Ont. C.A. Broadens the Scope of Relief from Forfeiture

A Commentary on *Kozel v. The Personal Insurance Company*

On Feb. 19, 2014, in an important new ruling in *Kozel v. The Personal Insurance Company*, 2014 ONCA 130, the Ontario Court of Appeal significantly broadened the scope of relief from forfeiture under s. 98 of the Courts of Justice Act, R.S.O. 1990, c. C.43. While this decision came in an auto context, it is of broad application to general contractual litigation.

In the same decision, the Court resolved the long-standing issue as to whether the relief from forfeiture provision in s. 98 of the *Courts of Justice Act* applies to contracts regulated by the Insurance Act in view of the existence of a narrower relief from forfeiture provision found in s. 129 of the Insurance Act.

Kozel was a case in which a 77-year-old lady unintentionally failed to renew her driver's licence. She was involved in an accident. The Personal refused to defend or indemnify citing 4(1) of Statutory Conditions to the Standard Automobile Policy — 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.

The motions court judge held 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 offence. He further held that on the facts, the plaintiff was able to make out a due diligence defence and was not therefore in breach of s. 4(1).

The Court of Appeal agreed that the offence was one of strict liability, but did not agree that, on the facts, the plaintiff was able to make out a due diligence defence.

The Court of Appeal agreed that relief from forfeiture was not available under s. 129 of the *Insurance Act*, because that provision pertains only to imperfect compliance with the terms of a policy relating to actions taken or not taken after a loss has occurred.

That left two important issues to be decided:

> 1. Is the relief from forfeiture provision in s. 98 of the *CJA* applicable in the face of the narrower and more specific relief from forfeiture provision in s. 129 of the Insurance Act?

> 2. If s. 98 of the *CJA* is applicable to policies of insurance to which s. 129 of the *Insurance Act* was also applicable, what criteria should be applied to granting such relief?

With respect to the issue as to whether s. 129 of the *Insurance Act* "occupied the field" and prevented application of s. 98 of the *CJA*, the Court stated:

> [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.
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> 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.
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> [53] The Supreme Court addressed equitable jurisdiction in the insurance context in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490. 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."
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> [54] It is worth repeating that courts are to interpret relief from forfeiture provisions broadly. …
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> [55] … 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.

With respect to the application of s. 98 of the *CJA*, the Court held that,

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

The court noted, at Para. 29, that "The remedy of relief against forfeiture is equitable in nature and purely discretionary". It went on to say,

> [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"

The Court then noted that its earlier decision in *Stuart v Hutchins* had been interpreted to preclude relief from forfeiture in the case of non-compliance with a condition precedent of a contract:

> [33] In *Stuart v. Hutchins* (1998), 40 O.R. (3d) 321 (C.A.), this court addressed the scope of both of these statutory provisions. Citing *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co., [1989] 2 S.C.R. 778*, 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.
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> However, a breach that consists of non-compliance with a condition precedent to coverage forecloses the availability of relief against forfeiture under s. 129.
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> 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.
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> [34] Courts have interpreted *Stuart* as having decided that s. 98 has no application to instances of non-compliance with a condition precedent.

However, the Court then restricted and narrowed the application of *Stuart*, stating,

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

The Court then applied the three criteria set out in Para. [31] of the judgment (recited *supra*).

It noted that it was not precluded from finding under criteria 1 that the plaintiff had acted reasonable, notwithstanding that it had found that the plaintiff had not acted with sufficient care to make out a "due diligence" defence to the offence of driving while not authorized to do so. The court noted:

> [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.
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> ***However, this is not necessarily so, because the reasonableness inquiry in the relief against forfeiture analysis is a much broader one.*** [emphasis added]
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> [61] As Doherty J.A. explained in *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, 333 D.L.R. (4th), at Para. 89, the first factor of the analysis "requires an examination of the reasonableness of the breaching party's conduct as it relates to all facets of the contractual relationship, including the breach in issue and the aftermath of the breach" (emphasis added). The scope of the reasonableness analysis was also discussed by Osborne J.A. in Williams Estate v. Paul Revere Life Insurance Co. (1997), 34 O.R. (3d) 161, at p. 175:
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> > 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.

The Court noted that prior cases in which relief from forfeiture was denied based on the unreasonableness of plaintiff amounted to cases of willful or reckless conduct, which was not the case here. In short, the Court has set the bar for "reasonableness" fairly low in the case of relief from forfeiture.

The Court then turned to the second criterion, "the gravity of the breach", stating,

> [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, the breach here was by no means grave.

With respect to the third factor, the Court held,

> [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…
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> 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.
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> [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.

In summary then, in *Kozel v. The Personal Insurance Company,* the Ontario Court of Appeal settled the longstanding issue as to whether the relief from forfeiture provisions of the *Insurance Act* preclude application of the relief from forfeiture provisions of the *Courts of Justice Act* (they do not), and has significantly broadened the application of relief from forfeiture under the *Courts of Justice Act*, expressly limiting and narrowing the application of its earlier decision in *Stuart*.

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