Clerk's stamp:

COURT FILE NO.	1601-06131	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
APPLICANT	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED** **AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CONNACHER OIL AND GAS LIMITED**	
DOCUMENT	**BOOK OF AUTHORITIES**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Cassels Brock & Blackwell LLP** Suite 1250, Millennium Tower 440 – 2nd Avenue SW Calgary, Alberta T2P 5E9 Attn: Timothy Pinos/Ryan Jacobs/Joseph Bellissimo Tel: 403-351-2920 Fax: 403-648-1151 tpinos@casselsbrock.com rjacobs@casselsbrock.com jbellissimo@casselsbrock.com	

Book of Authorities of Connacher Oil and Gas Limited
Cross-Application (Emkay Lease Accounting) returnable October 30, 2017

INDEX

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Tab 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.6)

R.S.C. 1985, c. C-36, s. 11.01

s 11.01 Rights of suppliers

Currency

11.01Rights of suppliers
No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

Amendment History
2005, c. 47, s. 128

Currency
Federal English Statutes reflect amendments current to October 4, 2017
Federal English Regulations are current to Gazette Vol. 151:20 (October 4, 2017)

Tab 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 17, 2014

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

Tab 3

1986 CarswellNS 147
Supreme Court of Canada

Hillis Oil and Sales Ltd. v. Wynn's Canada Ltd.

1986 CarswellNS 147F, 1986 CarswellNS 147, [1986] 1 S.C.R. 57, [1986] S.C.J. No. 9, 171 A.P.R. 353, 25 D.L.R. (4th) 649, 36 A.C.W.S. (2d) 3, 65 N.R. 23, 71 N.S.R. (2d) 353, J.E. 86-281, EYB 1986-67371

Hillis Oil and Sales Limited, Appellant and Wynn's Canada, Ltd., Respondent

Beetz, Estey, McIntyre, Lamer and Le Dain JJ.

Judgment: November 2, 1984
Judgment: February 28, 1986
Docket: 17669

Proceedings: On appeal from the Court of Appeal for Nova Scotia

Counsel: *John M. Davison, Q.C.*, and *F.V.W. Penick*, for the appellant
John M. Barker, Q.C., for the respondent

Subject: Contracts

Related Abridgment Classifications

Contracts

VII Construction and interpretation
VII.4 Resolving ambiguities
VII.4.b Contra proferentem

Contracts

X Discharge
X.2 Cancellation
X.2.b Exercise of right of termination
X.2.b.ii Notice

Headnote

Contracts --- Discharge — Cancellation — Exercise of right of termination — Notice

Contracts --- Construction and interpretation — Contra proferentem rule

Manufacturer terminating contract of distributorship with long-term distributor in writing but without notice -- Contract providing for termination upon written notice but not stating when notice to take effect -- Trial Judge allowing distributor's action for damages and holding that 1 year's notice reasonable in circumstances -- Manufacturer's appeal allowed by Court of Appeal on basis no notice period required -- Distributor's appeal allowed and trial judgment restored -- Contract ambiguous as to whether termination could take effect only upon reasonable notice -- Ambiguity interpreted against manufacturer as author of contract -- Distributor entitled to reasonable notice.

Manufacturer terminating contract of distributorship with long-term distributor in writing but without notice -- Contract providing for termination upon written notice but not stating when notice to take effect -- Trial Judge allowing distributor's action for damages and holding that 1 year's notice reasonable in circumstances -- Manufacturer's appeal allowed by Court of Appeal on basis that notice period required -- Distributor appealing -- Appeal allowed and trial judgment restored -- Contract ambiguous as to whether termination could take effect only upon reasonable notice -- Ambiguity interpreted against manufacturer as author of contract -- Distributor entitled to reasonable notice.

The judgment of the Court was delivered by *Le Dain J.*:

1 This appeal raises a rather narrow issue concerning the interpretation of a termination clause in a distributorship agreement. The issue is whether a clause providing for termination of the agreement by the manufacturer or the distributor "at any time" with or without cause should be construed as impliedly requiring reasonable notice of termination because another clause of the agreement providing for termination by the manufacturer in certain events, including any breach of the agreement by the distributor, stipulates that termination in such case shall take effect upon the giving of the notice of termination.

2 The appeal is by leave of this Court from the judgment of the Supreme Court of Nova Scotia, Appeal Division, on February 14, 1983, allowing the appeal from the judgment of Richard J. in the Trial Division on August 26, 1982, which awarded the appellant damages for breach of contract because of the respondent's failure to give the appellant reasonable notice of termination of the agreements under which the appellant was an exclusive distributor of certain of the respondent's products in Nova Scotia, New Brunswick and Prince Edward Island.

I

3 During the relevant period the respondent Wynn's Canada, Ltd. (hereinafter referred to as "Wynn's") was the subsidiary of Wynn Oil Company of Los Angeles, California, and part of a multinational business organization with distributor networks in some eighty countries. It was engaged in the manufacture and sale of automotive engine and cooling system additives as well as industrial lubricants and coolants, among other products. It distributed its products through wholesale distributors with exclusive sales territories. The standard terms of the form of distributorship agreement (or "distributor's agreement", as it is entitled) offered by Wynn's and its parent to prospective distributors were not subject to negotiation or modification. As the president of Wynn's acknowledged in his testimony, it was a case of sign the standard form or not be a distributor.

4 The appellant Hillis Oil and Sales Limited (hereinafter referred to as "Hillis") was incorporated as a distributorship company in Nova Scotia in 1959. Its relationship with Wynn's, which began in 1969, is reflected in a series of agreements which may be briefly identified. By a distributor's agreement of October 1, 1969 Hillis was appointed as the exclusive distributor in Nova Scotia of a line of products in the marketing division of Wynn's designated as "Automative". That

agreement was replaced by a distributor's agreement of July 18, 1972, which made Hillis the exclusive distributor in Nova Scotia and Prince Edward Island of certain "XTEND" products in the marketing division of Wynn's designated as "Automotive & Fleet". A modification agreement of July 17, 1974 added "X-TEND GUARANTEE KITS" (sometimes referred to as "warranty sales") to the products covered by the agreement of July 18, 1972. A modification agreement of February 23, 1976 extended the exclusive territory covered by the agreement of July 18, 1972 to include New Brunswick and Newfoundland. A modification agreement of February 4, 1977 deleted the word "Fleet" from the designation of the marketing division covered by the agreement of July 18, 1972. A distributor's agreement of February 11, 1977 made Hillis the exclusive distributor in the four Atlantic Provinces of certain lines of products in the marketing division of Wynn's designated as "INDUSTRIAL/FLEET". By agreement effective July 1, 1979 New-foundland was withdrawn from the Hillis territory. The action in damages is based on the termination of the distributor's agreements of July 18, 1972 and February 11, 1977, as modified from time to time, but the agreement of July 18, 1972 is the one that is generally referred to, being the more important of the two.

5 From 1959 to 1969, when the Wynn's distributorship began, the business of Hillis was chiefly dependent on the sale of one product, Quaker State Motor Oil. By 1978 the sale of Wynn's products was accounting for about 90 per cent of the company's profit. Hillis made a considerable investment in time and money to develop the potential of the Wynn's distributorship. In particular, it hired a sales manager and increased its sales staff from an average of two to an average of eight or nine. It also enlarged its warehousing facilities and stocked inventory at various locations for its salesmen. A high proportion of its development costs were incurred in connection with the introduction in 1976 of the "flush unit program" for cleaning radiators and promoting the sale of Wynn's radiator additives and with the difficulties experienced with that program in the following year or two. The president of Hillis estimated that it would have taken three or four years to recover the company's investment or development costs but that was made impossible by the termination of the distributor's agreements in early 1980. It should perhaps be observed that while the standard distributor's agreement did not expressly prohibit Hillis from handling products that would be competitive with those of Wynn's, there was a clear understanding from Wynn's that Hillis should not do so.

6 The distributor's agreements of July 18, 1972 and February 11, 1977 contain the following clauses 20 and 23 providing for termination, the terms of which give rise to the issue in the appeal:

> 20. In the event that Distributor shall breach, or shall have breached, any of the terms, provisions or conditions of this Agreement, or in the event there be filed proceedings in bankruptcy, voluntary or involuntary, by or against Distributor, or that Distributor becomes insolvent or determined, voluntarily or involuntarily, to be bankrupt, or in the event of any dissolution of, or change in, partnership, if Distributor is a partnership, then, in any of such events, Manufacturer may, at its option, by notice in writing to Distributor by mail to Distributor's last known address, terminate and cancel this Agreement; and upon the giving of such notice, this Agreement shall be cancelled, terminated and at an end.
>
> 23. That Distributor acknowledges the receipt of a duplicate of this Agreement and accepts such appointment as a distributor subject to, and conditioned upon, Distributor's keeping, observing and performing all of the terms, provisions and conditions in this Agreement set forth all to the full satisfaction of Manufacturer.
>
> That this Agreement may be terminated and ended, wholly or as to any Marketing Division designated in this Agreement, and/or as to any "XTEND Products" specified in this Agreement, at any time, with or without cause, by either party hereto, by written notice given to the other of them by mail addressed to the last known address of the party to whom said notice is directed. And upon any termination of this Agreement by either party, the Distributor shall remain liable for all sums due to Manufacturer for purchases made by Distributor and unpaid for up to the time of such termination.

7 Clause 24 of the standard distributor's agreement provides that "in the event of, and upon, termination of this Agreement at any time by either party with or without cause under any circumstances whatsoever" the manufacturer shall have the option to repurchase products from the distributor at a defined price and that notice of the intention to exercise such option shall be given "at the time of the effective date of such termination or at any time within ten days after said effective date of such termination".

8 By letter dated February 11, 1980 Wynn's gave Hillis notice of termination of the distributor's agreement of July 18, 1972 as follows:

> By the terms of the Distributor's Agreement between you and Wynn's Canada Ltd., dated July 18th, 1972, it is provided, among other things:
>
> > That this Agreement may be terminated and ended, wholly or as to any Marketing Division designated in this Agreement, and/or as to any product specified in this Agreement, at any time, with or without cause, by either party hereto, by written notice given to the party to whom said notice is directed. And upon any termination of this Agreement by either party, the Distributor shall remain liable for all sums due to Manufacturer for purchases made by Distributor and unpaid for up to the time of such termination.
>
> In accordance with the foregoing provision, this company does hereby give you written notice that said Distributor's Agreement, dated July 18th, 1972, shall be and hereby is terminated and ended wholly and as to all Marketing Divisions and all products specified in said Agreement.

9 By letter dated April 22, 1980 Wynn's gave Hillis notice of termination of the distributor's agreement of February 11, 1977 as follows:

> Notice is hereby given that the Distributor's Agreement between you and Wynn's Canada Ltd., dated February 11, 1977, is hereby terminated and ended wholly as to all marketing divisions and all products specified in the said Agreement, effective immediately pursuant to the provisions of the said Agreement.

10 Following the termination of the agreements Wynn's established four new distributorships with former employees of Hillis in the territory covered by the Hillis distributorship. Hillis sued the new distributors as well as Wynn's but the claim against the new distributors was settled before trial.

11 It was agreed at a pre-trial conference that the termination of the distributor's agreements of July 18, 1972 and February 11, 1977 purported to be made pursuant to clause 23 of the agreements rather than clause 20, as indeed is clear from the terms of the notice of February 11, 1980. Considerable evidence was adduced at the trial concerning the performance of Hillis and the reasons for the termination, but the trial judge held that it was irrelevant, in so far as the interpretation and application of clause 23 were concerned, since that clause provided for termination with or without cause. He did not make a finding as to whether Wynn's had cause.

12 In maintaining the action of Hillis against Wynn's for breach of contract Richard J. held that one year would have been reasonable notice of termination of the distributor's agreements and fixed the damages at $91,846. From this amount was to be deducted the sum of $18,924.72, which was agreed by the parties to be owing by Hillis to Wynn's, for a net award of $72,921.28, with interest at the rate of 15 per cent from August 11, 1980. The length of notice required and the amount to which Hillis is entitled if Wynn's is liable for breach of contract are not in dispute. The sole issue in this Court, as in the Court of Appeal, is whether, in terminating the distributor's agreements pursuant to clause 23, Wynn's was obliged to give Hillis reasonable notice of termination.

13 The reasoning of the trial judge on this issue is contained in the following passages of his reasons for judgment:

> There is no question the Distribution Agreement is prepared by Wynn's and is totally non-negotiable as to variations. The agreement is the same used by Wynn's throughout the world - albeit in the appropriate language. Kenneth M. Lovett, President of Wynn's Canada said the Distributor Agreement is the only one used by Wynn's - "sign that form or not be a distributor." Mr. Lovett indicated it was normal practice for Wynn's not to give prior notice of cancellation of an agreement because of the impossibility of a continuing relationship after notice had been given.

> I am satisfied that the *contra proferentem* rule applies here and any ambiguity must be interpreted against the author - in this case Wynn's.
>
> The difference in the wording of the two termination clauses - 20 and 23 - bears some comment. Under clause 20 notice must be given "in writing" and "upon the giving of such notice, *this Agreement shall be cancelled, terminated and at an end*." It is clear from this that a notice given pursuant to clause 20 is effective on the giving - by mail - of the written notice.
>
> In the case of a notice of termination under clause 23 it is not expressly stated when the notice is to take effect. Standing alone, clause 23 could be interpreted as making the termination effective as of the time of delivery of the written notice to the other party. However, when read in conjunction with clause 20 it appears clause 23 lacks the specificity of the earlier clause. If both clauses resulted in immediate termination without notice, then the final phrase of clause 20 ("this Agreement shall be cancelled, terminated and at an end.") would be redundant. In my view, the court ought to assume that words in a contract mean something, and, that when two phrases differ, the author meant the result or effect to be different.
>
> With respect to clause 20, it is obvious the notice was meant to be immediately effective. One must conclude, therefore, that the author of clause 23 meant its effect to be something other than clause 20. The only reasonable conclusion is that a termination under clause 23 would take place upon notice rather than immediately.

14 In the Court of Appeal Hart J.A., delivering the unanimous judgment of the Court, held that there was no ambiguity arising from the terms of clauses 20 and 23 as to whether the agreement could be terminated with immediate effect pursuant to clause 23. He said:

> I am persuaded by the arguments of counsel for the appellant that we have here a case where the terms of the contract are perfectly clear. I can see no ambiguity relating to the termination provisions, and, in my opinion, the trial judge was in error when he implied an additional agreement between the parties which was not necessary to the interpretation of the written contract between them. Either party had the right to terminate the distributor's agreement without cause at any time they chose, and Wynn's chose February 11, 1980 the date upon which they delivered the notice of termination to Hillis.

II

15 If it stood alone as the only termination clause in the distributorship agreements clause 23 would have to be construed, I think, as permitting termination with or without cause by either party with immediate effect. But clause 23 cannot be regarded as standing alone; it must be construed in the light of the agreement as a whole, and in particular in the light of the other termination provision in clause 20. The general principle was stated by Estey J. in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 901, where he said that "the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract." Also particularly apposite are the words of Dickson J. (as he then was) in *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6, at p. 19, where he said:

> Taken alone and read without consideration of the scheme of the policy the kindred language of the self-destruction clause and the Declaration undoubtedly create a formidable argument in support of the case of the assurance company. It is plain however these cannot be read in an isolated and disjunctive way. The question before us is not to be determined on a mechanical reading of two phrases set apart, but rather on a reading of the policy and the Declaration in entirety.

16 With great respect, I agree with the learned trial judge that the inclusion of the words "upon the giving of such notice, this Agreement shall be cancelled, terminated and at an end" in clause 20 and their omission in clause 23 creates an

ambiguity as to whether the distributor's agreement may be terminated pursuant to clause 23 with immediate effect. If a distributorship agreement does not contain a provision for termination without cause it is so terminable only upon giving reasonable notice of termination. See *Martin-Baker Aircraft Co. v. Canadian Flight Equipment, Ltd.*, [1955] 2 All E.R. 722 (Q.B.), at p. 736; *Paper Sales Corporation Ltd. v. Miller Bros. Co. (1962) Ltd.* (1975), 55 D.L.R. (3d) 492 (Ont. C.A.), at p. 498; *C.C. Hauff Hardware, Inc. v. Long Mfg. Co.*, 19 ALR3d 191 (Iowa 1965). A right to terminate a distributorship agreement without cause with immediate effect must be expressly provided for in the agreement. (It is not necessary for purposes of the present appeal, in view of the conclusion with respect to ambiguity, to consider whether a provision for the termination of a distributorship agreement without cause with immediate effect should be held to be void for unconscionability or subject to some good faith limitation. Compare *Bushwick-Decatur Motors v. Ford Motor Co.*, 116 F.2d 675 (1940); *Seegmiller v. Western Men, Inc.*, 437 P.2d 892 (1968), and *Shell Oil Co. v. Marinello*, 307 A.2d 598 (1973); and see Gellhorn, "Limitations on Contract Termination Rights — Franchise Cancellations," [1967] *Duke L.J.* 465; Vesely, "Franchising as a Form of Business Organization — Some Legal Problems" (1977-78), 2 *C.B.L.J.* 34.) The question is whether, having regard to the inclusion of the above words in clause 20 and their omission in clause 23, the words "at any time" in the latter clause nevertheless make it clear and unequivocal that the agreement may be terminated without cause with immediate effect. In my respectful opinion they do not. There is a strong suggestion that where it was intended to provide for termination with immediate effect the concluding words in clause 20 were the ones considered to convey that meaning. The words "at any time" in clause 23 then bear the same relationship to the right to terminate under that provision as the specified events (breach of the agreement, insolvency and change in partnership) bear to the right to terminate in clause 20; they merely indicate that the right to terminate provided by clause 23 may be exercised at any time, but the clause is silent as to when termination may take effect. In the absence of provision for this question, the rule requiring reasonable notice of termination should be applied as an implied term of the contract. The fact that the same requirement would necessarily have to apply to termination for cause pursuant to clause 23 does not in my opinion make this any less a reasonable alternative construction of clause 23. A possible reason for an intended difference between clause 20 and clause 23 with respect to the right to terminate for cause with immediate effect is that clause 20 is for the protection of the manufacturer in the specified events — breach of contract by the distributor, insolvency of the distributor and change in partnership of the distributor — whereas clause 23 gives the distributor as well as the manufacturer the right to terminate for cause. The manufacturer, knowing that it could always terminate for cause with immediate effect pursuant to clause 20, might well have found it acceptable that neither party should have the right to terminate for cause with immediate effect pursuant to clause 23.

17 Given this ambiguity as to whether the distributor's agreements could be terminated pursuant to clause 23 with immediate effect or whether such termination could take effect only upon reasonable notice, I also agree with Richard J. that it should be resolved against Wynn's and in favour of Hillis by application of the *contra proferentem* rule of construction. It is true that this rule has been most often invoked with reference to the construction of insurance contracts, particularly clauses in such contracts purporting to limit or exclude the insurer's liability. Statements of the rule and its application in such cases may be found in the decisions of this Court in *Consolidated-Bathurst, supra*, and *McClelland and Stewart, supra*. The rule is, however, one of general application whenever, as in the case at bar, there is ambiguity in the meaning of a contract which one of the parties as the author of the document offers to the other, with no opportunity to modify its wording. The rule is stated in its general terms in *Anson's Law of Contract* (25th ed. 1979), at p. 151, as follows:

> The words of written documents are construed more forcibly against the party using them. The rule is based on the principle that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage.

The rule is also stated in general terms by Estey J. in *McClelland and Stewart, supra*, at p. 15 as follows:

> That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting.

Examples of cases in which the rule has been applied to the construction of contracts other than insurance contracts are *Lee (John) & Son (Grantham), Ltd. v. Railway Executive*, [1949] 2 All E.R. 581 (C.A.); *Red Lake (Twp.) v. Drawson*, [1964] 1 O.R. 324 (H.C.), aff'd [1964] 2 O.R. 248 (C.A.); *Chin v. Jacobs*, [1972] 2 O.R. 54 (C.A.); and *Alex Duff Realty Ltd. v.*

Eaglecrest Holdings Ltd. (1983), 44 A.R. 67 (C.A.)

18 For these reasons I am of the opinion that the respondent is liable for breach of contract for its purported termination of the distributor's agreements without giving the appellant reasonable notice of such termination. I would accordingly allow the appeal, set aside the judgment of the Appeal Division and restore the judgment of Richard J. in the Trial Division, with costs in this Court and in the Appeal Division. Costs in the Trial Division should be as awarded by the trial judge.

Appeal allowed with costs.

Solicitors of record:
Solicitors for the appellant: *John M. Davison* and *F.V.W. Penick*, Halifax.
Solicitor for the respondent: *John M. Barker*, Halifax.

End of Document

Tab 4

2013 ONCA 95
Ontario Court of Appeal

Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.

2013 CarswellOnt 2988, 2013 ONCA 95, 14 C.B.R. (6th) 276, 226 A.C.W.S. (3d) 642

Scott & Pichelli Limited, Trustee in Bankruptcy for the Estate of Aircell Communications Inc., Plaintiff (Respondent) and Bell Mobility Cellular Inc. and Bell Distribution Inc., Defendants (Appellants)

Robert P. Armstrong, H.S. LaForme, Alexandra Hoy JJ.A.

Heard: February 8, 2013
Judgment: February 14, 2013
Docket: CA C54587

Counsel: Brent Arnold for Appellants
David J. Jackson for Respondent

Subject: Civil Practice and Procedure; Insolvency; Public; Contracts

Related Abridgment Classifications

Bankruptcy and insolvency

XVI Effect of bankruptcy on other proceedings
XVI.3 Miscellaneous

Communications law

IV Telecommunication services
IV.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Miscellaneous

Defendant BD Inc. appointed A Inc. as independent dealer of its telecommunications products and services — A Inc. purchased inventory from BD Inc. and was entitled to commissions in relation to services it sold — A Inc. experienced financial difficulty, owing BD Inc. $64,000 for inventory — Unbeknownst to BD Inc., A Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — BD gave notice that it would terminate agreement if A Inc. did not pay outstanding amount within 30 days — A Inc. was deemed bankrupt before expiry of 30-day notice period, and therefore before effective date of termination of agreement — BD Inc. owed A Inc. $188,981 for commissions — Clause in agreement provided that upon its expiry, or if BD Inc. terminated as result of A Inc.'s failure to remedy default in time, BD Inc.'s obligations to pay commissions would cease immediately — Trustee in bankruptcy for estate of A Inc. brought successful action to recover amount by which commissions owing by BD Inc. exceeded amounts owing to BD Inc. in respect of inventory — BD Inc. appealed — Appeal dismissed — There was no basis to interfere with trial judge's finding of fact that A Inc.'s failure to pay BD Inc. was due to A Inc.'s insolvency — Clause provided windfall to one of A Inc.'s creditors and, in context of insolvency, clause was inequitable — There was agreement with trial judge that clause should be declared unenforceable as against A Inc.'s trustee in bankruptcy as contrary to overriding public policy requiring equitable and fair distribution among bankrupt's creditors.

Communications law --- Telecommunication Services — Miscellaneous issues

Agreements between companies — Enforceability of terms — Defendant BD Inc. appointed A Inc. as independent dealer of its telecommunications products and services — A Inc. purchased inventory from BD Inc. and was entitled to commissions in relation to services it sold — A Inc. experienced financial difficulty, owing BD Inc. $64,000 for inventory — Unbeknownst to BD Inc., A Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — BD gave notice that it would terminate agreement if A Inc. did not pay outstanding amount within 30 days — A Inc. was deemed bankrupt before expiry of 30-day notice period, and therefore before effective date of termination of agreement — BD Inc. owed A Inc. $188,981 for commissions — Clause in agreement provided that upon its expiry, or if BD Inc. terminated as result of A Inc.'s failure to remedy default in time, BD Inc.'s obligations to pay commissions would cease immediately — Trustee in bankruptcy for estate of A Inc. brought successful action to recover amount by which commissions owing by BD Inc. exceeded amounts owing to BD Inc. in respect of inventory — BD Inc. appealed — Appeal dismissed — There was no basis to interfere with trial judge's finding of fact that A Inc.'s failure to pay BD Inc. was due to A Inc.'s insolvency — Clause provided windfall to one of A Inc.'s creditors and, in context of insolvency, clause was inequitable — There was agreement with trial judge that clause should be declared unenforceable as against A Inc.'s trustee in bankruptcy as contrary to overriding public policy requiring equitable and fair distribution among bankrupt's creditors.

Table of Authorities

Cases considered:

Canadian Imperial Bank of Commerce v. Bramalea Inc. (1995), 1995 CarswellOnt 2253, 33 O.R. (3d) 692, 44 B.L.R. (2d) 188 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 65.1 [en. 1992, c. 27, s. 30] — referred to

s. 95 — referred to

s. 95(1) — referred to

APPEAL from judgment allowing action for unpaid commissions arising from dealership agreement between telecommunications companies.

***Per curiam*:**

1 This appeal considers whether a clause in an Independent Dealer Agreement between the appellant, Bell Distribution Inc., and Aircell Communications Inc. relieving Bell of its obligation to pay unpaid commissions to Aircell on termination of the Agreement is void as against Aircell's trustee in bankruptcy.

2 For the reasons below, we agree with the trial judge that the clause is not enforceable as against the trustee, and accordingly dismiss this appeal.

3 Briefly, the relevant facts are as follows.

4 Bell appointed Aircell as an independent dealer of Bell's telecommunications products and services. As such, Aircell purchased inventory from Bell and was entitled to commissions in relation to services Aircell sold.

5 Aircell experienced financial difficulty; it owed Bell $64,000 for inventory.

6 The Agreement contained a provision entitling Bell to terminate it on notice to Aircell if Aircell commenced any proceedings related to Aircell under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act").

7 In a meeting at which a representative of Bell was present, Aircell explored restructuring options. Unbeknownst to Bell, at the time of the meeting, Aircell had filed a Notice of Intention to make a proposal under the Act. After the meeting, Bell gave notice to Aircell that it would terminate the Agreement if Aircell did not pay the outstanding amount within 30 days.

8 Aircell was deemed a bankrupt before the expiry of the 30-day notice period, and therefore before the effective date of termination of the Agreement. At the time, Bell owed Aircell $188,981 for commissions. The Agreement provides that upon its expiry, or if Bell terminates the Agreement as a result of Aircell's failure to remedy a default in payment within 30 days after notice of default, or otherwise in accordance with the Agreement, all of Bell's obligations to pay commissions "shall cease immediately". Bell relied on this clause to withhold payment of commissions to Aircell's trustee in bankruptcy. The trustee brought an action to recover the amount by which the commissions owing by Bell exceeded the amounts owing to Bell in respect of inventory.

9 The trial judge found that Aircell's failure to pay Bell was due to its insolvency and that, as against the claim of Aircell's trustee in bankruptcy, the clause at issue is void both pursuant to *Canadian Imperial Bank of Commerce v. Bramalea Inc.* [1995 CarswellOnt 2253 (Ont. Gen. Div. [Commercial List])], 1995 CanLII 7420, and under ss. 65.1 and s. 95 of the Act. He ordered Bell to pay the trustee the amount by which the unpaid commissions exceeded the amounts owing by Aircell.

10 In *Canadian Imperial Bank of Commerce v. Bramalea Inc.*, Blair J. considered a clause that permitted a noninsolvent partner to purchase an insolvent partner's interest at a price less than fair market value. He concluded that a contractual provision triggered only in the event of insolvency or bankruptcy which would deprive creditors of value otherwise available to them, and effectively divert the value to an unsecured creditor, is void. This principle - sometimes referred to as "fraud upon the bankruptcy law" - violates the public policy of equitable and fair distribution among unsecured creditors in an insolvency. Justice Blair determined that the clause at issue was void.

11 We see no basis for interfering with the trial judge's finding of fact that Aircell's failure to pay Bell was due to Aircell's insolvency.

12 While the clause at issue in this case is triggered upon termination of the agreement for any number of reasons, and not only upon insolvency or bankruptcy, it was in fact triggered as a consequence of Aircell's insolvency. The clause provides a windfall to one of Aircell's creditors: Bell. In the context of an insolvency, the clause is inequitable. We agree with the trial judge that the principle in *Canadian Imperial Bank of Commerce v. Bramalea Inc.* should be extended to declare the clause unenforceable as against Aircell's trustee in bankruptcy as contrary to the overriding public policy that requires equitable and fair distribution among a bankrupt's creditors.

13 Having determined that the trial judge did not err in declaring the clause unenforceable as against the trustee on the foregoing basis, it is unnecessary for us to address the trial judge's alternative conclusion that the clause is void pursuant to ss. 65.1 and 95(1) of the Act. We note, however, that the trustee concedes that these provisions do not apply in the circumstances.

14 The appeal is accordingly dismissed. The trustee shall be entitled to costs, inclusive of disbursements and HST, in the amount of $15,000.

Appeal dismissed.

End of Document

Tab 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: S. Funtig & Associates Inc. v. Windsor (City) | 2008 CarswellOnt 4624, 169 A.C.W.S. (3d) 22, 46 C.B.R. (5th) 283, [2008] O.J. No. 3038, 49 M.P.L.R. (4th) 47 | (Ont. S.C.J., Jul 31, 2008)

1995 CarswellOnt 2253
Ontario Court of Justice (General Division) [Commercial List]

Canadian Imperial Bank of Commerce v. Bramalea Inc.

1995 CarswellOnt 2253, 33 O.R. (3d) 692, 44 B.L.R. (2d) 188

Canadian Imperial Bank of Commerce and Montreal Trust Company of Canada as Trustee for Debentureholders, Plaintiffs and Bramalea Inc. and all Other Companies Set Out in Schedule "A" Attached Hereto, Defendants

Blair J.

Judgment: December 13, 1995
Docket: 95-CQ-63582

Counsel: *Ronald F. Biderman*, *Ronald Birken* and *Wendy Greenspoon*, for Moving Parties.
Daniel R. Dowdall, for the Receiver and Manager.
Derrick Tay, for the Trustee in Bankruptcy.
Alan H. Mark and *Robert Chadwick*, for Montreal Trust (Debentureholders).

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Contracts

VI Illegal contracts (substantive validity)
  VI.3 Contrary to public policy
    VI.3.f Miscellaneous

Headnote

Contracts --- Illegal contracts (substantive validity) — Contrary to public policy — General

Table of Authorities

Cases considered by *Blair J.*:

Borland's Trustee v. Steel Brothers Canada Ltd., [1901] 1 Ch. 279 (Eng. Ch. Div.) — applied

Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc. (1993), (sub nom. *Raymond, Chabot, Fafard, Gagnon Inc. c. Dubois)* [1994] R.J.Q. 55, (sub nom. *Raymond, Chabot, Fafard, Gagnon Inc. c. Dubois)* [1994] R.D.I. 20, 37 C.B.R. (3d) 207 (C.A. Que.) — referred to

Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc., 39 C.B.R. (3d) 253, (sub nom. *Dubois v. Coopérants (Les), Société mutuelle d'assurance-vie (Liquidation))* 196 N.R. 81, (sub nom. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois)* 133 D.L.R. (4th) 643, (sub nom. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois)* [1996] 1 S.C.R. 900 (S.C.C.) — referred to

Daoust c. Cie de gestion Gar-Vin Inc., (sub nom. *Fréchette, Re)* 42 C.B.R. (N.S.) 50, [1982] C.S. 482, (sub nom. *Frechette, Re)* 138 D.L.R. (3d) 61 (C.S. Que.) — referred to

Fort Frances (Town) v. Boise Cascade Canada Ltd. (1981), (sub nom. *Boise Cascade Canada Ltd. v. R.)* 34 O.R. (2d) 18, (sub nom. *Boise Cascade Canada Ltd. v. R.)* 15 B.L.R. 1, (sub nom. *Boise Cascade Canada Ltd. v. R.)* 126 D.L.R. (3d) 649 (Ont. C.A.) — referred to

Harrison, Re (1880), 14 Ch. D. 19 (Eng. C.A.) — referred to

Knechtel Furniture Ltd., Re (1985), 56 C.B.R. (N.S.) 258, 20 E.T.R. 217, 8 C.C.E.L. 193 (Ont. S.C.) — referred to

R. v. Murphy (1803), 1 Sch. & Lef. 44 (Ireland Ch.) — referred to

MOTION by partners to exercise contractual right to purchase interest of insolvent partner.

***Blair J.*:**

1 The issues on this Motion arise out of a partnership which was formed to develop and operate a shopping mall known as Shops on Steeles. The partnership is governed by a Partnership Agreement executed in 1973 between the Moving Parties (who together held a 50% interest in the partnership) and Trizec (holder of the remaining 50% interest). In 1986 Bramalea Inc. succeeded to the interest of Trizec in the partnership. Trizec, and subsequently Bramalea, were the managers and operators of the shopping mall.

2 In 1995 Bramalea Inc. was placed in receivership and bankruptcy.

3 What is at issue on this motion is a particular clause in the Partnership Agreement which contemp ates insolvency and which provides that, in the event of the insolvency of one of the partners, the non-insolvent partner (provided it does not waive the event of insolvency) may purchase the interest of the insolvent partner at *the lesser of* book value or fair market value.

4 The Moving Parties have sought to exercise that right by serving a Notice of Intention to purchase the Bramalea interest at book value, estimated to be approximately $200,000. This is contested by the Receiver, the Trustee and other creditors. They submit that fair market value exceeds book value and, on the evidence, may exceed book value by a considerable amount (perhaps by as much as $2 million or $3 million). Mr. Biderman concedes, on behalf of the Moving Parties, that the fair market value of Bramalea's interest in the Partnership does exceed book value, although he does not accept the Responding Parties' evidence as to the extent of that difference. On the view I take of the case, the exact spread between book value and fair market value is not important. I am satisfied that the difference is more than minimal, and enough to attract the interest of the Receiver and Trustee and the creditors.

5 The Moving Parties submit that the Agreement entered into in 1973 was an arm's length commercial transaction, entered into in good faith and indeed, carried out for more than 20 years. The contract was freely entered into, they argue, and when the resulting obligations are of a *nature* contemplated by the contract, the courts should not interfere merely because a contract results in onerous obligations that may not have been contemplated when the contract was entered into: see *Fort Frances (Town) v. Boise Cascade Canada Ltd.* (1981), 34 O.R. (2d) 18 (Ont. C.A.). Except for statutory provisions dealing with translucent preferences on settlements, they conclude a Trustee succeeds only to the rights of the bankrupt and has to higher rights.

6 The Respondents submit, on the other hand, that there is a higher principle it play here and that the question is not one of interfering with freedom of contract, but rather one of whether or not the specific contractual provision in the Partnership Agreement to which I have alluded is void as being contrary to public policy. While the provision may very well be valid as between the contracting parties, they say, if it is unenforceable as against the Trustee and the Receiver in the bankruptcy and receivership proceedings. As Mr. Dowdall put in his argument, and more specifically in his factum:

> A provision in an agreement which provides that upon an insolvency, value is removed from the reach of the insolvent person's creditors to which would otherwise have been available to them, and places that value in the hands of others — presumably in a contract other than a valid secured transaction — is void on the basis that it violutes the public policy of equitable and fair distribution amongst unsecured creditors in insolvency situations.

7 I have concluded that this submission is correct and that it applies in the circumstances of this case.

8 The principle is sometimes referred to as that of "fraud upon the bankruptcy law", by which is meant not necessarily "fraud" in the sense of dishonesty or impropriety, but fraud in the effect. (I hasten to note that there is no suggestion of the former in the circumstances of this case.) The principle is stated most simply by Farwell, J. in *Borland's Trustee v. Steel Brothers Canada Ltd.*, [1901] 1 Ch. 279 (Eng. Ch. Div.), at p. 291, in the context of a share purchase agreement, as follows:

> If I came to the conclusion that there was any provision in these articles compelling persons to sell their shares in the event of bankruptcy at something less than the price they would otherwise obtain, such a provision would be repugnant to the bankruptcy law. (underlining added)

9 While some of the older authorities in which this principle was first developed involved factual situations where the property itself was to be conveyed, to the detriment [illegible text] the question of price or value to the creditors, I am satisfied that the principle which underlies the notion is the deprivation of the creditors' interests in a bankruptcy as a result of a contractual provision that is triggered only in the event of bankruptcy or insolvency and which results in property that would otherwise be available to the bankrupt (and the creditors, or its value, being diverted to which is in effect, a preferred unsecured creditor: see *Harrison, Re* (1880), 14 Ch. D. 19 (Eng. C.A.) per James L.J. at p. 25; *R. v. Murphy* (1803), 1 Sch. & Lef. 44 (Ireland Ch.), at 49. There are cases where the principle has been applied in circumstances involving a transfer, triggered by insolvency, at a discounted value: see *Daoust c. Cie de gestion Gar-Vin Inc.* (1982), 42 C.B.R. (N.S.) 50 (C.S. Que.); *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.* (1993), [1994] R.J.Q. 55 (C.A. Que.); (leave to appeal to SCC granted) [(1996), 39 C.B.R. (3d) 253 (S.C.C.)]. See also *Knechtel Furniture Ltd., Re* (1985), 8 C.C.E.L. 193 (Ont. S.C.).

10 Here, it is clear from the provisions of the Partnership Agreement itself that the parties contemplated a transfer to one of the partners of the other partner's partnership interest, solely in the event of insolvency of the latter, at a price *less than* what could be obtained for that interest on the market. While this provision may have made perfect sense, as between the contracting parties, in terms of preserving their partnership and their interests in the partnership. I do not see how the provision can survive the scrutiny of the "fraud on the bankruptcy law" principle established in the foregoing line of authorities.

11 Accordingly, the motion must be dismissed. I can see no reason why costs should not follow the event, but the Respondents should have only one set of costs in the circumstances. I fix them at $7,000.00

Motion dismissed.

Tab 6

2017 ABQB 308
Alberta Court of Queen's Bench

Funk v. Wawanesa Mutual Insurance Co.

2017 CarswellAlta 801, 2017 ABQB 308, [2017] I.L.R. I-5971, [2017] A.W.L.D. 2246, 279 A.C.W.S. (3d) 163, 52 Alta. L.R. (6th) 194, 68 C.C.L.I. (5th) 138

Andrew Funk (Plaintiff / Respondent / Cross-Applicant) and Wawanesa Mutual Insurance Company (Defendant / Applicant / Cross-Respondent)

E.J. Simpson J.

Heard: March 16, 2017
Judgment: May 8, 2017
Docket: Edmonton 0903-19437

Counsel: Timothy R. Wood, for Plaintiff / Respondent / Cross-Applicant
Wendy N. Moody, for Defendant / Applicant / Cross-Respondent

Subject: Civil Practice and Procedure; Contracts; Insurance

Related Abridgment Classifications

Insurance

XII Automobile insurance
  XII.7 Uninsured automobile coverage
    XII.7.b Limit and extent of liability
      XII.7.b.iii Miscellaneous

Headnote

Insurance --- Automobile insurance — Uninsured automobile coverage — Limit and extent of liability — Miscellaneous

Insured was operating vehicle when it entered ditch and struck field approach — Insured sustained number injuries including spinal cord injury — Insurer alleged that family protection endorsement attached to Alberta standard automobile policy provided no coverage to insured — Insurer brought application for summary dismissal of insured's statement of claim — Application dismissed — Declaratory order was granted to effect that insured had coverage under endorsement — Plain reading of definition of "unidentified automobile" in endorsement risked encouraging unreasonable conduct, s 545(1) of Insurance Act could not assist insured in this case because it came into effect after insured's right to claim indemnity under endorsement arose — Common definition of "unidentified automobile" in endorsement and standard policy produced in these circumstances strange result — Including requirement of "physical contact", between unidentified automobile and insured who avoided contact, left insured with no opportunity to access coverage, as intended by insuring agreement, even though insured could produce otherwise required corroborating evidence supporting his allegations — If insured deliberately made contact he risked losing coverage for his deliberate act but if he avoided contact he lost coverage for driving defensively — Enforcement of "physical contact" term in endorsement would tend to lead to result contrary to public policy; and as such should not be enforced.

Table of Authorities

Cases considered by *E.J. Simpson J.*:

Angus v. Hart (1988), 9 M.V.R. (2d) 245, (sub nom. *Angus v. Sun Alliance Insurance Co.*) [1988] 2 S.C.R. 256, (sub nom. *Angus v. Sun Alliance Insurance Co.*) [1988] I.L.R. 1-2370, 52 D.L.R. (4th) 193, 87 N.R. 200, 30 O.A.C. 210, 34 C.C.L.I. 237, 47 C.C.L.T. 39, 65 O.R. (2d) 638n, 1988 CarswellOnt 966, 1988 CarswellOnt 41, 65 O.R. (2d) 638, 65 O.R. (2d) 638 (note) (S.C.C.) — followed

Brazier v. Columbia Fishing Resort Group Corp. (1997), 1997 CarswellBC 1000, 33 B.C.L.R. (3d) 293 (B.C. S.C.) — considered

Brazier v. Columbia Fishing Resort Group Corp. (1997), 1997 CarswellBC 1431 (B.C. C.A. [In Chambers]) — referred to

Bruno Appliance and Furniture Inc. v. Hryniak (2014), 2014 SCC 8, 2014 CarswellOnt 642, 2014 CarswellOnt 643, 37 R.P.R. (5th) 63, 27 C.L.R. (4th) 65, 47 C.P.C. (7th) 1, 2014 CSC 8, 12 C.C.E.L. (4th) 63, 21 B.L.R. (5th) 311, 128 O.R. (3d) 799 (note), 366 D.L.R. (4th) 671, 453 N.R. 101, 314 O.A.C. 49, [2014] 1 S.C.R. 126 (S.C.C.) — considered

Clear Hills Development Corp. v. Horseman (2016), 2016 ABQB 341, 2016 CarswellAlta 1143 (Alta. Q.B.) — considered

Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. 1-1176, 1979 CarswellQue 157, 1979 CarswellQue 157F, 29 O.R. (2d) 720 (S.C.C.) — followed

Gustavson Drilling (1964) Ltd. v. Minister of National Revenue (1975), [1977] 1 S.C.R. 271, [1976] C.T.C. 1, 75 D.T.C. 5451, 66 D.L.R. (3d) 449, 7 N.R. 401, 1975 CarswellNat 330, 1975 CarswellNat 376 (S.C.C.) — considered

Kozel v. Personal Insurance Co. (2014), 2014 ONCA 130, 2014 CarswellOnt 1790, 119 O.R. (3d) 55, 315 O.A.C. 378, 61 M.V.R. (6th) 1, 372 D.L.R. (4th) 265, 31 C.C.L.I. (5th) 171, [2014] I.L.R. I-5636 (Ont. C.A.) — referred to

Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co. (2016), 2016 SCC 37, 2016 CSC 37, 2016 CarswellAlta 1699, 2016 CarswellAlta 1700, [2016] 10 W.W.R. 419, 54 B.L.R. (5th) 1, 59 C.C.L.I. (5th) 173, 56 C.L.R. (4th) 1, 487 N.R. 1, [2016] I.L.R. I-5917, 404 D.L.R. (4th) 258, [2016] 2 S.C.R. 23 (S.C.C.) — followed

Marche v. Halifax Insurance Co. (2005), 2005 SCC 6, 2005 CarswellNS 77, 2005 CarswellNS 78, 18 C.C.L.I. (4th) 1, 248 D.L.R. (4th) 577, [2005] I.L.R. 4383, 330 N.R. 115, 230 N.S.R. (2d) 333, 729 A.P.R. 333, [2005] 1 S.C.R. 47, [2005] R.R.A. 1, 2005 CSC 6 (S.C.C.) — considered

Mohr v. Paul Revere Life Insurance Co. (1999), 1999 CarswellBC 686, 11 C.C.L.I. (3d) 249, 18 B.C.T.C. 188 (B.C. S.C.) — referred to

P. (W.) v. Alberta (2014), 2014 ABCA 404, 2014 CarswellAlta 2152, 378 D.L.R. (4th) 629, 62 C.P.C. (7th) 111, [2015] 5 W.W.R. 430, 588 A.R. 110, 626 W.A.C. 110, 7 Alta. L.R. (6th) 319 (Alta. C.A.) — referred to

Pense v. Northern Life Assurance Co. (1907), 15 O.L.R. 131, 10 O.W.R. 826, 1907 CarswellOnt 285 (Ont. C.A.) — referred to

Poulin v. Wawanesa Mutual Insurance Co. (2016), 2016 ABQB 547, 2016 CarswellAlta 1992, 44 Alta. L.R. (6th) 374 (Alta. Q.B.) — considered

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994), [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, (sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.*) [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 744, [1994] 2 S.C.R. 490, 1994 CarswellAlta 769 (S.C.C.) — considered

Somersall v. Friedman (2002), 2002 SCC 59, 2002 CarswellOnt 2550, 2002 CarswellOnt 2551, 25 M.V.R. (4th) 1, 39 C.C.L.I. (3d) 1, (sub nom. *Scottish & York Insurance Co. v. Somersall*) 215 D.L.R. (4th) 577, 292 N.R. 1, [2002] I.L.R. I-4114, 163 O.A.C. 201, [2002] R.R.A. 679, [2002] 3 S.C.R. 109, 2002 CSC 59 (S.C.C.) — considered

Windsor v. Canadian Pacific Railway (2014), 2014 ABCA 108, 2014 CarswellAlta 395, [2014] 5 W.W.R. 733, 94 Alta. L.R. (5th) 301, 371 D.L.R. (4th) 339, 56 C.P.C. (7th) 107, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 572 A.R. 317, (sub nom. *Windsor v. Canadian Pacific Railway Ltd.*) 609 W.A.C. 317 (Alta. C.A.) — referred to

776826 Alberta Ltd. v. Ostrowercha (2015), 2015 ABCA 49, 2015 CarswellAlta 155, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 593 A.R. 391, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 637 W.A.C. 391 (Alta. C.A.) — referred to

Statutes considered:

Insurance Act, R.S.A. 2000, c. I-3
Pt. 5, subpt. 3 — referred to

s. 513 — referred to

s. 545 — considered

s. 545(1) — considered

s. 552 — considered

s. 552(1) — considered

Insurance Act, R.S.N.S. 1989, c. 231
Generally — referred to

Insurance Amendment Act, 2008, S.A. 2008, c. 19
Generally — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 10 — considered

s. 16 — referred to

Motor Vehicle Accident Claims Act, R.S.A. 2000, c. M-22

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 7.3(1)(b) — considered

APPLICATION by insurer for summary dismissal of insured's statement of claim.

***E.J. Simpson J.*:**

Introduction

1 The Defendant/Applicant, Wawanesa Mutual Insurance Company (Wawanesa), brings an application for summary dismissal of the Plaintiff/Respondent's Statement of Claim. Wawanesa alleges the SEF No. 44 Family Protection Endorsement (Endorsement or SEF 44) — attached to the Alberta Standard Automobile Policy SPF No. 1 — provides no coverage to the insured, the Plaintiff/Respondent, Andrew Funk (Mr. Funk).

2 Mr. Funk disputes the denial of coverage, and brings a cross-application for summary judgment and an order setting the matter down for an assessment of the damages he has claimed.

Issue

3 The overarching issue of importance to Mr. Funk is whether the Endorsement provides him coverage in the circumstances in which he finds himself.

4 The answer to that question turns on the interpretation of the term "unidentified automobile" in the Alberta Standard Automobile Policy SPF No. 1 (Standard Policy or SPF #1) and the Endorsement attached to it.

Decision

5 The summary dismissal application brought by Wawanesa is denied.

6 A declaratory order is granted in favour of Mr. Funk to the effect that he has coverage under the Endorsement.

7 Given the nature and scope of the present corroborating evidence adduced by Mr. Funk, I am *not* satisfied that a disposition that is fair and just to both parties can be made on the existing record, regarding the issue of liability. His application for summary judgment, with respect to liability, is denied.

Facts

8 Mr. Funk, on May 20, 2008, owned a 1999 Jeep TJ. He carried insurance for it with Wawanesa. His insurance included the Standard Policy and the attached Endorsement.

9 The parties agree to the following facts:

(a) the Plaintiff, Andrew Funk (date of birth — December 12, 1985), was involved in a single vehicle rollover accident on May 20, 2008, on 101 Street, approximately 450 metres south of 30 Avenue, Edmonton, Alberta;

(b) the Plaintiff was operating a 1999 Jeep TJ and was travelling southbound on 101 Street when the vehicle entered the right ditch and struck a field approach;

(c) as a result of the accident, the Plaintiff sustained numerous injuries including a spinal cord injury; and

(d) the Plaintiff's injuries have affected him in all aspects of his life.

10 Mr. Funk deposes that while operating his vehicle on May 20, 2008 at approximately 10:00 p.m., it was dark and the area where the rollover occurred had no street lights. He states that while travelling south, he travelled in his own lane on the two-lane partially paved roadway, straight and flat, at the location of the rollover. He was familiar with the road having driven it many times.

11 He deposes that he noticed the headlights of an oncoming vehicle and he remained in his lane, southbound. The road was sufficiently wide enough for two vehicles to pass one another. However, as the other vehicle approached, it came towards him.

12 Mr. Funk swerved to the right to avoid an impact with the oncoming vehicle. When he swerved, his vehicle entered the ditch on his right, struck an approach and rolled over in an adjacent field.

13 He deposes that no other objects were on the road that may have caused him to swerve, including specifically a deer.

14 Mr. Funk believes that without swerving, his vehicle and the other would have collided.

15 He acknowledges he has no information suggesting his vehicle collided with the oncoming vehicle nor does he recall a collision.

16 He believes the other vehicle left the scene, and he has no information as to the identity of the driver or the owner of it.

17 Mr. Funk retained and instructed counsel to advance a claim on his behalf for the injuries and other losses he suffered from the rollover. He came to understand that as the identity of the other driver and vehicle were not known, his compensatory recovery was statutorily limited to $200,000, pursuant to the *Motor Vehicle Accident Claims Act*, RSA 2000, c M-22. Accordingly, he instructed his legal counsel to advance a claim against Wawanesa for coverage under the Endorsement, anticipating there would be a deficiency between his losses and any potential damages he might recover statutorily.

18 He settled his claim with the Motor Vehicle Accidents Claim Fund for the statutory limit of $200,000 plus costs. However, he assessed his claim in excess of $1,000,000, and sought the balance under the Endorsement.

19 Mr. Funk's uncle attended the scene on May 23, 2008. He took photographs of tire tracks leading from the road into the ditch and the ground disturbances from the rollover. These were supplied to Donald K. Pohl, an accident reconstruction engineer, who prepared a report.

20 Mr. Pohl concluded that the high angle of entry into the ditch indicated an evasive maneuver, which would require turning of the steering wheel approximately 90 degrees to the right. Mr. Pohl concluded the ditch entry angle was consistent with the recollection of the Plaintiff that he steered to the right to avoid an oncoming vehicle.

21 Wawanesa in turn filed an expert's report in which the expert concluded there was no damage to the Jeep to support that it was physically contacted by another vehicle before entering the ditch.

22 Upon Mr. Funk advancing his claim for coverage under the Endorsement, Wawanesa denied his claim on the grounds that the vehicle Mr. Funk alleges came towards him does not meet the definition of an "unidentified automobile," as defined in his insurance policy.

The Policy Wording

23 Section 2 of the insuring agreement clause in the Endorsement reads:

In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the Insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an *inadequately insured motorist* as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile. (*emphasis added*)

24 Section 1 of the Endorsement defines the term "inadequately insured motorist":

1 (e) The term inadequately insured motorist means:

. . .

ii. the driver or owner of an uninsured automobile or unidentified automobile as defined in the "Uninsured Automobile Coverage" of the Policy.

Provided That

. . .

C. where an eligible claimant alleges that both the owner and driver of an automobile referred to in 1(e)(ii) cannot be determined, the eligible claimant's own evidence of the involvement of such automobile must be corroborated by other material evidence; and

D. "other material evidence" for the purposes of this section means:

i. independent witness evidence, other than evidence of a spouse as defined in this endorsement or a dependent relative as defined in this endorsement; or

ii. Physical evidence indicating the involvement of an unidentified automobile.

25 Section B of the Standard Policy deals with Accident Benefits. That section defines the term unidentified automobile in its Subsection 3 — Uninsured Motorist Cover as follows:

(3) An unidentified automobile under this subsection means an automobile which causes bodily injury or death to an insured person arising out of *physical contact of such automobile with the automobile of which the insured person is an occupant* at the time of the accident, provided

(a) the identity of either the owner or driver of such automobile cannot be ascertained . . . (*emphasis added*)

Law

26 Rule 7.3 (1)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010 provides that a party may apply to the Court for summary judgment in respect of all or part of a claim on the ground that there is no merit to a claim or part of it. This rule invites "a broad, practical and holistic approach to summary judgement applications": *Clear Hills Development Corp. v. Horseman*, 2016 ABQB 341 (Alta. Q.B.) at para 5; citing *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.) at para 25, (2014), 588 A.R. 110 (Alta. C.A.).

27 The modern test for summary judgment is for the court to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record: *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.). From the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record by using that alternative method for adjudication. From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim: *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.) at paras 9-13, (2015), 593 A.R.

391 (Alta. C.A.); citing *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para 13, (2014), 572 A.R. 317 (Alta. C.A.).

28 The parties agree the Court should, when interpreting an insurance policy, follow the two-step procedure in *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49 (S.C.C.). At the first step, effect must be given to the intention of the parties taken from the words of the contract. At step two, if the Court has found ambiguity, it must resolve the ambiguity.

29 The Court resolves any doubt as to the meaning and scope of the excluding or limiting term of the contract by the application of the *contra proferentem* doctrine against the party inserting the clause and now relying upon it.

30 Apart from that doctrine, the Court must apply the normal rules of construction in order to reach an interpretation which, from the whole of the contract, would tend to advance or promote the intention of the parties upon the making of the contract.

Positions of the Parties

31 Mr. Funk and Wawanesa disagree as to whether at the first step of the interpretation procedure any ambiguity exists regarding the definition of an "unidentified automobile."

32 Mr. Funk sets out his position in paragraphs 32 and 33 of his Written Brief as follows:

> 32. However, the definition in the SPF #1 is entirely different from that set out in the SEF 44. Specifically, the SPF #1 sets out an evidentiary condition that is different from the requirements stipulated in the SEF 44, yet it is somehow supposed to be included in the SEF 44.
>
> 33. The SPF #1 refers to physical contact between the insured's vehicle and the unidentified vehicle, whereas the SEF 44 refers to corroboration of the unidentified vehicle by physical evidence [which] indicates the involvement of an unidentified automobile. These are two separate and distinct tests. They are not compatible, nor reconcilable.

33 Whereas, Wawanesa submits the plain and ordinary meaning of the phrase "arising out of physical contact of such automobile with the automobile of which the insured person is an occupant" excludes coverage for Mr. Funk in these circumstances, where he allegedly avoided contact with an unidentified vehicle, because the insured's vehicle and the unidentified vehicle did not make physical contact.

34 Mr. Funk argues that Justice Sanderman dealt with this issue of interpretation in the case of *Poulin v. Wawanesa Mutual Insurance Co.*, 2016 ABQB 547, 44 Alta. L.R. (6th) 374 (Alta. Q.B.) (*Poulin*), finding an ambiguity.

35 In my view, Sanderman J dealt with the definition of "inadequately insured motorist," which was defined *differently* in the endorsement and in the policy: *Ibid* at para 10. As such, *Poulin* is distinguishable from the present case.

36 Mr. Funk argues that because subsections 1(e)(ii) C and D of the Endorsement require corroboration by physical evidence while the Standard Policy refers to physical contact, the two sections create different tests, and thereby cause an ambiguity.

37 The Standard Policy definition, he argues, is much stricter and restrictive than the one found in the Endorsement.

One Definition Exists

38 Interestingly, although the Endorsement refers to the definition of an "unidentified automobile" as defined in the "Uninsured Automobile Coverage" section of the Standard Policy, no such heading exists in the Standard Policy. Nonetheless, the parties take no issue with the only such definition found under "Subsection 3 — Uninsured Motorist Cover," there being no other definition of "unidentified automobile" in the Standard Policy.

39 "Unidentified automobile" has no definition in the Endorsement. Rather, the Endorsement incorporates by reference the definition in the Standard Policy. Consequently, the definition in the Endorsement cannot be ambiguous. The definition in the Endorsement is identical to the one in the Standard Policy.

40 The Standard Policy states that an "unidentified automobile" means an automobile which causes bodily injury or death to an insured person arising out of *physical contact* of such automobile with the automobile of which the insured person is an occupant at the time of the accident. (*emphasis added*)

41 The words "physical contact" can only refer to a situation where the unidentified automobile and the one occupied by the insured must, during their encounter, touch one another.

42 Thus, Mr. Funk's interpretation of those words is incorrect because his interpretive approach takes the evidentiary requirement of corroboration of physical contact, as required under clauses C and D of the Endorsement, and incorporates it, wrongly, as part of the definition of "uninsured automobile," specified in the Standard Policy. That use of clauses C and D makes no sense because D(ii) refers to physical evidence indicating the involvement of an unidentified automobile.

43 In other words, Mr. Funk's interpretation conflates the issue of entitlement to coverage with the separate issue of the evidence required to establish his claim for coverage. Clauses C and D describe a standard of proof for the physical contact required in the definition of an unidentified automobile. They do not form part of the definition.

44 The Supreme Court of Canada in *Consolidated-Bathurst* at 899, quoting from (*Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 (Ont. C.A.) at 137, 1907 CarswellOnt 285 (Ont. C.A.)), commented that:

> There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch on natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used.

45 Recently, our Supreme Court reaffirmed this position in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (S.C.C.) at para 49, [2016] 2 S.C.R. 23 (S.C.C.):

> The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in [***Progressive Homes Ltd v Lombard General Insurance Co of Canada***, 2010 SCC 33, [2010] 2 SCR 245]. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole.

46 In the present matter, only one definition exists. There is no ambiguity reading the contract as a whole. The Standard Policy sets out the definition, and the Endorsement incorporates that definition by reference.

47 The words "physical contact" require just that — touching of surfaces — between the two vehicles.

Unjust or Unreasonable Result

48 Since there is no ambiguity in the meaning of the term "physical contact," the alternative issue raised by Mr. Funk during oral arguments is whether the application of that term, in the circumstances of the insured's accident, as contained in the insurance contract, is unjust or unreasonable as not to be binding on the insured, pursuant to the provision of s 545(1) of the *Insurance Act*, RSA 2000, c I-3.

49 For the purpose of my analysis in this Judgment, s 545(1) of the *Insurance Act* reads:

> If a contract contains a [term, the term,] is not binding on the insured if it is held to be unjust or unreasonable by the Court before which a question relating to it is tried.

50 On its face, this section permits the Court to relieve an individual from a binding contractual term if the Court finds the term unreasonable.

51 A similar provision in the *Nova Scotia Insurance Act*, RSNS 1989, c 231, was analyzed in *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.) (*Marche*).

52 *Marche* dealt with the statutory insurance condition requiring an insured to inform the insurer of a material change to the risk, which the insurer argued was created by leaving the insured property vacant. The insured had not informed the insurer of the vacancy, a vacancy that was uneventful. The property was destroyed by fire *after* a tenant had moved in and the insurer sought to invalidate coverage because of the earlier failure to inform. At paras 10-12, McLachlin CJ framed the issues as:

> For others, the question is whether s. 171 [i.e. the similar provision to Alberta's s 545] applies not only to delete conditions that are unreasonable on their face (should there be any), *but also to relieve against the results of applying conditions that, in the particular circumstances of the case, are unreasonable in their application or draconian in their consequences*. Framed in these terms, the question takes on an entirely different complexion — which I find more attractive because it avoids an inequitable result otherwise inescapable.
>
> The wording of s. 171 permits the issue to be characterized either way, but the second, in my view, better corresponds with the remedial objectives of the provision.
>
> It follows that the essential question is whether s. 171 applies to statutory conditions that are unreasonable or unjust in their application. For the reasons that follow, I conclude that it does. (*emphasis added*)

53 The Supreme Court confirmed that s 171 was intended to provide relief from unjust conditions and should be interpreted broadly to apply to both statutory and contractual provisions; and further, that a condition may be reasonable on its face and unjust in the particular circumstances. It upheld the trial judge's conclusion that the Court should relieve against any injustice.

54 Given the intention of parties to this type of insurance coverage, which is to compensate the insured person injured as a result of an incident involving an unidentified automobile, it seems unreasonable to enforce a term of the contract that demands physical contact between the insured motor vehicle and the unidentified automobile, notwithstanding the existence of physical evidence corroborating the fact that the relevant incident occurred as a result of the insured's defensive driving action directed at avoiding physical contact with another vehicle.

55 An insured would expect coverage when he took steps to avoid physical contact and could provide evidence to corroborate those steps which led to the damages he has suffered. An insured who could produce a witness or witnesses or physical evidence, or both, to corroborate his allegations of avoiding contact with an unidentified automobile would expect his own insurer to provide coverage under the Endorsement.

56 The effect of applying the "physical contact" portion of the definition in Mr. Funk's insurance policy generates an unreasonable outcome, where the insured who avoids physical contact in order to prevent an accident would have no coverage under the Endorsement, but the insured who takes no evasive action and physically contacts the unidentified vehicle has coverage.

57 Nevertheless, while I have concluded that the definition of "unidentified automobile" in the Endorsement, requiring "physical contact" between the insured's automobile and the other automobile that caused the accident, would lead to an unreasonable result, the provision of the *Insurance Act*, s 545(1) as it currently exists in Alberta, was *not* applicable to automobile insurance at the time Mr. Funk's rollover accident occurred. In other words, Mr. Funk can only benefit

from the retrospective application of s 545(1), where the legislature indicates the intention that the legislative provision applies retrospectively.

58 I now turn to examine the implication of the preceding paragraph.

Section 545 (1) and Retrospectivity

59 Neither party dealt with the issue of retrospectivity in their original briefs. Counsel for Mr. Funk raised the point on s 545 during oral arguments. Consequently, the parties were allowed time to file Supplemental Briefs in order to address the legal effect of that statutory provision. Wawanesa filed a Further Brief and Mr. Funk filed a Memo in response.

60 When Mr. Funk rolled his vehicle on May 20, 2008, s 545 (1) of the *Insurance Act*, RSA 2000, c I-3 did not exist. It came into force on July 1, 2012, pursuant to the *Insurance Amendment Act*, 2008 SA 2008, c 19 (see Proclamation, July 1, 2012, (2011) A Gaz 1, 580-581).

61 However, at the date of Mr. Funk's rollover, a similar section 552 (1) did appear in the *Insurance Act*, and it read:

> 552(1) When a contract
>
> > a) . . .
> >
> > b) contains any stipulation, condition or a warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,
>
> the exclusion, stipulation, condition or warranty is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

62 This s 552 provision was placed under Subpart 3 of Part 5 governing contracts of fire insurance and fire insurance policies. Further, Subpart 3 was specifically excepted from applying to contracts for automobile insurance. The old s 552 did *not* apply to automobile insurance on the date of Mr. Funk's accident.

63 The law generally presumes against applying a statutory provision retrospectively when the provision affects substantive issues implicating vested rights of the parties, absent a clear legislative indication to the contrary. In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue* (1975), [1977] 1 S.C.R. 271 (S.C.C.) at 279-282, (1975), 66 D.L.R. (3d) 449 (S.C.C.), the Supreme Court commented, *inter alia*, as follows:

> First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively . . .
>
> Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction.

64 When Mr. Funk rolled his vehicle, the right, if any, in respect of which he had to claim indemnity from Wawanesa, was a substantive right.

65 In this regard, the Supreme Court in *Angus v. Hart*, [1988] 2 S.C.R. 256 (S.C.C.) at paras 19-21, (1988), 52 D.L.R. (4th) 193 (S.C.C.) (CanLII) (*Angus*), observed that:

> A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but according to whether or not it affects substantive rights.

> . . .
>
> Whatever may be the reasons for this, and whether one agrees or disagrees with them, the provision of a complete defence to an action, just as much as the creation of a cause of action itself, is a substantive matter.
>
> . . .
>
> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. (*emphasis in original*)

66 Thus, a cause of action is a substantive right. In this case, Mr. Funk's cause of action is his claim for indemnity from Wawanesa, following the injuries he suffered when his vehicle rolled.

67 In *Somersall v. Friedman*, 2002 SCC 59 (S.C.C.) at para 30, [2002] 3 S.C.R. 109 (S.C.C.), the Supreme Court said:

> The question, therefore, is when the obligation to indemnify comes into being. In my view, the answer must be that the insurer becomes obliged to make the payment the moment the claim of the insured against the tortfeasor comes into being, that is, at the time of the accident. At that moment, all of the conditions set out in the SEF 44 will be satisfied; death or bodily injury has occurred, negligently caused by an inadequately insured motorist. In other words, all of the conditions necessary to make out a claim in tort against the inadequately insured driver come into being at the moment of the accident. The SEF 44 means to compensate the insured for the existence of such a claim against an inadequately insured driver. The obligation of the insurer, therefore, comes into being at the same time as the obligation of the tortfeasor to pay damages.

68 Mr. Funk's substantive rights under the Endorsement crystallized at the time of the rollover; so did Wawanesa's substantive rights. Those rights vested at the time of the rollover on May 20, 2008, and s 545(1) cannot be retroactively applied to interfere with them. The similar provision in the old s 552 was *only* applicable — on the day of Mr. Funk's rollover — to contracts of fire insurance and fire insurance policies.

69 The Supreme Court in *Angus* at para 28, sets out the policy reasons for not applying statutes retrospectively:

> This case is a good illustration of the policy reasons why statutes should not be given retrospective operation in the absence of an intention to do so that is either expressed in, or is necessarily implied by the statute. Substantial rights of insurance companies are affected by the decision of Galligan J. The reasoning regarding limitations Acts applies *a fortiori* to the situation of the insurance companies. Insurance companies calculate their premiums according to known risk factors. When the rates for the contract in question here were calculated, it was known that this particular risk — a suit in tort by Diane Angus against her husband — was precluded by s. 7. The insurance company relied upon that knowledge in setting its rates. A retrospective change to that circumstance should not lightly be implied. In [***Martin v Perrie***, [1986] 1 SCR 41], this Court held that the change of a limitation period for medical malpractice actions (from one year from the date of the Act to one year from the date of discovery of the damage) could not be given retrospective effect since physicians could have relied on the older provision to order their affairs (e.g., by destroying records) in such a way that they would be prejudiced by the change. The analogy here, in my view, is clear.

70 Accordingly, although the plain reading of the definition of an "unidentified automobile" in the Endorsement risks encouraging unreasonable conduct, s 545(1) of the *Insurance Act* cannot assist Mr. Funk in this case because it came into effect (under Part 5, Subpart 1 — General Insurance Provisions) *after* Mr. Funk's right to claim indemnity under the Endorsement arose.

71 In the result, s 545(1) of the *Insurance Act* cannot apply retrospectively so as to alter whatever rights accrued to Mr. Funk at the time of the rollover.

72 This conclusion, however, does not, in these circumstances, end the analysis.

Public Policy Consideration

73 Notwithstanding the fact that s 545 was not available to Mr. Funk at the time of the rollover, this Court is persuaded that the requirement of "physical contact" in the Endorsement would have *resulted* in the commission of a tortious act by the insured contrary to public policy. Rather than encouraging defensive driving on the part of the insured in order to avoid a collision, the provision of the Endorsement requires "physical contact" with the other automobile, creating a situation which obliges Mr. Funk to somehow make physical contact with the other automobile in order to benefit from insurance coverage by Wawanesa.

74 Applying the "physical contact" portion of the definition in Mr. Funk's insurance policy would produce a result at odds with public policy. Effectively, the insured who avoids physical contact has no coverage under the endorsement, but the insured who takes no evasive action and physically contacts the unidentified vehicle has coverage.

75 Courts have generally refused to enforce the term of a contract that would make the insured commit a tortious act: *Brazier v. Columbia Fishing Resort Group Corp.* (1997), 33 B.C.L.R. (3d) 293 (B.C. S.C.) at paras 16-17, 1997 CarswellBC 1000 (B.C. S.C.), leave to appeal to BCCA refused 1997 CarswellBC 1431 (B.C. C.A. [In Chambers]). In the case, the BC Supreme Court observed:

> In describing common law illegality, Waddams sets out a number of contracts which the court has declined to enforce. Those include <u>contracts to commit</u> a criminal offence or <u>a tortious act</u> . . .
>
> . . .
>
> In this regard, Waddams concludes at p. 374:
>
> > <u>Even though an agreement does not actually require</u>, for its performance, the commission of an illegal act, <u>it may be struck down if it tends to facilitate an illegality</u>.
> >
> > . . .
>
> In dealing with the philosophical basis for the scope of the power of the Court to intervene for reasons of public policy, Waddams concludes:
>
> > The assertion of such a wide power does not, of course, imply that it should be used arbitrarily or irrationally, but the recognition of the true basis for decisions, even though the principle is vague and general tends, it is suggested, towards a rational system of justice and therefore in the long run to stability and certainty. If it is recognized, for example, that the court interferes with an agreement not, as it were, automatically, because it falls into some established category, but only because on balance the desirability of enforcement is outweighed by other considerations important to society, several consequences follow. First, the heads of public policy may be extended or restricted according to the changing values of society. Secondly, the approach of the court to the consequences of the illegal agreement will require a similar balancing process . . . (*emphasis added*)

76 On balance, the desirability of enforcing the contractual term and the requirement of "physical contact" in the Endorsement is outweighed by the need to encourage or facilitate conduct that is *not* contrary to public policy. That is, the promotion of defensive driving on the part of the insured in a manner that avoids collision is more beneficial to the society than encouraging the insured to collide with another automobile in order to benefit from insurance coverage.

77 The common definition of an "unidentified automobile" in the Endorsement and the Standard Policy produces in these circumstances a strange result. Including the requirement of "physical contact" — between the unidentified automobile and the insured who avoided contact — leaves the insured with no opportunity to access coverage, as intended by the insuring agreement, even though the insured can produce the otherwise required corroborating evidence

supporting his allegations. This seems to encourage or facilitate conduct contrary to public policy: i.e. a collision provides coverage, but avoiding a collision does not.

78 Following this to its logical result leaves the insurer in a most desirable position. If an insured deliberately makes contact he risks losing coverage for his deliberate act. If he avoids contact he loses coverage for driving defensively. Having found no legal equivalent to more eloquently state it, the position of the insurer is, "heads I win, tails you lose".

79 Consequently, I find that the enforcement of the "physical contact" term in the Endorsement will tend to lead to a result contrary to public policy; and as such should not be enforced: *Brazier* at paras 16-17.

Exercise of Equitable Jurisdiction

80 Aside from the fact that the enforcement of the "physical contact" term in the Endorsement will produce a result contrary to public policy, I note the courts in Alberta (and other Canadian provinces) are mandated to administer concurrently all rules of equity and the common law: *Judicature Act*, RSA 2000, c J-2, s 16; CED Equity I.1.(a),]§1.

81 Relief against penalties and forfeitures is an established equitable doctrine or rule of equity. This Court is statutorily empowered "to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit": *Judicature Act*, s 10.

82 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: *Kozel v. Personal Insurance Co.*, 2014 ONCA 130 (Ont. C.A.) at para 28, (2014), 119 O.R. (3d) 55 (Ont. C.A.) (*Kozel*). In the present matter, Mr. Funk runs the risk of losing his insurance coverage interest because of his failure to make physical contact with the unidentified automobile that he claims caused the injuries he suffered from the rollover, as required by the Endorsement.

83 Relief from forfeiture is available in an insurance context: *Mohr v. Paul Revere Life Insurance Co.* (1999), 11 C.C.L.I. (3d) 249 (B.C. S.C.) at paras 39-41, 44, 1999 CanLII 5415.

84 The Supreme Court directs that 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 Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.) at para 32, *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* (1994), 115 D.L.R. (4th) 478 (S.C.C.) (WL) (*Saskatchewan Bungalows); Kozel* at para 31. On the existing record there are no arguments or evidence from parties as to the reasonableness or otherwise of Mr. Funk's conduct; although it seems to me that, if proven, a defensive driving maneuver seeking to avoid collision would be characterized as reasonable conduct. While the issue of unpaid premiums does not appear relevant in the present matter, the value of Mr. Funk's loss of insurance coverage is potentially of a significant magnitude where his defensive driving is considered a breach of his insurance policy.

85 The modified application of the test prescribed in *Saskatchewan Bungalows* to Mr. Funk's case and my conclusion that the enforcement of the "physical contact" term in the Endorsement will lead to a result contrary to public policy, show there is merit to Mr. Funk's claim for coverage under the Endorsement.

86 The decision to exercise the Court's equitable jurisdiction to relieve Mr. Funk from forfeiting his insurance coverage is informed by the Court's refusal to enforce a contractual term that would lead to a result contrary to public policy, not by sympathy.

87 In addition, although I have concluded earlier that s 545 was not operative at the time of Mr. Funk's rollover and *cannot* be applied retroactively, I note that it is now applicable to every contract [of insurance] made in Alberta other than a contract of (a) life insurance, (b) accident and sickness insurance, or (c) reinsurance: *Ibid*, s 513. Thus, the current application of s 545 to contracts of automobile insurance precludes the notion that the exercise of the Court's equitable

jurisdiction in the circumstances of Mr. Funk's matter might potentially open the floodgates, because it is a rare occasion where a contract produces a result which is contrary to public policy.

Disposition

88 Accordingly, for the reasons I have set out:

(i) Wawanesa's application for summary dismissal of Mr. Funk's claim for coverage is denied; and

(ii) a declaratory order is granted in favour of Mr. Funk to the effect that he has coverage under the Endorsement.

89 Mr. Funk argued he should not only have coverage but should be granted summary judgment with respect to liability against Wawanesa under the Endorsement. He submits the matter should then be set for assessment of his damages. The circumstances of this case do not support his position.

90 Although I have concluded that Mr. Funk has coverage under the Endorsement, given the evidence adduced by him I am *not* satisfied that a disposition that is fair and just to both parties can be made on the existing record. A trial court should deal with Mr. Funk's credibility and the expert evidence he offers.

91 Mr. Funk's application for summary judgment, with respect to liability, is denied.

92 In the result, I direct that the matter as it relates to liability and damages should proceed to trial.

Application dismissed.

Tab 7

2014 ONCA 130
Ontario Court of Appeal

Kozel v. Personal Insurance Co.

2014 CarswellOnt 1790, 2014 ONCA 130, [2014] I.L.R. I-5636, [2014] O.J. No. 753, 119 O.R. (3d) 55, 237 A.C.W.S. (3d) 479, 315 O.A.C. 378, 31 C.C.L.I. (5th) 171, 372 D.L.R. (4th) 265, 61 M.V.R. (6th) 1

Barbara Kozel, Respondent and The Personal Insurance Company, Appellant

M. Rosenberg, J.C. MacPherson, H.S. LaForme JJ.A.

Heard: January 8, 2014
Judgment: February 19, 2014
Docket: CA C57167

Proceedings: affirming *Kozel v. Personal Insurance Co.* (2013), 2013 CarswellOnt 5631, 48 M.V.R. (6th) 74, 2013 ONSC 2670, [2013] I.L.R. I-5430, 116 O.R. (3d) 227, 22 C.C.L.I. (5th) 134 (Ont. S.C.J.)

Counsel: Todd J. McCarthy, for Appellant
David A. Zuber, for Respondent

Subject: Criminal; Insurance; Civil Practice and Procedure

Related Abridgment Classifications

Criminal law

I General principles
  I.2 Fault
    I.2.f Regulatory offences
      I.2.f.ii Defence of due diligence

Insurance

X Actions on policies
  X.1 Commencement of proceedings
    X.1.d Obligations of insurer
      X.1.d.ii To defend
        X.1.d.ii.D Allegation of insured's policy breach

Insurance

X Actions on policies
  X.3 Relief against forfeiture

Headnote

Criminal law --- General principles — Fault — Regulatory offences — Defence of due diligence

Insured severely injured motorcyclist in automobile accident — At time of accident, insured was driving with expired licence — As result, insured was in breach of her policy with insurer — Motorcyclist commenced tort action against insured — Insured brought successful application seeking declaration that insurer owed duty to indemnify and defend her — Application judge found that insured had exercised sufficient diligence and was therefore not in breach of insurance policy — Insurer appealed — Appeal dismissed — Evidence was not strong enough to mount due diligence defence — Insured did no more than state that she received envelope from Ministry of Transportation, which she merely placed in china cabinet and did not open — It was doubtful that insured's preoccupation with her sons' health issues rose to level where it would excuse her failure to take steps to renew her driver's licence — However, insured was entitled to relief against forfeiture under s. 98 of Courts of Justice Act.

Insurance --- Actions on policies — Relief against forfeiture

Insured severely injured motorcyclist in automobile accident — At time of accident, insured was driving with expired licence — As result, insured was in breach of her policy with insurer — Motorcyclist commenced tort action against insured — Insured brought successful application seeking declaration that insurer owed duty to indemnify and defend her — Insurer appealed — Appeal dismissed — Insured was granted relief against forfeiture under s. 98 of Courts of Justice Act (CJA) — Insured's breach of Sched., stat. con. 4(1) under Insurance Act Regulations constituted imperfect compliance with policy term, not non-compliance with condition precedent — There were no grounds to believe that 4(1) was fundamental term or that insured's breach of it was of fundamental nature — Section 98 of CJA was available as avenue of relief for contracts governed by Insurance Act — Insured's conduct was reasonable — Breach was by no means grave, as it had no impact on insured's ability to drive safely or on contractual rights of insurer — Disparity between loss of coverage and extent of damage caused by insured's breach was enormous.

Insurance --- Actions on policies — Commencement of proceedings — Obligations of insurer — To defend — Allegation of insured's policy breach

Table of Authorities

Cases considered by *H.S. LaForme J.A.*:

Canadian Newspapers Co. v. Kansa General Insurance Co. (1996), 1996 CarswellOnt 3227, 30 O.R. (3d) 257, [1996] I.L.R. I-3369, 93 O.A.C. 26 (Ont. C.A.) — considered

Colliers McClocklin Real Estate Corp. v. Lloyd's Underwriters (2004), 2004 SKCA 66, 2004 CarswellSask 346, 10 C.C.L.I. (4th) 1, 249 Sask. R. 187, [2004] 11 W.W.R. 393 (Sask. C.A.) — considered

Commander Construction v. Sovereign General Insurance Co. (2013), 26 C.L.R. (4th) 299, 2013 CarswellOnt 16613, 2013 ONSC 7104 (Ont. S.C.J.) — referred to

Day Estate v. Pandurevic (2008), 2008 ONCA 266, 2008 CarswellOnt 1961, (sub nom. *Day Estate v. Royal & Sun Alliance Insurance Company)* [2008] I.L.R. I-4692, 61 C.C.L.I. (4th) 50 (Ont. C.A.) — considered

Elance Steel Fabricating Co. v. Falk Brothers Industries Ltd. (1989), 35 C.L.R. 225, 99 N.R. 228, (sub nom. *Falk Brothers Industries Ltd. v. Elance Steel Fabricating Co.)* [1990] 1 W.W.R. 29, 80 Sask. R. 22, 39 C.C.L.I. 161, (sub nom. *Falk Brothers Industries Ltd. v. Elance Steel Fabricating Co.)* [1989] 2 S.C.R. 778, (sub nom. *Falk Brothers Industries Ltd. v. Elance Steel Fabricating Co.)* [1989] I.L.R. 1-2506, (sub nom. *Falk Brothers Industries Ltd. v. Elance Steel Fabricating Co.)* 62 D.L.R. (4th) 236, (sub nom. *Falk Brothers Industries Ltd. v. Elance Steel Fabricating Co.)* [1989] R.R.A. 1029, 1989 CarswellSask 297, 1989 CarswellSask 469 (S.C.C.) — considered

Lévis (Ville) c. Tétreault (2006), 36 C.R. (6th) 215, 2006 CarswellQue 2911, 2006 CarswellQue 2912, 2006 SCC 12, 31 M.V.R. (5th) 1, (sub nom. *Lévis (City) v. Tétreault)* 346 N.R. 331, 207 C.C.C. (3d) 1, [2006] 1 S.C.R. 420, (sub nom. *Lévis (City) v. Tétreault)* 266 D.L.R. (4th) 165 (S.C.C.) — considered

Marche v. Halifax Insurance Co. (2005), 230 N.S.R. (2d) 333, 729 A.P.R. 333, [2005] I.L.R. 4383, 330 N.R. 115, [2005] 1 S.C.R. 47, 2005 CarswellNS 77, 2005 CarswellNS 78, 2005 SCC 6, [2005] R.R.A. 1, 248 D.L.R. (4th) 577, 18 C.C.L.I. (4th) 1 (S.C.C.) — considered

Ontario (Attorney General) v. McDougall (2011), (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road (Windsor))* 333 D.L.R. (4th) 326, (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road (Windsor))* 269 C.C.C. (3d) 159, 2011 ONCA 363, 2011 CarswellOnt 3107, (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road, Windsor)* 279 O.A.C. 268 (Ont. C.A.) — considered

Sage v. Peel Mutual Insurance Co. (2005), 32 C.C.L.I. (4th) 110, 2005 CarswellOnt 5907 (Ont. S.C.J.) — considered

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994), [1994] 2 S.C.R. 490, 1994 CarswellAlta 744, [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, (sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.)* [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 769 (S.C.C.) — followed

Shiloh Spinners Ltd. v. Harding (1972), [1973] 1 All E.R. 90, [1973] A.C. 691, 25 P. & C. 48 (U.K. H.L.) — considered

Stuart v. Hutchins (1998), [1999] I.L.R. I-3619, 6 C.C.L.I. (3d) 100, 164 D.L.R. (4th) 67, 1998 CarswellOnt 3540, 27 C.P.C. (4th) 1, 40 O.R. (3d) 321, 113 O.A.C. 12 (Ont. C.A.) — distinguished

Tut v. RBC General Insurance Co. (2011), 107 O.R. (3d) 481, 19 M.V.R. (6th) 188, 2011 ONCA 644, 2011 CarswellOnt 10626, 1 C.C.L.I. (5th) 186, 285 O.A.C. 100, 342 D.L.R. (4th) 464 (Ont. C.A.) — distinguished

Williams v. Paul Revere Life Insurance Co. (1997), 1997 CarswellOnt 2450, 34 O.R. (3d) 161, (sub nom. *Williams Estate v. Revere (Paul) Life Insurance Co.)* 101 O.A.C. 280, [1997] I.L.R. I-3464, 47 C.C.L.I. (2d) 212 (Ont. C.A.) — considered

Williams v. York Fire & Casualty Insurance Co. (2007), 2007 ONCA 479, 2007 CarswellOnt 4090, 51 C.C.L.I. (4th) 177, 225 O.A.C. 157, 86 O.R. (3d) 241, [2007] I.L.R. I-4613 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 98 — considered

Insurance Act, R.S.A. 1980, c. I-5
Generally — referred to

Insurance Act, R.S.N.S. 1989, c. 231
s. 171 — considered

Insurance Act, R.S.O. 1990, c. I.8
Generally — referred to

s. 129 — considered

Judicature Act, R.S.A. 1980, c. J-1
Generally — referred to

Saskatchewan Insurance Act, R.S.S. 1978, c. S-26
s. 109 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 61.07(1) — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8
Statutory Conditions — Automobile Insurance, O. Reg. 777/93

Sched., stat. con. 4(1) — considered

Words and phrases considered:

relief from forfeiture

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.

APPEAL by insurer from judgment reported at *Kozel v. Personal Insurance Co.* (2013), 2013 CarswellOnt 5631, 48 M.V.R. (6th) 74, 2013 ONSC 2670, [2013] I.L.R. I-5430, 116 O.R. (3d) 227, 22 C.C.L.I. (5th) 134 (Ont. S.C.J.), granting insured's application for declaration that insurer had duty to indemnify and defend insured.

***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 (Ville) c. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420 (S.C.C.), 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 (Ont. C.A.), 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 (S.C.C.), at p. 504. Its origin and purpose was briefly reviewed by Doherty J.A. in *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363, 333 D.L.R. (4th) 326 (Ont. C.A.), 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": *Elance Steel Fabricating Co. v. Falk Brothers Industries Ltd.*, [1989] 2 S.C.R. 778 (S.C.C.), 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 (Ont. C.A.), this court addressed the scope of both of these statutory provisions. Citing *Falk Brothers*, 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, 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 (Ont. C.A.), 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 Brothers*, 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 Brothers*, 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 (Ont. C.A.). 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 (Sask. C.A.), 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 (S.C.C.), 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 Brothers*, 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 Brothers*, 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.J.), 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 *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 v. Paul Revere Life Insurance Co.* (1997), 34 O.R. (3d) 161 (Ont. C.A.), 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 (Ont. C.A.), 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": *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": *Darlington Crescent*, at para. 92. In an insurance 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.

M. Rosenberg J.A.:

I agree.

***J.C. MacPherson J.A.*:**
I agree.

Appeal dismissed.

Footnotes

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

2 See e.g., *Shiloh Spinners Ltd. v. Harding* (1972), [1973] A.C. 691 (U.K. H.L.), 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.").

Tab 8

2005 CarswellOnt 2782
Ontario Court of Appeal

869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership

2005 CarswellOnt 2782, [2005] O.J. No. 2749, 10 B.L.R. (4th) 44, 140 A.C.W.S. (3d) 650, 200 O.A.C. 159, 256 D.L.R. (4th) 490, 76 O.R. (3d) 362

PEACHTREE II ASSOCIATES — DALLAS, L.P., by its general partner, 857485 ONTARIO LIMITED, MARCO MUZZO, ELIO MUZZO, ROBERT MUZZO, ALEX MUZZO, BARRY PERCIVAL, MARTIN GOLDFARB, JAGDISH PATEL, ROSS McKENZIE, DOMINIC MESITI, GARY GOLDFARB, LARRY SHULMAN and BENJAMIN SHISHLER (Plaintiffs / Respondents) and 857486 ONTARIO LIMITED and GOODMAN FREEMAN PHILLIPS & VINEBERG (Defendants / Appellant)

857486 ONTARIO LIMITED (Plaintiff by Counterclaim / Appellant) and PEACHTREE II ASSOCIATES — DALLAS, L.P., by its general partner, 857485 ONTARIO LIMITED, MARCO MUZZO, ELIO MUZZO, ROBERT MUZZO, ALEX MUZZO, BARRY PERCIVAL, MARTIN GOLDFARB, JAGDISH PATEL, ROSS McKENZIE, DOMINIC MESITI, GARY GOLDFARB, LARRY SHULMAN, BENJAMIN SHISHLER, SHLOMO SHARON and FORWARD PROPERTY MANAGEMENT (U.S.) INC. (Defendants to the Counterclaim / Respondents)

869163 ONTARIO LIMITED (Plaintiff / Appellant) and TORREY SPRINGS II ASSOCIATES LIMITED PARTNERSHIP, EVERGREEN PROPERTIES NO. 26, INC., MARCO MUZZO, MARCO MUZZO, Estate Trustee of the Estate of ELIO MUZZO, ROBERT MUZZO, ALEX MUZZO, DANNY SALVATORE, PAUL DIGENOVA, GINO DIGENOVA, MARIO DIGENOVA, NICK CORTELLUCCI, MARIO CORTELLUCCI, ROSS McKENZIE, DOMINIC MESITI, PAUL MORGAN, SAM BROWN, GOLDFARB, SHULMAN, PATEL & CO., SHLOMO SHARON, FORWARD PROPERTY MANAGEMENT (CANADA) INC., FORWARD PROPERTY MANAGEMENT INC., and GOODMAN PHILLIPS & VINEBERG (Defendants / Respondents)

TORREY SPRINGS II ASSOCIATES LIMITED PARTNERSHIP, EVERGREEN PROPERTIES NO. 26, INC., MARCO MUZZO, MARCO MUZZO, Estate Trustee of the Estate of ELIO MUZZO, ROBERT MUZZO, ALEX MUZZO, DANNY SALVATORE, PAUL DIGENOVA, GINO DIGENOVA, MARIO DIGENOVA, NICK CORTELLUCCI, MARIO CORTELLUCCI, ROSS McKENZIE, DOMINIC MESITI, PAUL MORGAN, SAM BROWN, GOLDFARB, SHULMAN, PATEL & CO., SHLOMO SHARON, FORWARD PROPERTY MANAGEMENT (CANADA) INC., and FORWARD PROPERTY MANAGEMENT INC. (Plaintiffs by Counterclaim / Respondents) and 869163 ONTARIO LIMITED (Defendant to the Counterclaim / Appellant)

Feldman, MacPherson, Sharpe JJ.A.

Heard: May 25, 2005
Judgment: July 4, 2005
Docket: CA C42793, C42794

Proceedings: affirming *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2004), 48 B.L.R. (3d) 184, 2004 CarswellOnt 4306, 243 D.L.R. (4th) 502 (Ont. S.C.J.)

Counsel: Paul Dollak for Appellants
Milton A. Davis, Kelli Preston for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Contracts

Related Abridgment Classifications

Alternative dispute resolution

IX Appeal from arbitration awards
IX.6 Miscellaneous

Contracts

XIV Remedies for breach
XIV.2 Contractual remedies
XIV.2.c Penalty or liquidated damages

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — General principles

Parties contracted to purchase and operate two rental properties — Respondents were passive investors who provided appellant with promissory notes to secure their obligation to reimburse appellant for certain fees and advances — Contract provided that in event of appellant's breach, promissory notes were to be deemed paid — Contract provided for arbitration in event of dispute — Appellant breached contract and refused to honour clause deeming promissory notes paid on basis that penalty clauses in contracts were unenforceable — Arbitrator found penalty clause to be voidable, not void and upheld clause — Arbitrator applied two-step approach in determining whether clause was penal in nature and whether presumption of invalidity was rebutted — Appellant brought application for judicial review of arbitrator's decision — Arbitrator's decision was upheld — Appellant appealed — Appeal dismissed — Neither common law nor equity have blanket prohibition on penalty clauses — In recent years courts have moved toward upholding such clauses in order to uphold freedom of contract.

Contracts --- Remedies for breach — Contractual remedies — Penalty or liquidated damages

Parties contracted to purchase and operate two rental properties — Respondents were passive investors who provided appellant with promissory notes to secure their obligation to reimburse appellant for certain fees and advances — Contract provided that in event of appellant's breach, promissory notes were to be deemed paid — Contract provided for arbitration in event of dispute — Appellant breached contract and refused to honour clause deeming promissory notes paid on basis that penalty clauses in contracts were unenforceable — Arbitrator found penalty clause to be voidable, not void and upheld clause — Arbitrator applied two-step approach in determining whether clause was penal in nature and whether presumption of invalidity was rebutted — Appellant brought application for judicial review of arbitrator's decision — Arbitrator's decision was upheld — Appellant appealed — Appeal dismissed — Neither common law nor equity have blanket prohibition on penalty clauses — In recent years courts have moved toward upholding such clauses in order to uphold freedom of contract.

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Cases considered by *Sharpe J.A.*:

Dimensional Investments Ltd. v. R. (1967), [1968] S.C.R. 93, 64 D.L.R. (2d) 632, 1967 CarswellNat 347 (S.C.C.) — considered

Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. (1914), [1915] A.C. 79, [1914] All E.R. Rep. 739, 83 L.J.K.B. 1574 (U.K. H.L.) — considered

Else (1982) Ltd. v. Parkland Holdings Ltd. (May 10, 1993), Evans L.J., Russell L.J. (Eng. C.A.) — considered

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Robophone Facilities Ltd. v. Blank (1966), [1966] 1 W.L.R. 1428, [1966] 3 All E.R. 128 (Eng. C.A.) — considered

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co. (1994), [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, (sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.)* [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 744, [1994] 2 S.C.R. 490, 1994 CarswellAlta 769 (S.C.C.) — considered

Stockloser v. Johnson (1954), [1954] 1 Q.B. 476, [1954] 1 All E.R. 630, [1954] 2 W.L.R. 439 (Eng. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 98 — referred to

APPEAL from judicial review of arbitrator's decision reported at *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2004), 48 B.L.R. (3d) 184, 2004 CarswellOnt 4306, 243 D.L.R. (4th) 502 (Ont. S.C.J.), affirming decision of arbitrator.

***Sharpe J.A.*:**

1 The issue on this appeal is the enforceability of stipulated remedy clauses in two complex commercial agreements. The parties entered agreements to purchase and operate two rental properties. The respondents were passive investors who provided the appellant with promissory notes to secure their obligation to reimburse the appellant for certain fees and advances. The agreements provided that in the event the appellant defaulted on its obligations, the promissory notes were to be deemed paid. An arbitrator found that the appellant was in default and that, while the stipulated remedy "could be a penalty", it should nonetheless be enforced. The arbitrator also refused relief from forfeiture. The arbitrator's decision was upheld on appeal to the Superior Court: (2004), 243 D.L.R. (4th) 502 (Ont. S.C.J.). For the following reasons, I would dismiss the appeal.

Facts

2 In 1990, Morris Kaiser, the controlling mind of the appellant corporation, initiated a proposal for the acquisition of two multiple-unit residential properties — one in Dallas called Peachtree and one in Las Vegas called Torrey Springs. Kaiser brought his proposal to Stanley Goldfarb, then a partner in the accounting firm Goldfarb, Shulman, Patel & Co., asking Goldfarb to recruit investors. The respondents are the investors who became limited partners in the ventures, which were arranged to provide them with significant income tax deductions. For the purposes of these appeals, it is unnecessary to delve into the details of these complex transactions. Suffice it to say that the appellant corporation, aptly labelled "Serviceco", had certain obligations under the financing agreements while the respondents played an entirely passive role.

3 At issue on this appeal are promissory notes, referred to as the "C-Notes", which were given by the respondents to the appellant Serviceco. Serviceco was obliged to advance funds to meet some "soft costs" incurred in setting up the arrangements for the acquisitions of Peachtree and Torrey Springs. Repayment of those costs by the limited partners was secured by the C-Notes. The C-Notes also secured any amounts advanced by Serviceco after closing and up to the end of a guarantee period if funds were not available to meet that obligation.

4 As stated by the arbitrator, the limited partners secured the immediate advantage of income tax reductions resulting from losses in the operation of the property without having to advance any funds. They ran the risk of eventually having to pay off the C-Notes if the proceeds from the properties were insufficient to do so. They also ran the risk of having to advance funds to preserve their investment if Serviceco defaulted in its obligations.

5 In 1997 and 1998, the respondents alleged that Serviceco had failed to live up to its obligations under the agreements. They served a series of notices to that effect. Serviceco failed to remedy the alleged defaults.

6 The agreements each contained the following stipulated remedy provision:

> 3.01 In the event that a certificate (the "Certificate") of Messrs. Goldfarb, Shulman, Patel & Co. or any successor firm thereto, or of a national firm of chartered accountants licensed to practice in Ontario (the "Notifier") is delivered personally or by registered mail to Serviceco, Shlomo Sharon and Morris Kaiser, if they are alive, at their last known addresses, certifying that:
>
> (a)
>
> (i) there has been a default by any one or more of Serviceco, Evergreen Properties No. 23, Inc. or the Manager pursuant to the terms of this Agreement, or the Initial Services Agreement, or the Management Agreement and specifying particulars of the default and the response requested; and
>
> (ii) such default has continued for a period of thirty (30) days following the written notice thereof having been given by the General Partner or any Limited Partner to Serviceco, Shlomo Sharon and Morris Kaiser, if they are alive, at their last known addresses; and
>
> (iii) the General Partner or any Limited Partner has subsequently sent a second notice to the parties aforementioned in the manner aforesaid and the default has continued for a period of thirty (30) days following such second written notice thereof; or
>
> (b) that there has been a default by Serviceco pursuant to Section 2.02(b) hereof;
>
> *then in addition to the set off rights in Section 2.10 hereof, the C-Notes shall immediately be deemed to have been paid in full upon payment of $1.00 to the holder of the C-Notes, and the Escrow Agents, upon receiving notice from the General Partner or any aforesaid, shall immediately and without inquiry as to the correctness of the matters set out in the Certificate, deliver the Releases to the Limited Partners.*

(Emphasis added.)

7 The Arbitrator found that this clause had been included in the agreements because Goldfarb had "insisted on the provision to ensure performance on the part of Kaiser and his corporations and that there was no attempt to relate the amount outstanding on the notes to an estimate of the amount of damages."

Abritration Awards

8 The agreements provided for arbitration of disputes. The respondents issued claims for a declaration deeming the C-Notes paid in full or in the alternative for damages on the basis of alleged defaults by the appellant. The appellant denied that it was in breach and raised a number of defences. The appellant denied that the respondents had followed the proper procedure to give notice of the defaults, alleged conspiracy on the part of the respondents, and counterclaimed for damages.

9 Although there are some differences in the financial arrangements and the nature and extent of the appellant's defaults under the two agreements, the arbitrator found that the situation in both cases was substantially the same. For the purposes of this appeal, therefore, his two awards are virtually identical. The arbitrator found that the appellant was in breach, dismissed the counterclaims, and awarded the respondents declarations that the C-Notes are deemed to have been paid in full.

10 The arbitrator found that Serviceco was in serious default of its obligations. Serviceco failed to provide a promised line of credit and failed to refund approximately $432,000 in tax overpayments to the limited partners. The arbitrator rejected Serviceco's contention that it had made payments for which it had not been reimbursed.

11 The stipulated remedy clause did not require Serviceco to pay damages upon breach but it did deem payment of the C-Notes to have been made, and the appellant argued that this amounted to an unenforceable penalty. The arbitrator stated: "...I am prepared to assume that the deemed payment is analogous to a payment of damages by Serviceco and that it is appropriate to consider whether it could be regarded as a penalty." The arbitrator found that "[t]he aggregate principal of the C-Notes was not a fixed amount and could vary over the life of the financing agreement." However, as any default could trigger payment of the C-Notes which on their face had an aggregate principal amount of several million dollars and, as "there was no attempt to relate the amount outstanding on the notes to an estimate of the amount of damages", the arbitrator concluded that "the deemed payment could be regarded as a penalty."

12 The arbitrator proceeded to apply what he described as "equitable principles" to determine whether or not the stipulated remedy clause should be enforced. He found that at the time of breach nothing was owed to Serviceco that would be secured by the C-Notes: "There is no evidence that Serviceco made payments for which it has not been reimbursed and for which it is entitled to be reimbursed by the limited partners" and anything owing to Serviceco for fees or services "has to be offset against the total failure to provide the line of credit and to refund the overpayments on account of taxes." In view of the default and "[s]ubject to considering relief from forfeiture," the arbitrator found the stipulated remedy clause deeming the notes to be paid was enforceable.

13 The arbitrator then considered whether the appellant should be granted relief from forfeiture. He applied the following passage from *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), at 504 (per Major J.), describing the power to grant relief from forfeiture.

> The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach. (Citations omitted.)

14 In view of the "gravity of the breach" and the fact that "Serviceco had not established on the evidence that a disparity exists" between the value of the C-Notes and the damage caused by the breach, he refused to grant relief from forfeiture. He

added that, in any event, the appellant's conduct militated against granting equitable relief. The appellant had, *inter alia*, failed to make any attempt to remedy its breach despite the notices and had made unfounded allegations of conspiracy during the arbitration.

Appeal to the Superior Court

15 The arbitration agreement provided for an appeal to the Superior Court "on errors of law, errors of fact, and errors of mixed fact and law, with such appeals to be dealt with as if the arbitration had been a trial in the Superior Court of Justice". The appellant raised a number of grounds of appeal, all of which were dismissed. Only one of these remains alive before this court, namely the enforceability of the stipulated remedy clause.

16 The appeal judge rejected the argument that the arbitrator was required in law to restrict the respondents to their remedy in damages after having found that the stipulated remedy clause "could be a penalty." The appeal judge held that the arbitrator had the discretion to decide whether or not the clause should be enforced even if it were a penalty. As to the exercise of that discretion, the appeal judge wrote at para. 18:

> Given the nature of the transactions, the roles of the parties, the "double notice" provision with its attendant opportunity for remedying breaches, the large potential for serious damage to the interests and property of the investors, the sophistication of the parties or their representatives and the Arbitrator's finding it was uncertain that there was a disparity between the value of the C-Notes and the damage caused by the breaches, it has not been established that the clause in question was extravagant, extortionate, unconscionable or unreasonable ....

17 The appeal judge also affirmed the arbitrator's decision with respect to relief from forfeiture at para. 25:

> The passage from *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* quoted by the Arbitrator at p. 31 of his reasons ... is equally applicable to the facts in this case and it supports the Arbitrator's actions in taking into account for the purposes of the exercise of his discretion (i) the conduct of the plaintiff and his directing mind, Mr. Kaiser; (ii) the gravity of the breaches; (iii) the principal amounts of C-Notes deemed to have been paid; and (iv) the disparity between the value of those C-Notes and the damage caused by the breach. With respect to the exercise of his discretion, the Arbitrator was correct in considering whether the disparity had been proven at the hearing and in noting that the onus of proving such disparity was on the defendants.
>
> (Citations omitted.)

Issue

18 The sole issue on this appeal is whether the appeal judge erred by affirming the arbitrator's decision that the stipulated remedy clause should be enforced.

Analysis

19 The appellant submits that the arbitrator found that the stipulated remedy clause was a "penalty", and that, having done so, the arbitrator was required to apply a simple, black-letter common law rule that precludes enforcement of penalty clauses. The appellant further submits that the appeal judge erred in finding that the arbitrator had the discretion to enforce what he had found to be a penalty clause.

20 In my view, the applicable legal and equitable principles are considerably more nuanced than is suggested by the appellant's argument. I do not agree that the arbitrator found the stipulated remedy clause to fall into the category of penalties

that contract law does not enforce. I also consider the applicable legal and equitable principles to be sufficiently flexible to support the enforcement of the clause at issue in this case on the basis of the relief from forfeiture doctrine.

21 To understand the law's treatment of stipulated remedy clauses as it pertains to this case, we must turn to history and to the two great streams of our legal tradition, common law and equity. Although those two streams were joined well over a century ago, as this case demonstrates, we continue to encounter issues of confluence and the reconciliation of doctrines derived from one tradition with those derived from the other.

22 The courts of common law and equity adopted similar but distinctive rules with respect to stipulated remedy clauses that had penal consequences. The courts of common law dealt with attempts to enforce the payment of penalties while the courts of equity dealt with pleas for relief from penal forfeitures. In the oft-quoted words of Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.* (1914), [1915] A.C. 79 (U.K. H.L.), at 86-87, "The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party...." On the other hand, a forfeiture is the loss, by reason of some specified conduct, of a right, property, or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party.

23 There is a venerable common law rule to the effect that the courts will not require a party to pay a genuine or true penalty on grounds of public policy. The parallel, but distinctive, equitable rule is to the effect that penal forfeitures will be relieved against where their enforcement would be inequitable and unconscionable.

24 While both doctrines have the effect of relieving the breaching party of the penal consequences of stipulated remedy clauses, in their traditional formulations they bear significant differences. The common law penalty rule involves an assessment of the stipulated remedy clause only at the time the contract is formed. If the stipulated remedy represents a genuine attempt to estimate the damages the innocent party would suffer in the event of a breach, it will be enforced. On the other hand, again to quote Lord Dunedin from *Dunlop*, *supra*, "[i]t will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could be conceivably be proved to have followed from the breach." Laskin C.J.C. adopted a virtually identical formulation (taken from *Snell's Principles of Equity* (27th ed. 1973) at p. 535) in *H.F. Clarke Ltd. v. Thermidaire Corp.* (1974), [1976] 1 S.C.R. 319 (S.C.C.), at 338. Although the common law defined penalties in terms of unconscionability, that assessment is to be made at the time the contract was formed. The common law doctrine did not include any discretion to be exercised in the light of circumstances that may exist at the time of breach.

25 Equity, on the other hand, considers the enforceability of forfeitures at the time of breach rather than at the time the contract was entered. Equity also looks beyond the question of whether or not the stipulated remedy has penal consequences to consider whether it is unconscionable for the innocent party to retain the right, property, or money forfeited. As explained by Denning L.J. in *Stockloser v. Johnson*, [1954] 1 All E.R. 630 (Eng. C.A.) at 638: "Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."

26 Against this general background, I cannot agree with the appellant's contention that the arbitrator and the appeal judge erred by refusing to strike down the stipulated remedy clause as an unenforceable penalty. The central pillar of the appellant's argument, as I understand it, is that there is an iron-clad rule to the effect that all stipulated remedy clauses, whether penalties or forfeitures, assessed at the date of the contract as having penal consequences will not be enforced. In my view, that proposition does not represent an accurate statement of the law. Not all stipulated remedy clauses having penal consequences are unenforceable. In particular, the equitable doctrine of relief from forfeiture enforces such penalty clauses, where they are in the form of a forfeiture, where it is not unconscionable to do so.

27 The proposition advanced by the appellant has been explicitly rejected in the case law. For example, in *Dimensional Investments Ltd. v. R.* (1967), [1968] S.C.R. 93 (S.C.C.), the Supreme Court of Canada dealt with a contract to purchase lands that provided for installment payments. If the purchaser defaulted, the contract terminated, and the vendor could retain all installments. This amounted to a penalty as it bore no relation to the damages suffered. The Court adopted the approach taken in *Stockloser*, *supra*, and enforced the term, holding at p. 100 that "even if [the impugned stipulated remedy clause] had been

found to impose a penalty rather than a genuine pre-estimate of damage, it does not follow" that the clause would not be enforced.

28 *Else (1982) Ltd. v. Parkland Holdings Ltd.* (Eng. C.A.) involved an agreement that required the purchaser of shares to make certain payments in default of which the vendor would recover shares held in escrow and would be permitted to retain half of the substantial payments that had already been made for the shares. This was a penal provision, as the amount forfeited bore no relation to the damages suffered, yet it was enforced. The purchaser made essentially the same argument as that advanced by the appellant in the case a bar. The English Court of Appeal, at para. 23, flatly rejected the submission that all stipulated remedy clauses having penal consequences are unenforceable as being inconsistent with the doctrine of relief from forfeiture: "[I]t has never been held or even argued, so far as the law reports indicate, that forfeiture clauses which foreseeably at the time of the contract involved penal consequences are unenforceable and should therefore be disregarded for that reason alone."

29 On these authorities, if the appellant's case, properly considered, amounts to a request for relief from forfeiture, the appeal must fail as the findings of the arbitrator in that regard are not attacked and, in any event, appear to me to be unimpeachable. I pause here to note that it is with some reluctance that I frame the issue in terms of a choice between common law and equity. In doing so, I do not wish to be taken as encouraging the perpetuation of what very well may amount to an outdated distinction between the common law's treatment of penalty clauses and the equitable doctrine of relief from forfeiture. However, as I am satisfied that the appeal fails even on the terms of these traditional categories, it is unnecessary to go further. Moreover, as I will explain, my analysis is driven in large part by considerations that would tend to favour, whenever possible, the equitable approach as the dominant one.

30 Should the impugned clause in the present case be assessed from the perspective of the common law rule against penalty clauses or does the appellant's case amount to a request for relief from forfeiture? For the following reasons, I consider that the appellant's case amounts to a request for relief from forfeiture.

31 First, it seems to me more apt to describe deeming the notes paid as being a forfeiture rather than the payment of a penalty. A penalty is the payment of a sum as a consequence of breach. By the terms of the clause at issue here, the appellant pays nothing on account of its breach. Rather the appellant forfeits the right to enforce the notes. Admittedly, in the case at bar, we are to some extent looking at two sides of the same coin, but as I shall explain, there is good authority to the effect that courts should, if at all possible, avoid classifying contractual clauses as penalties and, when faced with a choice between considering stipulated remedies as penalties or forfeitures, favour the latter.

32 Second, I agree with Professor Waddams' observation in *The Law of Damages*, looseleaf (Aurora: Canada Law Book Inc., 1991) at para. 8.310 that as there is often little to distinguish between the two types of clauses and that there is much to be said for assimilating both under unconscionability. The effect of assimilation would be "to provide a more rational framework for the decisions of both forfeitures and penalties." Unconscionability is also the direction suggested by the dictum of Dickson J. in *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916 (S.C.C.), at 937: "It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum." As pointed out by the appeal judge, this would also appear to be the direction of s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43: "A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise, as are considered just." All of this suggests to me that courts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses.

33 Third, there is good authority for the proposition that the strict rule of the common law refusing to enforce penalty clauses should not be extended. The English Court of Appeal has stated in *Else*, *supra* at para. 30 (per Evans L.J.) that "in modern conditions the courts should not seek to extend the common law rule" and at para. 58 (per Hoffman L.J.) "the penalty doctrine, being an inroad upon freedom of contract which is inflexible compared with the equitable rules of relief against forfeiture, ought not to be extended." A similar view was expressed by Diplock L.J. in *Robophone Facilities Ltd. v. Blank*, [1966] 1 W.L.R. 1428 (Eng. C.A.), at 1447, stating that courts should not be "astute to descry 'a penalty clause' in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former."

34 This is closely related to the fourth factor, namely, the policy of upholding freedom of contract. Judicial enthusiasm for the refusal to enforce penalty clauses has waned in the face of a rising recognition of the advantages of allowing parties to define for themselves the consequences of breach. As I have already noted, in *Elsley*, *supra*, Dickson J. labeled the penalty clause doctrine as "a blatant interference with freedom of contract," a sentiment echoed by the English Court of Appeal in *Else*. The arguments favouring the enforcement of stipulated remedy clauses on this score are recognized by Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 817 and are especially well put by Waddams, *supra* at para. 8.330:

> It is useful to remember that the jurisdiction to strike down penalty clauses represents an exception to a general principle of freedom of contract. The force of the general principle should not be underestimated. There are strong arguments for enabling parties to set their own value on performance. The power to do so gives flexibility to the contracting process; it enables the promisor to offer an assurance of performance while limiting liability for consequential damages and thereby making the cost of breach predictable. It enables the promisee to avoid the cost of securing compensation by litigation and the risks of undercompensation that may be caused by the legal restrictions on damages, such as remoteness, certainty of proof, mitigation, and failure to recognize intangible losses; it reduces the cost to the parties and to the state of settling a dispute after breach; it enables the promisee to purchase insurance against default from the party in the best position to provide it at the lowest cost. A further point is that the striking down of the clause may represent an injustice to the promisee for the price of performance will have been agreed in the light of all the promisor's obligations, including the promise to pay an agreed sum on breach; if that promise is struck down, the promisee does not receive what has been paid for. (Footnote omitted.)

35 Taking all of these factors into account, I conclude that the appellant's contention that the stipulated remedy clause should not be enforced, properly considered, amounts to a request for relief from forfeiture. As there is no basis upon which I would interfere with the arbitrator's treatment of relief from forfeiture, it follows that the appeal must be dismissed.

36 My conclusion with respect to relief from forfeiture makes it unnecessary for me to consider the point dealt with by the appeal judge, namely, whether there is a residual discretion to enforce a payment that would be a penalty under the common law rule, and I leave that question to another day.

Conclusion

37 For these reasons, I would dismiss the appeal. The respondents are entitled to their costs of the appeals fixed at $40,000, inclusive of disbursements and G.S.T.

***Feldman J.A.*:**
I agree.

***MacPherson J.A.*:**
I agree.

Appeal dismissed.

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