MONK V. FARMERS MUTUAL INSURANCE CO. (LINDSAY), 2017 O.J. NO. 4252

This action arose out of property damage to the insured's log home (including stained carpets, scratched glass panes of windows and doors, and damaged exterior light fixtures), caused by the contractor retained to, among other things, restore the exterior logs and wooden surface areas of the property.

We defended the claim on behalf of the insurer on the basis that: (1) the damage was excluded; and, in the alternative, (2) that the insured ("Ms. Monk") breached her Policy by failing to provide notice of her loss forthwith contrary to Statutory Condition 6, which requires that the insured:

(a) give notice of the loss or damage to the insurer "***forthwith***"; and
(b) deliver a proof of loss verified by a statutory declaration "***as soon as practicable***".

I. THE BREACH

It was the broker's evidence at trial that any damage to the insured's property was first reported during a meeting between the parties held in September, 2011. Since the September 2011 meeting occurred ***2 years and 9 months*** after Ms. Monk ought to have reasonably discovered damage to her property, we argued that Ms. Monk was in breach of SC6.

In an attempt to explain her delay, Ms. Monk claimed that she notified the broker of her loss on three different occasions prior to the September, 2011 meeting. She further claimed that on each of these three occasions, she was told that her loss was not covered.

Upon weighing the evidence, Justice Koke accepted our position and rejected Ms. Monk's claim that she reported her loss prior to the September 2011 meeting. In arriving at this conclusion, his Honour took several factors into account, including: (i) that the evidence of the witness put forward to support Ms. Monk's position was unreliable; and (ii) that Ms. Monk's evidence was contradictory, misleading, and plainly self-serving.

Koke J. thus found as fact that the first time Ms. Monk spoke to her broker about her loss was on September 2, 2011, being a period of ***2 years and 9 months*** after she first discovered the damage to her property. Since she clearly failed to report the property damage to her insurer "forthwith", she breached the notice requirements of SC 6. The only remaining question before the court was whether Ms. Monk was entitled to relief from forfeiture.

II. RELIEF FROM FORFEITURE

As directed by the Supreme Court in *Saskatchewan River Bungalows* [1994] 2 S.C.R. 490, in exercising its discretion to grant relief from forfeiture, the court must first consider the threshold question of whether the breach constitutes ***imperfect compliance*** or ***total non-compliance*** with the contract. Where there is *imperfect* compliance, the next step is to determine whether relief from forfeiture is warranted in a particular case. In this regard, the court is required to examine the following factors: (1) the conduct of the plaintiff; (2) the gravity of the breach and prejudice; and (3) the disparity between the property forfeited and the damage caused by the breach.

1) Threshold Issue: Imperfect Compliance vs. Non-Compliance

Koke J. concluded that since the policy at issue was an "occurrence based" policy and since Ms. Monk's breach was a failure to give timely notice rather than a failure to bring an action within a prescribed time, her breach of SC No. 6 constituted imperfect compliance rather than non-compliance. She was therefore allowed to claim relief from forfeiture under section 129 of the *Insurance Act,* and the issue before the court was whether such relief was warranted in this case.

2) The Conduct of the Plaintiff – Was it Reasonable?

Justice Koke's reasons in Monk underscored that in order to benefit from equitable relief, the person seeking it must come to court with "clean hands". To determine whether Ms. Monk has come to court with "clean hands", Koke J. examined her conduct, including, "the reasonableness of [Ms. Monk's] conduct as it relates to all facets of the contractual relationship, including the breach in issue and the aftermath of the breach".

In this case, Justice Koke simply did not believe Ms. Monk. His Honour concluded that Ms. Monk not only failed to explain the delay in reporting her loss, but that she also attempted to mislead the insurer with respect to the date her damages were discovered. He found her evidence with respect to the discovery and reporting of her loss to be "contradictory" and "self-serving" as well as altogether inconsistent with the record. In these circumstances, Ms. Monk's conduct, including her conduct in the aftermath of the breach of SC 6 fell far short of meeting the reasonableness test.

This was not simply a case of a minor lapse in judgment. This case involved an intentional breach of the policy, compounded by falsehoods used in an effort to avoid the consequences of the breach. As she did not conduct herself in good faith, Ms. Monk could not benefit from an equitable remedy, and the loss of the entirety of the benefits under the policy was justified.

3) Gravity of the Breach and Prejudice

As Koke J. correctly observed, the notice provisions have taken on a greater significance following the 2014 decision in *Schmitz v. Lombard* [2014] ONCA 88 where the court ruled that in the context of first party insurance claims, the limitation period pursuant to the *Limitations Act* does not begin to run until ***a day after the insured makes a claim for indemnity.*** Since, in theory, the insured could choose to wait indefinitely to make a claim that would trigger the limitation period, this ruling effectively left the insurer without a limitation period defence.

As the Court of Appeal pointed out in *Schmitz*, the insurer's only protection in case of such unreasonable delay on the part of the insured is the inclusion of timely notice provisions in the policy. Since these provisions require the insured to give timely notice and deliver a proof of loss forthwith – this reasoning goes, they will be sufficient to alleviate prejudice to the insurer in the event the insured choses to unreasonably delay making a claim and triggering the limitation period.

Given the importance of the notice provisions in the post- *Schmitz* era, the last branch of the *Saskatchewan River* test required the court to assess "both the nature of the breach itself and the impact of that breach on the contractual rights of the other party". In this case, after examining

the evidence, Koke J. concluded that the insurer was in fact seriously prejudiced as a result of the insured's failure to report her loss in a timely manner. The prejudice to the insurer included the following:

- First, the insurer lost the ability to investigate the circumstances and value of the loss as of the date of the occurrence. By the time the loss was reported, Ms. Monk had already replaced the damaged carpets and light fixtures, and painted her windows.
- Second, the insurer lost the ability to take early remedial/mitigating action to reduce its potential exposure.
- Third (and most importantly), the insurer lost its right to subrogate against the contractor whose negligence caused the damage, as that action was statute-barred by the time the insured reported her loss.
- Finally, even if the subrogated action could have been brought, the insurer was irreparably prejudiced by the passage of time, in that the owner/principal of the contractor had passed away during the course of the delay, and would have been unable to testify.

According to Koke J., the prejudice suffered by the insurer was both serious and "precisely the *type* of prejudice from lack of notice that the court in *Schmitz* was addressing". In addition to the factors detailed above, the irreparable prejudice suffered by the insurer by reason of the insured's delay in reporting her loss was fatal to Ms. Monk's argument for relief against forfeiture in this case.

4) Proportionality Analysis: What is the Disparity between the value of the property forfeited and the damages caused by the breach?

Justice Koke estimated the value of the property forfeited by Ms. Monk to be approximately $100,000. While this was considerable, the prejudice to the insurer resulting from Ms. Monk's failure to provide timely notice was also significant: had it received timely notice, the insurer may well have been able to take steps to recover or mitigate its loss vis-à-vis the contractor. As it stands, it could not be said that the property forfeited would be disproportional to the damages caused by the breach.

III. CONCLUSION

In sum, Justice Koke was satisfied that relief from forfeiture was not warranted in this case and Ms. Monk's claim against the insurer was dismissed in its entirety.