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KOZEL V THE PERSONAL INSURANCE CO.: THE LATEST WORD ON RELIEF FROM FORFEITURE

Lori D. Mountford

On February 19, 2014, the Ontario Court of Appeal released its decision in *Kozel v The Personal Insurance Company*, 2014 ONCA 130. The case will be of interest to auto insurers and representatives presented with "authorized by law to drive" issues. Its significance, however, is broader. The appellate court's holdings with respect to relief from forfeiture and section 98 of the *Courts of Justice Act*, RSO 1990, c C43 (the "*CJA*") have widespread implications within the insurance realm more generally. Liability insurers, property insurers, whether commercial or residential, insurance law counsel, adjusters, brokers, etc. take note.

The Facts

The underlying action arose out of a motor vehicle accident which occurred on February 16, 2012, in Florida. At the material time, the insured was driving with an expired licence. She received mail from the Ontario Ministry of Transportation two months prior to expiry of her driver's licence and licence plate stickers. She did not open it at the time. One month prior to expiry, she provided the envelope, believing it to pertain to licence plate renewal, to a dealership in order that it could licence a new car. She opened the envelope, but did not know whether it also pertained to driver's licence renewal. Her driver's licence expired on October 7, 2011. The insured renewed her licence without difficulty three days after the accident. Subsequently, the motorcyclist involved in the accident brought a personal injury action against the insured in Florida.

The insurer denied coverage under its motor vehicle liability insurance policy on the basis that the insured was not authorized to drive at the time of the accident, contrary to statutory condition 4(1) of *Statutory Conditions – Automobile Insurance*, O Reg 777/93, enacted under the *Insurance Act*, RSO 1990, c I8 (the "*IA*"). The statutory condition, forming part of the policy, provides: "[t]he 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."

Justice T.M. Wood of the Superior Court of Justice heard the coverage application. He disagreed. Defence and indemnity were found to be owed under the auto policy with respect to the underlying action. This was on the basis that there was no breach of the statutory condition. Driving without a valid licence is a strict liability offence. The defence of due diligence is, therefore, available. Such defence was applicable on the facts.

The Court of Appeal

The Court of Appeal dismissed the appeal. It also found a duty to defend and a duty to indemnify on the insurer's part. The basis for

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"... the court found that the insured's breach of statutory condition 4(1) constituted imperfect compliance with a policy term as opposed to non-compliance with a condition precedent to coverage."

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this finding, however, differed. It agreed that there was a breach of statutory condition 4(1), but found that a due diligence defence was not made out on the facts. The Court of Appeal went on to grant the insured relief from forfeiture under the *CJA*.

Due Diligence Defence

The due diligence defence was rejected at the appellate level. While there was evidence of the exercise of reasonable care in relation to renewal of her licence plate, the evidence did not demonstrate that the insured took all reasonable steps to avoid expiry of her driver's licence or that she reasonably believed in a mistaken set of facts which, if true, would have rendered her failure to renew her driver's licence innocent. The relevant misapprehension of facts and care were those with respect to the offence with which she was charged. Despite having held a driver's licence for 60 years and having previously renewed it on time, there was no evidence that the insured did anything to inquire about or even consider her driver's licence renewal on this occasion.

Relief From Forfeiture

The Court of Appeal agreed that section 129 of the *IA* had no application. Section 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.

The court's discretion to grant relief from forfeiture thereunder is limited. The provision pertains only to breach of insurance policy conditions, whether statutory or contractual, relating to proof of loss.

The language under section 98 of the *CJA* is broader. Under section 98, "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

In granting relief from forfeiture under section 98 of the *CJA* for breach of the "authorized by law to drive" statutory condition, the Court of Appeal made two significant threshold determinations. First, the court found that the insured's breach of statutory condition 4(1) constituted imperfect compliance with a policy term as opposed to non-compliance with a condition precedent to coverage. Second, the court held, as a question of law, that section 98 of the *CJA* applies to contracts regulated by the *IA*.

The Court of Appeal identified the imperfect compliance/non-compliance analysis undertaken in the context of relief from forfeiture as distinct from that undertaken in contracts jurisprudence on conditions precedent. The focus in the relief from forfeiture context is on "whether the breach of the term is serious or substantial." This appears to be informed by the significance of the term, i.e., where incidental, breach is deemed to be imperfect compliance and, where fundamental or integral, breach is non-compliance with a condition precedent. It appears also that prejudice to the insurer is relevant.

In the case before it, the court found that the insured's breach of statutory condition 4(1) did not constitute non-compliance with a condition

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precedent. It was said to be a "relatively minor breach" rather than a "fundamental one." The provision was a "condition in name." However, there was no language in the policy "stressing that the insurance coverage was conditioned on the claimant being authorized to drive." This was unlike in *Stuart v Hutchins* (1998), 40 OR (3d) 321 (CA) where failure to provide notice within the policy period under a claims-made and reported errors and omissions policy was held to be non-compliance with a condition precedent. *Stuart* was distinguished on the basis of plain language within the policy at issue which identified such notice as a condition precedent. Finally, the breach caused no prejudice to the insurer. The breach was, therefore, deemed imperfect compliance.

Directing a narrow application of *Stuart* in future, Justice LaForme wrote:

> 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.

In holding that relief under section 98 of the *CJA* is available in insurance cases, the court accepted that the *IA* does not occupy the field of equitable relief nor completely codify the law of insurance. As well, section 129 of the *IA* is restricted to breaches occurring after a loss (pertaining to breach of condition as to the proof of loss), leaving individuals whose relatively minor breaches occur before the loss without a remedy. Absent a clear intent by the Legislature that section 129 operate to the exclusion of section 98, the court held the latter applies to contracts governed by the *IA*.

Finally, the Court of Appeal went on to consider entitlement of the insured to relief against forfeiture based on three factors: (1) the conduct of the insured; (2) the gravity of the breach; and (3) the disparity between the value of the property forfeited and the damage caused by the breach. On the facts, the court found the insured established that her conduct was reasonable with respect to all facets of the contractual relationship. She paid her premiums in a timely manner and acted in good faith. Her driver's licence was valid up to her 77th birthday. As soon as she discovered its expiry, she renewed it without difficulty. The plaintiff also established that the breach was not grave. The fact that the insured was driving with an expired licence did not impact on her ability to drive safely nor did it impact on the contractual rights of the insurer. Finally, the disparity between the value of the property forfeited and the damage caused by the breach was "enormous." The value of the coverage potentially lost to the insured was $1,000,000 whereas the insurer suffered no prejudice as a result of the breach.

Implications

A number of the implications of the Court of Appeal's decision in *Kozel* are immediately evident. Others are less obvious and uncertain.

Relief from forfeiture under section 98 of the *CJA* is now definitively available in insurance cases. It follows that coverage is not necessarily foreclosed in the event of imperfect compliance with a policy provision in respect of which relief from forfeiture is not available under section 129 of the *IA*. Given the broader application of the former, at a minimum, the number of requests for relief from forfeiture can be expected to increase.

"The application of Stuart v Hutchins has been expressly restricted ... What constitutes non-compliance with a condition precedent ... is fact specific."

What about the situation in which relief from forfeiture is available under the *IA*, but there is no entitlement on the facts? Can the insured seek remedial relief under the *CJA*? Put another way: is relief available under section 98 in circumstances of imperfect compliance with a policy condition as to proof of loss, i.e. breach of the notice condition under an occurrence based policy? There is overlap in the three part test adopted by the Court of Appeal for application of section 98 and the two part test generally adopted with respect to a grant of relief from forfeiture under section 129 ((1) the conduct of the insured; and (2) whether the insurer has been prejudiced). But, it is conceivable that an insured could fail under section 129, yet succeed under the broader provision in the *CJA*. Would recourse to section 98 be prevented on the basis that a provision in a special Act prevails over an incompatible provision in a general Act (*generalia specialibus non derogant*)?

The application of *Stuart v Hutchins* has been expressly restricted. Previously, *Stuart* was widely relied upon for the proposition that breach of a notice condition under a claims-made and reported policy constitutes non-compliance with a condition precedent for which relief from forfeiture is not available (whether under the *IA* or the *CJA*). It remains the case that there can be no relief from forfeiture in the event of non-compliance with a condition precedent. **What constitutes non-compliance with a condition precedent, however, has been narrowed and is fact specific.**

Did the Court of Appeal intend to restrict the application of *Stuart* to cases with similar policy wording, i.e. affording coverage "provided" the insured does x or requiring the insured to do x "as a condition precedent to the availability of the rights provided under this policy"? Alternatively, is notice within the policy period so integral to coverage under a claims-made and reported policy that the fundamental nature of the term and corresponding seriousness of the breach render its breach non-compliance with a condition precedent?

Breaches of statutory condition 4(1) do not necessarily constitute non-compliance with a condition precedent, so relief from forfeiture may be available. On the other hand, the Court of Appeal did not suggest that all breaches of the condition amount to imperfect compliance with a policy term. In fact, the court offered an example of a violation possibly barring the insured from relief under section 98: where an insured drank heavily prior to driving.

What about the greyer area in between the relatively minor breach of an inadvertently expired driver's licence renewed without difficulty days after an accident and the drunk driver? Previously, case law supported reduction to minimum third party liability limits where a novice driver violates the zero blood alcohol concentration condition under a G2 licence. This was on the basis of statutory condition 4(1). Could such driver now obtain relief from forfeiture under section 98 in certain circumstances, thereby accessing full policy limits?

Conclusion

As the latest word on relief from forfeiture out of the Ontario Court of Appeal, *Kozel* requires careful consideration when analyzing coverage issues arising out of breach of an insurance policy condition. No doubt, it will not be the last word. ■

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