weighing all of the evidence before me I take into account all of the above in particular:

- When they sent out the Shipping Documents for Shipments 1 to 3, even when they had the containers delivered, Stacey continually delayed the pickup. They were already very behind when David began sending out the Shipping and other Documents for the disputed shipments. It is not believable that whatever problems they had getting these shipments out the door were suddenly fixed for later shipments.

- There are reasons to be concerned that the factory was not running optimally. MM&A had a significantly diminished factory by virtue of the fire in 2017. Stacey testified that there was a forklift that kept breaking. David said they had a furnace problem in mid-December 2020 where they had to stop production for six weeks.
- Stacey prepared the Quality Certificates and Packing Lists based upon information that David now concedes was given to her by someone at the factory.
- Stacey did not have expertise in these areas and did not witness the testing of the Product or the packing of the containers.
- There is no correspondence from the factory to Stacey, forwarding to her the information that she set out in the Packing Lists and Quality Certificates and no evidence of who told her what it was or what they told her.
- I have significant concerns about Stacey's conduct with respect to the alteration of the BLs as set out above and she is the one who prepared the Quality Certificates, Packing Lists and Invoices.
- If the Quality Certificates, Packing Lists, and Invoices are admissible for the truth of their contents, then the Packing Lists show that the Product must have been packaged up on the dates set out therein because it could not possibly have been scheduled to ship on those dates if it was not even packaged. Yet this is demonstrably false based on David's evidence because MM&A still didn't have containers as of December 2020. The Packing Lists all have a ship date that is also demonstrably false because the Product never shipped.
- Again, even if Kallet cannot make out a case of fraudulent misrepresentation in respect of the BLs, Booking Notices and Packing Lists due to pleadings issues, these details are relevant in assessing credibility and surrounding circumstances in respect of the Quality Certificates, Invoices and Packing Lists because David has sought to admit them as business records.
- The very person who is alleged to have diverted this Product, Ryan, was not called as a witness.
- David gave inconsistent explanations to Cara for why the Product was not shipped in the contemporaneous communications.
- David failed to give any evidence of who these customers were or any details.
- While the business records exception is important, there are significant reasons to doubt that these records show that the Product was actually produced at the time David sent them. This is not to require the maker of the document to testify: *Harvie Construction Inc. v. Atlas Dewatering Corporation*, 2025 ONSC 4672. Indeed, the maker of the documents,

Stacey, did testify. The problem is that the individuals who allegedly did the testing or packaged the materials and allegedly assembled the information for these documents are not the ones who prepared the documents.

- Therefore, even though the Packing Lists, Quality Certificates, and Invoices may be admissible as business documents for the truth of their contents, I give them no weight and conclude that they do not demonstrate that the Product had been produced at the time David sent the Shipping Documents. In accordance with Kallet's pleading in paragraph 36 of the Claim, I conclude that the allegation that the Product was diverted is nothing more than an excuse.
- While there was no burden on David in this case to prove that the Product was produced, it is the incredulity of the explanation offered by him voluntarily in the inconsistent contemporaneous communications he made to Cara, and at trial, in part, that leads me to conclude that the Product had not been produced at the time he sent the Shipping and other Documents. There would be no need to resort to such a spurious explanation if the Product had actually been produced when the Shipping Documents were sent.
- It is also the entire course of conduct in this case set out throughout this decision in particular: the inability to get Shipments 1 to 3 out the door for inexplicable reasons and Stacey's ongoing requests for delayed pickup; altered BLs; sending Booking Notices with significant discrepancies and no communications with any shipping company whereby MM&A obtained such bookings; Stacey's requests for BLs without containers beginning with Shipment 4; the absence of requests for containers for shipments after Shipment 4. This makes no sense if the Product was sitting at the factory; the various assurances given by David throughout the fall of 2020 after he sent the Shipping and other Documents where he provided detailed information about when the Product would be arriving in response to Cara's inquiries. He said he was getting this information from others. That may be, but the fact that people at MM&A were giving him all of this false information repeatedly suggests some very significant concerns with whatever was going on with MM&A during the fall of 2020; the ongoing assertions David made in 2021 where he kept telling Cara that the Product was en route when it was clearly not. Again, even if he obtained this information from others, it points to some very real concerns about MM&A's operations.
- I infer in all the circumstances that the Product was never even produced.

[440] Thus, I am satisfied that the Product was not even produced when the Shipping and other Documents were sent to Cara for all the reasons I have set out above.

[441] With respect to Shipments 4 to 14, I conclude that David made false representations primarily that the Product had departed when it had not. This is sufficient in my view for Kallet to prove that there were misrepresentations. If required, I am also satisfied that the Product was also not produced.

[442] I conclude that there were no false representations for Shipment 15 because there were no BLs, no Booking Notices, no Quality Certificates, and no Packing Lists included with the Invoice sent for Shipment 15. Although the email David sent Cara for this shipment said that he expected to have the BL for her for the first shipment which departed, I accept that when he said this, he meant the first shipment for the third Contract based upon the context and other communications. This was Invoice 19.459, and it did eventually arrive. Thus, David did not even say within the body of the email that the Shipment had departed.

Issue 2: Did David Make These Representations with an Absence of Belief in the Truth of the Statements or with Recklessness as to their Truth?

[443] Kallet is not alleging that David knowingly made false representations of fact, but that he did so recklessly.

I) The Law

[444] In the recent case, *CHU de Quebec-Universite Laval v. Tree of Knowledge International Corp.*, 2024 ONSC 3541, at paras. 201-212, Wilton-Siegel J. did a comprehensive review of the case law.

[445] I am borrowing generously from his research.

[446] In *Parna v. G. & S. Properties Ltd.*, at p. 344, the court stated that “[f]raud is a false representation of fact, made with a knowledge of its falsehood, or recklessly without belief in its truth” (Emphasis added).

[447] In *Bruno Appliance*, the Supreme Court indicated that fraudulent representations relate to representations of fact that are not true regardless of whether there was an intention to cheat or injure the person to whom the statement was made: para 18. The knowledge requirement includes not only a false representation made knowingly or without a belief in its truth but also a false representation made “recklessly, careless whether it be true or false”: (emphasis added) at para 18.

[448] Although carelessness was referenced in *Bruno Appliances*, in *CHU*, at para. 207, Wilton-Siegel J. noted an important distinction between carelessness alone, which will not constitute recklessness, and carelessness in the sense of being “indifferent or not caring about whether the statement being made is true.”: para 208. In that regard, carelessness or negligence, no matter how gross or culpable, is not fraud. The carelessness must be in respect of whether or not the representation is true. This is an important distinction.

[449] In *Derry v. Peek*, (1889), 14 App. Cas. 337 (H.L.), at p. 374, Lord Herschell confirmed that “willful blindness” is a form of dishonesty, and therefore considered fraudulent:

[A]lthough “means of knowledge are, as was pointed out by Lord Blackburn in *Browlie v. Campbell*, 5 App Cas at p 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or

purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

[450] The above statement was adopted in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378, 60 Alta L.R. (6th) 57, at para. 35. In *Bank of Nova Scotia v. Five Star Motor Group Ltd.*, 2020 ABCA 244, at para. 39, the Court also referenced the “vast distinction between a state of mind which consists of refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make.” There is no recklessness in the latter case.

[451] David references *McLaughlin v. Colvin*, [1941] 4 DLR 568 (Ont. C.A.), aff’d [1942] 3 DLR 292 (S.C.C.), at p. 583, in which the court indicated that a tortfeasor who is careless as to the truth of his statement may be negligent, but “that is not enough to establish fraud in the absence of moral recklessness and a callous disregard as to whether the statement is false or true” (recklessness). Moral turpitude has also been referenced in *Chapman v. Warran*, [1936] 2 D.L.R. 157 (Ont. H.C.) at pp. 162-163:

Ever since the decision in *Derry v. Peek* (1889), 14 App. Cas 337, the law has been settled that carelessness, however gross, is not fraud. Where the word “careless” is used in the cases the expression does not mean “without taking care” but “not caring.”...The element of moral turpitude must be present, as put by one learned Judge, to constitute fraud. The statement must be with a wicked indifference, immorally not caring whether the thing is true or not.

[452] In *Noble v. Fuller, Ellis Realty Ltd.*, [1985] B.C.J. No. 1007, 31 A.C.W.S. (2d) 326 (B.C. S.C.), McLachlin J. (as she then was), provided this definition: “[t]he essence of recklessness is not a premeditated intention to deceive, but a wanton disregard as to whether one deceives or not. When a professional salesperson chooses to give answers to serious questions from potential purchasers without ascertaining whether or not they are true, recklessness and the tort of deceit are established.” This definition was adopted in *Business Development Bank of Canada v. Experian Canada Inc.*, 2017 ONSC 1851, at para 144.

[453] David also references *Bank of Nova Scotia* at para. 39, for the proposition that there is a high standard that must be met to prove recklessness. However, a review of this paragraph shows that the court simply set out the above principles and then said that the plaintiff would have to meet this “high standard.” The standard of proof is the same: a balance of probabilities.

[454] David argues that the evidence does not rise to the level of demonstrating mere carelessness (in the sense of failing to take care), let alone recklessness as to the truth of the representations because his uncontradicted evidence is that he had an honest belief in the information he was providing based upon decades of experience and trust built with Stacey, who provided information within her core competency: *Toronto Dominion Bank v. Wilde*, 2022 ABCA 128, at para. 40.

[455] Notably, in *CHU*, Wilton-Seigel J. noted that reliance on others in that case was a factor to be considered, but it was not a defence on its own to a finding of recklessness: at para. 242. Ultimately, the court in *CHU* concluded that despite the defendant's assertion that he acted in good faith and relied on someone else, he acted recklessly: at para. 245.

[456] In *Toronto Dominion Bank v Wilde*, the Court of Appeal also referenced the decision in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378 at paras. 35-36 where the court noted that the absence of reasonable grounds for a representor's belief may provide some evidence of recklessness and that recklessness is most likely dependent upon inferences from circumstances: para 39.

[457] It is important to consider all of the relevant circumstances which I have set out below.

II) The Emails David Was Copied on and Participated In

[458] I reject David's evidence that he was not reviewing the correspondence that Stacey copied him on.

[459] As noted, Stacey copied him on almost all her communications with Andrew, many of which related to Andrew's complaints that MM&A was failing to make the Shipments available for pickup.

[460] David and Stacey's position was that because of their division of responsibility, David left shipping matters entirely up to Stacey because she had been doing this job for 25 years. David testified that Stacey copied him on emails just in case she needed him to take care of something for her.

[461] At trial David initially testified that he would "filter through them, you know just look at them. And if I didn't think it applied or whatever, like a lot of, you know, the, the shipping stuff, it just didn't apply. Anything that didn't apply to me or wasn't you know, on my radar, I didn't, didn't bother answering." I note that David did not initially say he did not read the emails or open them. Instead, he said that he did not bother "answering" the emails if they were not related to his area.

[462] Later in his testimony, David said that he did not look at the emails Stacey copied him on at all and did not even open them. This is inconsistent with his earlier testimony, and also not consistent with the trial evidence that showed he did read the emails.

[463] As noted, beginning October 1, 2020, David was copied on extensive emails between Andrew and Stacey related to Shipments 1 to 3 which had still not yet been picked up from MM&A's premises. There were approximately 60 such emails with the following subject line: "**Regarding the First Dalian Shipment**". (Emphasis added)

[464] Recall that David sent Cara the Shipping and other Documents for Shipment 1 on September 11, 2020. When he was copied with the "**Regarding the First Dalian Shipment**"

communications, he would have seen that weeks later, these Shipments had not been loaded or been picked up. As noted, in these communications, Andrew was continually following up on when BNX could pick up the containers for Shipments 1 to 3. (Emphasis added)

[465] I will not repeat the details of all these communications which are set out above. However, I provide the following additional details related specifically to the days that David sent Cara the Shipping and other Documents.

[466] On October 7, 2020, David sent Cara the BL related to Shipment 5. As of that time, David had been copied on 30 emails related to delays in respect of the earlier shipments with the email subject line being “**Regarding the First Dalian Shipment**”. (Emphasis added).

[467] On October 16, 2020, David sent Cara the BL related to Shipment 6 after he had been copied on approximately 12 emails on October 15, 2020, with the subject line “**Regarding the First Dalian Shipment**”. (Emphasis added).

[468] On October 26, 2020, David sent Cara the BL related to Shipment 7 after he had been copied on approximately 19 emails between October 23 and October 26 also with the subject line “**Regarding the First Dalian Shipment**”. (Emphasis added).

[469] On October 28, 2020, David sent Cara the BL related to Shipment 8 after he had been copied on four emails related to arrangements to pick up the container for Shipment 3 also with the subject line “**Regarding the First Dalian Shipment**”. (Emphasis added)

[470] I add that each of these emails are short and anyone filtering through them, as David said he did, would have been alerted to the issues at first glance.

[471] During this period, Cara was also writing to David asking questions about when the Product would be delivered and seeking information to help her search for the containers, container numbers in particular, and expressing the need for the goods to have departed. It is telling that at no time did David provide her with the container numbers.

[472] Then, as noted above, David also directly participated in a troubling conversation with Andrew on October 30, 2020, related to the reasons why BNX would not be providing any further BLs until former bookings were cleared out.

[473] I have already reviewed these communications extensively but with respect to the issue of recklessness, I point out:

- Andrew advised David that BNX was not prepared to provide any further BLs because of the backlog and MM&A’s failure to return containers to the railyard on schedule.
- Andrew put David on notice that the details in the Booking Notice for Shipment 9 were not correct and that the container number, invoice number and weight of the cargo would be changed once the shipment was ready. The implication of this email from Andrew was

that the Booking Notice would not actually be coming from HMM but from BNX to assist MM&A with its client issues. Whether this was true or not, David was put on notice of Andrew's position that the Booking Notice was not correct. He still sent it to Cara without providing her with information that Andrew advised him. This showed David's clear disregard for the truth.

- What is telling in this entire exchange is that David was responding quickly, and providing information that he says only Stacey had. David did not once say he had to ask Stacey for this information. Nor are there any written communications from Stacey providing him this information.
- When asked whether he was involved in the October 30, 2020, communications because Andrew was saying he would stop issuing draft BLs, David responded "yes". And so, he appreciated the significance of this which is also evident from the exchange at the time.
- David did not express any surprise to what Andrew told him.
- David's continued involvement in this discussion even after Stacey responded to the emails, as well as the nature of his communications, show that David was involved in shipping matters because he was concerned about losing the client. He was not merely filling in for Stacey who was unavailable. He told Andrew that MM&A "needed this".

[474] Even when he learned of BNX's concerns, he said nothing to Cara and continued to send her the Documents but with a Booking Notice instead of the BL. After the October 30, 2020 discussion with Andrew, he sent Cara the Shipping Documents for Shipments 9 to 15.

[475] I ask the rhetorical question: if David knew that BNX was not prepared to send BLs pending clearing out of old bookings, why didn't David simply wait until old bookings were cleared out and BNX sent the BLs and then send the Shipping and other Documents to Cara once BNX was prepared to continue with BLs and the delivery of containers?

[476] On November 5, David sent Cara an update on the shipments 1 to 3 which also shows he was aware of the delays. What is notable however is that he included in his email to Cara a chart setting out details. This chart is identical to a chart in an email between Stacey and Andrew that David had been copied on dated November 4, 2020 in terms of the chart layout, the font, the words used and the spacing. I have attached these emails as Schedule "C".

[477] There is no email from Stacey to David providing him this chart directly.

[478] David gave a strange and rambling answer when confronted with the proposition that he had copied the chart from the November 4, 2020 email that Andrew sent Stacey, as though he was offended at the suggestion that he would have cut and paste something: "I wouldn't have done this. I wouldn't have, like, there's no way I would have done something like that, like, just copied

and pasted it for myself, because I don't do the shipping. I don't, I don't know what all these details are on this stuff, and that's her, that's her role to do that. So, I wouldn't do something like that.”

[479] In my view, David continued to maintain that he did not copy and paste the chart from the November 4, 2020 email between Andrew and Stacey, when it was obvious he did, because it would show he was in fact reading all the emails and was apprised of and knew precisely about all the problems they were having with the early shipments that made it impossible or at least highly improbable that the later Shipments would be able to depart. Again, even the argument that they could not access containers, which I do not accept, does not assist. If they could not access containers for Shipments 1 to 3, it makes little sense that they would be able to access containers for remaining Shipments.

[480] For the reasons I have already noted, I do not accept that there are missing emails because they have been lost. In this case, in addition, any such email between David and Stacey where Stacey would have sent David this chart would have had to have been lost from both of their computers when they did their searches which is additionally implausible.

[481] I conclude David opened, read and copied and pasted the chart from the email between Andrew and Stacey into his email to Cara on November 5, 2020.

[482] It was unreasonable for David to continue to rely on Stacey given the above communications that put him on notice of serious problems that MM&A was having getting the Product out the door and in particular that showed that previous representations made when he sent out Shipping Documents had been false because the Product had never actually departed: *Toronto Dominion Bank v. Wilde*.

[483] To put it another way, David had significant reason to doubt the information that Stacey gave him in light of communications that he was aware of: *Transamerica Life Insurance Co. of Canada v. Hutton* (2000), 33 R.P.R. (3d) 1, 97 A.C.W.S. (3d) 824 (Ont. S.C.) at paras. 60-62.

III) MM&A's Financial Difficulties

[484] David closed his mind to what was obvious because MM&A required payments from Kallet that were triggered by delivery of the Shipping and other Documents to keep the business running. David's own interests were also bound up with those of MM&A.

[485] As per his pleading, David also confirmed that since 2017, MM&A had cash flow problems.

[486] David's counsel concedes in his supplementary submissions that in February 2020 David advanced \$248,000 to MM&A to fund its operating expenses. During the month of July 2020, MM&A's bank account was continually overdrawn. As of July 7, 2020, MM&A's bank account was overdrawn by \$421,780. David took out a second mortgage on his home in the amount of \$300,000 to reduce MM&A's line of credit because MM&A's banker and secured lender asked

him to do it. David also admitted that prior to signing the contract with Kallet, MM&A was deeply indebted.

[487] David's entire family's fortunes were tied up in the company. He testified in chief that his family invested close to \$2 million in or around 2020 and 2021. As well, his family had previously invested into MM&A which had retained earnings of \$4 million. Altogether, his family had approximately \$8 million on the line. It was in David and his family's interest to keep the money flowing from Kallet in the hopes that they could save the business.

[488] What is also telling is that even after the receipt of all the emails he was copied on in October 2020 relating to Shipments 1 to 3 (which had still not departed), and participating in the troubling conversation with Andrew on October 30, 2020 and after admitting he knew the shipments had not departed as of November 19, 2020, David did not advise Cara of the issues. He did not really advise Cara that the Product had not departed the factory until February 2021 when he finally disclosed that the shipments were purportedly ready but had been diverted to other customers in December 2020.

[489] This is not the action of someone who cares about whether what they are representing is true.

[490] Rather, during the fall of 2020 and the early part of 2021, David was focused on having Kallet commit to additional contracts to purchase titanium even though they were having significant problems delivering the Product pursuant to the Contracts.

[491] At various points, he stated:

November 5, 2020: "I also have 30mt of Ti CP grade plates as per the attached picture that has a Ruthenium oxide coating on them. Do you possibly have any interest in this material?"

November 6, 2020: "Can you please let me know your thoughts on the Ti ingots? Does your customer have interest? Is there an issue with pricing? Do you possibly have any customers who might have interest in the 30mt of Ti plates with Ru (ruthenium) we offered."

November 12, 2020: "Did you have any comments on the CP Ti plates with Ru? Please let me know."

November 18, 2020: "The price for FeTi continues to slowly increase. I want to secure this additional business with you and I don't want to overprice so we lose the business. Do you have a price indication you can share with me that would be workable for you to secure the business for January / February?"

November 19, 2020: “I also worked on the pricing for Jan / Feb 2021. Please let me know if \$3.75/kg Ti content would be workable for January and February shipments. I would very much like to conclude this further business with you.”

November 24, 2020: “Please also let me know about January and February offer of shipments. I also wanted to let you know if we sign contract, we do not expect any advance payments from you until we are ready to start shipping to you. I hope this is acceptable.”

January 7, 2021: “I am very distraught over this situation as we need to proceed with new business with you... Please do let me know your thoughts on new shipments.”

February 4, 2021: “We would like to propose to offer to supply material against a new contract with you which the price could be discussed and agreed on a monthly basis between us so that both of us could ensure that the price is workable and good for each of us.... We would also like to propose that we will not supply any other customers in China and sell exclusively to you to help give you an advantage in the market to secure the business together.”

February 6, 2021: Again, at this time, David disclosed that they had allegedly shipped the Kallet Product to other customers. He also again asked “I hope you can please give some consideration to the new business scenario to help make repayment faster.”

February 9, 2021: He again referenced a proposal where there would be a new contract with Kallet and that Kallet would pay 80% of shipments, and then the remaining 20% would be deducted from amounts owed to Kallet for previous shipments. David also indicated that MM&A did not have the cash flow to repay Kallet which begs the question as to how MM&A could have afforded to purchase raw materials and to manufacture any Product for a new contract or indeed manufacture the Product to fulfill the old orders that he kept saying were on their way.

February 17, 2021: “If there was any way we could do new business between us as I suggested we can really speed up the repayment faster. Maybe we can help each other.”

[492] Even when he knew there were significant problems, he was primarily focused on having Kallet continue paying more money for shipments that MM&A would not have been able to fulfill, rather than being honest about the situation.

[493] On March 31, 2021, David provided Cara with a document titled “Wire Payment Details”, which purported to show a payment of \$15,000 which was never processed. At trial, David testified that the payment was not processed because MM&A had been under restrictions by its secured creditor which prevented the transfer of funds.

[494] MM&A could not even clear a \$15,000 cheque by David’s own admission in March 2021 because of bank restrictions. It had significant problems and David knew it.

[495] Despite this, as noted, he made ongoing and repeated promises that the Product would be delivered throughout 2021 and that it was on its way which was not true. On May 18, 2021, David advised Cara that the materials would arrive between May 28 and May 31, which was yet another delay. And again, despite these communications from David, there is no evidence that MM&A made any arrangements to ship the Product he continued to promise would arrive even though apparently MM&A could not even write a \$15,000 check. If this was the case, how could it have possibly produced and delivered new Product?

[496] The correspondence also did not reveal any new Quality Certificates or Packing Lists if MM&A was indeed trying to produce new product to replace the old Kallet Product. David was still stringing Cara along in 2021. These are not the actions of someone who is concerned about what had occurred or who is concerned about being truthful.

[497] In all the circumstances, I reject the suggestion that David's various solutions in 2021 including selling Product at a discount, paying the cash value of the Product over 12 months, or offering to settle with a consent judgment demonstrates any good faith or honesty.

IV) David's Consciousness of Guilt

[498] David sent Cara an email on February 18, 2021, which demonstrates that he felt guilty. David stated:

“[t]hank you very much for your response. I completely understand your position and I do apologize, I should have been more truthful about the situation.” (Emphasis added).

[499] At trial, when asked what he meant by this statement, he gave the following rambling answer:

Q: What did you mean?

A: I think I just meant there was look, there, there was a lot of stuff going on, and I should have like, you know, maybe just been more forthcoming with like what I was like, what, what was actually going on, you know, and, and that's all I meant at that point, because I was truthful. I sent her, I, I sent all the documents, the load were shipped, everything, you know, like I said, like the loads were produced, and all this kind of stuff. And I think I just meant it, you know, like there was other stuff I could have filled her in in, in on, like the, ...equipment breakdown, like all this kind of other stuff that was happening at the factory at the same time...like after I found out about all of this stuff. Which was during the second half of December. (Emphasis added.)

Q: When you say other stuff, what do you mean?

A: Like the equipment breakdown, like all this kind of other stuff that was happening at the factory at the same time.

[500] Notably, in his trial evidence above, he stated that the “load” was shipped, and yet he also admitted at trial that none of the loads for the disputed shipments had ever departed the factory. This is yet another example of David’s inconsistent evidence.

V) David’s Moral Turpitude

[501] One of David’s principal arguments is that he gave uncontradicted evidence of his belief in the truth of what Stacey was telling him and the integrity of the documents he sent.

[502] A finding of recklessness could certainly be based on an admission by a defendant that he had no regard for the truth of the representations he made, but it would be a rare case where such an admission was made. In general, a court cannot delve into the state of mind of a defendant; and most defendants sued for fraudulent misrepresentation do not admit that they did not care whether what they said was true or not. The cases cited involve the court evaluating the evidence, considering the credibility of the defendant and making inferences where appropriate, taking into account all of the evidence to ascertain whether the defendant had a reckless disregard for the truth of his representations.

[503] David was copied with communications that showed that MM&A was having difficulty getting the Product out the door. Notwithstanding both of their evidence, I find that Stacey was deliberately keeping David informed by forwarding the emails. She copied him throughout; she was not hiding anything from him, and it makes little sense that she did so just so that he could “step in” when needed.

[504] He participated in a troubling conversation with Andrew relating to these problems and BNX’s serious concerns. All of this showed him that MM&A was not meeting deadlines with the railyards and was having difficulty getting the Products out the door weeks after he sent the Shipping and other Documents to Cara related to these earlier Shipments.

[505] The information that he received and must have reviewed to provide status updates to Cara, as well as the communications he participated in made it impossible or at least highly implausible that later Shipments were departing as was represented by the Shipping Documents he continued to send. It also made it improbable that the later shipments were even produced. If they could not load and ship out containers for Shipments 1 to 3 for almost 2 months, this should have been ringing alarm bells in David’s mind. But he did not want to know.

[506] And even when he specifically participated in such conversations, he still implausibly maintained at trial that he could not have known that anything was amiss or that he should be concerned about the information he was sending about the later shipments. This shows the level of his indifference or willful blindness which continues to this day.

[507] He purposely abstained from making inquiries in circumstances that cried out for him to ask questions because it was in his interests to keep receiving the payments triggered by delivery of the Shipping and other Documents. In doing so, he demonstrated a callous indifference. Put another way, he had enough knowledge to know there was a real and significant probability that

the representations were not true, and that the Product had not been shipped and was not available or ready to be shipped at the time he sent the Shipping Documents to Cara. He closed his eyes to what was obvious.

[508] It is not that he was simply careless or unreasonably failed to appreciate there was a risk. Rather, he was reckless in the sense of being indifferent to whether the representations he was making were true.

[509] In so doing, he showed the requisite moral turpitude or state of mind.

[510] While I accept that in the ordinary course when there were no problems, David would not be scrutinizing Shipping and other Documents, because this was Stacey's department, this was not a usual situation. It was a situation where he was copied on communications related to significant delays for Shipments 1 to 3, and he participated directly in some troubling communications with BNX on October 30, 2020 related to BNX's unwillingness to issue further BLs until old bookings were completed.

[511] As such I find him reckless with respect to Shipments 5 to 15. I do not find him reckless with respect to Shipment 4. There is no evidence that at that time, any concerns about delays at MM&A's factory were communicated to him and he had not been copied on any emails or documents that should have caused him concern.

VI) The Misrepresentations are Not Estimates

[512] Finally, I reject David's argument that a finding of recklessness cannot be made because many of the alleged representations are estimates regarding arrival times and departure times.

[513] I have not taken into account any estimates or any of the assurances that David gave Cara after he sent her the Shipping and other Documents in finding misrepresentations. The findings of misrepresentation are based upon representations of fact that the Product had been shipped or would be shipped upon payment in circumstances where MM&A was not able to fill the orders at the time.

Issue 3: Did David Intend that Kallet Rely on the Misrepresentations?

[514] David consistently testified that he sent the emails enclosing the Shipping and other Documents intending that Kallet pay for the Product.

[515] For example, he was asked with respect to Shipment 4:

Q: And you sent this messages, and you know, you sent this email with the intention to receive payment from Kallet, correct?

A: Yes.

[516] He gave similar answers for the other Shipments.

[517] I am satisfied that he intended Kallet to rely on misrepresentations contained in these emails.

Issue 4: Did Kallet Rely on the Misrepresentations or Did the Misrepresentations Cause Kallet to Act?

[518] In *Bruno Appliance*, the Supreme Court stated the test as did the plaintiff rely on the false representation or did the false representation cause the plaintiff to act: para 21.

[519] Cara's evidence was that she relied on the emails sending her the Shipping and other Documents to make the payment.

[520] When Cara testified in chief, she consistently testified that the reason Kallet paid the Invoices was because the Contracts required Kallet to pay within 3 days of receipt of the Shipping and other Documents.

[521] She reviewed each of the emails that David sent her and said that upon receiving the emails she initiated the payment process.

[522] See *CTC* at para 98 where Black J. found reliance where the submission of false documents caused the defendants to act by paying false claims submitted. This is analogous to this case.

[523] Cara also reviewed the various payments that were made and testified that she made these payments because David had told her that he had sent the Product, and all the paperwork had been sent to her. Notably, based on the trial evidence and the Agreed Statement of Facts, payment was made approximately 3 days of receipt of the Shipping and other Documents as per the contractual requirement.

I) *David's Arguments*

[524] I reject a variety of arguments that David makes.

a) The Norwich Order

[525] David again argues that the Norwich Application means that Kallet could not have relied on any representations that the Product had been shipped because in the Application, Kallet pleaded that when David presented the Shipping and other Documents "it meant that MM&A had already shipped the Product or had the Products ready for shipping upon receipt of payment from the Applicant." Again, he argues that this means that Kallet was satisfied with paying as long as

the Product was produced and that is what it relied upon in making the payment. I reject this for the same reasons as set out above.

[526] I also note that this particular phrase indicated that Kallet relied upon the representation that the Products were ready for shipping upon receipt of payment. This was not true. Even after Kallet paid, nothing was shipped.

b) Cara Reported to Someone Else

[527] David also argues that Kallet cannot prove reliance because Cara reported to her manager who gave the final authorization to issue payment after she made a request. This is the evidence he referred to:

Q: Now, when payments were being made to foreign suppliers like MMA, those payments, before they were paid, they would have to be reviewed by your accounting department correct?

A: So, I would review it first and then I would forward those documents over to accounting.

Q: Right. And after they were done their review, it would have to be the general manager who would give the final authorization, correct?

A: Correct.

Q: Right. And in the case in here, with all the payments that were made to MMA, those were all reviewed by the accounting department before they were paid, correct?

A: Yes.

Q: And they were also all approved by the general manager, correct?

A: Yes

Q: And the general manager was the ultimate—was the final decision maker in all of this?

A: Correct

Q: If the general manager said no, it wouldn't happen correct?

A: Correct [Emphasis added]

[528] David asks that I draw an adverse inference from the failure to call Cara's manager, Ms. Shen, as a witness.

[529] I draw no adverse inference, nor do I find that Kallet has failed to satisfy its burden because it did not call Ms. Shen for the following reasons.

- The standard of proof is a balance of probabilities. The court is permitted to make reasonable inferences from the evidence before it applying logic, reason and human experience.
- Cara testified that Kallet's general manager, Ms. Shen, did not speak English. As such, Cara was assigned responsibility for dealings with MM&A.
- Since Cara was the only one who spoke English, she was the only one who could read the Contracts and evaluate whether the payment should be made. She testified that she was satisfied with the Shipping and other Documents David sent her and made that request. In other words, she believed what the Documents represented.
- The legal obligation to pay was triggered by receipt of the Shipping and other Documents, which misrepresented the state of affairs.
- The fact that she said that payment would not be made if her manager or accounting did not approve it does not mean that they relied on some other reason for approving payment outside of Cara's request for payment that was based upon receipt of the Shipping and other Documents.
- The payment was made approximately within 3 days of receipt of the Shipping and other Documents as per the contractual requirement which shows it was the receipt of the Shipping and other Documents that caused Kallet to act.
- Cara testified that approval was "just a process. It's a procedure."
- I infer that Cara's manager and the accounting department authorized payment because Cara had received the Shipping and other Documents, had no reason to doubt them, was satisfied with them and requested payment.

[530] It is unclear what else the manager or accounting department could have plausibly relied on in all the circumstances. Further, since the Product had never actually left MM&A's factory, and never even had any containers assigned, there would have been nothing else for them to rely on, for example such as tracking information which could not have existed in the absence of assigned containers.

[531] In all the circumstances I am not satisfied that the manager or the accountant had key evidence; what they could have testified to was their pro forma approval following receipt of the Shipping and other Documents from the person who was assigned responsibility for the matter. I find nothing suspicious about this or that warrants any inference that the manager or accountant would have given adverse evidence to Kallet's case.

c) Failure to Produce Relevant Documents

[532] David also argues that there has been no production of any documents relating to Cara's payment requests. He argues that a fair reading of Cara's testimony at trial is that Kallet only produced documents that they deemed relevant or helpful to their case.

[533] He asks that I draw an adverse inference in particular, that Kallet did not produce documents related to the payment process because they would have contradicted Kallet's trial evidence that it relied on David's communications and the Shipping and other Documents.

[534] Although she did testify that she would expect there would be some written record of the internal approval process, when the totality of Cara's evidence is considered, she made it clear that most of her communications with her general manager and the accounting department that were related to payments were verbal or by way of WeChat and that they did not keep these WeChat communications.

Q: Now, when you were communicating with your general manager as part of your job, sometimes you would communicate to her in writing and sometimes in person, correct?

A: In general, verbal.

Q: Okay. But sometimes you communicated through email and WeChat?

A: WeChat sometimes.

[535] Then she was referred to her Affidavit of Documents. She did testify that when she swore her Affidavit of Documents, she understood her obligation to be that she was supplying all the evidence that Kallet wanted to rely upon and so she did misunderstand her obligation at that time. But she was forthright in giving this evidence. A dishonest person would have simply denied this or been evasive.

[536] She was asked questions about the period when she put together her original Affidavit of Documents and agreed she did not ask her manager or the accounting department to search for documents related to the approval process for payments.

[537] She agreed that she did not do a search for any WeChat communications with her general manager or accounting.

[538] Then the following exchange took place:

Q. And this—undertaking, I'm going to read it to you. It says:

To search Jinzhou Kallet Titanium Industry Co. Ltd.'s records for internal emails, memos, correspondence, or notes relevant to the pleadings, and produce any materials found in accordance with the rules.

Do you see that?

A. Okay, I see that:

Q. Okay, and then the answer:

There are no internal emails, memos, correspondence, or notes relevant to the issues in dispute as defined by the pleadings.

Do you see that?

A. Okay, I see that.

Q. That answer's actually inaccurate because no search was conducted, correct?

A. I don't think you can say that we have not conducted a search at all, because we have already submitted all the relevant documents. We believed they were relevant.

Q. You agree with me that there are internal correspondence, there is internal written communication and written documents, internal documents, related to the payment process that wasn't produced. Are you telling me that's 'cause you don't think it's relevant?

A. First of all, just like what I stated earlier, the way how we communicate, most of them were conducted in verbal manner.

Q. That wasn't my question.

A. And so in terms of the rest of them in writing, I would say WeChat. And then it has been really such a long time and so, no one really keep those.

Q. Okay. Right. But nobody searched, correct?

....

A. I know, I'm still correct. No we, didn't.

[539] However, in my view, this questioning was unfair and constituted improper impeachment because she was never directed to the following answer to an undertaking that she provided which was a specific answer related to production of documents about the payment approval process.

Question	Answer
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<p>Q. 158: To produce all documents with respect to issuance of payment and approval to issue payment for various shipments.</p>	<p>The Plaintiff’s payment of the shipment is not an issue in dispute. In any event, the question is answered under Rule 34.12.</p> <p>The plaintiffs has produced all relevant documents showing the approved payment for the various shipments that are the subject matters of the litigation.</p>
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[540] David read this answer in as part of his case, and I accept it. The answer states that Kallet had produced all relevant documents related to the payment for the various shipments.

[541] The discovery and her above answers occurred several years ago when her memory would been better. Cara was never given the opportunity to look at this answer which was specific to the payment process, which may have jogged her memory, and which may have caused her to recall specific searches related to the payment process and for WeChat messages after she swore her affidavit of documents.

[542] I decline to make an adverse inference

[543] In my view these documents if they existed were not key. The proposition that there could have been something in some unspecified written communications that the processing of the payments, for shipments that never even departed MM&A’s factory, was made for some reason other than the receipt of these Shipping Documents is not believable.

[544] As a matter of fact, they received the Shipping and other Documents, Cara initiated the payment process and Kallet made the payment right afterwards.

[545] In accordance with Cara’s evidence at trial, I infer that the answer to the undertaking above means that whatever WhatsApp conversations may have occurred related to the payment approval, they no longer existed or were irretrievable, just as David’s WhatsApp messages were not.

[546] I also reject the proposition that Cara is not credible because of any of the questioning surrounding her Affidavit of Documents and her initial misunderstanding of her obligation.

[547] There were many specific undertakings requested and answered that showed that after the discovery, Kallet specifically did further searches or revisited the documents produced to consider whether there were any other documents specific to questions asked.

Question	Answer
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131: To search records and identify the email communication from Stacey Sharpe (responding on behalf of David while he was ill) in response to Cara's email addressed to David:	See Appendix B.
145: To search WeChat records and produce any communications with David or anyone else at MM&A during the material time, to the extent they can be retrieved.	All communications with David and anyone else at MM&A during the material time, that are relevant and could be retrieved, have been produced.
159: To search Jinzhou's records and to produce Cara's notes created during phone calls with David, if any and to the extent they are relevant.	Search conducted. No notes have been found.
66: To produce any communications that Cara had in writing, either via WeChat or email or any notes of conversations, with Jinzhou's agent.	No written communications have been found.

[548] These read ins form part of David's case and I accept that they show that Kallet conducted further searches or revisited its consideration of documents produced already and then produced further documents after Cara swore her Affidavit of Documents.

[549] It is unfair to show her one answer that sought the production of any additional relevant documents in general and seek the kinds of inferences that David seeks without showing her all of these other answers which were specifically answered and which showed that further searches were in fact made and which could have jogged her memory.

[550] I note that in David's supplementary submissions made in January 2026 in response to the court's questions, David's counsel indicated that only the highlighted portions of the read-ins were read ins. This would mean that he did not intend some of the above answers to undertakings to be read in.

[551] This restriction was not placed on any part of the Brief of Read-Ins, and I reject that position taken too late in the day after it must have been clear that some of the read-ins may be disadvantageous. When I reviewed the Brief, I assumed that the highlighted portions were for

emphasis not that they constituted the totality of the read-ins. In any event I conclude that the unhighlighted portions of David's read ins are required as a matter of fairness to give context to the highlighted portions and also to put Cara's impeachment into context.

[552] The case *Tri-Con Concrete Finishing Co. v. Caravaggio*, referenced by David is not similar. In that case, the plaintiff was suing a number of defendants on the basis that it understood that it had been dealing with them. In that case, documents had been seized by Canada Customs, and the defendants had written requesting production of documents held by Revenue Canada who responded indicating that it could not produce photocopied income tax material regarding the corporate defendants.

[553] The response from Canada Customs was unrelated to the question asked by counsel and no follow up took place to explain why what was being requested was not income tax returns but rather the documents that had been seized. The judge was satisfied that the documents existed and that they were under the control of the defendants at some point and that there was authority under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), for their production.

[554] In *Tri-Con*, there was also evidence of a bank account, and the defendants made no efforts to obtain production of such documents. And although the individual defendants' position was that they were merely acting as directors of the corporate defendants, they failed to produce any of the corporate documents including minute books, directors' resolutions including bank resolutions or financial statements. The court concluded that the delivery of an affidavit of documents that sets out no documents in the circumstances was fraudulent and there would be no other purpose than to mislead the court. Then there was an undertaking that was never complied with to produce documents. In such circumstances, the court inferred that the documents would be contrary to the defendants' case.

[555] *Tri-Con* is nothing like this case where Kallet has produced reams of documents.

[556] David also references the fact that there were a number of documents that were not in Kallet's initial affidavit of documents but produced later. I do not find this concerning. This often happens in litigation. David himself produced multiple documents in December 2024 or January 2025.

[557] David's record was also incomplete. He testified that he deleted his emails regularly as an explanation for the incompleteness of the record of communications on his part.

[558] David also references the fact that Cara agreed that none of the correspondence negotiating the payment terms or the draft of the First Contract were produced. These are not relevant. What is relevant is what the Contracts they finally negotiated said.

d) Refusal to Provide Evidence Related to any System in Place to Deal with Product that had not been Delivered by the Delivery Date

[559] Kallet refused to provide evidence regarding Kallet's system for dealing with orders that had not been delivered. David argues this is relevant because Kallet could only have relied on statements from David concerning the status of shipments if they had no other source of this information.

[560] This is not a persuasive argument.

[561] I have not found any misrepresentation based upon status updates, only based upon the emails David sent attaching the Shipping and other Documents after which Kallet provided payment within approximately 3 days.

[562] Since it took at a minimum 40 days for the Product to travel to China, the Product would not be undelivered at the time of payment and so any system dealing with undelivered Product is not relevant to the misrepresentations I have found.

e) Failure to Produce Communications with Kallet's Shipping Agent

[563] David also references the fact that Kallet did not produce the documentation it had with its own shipping agent who would pick up the Product at Dalian to deliver to Kallet. Cara testified that she would send the BLs to Kallet's agent when she received them but did not remember whether the agent was able to track any shipments.

[564] He argues that an adverse inference should be made that since the shipping agent in China was validating the information that David was providing, Kallet could not have relied on the information David provided but rather was relying on its own agent.

[565] I note tracking of shipments was based on container numbers and Cara was continually asking David for these numbers. He did not provide them, of course, because there were never any containers assigned or delivered as ultimately admitted by David. Therefore, the agent in China would not have been able to track them without this information. As such that agent had no key evidence to give.

[566] Furthermore, the misrepresentations that I have found is related to emails attaching the Shipping Documents which precipitated payment within approximately 3 days. As a matter of logic, Kallet would have paid well before the time it would take to send the Shipping Documents to the agent in China and begin the process of tracking any containers which would take at a minimum 40 days to arrive.

[567] As such I draw no adverse inference related to Kallet's failure to produce communications with its shipping agent.

[568] David also argued in his closing submissions that Cara refused to provide the name of Kallet's shipping agent. This is not accurate. She said the identity was not relevant but provided the name of the company in any event pursuant to r. 34.14 of the *Rules*. When I pointed this out, David argued that she did not provide the name of the individual only the company. The question asked was for the name of the shipping agent and did not specify that David wanted the name of an individual. If David was unsatisfied because he wanted the name of the individual, he could have followed up or brought a motion.

[569] Finally, with respect to Kallet's shipping agent in China, in his written closing submissions David referenced Cara's discovery evidence where he said she admitted she made a payment to MM&A based upon a "notification [she] received from the agent, the Shipping Arrival Notification, so I felt secure. And also, because I have dealt with him indirectly before, so I trusted him even more."

[570] This is out of context.

[571] Although it may be somewhat unclear in the transcript, in my view what the entire exchange shows is that Cara was talking about the fact that her shipping agent in China had explained to her that the BLs were not Ocean Bills of Lading, after she had received a Shipping Arrival Notification with respect to one of the shipments that did arrive and that is not the subject of this proceeding. What she was saying is that she trusted that what her agent told her was accurate about the BL not being an Ocean Bill of Lading and that she was also reassured because she received that notification with respect to one shipment which assured her that the others were on the way too. The way that David has put this statement forward also makes no sense because there could not have been any Shipping Arrival Notifications for the disputed Product at the time Kallet paid because as ultimately admitted by David these shipments never left the factory. As well the shipments took 40 days to get to China, and the payment was made within approximately 3 days of receipt of the Shipping and other Documents. As such, the decision to pay could not have been made on the basis of any Shipping Arrival Notification.

f) Failure to Produce Communications with Andrew

[572] David's counsel also put the proposition to Cara that sitting in the courtroom she could not say that the emails produced were all the emails that she had with him and she agreed, "That's fair, yes." She agreed that she may have deleted some of her emails because she would not necessarily have kept everything. She agreed she had no idea whether she was able to find everything.

[573] I do not find what I consider to be minor issues with Kallet's productions at all concerning as to Cara's credibility.

[574] David has not demonstrated that there are any material documents that have not been produced or that would contain anything that would affect the assessment of whether or not David's communications caused Kallet to act or that causes me any concerns about Cara's overall credibility.

[575] Further, and again, if there were relevant emails from Andrew that could have helped David, the BNX file was brought right to court, and he did not want to look at it.

[576] I add that to the extent there were refusals on the basis of relevance, David could have moved to obtain answers and did not. He also had the name of the shipping agent and could have moved for third party production. This shipping agent was an independent company and therefore equally available to David.

g) Kallet Allegedly Paid Because the Price of Titanium Ingots Was Going Up

[577] David also alleges that Cara's discovery evidence shows that the reason Kallet paid was because the price for titanium was going up and the price was good.

[578] This is the excerpt referred to in the read-ins:

Q. So based on what I understand in your conversation with her, a decision was made to issue payment, continuing issue payment because you had already received some product; correct?

A. Yes.

Q. And also because the price was very good.

A. Correct.

Q. I understand at this point, the price in the marketplace for titanium was going up quite high; is that correct?

A. The price increased, yes (Emphasis added)

[579] On its face, this entire exchange relates to payments made after Kallet had already received at least one shipment. As set out in Kallet's answers to undertakings which were read in, Kallet received the first shipment on November 6, 2020. Therefore, this questioning must have related to the period afterwards. More specifically, it could only have related to payments for the shipments made after November 6, 2020, which were for Shipments 11 to 15. Her answer was in respect of why Kallet continued to pay notwithstanding the fact it had only received one shipment and does not imply that receipt of the Shipping and other Documents did not trigger the payments.

[580] At trial, when she was asked why she did not mention the Shipping Documents as part of the above answer, she said it was because it was obvious that she paid based on the Shipping Documents:

Q: Right. So you'll agree with me that it is possible that you are misremembering today and that in fact your answer was correct in 2022.

A: Because you know what, if you do believe that—my answer back in 2022 is in—was inconsistent to what I stated today, and I know I don't think so because what I'm saying here is the fact that David had already promised that the products are going to be sent out, and it was quite obvious it was a sure thing. Therefore, I didn't mention that. You can see everything in the email. However, because back then, when the question was being presented to me, and then that email was such an obvious thing.

.....

Q: You agreed with me that the answer you gave in 2022 was incomplete. So if you were asked again, you would've made it more complete and mentioned David's emails.

A: Yes

[581] There are other parts of Cara's discovery that were read in by David and which she was not referred to when impeached which are relevant and which show that she did in fact say that she relied on the Shipping and other Documents when she initiated the payment process.

[582] In another part of her discovery, she said:

A. So let me explain. The majority of the time when I received the documents—I always received what David told me the words assured me that the goods had been dispatched. I trusted him. I believed whatever he said to me. (Emphasis added)

[583] In yet another part of her discovery, Cara provided the following evidence which entirely supports her evidence at trial that the payment was made because of trust in David and the receipt of the Shipping and other Documents:

A: And after he told me about the means—the ways how the goods were transported. I didn't really understand it but we had some conversations about it.

And, plus, in the past we had purchased, through a trader, their products not just once but multiple times so we had some basic understanding and trust for them. And I knew that they were the manufacturer and the price was really good.

So after he said that the goods were dispatched, and after he gave me the invoice, the packing list, the quality certificates, which meant that the goods have been dispatched, and then I made the payment. (Emphasis added)

[584] It was unfair to put to her that her answer in 2022 was incomplete when she actually gave answers at that time related to her reliance on the Shipping and other Documents in another part of her discovery evidence.

[585] It was unfair to suggest that she did not give testimony that she in fact gave. It is irrelevant that her counsel did not object at the time and did not refer her to this in redirect because I have seen these answers in the Read-ins which have the quality of being actual trial evidence. I take them into account.

[586] Her discovery evidence set out above clearly referenced the documentation she received as something that she relied upon. I accept Cara's evidence in this regard as well as her explanation that in the portions that he read in, where she referenced the price as being a relevant factor after she had only received one shipment, she did not mention the documentation because it was obvious. As well, she had already testified that she relied on the Documents as a whole before she gave the evidence that the price was good.

[587] In my view, what she was answering was why Kallet continued to pay even though it had only received one shipment. But that does not diminish the reliance on the Shipping and other Documents. Rather, it explains why further payments were made upon receipt of the Shipping and other Documents even though only one shipment had been received.

[588] In fact, even when cross-examined, it was put to Cara repeatedly that she commenced the payment process after receipt of David's emails and the Shipping and other Documents and her satisfaction with them, and she repeatedly agreed that this was the case.

[589] Furthermore, because the price of the Product had already been agreed upon under the Contracts prior to shipments, Kallet had no reason to pay the balance just because the price was good unless it had been confident that the Product had been shipped.

[590] I do not have any concerns about the reliability or credibility of Cara's evidence taking into account her discovery evidence. Frankly, it strains credulity that Kallet made the payments in every single case after it received the Shipping and other Documents, that these were required for its bank to process the payment, and that the payment was made because the price was good. What benefit is it to be charged a good price for a Product that never arrived?

h) Cara's Failure to Review the Documents in Detail

[591] David also references the fact that Cara did not review the Shipping and other Documents other than the container numbers where they existed and Invoice numbers. This is not relevant to the issue of reliance because the concept of contributory negligence does not apply to fraudulent misrepresentation.

[592] Kallet was entitled to rely on the receipt of the Shipping and other Documents. The Contract required Kallet to pay upon receipt of the Shipping and other Documents, not after a rigorous evaluation of them. It was not required to examine them to ensure that they were truthful for the purposes of this tort.

i) Did Cara Know about the Incorrect Information?

[593] David also argues, relying on *Natural Science Inc. v. Ramm Pharma Corp.*, 2024 ONSC 6918, at para. 29, that where there is clear, unequivocal and complete proof that the plaintiff had actual and not constructive or fragmentary knowledge of the lack of truth of a representation, a case in fraudulent misrepresentation cannot be made out.

[594] I disagree that this applies here.

[595] At no time did Cara or Kallet ever know that the Product had not departed MM&A's factory when she initiated the payment process.

j) Cara's Changed Understanding as of October 20, 2020

[596] David also argues that Cara's understanding of the Shipping Documents changed as of October 20, 2020, such that she understood the BLs were like a cargo reservation only. He references the following evidence:

Q: And was it your understanding from that discussion with David, at that point you understood that the bills of lading he was providing were not for a ship, but they were essentially like a cargo reservation?

A: Correct.

Q: You understood from that point that they were like drafts, that was your understanding, correct.

A: Yes

Q: Okay. And—okay, now I want to look at Exhibit 21, which will—which is F218. This is that payment record for containers 13 to 16. You see that?

A: Yes. I see that.

Q: You were the one who initiated this payment process, correct?

A: Yes.

Q: And you were comfortable doing so, even though the bills of lading you were getting, you understood that they were like cargo reservations, not the final bill of lading, correct?

A. Correct.

[597] I agree that Cara relied on a misunderstanding of what the BLs meant prior to October 20, 2020 in initiating the payment process. Neither their communications before October 20, 2020, nor the contents of the BLs could reasonably have been interpreted as meaning that the Product

was already on an ocean liner. Therefore, with respect to Shipments 4, 5, and 6 which are the only shipments where I have found a misrepresentation before October 20, 2020, Kallet did not rely on the package of documents sent because part of the reason it paid was a misunderstanding of the BLs.

[598] Therefore, I conclude that Kallet only relied on the misrepresentation with respect to Shipments 7 to 14.

[599] I exclude Shipment 15 because I have found no misrepresentation in respect of it.

Issue 5: Did Kallet Suffer a Loss in Doing So?

[600] It is agreed that Kallet paid a total of \$1,719,190.85 U.S.D. for all the product and received product valued at only \$281,495.76 U.S.D. It claims the balance of \$1,437,695.09 U.S.D. it paid in respect of the Contracts on the basis that it did not receive Product valued at this amount. This is based upon all shipments that never arrived or Shipments 4 to 15.

[601] There are a number of ways that Kallet has proven its damages.

[602] With respect to the pleading that the Shipping Documents falsely represented that the Product had been shipped or was ready or available for shipment or delivery, I have only found the elements of fraudulent misrepresentation satisfied for shipments 7 to 14.

[603] Kallet can also prove its damages with respect to the falsity of the BLs, Booking Notices and Packing Lists, although it obviously cannot have double recovery.

[604] The damages in respect of the claim that the BLs were false relates only to Shipments 7 and 8.

[605] The damages in respect of the claim that the Booking Notices were false relates to Shipments 10 to 12.

[606] The damages in respect of the claim that Packing Lists were false relates to Shipments 7 to 12.

[607] Because of the way Kallet made payments, which were blended payments of deposit and invoices, I require the parties submissions on the calculation above.

[608] This should take into account my rejection of Kallet's argument that the deposits for Contracts 2 and 3 should be deducted on the basis that it would not have entered into Contracts 2 and 3 had the misrepresentations not been made. Kallet did not plead this and so it is not entitled to make this claim. As well, Kallet provided no evidence that it would not have entered into Contracts 2 and 3 had the misrepresentations not been made.

[609] The deposits required to be paid by Kallet in respect of the three Contracts which must be deducted are:

First Contract: \$182,700

Second Contract: \$ 110,250

Third Contract: \$18,690

Total Deposits: \$311,640

[610] I do not add to this the legal fees incurred by Kallet to prosecute its Norwich Application which it claimed. This is a matter of costs which I will address at a later point.

Issue 6: Is There a Basis for David to be Personally Liable as a Director and Officer of MM&A?

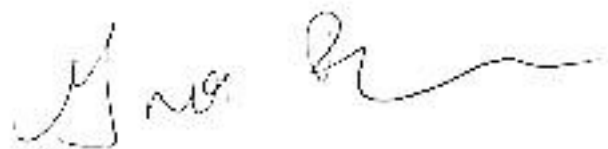
[611] David was not acting in his personal capacity, but as a director and officer of MM&A. Officers and directors cannot be held liable for the actions of the corporation unless there is some conduct by the individual that is either tortious in itself or exhibits a separate identity of interest from that of the corporation so as to make the act that of the individual: *Balanyk*, at para. 56, citing *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.) at p. 491.

[612] I conclude that David's conduct was tortious in itself in that he made false representations recklessly. As set out in *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101, 168 D.L.R. (4th) 351 (C.A.), cited in *Balanyk* at para. 60, there is no principled basis for protecting directors and officers from liability on the basis that such conduct was in pursuit of the interests of the corporation.

Conclusion

[613] The parties may make their submissions on the damages, interest and costs as follows: Kallet within ten days followed by David within ten days followed by Kallet's right to make reply submissions within a further 5 days.

[614] I thank the parties for all the work they did in making their submissions.



Papageorgiou, J.

Released: February 27, 2026

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COURT FILE NO.: CV-21-00667942-0000
DATE: 20260227

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JINZHOU KALLET TITANIUM INDUSTRY CO.
LTD

Plaintiff

– and –

DAVID E. SHARPE

Defendant

REASONS FOR JUDGMENT

Papageorgiou, J.

Released: February 27, 2026