Court File No.CV-19-616261-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 60 OF THE *TRUSTEE ACT*, R.S.O. 1990, C. T.23, AS AMENDED, AND RULE 10 OF THE ONTARIO *RULES OF CIVIL PROCEDURE*, R.R.O 1990, REG. 194, AS AMENDED

AND IN THE MATTER OF HI-RISE CAPITAL LTD. AND IN THE MATTER OF ADELAIDE STREET LOFTS INC.

BOOK OF AUTHORITIES OF LANTERRA DEVELOPMENTS LIMITED
(Re: Amendment of Minutes of Settlement and Agreement of Purchase and Sale)
(Returnable April 22, 2020)

April 21, 2020

Stikeman Elliott LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley Taylor LSO#: 39932E
Tel: (416) 869-5236
Email: ataylor@stikeman.com

Sanja Sopic LSO#: 66487P
Tel: (416) 869-6825
Email: ssopic@stikeman.com
Fax : (416) 947-0866

Lawyers for Lanterra Developments Limited

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I N D E X

TAB 1

2007 CarswellOnt 5037
Ontario Superior Court of Justice

McLeod v. Schmidt

2007 CarswellOnt 5037, [2007] O.J. No. 3039, 159 A.C.W.S. (3d) 453

MURRAY McLEOD and JOANNE LYSY v. CONNIE SCHMIDT and MARY LOUISE SCHMIDT

Master Dash

Heard: July 26, 2007
Judgment: August 9, 2007
Docket: 06-CV-315458PD1

Counsel: Jeffrey Radnoff for Plaintiffs
Sheila Monteiro for Defendant, Connie Schmidt

Related Abridgment Classifications
Contracts
XIV Remedies for breach
XIV.4 Specific performance
XIV.4.c Availability in particular contracts
XIV.4.c.x Sale of land
Contracts
XIV Remedies for breach
XIV.4 Specific performance
XIV.4.d Relation to other remedies
XIV.4.d.i Damages
Remedies
III Specific performance
III.2 Availability in particular contracts
III.2.f Sale of land
Remedies
III Specific performance
III.3 Relation to other remedies
III.3.a Damages

Headnote
Remedies --- Specific performance — Availability in particular contracts — Sale of land
Remedies --- Specific performance — Relation to other remedies — Damages — Adequacy of remedy — Unique property

Table of Authorities
Cases considered by *Master Dash*:
Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 26 C.P.C. (4th) 1, 111 O.A.C. 201, 164 D.L.R. (4th) 257, 1998 CarswellOnt 3202, 20 R.P.R. (3d) 207 (Ont. C.A.) — followed

JDM Developments Inc. v. J. Stollar Construction Ltd. (2004), 24 R.P.R. (4th) 133, 2004 CarswellOnt 4502, 2 C.P.C. (6th) 313 (Ont. S.C.J.) — followed

John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd. (2003), 34 B.L.R. (3d) 12, 10 R.P.R. (4th) 98, 63 O.R. (3d) 304, 168 O.A.C. 252, 223 D.L.R. (4th) 541, 2003 CarswellOnt 342 (Ont. C.A.) — followed

Semelhago v. Paramadevan (1996), 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.05 — referred to

R. 34.15(1)(c) — referred to

***Master Dash*:**

1 The plaintiffs agreed to purchase a home from the defendant Connie Schmidt ("Connie") pursuant to a written agreement of purchase and sale. Five days later Connie advised she would not complete the sale. The plaintiffs seek summary judgment for specific performance. Connie raises two defences. Firstly she asserts there was no enforceable agreement because Connie's mother, the defendant Mary Louise Schmidt ("Mary"), who was a co-owner of the property, did not sign the agreement of purchase and sale. Secondly she asserts that the house is not unique and that damages are a sufficient remedy.

Is There a Binding Enforcable Agreement?

2 Connie purchased 16 Coxwell Ave., Toronto (the "property") in August 2002 with funds from the sale of her former matrimonial home. The agreement to purchase the property in 2002 listed only Connie as purchaser, but Connie subsequently directed that title be taken in the name of herself and Mary because the bank providing the mortgage wanted two people on title, and her mother was someone Connie could trust. There was no written agreement between Connie and Mary. Mary did not contribute to the purchase price, although Connie claims that Mary contributed to the cost of renovations and half of the mortgage payments. There is no record of these payments as they were always made in cash. Connie's father, who is a contractor, personally helped with the renovation work. Connie used the third party Dale Campbell as her real estate agent on both the purchase and the sale of the property.

3 Connie listed the property for sale with Campbell in 2005, but it did not sell. Connie was the sole vendor and signatory on the listing agreement. Connie listed the property a second time, again with Campbell, on April 12, 2006 for $299,900. Again Connie was listed as the sole vendor and she was the sole signatory. Connie claims that Campbell pressured her into listing and selling the property, whereas Campbell gave evidence that Connie approached him. This is an issue in the third party claim issued against Campbell, but its resolution has no bearing on the issues on this summary judgment motion between the plaintiffs, who had no involvement or knowledge of such dealings, and defendants. The listing agreement contains the following term:

> **6. Warranty**: I represent and warrant that I have the exclusive authority and power to execute this Authority to offer the Property for sale or lease and that I have informed you of any third party interests or claims on the property...which may affect the sale or lease of the Property.

4 On June 27, 2006 the plaintiffs offered to purchase the property from Connie for $300,000 pursuant to a written agreement of purchase and sale (the "APS"). Connie accepted the offer the same day. Connie was the sole vendor listed in the APS and she was the sole signatory as vendor. A $5000 deposit was paid. The offer was conditional for seven banking days on arranging financing and for ten banking days on an acceptable home inspection. Both conditions could be waived by the purchaser. The plaintiffs were never advised that there was a co-owner on title.

5 On June 30 the plaintiffs arranged for a house inspector to attend the property on July 3. On July 2 Connie called the plaintiffs' real estate agent, Colin Poponne, and stated that she would not allow the inspection to proceed and that she would not be proceeding with the sale of the property. Campbell then spoke to Connie and testified that Connie told him she no longer wished to sell because the property was worth more than $300,000. Connie gave evidence at her discovery that she had also told

Campbell about a month earlier that she felt the property was worth more money. It is undisputed that Connie did not tell either Poponne or Campbell at the time that her mother was a co-owner or that this played any role in her decision not to proceed with the APS with the plaintiffs. On July 5, 2006 the plaintiffs waived both conditions in the APS, within the time limits set out therein. Connie later consulted with a lawyer and was advised that the APS was unenforceable because her mother did not sign.

6 I must determine if there is a genuine issue for trial based on Mary's failure to sign the APS. The real issue is whether Mary authorized Connie to sell the property to the plaintiffs on behalf of both of them. Connie takes the position that Mary did not authorize Connie to sell the property on her behalf, had not agreed to the sale and in any event did not sign the agreement of purchase and sale. Connie was examined for discovery on May 2, 2007. She then filed an affidavit in response to this motion sworn June 13, 2007. She was cross-examined on her affidavit on July 4, 2007. In my view, given Connie's admissions on her examinations, there is no air of realty to Connie's defence on this ground. Mary, who is representing herself in this action, also submitted a short affidavit sworn June 13, 2007. Mary failed to attend a scheduled cross-examination on her affidavit, although properly served with notice of examination and on July 26, 2007 I struck her affidavit under rule 34.15(1)(c). Mary failed to attend to oppose the motion.

7 *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240, 164 D.L.R. (4th) 257 (Ont. C.A.) at paragraphs 17 to 20 and *JDM Developments Inc. v. J. Stollar Construction Ltd.* (2004), 2 C.P.C. (6th) 313 (Ont. S.C.J.) at paragraphs 53 to 55 set out the test for summary judgment. It is not for a judge or master determining a motion for summary judgment to assess the strengths and weaknesses of a claim or defence or attempt to try facts or assess credibility. The legal onus is on the moving plaintiffs to satisfy the court that there is no genuine issue for trial and that they are entitled to summary judgment. On the other hand, the respondents to such motion have an evidentiary burden to present evidence of specific facts demonstrating a genuine issue for trial. They must put their best foot forward and "lead trump or risk losing". The court is entitled to assume that the record before it contains all of the evidence the parties would present at trial. The court must take a "hard look" at the evidence in determining whether there is a genuine issue in respect of a material fact that requires resolution by a trial judge. The "essential purpose of summary judgment is to isolate, and then terminate, claims and defences that are factually unsupported" (*Dawson* paragraph 13). "Underlying Rule 20 is the premise that little purpose is achieved by having an unnecessary trial" (*Dawson* paragraph 20).

8 In her affidavit Connie swears that Mary was not approached to sign and did not sign the APS. Those facts are not disputed, but in my view they do not answer the question whether Mary agreed to the sale and whether Connie was authorized to sign and did sign the APS on behalf of both of them. Connie alleges that Campbell knew Mary was a co-owner because he was the agent that sold her the property. She claims it was Campbell's job to add Mary as a vendor and obtain her signature on the APS. Campbell claims he did not know Mary was on title since Connie was the sole purchaser named in the agreement of purchase and sale when Connie purchased the property and Connie never told him Mary was put on title. These may be issues in the third party action, but in my view do not affect the rights as between the plaintiffs and defendants.

9 Connie swears that she did not have Mary's authority to deal with her property interest. In my view it is clear on the evidence from Connie's examination for discovery and cross-examination that Mary had been aware at the material time of the listing and of the sale and of the sale price, had agreed to the sale and that Connie had the authority to act and did act on behalf of herself and Mary. The following examples illustrate this conclusion.

10 From Connie's examination for discovery:

(a) Questions 189-190

> Q. When did you tell her about the agreement?
>
> A. She knew from the very beginning of the listing of the house.
>
> Q. Yes, she knew you were listing it for $300,000.00, right?
>
> A. Yes.

(b) Question 192

Q. And I take it before you signed this agreement, you would have checked with your mother to see if it was okay to sell it for $300,000.00. Correct?

A. Yes.

(c) Questions 230-234

Q. Okay. So you told her it looked like there was a sale for $300,000.00.

A. Yes.

Q. Okay. And this was told to her before you signed. Right?

A. It would have been.

Q. Thanks. And she didn't say before you signed 'do not sign if it's only $300,000.00'?

A. No, but she wasn't happy with —

Q. Because if she —

— the price, though.

Q. Okay. But had she told you not to sign it for $300,000.00, you wouldn't have. Correct?

A. Probably, yes, of course.

Q. So, although she may not have been happy with the price, you knew that she agreed with the sale for $300,000.00 before you signed it?

A. Believe me, if they would have did their job, these real estate agents, and pursued after getting my signature and then continued — or got a hold of my mother to get her signature, she would have signed it, too.

Q. Okay. So she would have signed it. Fine.

A. Yes, of course she would have.

(d) Question 241-242

Q. Is that before you signed this, you spoke to your mother about the sale for $300,000.00. And both of you reluctantly agreed to sell it for —

A. 'Reluctantly', that's a good word.

Q. Agreed to sell it for $300,00.00. Right?

A. Yes.

(e) Question 253

Q. And I take it to today, you and your mother would agree to sell it to my clients if they paid more money. Correct?

A. With the reasonable amount that the house is worth, yes.

(f) Question 278-280 (after referring to Campbell's failure to get Mary's signature)

Q. And had he gotten your mother's signature, at the time, as he should have, —

A. It would have gone through, yes.

Q. You mean the sale would have gone through —

A. Yes.

Q. — for $300,000.00?

A. Yes. Yes.

(g) Questions 331-334

Q. Because you had agreed to sell the house for $300,000.00, when you signed the document, at the time you signed your document your mother also had agreed to sell the house for $300,000.00. Correct?

A. She — yes, she would have agreed if I agreed.

Q. Okay.

A. Even — she knew, though, too, that I was unhappy about the listing price and she was a little leery about it herself.

Q. But both of you reluctantly agreed to sell it for $300,000.00. Correct?

A. Yes.

Q. But your complaint is that the real estate agents mishandled this.

A. Yes.

11 From the cross-examination of Connie on her affidavit:

(a) Questions 24 to 31:

Q. Now in paragraph 13 you state, "At all material times, my mother and myself were the co-owners of the property. There was no meeting of the minds." Whose minds were you referring to there, ma'am?

. . . . .

A. My mother.

Q. Yes. And who else?

A. And myself, of course.

Q. Okay. So you and your mother's minds didn't meet. Can you tell me what that means in regular language, please?

. . . . .

A. Well I guess we weren't together when these documents were signed by both of us — we weren't together.

Q. So you weren't physically together.

A. No.

Q. So that's what you mean by "There was no meeting" —

A. Yeah.

Q. — "of minds".

A. Yes.

(b) Between questions 40 and 58 Connie explains that she communicated with a lawyer shortly after signing the agreement and the meeting is summarized at question 58 by Ms. Monteiro, Connie's solicitor, as follows:

> A. ...She met a lawyer. And as her affidavit said that since the purchase agreement was not signed by her mother, she was advised by the lawyer that since the purchase and sale agreement was not signed by her mother, who is the co-owner of the property, it's not a binding agreement.

(c) At question 61 Connie refuses to answer the question: "Isn't the reason you wanted to get out of the agreement because you wanted more for the property?" In my view that was a proper question for cross-examination and I draw the adverse inference that the answer would have been "yes".

12 In my view, on the evidentiary record before me, it cannot be genuinely disputed that both Connie and Mary agreed to sell the property to the plaintiffs for $300,000, that Mary had communicated to Connie her agreement to do so, that only Connie signed the APS, but Mary would have signed as well if she had been asked. Connie, who knew that Mary was a co-owner, did not ask Mary to sign. Connie did not tell anyone that Mary was a co-owner nor did she suggest to anyone that Mary needed to sign the APS. In my view the evidence is clear that Connie had Mary's authority to sign the listing agreement and the APS and that Connie in fact signed both documents on behalf of both owners. The defence that Connie did not have Mary's authority is not factually supported and in fact is undermined by Connie's own evidence.

13 If there were a genuine issue whether Mary intended to sell, or whether Connie had Mary's authority to sign for her, then the onus would be on Mary to come forward with that evidence, and to have it tested by cross-examination, since it is Mary's interest that would be conveyed without her signature. It is beyond any doubt that Connie, at least for herself, intended to sign and did sign the APS, then reneged because she wanted more money and later took the position that the agreement was not binding because Mary did not sign. Mary has defended the action without counsel. The solicitor representing Connie does not represent Mary in the action and made it clear she did not represent Mary on the summary judgment motion. Mary did not attend upon the return of the motion. Although Connie's solicitor presented an affidavit from Mary, that affidavit was struck because Mary refused or neglected to attend for cross-examination thereon. Mary has therefore not opposed the motion for summary judgment for specific performance.

14 In all the circumstances I conclude there is no genuine issue for trial on the enforceability of the agreement of purchase and sale based on Mary not being a signatory thereto. The agreement is binding and enforceable.

Uniqueness

15 The leading authority on the modern approach to specific performance of realty is the Supreme Court of Canada decision in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1 (S.C.C.). At paragraph 14 Sopinka J. restates the common law that purchasers of real estate were generally entitled to specific performance:

> Under the common law every piece of real estate was generally considered to be unique. Blackacre had no readily available equivalent. Accordingly, damages were an inadequate remedy and the innocent purchaser was generally entitled to specific performance.

16 He notes at paragraph 20 that this position has changed with modern real estate development and the availability of other properties:

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Both residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

17 The court must consider whether damages would be a complete remedy to a purchaser to whom the land has a peculiar or special value. At paragraph 21:

> It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. The common law recognized that the distinction might not be valid when the land had no peculiar or special value. In *Adderley v. Dixon* (1824), 1 Sim. & St. 607, 57 E.R. 239, Sir John Leach V.C. stated (at p. 240 E.R.):
>
> > Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value.

18 The court concluded in paragraph 22 that before specific performance is granted there must be evidence of uniqueness to the extent that its substitute is not readily available. For example similar houses on subdivision lots purchased for investment would not qualify:

> Some courts, however, have begun to question the assumption that damages will afford an inadequate remedy for breach of contract for the purchase of land. In *Chaulk v. Fairview Construction Ltd.* (1977), 14 Nfld. & P.E.I.R. 13...the Newfoundland Court of Appeal (per Gushue J.A.), after quoting the above passage from *Adderley v. Dixon*, stated, at p. 21:
>
> > The question here is whether damages would have afforded Chaulk an adequate remedy, and I have no doubt that they could, and would, have. There was nothing whatever unique or irreplaceable about the houses and lots bargained for. They were merely subdivision lots with houses, all of the same general design, built on them, which the respondent was purchasing for investment or re-sale purposes only. He had sold the first two almost immediately at a profit, and intended to do the same with the remainder. It would be quite different if we were dealing with a house or houses which were of a particular architectural design, or were situated in a particularly desirable location, but this was certainly not the case.
>
> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

19 In *John E. Dodge Holdings Ltd. v. 805062 Ontario Ltd.*, 63 O.R. (3d) 304, [2003] O.J. No. 350 (Ont. C.A.) the Court of Appeal elaborates at paragraph 38-39 that uniqueness does not require proof that the property is entirely different from every other property, but that it must have a quality that makes it particularly suitable for the intended purposes or proposed use of the moving party that cannot be readily duplicated elsewhere:

> In *Semelhago v. Paramadevan*... Sopinka J. observed that specific performance will only be granted if the plaintiff can demonstrate that the subject property is unique in the sense that, "its substitute would not be readily available". Although Sopinka J. did not elaborate further on this definition, in *1252668 Ontario Inc. v. Wyndham Street Investments Inc*....Justice Lamek stated that he
>
> > [does] not consider that the plaintiff has to demonstrate that the Premises are unique in a strict dictionary sense that they are entirely different from any other piece of property. It is enough, in my view, for the plaintiff to demonstrate

that the Premises have a quality that makes them especially suitable for the proposed use and that they cannot be reasonably duplicated elsewhere.

I agree that in order to establish that a property is unique the person seeking the remedy of specific performance must show that the property in question has a quality that cannot be readily duplicated elsewhere. This quality should relate to the proposed use of the property and be a quality that makes it particularly suitable for the purpose for which it was intended.

20 The "time when a determination is to be made as to whether a property is unique is the date when the actionable act takes place": *John E. Dodge Holdings*, supra, paragraph 40.

21 What do the plaintiffs say makes the property unique or, as stated in *John E. Dodge Holdings*, what "makes it particularly suitable for the purpose for which it was intended" or for its "proposed use"? In her affidavit Joanne Lysy states that the plaintiffs had "been looking for a house together for approximately 6 months. We are looking for an affordable detached house in the city of Toronto which can be renovated by us...I cannot find another suitable house in the city of Toronto at this price. In particular [we] wish to obtain a detached house in the City of Toronto for us to renovate this house which perfectly meets our needs."

22 She expands upon this during her cross-examination:

a) The plaintiffs had been restricting their search to East York.

b) It was to be a commutable distance for both plaintiffs and TTC accessible.

c) The price range was up to $300,000.

d) They wanted a home that could be renovated. It was to be a "fixer-upper."

e) They were not looking for an aesthetically finished property.

f) The renovation budget was $20-25,000.

g) The home was to be detached.

h) It required parking.

i) It required three bedrooms and a minimum of one bathroom.

23 The plaintiffs had looked at eight or nine properties before deciding on 16 Coxwell, all in East York and five to eight since this claim was initiated. As Ms. Lysy stated at question 71: "We have been looking, and we have not found anything that has met our needs."

24 In my view the plaintiffs have established that the property is unique to them and particularly suitable for their proposed use. It is a property in which the plaintiffs intend to live. It is not a purchase for investment or re-sale. It was the right price in the right area, suitable to renovate within their means and with the amenities and accessibility that made the property particularly suitable to their needs and intended use. They have been unable to find another property that meets their needs and that is equally desirable to them. The property is not a building lot or one of a number of similar houses in a subdivision. The property is unique and its substitute is not readily available. Damages would not afford the plaintiffs a complete or adequate remedy.

25 Connie has in her affidavit stated that the property is not unique because there "are many properties within the same area, namely the City of Toronto within the price range that the plaintiffs are looking for." She has attached as an exhibit to her affidavit "listings of 8 properties in the same general area within the City of Toronto that were on sale last year. The price range is from $215,000 to $300,000." The defendants however are required to put their best foot forward. Connie has not indicated that she has examined any of the houses. There is no fulsome description of each house. She does not describe how they are similar to, compare with or could easily substitute for the property. The only thing they have in common, from a perusal of the listings themselves, is that they are all somewhere on Coxwell Ave. and are all under $300,000 and that seven of them appear

to have the requisite number of bedrooms and bathrooms. There is no indication as to their accessibility to transit or the state of renovations. Ms. Lysy was asked about these houses on her cross-examination. The plaintiffs had only looked at one of the homes and the renovations were beyond their means. As to the remainder, the plaintiffs had not seen them and it is impossible to tell the suitability of a home just by examining a listing. Connie lists other properties currently available, but as stated in *John E. Dodge Holdings*, the "time when a determination is to be made as to whether a property is unique is the date when the actionable act takes place." In any event, they suffer from the same lack of particularity.

26 In my view there is no genuine issue of fact requiring a trial on the uniqueness of the property. The property is unique and the agreement of purchase and sale may be specifically enforced. Damages would not adequately compensate the plaintiffs.

Conclusion and Order

27 The plaintiffs have satisfied the court that there was a binding and enforceable agreement of purchase and sale, that the defendants breached the agreement by refusing to complete the sale, that damages would not adequately compensate the plaintiffs and that specific performance is the appropriate remedy. There is no genuine issue for trial.

28 Order to go granting to the plaintiffs summary judgment for specific performance of an agreement of purchase and sale dated June 27, 2006 in respect of the property known as 16 Coxwell Avenue in the City of Toronto.

Costs and Other Matters

29 The plaintiffs were successful and they are entitled to their costs of the motion on a partial indemnity scale. Both parties submitted a Costs Outline. I am however not in a position to fix costs based on the information provided. The plaintiffs' Costs Outline refers to all of the costs of the action, and not just of the summary judgment motion. The statement of claim refers to a claim for damages for breach of warranty of authority but this was a claim in the alternative to specific performance. The statement of claim however also refers to a claim for punitive damages, which appears to be in addition to, and not as an alternative to, specific performance. It is unknown whether the plaintiffs intend to proceed with that claim. If they do, it is appropriate to fix only costs of the motion for summary judgment at this time. In that case the costs of preparing pleadings, obtaining a certificate of pending litigation, preparing an affidavit of documents and preparing for and attending examinations for discovery would more properly be considered at a later date as costs of the action. If the plaintiffs indicate they will not be proceeding with any other claims in the action I would then be prepared to fix costs of the action which would include costs of this motion. The outline of the plaintiffs' disbursements is also problematic. Not only is it difficult to differentiate disbursements relating to the motion as opposed to the action, but it is equally difficult to ascertain in many cases exactly what each expenditure was for. For example there are charges for "other" disbursements. There also appears to be duplication, such as six separate charges of $127 to file a motion record. The disbursements must be clearly broken down into each constituent expense with greater particularity.

30 Unless the parties are able to agree as to costs, I would be prepared to receive further brief costs submissions from the plaintiffs within 14 days. They are to indicate whether they will be proceeding with the action or if this motion disposes of the entirety of the action. They must address the concerns raised respecting the Costs Outline. Brief responding submissions may be received within seven days thereafter. I will then fix either the costs of the motion, or of the action, as may be appropriate.

31 If the plaintiffs are not proceeding with the balance of their claims, I am also prepared to receive written submissions within 14 days respecting such further orders as may be appropriate to dispose of the main action. Finally, I anticipate that counsel will forthwith confer and attempt to agree on a closing date and other terms for the completion of the purchase and sale. If they are unable to so agree I am prepared, upon written request made within 14 days, to convene a case conference to impose terms and give directions under rule 1.05 if and as appropriate.

TAB 2

40 CBLJ 250
Canadian Business Law Journal
2004

250 — THE COURTS' INHERENT JURISDICTION AND THE CCAA: A BENEFICENT OR BAD DOCTRINE?

THE COURTS' INHERENT JURISDICTION AND THE CCAA: A BENEFICENT OR BAD DOCTRINE?

Keith Yamauchi [*]

> *For a concept in common currency, and one which is doing important work, "inherent jurisdiction" is a difficult idea to pin down. There is no clear agreement on what it is, where it came from, which courts and tribunals have it and what it can be used for. The law reports are full of apparently contradictory statements on these questions. In this area, there is little which can be said with complete confidence; the uncertainty of the law is almost the only thing which is never in doubt.* [1]

Contrary to all expectations, the 71-year-old Companies' Creditors Arrangement Act (the "CCAA") [2] has become Canada's vehicle of choice for major corporate reorganizations. A leading American practitioner text describes the CCAA's metamorphosis as follows:

> The Companies' Creditors Arrangement Act . . . is probably the most unusual piece of reorganizational legislation in the world. It is only 20 sections long and, in its origin in the depths of the Depression, it was intended to facilitate the reorganization of major public companies with complicated public debt structures. Instead, 60 years later, it has turned out to provide the most effective framework for financial restructuring Canada has ever had. [3]

The authors proceed to describe the CCAA as "Chapter 11 Without Rules!" More recently, Andrew Kent expressed concern to a *Financial Post* reporter about the CCAA process involving Air Canada's restructuring, saying: "This kind of thing looks like Mickey Mouse time . . . What the hell are the rules? Nobody knows." [4]

The CCAA is perhaps unusual from an outsider's perspective, but one must ask whether Canadians should be satisfied with its current, flexible form, which is composed of a mere 20 sections. [5] This article will examine the use of inherent jurisdiction under the CCAA and whether that doctrine helps facilitate Parliament's will to encourage the reorganization of insolvent businesses. [6] It will review the doctrine generally and then focus on how courts have used it when they deal with issues under the CCAA. Finally, it will discuss whether the doctrine is beneficent or bad when courts use it in CCAA proceedings [7] and how Parliament might resolve the CCAA's perceived shortcomings. [8]

I. — INHERENT JURISDICTION

As seen from the quotation that opens this article, the doctrine of inherent jurisdiction seems incapable of precise definition. Its source is unknown and its extent fluid. Cases in a number of different contexts throughout the common law world quote Master I.H Jacob's article as the leading authority for a description of the doctrine. [9] Jacob's article addresses many aspects of the doctrine that serve no purpose for this discussion. A variety of cases, however, have used his general statements to describe the doctrine. [10] Like

Dockray, [11] Jacob describes it as follows: "This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy challenge to determine its quality and to establish its limits." [12] Having said that, he then describes the nature of inherent jurisdiction:

> [T]he "inherent" jurisdiction of the court is only a part or an aspect of its general jurisdiction. The general jurisdiction of the High Court as a superior court of record is, broadly speaking, unrestricted and unlimited in all matters of substantive law . . . except in so far as that has been taken away in unequivocal terms by statutory enactment. The High Court is not subject to supervisory control by any other court except by due process in all matters concerning the general administration of justice within its area. Its general jurisdiction thus includes the exercise of an inherent jurisdiction . . . the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory jurisdiction. [13]

The CCAA defines the superior courts of record that govern proceedings under it. [14] These courts, by Jacob's definition, are granted inherent jurisdiction.

Even though Jacob stated that inherent jurisdiction is "part of procedural law . . . and not of substantive law", [15] many of the matters regarding which Canadian courts have invoked their inherent jurisdiction are of a substantive nature. [16] The CCAA is, in the main, procedural. However, many of the cases that deal with issues under it are matters of substance and not of procedure, such as the giving of priority to those that finance the proceeding or the termination of executory contracts. [17] The Supreme Court of Canada specifically allowed courts to invoke the doctrine to deal with matters of substance. [18] This likely makes Jacob's argument moot.

When discussing the juridical basis of inherent jurisdiction, Jacob said:

> [T]he jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent" . . . the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed or abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute . . . The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. [19]

This statement may seem hyperbolical at first blush. However, it provides us with an idea of the scope of the power the common law gives these courts, the courts are reluctant to give us a precise definition of that scope. [20]

Of further importance, is the fact that inherent jurisdiction derives from the nature of the court and not any statute or rule of law. [21]

Thus, any attempt to try to find the source of inherent jurisdiction in a statute or case would be fruitless. At this point, such an attempt would be a fascinating academic exercise but, for our purposes, inherent jurisdiction exists as a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. [22]

A reference to a doctrine that is intended to "do justice" between the parties provides the court with a broad discretion. Thus, we must differentiate between discretion and inherent jurisdiction. Jacob recognized that there is a difference between them, but he gives no guidance on how to differentiate them. [23] Jurisdiction is the power a statute or rule gives the court and includes the residual power, or inherent jurisdiction. Discretion or judicial discretion is the exercise of that jurisdiction by a court based

on statute, legal rules or doctrine. Thus, one can see that there is the overlap of which Jacob speaks.[24] For example, when a court in a CCAA proceeding sanctions an arrangement that allows for the disclaimer of executory contracts or affects the rights of third parties, it is exercising a discretion that the CCAA gives it under s. 6 to sanction arrangements that appear to be fair and reasonable.[25] On the other hand, when a court allows a person who is financing the proceeding to obtain priority over existing creditors or prohibits third parties from exercising their rights in the face of a CCAA proceeding, the court is exercising its inherent jurisdiction, as the CCAA does not contemplate or deal with the issue and the court must exercise its residual power to fill the gap. A court is not bound to exercise its inherent jurisdiction; the exercise of that power is itself discretionary.[26] A further overlap occurs when the court uses inherent jurisdiction to "supplement a statute and effect a statutory object".[27]

Thus, to differentiate between the concepts, we must ask whether the court is exercising its discretion as allowed by the statute or rule, or its residual power to fill a lacuna in the statute. This is not always an easy task. The court in *Skeena* said that "the distinction between these two sources of authority is one that, in my mind at least, 'eludes definition'".[28]

The CCAA provides the courts with little guidance when they attempt to resolve issues under it. There is a gap in the CCAA, or the CCAA provides them with authority but the authority requires them to effect a result that is fair and reasonable by balancing the stakeholders' interests. In either case, there is apparent uncertainty in result.[29] Does this create a situation that is "Mickey Mouse time"? The courts do not see inherent jurisdiction as an invitation to make whatever orders they feel are appropriate "in the interests of justice". They have fettered their own discretion when asked to apply it. In A.J. Bekhor & Co. Ltd. v. Bilton, the court said that if and in so far as [counsel for the plaintiff] contends that the courts have a general residual discretion to make any order necessary to ensure that justice be done between the parties, then in my judgment that is too wide and sweeping a contention to be acceptable.[30]

Although the court in *Behkor* did not give us any idea as to when the contention would be acceptable, the Supreme Court of Canada has offered some guidance. In Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.,[31] the court cited with approval the following statement from Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.:[32] "Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case."

Because of this limit on the courts' exercise of this "special and extraordinary power" and the fact that courts are provided with little guidance on when they should exercise the power, courts take a cautious approach when determining whether a matter calls for the exercise of their inherent jurisdiction.[33] Jacob's description of the doctrine could lead a court to grant any order it chooses in the interests of justice. Even if the order has a sound legal foundation, such an order would surely be arbitrary. When describing Jacob's description of the doctrine, the court in *Gillespie* said:

> His statements, in my view, were intended to describe the broad auxiliary powers of a superior court, not to extend the ordinary jurisdiction of such a court into the realm of law-making. Justice is better administered by laws made by, or under authority from, the Legislature.[34]

Furthermore, even if the statute purports to deal with an issue or to address a matter in which the courts have been exercising inherent jurisdiction, but does not override that jurisdiction entirely, the courts may still exercise inherent jurisdiction to fill any remaining gaps.[35] However, the court must be careful to ensure that there is, indeed, a gap in the legislation and that the situation is one that the legislature did not contemplate when it drafted the legislation.[36]

To do otherwise would breach the Supreme Court of Canada's admonition.[37]

In summary, inherent jurisdiction exists in Canadian superior courts and, in Jacob's words, is "a virile and viable doctrine . . . claimed by the superior courts of law as an indispensable adjunct to all their other powers . . . to prevent any clogging or obstruction of the stream of justice".[38] Whether one sees this doctrine as too wide or sweeping, the courts see it as an

indispensable adjunct to their powers. Its purpose is to fill legislative lacunae in order to ensure justice is done, but it must be used "only sparingly and in a clear case". [39] When a court uses it, its use must not conflict with a statute or rule. [40] Despite the fact that courts have fettered their own discretion on when they will exercise it, a complete or extensive gap in the legislation invites its use to ensure that justice is done.

II. — INHERENT JURISDICTION UNDER THE CCAA

1. — History and Purpose of the CCAA

The CCAA provides courts little guidance when they deal with the myriad of problems in a CCAA proceeding. Parliament has, therefore, invited courts to exercise, or at least explore, the possibility of exercising inherent jurisdiction. One court went so far as to describe the CCAA as operating "substantially through judge-made law interpreting and applying its 22 sections". [41] One of the most thorough summaries of judicial use of inherent jurisdiction in CCAA proceedings is as follows:

> The vitality of the CCAA is due in part to the way it has been interpreted by the courts, primarily in Ontario, British Columbia and Alberta. These courts opted for a broad and liberal interpretation of the CCAA and the notion inappropriately called 'contempt of court' is sui generis and has from time immemorial reposed in the judge for the protection of the public. Although the point is by no means free from difficulty, I agree with my Lords that Parliament cannot be taken to have intended . . . these Acts to apply to proceedings such as these." Thus, the court held that the sentencing judge had had inherent jurisdiction to deal with the matters in the way he did, albeit harshly, but, because the court had now considered the issue, the application of inherent jurisdiction previously exercised would be enforced thereafter.
>
> of "inherent jurisdiction" and "equity" in order to give effect to the aims of the CCAA, which are to enable companies to remain in operation so that they can find a solution to their insolvency and turn their financial situation around. The courts concluded that the CCAA must be interpreted and applied in this way in order to provide a flexible tool for restructuring insolvent companies.
>
> . . . . .
>
> A number of these judgments draw on the Supreme Court decision in Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. [[1996] 2 S.C.R. 475], for the purpose of exercising their inherent jurisdiction and giving effect to the objectives of the CCAA. The Supreme Court stated that a court's inherent jurisdiction does not allow it to render an order negating the unambiguous expression of the legislative will. In *Re Westar Mining Ltd.* [14 B.R. (3d) 88], Macdonald J. referred to *Baxter* and established the principle that would be followed in several judgments:
>
> > Proceedings under the C.C.A.A. are a prime example of the kind of situation where the Court must draw such powers to "flesh out" the bare bones of an inadequate incomplete statutory provision in order to give effect to its objectives [*Westar*, at p. 93]. [42]

How did we arrive at this point? Are Canadian courts taking a sound approach in their use of inherent jurisdiction and abiding by the parliamentary mandate when approaching CCAA matters this way? If we proceed from the assumption that the CCAA is devoid, or nearly so, of any guidance to the courts when the courts are dealing with matters under the CCAA, what guides them through their journey?

Historically, the CCAA was enacted to fill a void in the bankruptcy and insolvency legislation. Parliament enacted it in 1933. [43] The following statement of the Honourable Charles H. Cahan reflected the need for a business reorganization system at that time:

> At the present time, some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby compromises might be carried into effect under the supervision

> of the court without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets. [44]

Following the CCAA's enactment, different types of insolvent companies used it when seeking to make arrangements with their unsecured creditors. Parliament had a concern that the CCAA did not adequately protect unsecured trade creditors because of the absence of a requirement that the company appoint an official trustee to oversee the reorganization. [45] As a result, unsecured creditors were induced by false or misleading statements to accept the arrangement the debtor company was putting forth. [46] Because of this apparent abuse, Parliament amended the CCAA in 1953 [47] to make it applicable only to debtor companies that had issued bonds, debentures or other evidences of indebtedness under a trust deed or other instrument running in favour of a trustee.

Parliament made no substantive amendments to the CCAA before 1997, when it passed "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act". [48] Through the work of creative counsel, debtors seeking to reorganize their financial affairs started using the CCAA in the early 1980s. Since then, the Act has become the "remedy of choice" [49] for debtors. The 1997 amendments made several changes to the CCAA. Among others, Parliament removed the need for a trust deed [50] and defined companies to which the CCAA

would apply. [51] The objectives have not changed [52] although Parliament is more committed to reorganizations and the courts have responded to that commitment by outlining and, arguably, broadening those objectives and the means to accomplish them through their use of inherent jurisdiction. [53]

Because the CCAA provides courts with little guidance, the only way they may deal with the diverse issues that arise under it is through their use of inherent jurisdiction. In fact, the CCAA invites them to do so. For example, on the initial application, which the debtor company usually makes *ex parte* or on very short notice to certain creditors, [54] and on all applications after the court grants the initial order, the CCAA invites the court to "make an order on such terms as it may impose". [55] Rather than simply plucking ideas out of the air, courts have been cautious to ensure that their exercise of that jurisdiction accords with Parliament's objectives. Perhaps guided by the CCAA's legislative history, the court in *Lehndorff General Partner Ltd. (Re)* [56] provided us with its perception of the CCAA's purpose:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make [orders] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. [57]

The Bankruptcy and Insolvency Advisory Committee, [58] in its report on amendments that Parliament might consider, said:

> The [CCAA] contains few guidelines; it gives very wide discretion to the court as regards both procedural and substantive rights respecting stays, disclosure, termination or continuation of contracts and other matters. This appears to have led to some variation in the way courts handle CCAA cases in the different Canadian jurisdictions, although a body of case law precedents seem [*sic*] to be emerging which may produce a more uniform, consistent approach in the future. [59]

Is this flexibility and lack of guidance resulting in uncertainty or lack of predictability? The fact that courts are guided by the object and purpose of the CCAA might not answer this question. [60] Furthermore, even though one might describe proceedings under the CCAA as unpredictable or a legal free-for-all, the courts have exercised some restraint in their exercise of inherent

jurisdiction. The court in *Pacific National Lease Holding Corp. (Re)* [61] said that "this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A.".

Are the courts permitted to use their inherent jurisdiction when managing a case under the CCAA? Section 12 of the Interpretation Act [62] provides that:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The courts' use of this through their exercise of inherent jurisdiction is more pronounced when the enactment provides little or no guidance. The courts are, thus, entitled to look to the objects of the CCAA and give the CCAA a fair, large and liberal interpretation to meet those objects.

2. — Practical Application of Inherent Jurisdiction under the CCAA

Courts have used s. 11(3) and s. 11(4) of the CCAA as their launching pad for exercising their inherent jurisdiction. That, twinned with the prerogative contained in the Interpretation Act, [63] has allowed the courts to use their inherent jurisdiction in various, seemingly unrelated, ways. The following provides examples of when courts have used their inherent jurisdiction when managing cases under the CCAA.

(a) — Financing the Restructuring Proceeding [64]

Courts have used their inherent jurisdiction to allow debtor companies to finance the restructuring proceeding. [65] The difficulty with these cases involves the subordination of the interests of creditors holding security to the entity providing the restructuring financing. As a result, courts have attempted to temper their exercise of inherent jurisdiction by limiting the amount of the financing that would obtain this priority to "what is essential for the continued operations of the company during a brief 'sorting-out' period". [66] Even this might prove onerous to secured creditors, however, as this priority might erode the secured creditors' interests and results in the secured creditors financing the proceeding to that extent. [67] Courts have expressed their concern that the exercise of inherent jurisdiction to subordinate existing security should be exercised only in "extraordinary circumstances" and have further tried to temper this priority by requiring the parties seeking this priority to show cogent evidence that the benefit to those parties clearly outweighs the potential prejudice to secured creditors. [68] That said, the courts have relied on their inherent jurisdiction to grant this priority in the face of objecting creditors as, to deny this priority "would . . . frustrate the objectives of the CCAA". [69]

(b) — Affecting the Rights of Third Persons

Strangers to the restructuring proceeding are not immune from the courts' exercise of inherent jurisdiction. Courts have used their inherent jurisdiction to affect the rights of non-creditor third persons where the actions of these parties have the potential of prejudicing the success of a reorganization plan. [70] In *T. Eaton Co. (Re)*, [71] the court would not permit tenants in retail shopping centres to terminate their leases during the restructuring period. The argument on the tenants' part was that their leases permitted them to terminate if Eaton's, the anchor tenant, ceased operating in those shopping centres. The argument against termination was based on Eaton's ability to put forth an acceptable restructuring plan and the claims the landlords might have against Eaton's should Eaton's fail to put forth an acceptable plan. Interestingly, the arguments against termination were made by the landlords and not the debtor. Nonetheless, the court dismissed the motion.

The effect of the courts' exercise of their inherent jurisdiction might not always be detrimental to the third party. In Campeau v. Olympia & York Developments Ltd., [72] the court restrained the applicant from continuing proceedings against a third party that was a co-defendant with the debtor company. The reasoning in that case was on the prejudice to the debtor "if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one". [73]

(c) — Termination of Contracts

The BIA and the U.S. Bankruptcy Code [74] permit the disclaimer of contracts. Section 65.2 of the BIA permits the insolvent person to disclaim commercial leases. Section 365 of the U.S. Bankruptcy Code [75] is much broader and permits the rejection (or disclaimer) of unexpired leases or executory contracts. The CCAA contains no provision allowing for the repudiation, rejection or disclaimer of executory contracts or unexpired leases. However, courts allow the debtor company to disclaim leases and executory contracts using their inherent jurisdiction.

In *Dylex Ltd. (Re)*, [76] the court permitted the debtor to terminate several leases in retail shopping centres in which the debtor was a tenant. The court balanced the interests of the various stakeholders and said that "the court has the inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan". [77] Based on this reasoning, the court in *Blue Range Resource Corp. (Re)* [78] permitted the debtor to terminate its longterm natural gas supply contracts with certain gas marketing companies and said:

> In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that it does not affect the creditors' rights to claim for damages.
>
> The applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathize with the applicants' positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route. [79]

One area that causes some concern is the status of collective bargaining agreements and employment relationships. Section 1113 of the U.S. Bankruptcy Code [80] permits the assumption or rejection of collective bargaining agreements. The CCAA has no similar provision. The Quebec Court of Appeal considered this issue in Syndicat National de L'Amiante d'Asbestos Inc. v. Mine Jeffrey Inc. [81] In that case, the court held that a monitor could neither terminate nor amend collective bargaining agreements, as the "property and rights of the insolvent company were not devolved to the monitor under the CCAA". [82] Accordingly, the debtor company remained the employer and bound by the collective bargaining agreements, and anything the monitor did while acting as such was done on behalf of the debtor company. The court also held that the certifications of the various unions remained valid. Thus, the monitor, on behalf of the debtor company, could not negotiate directly with a member of the bargaining unit but had to do so with the union. [83] The practical result of this case was that the debtor company, through the monitor, could terminate employees. [84] If those employees were rehired, they would retain the rights they had under the collective bargaining agreements, and the monitor could not unilaterally change the working conditions, as this would violate the certifications. [85]

Of course, if the debtor company were to honour completely the collective bargaining agreements, the dire financial situation in which the debtor company found itself could become worse. Accordingly, the court said that the provision in the order of the Quebec Superior Court declaring that the monitor is not bound by the collective agreements, is unfounded and null. Instead, the judge should have declared that the monitor was required to negotiate with the [unions] any amendment considered necessary. I invite the parties to enter into urgent negotiations, in good faith, in order to agree on any amendments. . . . [86]

(d) — Sale of Assets before the Plan is Filed and Approved

Section 6 of the CCAA allows the courts to sanction a plan of compromise or arrangement once the creditors agree to the plan. In *Canadian Red Cross Society (Re)*, [87] the court approved the sale of the blood supply operations and assets of the debtor before the plan had been filed and agreed to by the creditors, based on its inherent jurisdiction. In so doing, the court found it had jurisdiction and could grant such an order if "the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation". [88]

(e) — Claims Bar Procedure

Although the CCAA contains a section that deals with claims, the provision is a fairly general one that does not address specific issues or the procedure that parties may use to determine or deny claims. A procedure that had its roots in the United States and found its way into Canada is the claims bar procedure. The CCAA contains no provision allowing a court to set a procedure for barring claims. In the United States, the claims bar procedure was created to deal with potential mass tort liability cases. As the vast number and location of claimants are unknown in such cases, the courts developed this procedure to create certainty in the restructuring process and make "certain that all legitimate creditors come forward on a timely basis". [89] Under the claims bar procedure, claimants must file claims before a certain date. The debtor is required to send notice of the date and procedure to all potential claimants, and in the case, for example, of a potential mass tort liability, the debtor must publish the notice in various newspapers.

Despite the lack of guidance or, for that matter, permission in the CCAA, allowing such a procedure, the courts have allowed it under their inherent jurisdiction. [90] However, they have tempered the effect of this procedure on the rights of creditors who fail to file claims by the bar date by setting forth the criteria they will consider when asked to extend the date. [91]

(f) — International Considerations

Before 1997, the CCAA contained no provisions that would guide a court when faced with a restructuring matter when a debtor owned assets, owed liabilities or had commitments that transcended national boundaries or where the debtor otherwise carried on business in more than one jurisdiction. In 1997, Parliament enacted s. 18.6 with the heading "International Insolvencies". [92] Before Parliament passed s. 18.6, parties had relied on the doctrine of comity [93] or, more commonly, the negotiation skills of the various stakeholders. [94] Negotiation often resulted in a protocol among stakeholders that governed various cross-border issues in a coordinated way. [95] Because the CCAA contained no provisions to guide the courts through a cross-border reorganization, the courts used their inherent jurisdiction to sanction protocols. In *Olympia & York Developments Ltd. (Re)*, [96] the court said:

> I have no hesitation in concluding, as I do, that this Court has the jurisdiction to approve a vehicle such as the Protocol, negotiated and agreed to by all of the affected parties, and designed to facilitate the implementation or a re-organization Plan by providing some certainty regarding cross-jurisdictional issues. Such jurisdiction can be founded on the principles of international comity between nations, or, if necessary upon the Court's inherent jurisdiction . . .

3. — How the Courts Have Applied Inherent Jurisdiction in CCAA Cases

From the foregoing, we see that courts do not hesitate to use their inherent jurisdiction "to 'flesh out' the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects". [97] The question remains, however, is it "Mickey Mouse time"?

When discussing judicial discretion, Chief Justice Cardozo has said:

> The judge even when he is free, is not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains. [98]

This could apply equally to the courts' exercise of their inherent jurisdiction. As mentioned earlier, courts take a cautious approach when they exercise their inherent jurisdiction under the CCAA. [99] What does this mean? Does the court still roam as a knight errant?

The starting point in most cases in which the courts exercise their inherent jurisdiction under the CCAA is to determine the objects of the legislation, which were stated by the court in Hongkong Bank of Canada v. Chef Ready Foods Ltd. [100] This gives the court a very broad brush with which to paint the CCAA landscape. Courts have suggested that those objects invite the courts to ensure the debtor "survives", [101] that the court "should do whatever can be done to provide . . . an opportunity" to put forth a reorganization plan [102] or "that the company is able to continue in business". [103] These approaches might be a bit strong, as they must be tempered by the fact that other stakeholders are involved in the proceeding and some debtors simply might not be worth saving.

A better approach, and one that appears to have found favour with some courts, is the balancing of the various stakeholders' interests. While the courts are dealing with matters under the CCAA, they are courts of equity. [104] Equity, of course, guides the courts in reaching results that are just, fair and reasonable, but the courts must not exceed their inherent jurisdiction to produce such results if those results are contrary to the statutory mandate Parliament has given them. Because the CCAA is sparse, the courts are, indeed, guided by equitable principles "to supplement a statute and effect a statutory object". [105]

Although one might argue that the concepts of fairness and reasonableness are metaphysical concepts that provide the courts complete and unfettered discretion, the court in *Olympia & York Developments Ltd. (Re)* described them as follows:

> "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the *Companies' Creditors Arrangement Act*. "Fairness" is the quintessential expression of the court's equitable jurisdiction — although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity — and "reasonableness" is what lends objectivity to the process. [106]

This balancing of diverse interests underscores most of the reported CCAA cases. [107] The court in *Woodward's Ltd. (Re)* provided us with the test the courts must use in this balancing:

> In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the Court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay). [108]

Who are these "parties who will be affected by the exercise of the inherent jurisdiction"? The insolvent person and its creditors will fall within that description. The description could also include third parties that are directly or indirectly affected by the reorganization proceedings. [109]

Do the courts evenly balance the competing interests? The balancing, it appears, does not seem to be a scientific exercise where judges examine the minutiae of every competing interest. [110] Rather, the courts seem to take the broad brush approach, referred to earlier. [111] The courts, however, appear to accept that the largest cost will be borne by the creditors. In *Sammi Atlas Inc. (Re)*, the court said:

> A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights . . . [112]

The reason for this is related to the CCAA's main purpose, which is to ensure the survival of debtor companies or, at least, provide the debtor company with a life support system which will allow it to present a plan of arrangement to its creditors. The creditors then determine whether they will "pull the plug". The CCAA itself seems to engender this approach, as it allows a majority in number, representing two-thirds in value of the creditors, to impose a plan of arrangement on the dissenting minority. [113] Further weighing against the creditors' interests is the fact that societal interests or public policy objectives are thrown onto the scale. When weighing this factor, a court takes a narrow approach by looking at the potential effect of its ruling on the debtor company and its employees and creditors, [114] or a broader approach by looking at the potential effect on the provincial or federal economies or society generally. [115] Either way, the balance tips in favour of allowing the debtor time to formulate and present a plan of arrangement to the possible detriment of creditors and others. Of course, if the debtor company succeeds in its plan of arrangement, its success might benefit all stakeholders, including secured creditors.

One might be inclined to think that the CCAA creates a structure that allows the debtor company to work independently of other stakeholders with a view to presenting a plan of arrangement that the creditors and the court will consider. Courts, however, reinforce what might be the crux of any reorganization proceeding, which is to encourage stakeholders to negotiate a structured settlement. In other words, courts might simply be facilitators of the reorganization process, [116] moving the stakeholders to a compromise that will benefit all. [117] This position was strongly stated in Lindsay v. Transtec Canada Ltd.:

> A plain reading [of CCAA, s. 4] suggests simply the conferring on the court of a discretion to direct the manner in which a meeting may be called. Presumably a court is to exercise that discretion judicially, to take account of the purpose of the CCAA, to consider the variety of interests being served by the CCAA, and to arrive at a fair direction — one that will permit the debtor company and, inter alia, its unsecured creditors to meet to discuss its continuation, although insolvent, in their mutual best interests, but also in the interest of the broader community the CCAA was designed to serve. [118]

But does this really happen? Certainly, major creditors and other stakeholders will be invited to the bargaining table. The balance of the stakeholders, however, will likely not participate because, among other things, they do not have the financial wherewithal to deal with the many issues they could face in a CCAA reorganization proceeding. In many cases, the debtor company will attempt to secure the requisite numerical majority by paying *de minimus* unsecured creditors in full. The others will often not be involved in the negotiations. Thus, the statement in *Lindsay* might be a bit illusory, but the fact that major creditors are involved in the negotiations and others are taken care of through those negotiations might make CCAA proceedings a form of alternative dispute resolution. If that is the case, the court's exercise of inherent jurisdiction to facilitate this process is laudable. [119] The difficulty, however, is that courts tend to go beyond these bounds and deal with matters of substance. [120]

III. — IS INHERENT JURISDICTION A BENEFICENT OR BAD DOCTRINE?

This question boils down to whether Parliament should provide the courts more guidance when they attempt to wade through a CCAA proceeding. The choices are many and varied. They include:

(a) leaving the CCAA the way it exists;
(b) repealing the CCAA;
(c) making slight modifications to the CCAA;
(d) making substantial modifications to the CCAA.

Whichever option one chooses depends on the interests one is seeking to protect. From a creditor's perspective, the CCAA is generally bad in the short term, as it results in the immediate compromise of the creditor's claim. Of course, the restructuring and rehabilitation of the debtor company could prove beneficial in the long term, which directly or indirectly could benefit that creditor.

For this reason and more general public policy reasons, Parliament has chosen to retain the CCAA and clarify certain aspects of Part III of the BIA.

The Senate Committee proceedings [121] indicate that there are those who support a system that retains a flexibility in which courts may exercise their inherent jurisdiction and encourage an alternative dispute resolution model, and others who do not. [122] This article supports the view that Parliament should retain some flexibility in the CCAA.

The fact that other countries see reorganization as a beneficial approach to insolvencies shows that Parliament is on a level playing field globally. [123] In fact, many countries see the Canadian system as being sophisticated, if not sound. Thus, the total repeal of the CCAA is likely not a viable alternative. The Joint Report also recommended against this alternative. [124] The retention of the CCAA as it presently exists, however, raises the issue at hand.

The court in Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc. [125] noted:

> It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

Combining this with the lack of guidance the CCAA itself provides the courts, it is no wonder courts have had to resort to their inherent jurisdiction when determining issues under the Act. But is inherent jurisdiction bad doctrine? Courts have seen the need for flexibility in bankruptcy and insolvency statutes in order to meet novel issues and unforeseen societal needs and characterize this as "a very positive feature of the [CCAA]" [126] and one that allows the

CCAA to "adapt to new exigencies". [127] In *N.T.W. Management Group Ltd. (Re)*, [128] the court said:

> Courts have recognized in dealing with the bankruptcy and insolvency legislation a technical or stringent interpretation should not be applied. The Act has to be flexible to deal with the numerous situations and variations which arise from time to time. To take a technical approach to the Act would in my view defeat the whole purpose of the legislation.

Does this mean Canadian courts are roaming like knights errant? Given the very cautious approach courts take with respect to the issues that face them, one could hardly make that argument. In *Olympia & York Developments Ltd. (Re)*, [129] the court said, of the flexibility of bankruptcy and insolvency legislation generally, "that does not mean that the 'rules' and jurisprudence are to be thrown out or the legislation ignored so as to get what some may feel is a 'juster' or more appropriate result in particular circumstances". Courts are guided by the delicate balancing act imposed on them by the principles of equity, and their changes are incremental rather than arbitrary. [130]

The Joint Report [131] made several recommendations that add some certainty to reorganization proceedings. In particular, the recommendations provide courts some guidance when considering the issues this article discusses. [132] Thus, the Joint Report recommendations are a positive step, and Parliament should consider adopting them. In so doing, however, Parliament must be

careful not to detract from the CCAA's flexibility, which the courts see as one of the Act's most positive features. We cannot predict what the future will bring to Canadian or global business, so restricting the courts' inherent jurisdiction could prove to be a disaster. Policy-makers could not have foreseen in 1933 that the CCAA would be used to restructure an entity that caused the suffering of thousands of individuals as a result of diseases that had not even manifested themselves until 50 years after the passage of the Act. The objectives contained in the Joint Report recognized this and said that "it would be helpful to enact some *basic statutory provisions that establish the fundamental principles* and provide for appropriate protections against abuse". [133] Thus, the Joint Report [134] recommendations are not trying to fetter the courts' inherent jurisdiction — they are simply trying to give judges some guidance when exercising it.

Parliament could make wholesale changes to the CCAA by, for example, inserting a provision to deal with financing the debtor company during the reorganization proceeding that is similar to s. 364 of the U.S. Bankruptcy Code. [135] But should it? Section 364 deals with a specific issue under a very detailed reorganization procedure. If Parliament chooses to insert one particular provision, or several for that matter, this may address public policy issues that do not reflect the fabric of Canadian society or its business. Besides, does s. 364 really add certainty to the process? An unscientific review of the number of cases on one of the bankruptcy legal search engines using "section 364" showed 952 reported cases. Can one really argue that s. 364 has added certainty?

Parliament is committed to allowing viable companies to attempt to reorganize. The very nature of reorganization results in sacrifices on the part of stakeholders. Since debtor companies started using the CCAA in the 1980s, courts have attempted to balance the interests of stakeholders using inherent jurisdiction and acting as facilitators to effect structured settlements. Inherent jurisdiction is a "difficult idea to pin down". [136] However, it has worked to help guide Canadian courts in effecting fair and reasonable results that help the Canadian economy by delicately balancing the stakeholders' diverse interests. It has not been "Mickey Mouse time". By adopting the recommendations contained in the Joint Report while, at the same time, retaining flexibility that will allow the courts to exercise their inherent jurisdiction in appropriate circumstances, Canadians will continue to have a very sound reorganization regime.

Footnotes

* Assistant Professor, Faculty of Law, University of Calgary. This is a revised version of a paper presented at the 33rd Annual Workshop on Commercial and Consumer Law held at the Faculty of Law, University of Toronto, on October 17 and 18, 2003.

1 Martin S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings" (1997), 113 L.Q.R. 120 at p. 120.

2 R.S.C. 1985, c. C-36.

3 William L. Norton, Jr., ed., *Norton Bankruptcy Law and Practice*, 2nd ed. (Deerfield, Clark Boardman Callaghan, 1994), vol. 6A, §152.58.

4 Peter Brieger, "Bankruptcy Rules Overhaul Urged", *Financial Post* (May 7, 2003), p. FP9. When questioned by the Standing Senate Committee on Banking, Trade and Commerce, Kent replied: "The *Financial Post* quote is in relation to how our system appears to people outside the country, where we cannot say what the rules are on a variety of issues and where a judge is in doubt about the rules and his powers, pending a difficult case that he is not sure how to handle. When that happens, internationally, it seems odd for people, from a major, developed economy, to be in such doubt and in such a position regarding the most fundamental questions": Canada, *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, Issue No. 19 (May 8, 2003) (testimony of Andrew Kent), p. 6; online at http://www.parl.gc.ca/37/2/parlbus/commbus/senate/Com-e/bank-e/19cve.htm?Language=E&Parl=37&Ses=2&comm_id=3, "Transcript (Evidence) of Proceedings".

5 The CCAA is actually 22 sections, but the first section gives us the statute's short name and the last directs a review of the statute by Parliament.

6 When he presented to Parliament the 1992 amendments to the Bankruptcy and Insolvency Act, R.S.C. 1983, c. B-3 (the "BIA"), the then Minister of Consumer and Corporate Affairs said:

> The new legislation will also make it possible for individuals and businesses to restructure and, if possible, avoid bankruptcy.
>
> The thrust of this reform is to provide a mechanism that will safeguard businesses that have the misfortune to be in financial difficulty but are still viable. It is not, as I have said from time to time, to give artificial respiration to businesses that are clinically

> dead but to ensure that businesses that are viable get the help they need to keep going. Thanks to this mechanism, we will save thousands of jobs: *House of Commons Debates* at p. 11775 (June 10, 1992) (Pierre Blais).

Later, when the 1997 amendments to the BIA and the CCAA were presented to Parliament for second reading, the member introducing the amendments said the following:

> The amendments we are putting forward today are a further striking of a balance between rehabilitation and obligation. In other words, the emphasis in the bill is to make sure we do everything we can to help preserve jobs and the businesses that create them. Rather than automatically having a situation in which people lose their businesses, we create an environment in which we can actually help them through and that before they become bankrupt we take every measure possible to help them through difficult circumstances: *House of Commons Debates*, at pp. 16922-23 (November 28, 1995) (Hon. Dennis J. Mills).

7 This article will not conduct a detailed examination of specific issues that the courts have attempted to address using the doctrine. For discussion of specific issues, the reader is referred to the numerous papers prepared for the Insolvency Institute of Canada's annual conferences on WestlawCARSWELL under "Articles": Janis Sarra, "Debtor in Possession Financing: The Jurisdiction of Canadian Courts to Grant SuperPriority Financing in CCAA Applications" (2000), 23 Dal. L.J. 337; Janis Sarra, "Entre Loup et Chien: Restructuring under Canadian Insolvency Law and Proposals for Legislative Reform" (2003), 12 Int. Insolv. Rev. 83; to a lesser extent, David Chaiton, "Inherent Jurisdiction of the Courts in Restructuring Proceedings — Part II" (2001), 13 Comm. Insolv. Rev. 49.

8 Pursuant to the CCAA and the BIA, the parliamentary Standing Senate Committee on Banking, Trade and Commerce conducted proceedings to review the administration and operation of those acts (Senate Committee proceedings). The BIA contains a provision which provides:

> 216(1) This Act shall, on the expiration of five years after the coming into force of this section, stand referred to such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established to review the administration and operation of this Act.
>
> (2) The committee shall, within one year after beginning the review or within such further time as the Senate, the House of Commons or both Houses of Parliament, as the case may be, may authorize, submit a report on the review to that House or both Houses, including a statement of any changes to this Act that the committee would recommend.

The CCAA contains a similar provision as s. 22.

9 I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23.

10 See, *e.g.*, BCGEU v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, affg 20 D.L.R. (4th) 399, [1985] 5 W.W.R. 421 (B.C.C.A.); Gillespie v. Manitoba (Attorney General) (2000), 185 D.L.R. (4th) 214, 144 C.C.C. (3d) 193 (Man. C.A.); Glover v. Bell Canada (1980), 113 D.L.R. (3d) 174, 29 O.R. (2d) 401 (C.A.), affd 130 D.L.R. (3d) 382*n*, [1981] 2 S.C.R. 563; Standard Trust Co. v. Lindsay Holdings Ltd. (1994), 29 C.B.R. (3d) 297, [1995] 3 W.W.R. 181 (B.C.S.C.); Coopers & Lybrand Ltd. v. Bank of Montreal, [1993] N.J. No. 232 (QL) (S.C.); Danson v. Ontario (Attorney General) (1985), 20 D.L.R. (4th) 288, 51 O.R. (2d) 405 (H.C.J.), affd 27 D.L.R. (4th) 758, 55 O.R. (2d) 1 (Div. Ct.), revd 41 D.L.R. (4th) 129, 60 O.R. (2d) 676 (C.A.), affd 73 D.L.R. (4th) 686 *sub nom. R. v. Danson*, [1990] 2 S.C.R. 1086.

11 *Supra*, footnote 1.

12 Jacob, *supra*, footnote 9.

13 *Ibid.*, at pp. 23-24. See also the following description, from *Loxtave Buildings of Canada (Re)* (1943), 25 C.B.R. 22 (Sask. K.B.) at p. 25, of inherent jurisdiction in the context of the BIA: "[T]he Court has inherent powers in respect to any matter within its jurisdiction . . . It is well established law that nothing shall be intended to be out of the jurisdiction of a Superior Court but what expressly appears to be so. The jurisdiction of the King's Superior Courts over matters cognizable by them can not be taken away but by express words or perhaps by necessary implication arising from the use of words absolutely inconsistent with the exercise of the jurisdiction . . . If a Court has jurisdiction of the principle matter it has also jurisdiction over all matters incident thereto and may try them according to the course of their law so that it be not contrary to the common law . . . if the subject-matter is within the statute, the Court may draw on its inherent powers to give effect to the provisions of the statute."

14 CCAA, s. 2, definition "court".

15 Jacob, *supra*, footnote 9, at p. 24.

16 See, *e.g.*, 80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd., [1972] 2 O.R. 280 at p. 282, 25 D.L.R. (3d) 386 (C.A.), where the court said: "As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do

justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unreserved *in substantive law in civil matters*" (emphasis added).

17 On the issue of whether procedural rules may create substantive law, see BRAC, System Board of Adjustment No. 435 v. Canadian Pacific Airlines Ltd. (1984), 55 B.C.L.R. 18 (C.A.) at p. 35, where the court said: "In my opinion, the Rules can create new substantive law. But they are intended to be a collection of procedural rules for the enforcement of substantive rights that are derived from the true sources of substantive law, namely, the common law, equity, the Constitution and the statutes. It is only in exceptional cases that the Rules create new substantive law." *Quaere* whether the huge gaps in the substantive portions of the CCAA make the CCAA an "exceptional case". See the discussion, *infra*, footnotes 63-96 and accompanying text.

18 Societe des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549 at paras. 94-95, 27 D.L.R. (4th) 406.

19 Jacob, *supra*, footnote 9, at pp. 27-28.

20 See, *e.g.*, Glover v. Bell Canada (C.A.), *supra*, footnote 10, at p. 182, where Wilson J.A. said in her dissenting judgment: "It is impossible to define the scope of the Court's inherent jurisdiction because the contexts in which the Court may have to resort to it to protect its process and render it efficacious are themselves incapable of definition."

21 R. v. Unnamed Person (1985), 22 C.C.C. (3d) 284 at p. 286, 10 O.A.C. 305 (C.A.). See also R. v. Norwich Crown Court, Ex parte Belsham, [1992] 1 W.L.R. 54 (Q.B.D.) at p. 65, in which the court said: "There is ample authority to show that a court, whether superior or inferior, has *at common law* an inherent jurisdiction or power to control its processes and a duty to prevent abuse of it" (emphasis added).

22 Jacob, *supra*, footnote 9, at p. 51. Because the power is residual, the court in Gillespie v. Manitoba (Attorney General), *supra*, footnote 10, at p. 226, chose to refer to the power as "auxiliary", as it supports rather than enhances the courts' general jurisdiction. The court said: "It is available to assist the judge in the performance of his or her primary function . . . I have found no case in which a judge of a superior court has purported to exercise inherent jurisdiction other than as an incident of, and in the course of exercising, the ordinary jurisdiction of the court."

23 Jacob, *ibid.*, at p. 25.

24 *Ibid.*

25 *Skeena Cellulose Inc. (Re)*, 2003 CarswellBC 1399 (C.A.) at para. 46. As to the courts' use of fair and reasonable in a CCAA proceeding, see *infra*, footnotes 104-115 and accompanying text. The reason that "discretion" is exercised at all, even though a statute or other rule of law purports to deal with the issue, has been described as follows in Stephen M. Waddams, "Judicial Discretion" (2001), 1 Ox. U. Commonwealth L.J. 59 at p. 59: "All legal rules . . . contain elements of uncertainty, because the circumstances in which the rules come to be applied cannot be precisely foreseen, nor can any rule, however detailed, describe in advance every possible future case. Many important and fundamental legal rules are necessarily very general, and are open-textured in nature, or allow for open-ended exceptions. It is sometimes said of rules of this kind that they are discretionary."

26 Connelly v. Director of Public Prosecutions, [1964] A.C. 1254 (H.L.) at pp. 1296, 1301, 1334-37, 1350, 1359-61.

27 *United Used Auto & Truck Parts Ltd. (Re)* (2000), 16 C.B.R. (4th) 141 at p. 149, [2000] 5 W.W.R. 178 (B.C.C.A.), leave to appeal to S.C.C. granted 261 N.R. 196*n*, 244 W.A.C. 160*n*.

28 *Skeena Cellulose Inc. (Re)*, *supra*, footnote 25, at para. 47.

29 The balance of this article will use "inherent jurisdiction" in this context, without differentiating between whether the court is purporting to exercise this jurisdiction or its discretion.

30 [1981] Q.B. 923 (C.A.) at pp. 942-43.

31 [1976] 2 S.C.R. 475 at p. 480, 57 D.L.R. (3d) 1.

32 [1971] 4 W.W.R. 542 at p. 547, 21 D.L.R. (3d) 75 (Man. C.A.).

33 See, *e.g.*, Glover v. Bell Canada, *supra*, footnote 10. In that case, a wife, in divorce proceedings, was granted custody of her children, but the husband absconded with the children. The husband had been in telephone contact with his brother-in-law, and the wife sought and obtained an order compelling the production of telephone records from the brother-in-law and Bell Canada. Bell Canada appealed. The majority strictly interpreted the Family Law Reform Act, 1978, S.O 1978, c. 2, s. 26, and allowed the appeal. Wilson J.A., in dissent, said (*ibid.*, at p. 183): "The inherent jurisdiction of the Court can only be taken away by statute by clear and unequivocal language . . . I would have thought that, having regard to what is at stake here, namely, the integrity of the Court's own process, the circumstances cry out for the exercise of the Court's inherent jurisdiction."

34 Gillespie v. Manitoba (Attorney General), *supra*, footnote 10, at p. 227.

35 See the discussion, *infra*, footnotes 54-62 and accompanying text.

36 See, *e.g.*, Morris v. Crown Office, [1970] 2 Q.B. 114 (C.A.) at p. 129, where the court, when speaking of the Criminal Justice Act, 1948 (U.K.), 11 & 12 Geo. 6, c. 58, and the Criminal Justice Act, 1967 (U.K.), 1967, c. 80, in which Parliament intended to deal with issues of sentencing, said: "This power to commit for what is

37 *Supra*, footnotes 31-32 and accompanying text.

38 Jacob, *supra*, footnote 9, at p. 52.

39 *Supra*, footnotes 31-32 and accompanying text.

40 *Ibid.*

41 *Skeena Cellulose Inc. (Re)*, *supra*, footnote 25, at para. 33.

42 Syndicat National de L'Amiante d'Asbestos Inc. v. Mine Jeffrey Inc., [2003] J.Q. No. 264 (QL) (translation) at para. 32, 40 C.B.R. (4th) 95 *sub nom. Mine Jeffrey Inc. (Re)* (C.A.), quoting *P.C.I. Chemicals Canada Inc. (Plan D'Arrangement de Transaction ou d'Arrangement Relatif A) (Re)*, [2002] R.J.Q. 1093 (S.C.) at paras. 52 and 54, leave to appeal to Que. C.A. refused [2002] R.J.Q. 1093*n*. See also *Dylex Ltd. (Re)* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)) at p. 111, where the court said that "the CCAA since its inception has been a skeleton piece of legislation, almost pre-Victorian in style. The history of CCAA law has been an evolution of judicial interpretation". It would be difficult to argue that there has been any interpretation, as there is little to interpret.

43 Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36.

44 *House of Commons Debates*, at p. 4091 (April 20, 1933).

45 *House of Commons Debates*, at p. 1269 (January 23, 1953) (Stuart S. Garson).

46 *Ibid.*

47 "An Act to amend The Companies' Creditors Arrangement Act, 1933", S.C. 1952-53, c. 3.

48 S.C. 1997, c. 12.

49 Frank J.C. Newbould, Q.C., "The Companies' Creditors Arrangement Act" (October 1991), 7 B.F.L.R. 51.

50 Before the 1997 amendments, courts allowed debtors that had not issued trust deeds to use the CCAA by permitting them to gain access to its provisions by issuing "instant trust deeds": see, *e.g.*, Nova Metal Products Inc. v. Comiskey (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey (C.A.); Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136 (B.C.C.A.); Banque Royal v. Bâtisses d'Acier Novac Inc. (1990), 5 C.B.R. (3d) 140 (Que. S.C.). But see *Norm's Hauling Ltd. (Re)* (1991), 6 C.B.R. (3d) 16 at pp. 18-19, [1991] 3 W.W.R. 23 (Sask. Q.B.), where the court held: "With some hesitation and with the utmost respect for the opinions of those who see these so-called 'instant trust deeds' as a permissible way for a company to get itself within the Act, I cannot agree."

51 CCAA, s. 3(1) provides:

> 3(1) This Act applies in respect of a debtor company or affiliated debtor companies where the total of claims, within the meaning of section 12, against the debtor company or affiliated debtor companies exceeds five million dollars.

52 *Supra*, footnotes 6 and 44 and accompanying text.

53 Parliament's commitment to reorganizations is illustrated by the report of the Study Committee on Bankruptcy and Insolvency Legislation: Advisory Committee on Bankruptcy and Insolvency, *Report* (Ottawa, Consumer and Corporate Affairs Canada, 1986) (chair Gary Colter), at p. 20, which lists as objectives of bankruptcy legislation the following: "Bankruptcy legislation should allow for effective reorganizations and support the maintenance of viable business enterprises . . . It should facilitate the rehabilitation of debtors where feasible." This committee was formed by the then Minister of Justice in March 1985, after the sixth attempt to effect sweeping reforms to the Canadian bankruptcy regime. The BIA, which provides factors a court must consider on a bankrupt's application for discharge, provides in s. 173(1)(n):

> (n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness;

This is an example of Parliament's commitment to encourage reorganizations rather than liquidations.

54 *Royal Oak Mines Inc. (Re)* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. (Gen. Div.)) at pp. 317-18. See also *Smoky River Coal Ltd. (Re)* (1999), 12 C.B.R. (4th) 94 at pp. 111-12, 175 D.L.R. (4th) 703 (Alta. C.A.), supp. reasons 175 D.L.R. (4th) at p. 727, 244 A.R. 196 (C.A.).

55 CCAA, s. 11(3) and (4).

56 (1993), 17 C.B.R. (3d) 24 at p. 31, 9 B.L.R. (2d) 275 (Ont. Ct. (Gen. Div.)).

57 Cited with approval in *Smoky River Coal Ltd. (Re)*, *supra*, footnote 54, at p. 109. This is in keeping with a reference case that the Supreme Court of Canada decided soon after Parliament passed the CCAA. In *Reference re the Constitutional Validity of the*

Companies' Creditors Arrangement Act, [1934] S.C.R. 659 at p. 662, the court said: "The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders."

58 Pursuant to the requirement that Parliament establish a parliamentary committee to review the provisions and the operation of the BIA and the CCAA, *supra*, footnote 8, the Department of Consumer and Corporate Affairs (now Industry Canada) formed the Bankruptcy and Insolvency Advisory Committee: "Bankruptcy and Insolvency Advisory Committee" (1993), 13(2) Insolv. Bull. 124. The committee set up seven working groups to examine separate areas of possible reform. For a detailed overview of the working groups and their areas of focus, see Stanley J. Kershman, "Working Groups of the Bankruptcy and Insolvency Advisory Committee" (1993), 13(3) Insolv. Bull. 342.

59 Office of the Superintendent of Bankruptcy, Industry Canada, "Bill C-5: Excerpts of the Recommendations by the Bankruptcy and Insolvency Advisory Committee" (1996), 16(3) Insolv. Bull. 23 at p. 51. See also Julius Melnitzer, "Air Canada's Case Exposes Vagaries of Bankruptcy Code", *Corporate Legal Times* (September 2003), p. 38, which quotes Andrew Kent as saying: "The problem [with the CCAA] is that the rules vary among judges and jurisdictions . . . Ontario judges, for example, are the most comfortable bending precedent and ignoring process. Quebec judges aren't as comfortable making things up as they go along."

60 See, *e.g.*, Hongkong Bank of Canada v. Chef Ready Foods Ltd., *supra*, footnote 50, at p. 320, where the court said: "In the exercise of their functions under the C.C.A.A. Canadian courts have shown themselves partial to a standard of liberal construction which will further the policy objectives." The court listed several cases decided under the CCAA, then continued: "The trend demonstrated by these cases is entirely consistent with the object and purpose of the C.C.A.A."

61 (1992), 72 B.C.L.R. (2d) 368 at p. 375, 15 C.B.R. (3d) 265 (B.C.C.A.). See also *Woodward's Ltd. (Re)* (1993), 17 C.B.R. (3d) 236 at p. 247, 79 B.C.L.R. (2d) 257 (S.C.), where the court said inherent jurisdiction to impose stays of proceedings against third parties "should be used cautiously".

62 R.S.C. 1985, c. I-21.

63 *Ibid.*

64 For a detailed examination of this use, see Sarra, "Debtor in Possession Financing", *supra*, footnote 7. Courts have used the term "debtor in possession" financing. This term has various connotations that arise from s. 364 and other provisions of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (the "U.S. Bankruptcy Code") (codified as amended at 11 U.S.C. §§101-1329 (1988)). Section 364 provides in part:

> 364. Obtaining Credit
>
> (a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204 or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.
>
> (b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.
>
> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt —
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
> (3) secured by a junior lien on property of the estate that is subject to a lien.
>
> (d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if —
>
> (A) the trustee is unable to obtain such credit otherwise; and
> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.
>
> (2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

Section 503(b)(1) of the U.S. Bankruptcy Code, *ibid*., deals with costs and expenses of preserving the estate, including wages and salaries.

65 See, *e.g.*, *Sulphur Corp. of Canada Ltd. (Re)*, [2002] A.J. No. 918 (QL), 5 Alta. L.R. (4th) 251 (Q.B.); *Hunters Trailer & Marine Ltd. (Re)* (2001), 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299 (Alta. Q.B.); *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), affd [2000] 5 W.W.R. 178, 73 B.C.L.R. (3d) 236 (C.A.), leave to appeal to S.C.C. granted 261 N.R. 196*n*, 244 W.A.C. 160*n*, but the parties settled before hearing.

66 *Royal Oak Mines Inc. (Re)*, *supra*, footnote 54, at p. 321.

67 The court recognized this concern in *United Used Auto & Truck Parts Ltd. (Re), supra*, footnote 65, at p. 154 (B.C.S.C.), where it said that "in the event that the restructuring is not successful and there is a shortfall in the recovery for the secured lenders, it would not be fair to require those lenders to bear all of the burden of the expense of the lawyers for the Petitioners in acting against them". Nevertheless, the court granted an order that subordinated the creditors' security to legal expenses "reasonably incurred in connection with the restructuring": *ibid.*, at pp. 154-55.

68 *Ibid.*, at p. 153.

69 *Hunters Trailer & Marine Ltd. (Re)*, *supra*, footnote 65, at p. 248.

70 *Lehndorff General Partner Ltd. (Re)*, *supra*, footnote 56; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 92 A.R. 81 (Q.B.).

71 (1997), 46 C.B.R. (3d) 293 (Ont. Ct. (Gen. Div.)).

72 (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Ct. (Gen. Div.)).

73 *Ibid.*, at pp. 310-11.

74 *Supra*, footnote 64.

75 *Ibid.*

76 *Supra*, footnote 42.

77 *Ibid.*, at p. 110.

78 (1999), 245 A.R. 154 (Q.B.), revd [2000] 11 W.W.R. 117, 261 A.R. 162 (C.A.).

79 *Ibid.*, at p. 162 (Alta. Q.B.). See also *Skeena Cellulose Inc. (Re)*, *supra*, footnote 25, where the court permitted the debtor to terminate replaceable logging contracts, based not on inherent jurisdiction, but discretion. The court was considering the termination, however, in the context of its approval of the plan of arrangement rather than as a part of a pre-plan arrangement: *ibid.*, at para. 46.

80 *Supra*, footnote 64.

81 *Supra*, footnote 42.

82 *Ibid.*, at para. 37.

83 *Ibid.*, at para. 46.

84 *Ibid.*, at para. 64.

85 *Ibid.*, at para. 52.

86 *Ibid.*, at para. 68. The court took a similar approach when dealing with the dispute between Air Canada and the unions representing Air Canada's employees in *Air Canada (Re)*, 2003 CarswellOnt 1530 (S.C.J.), where it said: "I would urge the players — as I do all other players — to get on to meaningful functional *bona fide* negotiations with a view towards seeing if the parties can reach a consensual resolution on the various issues in question, with the objective as indicated by all present today of seeing if the Air Canada applicants can be restructured — and if so, with dispatch to maintain ongoing value for the benefit of all stakeholders."

87 (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)).

88 *Ibid.*, at p. 315.

89 *Blue Range Resource Corp. (Re)*, [2000] A.J. No. 1232 (QL) at para. 10, 193 D.L.R. (4th) 314 *sub nom.* Enron Canada Corp. v. National-Oilwell Canada Ltd. (C.A.).

90 See, *e.g.*, *Blue Range Resource Corp. (Re)* (1999), 251 A.R. 1 (Q.B.), affd 193 D.L.R. (4th) 314 *sub nom. Enron Canada Corp. v. National-Oilwell Canada Ltd.*, [2001] 2 W.W.R. 477 (Alta. C.A.), leave to appeal to S.C.C. refused 202 D.L.R. (4th) vi *sub nom.* Enron Canada Corp. v. National-Oilwell Canada Ltd., 299 A.R. 179*n*.

91 *Blue Range Resource Corp. (Re)*, *supra*, footnote 89, at para. 41.

92 For a discussion of the structure and history of the CCAA, s. 18.6, see Jacob S. Ziegel, "Corporate Groups and Canada-U.S. Crossborder Insolvencies: Contrasting Judicial Visions" (2001), 35 C.B.L.J. 459.

93 The United States Supreme Court's frequently quoted description of "comity" appears in Hilton v. Guyot, 159 U.S. 113, 163-4, 16 S. Ct. 139, 143 (1895): "'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial

acts of another nation, having due regard both to international duty and convenience, and to *the rights of its own citizens or of other persons who are under the protection of its laws*" (emphasis added). The Supreme Court of Canada has cited this description with approval as a "more complete formulation of the idea of comity": see Morguard Investments Ltd. v. De Savoye (1990), 76 D.L.R. (4th) 256 at p. 269, [1990] 3 S.C.R. 1077.

94 In *Olympia & York Developments Ltd. (Re)* (1993), 20 C.B.R. (3d) 165 *sub nom. Olympia & York Developments Ltd. v. Royal Trust Co. at p. 167*, [1993] O.J. No. 1748 (QL) (Gen. Div.), the court showed its enthusiasm for this method of resolution of the cross-border issues by stating: "Like most other accomplishments in this multinational corporate re-organization of the Olympia & York companies, the Protocol is the product of intense — even herculean — efforts on the part of all concerned. Mr. Vance and everyone involved are to be commended for what is yet another triumph in these proceedings of the oldest of all 'alternative dispute resolution' techniques: negotiation."

95 The International Insolvency Institute has placed many protocols on its website: http://www.iiiglobal.org/international/protocols.html.

96 *Supra*, footnote 94, at p. 168.

97 *Westar Mining Ltd. (Re)* (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331 (B.C.S.C. (Bkcy)).

98 Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921), p. 141, quoting F. Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif*, vol. II (1919), at p. 303, s. 200.

99 *Supra*, footnote 61 and accompanying text.

100 *Supra*, footnote 50.

101 Syndicat National de L'Amiante d'Asbestos Inc. v. Mine Jeffrey Inc., *supra*, footnote 42, at para. 31.

102 *Westar Mining Ltd. (Re)*, *supra*, footnote 97, at pp. 94-95.

103 Hongkong Bank of Canada v. Chef Ready Foods Ltd., *supra*, footnote 50, at p. 315.

104 *United Used Auto & Truck Parts Ltd. (Re)*, *supra*, footnote 27, at p. 143; *Deacon (Re)*, [1986] O.J. No. 2163 (QL) at para. 13, 60 C.B.R. (N.S.) 28 (S.C.).

105 *United Used Auto & Truck Parts Ltd. (Re)*, *ibid.*, at p. 149.

106 (1993), 17 C.B.R. (3d) 1 at p. 9, *sub nom. Olympia & York Developments Ltd. v. Royal Trust Co.*, 12 O.R. (3d) 500 (Gen. Div.).

107 Many of the cases introduce this balancing exercise with a quote from *Pacific National Lease Holding Corp. (Re)*, *supra*, footnote 61, at p. 375, where the court said: "In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems." See, *e.g.*, *Canadian Airlines Corp. (Re)* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at p. 6; Pacific National Lease Holding Corp. v. Sun Life Trust Co. (1995), 34 C.B.R. (3d) 4 at pp. 14-15, [1995] 10 W.W.R. 714 (B.C.C.A.).

108 *Supra*, footnote 61, at p. 248.

109 *Supra*, footnotes 70-73 and accompanying text.

110 *Skeena Cellulose Inc. (Re)*, *supra*, footnote 25, at para. 3.

111 *Supra*, footnotes 100-103 and accompanying text.

112 (1998), 3 C.B.R. (4th) 171 (Ont. Ct. (Gen. Div.)) at p. 173. See also *Skydome Corp. (Re)* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)) at p. 123, where the court said, when discussing the subordination of existing secured creditors' interests: "This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors — in the exercise of balancing the prejudices between parties which is inherent in these situations — have been asked to make such a sacrifice." But see *United Used Auto & Truck Parts Ltd. (Re)*, *supra*, footnote 65, at p. 153 (B.C.S.C.), where the court noted that "there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated". One very strange use of this balancing took place in *Dylex Ltd. (Re)*, *supra*, footnote 42, at p. 110, where the court balanced the relative financial strengths of the parties and said "in weighing the balancing of interests in a CCAA context, the nod should continue to be given to Dylex which is in a precarious position as opposed to Cambridge which is in a sound financial condition". Whether this is a sound approach to the balancing exercise is open to question.

113 CCAA, s. 6.

114 See, *e.g.*, *T. Eaton Co. (Re)*, *supra*, footnote 71, at p. 295; *Sulphur Corp. of Canada Ltd. (Re)*, *supra*, footnote 65, at para. 33.

115 See, *e.g.*, Hongkong Bank of Canada v. Chef Ready Foods Ltd., *supra*, footnote 50, at p. 318; *Smoky River Coal Ltd. (Re)*, *supra*, footnote 54, at p. 110; Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110, [1995] 2 W.W.R. 404 (B.C.S.C.), affd [1995] 4 W.W.R. 364, 2 B.C.L.R. (3d) 304 (C.A.). See also *Alberta-Pacific Terminals Ltd. (Re)* (1991), 8 C.B.R. (3d) 99 (B.C.S.C.) at p. 105, where the court said: "The status quo is not always easy to find . . . Nor is the status quo easy to define. The preservation of

the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same level. It is the company and all the interests its demise would affect that must be considered."

116 *Blue Range Resource Corp. (Re)*, *supra*, footnote 90, at p. 7 (Alta. Q.B.).

117 *Lehndorff General Partner Ltd. (Re)*, *supra*, footnote 56, at p. 31.

118 *Supra*, footnote 115, at pp. 120-21 (B.C.S.C.).

119 The Joint Task Force on Business Insolvency Law Reform, *A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals* (March 15, 2003) (chair Andrew F. Kent) ("Joint Report"), p. 2, recognized this result when it said: "As compared to U.S. proceedings however, Canadian restructuring proceedings are more business negotiation oriented and less litigation oriented. CCAA proceedings can be considered a form of mandatory alternative dispute resolution."

120 *Supra*, footnotes 15-18 and accompanying text.

121 *Supra*, footnote 8.

122 See, *e.g.*, the testimony of Marie-Josée Thivierge, Marc Mayrand and Lawrence McBrearty, and the testimony of David F.W. Cohen, Jacob Ziegel and Andrew Kent, respectively.

123 The Joint Report, *supra*, footnote 119, p. 4, recognized that, domestically, Canadian practitioners are satisfied with the ways in which the BIA and the CCAA operate in the international arena. It said: "The general perception of insolvency practitioners in Canada is that the Canadian provisions as a general matter work well and there is no compelling domestic experience that would suggest a need for fundamental changes to those provisions."

124 Joint Report, *ibid.*, recommendation 81.

125 (1994), 114 D.L.R. (4th) 176 at p. 185, 27 C.B.R. (3d) 148 (Ont. Ct. (Gen. Div.)).

126 *Blue Range Resource Corp. (Re)*, *supra*, footnote 90, at p. 9 (Alta. Q.B.).

127 *United Used Auto & Truck Parts Ltd. (Re)*, *supra*, footnote 27, at p. 152 (B.C.C.A.).

128 (1994), 29 C.B.R. (3d) 139 (Ont. Ct. (Gen. Div.)) at p. 143.

129 (1997), 45 C.B.R. (3d) 85 at p. 90, 143 D.L.R. (4th) 536 (Ont. Ct. (Gen. Div.)), supp. reasons 146 D.L.R. (4th) 382, 18 C.B.R. (4th) 243 (Ont. Ct. (Gen. Div.)).

130 One writer describes "incrementalism" as follows: "The decision-maker starts from the status quo and compares alternatives which are typically marginal variations from the status quo. Formulation and choice among alternatives is [*sic*] derived largely from historical and contemporary experience. It follows that only a restricted number, rather than all rationally conceivable, alternatives are considered. Moreover only a restricted number of the consequences of any given alternative are considered. And those that are chosen for consideration are not necessarily the most immediate or important but those that fall most clearly within the formal sphere of competence of the analyst and with which he feels most technically competent to deal . . . policy is usually made by following a long series of steps. Rather than attempting to solve the problem in one fell swoop the decision maker whittles away at it. Indeed the analyst is likely to "identify . . . ills from which to move away rather than goods toward which to move" (Martin Shapiro, "Stability and Change in Judicial DecisionMaking: Incremental of Stare Decisis" (1965), 2 L. in Trans. Q. 134 at pp. 138-39, quoting from David Braybrooke and Charles E. Lindblom, *A Strategy of Decision: Policy Evaluation as a Social Process* (New York, Free Press, 1963), p. 102.) Shapiro then used this concept to discuss the judicial decision-making process in the light of *stare decisis*.

131 *Supra*, footnote 119.

132 See, *e.g.*, Joint Report, *supra*, footnote 119, recommendation 2, where the report recommends that Parliament adopt a provision allowing for the financing of the reorganization proceeding. It then recommends inserting a non-exclusive, non-inclusive list of matters the court should take into account when deciding whether to allow the financing and, if the financing is allowed, the priority that should be given to the financier. This gives the courts some guidance, but does not alleviate the need for the court to exercise its inherent jurisdiction.

133 *Ibid.* (emphasis added).

134 *Ibid.*

135 *Supra*, footnote 64.

136 *Supra*, footnote 1.

End of Document

TAB 3

Most Negative Treatment: Check subsequent history and related treatments.

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 [mens rea]
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
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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 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Wilkie v. Jeong | 2017 BCSC 2131, 2017 CarswellBC 3252, 6 B.C.L.R. (6th) 119, 285 A.C.W.S. (3d) 532, [2017] B.C.W.L.D. 7117, [2017] B.C.W.L.D. 7216, [2018] 3 W.W.R. 782 | (B.C. S.C., Nov 22, 2017)

1994 CarswellAlta 769
Supreme Court of Canada

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.

1994 CarswellAlta 744, 1994 CarswellAlta 769, [1994] 2 S.C.R. 490, [1994] 7 W.W.R. 37, [1994] I.L.R. 1-3077, [1994] A.W.L.D. 658, [1994] S.C.J. No. 59, 115 D.L.R. (4th) 478, 155 A.R. 321, 168 N.R. 381, 20 Alta. L.R. (3d) 296, 23 C.C.L.I. (2d) 161, 48 A.C.W.S. (3d) 1240, 73 W.A.C. 321, J.E. 94-1053, EYB 1994-66952

MARITIME LIFE ASSURANCE COMPANY v. SASKATCHEWAN RIVER BUNGALOWS LTD. and CONNIE DOREEN FIKOWSKI

La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: March 14, 1994
Judgment: June 23, 1994
Docket: Doc. 23194

Counsel: *James D. McCartney* and *Brian E. Leroy*, for appellant.
James S. Peacock, for respondents.

Subject: Contracts; Insurance; Civil Practice and Procedure
Related Abridgment Classifications
Estoppel
II Estoppel in pais
II.5 Particular classes
II.5.a Corporations
II.5.a.ii Insurance companies
II.5.a.ii.A Cancellation of policy
Insurance
III Contracts of insurance
III.10 Cancellation and termination
III.10.e For non-payment
III.10.e.ii Waiver
Insurance
X Actions on policies
X.3 Relief against forfeiture
Headnote
Estoppel --- Estoppel in pais — Particular classes — Corporations — Insurance companies — Cancellation of policy
Insurance --- Contracts of insurance — Cancellation and termination — For non-payment — Waiver
Insurance --- Actions on policies — Relief against forfeiture
Insurance — Insurance generally — Premium — Non-payment or underpayment of premium — Insurance premium remaining unpaid after grace period expiring — Insurer's letter requesting immediate payment of premium — Later letter stating that policy lapsed — Beneficiary picking up both letters at same time — First letter waiving insurer's right to receive timely payment — Insurer not having to give notice of retraction of waiver because insured not relying on waiver.

Equity — Equitable doctrines — Relief against penalties and forfeitures — Life insurance premium remaining unpaid after grace period expiring — Insurer's letter requesting immediate payment of premium — Beneficiary not picking up letter for several months — Beneficiary waiting further three months before paying premium — Court outlining test for relieving from forfeiture and refusing to relieve because beneficiary's conduct unreasonable — As Alberta Insurance Act not "codifying" whole law of insurance, that Act not "occupying" field of equitable relief. .

Insurance — Insurance generally — Interpretation of legislation — As Alberta Insurance Act not "codifying" whole law of insurance, that Act not "occupying" field of equitable relief.

The insurer issued a policy to the company on the insured's life. The policy provided for a grace period of 31 days for the payment of premiums. If the premium still remained unpaid, the policy automatically lapsed but might be reinstated on proof of the insured's good health. One year the company mailed a cheque to pay the annual premium. The insurer never received the cheque. A month later the insurer sent the company a letter agreeing to accept the premium if it were mailed within two weeks. Two months after that the insurer wrote that the policy was "now technically out of force," and that it would require immediate payment of the premium. The insurer awaited payment for another two months. It then sent the company a notice of policy lapse. The company had closed its business for the winter and picked up its mail infrequently. It thus did not learn of the insurer's letters until over two months after the lapse notice was sent. It searched for the lost premium cheque for three months before it sent the insurer a replacement cheque. The insurer refused the cheque, and refused to reinstate the policy because the insured was terminally ill. When the insured died, the company sued the insurer and claimed, alternatively, for relief against forfeiture. The trial judge rejected the claim, and refused to grant relief against forfeiture because the company's conduct was not reasonable. The Court of Appeal allowed the appeal. It held that the insurer had waived the time requirement for paying the premium, and had failed to give the company reasonable notice that the waiver was withdrawn. The insurer appealed.

Held:

Appealed allowed.

Waiver occurs when one party foregoes reliance on some known right or defect in the other party's performance. Waiver will be found only where the party waiving had full knowledge of its rights and an unequivocal and conscious intention to abandon them. A demand for payment may constitute waiver. The overriding consideration is whether one party communicated a clear intention to waive a right to the other party. Waiver can be retracted on reasonable notice to the other party. However, the notice requirement should not be imposed where the other party does not rely on the waiver. Here the insurer had full knowledge of its rights. Its letter that the policy was "technically out of force" constituted a waiver of its right to receive timely payment. The word "technically" removed all meaning from the expression "out of force." The insurer was willing to continue the policy's coverage upon payment of the premium. It did not mention the insured's health or reinstatement. However, the company was not aware of the insurer's waiver until it received the waiver and lapse notices together, when it picked up its mail. It thus did not rely on the waiver and so the insurer was not required to give notice of its intention to lapse the policy. Even if a reasonable notice requirement were imposed, it would have been met by the company's failure to act for three months after receiving notice. The insurer's waiver was no longer in effect when the company sought to make payment. The policy had lapsed.

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors for the court to consider are whether the applicant's conduct was reasonable, the gravity of the breaches, and the disparity between the value of the property forfeited and damage caused by the breach. The company's conduct here was not reasonable. It knew that the insured was terminally ill and uninsurable. When it learned that the premium payment was overdue, it waited three months to tender a replacement cheque. As the company's conduct was not reasonable, it was unnecessary to consider the other factors. However, as the *Insurance Act* does not "codify" the whole law of insurance, that Act does not "occupy" the field of equitable relief.

Table of Authorities

Cases considered:

Anguish v. Maritime Life Assurance Co., [1987] 4 W.W.R. 261, 51 Alta. L.R. (2d) 376, 24 C.C.L.I. 194, 77 A.R. 189, [1987] I.L.R. 1-2226 [additional reasons 29 C.C.L.I. 190, [1988] I.L.R. 1-2340, leave to appeal to S.C.C. refused, [1988] 2 S.C.R. vii, [1988] 6 W.W.R. lxviii, 61 Alta. L.R. (2d) lii, 91 A.R. 80, 32 C.C.L.I. xliii, 90 N.R. 319] — *referred to*

Duplisea v. T. Eaton Life Assurance Co., [1980] 1 S.C.R. 144, 26 N.B.R. (2d) 319, 55 A.P.R. 319, 27 N.R. 369, 7 B.L.R. 24, [1979] I.L.R. 1-1104, 99 D.L.R. (3d) 445 — *referred to*

Federal Business Develoment Bank v. Steinbock Development Corp. (1983), 42 A.R. 231 (C.A.) — *applied*

Guillaume v. Stirton (1978), 88 D.L.R. (3d) 191, leave to appeal to S.C.C. refused [1978] 2 S.C.R. vii — *referred to*

Hartley v. Hymans, [1920] 3 K.B. 475 — *referred to*
Holwell Securities Ltd. v. Hughes, [1974] 1 All E.R. 161 (C.A.) — *referred to*
Johnston v. Dominion of Canada Guarantee & Accident Insurance Co. (1908), 17 O.L.R. 462 (C.A.) — *distinguished*
Liscumb v. Provenzano Estate (1985), 51 O.R. (2d) 129, 40 R.P.R. 31, affirmed (1986), 55 O.R. (2d) 404 (C.A.) — *applied*
Marchischuk v. Dominion Industrial Supplies Ltd., [1991] 2 S.C.R. 61, [1991] 4 W.W.R. 673, [1991] I.L.R. 1-2729, 3 C.C.L.I. (2d) 173, 125 N.R. 306, 80 D.L.R. (4th) 670, 50 C.P.C. (2d) 231, 73 Man. R. (2d) 271, 30 M.V.R. (2d) 102 — *referred to*
McGeachie v. North American Life Insurance Co. (1893), 20 O.A.R. 187, affirmed (1894), 23 S.C.R. 148 — *distinguished*
Mitchell & Jewell Ltd. v. Canadian Pacific Express Co., [1974] 3 W.W.R. 259, 44 D.L.R. (3d) 603 (Alta. C.A.) — *referred to*
Northern Life Assurance Co. v. Reierson, [1977] 1 S.C.R. 390, [1976] 3 W.W.R. 275, [1976] I.L.R. 1-749, 8 N.R. 351, 67 D.L.R. (3d) 193 — *distinguished*
Rickards (Charles) Ltd. v. Oppenhaim, [1950] 1 K.B. 616, [1950] 1 All E.R. 420 (C.A.) — *referred to*
Shiloh Spinners Ltd. v. Harding, [1973] A.C. 691, [1973] 1 All E.R. 90 (H.L.) — *considered*
Stenhouse v. General Casualty Insurance Co. (1934), [1934] 3 W.W.R. 564, 2 I.L.R. 36, [1935] 1 D.L.R. 193 (Alta. C.A.) — *distinguished*
Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co., 2 Alta. L.R. (2d) 1, 2 A.R. 63, [1977] I.L.R. 1-844 (C.A.) — *distinguished*
Tudale Explorations Ltd. v. Bruce (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584 (Div. Ct.) — *referred to*
W.J. Alan & Co. v. El Nasr Export & Import Co., [1972] 2 Q.B. 189, [1972] 2 All E.R. 127 (C.A.) — *referred to*

Statutes considered:

Insurance Act, R.S.A. 1980, c. I-5 — *considered*

s. 201 — *considered*

s. 205 — *considered*

s. 211 — *considered*

Judicature Act, R.S.A. 1980, c. J-1 — *considered*

s. 10 — *considered*

Appeal from judgment of Alberta Court of Appeal, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895, 127 A.R. 43, 92 D.L.R. (4th) 372, reversing judgment of Deyell J. allowing insured's action on policy against insurer.

The judgment of the court was delivered by *Major J.*:

I. FACTS

1 On July 26, 1978, the appellant Maritime Life Assurance Company ("Maritime") issued an insurance policy on the life of Michael Fikowski Sr. to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Connie Fikowski, at which time she became the beneficiary. SRB retained the responsibility of paying the annual premiums under the policy.

2 The policy issued to the respondents was a term policy, renewable every five years. The policy expiry date was the insured's 70th birthday — July 26, 2000. However, prior to July 26, 1988, the policy-holder had an option to convert the policy to a new life or endowment policy. The policy contained the following conditions relating to premium payment:

2. PREMIUM PAYMENT PROVISIONS

(1) General

> The agreements made by the Company and contained in this contract are conditional upon payment of the premiums as they become due.
>
> Each premium is payable on or before its due date at the Head Office of the Company.
>
> ***(2) Grace Period***
>
> After the first period has been paid, a grace period of thirty-one days following its due date is allowed for the payment of each subsequent premium. During the grace period, this policy continues in effect.
>
> ***(3) Non-payment of Premiums***
>
> If any premium remains unpaid at the end of the grace period, this policy automatically lapses (terminates because of non-payment of premiums).
>
> Under certain conditions, this policy may be reinstated, as described below.
>
> ***(4) Reinstatement***
>
> This policy may be reinstated within 3 years of the date of the lapse upon written application to the Company subject to the following conditions:
>
> a) evidence that satisfies the Company of the life insured's good health and insurability must be submitted; and
>
> b) all unpaid premiums plus interest, at a rate to be determined by the Company, must be paid to the Company.

3 Over the years, SRB paid the annual policy premium irregularly. In 1979, the policy lapsed after SRB failed to pay the annual premium within the 31-day grace period. The policy was subsequently reinstated in accordance with the reinstatement provision (cl. 2(4)) of the policy. In 1981, SRB again failed to make payment within the grace period. On this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement.

4 On July 24, 1984, SRB mailed a cheque for $1,316 to pay the annual premium due on July 26, 1984. On August 13, 1984, SRB received a premium due notice from Maritime, requesting payment of $1,361. It sent Maritime a cheque for $45 — the difference between the July 24 cheque and the amount demanded in the payment due notice. This second cheque was received by Maritime on August 22, 1984. The first cheque, in the amount of $1,316, was never received by Maritime, nor was it deducted from SRB's bank account.

5 Subsequent to the expiry of the grace period on August 26, 1984, Maritime sent a late payment offer to SRB. In this offer, Maritime agreed to accept late payment of the July premium if it was "postmarked or, if not mailed, received at the Head Office at Halifax, N.S." on or before September 8, 1984. The offer also contained an explicit reserve of Maritime's right to require evidence of insurability. SRB did not respond to the late payment offer.

6 On November 28, 1984, Maritime wrote a letter ("the November letter") advising the respondent Connie Fikowski that the premium due on July 26, 1984 remained unpaid. This letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

7 Finally, on February 2, 1985, Maritime sent a notice of policy lapse to the respondents. This notice was originally sent to an incorrect address in Vancouver, but was eventually forwarded to SRB. It read, in part:

> According to our records this policy has lapsed for non-payment of the premium due on the date shown. The policy is no longer in force and no benefits are payable. Because your insurance affords valuable protection and represents a worthwhile investment we invite you to apply for reinstatement of the policy.

The Application for Reinstatement appended to the lapse notice required evidence of insurability.

8 SRB closed its hotel business at Lake Louise, Alberta, for the winter season around the middle of November, 1984. SRB picked up the corporate mail on an infrequent basis throughout the winter. As a result, SRB did not become aware of the late payment offer, the November letter or the lapse notice until April, 1985. They then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused.

9 On July 9, 1985, SRB's insurance agent informed Maritime that Michael Fikowski Sr. was terminally ill and uninsurable. On August 10, 1985, Michael Fikowski Sr. died. On October 11, 1985, Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The respondents then commenced the present action, claiming a right to benefits under the policy or, alternatively, relief against forfeiture.

II. JUDGMENTS BELOW

A. Alberta Court of Queen's Bench

10 Deyell J. rejected the plaintiffs' claim and refused to grant them relief against forfeiture. He made no specific finding as to whether a cheque was actually mailed to Maritime by SRB in July 1984, but emphasized that Maritime did not receive payment and advised SRB accordingly. Deyell J. reasoned that the respondents had to "live with the results" of their decision to have their corporate mail sent to Lake Louise throughout the year. As well, he considered that SRB was obliged to do more than search for a cancelled cheque when they learned of the policy lapse in April of 1985. Deyell J. further ruled that Connie Fikowski was bound by SRB's actions.

B. Alberta Court of Appeal

11 A majority of the Alberta Court of Appeal allowed the respondents' appeal: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895. The majority held that the postal acceptance rule did not apply, since an express term of the policy required that premiums be paid, not posted, by the due date: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161 (C.A.). However, both Harradence and Hetherington JJ.A. considered that, because it encouraged policy-holders to mail premium payments, Maritime was barred from demanding strict compliance with the time requirements for payment under the policy. Harradence J.A. cast this ruling in terms of estoppel, while Hetherington J.A. relied on waiver. Both agreed that, until the respondents were notified that the 1984 cheque had not been received and were given a reasonable period during which to effect payment, Maritime could not terminate the policy for non-payment.

12 Hetherington J.A. considered that none of Maritime's acts, including the late payment offer, the November letter and the lapse notice, gave the respondents reasonable notice that Maritime intended to rely on the lapsing provision of the policy. The February lapse notice was premature because it stated that "this policy has lapsed", without giving reasonable notice to the respondents. As such, Maritime's right to rely on the lapsing provision of the policy was never reinstated. She concluded that the policy was still in force in August 1985.

13 Harradence J.A. found that the respondents could have made payment within a reasonable period after they received actual notice of the overdue premium in April 1985. However, the respondents failed to pay within this period. Their three-month delay in providing a replacement cheque was unreasonable, and the policy lapsed. However, Harradence J.A. concluded that it was an appropriate case to relieve against forfeiture under s. 10 of the *Judicature Act*, R.S.A. 1980, c. J-1.

14 In dissent, McClung J.A. stated that Maritime did not waive its right to rely on the lapsing provision of the policy by encouraging policy holders to use the mail. He found that while Maritime had waived its position in the November letter,

the eventual payment of the missing premium in July 1985 did not comply with the request for "immediate payment" in the November letter. As a result, there was no waiver. In addition, he concluded that the Court had no jurisdiction to relieve against forfeiture since the field was occupied by a statutory scheme (the *Insurance Act*, R.S.A. 1980, c. I-5).

III. ISSUES

15 This appeal raises two issues:

(1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?

(2) If there was no waiver, are the respondents entitled to relief against forfeiture under the *Judicature Act*, R.S.A. 1980, c. J-1, s. 10?

IV. ANALYSIS

A. Waiver

16 Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

17 The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

18 Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see, e.g., *Alan (W.J.) & Co. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 189 (C.A.), and *Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S.M. Waddams, *The Law of Contracts* (3rd ed., 1993), p. 418, at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. C.A.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 [[1991] 4 W.W.R. 673] (waiver of a limitation period). The elements of waiver were described in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

> The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

21 As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that

by encouraging policy-holders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the $45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

22 It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

> Unfortunately this policy is now technically out of force, and we will require immediate payment of $1,361.00 to pay the July 1984-85 premium.

23 As late as November 28, 1984, Maritime was willing to *continue* coverage under the policy upon payment of the July 1984 premium. The November letter makes no mention of evidence of insurability, nor does it speak of reinstatement. As such, it constitutes clear evidence of Maritime's intention to waive its right to compel timely payment. In this regard, little weight should be given to the assertion that the policy was "technically out of force", for the qualifier "technical" removes all meaning from the expression "out of force". In any event, this assertion does not detract from the clarity of Maritime's demand for payment.

24 The appellant submits that, whereas the right to compel timely payment is clearly waived where premium payments are received and deposited by an insurance company after the expiry of the policy grace period (*Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376 [[1987] 4 W.W.R. 261] (C.A.), leave to appeal refused [1988] 2 S.C.R. vii [[1988] 6 W.W.R. lxviii, 61 Alta. L.R. (2d) lii]), a mere demand for payment beyond the grace period is insufficient. Support for that proposition is found in *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), affirmed (1894), 23 S.C.R. 148; and in *Northern Life Assurance Co. v. Reierson*, [1977] 1 S.C.R. 390 [[1976] 3 W.W.R. 275]. In both cases, this Court concluded that a demand for payment was equivocal or insufficient to give rise to a waiver. However, in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

25 The demand for payment in the present appeal provides stronger evidence of waiver than did the demands in either *McGeachie* or *Reierson*. The demand for payment by the appellant in its November letter was made well beyond the expiry of the grace period. As well, payment in the present case was tendered prior to the occurrence of the event insured against. Any doubt about whether Maritime intended to waive the time requirements of the policy was resolved by the testimony of its legal advisor, who indicated that, having received the $45 partial payment, Maritime was *still* awaiting payment of the July 1984 premium in January 1985. It was for this reason that the lapse notice was not sent until February 2, 1985. In these circumstances, the demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy.

26 As the November letter constituted waiver, the question is then whether the waiver was still in effect when SRB tendered payment of the missing premium in July 1985.

27 Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: *Hartley v. Hymans*, [1920] 3 K.B. 475; *Rickards (Charles) Ltd. v. Oppenhaim*, [1950] 1 K.B. 616 (C.A.); *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance by the person in whose favour waiver operates: *The Law of Contracts*, at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: ibid., at para. 606. In the present appeal, the respondents were not aware of Maritime's waiver until they received the November letter, along with the lapse notice and late payment offer, in April 1985. It follows that they did not rely on Maritime's waiver. In such circumstances, Maritime was not required to give any notice of its intention to lapse the policy. The statement that "this policy has lapsed", contained in the February lapse notice, took effect on its terms.

28 In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. An informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice: see, e.g., *Guillaume v. Stirton*, supra. The respondents did not tender a replacement cheque until July 1985, three months after they became aware of Maritime's intentions. As such, even if a reasonable notice requirement were imposed, it would be adequately met by the respondents' failure to act between April and July.

29 Maritime's waiver, as contained in the November letter, was no longer in effect when the respondents sought to make payment in July 1985. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case. Therefore, the respondents are not entitled to any of the benefits under the policy.

B. Relief Against Forfeiture

30 The second issue on appeal is the Court's equitable jurisdiction to relieve against forfeiture. The respondents submit that the general power to grant relief, contained in s. 10 of the *Judicature Act*, should be exercised in this case. The appellant contends that the *Judicature Act* does not apply since the field is occupied by a statutory scheme (the *Insurance Act*). It further submits that the respondents' loss was not a forfeiture and argues that, in any event, this is not an appropriate case for granting relief.

31 Section 10 of the *Judicature Act* reads:

> 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.

32 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: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.) ; *Snell's Principles of Equity* (29th ed., 1990), at pp. 541-42.

33 The Ontario High Court in *Liscumb v. Provenzano Estate* (1985), 51 O.R. (2d) 129, affirmed 55 O.R. (2d) 404 (C.A.), relying on the *Shiloh* decision, summarized the governing principles as follows (at p. 137, per McKinlay J.):

> I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

34 The first element of the test set out in *Liscumb* — the reasonable conduct requirement — is not met in this case. The respondents knew, at all relevant times, that Fikowski Sr. was terminally ill and uninsurable. Nonetheless, they chose to have their correspondence from Maritime sent to Lake Louise over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. The trial judge, who was in a position to assess the respondents' conduct, concluded that it was not reasonable. He wrote:

> The corporation chose to have a mail box at the Post Office at Lake Louise to receive its corporate mail on a 12-month basis and, having made that decision, I think they must live with the results. If you only pick up your mail every two weeks then you are going to be late in getting notices that may be of some importance. Ultimately, when the advice that the policy had lapsed was received in late April or early May of 1985, Mr. Michael Fikowski and Mr. J.D. Thomas started a search for a cancelled cheque. Under the circumstances, in this day and age of long distance telephones and all the communications that are available I think that they had an obligation to their company to take additional procedures in regard to this matter. They were advised that payment had not been made. There were procedures to have the policy reinstated. If they were

> going to do anything about it, it had to be done quickly. It wasn't until July 25th, if memory serves me correctly, met [sic] the replacement cheque was sent out, that is, three months after they ultimately received the notice.
>
> I therefore find that the plaintiffs' case fails and that they are not entitled to relieve against forfeiture.

35 As the failure to satisfy the first test in *Liscumb* determines the outcome of this appeal, it is unnecessary to comment on the second and third tests outlined in the case.

36 As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited (*Insurance Act*, ss. 201, 205, 211) does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

37 Several of the authorities cited by the appellant involved forfeitures made under statutory insurance conditions, which is not the case here: *Stenhouse v. General Casualty Insurance Co.*, [1934] 3 W.W.R. 564 (Alta. C.A.); *Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co.* (1977), 2 A.R. 63 [2 Alta. L.R. (2d) 1] (C.A.). The case of *Johnston v. Dominion of Canada Guarantee & Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.), treated the insurance legislation at issue as a statutory code, and for this reason is no longer good law.

38 It is also unnecessary to determine whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context. Clearly, the holder of a term life policy has no vested right to benefits until the loss insured against — death of the insured — has occurred. However, a modern understanding of the doctrine of relief would likely expand the notion of forfeiture to include less tangible losses, such as the loss of an option to convert a term policy into one under which benefits would be certain, or the loss of one's insurability. This question remains open.

C. Conclusion

39 For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Alberta Court of Appeal and restore the judgment at trial.

Appeal allowed.

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

2018 ONSC 668
Ontario Superior Court of Justice

Hatami v. 1237144 Ontario Inc.

2018 CarswellOnt 1740, 2018 ONSC 668, 288 A.C.W.S. (3d) 285, 93 R.P.R. (5th) 156

Shahnaz Hatami (Applicant) and 1237144 Ontario Inc. (Respondent)

P.J. Monahan J.

Heard: January 11, 2018
Judgment: January 26, 2018
Docket: CV-16-559939

Counsel: Elena Mazinani, for Applicant
J. Anthony Caldwell, for Respondent

Related Abridgment Classifications
Evidence
XIII Opinion
XIII.2 Experts
XIII.2.b Admissibility
XIII.2.b.iii Miscellaneous
Evidence
XIII Opinion
XIII.2 Experts
XIII.2.e Expert reports
XIII.2.e.i Admissibility

Headnote
Evidence --- Opinion — Experts — Expert reports — Admissibility
Buyer and seller entered into agreement of purchase and sale for property that seller had used as commercial office space but it was zoned residential — Purchase price was $1,575,000 with $100,000 deposit, and buyer later paid additional deposit of $100,000 to extend closing date — Buyer claimed she was not required to close transaction because seller mispresented nature of property — Buyer brought motion for summary judgment seeking to recover $200,000 deposit — Motion dismissed — Seller obtained report from expert in real estate law on whether buyer was legally required to close transaction — Expert's opinion was inadmissible, as it was not open to parties to tender experts on questions of domestic law — Expert evidence was to help trier of fact understand evidentiary issues that might be beyond everyday experience — Judge was presumed to know law and able to determine correct legal analysis — Expert witness on domestic law did not provide court with any added value — Expert's opinion was tendered for his analysis of law and report was excluded in its entirety.
Real property --- Sale of land — Remedies — Forfeiture of payments — Right to retain deposit — Conduct of vendor
Buyer and seller entered into agreement of purchase and sale for property that seller had used as commercial office space but it was zoned residential — Purchase price was $1,575,000 with $100,000 deposit, and buyer later paid additional deposit of $100,000 to extend closing date — Buyer claimed she was not required to close transaction because seller mispresented nature of property — Buyer brought motion for summary judgment seeking to recover $200,000 deposit — Motion dismissed — There was no misrepresentation by seller regarding nature of property — There was no representation to effect that property was zoned commercial — Fact property was zoned residential was clearly stated in listing for property, there was nothing in agreement that stated otherwise, and fact property was zoned residential did not entitle buyer to refuse to close transaction — Agreement imposed no obligation on seller to prove that property could continue to be used as administrative office space — Seller did not

breach agreement by failing to provide survey, as buyer's concerns about survey did not arise until after she refused to close, and seller was not in breach of obligation to certify that transaction was not subject to HST given its position that HST was based on use of property and not its zoning — Buyer's failure to close transaction amounted to anticipatory breach of agreement which relieved seller from obligation to tender — There was no other legally relevant consideration that would preclude seller from retaining deposit — Buyer's voluntary offer to increase deposit negated any suggestion that deposit could be considered unconscionable — There was no basis for concluding that $200,000 deposit was product of unequal bargaining power or that its retention by seller would be unconscionable even though seller might not have suffered any damages as result of buyer's refusal to close transaction — Deposit was forfeited to seller.

Table of Authorities

Cases considered by *P.J. Monahan J.*:

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Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 98 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20.04(2.2) [en. O. Reg. 438/08] — considered

***P.J. Monahan J.*:**

1 The Applicant, Shahnaz Hatami ("Hatami" or "Buyer"), brings this motion for summary judgment seeking to recover a deposit of $200,000 paid to the Respondent, 1237144 Ontario Inc. ("123 Ontario" or "Seller"), pursuant to an agreement of purchase and sale (the "Agreement") for a property located at 291 Eglinton Avenue East in Toronto (the "Property"). Hatami claims that she was not required to close the transaction and is entitled to the return of the deposit, primarily because 123 Ontario misrepresented the nature of the Property.

2 123 Ontario argues that there was no misrepresentation regarding the nature of the property and Hatami had no legal basis for failing to close the transaction. As such, Hatami anticipatorily breached the Agreement and forfeited the deposit that had been paid.

3 In my view, there was no misrepresentation by 123 Ontario regarding the nature of the property. Hatami's failure to close the transaction amounted to an anticipatory breach of the Agreement, thereby relieving 123 Ontario from the obligation to tender. There is no other legally relevant consideration that would preclude 123 Ontario from retaining the deposit without the necessity to prove damages. Hatami's motion for summary judgment is dismissed with costs to 123 Ontario and, as explained below, I grant judgment to 123 Ontario in the action brought by Hatami.

Background Facts

4 123 Ontario purchased the Property in 1997 and used it as commercial office space. In April 2016, 123 Ontario listed the Property for sale with Royal LePage Real Estate Services Inc. at a price of $1,650,000. The listing stated that the zoning for the Property was R4 Az4, which is a residential zoning in which use as office space is permitted. The listing agent was Andrew Sommers ("Sommers").

5 On May 10, 2016, Sommers showed the Property to Hatami, along with her son Amir Mazinani and her daughter Elena Mazinani. E. Mazinani made an offer (the "May 10th Offer") to purchase the Property for $1,575,000, with a closing date of June 30, 2016. The May 10th Offer was Prepared on the Ontario Real Estate Association's (OREA's) standard form "Agreement of Purchase and Sale - Commercial". The May 10th Offer provided, *inter alia*, that the buyer had until June 8, 2016 to satisfy herself that the present use of the Property as "Administrative Offices" may be lawfully continued and that the offer was conditional on the buyer obtaining financing within five business days. The May 10th Offer was accepted by 123 Ontario but E. Mazinani did not pay the required deposit of $100,000 and the May 10th agreement was cancelled.

6 On May 13, 2016, Hatami indicated to Sommers that she wished to purchase the Property. She entered into a buyer representation agreement with Sommers, the stated purpose of which was to locate a "Single Family Residence and Commercial Office Space" at 291 Eglinton Avenue East, Toronto. Sommers subsequently prepared the Agreement which was signed by Hatami on May 18, 2016 and accepted by 123 Ontario. As with the May 10th Offer, the Agreement was prepared on the OREA standard form "Agreement of Purchase and Sale - Commercial". The purchase price was $1,575,000, with a deposit of $100,000, which was paid by Hatami. The transaction was to close on July 15, 2016.

7 The Agreement differed in certain respects from the May 10th Offer, in that it was unconditional and did not contain a financing condition. The Agreement described the present use of the Property as "Administrative Office Space" and indicated that Hatami had until a date (the "Requisition Date") that was the earlier of (i) July 30, 2016, or (ii) five days before the closing of the transaction, to satisfy herself that this current use could be lawfully continued. In the event that Hatami raised a valid objection regarding the continued use of the Property prior to the Requisition Date, Hatami was entitled to refuse to close the transaction and receive a return of the deposit. The Agreement did not contain any representations regarding the zoning of the Property.

8 The Agreement provided that, if requested by Buyer, Seller would deliver any sketch or survey of the property within Seller's control as soon as possible. However, Buyer also acknowledged that a new survey may be required for financing purposes and agreed to obtain any such survey at the Buyer's expense. Any HST payable on the transaction was in addition to the purchase price. If the sale of the Property was not subject to HST, Seller agreed to so certify on or before closing.

9 On June 30, 2016, Hatami's solicitor, Behrouz Amouzgar ("Amouzgar"), made certain written requisitions of 123 Ontario's solicitor, Max Cohen ("Cohen"). 123 Ontario was asked to provide an up-to-date survey of the Property and to advise if one was not available. 123 Ontario was also asked to execute prior to closing a number of documents, including a statutory declaration re-HST. However, Hatami's solicitor did not make any requisition with respect to the permitted use of the property or its zoning.

10 On July 6, 2016, Cohen responded with a letter indicating, *inter alia*, that a survey would be provided with the vendor's closing documents. [1] With respect to the documents that Amouzgar had requested be executed by 123 Ontario, including the statutory declaration regarding HST, Cohen's July 6, 2016 letter indicated that the form of documents would be reviewed and

executed in accordance with the terms of the Agreement. On July 11, 2016, Cohen provided Hatami's solicitor with 123 Ontario's closing documents.

11 On July 13, 2016 Amouzgar wrote to Cohen requesting an extension of the closing date to August 15, 2016. Amouzgar offered, as consideration for the extension, the payment of an additional deposit of $100,000. On July 14, 2016, 123 Ontario consented to the extension of the closing date provided, amongst other things, that there would be no further requisitions. Hatami paid the additional deposit of $100,000 and the closing was set for August 15, 2016.

12 On August 10, 2016, Amouzgar contacted Cohen expressing concerns regarding the zoning of the Property. In an attempt to respond to these concerns, Cohen confirmed that although the Property was zoned residential, it could be used as office space. He further indicated that the determination of the applicability of HST is based on the use of the property rather than on its zoning and, on this basis, HST was applicable to the transaction.

13 On August 12, 2016, Amouzgar sent a further email to Cohen raising questions about whether the Property was zoned residential or commercial. Amouzgar asked why 123 Ontario had signed a "commercial agreement" if, in fact, the property was zoned residential. Amouzgar further asked why 123 Ontario had stated that HST applied to the transaction if the Property was zoned residential.

14 This prompted a further email from Cohen on August 13, 2016, indicating that, if Amouzgar's questions were meant to be requisitions, they were out of time, did not in any way go to the root of title and thus were irrelevant to Hatami's obligation to close the transaction. Nevertheless, in an attempt to respond to Amouzgar's concerns, Cohen confirmed that the existing use of the Property as administrative office space could lawfully be continued. The Property was zoned residential but this zoning designation was not inconsistent with the manner in which the property had been used, since the R4 designation contained an exception for use as office space. Cohen indicated that the zoning of the property was therefore not relevant to the Buyer's obligation to complete the transaction (since the Agreement had contained representations regarding the use of the Property rather than its zoning); that 123 Ontario was ready, willing and able to close; and that the keys and signed closing documents had previously been provided to Hatami. Cohen noted that if Hatami failed to complete the transaction, 123 Ontario reserved its rights and remedies, including the right to terminate the transaction and retain the deposit.

15 On August 15, 2016 at 8:19 AM, Amouzgar sent an email to Cohen indicating that if the property is zoned commercial, Hatami was willing to close the transaction in accordance with the Agreement but that, if the property is zoned residential, "there is no contract". Cohen responded at 9:53 AM by indicating that Seller was not required to provide evidence regarding the current zoning of the Property. He cautioned Amouzgar that if the transaction was not completed by 5:00 PM that day, the deposit would be immediately forfeit and 123 Ontario would hold Hatami liable for any losses arising from Hatami's failure to comply with the terms of the Agreement.

16 Amouzgar replied later that day at 4:48 PM, indicating that the Property had been listed on the Commercial MLS and that the parties had entered into a Commercial Agreement of Purchase and Sale. Hatami had retained the services of a commercial appraiser who, in a report dated July 22, 2016, had stated that the property was zoned residential and was only worth $1,130,000. Thus, according to Amouzgar, the Agreement was "null and void". In an attempt to mitigate Hatami's damages, Hatami was willing to purchase the property for $1,575,000, provided that 123 Ontario provide a vendor take-back mortgage in the amount of $1 million for a term of 10 years. Alternatively, Hatami was willing to purchase the property at a price of $1,130,000.

17 Cohen responded at 5:31 PM that day by indicating that Hatami had breached the terms of the Agreement by refusing to close the transaction. Cohen characterized Hatami's proposal as an attempt to renegotiate the purchase price based on an appraisal report that had been obtained three weeks prior to the closing date which was, in Cohen's view, the height of bad faith. Cohen anticipated that 123 Ontario would attempt to mitigate its losses by re-listing and re-selling the property as quickly as possible. He advised that in addition to the forfeiture of the deposit, Hatami would be liable for any losses incurred by 123 Ontario.

18 On the morning of August 16, 2016, Cohen wrote to Amouzgar confirming that Hatami had not delivered the funds or any closing documents required to complete the transaction and that Hatami was therefore in breach of the Agreement. He further confirmed that 123 Ontario was ready, willing and able to complete the transaction, and tendered upon Hatami. Cohen advised that Hatami had forfeited her deposit and that 123 Ontario would be relisting the property for sale.

19 At 9:09 PM on August 16, 2016, E. Mazinani wrote to Cohen identifying herself as litigation counsel for Hatami. E. Mazinani indicated that through entering into a "Commercial Agreement of Purchase and Sale", 123 Ontario had represented to Hatami that the property was zoned commercial when in fact it was zoned residential. E. Mazinani indicated that this misrepresentation was material in that it had induced Hatami to enter into the Agreement and therefore entitled her to "avoid the transaction and repudiate same". Hatami's position was that 123 Ontario was not in a position to convey what had been contracted for, namely, a commercial property. Therefore, Hatami was entitled to the return of her deposit.

20 Cohen responded at 9:36 PM that evening indicating that there had been no misrepresentation and Hatami had no right of rescission.

21 Notwithstanding this correspondence, there were further discussions between the parties in an attempt to resolve the matter, including an August 25, 2016 offer to settle made by 123 Ontario to Hatami. 123 Ontario maintained its position that Hatami had no right to refuse to close the transaction on August 15, 2016. However, 123 Ontario offered to settle the matter on two alternative bases. Option one was that the transaction would not proceed, one-half of the $200,000 deposit would be returned to Hatami, with 123 Ontario retaining the remainder. Alternatively, 123 Ontario offered to proceed with the transaction for the same purchase price by entering into a new agreement using the OREA residential form of agreement. Hatami would pay interest on the purchase price from July 15, 2016 until the closing on September 9, 2016, and Hatami would pay additional legal costs incurred by 123 Ontario. This offer was open for acceptance by Hatami until 5 PM on August 29, 2016.

22 This offer was not accepted within the time period specified. However, on September 1, 2016, Hatami made an alternative offer to settle pursuant to which she would purchase the Property for $1,575,000 with a closing date of October 31, 2016. 123 Ontario would return $100,000 of the deposit that had been paid, within 48 hours of acceptance of Hatami's offer.

23 At 5:53 PM on September 1, 2016, Cohen advised Hatami that 123 Ontario had resold the property to a third party and that, therefore, it could not accept Hatami's offer to settle. Subsequently, Hatami commenced this proceeding and has now brought a motion for summary judgment seeking a return of the $200,000 deposit.

Motion for Summary Judgment

24 There are a number of factual issues in dispute between the parties, particularly relating to whether 123 Ontario made any misrepresentations relating to the zoning of the Property. Hatami also claims that 123 Ontario failed to properly respond to certain of the requisitions made by Amouzgar in his June 30, 2016 correspondence with Cohen. Accordingly, the Court heard *viva voce* evidence from a number of witnesses[2] in order to resolve these factual issues, pursuant to Rule 20.04 (2.2) of the *Rules of Civil Procedure*, as well as the October 14, 2016 Endorsement of Belobaba J. in this matter. Based on this evidence, as well as the numerous affidavits and documentary evidence that were filed on this motion, I am satisfied that I am in a position to resolve the issues raised in a fair, just and appropriate manner, consistent with *Hryniak v. Mauldin*.[3]

Legal Issues

25 A preliminary issue arose from the fact that 123 Ontario had obtained an "expert report" from Sidney H. Troister, an expert in real estate law, on the issue of whether Hatami was legally required to close the transaction. Hatami objected to the admissibility of Troister's opinion. For the reasons discussed in the next section, I excluded Troister's opinion and his report has not been relied upon in the formulation of these reasons.

26 The issue that arises on this motion is whether Hatami is entitled to a return of some or all of the $200,000 deposit it paid to 123 Ontario. Hatami maintains that she is so entitled on either of the following two bases:

a. 123 Ontario misrepresented the zoning of the property as commercial rather than residential and this misrepresentation was fundamental in inducing Hatami to enter into the Agreement. Further, 123 Ontario failed to prove that the Property could continue to be used as office space, as Hatami claims the Seller was required to do under the Agreement. Accordingly, Hatami was relieved of the obligation to close the transaction and is entitled to the return of the deposit; or,

b. in the alternative, 123 Ontario was itself in breach of the Agreement because it failed to respond to Hatami's June 30, 2016 letter of requisitions. In particular, Hatami objects to the failure of 123 Ontario to provide a survey of the Property, as well as its failure to certify that the transaction was not subject to HST. Thus, even if Hatami was in breach of her obligation to close the transaction, 123 Ontario was also in breach, with the result that the contract was rescinded and entitling the Buyer to the return of the deposit.

27 In addition, even if Hatami was in breach of the Agreement by failing to close the transaction on August 15, 2016, it is necessary to consider whether there are any other legally relevant reasons why 123 Ontario should be precluded from retaining the deposit.

Admissibility of Troister Opinion

28 It is not open to the parties to tender experts on questions of domestic law.[4] This position has been affirmed in Ontario cases and is clearly articulated in *Teskey v. Canadian Newspapers Co.*[5] and *Wallace v. Allen*.[6]

29 The rationale excluding expert evidence on the law reflects the fundamental difference between facts and law. The purpose of evidence is to prove facts. Expert evidence aims to help the trier of fact understand evidentiary issues that may be beyond everyday experience. For example, an expert may explain how an automobile accident debris field and the damage to the vehicles can be used to reconstruct the point of impact of the collision.

30 The law, in contrast, is presented through counsel's written and oral submissions. It is the role of counsel to identify the applicable law and argue how it applies to the case. The judge is presumed to know the law and be able to determine, with the assistance of counsel's submissions, the correct legal analysis. As such, an expert witness on domestic law does not provide the court with any added value. Moreover, the expert is engaged in the very role assigned to the judge, namely, to apply the law to the facts as found in the litigation.

31 *R. v. Mohan*[7] elegantly states the rationale for limiting expert evidence to factual matters. Justice Sopinka stipulated that expert evidence must be necessary in the sense that it "is likely to be outside the experience and knowledge of a judge."[8] An expert on Ontario law will never be necessary because judges are presumed to know the law.

32 Troister's opinion is tendered for his analysis of the law. Relying on the facts provided by counsel, Troister considers whether any of the Buyer's objections to closing are legally valid. Troister opines that the Buyer is not entitled, as a matter of law, to refuse to close based on the permitted use of the Property because the zoning permitted use as office space and, in any event, the objection was out of time. These conclusions are reached based on an interpretation of the zoning bylaw and the law of requisitions. Relying on this kind of legal analysis, Troister ultimately concludes that "the Buyer did not submit any valid objection giving rise to a right to terminate the agreement of purchase and sale."

33 Troister's opinions are analogous to the legal opinions of a real estate lawyer in *Silver Sands Realty Ltd. v. Nova Scotia (Attorney General)*[9] that the court excluded. Unlike *Silver Sands* in which the legal and factual portions of the opinion were severable, once the portion of Mr. Troister's opinion that addresses the law is excluded, there is nothing left to merit the opinion's admission. The appropriate remedy is to exclude the report in its entirety.

Hatami's Obligation to Close the Transaction

34 Hatami argues that 123 Ontario misrepresented the Property as being zoned commercial when in fact it was zoned residential. She argues that this misrepresentation was material and entitled her to refuse to close the transaction.

35 The Agreement provided that the Property could be continued to be used as administrative office space. However, it did not contain any representations with respect to the zoning of the Property. Hatami maintains that the Agreement nevertheless did represent the property to be zoned as "commercial" on the basis that it had been prepared by Sommers using the OREA standard form "Agreement of Purchase and Sale - Commercial". Hatami also relies upon the fact that on May 24, 2016, A. Mazinani sent the following text message to Sommers in which he asked about the zoning of the Property:

> Hi Andrew. Hope you had a good weekend. Two questions for you. Can we meet at 5 today. If not 6 is okay. Can we get a copy of the 2015 tax bill. Bank is asking as they wanted to confirm if it's commercial or residential apartments zoning.

36 Sommers responded simply that "five is fine I will work on the latter." Although there are a number of other texts subsequently exchanged between Sommers and A. Mazinani, there is no further reference in this correspondence to either the provision of a tax bill or the zoning of the Property. [10]

37 In my view, there was no representation to the effect that the Property was zoned commercial. The MLS listing stated that the property was zoned R4 Az4, which is a residential listing. In his oral testimony, Sommers indicated that he had prepared the listing after inquiring with the City of Toronto about the zoning of the Property, and being told that it was zoned residential. He stated that he never told Hatami, A. or E. Mazinani that the property was zoned commercial. [11] While it is true that A. Mazinani raised the issue of the zoning of the property in his May 24, 2016 text to Sommers, it does not appear that Sommers ever responded directly to this question. Nor did A. Mazinani raise the question of the zoning of the property in any of the subsequent texts that he sent to Sommers. I accept Sommers' evidence to the effect that he never represented the property as being zoned commercial. [12]

38 More significant is the fact that the Agreement itself does not contain any representation with respect to the zoning of the Property. The fact that the Agreement was prepared using a standard form commonly used for the sale of commercial properties does not amount to a representation that the Property was zoned commercial. Even properties zoned as residential could be used for certain commercial purposes, as was the case here. Had Hatami wished to make the zoning of the property (as opposed to its continued use) a condition of the agreement, it would have been a simple matter to have said so expressly. As the Court of Appeal noted in *Pompeani v. Bonik Inc.*, [13] where the terms of an agreement concerning the sale of land are clear they should not be ignored.

39 Accordingly, the fact that that the Property was zoned residential rather than commercial was clearly stated in the listing for the Property and there is nothing in the Agreement that states otherwise. There was no misrepresentation regarding the zoning of the Property and the fact that the Property was zoned residential did not entitle Hatami to refuse to close the transaction. [14]

40 Hatami also maintains that 123 Ontario had an obligation to prove that the Property could continue to be used as administrative office space and that it failed to discharge this burden. In fact, however, the Agreement imposed no such obligation on the Seller. Clause 8 of the Agreement provided that the Buyer was obliged to satisfy herself as to whether or not the Property could continue to be used as administrative office space. Clause 10 provided that the Buyer could refuse to close the transaction if, prior to the Requisition Date, she raised a "valid objection... to the fact the said present use [as administrative office space] may not lawfully be continued..." In other words, the Agreement provided that it was the responsibility of the Buyer, rather than the Seller, to identify and raise valid concerns regarding the future permitted use of the Property.

41 No such concerns were ever identified by Hatami. In the correspondence exchanged between counsel in the days leading up to the closing date, Cohen provided Amouzgar with evidence that the Property could continue to be used as administrative office space even though it was zoned residential. Amouzgar did not take issue with 123 Ontario's assurance that the Property could continue to be used as office space. Instead, the email from Amouzgar sent at 8:19 AM on August 15, 2016 stated that

"[t]he issue is not that this is a residential property with an exemption for office use." In short, neither Hatami nor her counsel ever raised a concern regarding the permitted use of the Property; Hatami's refusal to close the transaction was based solely on the fact that the Property was zoned residential. [15]

42 In summary, the Agreement did not contain any representations regarding the zoning of the Property, nor had 123 Ontario misrepresented the zoning to be commercial rather than residential. Hatami did not raise any concern with respect to the future lawful use of the Property as administrative office space. As such, the fact that the property was zoned residential, with an exception for office use, was consistent with the Agreement and did not entitle Hatami to refuse to close the transaction.

123 Ontario's Alleged Breach of The Agreement

43 In the alternative, Hatami argues that 123 Ontario was itself in breach of the Agreement, thus relieving her from the obligation to close the transaction. In particular, Hatami maintains that 123 Ontario failed to respond to Amouzgar's June 30, 2016 letter of requisitions in that: (i) 123 Ontario failed to provide an up-to-date survey for the Property as requested; and (ii) 123 Ontario failed to provide evidence of whether HST applied to the transaction, as required by clause 7 of the Agreement. Hatami relies upon cases which have held that where a seller fails to respond to a buyer's letter of requisitions, [16] including a request to provide a survey, [17] the buyer is relieved of the obligation to close the transaction.

44 As noted above, on July 6, 2016, Cohen had responded to Amouzgar's June 30, 2016 letter of requisitions in which he indicated, *inter alia*, that 123 Ontario would be providing a survey that had been prepared some years previously. On July 11, 2016, Cohen provided Amouzgar with the closing documents which, he maintains, did include a survey that had been prepared in 1997.

45 Amouzgar asserts that he never received Cohen's July 6, 2016 letter but confirms that he did receive the closing documents provided by Cohen on July 11, 2016. However, Amouzgar maintains that the July 11, 2016 package of documents did not include the 1997 survey.

46 In his oral testimony, Cohen indicated that he was certain that the July 11, 2016 package of documents did in fact include the 1997 survey. He noted that there were staple marks on the original of the 1997 survey which matched exactly the staple marks on the other documents that were included in the July 11, 2016 package, and which Amouzgar acknowledged receiving.

47 At no time prior to the closing date did Amouzgar raise any concerns regarding a failure on the part of 123 Ontario to provide a survey for the property. In fact, in his correspondence on August 15, 2016, Amouzgar had confirmed that Hatami was prepared to close the transaction provided that the property was zoned commercial. It was only on August 18, 2016, after Hatami had refused to close the transaction, that Amouzgar raised concerns regarding the failure to provide a survey. In the event that it were material, I would be prepared to accept Cohen's evidence that the package of closing documents delivered on July 11, 2016 did in fact include the 1997 survey.

48 In any event, even if Cohen had failed to provide a copy of the survey, this would not have entitled Hatami to refuse to close the transaction. Courts have been willing in certain circumstances, such as where the provision of a survey was essential to the transaction, to permit a buyer to refuse to close the transaction on the basis that the seller has failed to meet its obligations in this regard. [18] Here, although the Agreement provided that Seller would provide any existing survey upon request, it also required the Buyer to obtain an up-to-date survey at its own expense in the event that this was required in order to close the transaction. Thus, unlike in *Domowicz*, 123 Ontario was not under an unqualified obligation to provide an up-to-date survey for the Property.

49 Moreover, again in contrast to *Domowicz*, any alleged failure on the part of 123 Ontario to provide a survey in no way affected Hatami's ability to close the transaction. As noted above, on August 15, 2016, Amouzgar indicated that Hatami was prepared to close the transaction provided only that the Property was zoned commercial. No reference was made to the requirement to provide a survey. As such, Hatami's reliance on the fact that 123 Ontario had failed to deliver a survey prepared 20 years earlier as the basis for her refusal to close the transaction is a purely technical objection, raised after-the-fact, in an effort to avoid her own obligations under the Agreement.

50 Finally, Hatami argues that 123 Ontario was in breach of its obligation under clause 7 of the Agreement to certify prior to closing that the transaction was not subject to HST. In fact, however, 123 Ontario's position was that the applicability of HST to the transaction was based on the use of the property rather than its zoning. Since the property had been used for commercial purposes (i.e. as office space), 123 Ontario was of the view that the transaction was subject to HST. Thus 123 Ontario could not certify that the transaction was not subject to HST because it did not believe this to be the case, and 123 Ontario was not in breach of clause 7 of the Agreement. In any event, a seller's failure to provide a certification regarding the application of HST would not entitle a buyer to refuse to close the transaction where, as was the case here, the issue of HST was immaterial to a buyer's ability to close the transaction.

Seller's Right to Retain the Deposit

51 Before concluding that the Seller is entitled to retain the deposit, it is necessary to consider whether Hatami's failure to close the transaction amounted to an anticipatory breach of the Agreement. Further, it is necessary to consider whether there are any other legally relevant considerations that would make it inequitable for 123 Ontario to retain the deposit, particularly in light of the fact that 123 Ontario does not appear to have suffered any loss.

52 There can be no doubt that Hatami, through her counsel, expressly repudiated the agreement on August 15, 2016. In his email sent at 4:48 PM on August 15, 2016, Amouzgar stated that the Agreement was "null and void". The fact that Amouzgar proposed an alternative purchase price, or the provision of a vendor take back mortgage, was an attempt to negotiate a new agreement and did not in any way qualify Hatami's repudiation of the existing Agreement. Moreover, in E. Mazinani's August 16, 2016 email to Cohen, she confirmed that Hatami had repudiated the Agreement.

53 As Charney J. noted in *Nicolaou v. Sobhani*, [19] when confronted by an anticipatory repudiation or breach, the innocent party has the right to elect to terminate the agreement, which relieves that party of any further requirement to perform its obligations under the contract. Moreover, the innocent party is presumptively entitled to retain the deposit without the necessity to prove damages.

54 In this case, out of an abundance of caution Cohen elected to tender upon Hatami on August 16, 2016, even though there was no obligation to do so. At that time, Cohen also made clear that 123 Ontario would not be proceeding with the transaction and instead would be relisting the property and retaining the deposit. I believe that this was a clear election by 123 Ontario that it was terminating the Agreement, communicated to Hatami, which presumptively entitled 123 Ontario to retain the deposit as liquidated damages.

55 The remaining issue is whether there is any other juridical reason or consideration which would preclude 123 Ontario from retaining the deposit. As the Court of Appeal noted recently in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, [20] a court may grant relief against penalties and forfeitures in circumstances where the forfeited deposit was out of all proportion to the damages suffered and it would be unconscionable for the seller to retain the deposit. [21] However as Lauwers J.A. went on to point out in *Redstone*, deposits are commonplace in the operation of the market, especially for larger assets such as residential and commercial real estate. Deposits are intended to motivate contracting parties to carry through with their bargains and thus are generally forfeited by a buyer who repudiates the contract without proof of damages by the innocent party. This reflects what Sharpe JA has described as a "rising [judicial] recognition of the advantages of allowing parties to define for themselves the consequences of breach." [22] Accordingly, any finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case. [23]

56 In this case, the original deposit of $100,000 was proposed by Hatami and represented less than 7% of the purchase price. The $100,000 increase in the deposit was also proposed by Hatami in return for an extension of the closing date. As was noted by Lauwers JA in *Redstone*, a buyer's voluntary offer to pay or increase a deposit, particularly in a commercial context, negates any suggestion that such a deposit could properly be characterized as unconscionable.

57 In short, I see no basis for concluding that the $200,000 deposit was a product of unequal bargaining power or that its retention by 123 Ontario would be unconscionable, even though 123 Ontario may not have suffered any damages as a result of Hatami's refusal to close the transaction.

Conclusion

58 Hatami's refusal to close the transaction amounted to anticipatory breach of the Agreement, thereby presumptively entitling 123 Ontario to retain the deposit of $200,000. There is no juridical reason that would require 123 Ontario to return the deposit. Accordingly Hatami's motion for summary judgment is dismissed with costs to 123 Ontario on a partial indemnity basis. Further, Belobaba J's endorsement of October 14, 2016 stated that the dispute had been reduced to the single issue of the Buyer's entitlement to the return of the deposit. Since I have found that the Seller is entitled to retain the deposit, I grant judgment to 123 Ontario, order the deposit to be forfeit and direct the Accountant of the Superior Court to release the deposit to 123 Ontario.

59 I leave it to the parties to attempt to settle the appropriate quantum of costs payable to 123 Ontario. However, in light of the fact that I have excluded the expert report prepared by Troister, 123 Ontario is not entitled to recover any costs associated with the preparation of that report. In the event that the parties are unable to so agree, they may make costs submissions of up to three pages (excluding Bills of Costs or offers to settle), with 123 Ontario's submissions due 21 days from today, and Hatami's submissions due 21 days from that date.

Motion dismissed.

Footnotes

1 There is some dispute between the parties as to whether Cohen's July 6, 2016 letter was ever received by Amouzgar. See the discussion below at paragraphs 44-47.

2 A. Mazinani, Sommers and Cohen, each of whom had previously provided affidavits, testified and were cross-examined.

3 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

4 Sidney Lederman, Allen Bryant & Michelle Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis, 2014) at p 836-837; *Canadian Encyclopedic Digest*, "Evidence", (Thomson Reuters Canada, 4th ed.), at IX.3.(i).(v).

5 (1989), 68 O.R. (2d) 737 (Ont. C.A.) at p 752.

6 [2007] O.J. No. 879 (Ont. S.C.J.)

7 [1994] 2 S.C.R. 9 (S.C.C.)

8 *Ibid* at p. 23

9 2007 NSSC 292, 259 N.S.R. (2d) 44 (N.S. S.C.) at paragraphs 5 and 6.

10 I note that in an earlier text sent to A. Mazinani on May 20, 2016, Sommers had indicated that he did not have a tax bill but that the taxes for the 2015 tax year were $20,427.83.

11 It should be noted that Sommers also provided Hatami with a copy of a report prepared by the Municipal Property Assessment Corporation (MPAC) which described the property type as "commercial". The MPAC report also described the Property as "405-office use converted from house". It is a fair characterization of the MPAC report that it was ambiguous with respect to the zoning of the Property. However there is no evidence that this report was ever discussed with Sommers, nor was it referred to in the various texts exchanged between A. Mazinani and Sommers.

12 In any event, the Agreement contained an "entire agreement" clause and stated "[t]here is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein." Thus, absent exceptional circumstances (none

of which is present here), any representations by Sommers regarding the zoning for the property were not incorporated into the Agreement and would not have entitled Hatami to refuse to close the transaction.

13 (1997), 104 O.A.C. 149 (Ont. C.A.) ("Pompeani"), at paragraph 34.

14 In addition, I note that Amouzgar did not raise any issue regarding the zoning of the property until August 10, 2016. The July 14, 2016 agreement to extend the closing date had included a stipulation that there would be no more requisitions. Unless an objection goes to the "root of title", which does not include matters relating to the zoning of the property, objections to title must be made within the time allowed for requisitions: *Jackson v. Nicholson* (1979), 25 O.R. (2d) 513 (Ont. H.C.) at paras. 12-16. Accordingly, even if (contrary to the findings above) Hatami had the right to object based on the fact that the property was zoned residential, she failed to do so in a timely manner.

15 The fact that the Property was zoned residential rather than commercial resulted in the valuation of the property being substantially lower than the purchase price. In turn, this affected the ability of Hatami to finance the purchase. Thus it was the zoning of the property, rather than the permitted future use, which was of practical concern to the Buyer.

16 *Pompeani* at paragraph 35.

17 *Domowicz v. Orsa Investments Ltd.* (1993), 36 R.P.R. (2d) 174 (Ont. Gen. Div.) ("Domowicz") at paragraph 30.

18 These were the circumstances in *Domowicz*, where the agreement of purchase and sale required the vendor to provide a survey and its failure to do so prevented the buyer from arranging financing for the transaction.

19 2017 ONSC 7602 (Ont. S.C.J.).

20 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.) ("Redstone") at paragraphs 18 to 30.

21 This jurisdiction is conferred by section 98 of the *Courts of Justice Act*, which provides that "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

22 *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362 (Ont. C.A.) at paragraph 34.

23 *Redstone* at paragraph 25.

TAB 6

2018 ONSC 3602
Ontario Superior Court of Justice

Voortman v. SPCVC Investments Inc.

2018 CarswellOnt 9632, 2018 ONSC 3602, 25 C.P.C. (8th) 305, 293 A.C.W.S. (3d) 767

Harry Voortman and Voortman Enterprises Trust (Applicants) and Voortman Cookies Ltd. (Formerly SPCVC Acquisition Inc.) and SPCV Investments Inc. (Respondents)

H. McArthur J.

Heard: April 30, 2018
Judgment: June 8, 2018
Docket: CV-17-588951

Counsel: Sean Dewart, Lindsay Beck, for Applicants
Alex Rose, Zev Smith, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Equity
III Equitable doctrines
III.7 Relief against penalty and forfeiture
III.7.f Circumstances where relief available
Equity
III Equitable doctrines
III.7 Relief against penalty and forfeiture
III.7.g Discretionary nature of relief under equity legislation
Headnote
Equity --- Equitable doctrines — Relief against penalty and forfeiture — Circumstances where relief available
Sellers sold company to buyers for $182.5 million — On closing, $1 million of purchase price was paid into escrow account to secure any claim by buyers for breaches of sellers' representations and warranties — Agreement stipulated buyers had 18 months to make any such claim, and sellers had 30 days to file written objection to claim, failing which they would be deemed to have admitted claim — Agreement stipulated that time was to be of essence — Buyers filed claim, and sellers' written objection ended up being seven days late due to sellers' solicitor and one of his associates having health issues — Sellers brought application pursuant to s. 98 of Courts of Justice Act for relief from forfeiture — Application granted — Argument that relief from forfeiture only applied to breach of contract and not failure to exercise option was rejected for three reasons — First, reasoning in Supreme Court of Canada authority did not stand for general proposition that relief from forfeiture was not available in absence of breach of contract — Second, facts in present case were distinguishable from that authority and led to different analysis — Third, argument advanced by buyers was inconsistent with Ontario Court of Appeal authorities — Buyers' argument that if relief from forfeiture was granted then it would be just and equitable to grant two-month extension of 180-day period was rejected, since such term did not relate to prejudice flowing from seven-day delay.
Equity --- Equitable doctrines — Relief against penalty and forfeiture — Discretionary nature of relief under equity legislation
Sellers sold company to buyers for $182.5 million — On closing, $1 million of purchase price was paid into escrow account to secure any claim by buyers for breaches of sellers' representations and warranties — Agreement stipulated buyers had 18 months to make any such claim, and sellers had 30 days to file written objection to claim, failing which they would be deemed to have admitted claim — Agreement stipulated that time was to be of essence — Buyers filed claim, and sellers' written objection ended up being seven days late due to sellers' solicitor and one of his associates having health issues — Sellers brought

application pursuant to s. 98 of Courts of Justice Act for relief from forfeiture — Application granted — Three guiding factors to be considered in exercise of discretion were: i) conduct of sellers; ii) gravity of breach; and iii) disparity between value of what had been forfeited and damage caused by breach — Sellers had acted reasonably in meeting with their solicitor after particulars had been provided and instructing him to file required objection — Sellers had reasonably relied on solicitor to follow instructions and comply with 30-day time frame, and solicitor's inadvertence in missing deadline was understandable and had been quickly remedied — Fact that there was time of essence provision rendered breach more serious than it otherwise would have been, but buyers could point to no actual prejudice suffered as result of delay — There was significant disparity between money forfeited by sellers and inferred prejudice suffered by buyers arising from time of essence provision.

Table of Authorities

Cases considered by *H. McArthur J.*:

Buurman v. Dominion of Canada General Insurance Co. (2015), 2015 ONSC 6444, 2015 CarswellOnt 15902, [2015] I.L.R. I-5814, 55 C.C.L.I. (5th) 185 (Ont. S.C.J.) — considered

Canadian Superior Oil of California Ltd. v. Kanstrup (1964), [1965] S.C.R. 92, 47 D.L.R. (2d) 1, 49 W.W.R. 257, 1964 CarswellAlta 57 (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

Niagara Falls (City) v. Diodati (2011), 2011 ONSC 2180, 2011 CarswellOnt 2370, 82 M.P.L.R. (4th) 140, 106 O.R. (3d) 154 (Ont. S.C.J.) — referred to

Ontario (Attorney General) v. McDougall (2011), 2011 ONCA 363, 2011 CarswellOnt 3107, (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, (sub nom. *Ontario (Attorney General) v. 1140 Aubin Road, Windsor)* 279 O.A.C. 268 (Ont. C.A.) — considered

PDM Entertainment Inc. v. Three Pines Creations Inc. (2015), 2015 ONCA 488, 2015 CarswellOnt 9648, 388 D.L.R. (4th) 478, 336 O.A.C. 156, 46 B.L.R. (5th) 1 (Ont. C.A.) — considered

Poplar Point First Nation Development Corp. v. Thunder Bay (City) (2016), 2016 ONCA 934, 2016 CarswellOnt 19605, 58 M.P.L.R. (5th) 181, 406 D.L.R. (4th) 421, 75 R.P.R. (5th) 1, 135 O.R. (3d) 458 (Ont. C.A.) — considered

Ross v. T. Eaton Co. (1992), 27 R.P.R. (2d) 33, (sub nom. *Ross v. Eaton (T.) Co.)* 58 O.A.C. 366, 11 O.R. (3d) 115, 96 D.L.R. (4th) 631, 1992 CarswellOnt 615 (Ont. C.A.) — referred to

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.) — referred to

Scicluna v. Solstice Two Limited (2018), 2018 ONCA 176, 2018 CarswellOnt 2634, 57 C.B.R. (6th) 250, 14 C.P.C. (8th) 209 (Ont. C.A.) — considered

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

120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd. (1993), 1993 CarswellOnt 5327 (Ont. C.A.) — considered

1473587 Ontario Inc. v. Jackson (2005), 2005 CarswellOnt 712, 29 R.P.R. (4th) 9, 74 O.R. (3d) 539 (Ont. S.C.J.) — considered

2181050 Ontario Ltd. v. Strong et al. (2018), 2018 ONSC 442, 2018 CarswellOnt 610 (Ont. S.C.J.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 98 — considered

Municipal Act, 2001, S.O. 2001, c. 25

Generally — referred to

Words and phrases considered:

relief from forfeiture

Relief from forfeiture refers to the power of the court to protect a party against the loss of an interest or a right because of a failure to perform a covenant or condition in an agreement or contract. The remedy is equitable and purely discretionary.

APPLICATION by business sellers pursuant to s. 98 of *Courts of Justice Act* for relief from forfeiture.

***H. McArthur J.*:**

Introduction

1 When sophisticated parties enter into an agreement, where "time is of the essence", what happens if one party misses a deadline? Is a deal always a deal? Or, in certain circumstances, can the court provide equitable relief? That is the issue in the present case.

2 Harry Voortman sold his cookie company to SPCVC Investments Inc. for $182.5 million. [1] The agreement provided that on closing, $1 million of the purchase price was to be paid into an escrow account to secure any claim by the "purchasers for breaches of the sellers' representations and warranties." The agreement stipulated that SPCVC had 18 months during which to make any such claim. If the claim exceeded $1.825 million, then Mr. Voortman would become liable for damages not exceeding the $1 million in the escrow account.

3 The agreement further provided that Mr. Voortman had 30 days to file a written objection to the claim. If Mr. Voortman failed to provide a written objection, he was deemed to have admitted the claim and given up his rights to the $1 million in escrow. The agreement stipulated that time was to be of the essence.

4 SPCVC filed a claim. Mr. Voortman's lawyer, Paul Grespan, wrote to SPCVC and asked for more particulars. After receiving particulars, Mr. Voortman met with Mr. Grespan and instructed him to file a written objection to the claim. Mr. Voortman's lawyer, however, missed the 30-day deadline by seven days. Why? In the week leading up to the deadline, Mr. Grespan was told he required open heart surgery. Further, an associate at his firm suffered serious injury in an accident and was unable to return to work on an indefinite basis. In the midst of these troubling circumstances, Mr. Grespan inadvertently missed the deadline.

5 Mr. Voortman now brings an application pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990. c. C.43, seeking relief from forfeiture. He argues that he acted reasonably in relying on his lawyer, that the breach was minor and that there is a significant disparity between the value of the property to be forfeited and the damage caused by the breach. This is a case, he argues, that cries out for equitable relief.

6 SPCVC counters that relief from forfeiture is not available in this case, as Mr. Voortman did not breach the contract; rather, he failed to exercise an option. SPCVC further argues that in the event that forfeiture is found to be an available remedy, it should not be granted in this case as time was to be of the essence. If relief from forfeiture is granted, SPCVC argues that it should be given an extension and allowed to make claim for any amounts discovered within two months of the end of the 18-month period stipulated in the agreement.

7 For the reasons that follow, I have determined that relief from forfeiture is an available remedy on the facts of this case. I have further concluded that given the unique facts of this case, relief from forfeiture should be granted. Finally, I have determined that a two-month extension for SPCVC to file a claim is not warranted.

8 I do not propose to detail the facts, but will refer to them as necessary in my analysis, to which I now turn.

Analysis

1) Issue One: Is relief from forfeiture an available remedy in this case?

9 The power of the Ontario Courts to grant relief from forfeiture is codified in s. 98 of the *Courts of Justice Act*. Section 98 provides:

> A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just.

10 Relief from forfeiture refers to the power of the court to protect a party against the loss of an interest or a right because of a failure to perform a covenant or condition in an agreement or contract. The remedy is equitable and purely discretionary. Relief from forfeiture should be granted sparingly and the party seeking the relief bears the onus of establishing the case for relief: *Kozel v. Personal Insurance Co.*, 2014 ONCA 130 (Ont. C.A.), at paras. 28-29; *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363 (Ont. C.A.), at para 87.

11 SPCVC argues that relief from forfeiture is not available in this case, as there has been no breach of contract. Mr. Voortman had an option to either; a) object to the claim notice within 30 days, or b) remain silent and be deemed to consent to indemnity claims. SPCVC argues that Mr Voortman's failure to exercise an option "does not create an actionable breach of contract that can support a claim for relief from forfeiture."

12 In making this argument, SPCVC relies on *Canadian Superior Oil of California Ltd. v. Kanstrup* (1964), [1965] S.C.R. 92 (S.C.C.). SPCVC argues that Mr. Voortman's position was expressly rejected by the Supreme Court in *Kanstrup* and that he is asking for a "novel expansion" of the law by asking the court to apply the doctrine of relief from forfeiture to cases where there has been no breach of contract, but rather, a failure to exercise an option.

13 I cannot agree with this argument for three reasons. First, in my view the reasoning in *Kanstrup* does not stand for the general proposition that in the absence of a breach of contract relief from forfeiture is not available. Second, the facts in the present case are distinguishable from *Kanstrup* and lead to a different analysis. Third, the argument advanced by SPCVC is inconsistent with Ontario Court of Appeal authorities. I will address each point in turn.

(i) The reasoning in Kanstrup does not stand for the general proposition that in the absence of a breach of contract, relief from forfeiture is not available

14 SPCVC argues that *Kanstrup* stands for the broad and binding proposition that in the absence of a breach of contract, relief from forfeiture is not available. In my view, however, the comments in *Kanstrup* with respect to breach of contract were narrowly tailored to the facts in that case.

15 *Kanstrup* involved a gas lease. Canadian Superior Oil had a 10-year lease. At the end of the 10 years, the lease would continue, so long as Canadian Superior Oil either produced gas or paid $100 annually. The company did not produce gas, and instead provided a cheque for $100. The cheque, however, was not provided until after the 10-year lease had already expired. Kanstrup thus took the position that the lease had been terminated.

16 Canadian Superior Oil advanced a number of arguments as to why the lease should not be terminated. In particular, it pointed to a provision in the agreement which stipulated that if Canadian Superior Oil breached any terms of the agreement, such breach would not lead to forfeiture or termination of the lease.

17 The court held at para. 37 that the provision did not assist Canadian Superior Oil, as the company did not breach the contract, rather it failed to take advantage of an opportunity to renew the lease. It is clear that the court's comments about breach of contract and forfeiture were limited to an assessment of the impact of the particular provision being considered in that case. Contrary to the submission of SPCVC, the court in *Kanstrup* did not articulate a general principle that a breach of contract is always required before relief from forfeiture is available.

(ii) The facts in the present case are distinguishable from Kanstrup

18 Moreover, the present case is distinguishable from *Kanstrup*. Canadian Superior Oil only had claim to the property because of the lease. The lease provided for a specified term, which would terminate automatically at the end of the term unless Canadian Superior Oil produced gas or paid $100. The company failed to take either action. The lease thus terminated. In this situation, the court found at para. 40 that there was simply "no forfeiture to relieve against."

19 In contrast, in the present case the $1 million in escrow belonged to Mr. Voortman. That money continued to be his unless SPCVC established a claim in excess of $1.825 million. By missing the deadline, Mr. Voortman was deemed to have admitted the claim. Thus, Mr. Voortman lost his right to the money because of his failure to perform a covenant in the agreement. Unlike in *Kanstrup*, Mr. Voortman clearly forfeited money in which he had an interest: there is forfeiture to relieve against.

(iii) The position of SPCVC is inconsistent with Ontario Court of Appeal authorities

20 Finally, the position of SPCVC is inconsistent with Ontario Court of Appeal authorities. For example, in *120 Adelaide Leaseholds Inc. v. Oxford Properties Canada Ltd.*, [1993] O.J. No. 2801 (Ont. C.A.), the court found that it had jurisdiction to grant relief from forfeiture in cases where an optionee has failed to exercise an option. The court noted that while the jurisdiction to grant equitable relief in such cases is limited, it is available. (See also *Ross v. T. Eaton Co.*, [1992] O.J. No. 2239 (Ont. C.A.))

21 In *PDM Entertainment Inc. v. Three Pines Creations Inc.*, 2015 ONCA 488 (Ont. C.A.), at paras. 61-62, the Court of Appeal rejected the argument that relief from forfeiture can only be granted where the party seeking relief has breached a contract and the breach gives rise to a right to forfeiture essentially to secure payment of money. Macpherson J.A. made clear at para. 63 that relief from forfeiture is available in a wide range of cases.

22 More recently, in *Poplar Point First Nation Development Corp. v. Thunder Bay (City)*, 2016 ONCA 934 (Ont. C.A.), the court held that relief from forfeiture was available, even though there had been no breach of contract. In that case, the appellant had failed to pay municipal taxes on his property, and the property was sold by the Municipality. The money from the sale exceeded the amount owed for taxes and the money was paid into court. Under the *Municipal Act*, the appellant then had one year to make a claim for the money. He missed the deadline by three weeks, thus he was deemed to have forfeited the money. In finding that relief from forfeiture was warranted, van Rensburg J.A. noted at para. 36 that s. 98 provides the court with "what appears to be broad and unlimited authority" to grant relief from forfeiture.

(iv) Conclusion on whether relief from forfeiture is an available remedy in this case

23 SPCVC relies on *Kanstrup* in arguing that relief from forfeiture is not available in the present case since there was no breach of contract. *Kanstrup*, however, does not stand for such a general proposition and, in any event, the facts in the present case are distinguishable. Moreover, SPCV's position is inconsistent with Ontario Court of Appeal authorities. I find that I have jurisdiction to grant relief from forfeiture in this case. I turn now to consider whether relief from forfeiture should be granted.

2) Issue Two: Should relief from forfeiture be granted in this case?

24 In considering whether to grant relief from forfeiture, the 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 what has been forfeited and the damage caused by the breach: *Kozel*, at para. 31; *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), at para. 32.

25 As Paciocco J.A. recently explained in *Scicluna v. Solstice Two Limited*, 2018 ONCA 176 (Ont. C.A.), at para. 29, these factors do not create a three-part test requiring satisfaction of each; they are elements to guide the court in the exercise of its discretion. I will consider each factor in turn.

i) The Conduct of the Applicant

26 The first factor 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": *8477 Darlington Crescent*, at para. 89. As Osborne J.A. explained in *Williams v. Paul Revere Life Insurance Co.*, [1997] O.J. No. 2773 (Ont. C.A.), at para. 49, the court should consider the nature of the breach, what caused it and anything that the party tried to do about it. All of the circumstances should be taken into account, including anything that tends to explain the act or omission that led to the forfeiture.

27 In my view, the circumstances in the present case establish that Mr. Voortman acted reasonably. Mr. Voortman met with his lawyer after particulars had been provided and instructed him to file the required objection. Mr. Voortman reasonably relied on his long-time lawyer to follow his instructions and comply with the 30-day time frame in which to file an objection. This is similar to the case of *Buurman v. Dominion of Canada General Insurance Co.*, 2015 ONSC 6444 (Ont. S.C.J.). There, at para. 43, the court found that it was reasonable for the plaintiffs to believe that their lawyers would attend to the time limit for claiming accident benefits coverage under an insurance policy. (See also, *Niagara Falls (City) v. Diodati*, 2011 ONSC 2180 (Ont. S.C.J.), at para. 26)

28 Mr. Voortman could not reasonably have anticipated that his long-time lawyer would suffer personal difficulties that would lead him to miss an important deadline contrary to his explicit instructions. Moreover, while it is Mr. Voortman's conduct that must be assessed, when considering whether an equitable remedy is appropriate, the reason that Mr. Grespan missed the deadline is a relevant circumstance to consider. The lawyer missed the deadline because of inadvertence stemming from personal issues.

29 It is true, as pointed out by SPCVC, that there were other lawyers at the firm. But in my view that does assist SPCVC for two reasons. First, the fact that there were other lawyers at the firm underscores that it was reasonable for Mr. Voortman to believe that his instructions to file a written objection would be followed. Second, other lawyers could not be expected to take over from Mr. Grespan unless they were aware of the need to do so. Mr. Grespan could not instruct other lawyers to take over unless he adverted to the deadline. But in the week leading up to the deadline, an associate at the firm had suffered serious injury and was unable to return to work. And Mr. Grespan had been told he required open heart surgery. The uncontroverted evidence is that Mr. Grespan did not advert to the deadline because of the challenging circumstances that arose in the week leading to the deadline.

30 The context supports that the deadline was missed inadvertently. The day he received the claim, Mr. Grespan advised SPCVC that he was seeking particulars of the claim. Mr. Grespan's uncontested evidence is that he was diligently engaged in reviewing and considering the Damages Claim Notice. The news that he would require open heart surgery and the injuries suffered by his associate led him to miss the deadline. The failure to comply did not arise because of indifference.

31 Further, as soon as Mr. Grespan realized that the 30-day deadline had passed, he notified SPCVC of the objection. The rapidity with which he moved to address the missed deadline supports the conclusion that the failure to comply with the deadline did not stem from indifference. It also highlights that Mr. Voortman instructed his lawyer to file an objection. Again, it was reasonable for Mr. Voortman to rely on his lawyer to follow his instructions.

ii) The Gravity of the Breach

32 When considering the gravity of the breach, the court should look at both the nature of the breach itself and the impact of that breach on the contractual rights of the other party: *8477 Darlington Crescent*, at para. 19; *Kozell*, at para. 67.

33 Mr. Voortman argues that the breach was minor; he was only seven days late in filing the objection and courts have granted relief from forfeiture where the breach was graver: *Buurman*, at para. 43-44. Mr. Voortman also argues that SPCVC has failed to articulate any actual prejudice flowing from the delay.

34 SPCVC counters that since the contract stipulated time was of the essence, it is a serious breach; Ontario Courts have strictly enforced time is of the essence clauses: *2181050 Ontario Ltd. v. Strong et al.*, 2018 ONSC 442 (Ont. S.C.J.), at paras. 17-18; *1473587 Ontario Inc. v. Jackson*, [2005] O.J. No. 710 (Ont. S.C.J.), at para. 19. SPCVC has been prejudiced by Mr. Voortman's failure to comply with the time is of the essence provision.

35 In my view, the fact that there was a time is of the essence provision renders the breach in this matter more serious than it would have been in the absence of any such clause. While SPCVC could not articulate any specific prejudice it suffered from the seven-day delay, prejudice can be inferred because of the time is of the essence clause. The need for certainty in commercial contracts militates in favour of finding prejudice in this type of situation.

36 On the other hand, SPCVC could point to no actual prejudice it suffered as a result of the delay in filing the objection. No steps it took that it would not have, but for the seven-day delay. No steps it failed to take that it would have, but for the delay. No missed opportunities. No unnecessary expenditures. Thus, overall I find the seven-day delay in filing the objection to be a relatively minor breach.

iii) Any Disparity Between the Value of the Property Forfeited and the Damage Caused by the Breach

37 The third factor requires the court to consider the disparity between the value of the property forfeited and the damage caused by the breach. This entails a "kind of proportionality analysis": *8477 Darlington Crescent*, at para. 92.

38 Mr. Voortman points to the fact that SPCVC has failed to articulate any real damage caused by the breach. In contrast, he will forfeit $1 million if relief is not granted. He argues that there is a substantial disparity between the value of the property he will have to forfeit and any damage caused to SPCVC.

39 SPCVC counters that Mr. Voortman is not required to pay $1 million as the money was already in the escrow account; Mr. Voortman is not required to "pay anything out of pocket". Thus, SPCVC argues that Mr. Voortman has not suffered any real loss. This argument ignores the reality that the money paid into escrow belongs to Mr. Voortman unless and until SPCVC establishes a claim in excess of $1.825 million. Since Mr. Voortman did not file a written objection within 30 days, he is deemed to have admitted the claim and to have given up his right to that money. Contrary to the submission of SPCVC, Mr. Voortman has clearly forfeited $1 million.

40 SPCVC has suffered some prejudice, as noted above. That said, the only prejudice is inferred because the contract specified that time was to be of the essence. SPCVC failed to articulate any actual prejudice suffered because Mr. Voortman was seven days late in filing the written objection. I find that there is a significant disparity between the money forfeited by Mr. Voortman and the prejudice suffered by SPCVC. The loss suffered by Mr. Voortman is disproportionate to the damages suffered by SPCVC.

iv) Conclusion on Whether Relief from Forfeiture Should be Granted

41 Mr. Voortman acted reasonably in relying on his lawyer. He met with his lawyer and instructed him to file the objection. He could not reasonably have anticipated that his lawyer would have troubling personal circumstances that would lead him to inadvertently miss the 30-day deadline. The breach is not particularly grave. While SPCVC has suffered some prejudice, it is minimal. There is a significant disparity between the $1 million forfeited and minimal prejudice suffered by the seven-day delay in filing the objection. Balancing all three factors, I find that Mr. Voortman should be granted relief from forfeiture.

42 The next issue is whether, as a result, SPCVC should correspondingly receive a two-month extension to file its claim. I turn to that issue now.

3) Issue Three: Should SPCVC receive a two-month extension to file its claim?

43 Section 98 allows for relief from forfeiture "on such terms as to compensation or otherwise as are considered just." SPCVC argues that if I grant relief from forfeiture to Mr. Voortman, it is just and equitable to grant SPCVC a two-month extension to file its claim.

44 Mr. Voortman counters that for any additional terms to be just, they must relate to prejudice flowing from the seven-day delay. For example, if SPCVC had incurred expenses as a result of the seven-day delay, it would be a just and appropriate term to order that Mr. Voortman pay those expenses. Here, SPCVC has no losses to point to; instead, SPCVC is asking for a remedy in the absence of any damage.

45 I agree. If SPCVC had been able to articulate any specific prejudice it suffered as a result of the delay, I would be prepared to impose a term to address that prejudice. In the absence of any articulable prejudice, however, I find that the remedy being sought by SPCVC is unjustified.

Conclusion

46 Relief from forfeiture is an available remedy in this matter. While such relief should be granted sparingly, it is justified in this case; Mr. Voortman acted reasonably, the breach was minor, and the forfeiture of $1 million by Mr. Voortman is disproportionate to the damages suffered by SPCVC because of the seven-day delay. Finally, I find that SPCVC is not entitled to a two-month extension to file its claim.

Costs on this Application

47 I encourage the parties to see if they can agree on costs. If the parties are unable to agree on costs, Mr. Voortman shall serve and file with my office written costs submissions within 15 days. SPCVC shall serve and file with my office any responding costs submissions within 15 days thereafter. The written submissions shall not exceed three pages in length, excluding the Costs Outline.

Application granted.

Footnotes

1 The applicants are Harry Voortman and Voortman Enterprises Trust. For ease of reference, I will generally refer to the applicants as Mr. Voortman. The respondents are Voortman Cookies Ltd. (formerly SPCVC Acquisition Inc.) and SPCVC Investment Inc. I will generally refer to the respondents as SPCVC.

HI-RISE CAPITAL LTD. Applicant	-and-	SUPERINTENDENT OF FINANCIAL SERVICES Respondent	Court File No.: CV-19-616261-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF LANTERRA DEVELOPMENTS LIMITED

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley Taylor LSO#: 39932E
Tel: (416) 869-5236
Email: ataylor@stikeman.com

Sanja Sopic LSO#: 66487P
Tel: (416) 869-6825
Email: ssopic@stikeman.com
Fax: (416) 947-0866

Lawyers for Lanterra Developments Limited