COURT OF APPEAL FOR ONTARIO

CITATION: Kerk-Courtney v. Security National Insurance Company (TD General Insurance Company), 2024 ONCA 676
DATE: 20240912
DOCKET: COA-23-CV-0476

van Rensburg, Sossin and Dawe JJ.A.

BETWEEN

Karen Joanne Kerk-Courtney also known as Karen Joanne Kerk and Daniel Joseph Courtney

Applicants
(Appellants/Respondents in Cross-Appeal)

and

Security National Insurance Company also known as TD General Insurance Company and TD Insurance Meloche Monnex

Respondent
(Respondent/Appellant in Cross-Appeal)

Lori Kruse and Gavin Freitag, for the appellants

Marc D. Isaacs and Erik L. Shum, for the respondent

Heard: May 6, 2024

On appeal from the order of Justice John S. Fregeau of the Superior Court of Justice dated April 4, 2023, with reasons reported at 2023 ONSC 2088, and from the costs order dated June 5, 2023.

Sossin J.A.:

[1] This appeal arises out of the sale of a residential property in Gorham, Ontario, by the appellants in 2016. In 2018, the purchasers sued the appellants, alleging that there were a number of problems with the house, and that the appellants had mispresented its condition at the time of the sale.

[2] Before the appellants sold the property, they had home insurance coverage with the respondent insurance company. In 2021, they reported the purchasers' lawsuit to the respondent and requested defence and indemnity protection pursuant to their home insurance policy ("the Policy"). The respondent denied coverage, and in 2022, the appellants commenced an application seeking a declaration that the respondent has a duty to defend and indemnify them in the purchasers' action (the "Underlying Action").

[3] The application judge dismissed the application, finding that the respondent had no duty to defend or indemnify the appellants. The appellants now appeal, arguing that the application judge made a number of errors.

[4] The respondent disputes that the application judge made these alleged errors, and also seeks to uphold the result reached by the application judge by arguing that he should have dismissed the application on several alternative bases.[1]

[1] Although the respondent raises one of these arguments by bringing a cross-appeal, this was unnecessary, since the respondent is not seeking to set aside or to vary the order under appeal, nor is

[5] For the reasons discussed below, I conclude that the application judge erred by basing his determination that the respondent had no duty to defend on the "entire agreement" clause in the agreement of purchase and sale. He concluded that the "entire agreement" clause made it impossible for the purchasers' negligence-based tort claims against the appellants to succeed, and found further that the purchasers' other claims against the appellants in the Underlying Action were all captured by exclusions in the Policy. Having concluded on this basis that the respondent owed no duty to defend, the application judge declined to address the other grounds raised by the respondent for why no such duty existed. These additional grounds were that the appellants had misrepresented their use of the property at the time they took out coverage, thereby voiding the Policy; and that they had breached a condition of the Policy requiring that they give prompt notice to the respondent of the claim being made against them.

[6] As I will explain, the application judge erred by relying on the entire agreement clause to conclude that the respondent has no duty to defend. However, I would conclude that he nevertheless reached the right result. In light of the application judge's error, it is necessary to consider the additional grounds for denying coverage relied on by the respondent. As set out below, I agree with the respondent that the late notice ground justified the denial of coverage, and that

---

the respondent seeking other relief or a different disposition if the appeal is allowed in whole or part: see r. 61.07 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194.

relief against forfeiture was not available to the appellants. On that basis, the appeal should be dismissed.

FACTUAL BACKGROUND

[7] In 2016, the appellant, Ms. Kerk, sold the property municipally known as 1258 Moving Post Road, Gorham, Ontario (the "Property") to Danielle Fex and Robert Duncan (the "Purchasers"), pursuant to an Agreement of Purchase and Sale dated October 27, 2016 (the "APS"). Her spouse, the appellant Mr. Courtney, was not a registered owner of the Property. The APS contained an "entire agreement" clause which provided that the APS, including any attached schedules, constituted the entire agreement. The schedules included a listing summary (the "Listing") and a Seller Property Information Statement (the "SPIS").

[8] Following the sale, the Purchasers discovered defects with the Property, including ice damming, mould growth, run-off issues, skirting damage, and rodent damage. In November 2018, the Purchasers commenced the Underlying Action against the appellants seeking damages for fraudulent misrepresentation, or in the alternative, negligent misrepresentation as to the condition of the Property at the time of the sale. The Purchasers alleged that when they entered into the APS, they relied on misrepresentations in the Listing and the SPIS, as well as on oral statements Mr. Courtney made during a showing of the Property. Specifically, the Purchasers alleged that the appellants represented that:

1. the Property had been “totally redone from the studs”; and

2. the appellants were unaware of “any moisture and/or water problems”, “any roof leakage or unrepaired damage” and any “damage due to rodents or wood rot”.

[9] Ms. Kerk and Mr. Courtney retained counsel, served and filed a statement of defence on March 28, 2019, and have defended the Underlying Action.

[10] In October 2021, nearly three years after the Underlying Action was commenced, Ms. Kerk reported it to the respondent, and requested defence and indemnity pursuant to the Policy.

[11] The Policy provided coverage to the appellants with respect to money they became legally liable to pay “as compensatory damages because of unintentional bodily injury or property damage arising out of” their personal actions anywhere in the world, and their ownership, use or occupancy of the Property. The Policy defined “property damage” as “physical damage to, or destruction of, tangible property” or the “loss of use of tangible property”.

[12] The Policy excluded coverage for liability that the appellants “have assumed by contract unless [the appellants’] legal liability would have applied even if no contract had been in force” (the “contractual liability exclusion”). The Policy also excluded coverage for any intentional act, or failure to act, by the appellants.

[13] The respondent denied coverage. The appellants commenced an application seeking a declaration that the respondent has a duty to defend and indemnify them in the Underlying Action.

THE DECISION BELOW

[14] The application judge dismissed the application. He applied the three-step test from *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 52, for determining whether a claim triggers an insurer's duty to defend, and the principles governing an insurer's duty to defend as set out by this court in *Tedford v. TD Insurance Meloche Monnex*, 2012 ONCA 429, 112 O.R. (3d) 144.

[15] The application judge accepted the appellants' submission that if there is any possibility that the claim falls within the coverage provided by the Policy, the respondent must defend. The Policy provided coverage for "all risks of direct physical loss or damage to the property". The application judge found that it was reasonable to conclude that the defects in the Property pled by the Purchasers constituted "property damage", defined in the Policy as "physical damage to tangible property".

[16] The application judge noted that the Purchasers' pleadings do not differentiate between alleged intentional misrepresentations and alleged negligent misrepresentations. He concluded that the Purchasers' negligence claim "survives

this stage of the [*Scalera*] analysis" because the pleadings "leave open the reasonable possibility that the alleged misrepresentations could have been unintentional – and that the [appellants] accordingly may not have been aware of the alleged property damage".

[17] The application judge then considered whether the claims fell under one of the Policy's exclusions.

[18] The application judge first concluded that "the entire agreement clause in the APS precludes any possibility that the Purchasers' claim in tort, based on an alleged misrepresentation made by Mr. Courtney prior to the signing of the APS, will be successful."

[19] He relied on this court's commentary on entire agreement clauses in *Soboczynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241, leave to appeal refused, [2015] S.C.C.A. No. 243, where the court stated, at para. 41, that entire agreement clauses limit reliance on representations, warranties, collateral agreements and conditions made prior to or during the negotiations leading up to the signing of the APS.

[20] Although the application judge recognized that he could not assume the "entire agreement" clause would be enforceable, he found that the appellants had not taken issue with the "entire agreement" clause or otherwise commented on the alleged oral misrepresentations in their statement of defence other than in a bald

denial of the claims. The application judge held that the “entire agreement” clause in the APS precluded any possibility that the Purchasers’ claim based on an alleged negligent oral misrepresentation prior to the signing of the APS would be successful, and that accordingly the respondent’s duty to defend was excluded because the only other claims in the Underlying Action were in respect of the APS, the SPIS and the Listing, which the appellants conceded would be subject to the contractual liability exclusion. Likewise, to the extent that the Purchasers were alleging intentional misrepresentations by the appellants, these would be subject to the exclusion in the Policy for intentional acts by the appellants.

[21] Having found on this basis that the respondent had no duty to defend, the application judge declined to consider the alternative bases for denying coverage raised by the respondent, namely, whether the notice provided by the appellants to the respondent was late and therefore invalid, and whether the appellants had made misrepresentations to the respondent about their use of the Property that invalidated the Policy.

ISSUES

[22] The appellants argue that the application judge erred by finding that the respondent had no duty to defend on the basis that the Purchasers’ claim based on the alleged oral misrepresentations about the condition of the property was doomed to fail because of the entire agreement clause in the APS. They argue

further that the application judge erred by treating the appellants' statement of defence in the Underlying Action as relevant to the issue of the respondent insurer's duty to defend, and by failing to consider the implications of contradictory decisions involving the same standard-form policy language.

[23] The respondent seeks to uphold the result reached by the application judge on three alternative bases, arguing that:

1. the application judge erred in finding that the alleged defects in the Property alleged by the Purchasers in the Underlying Action constituted "property damage" within the meaning of the Policy;
2. that coverage should be denied in any event because appellants gave late notice of the claim; and
3. that the appellants made misrepresentations about the nature of their business activities on the Property that should result in the Policy being found void prior to the events at issue in the Underlying Action.

[24] Although the respondent has raised these issues by bringing a cross-appeal, this step was procedurally unnecessary since appeals are against orders, not reasons, and the respondent is not seeking to vary the order in the court below dismissing the appellants' application: see footnote 1 and r. 61.07 of the *Rules of Civil Procedure*.

[25] The parties have each framed the issues and their sequence differently. In my view, the key issues that must be resolved are the following:

1. whether the application judge applied the proper legal test for determining an insurer's duty to defend;
2. whether the application judge erred in finding that the allegations made in the Underlying Action were not unambiguously excluded from the coverage for "property damage" in the Policy;
3. whether the application judge erred in finding that the "entire agreement" clause in the APS precluded the Purchasers from successfully claiming damages in tort against the appellants for negligent oral misrepresentations, and that coverage for the Purchasers' other claims was excluded by the Policy; and
4. whether any of the alternative grounds raised by the respondent for denying coverage to the appellants relieve the respondent of its obligation to indemnify and defend.

THE STANDARD OF REVIEW

[26] It is not contested that the applicable standard of review is correctness.

[27] Determining whether an insurer has a duty to defend involves interpreting the insurance policy, as the court must consider if the pleadings in the underlying action allege facts that, if true, would be covered by the policy: *Tedford*, at para. 14.

[28] While the interpretation of a contract generally is a question of mixed fact and law reviewable on a standard of palpable and overriding error, the standard is correctness where, as here, there is a standard form contract, the interpretation of which has precedential value, and there is no meaningful factual matrix specific to the parties to assist the interpretation process: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24; *MDS Inc. v. Factory Mutual Insurance Company*, 2021 ONCA 594, 465 D.L.R. (4th) 294, at paras. 14-17, 21.

ANALYSIS

(1) The application judge correctly instructed himself on the legal test to determine an insurer's duty to defend

[29] The application judge correctly instructed himself on the analytic framework in *Scalera* to determine if the respondent owed a duty to defend to the appellants. In *Scalera*, at paras. 50-52, Iacobucci J. provided a three-step process to be used when determining whether a given claim could trigger an insurer's duty to defend:

> First, a court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff. A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa. Therefore, when ascertaining the scope of the duty to defend, a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings. This does not involve deciding whether

> the claims have any merit; all a court must do is decide, based on the pleadings, the true nature of the claims.
>
> At the second stage, having determined what claims are properly pleaded, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> Finally, at the third stage, the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend….

[30] The application judge also relied on the following principles flowing from this framework, as set out by this court in *Tedford*, at para. 14:

> 1. The insurer has a duty to defend if the pleadings filed against the insured allege facts which, if true, would require the insurer to indemnify the insured.
>
> 2. If there is any possibility that the claim falls within the liability coverage, the insurer must defend.
>
> 3. The court must look beyond the labels used by the plaintiff to ascertain the "substance" and "true nature" of the claims. It must determine whether the factual allegations, if true, could possibly support the plaintiff's legal claims.
>
> 4. The court should determine if any claims plead are entirely "derivative" in nature…. A derivative claim will not trigger a duty to defend.
>
> 5. If the pleadings are not sufficiently precise to determine whether the claims would be covered by the policy, "the insurer's obligation to defend will be triggered

> where, on a reasonable reading of the pleadings, a claim within coverage can be inferred".
>
> 6. In determining whether the policy would cover the claim, the usual principles governing the construction of insurance contracts apply, namely: the *contra proferentem* rule and the principle that coverage clauses should be construed broadly and exclusion clauses narrowly…. As well, the desirability, where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.
>
> 7. Extrinsic evidence that has been explicitly referred to in the pleadings may be considered to determine the substance and true nature of the allegations. [Citations omitted.]

[31] This analytic framework is well settled and not disputed. The parties diverge, however, on whether the application judge correctly applied this framework to the circumstances of this case.

(2) The application judge correctly found that the Policy did not exclude coverage for the alleged property damage

[32] The application judge accepted that the Purchasers' allegations in their pleadings could possibly be covered by the appellants' Policy. The Purchasers were seeking compensatory damages from the appellants arising from work performed or not performed during the appellants' ownership and occupation of the Property.

[33] The application judge accepted the appellants' exposure to liability "[did] not fit neatly into the property damage definition in the policy." However, he concluded

that the Policy did not “unambiguously exclude coverage on the facts of this case” and accordingly “[rejected] this as a basis for the [respondent’s] denial of their duty to defend.”

[34] The respondent cross-appeals on this finding, arguing that the Purchasers’ claim that the Property was bought for a higher price as a result of misrepresentations by the appellants does not constitute “physical damage to, or destruction of tangible property”, or a “loss of use of tangible property” within the meaning of the Policy.

[35] According to the respondent, in order to be covered for legal liability, “the [a]ppellants’ actions, or their ownership, use or occupancy of the premises, must cause physical damage to tangible property or loss of use of that tangible property.” The appellants’ alleged misrepresentations only caused the Purchasers to have a “different, and perhaps erroneous, perception of the state of the Property and its corresponding economic value.” In other words, as a consequence of the appellants’ alleged conduct, the Purchasers thought the Property was in better condition and therefore paid more for it. Or, to put it conversely, had the Purchasers known about the true condition of the Property, they might have negotiated to pay less or simply walked away from the purchase. None of these scenarios result in property damage of the kind contemplated under the Policy.

[36] In the leading case from the Supreme Court of Canada, *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 35, Rothstein J. held that courts should avoid importing tort concepts in interpreting the term "property damage" in the context of an insurance policy. In *obiter*, Rothstein J. commented that it was not obvious that defective property cannot constitute "property damage" (at paras. 38-40). He added, at para. 41:

> The pleadings also describe defective property, which may also be "property damage": e.g., improperly built walls, inadequate ventilation system, poorly installed windows. Whether specific property actually falls within the definition of "property damage" is a matter to be determined on the evidence at trial. This meets the low threshold of showing that the pleadings reveal a possibility of property damage for the purpose of deciding whether Lombard owes a duty to defend.

[37] The application judge found the Purchasers' pleadings in the Underlying Action to be imprecise, alleging both negligent and fraudulent misrepresentation, but with limited detail as to how the Purchaser's claim was founded in negligence. The damages in the claim are said to flow from the alleged written and oral misrepresentations. The Purchasers claim that "latent defects" existed before the sale. They also claim that after the sale, those defects were revealed when various issues arose (for example, ice damming and water issues) or when the defects were uncovered (for example, with respect to rodent damage and rotten skirting).

[38] It is worth reiterating that the application judge did not find the alleged damage did fall within the Policy's meaning of "property damage" but rather, for

the purposes of the duty to defend analysis, he could not conclude that it was unambiguously excluded from constituting “property damage.”

[39] Relying on *Monenco Limited v. Commonwealth Insurance Company*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 32, the application judge instructed himself that the "the widest latitude should be given to allegations in the pleadings in determining whether they raise a claim within the policy". His conclusion that the claim was not unambiguously excluded from constituting “property damage” within the meaning of the Policy flowed from a reasonable and generous reading of the Purchaser’s pleadings, and in my view, does not reveal any error.

(3) The application judge erred in relying on the “entire agreement” clause to determine the contractual liability exclusion

[40] Having found that coverage was not unambiguously precluded under the Policy, the application judge next turned to whether the respondent had shown that exclusions under the Policy applied, thus resulting in no duty to defend.

[41] The application judge considered the alleged pre-contractual oral misrepresentations by Mr. Courtney. If the alleged negligent statements were found to be derivative of the alleged intentional conduct, they would be “subsumed into the intentional tort for the purposes of the exclusion clause analysis”: *Scalera*, at para. 85. This would exclude the appellants from coverage as stipulated by the “Intentional or criminal act or failure” exclusion in the Policy. If, however, the

underlying elements of the negligence and of the intentional tort were sufficiently disparate, the negligence claim would survive and possibly fall within coverage, triggering the insurer's duty to defend: *Scalera*, at para. 85. To determine this, the application judge was required to ascertain the substance or true nature of the claims: *Scalera*, at para. 50; *Tedford*, at para. 14.

[42] He found that the damage alleged on the basis of negligent oral misrepresentations was separate from the contractual liability itself and not derivative of any intentional torts such as fraud. Thus, he found allegations in the pleadings which were not derivative of the alleged intentional conduct, and therefore, not subject to an exclusion.

[43] However, the application judge found that the "entire agreement" clause in the APS would preclude the Purchasers from succeeding on their claim based on these alleged negligent misrepresentations.

[44] The appellants argue that the application judge erred by making this finding. They argue further that since alleged oral misrepresentations, if made negligently, would not be captured either by the contractual liability exclusion or the exclusion for intentional acts or failures to act in the Policy, the respondent therefore has a duty to defend the action.

[45] Specifically, the appellants submit that the application judge erred by speculating about how the "entire agreement" clause would be treated in the

Underlying Action. The appellants rely on *Monenco*, where the Supreme Court of Canada was clear that on an application determining the issue of whether there is a duty to defend, "a court considering such an application may not look to 'premature' evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation": at para. 37. In other words, as applied to this case, it was open to the application judge to look to the APS as a document referred to in the pleadings, but not to make factual findings about how a trial judge hearing the Underlying Action would interpret the provisions of the APS.

[46] Further, the appellants argue that the presence of an "entire agreement" clause does not necessarily preclude a successful claim for negligent misrepresentation made outside of the contract, relying on a number of cases, including *Gregor Homes Ltd. v. Woodyer*, 2022 ONSC 4089, at paras. 41-46; and *Spot Coffee Park Place Inc. v. Concord Adex Investments Limited*, 2021 ONSC 6629, 36 R.P.R. (6th) 234, at para. 197, aff'd 2023 ONCA 15, at paras. 16-18, 38.

[47] Finally, the appellants take issue with the application judge's consideration of the appellants' pleadings in their statement of defence in the Underlying Action.

[48] The respondent submits that the application judge did not err in his treatment of the "entire agreement" clause. The respondent argues that the application judge properly relied on this court's interpretation of an identical entire agreement clause

in *Soboczynski*. In the respondent's view, the application judge did not make factual findings about how a trial judge would interpret the APS, nor did he err in looking to the appellants' statement of defence.

[49] In my view, the application judge erred by improperly predetermining an issue in the Underlying Action – whether the "entire agreement" clause in the APS would defeat the Purchasers' claim, to the extent that it was based on the alleged oral misrepresentations by Mr. Courtney – that was not relevant to whether there was coverage for claims made in that action. In short, the fact that the insured may ultimately succeed in defending the Underlying Action on the basis of the "entire agreement" clause in the APS in no way precludes coverage under the Policy.

[50] While the application judge acknowledged, "I am cognizant of the [appellants'] submissions suggesting that I must not, in my analysis of the Respondent's duty to defend, assume that the entire agreement clause in the APS will be found enforceable in the Underlying Action", his conclusion turned on this very assumption. Whether or not a defence will be successful at trial is not a basis for the denial of coverage in the context of the duty to defend. As a result, it was an error of the application judge to rely on the "entire agreement" clause as a basis for excluding the possibility of coverage on this record, on the basis that the Purchasers' claim for damages for negligent oral misrepresentation was doomed to fail at trial.

[51] In this case, not only did the application judge assume the "entire agreement" clause would be a basis for the claim failing at trial, he improperly relied on the appellants' statement of defence in the Underlying Action – and the fact that the appellants did not "take issue" with the "entire agreement" clause – as support for this conclusion. As the appellants correctly note, they had no reason to "take issue" with this clause in their pleadings, since if the Underlying Action proceeds to trial, they will be the parties who will be seeking to rely on it.

[52] Because the application judge concluded that the Purchasers' negligent misrepresentation claim based on the alleged pre-contractual oral communications by the appellants could not succeed due to the "entire agreement" clause, he found that the rest of their claim flowed from the contractual provisions in the APS, the Listing and the SPIS, or was captured by the Policy's exclusion for intentional torts.

[53] On this basis, the application judge concluded that the Policy's exclusion for contractual liability left no room for any insured loss or damage, stating, at para. 83 of his reasons, "[o]n the facts of this case, it is obvious that the Purchasers would have suffered no harm and that the [appellants] would not be exposed to any liability but for the parties entering into the APS." Because this conclusion rested on the foundation of his erroneous finding that the "entire agreement" clause precluded liability for negligent pre-contractual misrepresentations, it also cannot stand as a basis for denying coverage.

[54] The claims for pre-contractual negligent misrepresentation provide the basis for coverage under the Policy, and they are not precluded by the exclusion for contractual liability.

[55] For these reasons, I would not accept the application judge's rationale for finding that the respondent had no duty to defend the Underlying Action.

[56] The application judge found it unnecessary to address the other two grounds on which the respondent argued the claim does not give rise to coverage or a duty to defend. As I conclude that the application judge erred in his analysis of the "entire agreement" clause and the contract liability exclusion, it is necessary to now turn to those additional grounds.

(4) The late notice justifies the denial of coverage

[57] The application judge declined to address the respondent's arguments that the appellants provided notice of the loss too late, or its alternative argument that the Policy was void because of the appellants' misrepresentations to the respondent about their use of the Property.

[58] The appellants agree that this court should exercise its powers under s. 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to reach findings on these questions based on the record below, as doing so does not require assessing credibility. Accordingly, this court can reach a fair and just determination on the merits.

[59] As I will now explain, I would give effect to the respondent's argument that the appellants failed to provide prompt notice of the Purchasers' claim.

[60] The Policy states that the insured must "promptly" give notice (in writing, if requested) to the insurer after an accident or occurrence for which coverage is claimed, and "immediately" send any legal documents or other written communications received concerning the accident or occurrence. The respondent argues that the appellants breached this requirement by defending the Underlying Action for two and a half years before giving notice of the claim. In light of this breach, the respondent contends it was entitled to deny coverage.

[61] The appellants submit that it was only during examinations for discovery that it became clear that the Underlying Action related to allegations of negligence, and not only to intentional acts, which are not covered by the Policy. After that point, once the possibility of coverage had emerged, notice was given promptly to the respondent.

[62] I disagree. The appellants learned of the Underlying Action in November 2018. They defended the action on March 28, 2019. On May 14, 2021, after examinations for discovery, the appellants requested policy documents from the respondent. The appellants finally notified the respondent of the Underlying Action on October 8, 2021. The appellants' conduct in delaying notice to the respondent for two and a half years clearly constituted a breach of its prompt notice obligation.

I do not accept the appellants' explanation for the delay: the fact that the appellants failed to appreciate that the Underlying Action related to allegations of negligence as well as intentional acts did not suspend the reporting obligation. A claim for negligent misrepresentation was clearly asserted in the statement of claim.

[63] In the event of a finding of a breach of the notice requirement, the appellants argue they should be granted relief against forfeiture under s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8, which states:

> 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.

[64] The appellants acknowledge that relief from forfeiture is discretionary. They argue, however, that the late notice constituted "imperfect compliance" as opposed to non-compliance with the Policy, and that they were not acting in bad faith.

[65] In *Pinder Estate v. Farmers Mutual Insurance Company (Lindsay)*, 2020 ONCA 413, 3 C.C.L.I. (6th) 8, at para. 122, this court affirmed that relief from forfeiture requires the consideration of three factors: 1) the reasonableness of the insured's conduct; 2) the gravity of the breach; and 3) the disparity, if any, between the value of the property forfeited and the damages caused by the breach. The

court emphasized that, in particular, the reasonableness of the insured's conduct lies at the heart of the relief from forfeiture analysis and that a party whose conduct is not seen as reasonable will face great difficulty in obtaining relief from forfeiture, relying on *Monk v. Farmers' Mutual Insurance Company (Lindsay)*, 2019 ONCA 616, 92 B.L.R. (5th) 1, at para. 93.

[66] On the record that was before the application judge, I see no basis for the discretionary relief against forfeiture sought by the appellants. The appellants' delay in reporting was not reasonable. Further, I accept the respondent's argument that the decisions undertaken with respect to the defence of the Underlying Action by the appellants during the period prior to notice to the respondent constrained and prejudiced the respondent's ability to defend the claim successfully. For example, the respondent argues that the appellants irreversibly damaged their credibility and prejudiced the defence by misrepresenting the date that the furnace in the Property was installed.

[67] Therefore, on the basis of the appellants' breach of the condition of the Policy requiring prompt reporting of the claim, the respondent was entitled to deny coverage. Consequently, there is no duty to defend arising in this case.

[68] In light of this conclusion, it is not necessary to address the remaining issue of whether the Policy was breached by the appellants' alleged misrepresentations about the use of the Property at the time the Policy was taken out.

[69] Finally, while the appellants' amended notice of appeal included an appeal against costs, this issue was not pursued in their factum or the hearing, and I would treat this ground of appeal as abandoned.

DISPOSITION

[70] For these reasons, I would dismiss the appeal and allow the cross-appeal.

[71] The respondent is entitled to costs. In accordance with the agreement of the parties on the quantum of costs on the appeal, the appellants shall pay costs in the amount of $10,000 all-inclusive, to the respondent.

Released: September 12, 2024 "K.M.v.R."

"L. Sossin J.A."
"I agree. K. van Rensburg J.A."
"I agree. J. Dawe J.A."