

COURT OF APPEAL FOR ONTARIO

CITATION: Kozel v. The Personal Insurance Company, 2014 ONCA 130

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Rosenberg, MacPherson and LaForme JJ.A.

BETWEEN

Barbara Kozel

Respondent

and

The Personal Insurance Company

Appellant

Todd J. McCarthy, for the appellant

David A. Zuber, for the respondent

Heard: January 8, 2014

On appeal from the judgment of Justice T.M. Wood of the Superior Court of Justice, dated May 9, 2013, with reasons reported at 2013 ONSC 2670.

H.S. LaForme J.A.:

I. INTRODUCTION

[1] In February 2012, the respondent severely injured a motorcyclist in an automobile accident in St. Petersburg, Florida. At the time of the accident, the respondent was driving with an expired license. As a result, the respondent was in breach of statutory condition 4(1) of her insurance policy, and the appellant

insurance company advised her of a possible denial of personal injury coverage. In the meantime, the injured motorcyclist commenced a tort action against the respondent in Florida. The respondent brought an application seeking a declaration that the appellant owes a duty to indemnify her and defend her in a third-party action under her contract of insurance.

[2] The application judge ordered that the appellant has both a duty to defend and a duty to indemnify the respondent under her motor vehicle liability insurance policy with respect to the action brought against her. The order included the requirement that the appellant reimburse the respondent for all costs incurred by her in defending the Florida action. The insurance company appeals his order.

II. BACKGROUND

[3] In Ontario, driver's licences must be renewed every five years by the holder's birthday. Motor vehicle licence plate stickers must be renewed annually, also by the vehicle owner's birthday. The respondent's birthday is October 7, and both her licence plate stickers and driver's licence were to expire on October 7, 2011.

[4] Sometime in August 2011, the respondent received an envelope in the mail from the Ontario Ministry of Transportation. She placed the envelope in her china cabinet and did not open it. On September 24, 2011, the respondent was taking possession of a new automobile she had purchased and brought the

envelope with her to the car dealership. She believes she gave the envelope pertaining to licence plate sticker renewal to the dealership to enable it to licence the new car. She remembers opening the envelope but does not know whether it also contained documentation pertaining to the renewal of her driver's licence.

[5] On February 16, 2012, the respondent was involved in an accident with Arthur Grimes, a motorcyclist, in St. Petersburg, Florida. She was charged in Florida with driving while having an expired licence. That charge was subsequently either dismissed or withdrawn. According to the application judge, this “[a]pparently ... occurred because of a provision in the Florida legislation granting a six month grace period before charges are laid for expired licences.” Grimes subsequently brought a tort action in Florida against the respondent, seeking damages for his injuries.

[6] At the time of the accident, the respondent's driver's license had been expired for just over four months. On February 19, 2012, three days after the accident, the respondent returned to Canada and renewed her licence without any difficulty.

[7] The application judge did not agree with the insurer that the respondent was not authorized to drive at the time of the accident. He found that, because the offence of driving without a valid license is one of strict rather than absolute liability, a due diligence defence was available to the respondent. After

considering the evidence before him, the application judge held that the respondent exercised sufficient diligence and was therefore not in breach of statutory condition 4(1). As he summarized it at para. 28 of his reasons: “While the [respondent]’s actions do not amount to the perfect diligence of the ideal citizen they are a far cry from ... complete passivity”.

[8] Apart from granting the respondent’s application on the basis of due diligence, the application judge went on to hold that the respondent was not entitled to relief from forfeiture under s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8, because that provision pertains to imperfect compliance with the terms of a policy relating to actions taken or not taken after a loss has occurred. Going further, he held that the respondent also could not obtain relief from forfeiture under s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”), because clause 4(1) is a fundamental term or condition precedent of the policy.

[9] The application judge also rejected the respondent’s arguments that she was not in breach of her policy because she was authorized to drive at the time of the accident under Florida law, and that the insurance company was estopped from denying personal injury coverage because of its payment of the respondent’s property damage claim.

III. THE ISSUES ON APPEAL

[10] There are two issues on appeal. The first issue is whether or not the respondent, at the time of the accident, was in breach of her insurance policy. That is, was the respondent entitled to the defence of due diligence? The policy condition engaged is statutory condition 4(1) of *Statutory Conditions — Automobile Insurance*, O. Reg. 777/93, enacted pursuant to the *Insurance Act*. This statutory condition provides that:

The insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it.

[11] The second issue is whether the respondent is entitled to relief from forfeiture under s. 98 of the *CJA*.

[12] Appellant's counsel asserted in oral argument that the respondent's submissions on the s. 98 issue are "an effective cross-appeal". I reject this characterization of the respondent's submissions. A respondent must file a cross-appeal if he or she seeks to set aside or vary the order appealed from, or if he or she will seek, if the appeal is allowed, other relief or a different disposition than the order appealed from: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 61.07(1). The respondent here sought none of the above, and her submissions on s. 98 fall within the proper scope of this appeal.

[13] As I will explain, I would dismiss the appeal. My reasons for upholding the application judge's order, however, differ from those he gave. While I disagree that this is a case in which the defence of due diligence is available to the respondent, I conclude that she is entitled to relief from forfeiture.

IV. ANALYSIS

(1) Due diligence

[14] The appellant takes the position that the application judge erred in making findings of fact based on evidence that was irrelevant and inferences that were incorrect and improper. It says that while deference is owed to a judge's findings of fact, this court should interfere in this case because the assessment of the facts upon which the legal conclusions are founded constituted an error of law.

[15] For purposes of this appeal, the appellant accepts that the application judge was correct in finding that the offence of driving without a valid license is one of strict liability for which a due diligence defence is available.

[16] The Supreme Court of Canada discussed the circumstances in which a due diligence defence is available in *Lévis (City) v. Tétrault*, 2006 SCC 12, [2006] 1 S.C.R. 420, at paras. 15 and 30:

The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

...

The concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are. Passive ignorance is not a valid defence.

[17] The application judge in this case relied on this court's reasoning in *Tut v. RBC General Insurance Co.*, 2011 ONCA 644, 107 O.R. (3d) 481, when deciding in favour of the respondent. At para. 27 of his reasons, he found that:

The events on [September 24, 2011] caused [the respondent] to make a mistake. She was rushed and focused on providing the dealership with the ministry documentation it would need to get current stickers for her new car. Time was running short and she admits that she may well not have noticed additional documentation for her driver's licence renewal.

[18] The application judge then found, at para. 28, that:

Because the [respondent] was focused on renewing her plate stickers she wrongly assumed that this was all that the envelope contained. She took active steps to ensure that the duty she thought the envelope signalled was performed. She provided a believable explanation for her lack of perfect diligence on September 24th when she picked up her car.

[19] The application judge concluded that the respondent had not demonstrated complete passivity in the handling of her affairs and did not deliberately place herself in harm's way. He therefore found that the respondent was not in breach of statutory condition 4(1).

[20] I disagree with the application judge. In my view, he misapprehended the evidence, and his decision is not entitled to deference on review by this court.

[21] The availability of the due diligence defence, as the Supreme Court explained in *Lévis, supra*, depends on the circumstances surrounding the relevant offence. That is, an individual can make out this defence if he or she can show a reasonable misapprehension of facts or reasonable care *with respect to the offence with which he or she is charged*. The respondent here, therefore, must show that she acted reasonably with regard to the expiry of her driver's license.

[22] The respondent, at the time of the accident, was 77 years of age. She had held a driver's licence since she was 17 or 18 and had always renewed it on time. Yet, on this occasion there is no evidence that she did anything to inquire about or even consider her driver's license renewal. The absence of reasonable care by the respondent distinguishes this case from *Tut*, in which the court considered – and found – due diligence as it related to the offence charged.

[23] On the relevant facts as found by the application judge, the respondent did no more than state that she received an envelope from the Ministry of Transportation, which she merely placed in a china cabinet and did not open. Weeks later she opened the envelope while purchasing a new automobile, but only remembers seeing information pertaining to the plate stickers, which she

gave to the dealer. She produced her driver's licence for the dealership to copy, and later at a lawyer's office for identification purposes, but she did not examine it on either occasion.

[24] The only additional potentially relevant facts to the due diligence defence, which were mentioned neither by the application judge nor by the parties in their factums, pertain to health problems experienced by the respondent's sons around the time her license expired.

[25] The respondent describes that, in the fall of 2011, she was dealing with the poor health of her two sons. One of her sons had "liver and back problems", and the other was "in [and] out of hospital for appointments and assessments because of issues relating to bleeding bowels." It was therefore open to the respondent to argue that, in light of these circumstances, the care she took to avoid driving with an expired license was "reasonable".

[26] The difficulty with this evidence is that it lacks specificity. That is, the precise period of time during which these events took place and the actual impact they had on her is not addressed. It is also telling to me that no mention was made of the evidence in the decision below or in the parties' factums. I doubt that the respondent's preoccupation with her sons' health issues rose to a level where it would excuse her failure to take steps to renew her driver's license, and

am therefore not persuaded that this evidence is strong enough to mount a due diligence defence.

[27] At best, the respondent's evidence in this case demonstrates that she took all reasonable care in connection with her vehicle plate renewal. It does not show that she acted with reasonable care or operated under a reasonable misapprehension of the relevant facts in connection with her driver's licence. I would accept the appellant's position on this ground of appeal.

(2) Relief from forfeiture

[28] Relief from forfeiture simply refers to the power of a court to protect a person against the loss of an interest or a right because of a failure to perform a covenant or condition in an agreement or contract.

[29] The remedy of relief against forfeiture is equitable in nature and purely discretionary: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, at p. 504. Its origin and purpose was briefly reviewed by Doherty J.A. in *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, 333 D.L.R. (4th) 326, at paras. 86-87:

Courts of equity have always had the power to relieve against the forfeiture of property consequent upon a breach of contract. That power is now expressed in various statutes dealing with specific kinds of contracts (e.g., contracts of insurance, leases) and has been given more general expression in s. 98 of the [CJA]. ... The power is predicated on the existence of circumstances in which enforcing a contractual right of

forfeiture, although consistent with the terms of the contract, visits an inequitable consequence on the party that breached the contract. Relief from forfeiture is particularly appropriate where the interests of the party seeking enforcement by forfeiture can be fully vindicated without resort to forfeiture. Relief from forfeiture is granted sparingly and the party seeking the relief bears the onus of making the case for it. [Citations omitted.]

[30] In insurance cases, the purpose of the remedy “is to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer”: *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778, at p. 783.

[31] In exercising its discretion to grant relief from forfeiture, a court must consider three factors: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the property forfeited and the damage caused by the breach: *Saskatchewan River Bungalows*, at p. 504.

[32] This appeal considers statutory provisions found in s. 98 of the CJA and s. 129 of the *Insurance Act*. Under s. 98, “A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.” In contrast to this broad language, s. 129 provides:

Where there has been *imperfect compliance with a statutory condition as to the proof of loss* to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in

whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. [Emphasis added.]

[33] In *Stuart v. Hutchins* (1998), 40 O.R. (3d) 321 (C.A.), this court addressed the scope of both of these statutory provisions. Citing *Falk Bros.*, Moldaver J.A. (as he then was) explained, at pp. 327-28, that where an insured's breach constitutes imperfect compliance with a policy term, relief under s. 129 remains available. However, a breach that consists of non-compliance with a condition precedent to coverage forecloses the availability of relief against forfeiture under s. 129. Without deciding whether s. 98 could be invoked in the circumstances of the case, Moldaver J.A. rejected, at p. 333, the possibility of its application on the same grounds: namely, that even if s. 98 was available, its reach could not extend beyond that of s. 129 to relieve against forfeiture in the case of a breach amounting to non-compliance with a condition precedent to coverage.

[34] Courts have interpreted *Stuart* as having decided that s. 98 has no application to instances of non-compliance with a condition precedent.¹ Indeed, in this case, the application judge based his holding that s. 98 relief was not available solely on the fact that the respondent's breach here is one of non-compliance with a condition precedent to coverage. At para. 43 of his reasons,

¹ See e.g., *Williams v. York Fire & Casualty Insurance Co.*, 2007 ONCA 479, 86 O.R. (3d) 241, at para. 40; *Commander Construction v. Sovereign General Insurance Co.*, 2013 ONSC 7104, at para. 38; *Sage v. Peel Mutual Insurance Co.* (2005), 32 C.C.L.I. (4th) 110 (Ont. S.C.).

he noted that *Stuart* is authority for the principle that relief cannot be granted under the powers conferred by s. 98 for a breach of a *fundamental term or condition precedent* of a contract.

[35] The respondent properly concedes that s. 129 of the *Insurance Act* cannot provide relief here. That provision does not give judges a broad discretion to "grant relief from forfeiture" generally where the conditions of an insurance policy are breached. Rather, the court's power under s. 129 is a narrow one pertaining only to those policy conditions – statutory or contractual – that relate to proof of loss. It does not apply generally to all policy conditions: *Williams v. York Fire & Casualty Insurance Co.*, 2007 ONCA 479, at paras. 33 and 35.

[36] The respondent argues that this might be the appropriate case in which to grant relief under s. 98 of the *CJA*. She argues that holding for the insurance company would expose her personal assets and allow the company to enjoy a large and unwarranted windfall.

[37] The brief submissions made by the appellant on the merits of the application of s. 98 were specific: authorization to drive is a condition precedent to coverage. That is, as the law is currently drafted, statutory condition 4(1) is a fundamental provision of an automobile insurance contract. And, until the legislature says otherwise, this court cannot grant relief against forfeiture. There

was no explanation as to why statutory condition 4(1) is “fundamental”, nor was this court directed to any authorities in support of this argument.

[38] In light of this and the current state of the law described above in *Stuart* and *Williams*, I propose to examine whether the breach here – the failure to hold a valid driver’s license, in violation of statutory condition 4(1) – constitutes imperfect compliance with a policy term, rather than non-compliance with a condition precedent, and whether the respondent may be entitled to relief under s. 98.

[39] There are two threshold questions to resolve before undertaking the three-part analysis in *Saskatchewan River Bungalows* to determine whether the court should exercise its discretion to grant relief from forfeiture. First, does the breach in this case constitute imperfect compliance with a policy term or non-compliance with a condition precedent to coverage? Second, is relief available under s. 98 of the *CJA* despite the existence of a specific relief against forfeiture provision in the *Insurance Act*?

(a) Does the breach here constitute imperfect compliance with a policy term or non-compliance with a condition precedent to coverage?

[40] The difference between imperfect compliance and non-compliance is crucial for the purposes of the relief against forfeiture analysis. If the respondent’s breach of statutory condition is 4(1) is imperfect compliance with a

policy term, relief against forfeiture under s. 98 of the CJA is available. If, however, the breach amounts to non-compliance with a condition precedent, the court cannot award relief under s. 98: *Stuart*, at p. 333.

[41] As McLachlin J. (as she then was) explained in *Falk Bros.*, at p. 784, the distinction between imperfect compliance and non-compliance “is akin to the distinction between breach of a term of the contract and breach of a condition precedent.” However, in the context of relief from forfeiture, the imperfect compliance/non-compliance analysis does not engage with the contracts jurisprudence on conditions precedent. Rather, the focus is on whether the breach of the term is serious or substantial. Where the term is incidental, its breach is deemed to be imperfect compliance; where the provision is fundamental or integral, its breach is cast as non-compliance with a condition precedent.

[42] In *Falk Bros.*, the issue was whether the claimant’s failure to give notice of his claim to the insurer within the prescribed period precluded an award of relief against forfeiture under s. 109 of the *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26. Reviewing the case law, McLachlin J. observed, at pp. 784-85, that the failure to give timely notice of a claim has been viewed as imperfect compliance, while failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of a condition precedent.

[43] McLachlin J. concluded that a failure to give notice of a claim within the relevant period is imperfect compliance, firstly because it is a “less serious breach” than failing to bring an action in a timely manner, and secondly because it pertains to proof of loss. In my view, this second reason has no application to our case, because unlike s. 109 of the *Saskatchewan Insurance Act*, s. 98 of the CJA does not limit relief to cases of imperfect compliance with a condition as to the proof of loss.

[44] Likewise, in *Stuart*, the import of the relevant contract provision – and accordingly, the scale of the breach – was an important factor in determining whether the breach constituted imperfect compliance or non-compliance with a condition precedent. At p. 332, Moldaver J.A. held that the failure of the broker to report the claim within the policy period amounted to non-compliance with a condition precedent to coverage, rather than imperfect compliance with a term of the policy. He stressed the conceptual difference between “occurrence” policies and “claims-made and reported” policies. In these latter policies, the notice provision is “integral”.

[45] Finally, this court addressed the imperfect compliance/non-compliance distinction in *Canadian Newspapers Co. v. Kansa General Insurance Co.* (1996),³⁰ O.R. (3d) 257. In that case, a newspaper publisher entered into a corporate insurance policy with the insurer, which provided, among other things, that the publisher had a duty to co-operate with the insurer. This court held that

the publisher could not succeed on its claim for relief against forfeiture because its breach of the duty of co-operation was “substantial”. In doing so, Weiler J.A. made the following observations, at p. 281:

In *Travellers Indemnity Co. v. Sumner Co.* [(1960), 27 D.L.R. (2d) 562 (N.B. C.A.)], the court held that, although a breach of the insured's duty of co-operation could qualify as imperfect compliance, an insurer could deny coverage or refuse to defend if the lack of co-operation was “substantial”. West J.A. held, at p. 565, that “[n]o inconsequential or trifling breach of such obligation should serve to exonerate the insurer from his contractual liabilities under the policy.” The liability in that case arose out of a motor vehicle accident. The breach complained of by the insurer was the insured's failure to promptly notify the insurer of a drink the insured had taken shortly before the accident. The insured informed the insurer of this drink before he was examined for discovery and, at trial, the judge found that the insured was not intoxicated at the time of the accident. The court of appeal held that this inconsequential breach should not serve to allow the insurer to refuse to indemnify the insured.

The breach complained of in the present appeal is a “substantial” breach of the insured's duty of co-operation and of the insurer's right to defend the action. [The publisher] failed to report on the progress of the litigation, to convey offers to settle, to inform [the insurer] of the theory of the defence and to advise that the action had proceeded to trial until after the trial had begun. This breach is more than mere “imperfect compliance,” it is a substantial breach of the policy and on this basis alone [the publisher] is not entitled to claim relief from forfeiture.

[46] In *Colliers McClocklin Real Estate Corp. v. Lloyd's Underwriters*, 2004 SKCA 66, 10 C.C.L.I. (4th) 1, at para. 28, the Saskatchewan Court of Appeal

followed *Canadian Newspapers*, emphasizing that the proper inquiry is whether the relevant contract provision is a fundamental term, and whether its breach is a fundamental breach.

[47] In light of the above, my view is that in this case, the respondent's breach of statutory condition 4(1) is not non-compliance with a condition precedent. There are no grounds to believe that 4(1) is a fundamental term or that the respondent's breach of it was of a fundamental nature. While the provision is a condition in name, the appellant pointed to no language in the contract stressing that the insurance coverage was conditioned on the claimant being authorized to drive. This fact renders our case different than the facts in *Stuart*, where plain language in the contract identified the relevant contractual term as a condition precedent. Neither was the respondent's breach here a fundamental one. Had the respondent's violation of statutory condition 4(1) been more substantial – for example, if she had been drinking heavily prior to driving – she may have been barred from obtaining relief from forfeiture. This case, however, involves a relatively minor breach.

[48] Going forward, this court's strict holding in *Stuart* should be applied narrowly. In *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, the Supreme Court decided that s. 171 of the *Nova Scotia Insurance Act*, R.S.N.S. 1989, c. 231, which states that a policy condition is not binding on the insured if a court finds it "unjust or unreasonable", extends to statutory

conditions. Citing the decision in *Falk Bros.*, McLachlin C.J. reasoned that s. 171's remedial purpose warranted this broad interpretation.

[49] Plainly, *Marche* addressed the interpretation of a different statute, and its holding is not controlling of the case before us. Nonetheless, *Marche*'s broad interpretive approach indicates that courts should give remedial provisions like s. 98 a wide scope to provide relief where the result would be otherwise inequitable or unjust.

[50] In light of *Marche*, I believe the decision in *Stuart* should be given a narrow application. A court should find that an insured's breach constitutes noncompliance with a condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other instances, the breach will be deemed imperfect compliance, and relief against forfeiture will be available.

[51] This holding does not upset the balance in the existing relief against forfeiture jurisprudence, because an insured must still make three showings – that his or her conduct was reasonable, that the breach was not grave, and that there is a disparity between the value of the property forfeited and the damage caused by the breach – in order to prevail.

(b) Is relief available under s. 98 in insurance cases?

[52] The remaining question of law is whether the relief against forfeiture provision in s. 98 of the *CJA* applies to contracts regulated by the *Insurance Act*.

There is little jurisprudence on this issue, and it appears to be unsettled as to whether the relief provision in s. 98 is operative in the insurance realm, given the existence of s. 129 of the *Insurance Act*. In my view, it is.

[53] The Supreme Court addressed equitable jurisdiction in the insurance context in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, *supra*. The Court rejected the appellant's argument that Alberta's *Insurance Act*, R.S.A. 1980, c. I-5 occupied the field of equitable relief and precluded application of the *Judicature Act*, R.S.A. 1980, c. J-1 (the equivalent of the CJA) to life insurance contracts. The Court explained at p. 505 that the *Insurance Act* "does not 'codify' the whole law of insurance"; rather, "it merely imposes minimum standards on the industry."

[54] It is worth repeating that courts are to interpret relief from forfeiture provisions broadly. In *Falk Bros.*, McLachlin J. noted at pp. 782-83, that:

The first consideration is that s. 109 is a remedial section and as such should be given an appropriately broad interpretation. In *Minto Construction Ltd. v. Gerling Global General Insurance Co.* (1978), 86 D.L.R. (3d) 147, citing *Canadian Equipment Sales & Service Co. v. Continental Insurance Co.* (1975), 59 D.L.R. (3d) 333 (Ont. C.A.), MacKinnon J.A. noted at p. 151 that the equivalent Ontario "section is 'an ameliorating clause', and [that] it should be given a fair, large and liberal interpretation".

[55] While these comments relate to relief from forfeiture provisions in Saskatchewan and Ontario's provincial insurance statutes, s. 98 is no different in that it too is a remedial section and merits a correspondingly broad interpretation.

[56] I endorse the view expressed by Brown J. in *Sage v. Peel Mutual Insurance Co.* (2005), 32 C.C.L.I. (4th) 110 (Ont. S.C.), a case discussed by the application judge. In *Sage*, the court granted relief under s. 98 to the plaintiffs who were denied coverage after failing to pay an insurance premium prior to an automobile accident. While recognizing that *Saskatchewan River* left the issue open, Brown J. stated, at p. 118:

In these limited circumstances I am satisfied that the general provisions of s. 98 of the [CJA] can provide the statutory basis for granting relief from forfeiture notwithstanding there is a specific relief from forfeiture provision in the *Insurance Act*.

[57] Like Brown J., I would hold that the relief from forfeiture provision in s. 98 of the CJA applies to contracts regulated by the *Insurance Act*. This holding is consistent with the Supreme Court's finding in *Saskatchewan River Bungalows* that an insurance statute does not occupy the field of equitable relief, and that statutory standards operate as a floor, rather than a ceiling, for the insurance industry.

[58] As the application judge explained, s. 129 of the *Insurance Act* is restricted to instances of imperfect compliance with terms of a policy *after* a loss has occurred; it has no application to cases where the breach occurred before the

loss. As a consequence, a person who loses coverage because he or she was driving with an expired license, or because he or she failed to make a premium payment, see *Sage*, cannot rely on s. 129 for relief. That s. 129 leaves individuals like these – who have acted in good faith and whose breaches are relatively minor – without a remedy gives force to the argument that s. 98 should be operative in insurance cases. Thus, in the absence of clear legislative intent indicating that s. 129 of the *Insurance Act* applies to the exclusion of s. 98 of the *CJA*, I would hold that the latter provision is available as an avenue of relief for contracts governed by the *Insurance Act*.

(c) Application of relief from forfeiture factors in this case

[59] Having resolved the two threshold questions in the respondent's favour, It remains to be decided whether she is entitled to relief against forfeiture. As noted above, the relief against forfeiture analysis is informed by three factors: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the property forfeited and the damage caused by the breach: *Saskatchewan River Bungalows*, at p. 504.

[60] The first factor focuses on the reasonableness of the breaching party's conduct. It might seem that a finding that the respondent acted reasonably here would be foreclosed by my holding that the respondent did not act with "all reasonable care" and therefore cannot make out a due diligence defence.

However, this is not necessarily so, because the reasonableness inquiry in the relief against forfeiture analysis is a much broader one.

[61] As Doherty J.A. explained in *8477 Darlington Crescent*, at para. 89, the first factor of the analysis “requires an examination of the reasonableness of the breaching party’s conduct *as it relates to all facets of the contractual relationship*, including the breach in issue and the aftermath of the breach” (emphasis added). The scope of the reasonableness analysis was also discussed by Osborne J.A. in *Williams Estate v. Paul Revere Life Insurance Co.* (1997), 34 O.R. (3d) 161, at p. 175:

The reasonableness test requires consideration of the nature of the breach, what caused it and what, if anything, the insured attempted to do about it. All of the circumstances, including those that go to explain the act or omission that caused the lapse (forfeiture) of the policy, should be taken into account. It is only by considering the relevant background that the reasonableness of the insured's conduct can be realistically considered.

[62] In my view, when “all facets of the contractual relationship” between the parties are taken into account, especially with the relevant background, the respondent in this case acted reasonably. Consider that, up until the respondent’s birthday on October 7, 2011, her driver’s license was valid, and as soon as she discovered that her license had expired she sought to renew it and had no difficulty doing so. Moreover, the respondent always paid her premiums in a timely manner and acted in good faith on all occasions.

[63] The cases in which courts have found that a breaching party failed to act reasonably involve conduct far removed from the respondent's actions here. For example, in *Day Estate v. Pandurevic*, 2008 ONCA 266, 61 C.C.L.I. (4th) 50, the court found at para. 4 that the respondent could not obtain s. 98 relief even though he had no knowledge that his license was suspended. The court emphasized the fact that the respondent's license had been suspended twice before, and that on the day of the accident he picked up two letters from the Ministry of Transportation and continued driving without reading them. To the court in *Day Estate*, the facts indicated that the respondent acted with wilful blindness or recklessness.

[64] In *Williams, supra*, the court held at p. 176 that the appellant did not qualify for relief under s. 98 because his failure to pay his premiums in a timely fashion occurred due to his "ongoing negligence" and general inability to keep track of his personal finances.

[65] Finally, in *Saskatchewan River Bungalows*, the Supreme Court found, at p. 504, that the respondents did not act reasonably because, among other things, they learned that payment of a premium was nine months overdue but did not tender a replacement cheque until three months later.

[66] In short, I have no doubt that, for the purposes of the relief against forfeiture analysis, the respondent's conduct here was reasonable.

[67] The second factor is the gravity of the breach. This inquiry “looks at both the nature of the breach itself and the impact of that breach on the contractual rights of the other party”: *8477 Darlington Crescent*, at para. 91. If, for example, the forfeiture provision operated as a means of securing the payment required under a lease, the fact that the breaching party had paid all the amounts owing could obviate the need to resort to forfeiture and support a claim for relief.

[68] This second factor has received less judicial consideration than the first, partly because courts often end the analysis once it has been determined that the breaching party failed to act reasonably. One might argue that in this case, the breach was serious because the license had been expired for over four months at the time of the accident. However, the breach had no impact on the respondent’s ability to drive safely or on the contractual rights of the insurance company. While the purpose of the forfeiture provision here was not a means of securing payment, which is typically a ground for finding this factor fulfilled,² the breach here was by no means grave.

[69] The third factor is the disparity between the value of the property forfeited and the damage caused by the breach. This factor entails “a kind of proportionality analysis”: *8477 Darlington Crescent*, at para. 92. In an insurance

² See e.g., *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691, at p. 722 (“[W]e should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result.”).

case, this inquiry involves comparison of the disparity between the loss of coverage and the extent of the damage caused by the insured's breach.

[70] For example, in *Sage*, the court found that the substantial disparity between the loss of insurance coverage – which required the plaintiffs to pay for damage to their car – and the value of the additional premium that the plaintiffs neglected to pay weighed in favor of granting relief against forfeiture.

[71] In the case at bar, the disparity is enormous: the respondent stands to lose \$1,000,000 in insurance coverage, while the breach of statutory condition 4(1) caused no prejudice to the insurance company.

V. CONCLUSION

[72] For the reasons stated above, I would reverse the application judge's holding on due diligence but grant the respondent relief against forfeiture under s. 98 of the *CJA*.

[73] In my view, the facts required to make out a due diligence defence are simply not present. At the same time, if this court were to allow the appeal, the insurance company would enjoy a large windfall at the expense of an individual who acted in good faith and whose breach caused no prejudice to the company. This result would be contrary to fundamental notions of equity. Accordingly, I would dismiss the appeal.

VI. COSTS

[74] As the respondent is the successful party on appeal, I would award her costs in the agreed-upon sum of \$12,500 inclusive of disbursements and HST.

Released:

“FEB 19 2014”

“JCM”

“H.S. LaForme J.A.”

“I agree M. Rosenberg J.A.”

“I agree J.C. MacPherson J.A.”