CITATION: Monk v. Farmers and Muskoka Ins., 2017 ONSC 3690
COURT FILE NO.: CV-11-093
DATE: 20170615

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Diana Lynn Monk Plaintiff	David A. Morin, Counsel for the Plaintiff
– and –	
Farmers' Mutual Insurance Company (Lindsay) Defendant	Martin P. Forget, Counsel, for the Defendant, Farmers' Mutual Insurance Company (Lindsay)
– and –	
Muskoka Insurance Brokers Ltd. Defendant	Demetrios Yiokaris, Counsel for the Defendant, Muskoka Insurance Brokers Ltd.
	HEARD: April 4-7;10-13;19, 2017

REASONS FOR JUDGMENT

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A. INTRODUCTION

[1] The action arises out of an insurance claim for property damage to a log home owned by the plaintiff, Diana Lynn Monk, in the town of Bracebridge, Ontario. Ms. Monk alleges that the damage was caused by the negligent workmanship of Pleasantview Log Restoration Systems Inc. ("Pleasantview"). Pleasantview was a contractor retained by Ms. Monk to perform restoration work on the premises in the summer and fall of 2008.

[2] At the time the damages were sustained Ms. Monk was insured by an all risk homeowner's policy issued by Farmers' Mutual Insurance Company (Lindsay) ("Farmers'"). The policy was arranged through her insurance broker, the defendant Muskoka Insurance Brokers Limited ("Muskoka").

[3] Ms. Monk commenced this action on November 14, 2011, almost three years after she first discovered damage to her property. She alleges that she first informed Muskoka that she had sustained damage in January, 2009, and several times thereafter but on each occasion she was informed by her broker that she did not have coverage for damages caused by a contractor.

[4] Ms. Monk's claim against Farmers' is based on an alleged breach of her contract of insurance by Farmers' which has refused to provide coverage for her damages.

[5] Ms. Monk's claim against Muskoka is based on an alleged breach of Muskoka's contractual and fiduciary duty to her and in particular its alleged failure to advise her in a timely way that she had a valid claim against Farmers' for coverage of her damages.

[6] Farmers' defends the claim on the basis that:

a) The nature of the damages is such that indemnity therefore is specifically excluded by the policy (the "coverage issue").

b) Ms. Monk was in breach of statutory conditions in the policy by not providing notice of the damage forthwith (the "notice issue") and also by failing to have her damages appraised before undertaking repairs (the "appraisal issue").

[7] Muskoka denies that it informed Ms. Monk that she did not have coverage for her damages and alleges that Ms. Monk first informed Muskoka of the damages on September 2, 2011.

B. BACKGROUND

The Contract with Pleasantview – Relevant Terms

[8] Pleasantview was retained to restore the exterior logs and wooden surface areas of Ms. Monk's home.

[9] The scope of the work was described in the contract as follows:

> Scope of Work
>
> Restoration of exterior of logs and board and batten structure using the Envirowash Wood Restoration System described in more detail hereafter.

[10] The description of the work to be performed by Pleasantview included the following:

> Preparation
>
> On commencement of on-site work all areas of the building where water from washing process might enter the structure will be inspected and temporarily sealed prior to commencement of stripping and neutralization process.
>
> Chemical Washing, Cleaning and Neutralization
>
> All exterior log surfaces shall receive a liberal coating of Envirowash #1 cleaning compound which shall be agitated with bristle brushes until complete dissolution of all oxidation mildew staining has occurred and surface cell layers have been thoroughly penetrated. This process shall be repeated where necessary to thoroughly clean all treated surfaces.
>
> Rinsing #1
>
> On achievement of complete cleaning being evident all treated surfaces shall be thoroughly rinsed with clean water until run off is visibly free of residue.
>
> Rinsing #2
>
> After a waiting period of 60 minutes the rinsing procedure (as outlined in Rinsing #1 above) shall be repeated.
>
> Neutralization
>
> When treated and cleaned surfaces have been air dried for one hour or longer all treated surfaces shall receive a liberal application of Envirowash neutralizer compound #2.
>
> Rinsing
>
> When the alkalinity ratio for the wood has been reduced to PH7, two further rinsing cycles shall be performed as outlined in Rinsing #1 and #2.
>
> Grinding and Sanding of all Log surfaces and application of clear penetrating epoxy sealer
>
> All exterior log surfaces shall be thoroughly ground and/or sanded to remove any loosened surface wood fibres; and oxidation as well as to open up the surface pores of the wood to encourage penetration of a liberal application of

C.P.E.S. which shall be applied within eight hours of the final sanding process.

All butt ends shall be ground and sanded to an even profile and finish and shall receive two coats of CPES applied until absorption ceases.

Finish Generally

Translucent Finish

(Natural grain and feature of logs visible through finish)

Primary Coat	Cetol #1	by Sikkens
Secondary Coat	Cetol #1	by Sikkens
Final Coat	Cetol 2-3 Plus	by Sikkens

Finish Methodology

Each of the coats of finish shall be liberally applied then brushed and back brushed to a smooth run free finish. Each coat shall be allowed to cure a minimum of overnight before application of the subsequent coat of finish.

Caulking and Sealing

All interfaces of similar or dis-similar material including but not confined to:

c) Around doors and windows.

e) And all other areas or interfaces where moisture might enter the structure including cracks and shakes in the log components and board and batten surfaces.

Clean up, Removal and Window Cleaning

On completion of the foregoing work all contractor's equipment shall promptly be removed from the site which shall be left in a clean and tidy condition absent of debris resulting from the works.

All windows and glass doors shall be thoroughly cleaned on the interior and exterior.

Warranty

The Contractor warrants the integrity of materials and workmanship for a period of 36 months after completion.

Notwithstanding anything aforesaid this warranty shall not come into full force

> or effect until such time that the Contractor has been paid in full for the works performed and arising from this contract proposal.
>
> Schedule of Payments
>
> | | |
> |---|---|
> | Cost of Works | $35, 955.00 |
> | Plus 5% GST | $1,797.75 |
> | Total Cost including tax | $37,752.75 |

[11] The contract was signed by Ms. Monk on June 27, 2008. Work commenced in August, 2008.

[12] Around November 3, 2008, Ms. Monk orally extended the scope of Pleasantview's work to include work to a dormer. The invoice for this work was entitled "Re Extras to Contract Re Repair and Renovation of Dormer Windows at above address".

[13] With the onset of cold weather and snow in November or December, 2008 Pleasantview left the site. No further work was performed at the home by Pleasantview thereafter.

Chronology of Events as per Ms. Monk (August, 2008 – September 2, 2011)

[14] Ms. Monk negotiated the contract for the restoration of the logs and wooden surfaces of her house with John Gasson, the owner of Pleasantview. Pleasantview had previously carried out repair work on her house in 2005 and she was pleased with the quality of Pleasantview's work on that occasion.

[15] Mr. Gasson did not personally become involved in working on the house but left the day to day management of the work in the hands of his foreman, Wayne Laskey.

[16] After the commencement of the work Ms. Monk raised a number of concerns with Mr. Gasson.

[17] Firstly, she noticed that Mr. Laskey appeared to be doing very little work himself. He spent a considerable amount of time sitting around on the site, leaving for periods of time and going for coffee.

[18] Secondly, Ms. Monk complained to Mr. Gasson that his workers were not removing the old caulking between the logs but applying brown caulking over the existing brown caulking. She reminded him that he had promised to remove the old caulking and apply a sealer to the joints before applying new caulking, and that she could choose the colour of the caulking. Mr. Gasson assured her that he would instruct his workers to remove the brown caulking and perform the work as per their oral agreement.

[19] Thirdly, Pleasantview did not cover up or seal and protect those areas where water and other chemicals could enter the building. Ms. Monk's partner, Mr. Way Lem testified

that one day he came into the house while the workers were using a power sprayer outside and he noticed that liquid was seeping into the house from under an exterior door. Upon further investigation, he and Ms. Monk noticed that water or chemicals had entered the house in a number of areas, and carpets had been stained on all three floors.

[20] When Ms. Monk complained to Mr. Gasson about the carpet stains he assured her that the stains could be removed. Initially he had his own crew attempt to remove the stains but they were unsuccessful. She then suggested to Mr. Gasson that they retain a reputable carpet cleaner who she had used in the past. Geoff Jarrett, the proprietor of a local carpet cleaning business was retained and he attended at the premises together with Mr. Gasson sometime in late December, 2008 or early January, 2009.

[21] Mr. Garrett was unable to remove the stains from the carpets. Mr. Gasson had also brought his own chemical solution to remove the stains but he too was unable to remove them. Ms. Monk testified that at a certain point Mr. Gasson and Mr. Garrett began to argue about how best to remove the stains. Mr. Gasson became frustrated and he picked up his cleaning supplies and walked out of the premises. When Ms. Monk called after him and asked him what he was going to do about the stained carpets he simply threw his hands up in the air and kept walking. Eventually, she replaced the carpets on the first and second floors at her own expense.

[22] Ms. Monk testified that Pleasantview did not clean the windows prior to leaving the premises around late November or early December, 2008 and the windows were left covered in sawdust and dirt.

[23] By December, 2008 Ms. Monk had paid all but $4851.10 of the contract price. Mr. Gasson requested payment of the balance of the contract but Ms. Monk refused, informing him that he had not completed the work. She complained that he had failed to clean up the ground around the house, the windows were filthy and the caulking was a mess. According to Ms. Monk, Mr. Gasson responded with the comment that "you know we'll be back and finish the job in the spring". Notwithstanding this assurance Ms. Monk refused to pay the balance.

[24] Following Mr. Gasson's unsuccessful attempt to clean the carpets Pleasantview did not return to the site and perform further work. The next time she spoke to Mr. Gasson was more than two and a half years later, on July 28, 2011.

[25] Ms. Monk alleges that when she came to the conclusion that the carpet could not be cleaned she contacted Muskoka Insurance Brokers by phone. She spoke to Marcia Bissell, the broker who she usually dealt with at Muskoka and inquired about making a claim with respect to her damaged carpets. According to Ms. Monk, Ms. Bissell advised her that she did not have coverage for this loss and that the contractor who she had hired was responsible. Ms. Monk submits that this conversation took place in early January, 2009. Ms. Bissell testified that this conversation did not occur and that she was never notified about the damaged carpets.

[26] Sometime in April or May of 2009 Ms. Monk decided to clean the outside of her windows. While cleaning the windows she noticed for the first time that a considerable number of the glass panes in the windows and exterior doors of her home were scratched and pock-marked. Many of the scratches were in a circular shape and located close to the edges of the window sashes. She attributed the scratching to the work performed by Pleasantview.

[27] In addition to the scratched glass, she also noticed other damages which included the following:

a) Cetol had been spilled on many of the windows, exterior door and light fixtures, landscape rocks and decking and on the screens of her wooden screen doors;

b) Most of the green wood stain on her wooden window sashes and doors had been removed. (Ms. Monk submits that the contract with Pleasantview did not include work on the doors and window sashes);

c) The grain where the stain had been removed around the windows appeared to be raised and hair-like fibres were visible on the wooden sashes;

d) Four holes had been drilled into her bedroom wall;

e) Two of the aluminum windows in the basement were sealed shut;

f) Some of the exterior light fixtures had been damaged.

[28] Ms. Monk testified that after she noticed this damage to her property she dropped by at the offices of Muskoka to speak to Ms. Bissell but Ms. Bissell was not in. This was in April or May of 2009. She did speak to another sales person who informed her that she probably wasn't covered for the damage to the glass because there is an exclusion in her policy for scratching to glass, and recovery of her damage would therefore have to come from the contractor. The sales person informed her that she would ask Ms. Bissell to contact her. Ms. Bissell later contacted Ms. Monk by telephone and confirmed that the scratches to the glass was excluded under the terms of her policy. Ms. Bissell denies that this conversation took place.

[29] Ms. Monk testified that she did not contact Mr. Gasson following the discovery of these damages to complain. She explained that Mr. Gasson was a very nice man and that he was involved in a community singing group called the "Men of Song". She also explained that she was aware that Mr. Gasson had fired Mr. Laskey and he was trying to find another foreman, and that she was "not ready to have another confrontation in her life".

[30] Ms. Monk sanded and applied a fresh coat of brown stain to the window sashes and doors during the summer of 2009.

[31] Ms. Monk testified that with the onset of cold weather in the winter of 2009/2010 she noticed that condensation was forming between the panes in many of the thermal pane windows of her home. She testified that prior to that winter she had noticed fogging and condensation in only three of the approximately 60 windows in her house, and the problem with these three windows dated back to 1997 when she purchased her home.

[32] In addition to the fogging of her windows Ms. Monk observed that some of the large thermal pane windows in the exterior doors appeared to have come loose and were slipping down into the interior of the doors. The frames of the doors were also becoming loose, causing the doors to sag and lose their shape and it was becoming difficult to open and close the doors.

[33] Ms. Monk submits that after she noticed the condensation in the thermal pane windows and the deterioration of her exterior doors during the winter of 2009/2010 she contacted Muskoka for a third time. She spoke to Ms. Bissell by telephone in January, 2010 and Ms. Bissell reiterated her belief that no insurance company covered damage caused by a contractor and advised her that she should claim against the contractor's liability insurer. Ms. Bissell denies that this third alleged communication took place.

[34] Ms. Monk did not contact Pleasantview to complain about the problems she was experiencing with her windows and doors at that time.

[35] On July 28, 2011, knowing that her three-year warranty from Pleasantview was soon to expire, Ms. Monk prepared a warranty claim and delivered it to Mr. Gasson. This was the first communication she had with Pleasantview since Mr. Gasson had attended in an unsuccessful attempt to clean her carpets in late December, 2008 or early January, 2009, a period of more than two and a half years. In her claim, she summarized the deficiencies in the work and included 40 pages of photographs which depicted these deficiencies. She demanded…

> "a written response detailing the methods to repair damages and complete the contract within one week. If no response has been received, I will be contacting my insurance company / your liability insurance company; this name to be provided to me by John or Pat Gasson. Failing this solution, I will be seeking the advice of a lawyer."

[36] By letter from Pleasantview dated August 3, 2011 Ms. Monk was assured by Mr. Gasson that someone would come and inspect the property after August 19, 2011 and that Pleasantview would stand behind its work. She submits that no one from Pleasantview came by to inspect.

[37] Thereafter, on September 2, 2011, Ms. Monk attended in person at the offices of Muskoka Insurance and asked about making a claim. She states that she spoke to Ms. Bissell and two other brokers and they viewed the 40 pages of photographs she had delivered to Mr. Gasson.

[38] At the conclusion of the meeting Ms. Bissell assured Ms. Monk that she would personally call Farmers' and explain her situation to a claims person. The following day Ms. Monk received an email from Ms. Bissell in which Ms. Bissell encouraged her to contact Farmers' Mutual directly because "perhaps there could be coverage" for the "resultant damage" to the "stained windows and damage done to the exterior doors as well the carpet". Ms. Bissell stated that if Farmers' was unable or unwilling to help her then "the only path is to take legal action".

[39] On September 8, 2011, Ms. Monk received an email from Ms. Bissell advising her that she had been informed by Carol Thomas in the claims department at Farmers' that her claim had been denied on the basis that the damages to the home occurred more than two years ago. She informed Ms. Monk there was also a potential limitation issue with respect to commencing legal action against the contractor and that they both recommended that she should seek the advice of a lawyer.

[40] Ms. Monk then retained a lawyer, who submitted a formal written claim for coverage against Farmers' on October 12, 2011 and commenced legal action by issuing a statement of claim against both Farmers' and Muskoka on November 14, 2011.

Damages alleged by Ms. Monk

[41] Ms. Monk has summarized her claim for damages in this action as follows:

a) $9,180.30 - replacement of damaged carpeting – first and second floors;

b) $6,396.02 - replacement of damaged carpeting – basement (estimated)

c) $1,501.64 - replacement of exterior lights;

d) $868.88 - initial replacement of exterior doorknobs on existing doors; and

e) $26,871.40 - replacement of doors;

f) $3,542.52 - replacement of door hardware on replacement doors;

g) $4,140.84 - installation of labor and materials re doors and hardware;

h) $ 63,306.27 - Window Works Muskoka estimate for window replacement – like and kind;

i) $8,640.80 - Window Works Muskoka – additional trim repair and staining.

Total: $124,448.87

C. ISSUES

[42] This claim is replete with issues of fact and issues of law. Counsel conceded very little. The issues include the following:

a) What damages are to be attributed to the restoration work performed by Pleasantview?

b) When did Ms. Monk first notify Muskoka of the damages to her house?

c) Does Ms. Monk's policy of insurance include coverage for her damages, and are some or all of the damages subject to an exclusion clause?

d) Assessment of damages (on a replacement cost basis)?

e) Did Ms. Monk fail to comply with certain Statutory Conditions?

f) If Ms. Monk failed to comply with one or more Statutory Conditions, is she entitled to relief from forfeiture?

D. DISCUSSION

I. <u>What Damages are to be attributed to the Restoration Work performed by Pleasantview?</u>

1. Scratches to glass on windows and doors (observed by Ms. Monk in April/May 2009).

[43] Both Ms. Monk and her partner Mr. Lem testified that after the windows were cleaned in the spring of 2009 they were able to observe scratches on a significant number of the windows in the house and on the glass panes of some of the doors. Many of the scratches were in a circular shape which is consistent with scratches caused by an orbital sander, the type of sander used by Pleasantview's workers.

[44] Mr. Stein Pedersen was retained as an expert by Muskoka to examine the windows and doors and prepare a report in relation thereto. He is a professional engineer, specializing in fractology and material failures. Muskoka decided not to call him as its witness and so he was called by the plaintiff. He was qualified as an expert in failure analysis as it relates to the damage to glass and thermal pane windows in particular.

[45] Mr. Pedersen attended at the Monk residence on May 18, 2013 for an inspection. He testified that he found 34 window panes that were marked with what he called cinch marks (semicircular scratches) or straight scratches. He observed that 16 panes were not scratched. Mr. Pedersen testified that the actual scratches were difficult to see unless

they were held up against a dark background and would likely not be seen on a dirty window.

[46] Mr. Pedersen stated the cinch marks were consistent with the motion of an orbital sander held at an angle to the glass and that this would be consistent with someone trying to machine sand the wood around the glass.

[47] Mr. Robert Sparling is a professional engineer who was retained by the plaintiff to examine the windows and doors. He was qualified as an expert in materials analysis and in particular the failure of glass materials as these issues relate to windows in general and seal failures in particular. He too was called to testify by the plaintiff.

[48] Mr. Sparling testified that he visited the site on January 14, 2013. At that time Ms. Monk reported to him that:

- Orbital sanders (random orbital sanders) were used to finish the logs;
- During the log cleaning process water was found coming in under the doors;
- The windows and doors were not masked/taped or otherwise protected during the log restoration process;
- No drop sheets or tarps were used on the decks, patio or landscaping;
- The stains to the carpets which occurred on the main floor, basement and master bedroom were not present before the restoration process, and occurred during this process; and,
- The doors opened and closed well prior to the restoration process and ceased to operate correctly during/after the restoration process.

[49] Mr. Sparling reported that his examination revealed that the vast majority of windows in the home showed a large amount of exterior scratching and abrasions, as did the glass on the doors on the upper level. Many of the windows also had drips or smears of stain (Cetol) on their exterior surfaces and the carpet in the basement was stained at the patio doors.

[50] Mr. Sparling noted that the scratches on the window surfaces had multiple swirls or linear abrasions and that the scratching was common along the edges of the window panes. In Mr. Sparling's opinion the window surfaces were damaged during the log restoration process when the sanders used to finish the wood were allowed to come in contact with the glass windows.

[51] Mr. Sparling also noted that in his experience it is standard practice in the painting and refinishing industries to mask windows, doors or other portions of a structure during the refinishing process to prevent damage from sanding, stripping or other processes. Based on the damage to the windows at the Monk residence, the masking was either not present

or was insufficient to prevent sanding damage to the windows. This was supported by Ms. Monk's observation that the windows were not masked during the refinishing process.

[52] Mr. Gasson passed away prior to the date of the trial. Ms. Monk had also commenced an action against Pleasantview and relevant evidence from Mr. Gasson's examination for discovery was read in at trial and a transcript of his examination was made available to Mr Sparling. Mr. Sparling notes that Mr. Gasson confirmed in his examination that the windows and doors were not masked.

[53] Mr. Sparling concluded that the scratching of the windows and door panes was caused by Pleasantview's failure to follow standard industry practices. Furthermore, he stated that in his opinion the scratches were obvious and distracting when looking out of the windows and were especially apparent when the sun was at a high angle to the glass, obscuring the scenery outside the windows. According to Mr. Sparling, the scratching damage warranted removal and replacement of the affected window/doors. He recommended that all the doors and windows be replaced to maintain the uniform appearance of the residence.

Conclusions…Scratching to glass

[54] On the basis of the aforementioned evidence I find as a fact that the scratching of the windows was caused by the failure by Pleasantview to take protective measures during the restoration process.

[55] The Monk house was built in 1991 and in 2009 the windows were 18 years old. In keeping with the natural appearance of the log house, the windows were constructed out of clear pine. After 18 years they would have had an aged and dated appearance and in my view it would have been difficult if not impossible to replace only the affected windows without losing the uniform appearance of the residence on both the inside and outside of the house. I agree with the plaintiff's expert, Mr. Sparling that the scratching damage warranted the removal and replacement of all the doors and windows.

2. Condensation and Fogging between the panes of the Windows and Deterioration of the Wooden Doors (Winter of 2009/2010)

[56] Ms. Monk testified that following her purchase of the log home in 1997 she noticed that three of her thermal windows showed evidence of condensation between the two panes in cold weather. The house was built in 1991 and was 6 years old at the time. She stated that she did not see evidence of further condensation in any of her other windows between the time of purchase and 2008.

[57] Ms. Monk testified that during the winter of 2009/2010 she noticed that a considerable number of her thermal pane windows were showing signs of condensation. She also testified that she observed that some of the windows in the doors appeared to be slipping down in between the frames of the doors. She was experiencing difficulties with the doors staying closed and popping open on their own. Mr. Lem recalls that on one

occasion Ms. Monk was attempting to open the patio door to the balcony when he heard her scream and he saw the door frame falling apart around her. The door would have fallen on Ms. Monk if had not stepped in to hold it up. They applied duct tape to this door to hold it together. Eventually Ms. Monk bought new hardware for all of the exterior doors which provided a more secure method of keeping the doors closed.

[58] Ms. Monk's partner, Way Lem also testified that following the work carried out by Pleasantview he noticed that practically all of the windows were fogging up in the cold weather, as opposed to "just one or two".

[59] Mr. Sparling stated in his report that when he attended at the premises he observed that the doors opening onto the patio in the basement were distorted and sagged. The main level doors to the deck (4 doors) and in the bedrooms (4 doors) also showed this distortion. The distortion was severe enough so that the door latch mechanisms were not vertically aligned with the catches on the frames and the doors would not latch closed. Additionally, the doors scraped on the floor when being opened or closed. The front entrance doors showed similar distortion with wide gaps having formed between the horizontal boards in their construction. Mr. Sparling also noted that some of the thermal pane glass units in the doors showed evidence of condensation between the panes.

[60] Mr. Sparling explained that during the stripping process the logs were stripped by Pleasantview using a chemical stripping system called Envirowash. He noted that during his examination for discovery Mr. Gasson stated that the stripping system consisted of a strong alkaline solution (pH14) and a neutralizer solution. Such systems are typical for stripping of paints and stains.

[61] The main front doors and patio doors at the Monk residence were of wood construction. Mr. Sparling explained that wood doors and windows generally use adhesive (carpenters glue or similar) to hold the wood components together. In the Monk residence, the cause of the distortion and sagging was the failure of the joints between the stiles (most commonly the hinge side stile) and the top and bottom rails.

[62] Mr. Sparling explained that door stile to rail joint failures can occur, but are generally rare, and doors such as the doors in the Monk residence will last many decades with appropriate maintenance. For all doors in a residence to have failed at the joints is very unusual. Since Ms. Monk had reported that the doors ceased to function correctly only after the log restoration project, he concluded that the cause of the joint failures was likely related to the restoration process.

[63] It was Mr. Sparling's opinion that since the doors and windows were not masked during the stripping process the stripping solutions found their way onto the doors and windows which were in close proximity to the logs. The type of glue used in the construction of doors and window frames (i.e. carpenters glue) are polymer based and as such are similar to paints and are attacked by highly basic stripping solutions such as the solutions used in the stripping process by Pleasantview. The stripping solution attacked the paint on the doors and window frames and made its way into the joints.

[64] In conclusion, Mr. Sparling opined that the glue joints in the doors were adversely affected by the log stripping process, eventually leading to their failure. Additionally, given that the windows were likely of the same construction, it is likely that joints in the wooden window frames were also damaged by the stripping process.

[65] With respect to the condensation in the windows, Mr. Sparling noted that when window seals in thermal pane windows fail, air along with associated water vapour enters the space between the two pieces of glass, leading to fogging of the windows when outdoor temperatures are colder than the gas between the panes.

[66] Ms. Monk replaced her windows in 2016. Thereafter, six of the original windows were retrieved by Mr Sparling and examined in his laboratory. After examining these windows Mr. Sparling prepared an addendum to his original report in which he reported his findings.

[67] Mr. Sparling reported that his inspection revealed that the seals on the affected windows had failed at the spacers which separated the two pieces of glass, and that there was little adhesion between the seal materials and the glazing.

[68] Mr. Sparling opined that the relative lack of adhesion between the spacer seals and the glazing indicated there were likely issues with the quality of the sealant or the sealant application process during the manufacturing of the windows. This likely contributed to the seal failures.

[69] Mr. Sparling opined that it is likely that some of the window frames also experienced warping and sagging due to moisture associated with the log stripping process. The warping and sagging of the window frames due to moisture absorption resulted in shear stresses occurring in the spacer seals between the two layers of glazing. These stresses accelerated the failure of the seal adhesive leading to premature failure of the seals. As such, it is more than likely that the failure to protect the windows during the log stripping process accelerated the glazing seal failures leading to many windows showing hazing and condensation shortly after the stripping process.

[70] In summary, Mr. Sparling concluded that while the window glazing seals were of relatively poor manufacture, the reports of the windows suddenly experiencing hazing shortly after the log stripping process strongly indicated that the seal failures occurred prematurely due to the windows not being protected during the log stripping process.

[71] In his report and in his testimony Mr. Pederson also noted that the doors were manufactured with glue joints. He too formed the opinion that the cleaner used by Pleasantview attacked the glue, allowing the joints in the doors to separate and the doors to sag. In some cases, the edge of the glass was now exposed. The cleaner had also attacked the sealant on the exterior of the glazing.

[72] Mr. Pedersen included with his written report copies of 21 photographs of the doors and windows. These photographs included pictures of the sagging which was occurring to some of the doors, as well as a photograph of a door held together with duct tape.

[73] With respect to the failure of the windows, Mr. Pedersen noted that the lifetime of a thermoseal unit depends greatly on the materials and workmanship of the manufacturer. Generally, thermoseal units last about 20 years, and "some thermoseal units have been known to last over 40 years". Early failures are generally from manufacturing defects.

[74] Mr. Pedersen concluded his report with the following comments:

> The window failures were mostly a result of the attack on the exterior sealant by the cleaning process – this attacked the window mounts and the wood and glue. The failure of the thermoseal units was not from cleaner attack, but most likely a result of age.
>
> The cleaning process was aggressive and did damage to the exterior seals and the wood glue. The cleanup sanding caused the damage to the glass surfaces. They need to be replaced.

[75] With respect to his conclusion that the failure of the thermoseal units was not from cleaner attack, but most likely from old age, Mr. Pedersen was asked whether he would be prepared to change his opinion if the court accepted the evidence that the majority of the thermoseal units began to show evidence of fogging over the course of a short period of time, following the completion of the work by Pleasantview. He stated that his opinion would not change because, notwithstanding the failure of Pleasantview to take protective measures when applying the stripping solution, the exterior sealant around the glazing would prevent moisture from entering the cavity between the two panes of glass.

Conclusions…Fogging of Thermal Pane Windows and failure of Doors

[76] Ms. Monk testified that she observed that the doors were starting to sag and literally come apart during the winter of 2009/2010.

[77] Mr. Pedersen and Mr. Sparling both attribute the failures of the wooden frames and sashes of the doors and windows to an attack on the exterior sealant by the cleaning process. They testified that the cleaning process attacked the exterior sealant of the window mounts and wood and glue, thereby compromising the structural integrity of the wooden frames and sashes.

[78] With respect to the fogging of the windows, I accept the evidence of Ms. Monk and Mr. Lem that there was a dramatic increase in the number of thermoseal window units which failed during the winter of 2009/2010. I accept the evidence of Mr. Sparling that these failures may not have become noticeable during the first winter following the work by Pleasantview (the winter of 2008/2009), both because the windows had not been cleaned prior to Pleasantview leaving the site and because the deterioration of the doors and window frames was the result of a process which occurred over a period of time. Also,

since Pleasantview completed its work late in the year in 2008 the first opportunity for warm moist air to enter the space between the window panes would have been the summer of 2009.

[79] Mr. Pedersen does not believe the failure of the thermoseal glazing units themselves was from cleaner attack, but most likely a result of age. He stated that if the court accepted the evidence that a considerable number of the thermoseal units failed shortly after the completion of the restoration work this should be attributed to mere coincidence.

[80] Mr. Sparling expressed the opinion that the window glazing seals were of relatively poor manufacture and that this was one of the reasons for the seal failures. However, in his view it is likely that some of the window frames also experienced warping and sagging due to moisture associated with the log stripping process. The warping and sagging of the window frames would have resulted in shear stresses occurring in the spacer seals between the two layers of glazing and these stresses would have accelerated the failure of the thermoseal units.

[81] I prefer the evidence of Mr. Sparling, namely that the log stripping process likely accelerated the failure of the thermoseal units, to the evidence of Mr. Pedersen that the failure should be attributed exclusively to old age. The failure of the thermoseal units was sudden and dramatic. A large number of windows were affected and the fact that the condensation problems became noticeable shortly after the restoration work cannot in my view be attributed to mere coincidence.

[82] In summary, I find as a fact that the chemicals and cleaning process used by Pleasantview compromised the structural integrity of the wooden frames and sashes of the doors and windows of the house, causing them to fail and accelerating the failure of the thermoseal glazing units. The nature of this damage was such that it required the complete replacement of the windows and exterior doors.

3. Damage to Carpets (observed November/December, 2008)

[83] Ms. Monk and Mr. Lem testified that the carpets on all three floors of the home sustained damage as a result of water which had been allowed to penetrate the building during the refinishing process. Ms. Monk replaced her main and upper floor carpets in October, 2009.

[84] Mr. Gasson testified at his examination for discovery that he was only aware of damage to the lower level carpet.

[85] The testimony of Ms. Monk and Mr. Lem is supported by a number of photographs which depict carpet stains outside of doorways in the house on all three floors. I am satisfied that the failure by Pleasantview to take protective measures to prevent the entry of water and chemicals into the house caused damage to the carpets on all three floors. The evidence is that the stains could not be removed by a professional carpet cleaning

company. In the circumstances, I find that it was necessary for Ms. Monk to replace the carpets on all three floors of her residence.

4. Damage to Exterior Lights (observed April/May, 2009)

[86] Ms. Monk submits that when Pleasantview left the site in November, 2008 they left almost every one of her 11-exterior brass coloured lights covered in Cetol. Also, four of the fixtures had the bottom tail broken off.

[87] Ms. Monk's evidence is supported by photographs and the evidence of Mr. Lem who testified that the lights were "broken in many places" as a result of the activities of Pleasantview. I am satisfied on the basis of the evidence that the lights were damaged by Pleasantview and that it was necessary for Ms. Monk to replace them.

II. When did Ms. Monk first notify Muskoka of the Damages to her House?

[88] Ms. Monk's claim against Muskoka is based on allegations that Muskoka advised her that she did not have coverage for her losses and for Muskoka's failure to report the damage to Farmers'.

[89] Muskoka had handled insurance matters for Ms. Monk and her family since 1999 and Marcia Bissell had been Ms. Monks contact broker throughout.

[90] The parties are agreed that Ms. Monk attended at Muskoka's offices on September 2, 2011 at which time she had a lengthy discussion with Ms. Bissell about the damages which she alleged were caused by Pleasantview.

[91] Also present at that meeting and involved in the discussion was Andrew Fox, a senior insurance broker who had been with Muskoka since 1984. A third broker, Bonnie Boerger was also present for a period of time. Ms. Monk delivered a computer memory drive to the meeting containing photographs of the damages and Ms. Boerger arranged to have these displayed on one of the office computers.

[92] Ms. Monk testified that prior to September 2, 2011 she had notified Ms. Bissell on three separate occasions that Pleasantview had caused damage to her log home, and on each of these occasions Ms. Bissell had advised her that she did not have coverage for damage caused by contractors. She testified that she spoke to her by telephone in January, 2009 in relation to the carpet damage, later that year in April or May in relation to the scratches on the windows and then in January of 2010 in relation to the condensation in the thermal pane windows and the door problems.

[93] Ms. Bissell denies that these three telephone conversations took place and testified that the first time she spoke to Ms. Monk about the damage caused by Pleasantview was during the September 2, 2011 meeting.

[94] For the following reasons I prefer the evidence of Ms. Bissell to that of Ms. Monk and I find as a fact that the first time that Ms. Monk spoke to Muskoka about the damage was on September 2, 2011.

[95] Firstly, Ms. Bissell presented at trial as a dedicated, thorough, and conscientious broker. Shirley MacDonald, a witness called by the plaintiff and a broker who had worked for Muskoka for many years described Ms. Bissell as a "broker that you wish you could be like – they don't make them like that anymore".

[96] Evidence of the fact that Ms. Bissell is deeply committed to her client's needs is reflected by the fact that the day following the September 2, 2011 meeting she wrote Ms. Monk a lengthy and heartfelt email in which she shared with Ms. Monk that she felt so terrible after her meeting with Ms. Monk the previous day that she "felt numb". When she had arrived home that evening she had discussed Ms. Monk's plight with her husband, who was a retired contractor and it was his view that the restoration methods used by Pleasantview were improper. In addition, she had read the policy again that day and suggested possible courses of action which were available to Ms. Monk. She also suggested that Ms. Monk approach Farmers' directly and if she did not receive any satisfaction she should consider legal action. I note that Ms. Bissell wrote this letter on the Saturday of the Labour Day long weekend.

[97] I find it difficult to reconcile Ms. Bissell's concerned response to Ms. Monk's potential claim for damages with the evidence of Ms. Monk who testified that on three occasions her claim was more or less summarily dismissed on the basis that the damage was caused by a contractor. Clearly, such a summary dismissal of Ms. Monk's potential claim is inconsistent with what occurred on September 2, 2011. When advised of the damages on that day Ms. Bissell: a) instructed Ms. Monk to bring her any documentation she has regarding the matter as this was "complicated" and "difficult to follow along"; b) reviewed the policy and consulted a colleague (Mr. Fox) to try to find some coverage; c) advised Ms. Monk that there is some chance there might be coverage; d) inquired with Farmers' regarding this loss; e) advised Ms. Monk that she should also report the loss to Farmers' herself and provided the telephone number; and f) instructed Ms. Monk to obtain legal advice.

[98] Secondly, I am not prepared to accept the plaintiff's submission that Ms. Bissell may simply have forgotten about her three conversations with Ms. Monk. Ms. Bissell testified that Ms. Monk's log home was the only log home on which she had ever placed insurance coverage. It was also the first time in her 28-year career that she can recall receiving an inquiry about whether there was insurance coverage on a home for damage caused by a contractor. Given the uniqueness and the nature of the three alleged conversations, I am unable to find that Ms. Bissell would have forgotten them.

[99] Thirdly, Mr. Fox and Ms. Bissell both testified that during their conversation with Ms. Monk on September 2, 2011 they informed her that her claim might very well be denied on the basis that it was reported almost three years after the contractor had performed the work. They also testified that at no time during this meeting did Ms. Monk respond by

reminding them that she had reported the damage to Ms. Bissell previously. In my view, if Ms. Monk had reported the damage to Ms. Bissell on three prior occasions a normal response by her would have been to bring this to their attention. I note as well that there is no reference by Ms. Monk of any such prior conversations in her email correspondence with Ms. Bissell following the September 2, 2011 meeting.

[100] Fourthly, Muskoka's file regarding Ms. Monk's insurance policies is thoroughly documented with respect to the various times in the past that Ms. Monk contacted Muskoka about potential loses. The files confirm that Ms. Bissell is a diligent note taker whose practice it is to report all losses to insurers. In the past she has reported losses to insurers on behalf of Ms. Monk which included both losses for which there was coverage and losses which were not covered. She testified that it is her policy to submit a claim and let the insurer determine the issue of coverage. In my view, if Ms. Monk had previously informed Muskoka of her damages there would be some notes or records confirming these conversations, but there were none.

[101] Fifthly, in Ms. Monks' letter to Pleasantview of July 28, 2011 she threatens Pleasantview that if the matter is not resolved "I will be contacting my insurance company…" This comment suggests that in July, 2011 Ms. Monk was still seeking redress against the contractor, and had not yet contacted her insurer.

[102] Sixthly, there is an inconsistency between Ms. Monk's insistence that she reported the damage to her broker on two occasions in 2009 and her communications with her insurer in which she reported that she did not "discover" the damage until 2010. Notably, these communications to her insurer followed the September 8, 2011 email to her from Ms. Bissell in which she was advised that her claim was denied by Farmers' "because this situation regarding damages to the home were at least two years ago…"

[103] The communications to Farmers' in which Ms. Monk referred to the date of discovery of her damages as 2010 included a non-waiver agreement which was prepared by Farmers' which indicated that the date of damage was 2008. When Ms. Monk returned a signed copy to Farmers' she added the phrase "& discovered in January 2010" to the form. Her statement of claim refers to the fact that she *"discovered that her damages were far greater*" in January, 2010 and "*soon after this discovery went to Muskoka to determine whether she had coverage"*. There is no reference in the statement of claim to the two previous reports of damage to Muskoka which Ms. Monk alleges she made in 2009. In paragraph 25 of her claim she claims against Muskoka as a "result of its failure to properly advise the plaintiff *when she first sought assistance in 2010*. [Emphasis added]. Also, when Ms. Monk's counsel notified Farmers' of her claim by letter dated October 12, 2011 the re: line in the letter referred to the date of loss as "January, 2010". The 2010 date was referenced notwithstanding the fact that she claims damages against the defendants for both the marring of the windows (which Ms. Monk admits she noticed in 2009) and the damage to the carpets (which she noticed in 2008). Ms. Monk's formal proof of loss also refers to the loss as having occurred in "January, 2010".

[104] In my view, Ms. Monk's numerous references to having discovered the damage in 2010 constituted an attempt on her part to avoid the consequences of her failure to comply with notice periods in her policy and to avoid potential limitation period defences in her claim against Farmers'. Her references to the earlier conversations with Ms. Bissell form the grounds on which she bases her claim against Muskoka. Her evidence is inconsistent and contradictory.

[105] Finally, Ms. Monk agrees that she did not complain or communicate in any way with Pleasantview for a period of approximately two and a half years, from the date Mr. Gasson attended to clean her carpets which she believes was in the first week of January, 2009 to July 28, 2011, which was the date she hand delivered her warranty claim to him. It is inconceivable to me that during this time period she initiated three reports of damage to her insurer but did not contact the party responsible for causing the damage even once, even though she alleges that she was advised by her broker that she should look to her contractor for relief.

[106] Ms. Shirley Macdonald was called by the plaintiff to support Ms. Monk's position that she had previously notified Muskoka about the damages.

[107] Ms. MacDonald was formerly employed as a broker with Muskoka. She testified that she can recall overhearing Ms. Bissell having a conversation with Ms. Monk about her log house. The conversation had something to do with a contractor and washing of the walls of the house. She did not recall hearing anything about damaged carpets or windows.

[108] Significantly, a wall or partition separated Ms. MacDonald's office area from that of Ms. Bissell and Ms. MacDonald does not know whether Ms. Bissell's conversation with Ms. Monk was in person or on the telephone, she can only recall hearing Ms. Bissell's side of the conversation. To the best of her recollection this conversation took place about 2-5 months before the September 2, 2011 meeting.

[109] Ms. MacDonald's evidence conflicts with Ms. Monk's evidence that she last reported the loss to Ms. Bissell by telephone in January, 2010, which is about 21 months before the September 2, 2011 meeting. Also, Ms. MacDonald can recall very few details about this alleged conversation, in which she did not participate personally. In the circumstances, her evidence is not helpful in establishing that Ms. Monk spoke to Ms. Bissell about the damages prior to the September 2, 2011 meeting.

[110] In conclusion, I find that the evidence supports Ms. Bissell's testimony that the first time Ms. Monk reported the damage to her was at her office on September 2, 2011. Muskoka followed up with Farmers' on her behalf immediately thereafter. Accordingly, I find that Ms. Monk does not have a claim for breach of fiduciary duty against Muskoka in these proceedings.

III. <u>Does Ms. Monk's policy of Insurance Include Coverage for her Damages, and is some</u>

or all of the damage subject to an exclusion clause?

The Policy – Coverage and Exclusions

[111] Ms. Monk's policy of insurance with Farmers' was an all-risk "Security Plus" homeowner's insurance policy. Generally, the policy covered all risks, subject to stated exclusions. The base coverage provides:

> You are insured against direct, accidental physical loss or damage subject to the EXCLUSIONS AND CONDITIONS in this policy.

[112] Farmers' relies on three exclusions in the policy in denying the claim. The exclusions are as follows:

> 1) "Losses Excluded":
> We do not insure:
> 1. the cost of making good faulty material or workmanship;
>
> 2) "Property Excluded"
> We do not insure loss or damage to:
> 2. Property…
> (ii) while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered)
>
> 3) "Losses Excluded"
> We do not insure:
> 3…., scratching

1. The "Faulty Workmanship" Exclusion

[113] This action first came before this court in the form of a summary judgment motion brought by the defendants (see *Monk v. Farmers' Mutual Insurance Co. (Lindsay)*, 2014 ONSC 3940). The main issue before the court was whether the "faulty workmanship" exclusion included an exclusion for "resulting damage". Summary judgment was granted to the defendants, the court finding that the faulty workmanship exclusion in Ms. Monk's policy precluded claims for both direct and resulting damage caused by faulty workmanship. The court also found that the "property being worked on" exclusion in the policy, which specifically preserved coverage for resulting damage to other insured property, was trumped by the general faulty workmanship provision in circumstances where damage to property had been caused by faulty workmanship.

[114] The decision was appealed to the Ontario Court of Appeal and on December 23, 2015 the Court of Appeal overturned the decision of the motions court, finding that the motions

court judge erred in interpreting the faulty workmanship exclusion broadly to deny coverage that the all-risks policy would otherwise provide. The court held that the exclusion should be interpreted narrowly and therefore exclude from coverage only direct damage and not the resulting damage flowing from faulty workmanship.

[115] The Court of Appeal also held that the "property being worked on" exclusion preserves coverage for resulting damage to other property whether or not the damage to the property was the result of faulty workmanship.

[116] As a result of the Court of Appeal's ruling the question before the court with respect to this first exclusion is no longer whether the exclusion includes resulting damage…the Court of Appeal has clearly ruled that resulting damage is covered. The question this court must answer is whether some or all of the damages caused by Pleasantview are properly identified as "the cost of making good faulty material or workmanship"? Damages which are not identified as such constitute resulting damage which are covered under the policy, subject of course to any other exclusions which may apply.

[117] The plaintiff submits that all of the damages for which it claims indemnity are damages which fall under the scope of resulting damages and should therefore be covered under the policy. The defendants submit that all of the damages which are claimed by the plaintiff are excluded, either because they constitute damages which constitute "the cost of making good faulty material or workmanship" or because they are damages to "property being worked on" and are excluded under that exclusion.

The "*Ledcor*" Decision

[118] In determining whether some or all of the damages in this case should be classified as resulting damage, guidance can be found in the recent Supreme Court of Canada decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37, 2016 CarswellAlta 1699 (S.C.C.) ("*Ledcor"*). In *Ledcor* the Supreme Court was asked to decide where to draw the line between damages which constituted the "the cost of making good faulty material or workmanship" and resulting damages in the context of a builders' risk policy of insurance.

[119] In *Ledcor,* the damage also involved damage to glass. What presented a particular challenge to the court in *Ledcor* was that the damage in that case occurred to the very thing being worked on.

[120] Briefly, the facts in *Ledcor* are that Station Lands Ltd. was in the process of building an office tower in Edmonton. Ledcor Construction Limited ("Ledcor") was the general contractor. When construction was nearing completion, Station Lands hired Bristol Cleaning to wash the windows of exterior construction dirt, paint specks and concrete splatter. Bristol was to provide all necessary equipment, manpower and materials to complete the task. The contract price was $45,000. The service contract set out that Station Lands would provide all-risk property insurance for the project in the form of a builders' risk policy, and it did so.

[121] Bristol cleaned the windows of construction dirt. Because it used improper tools and methods however, it badly scratched the windows, which had to be replaced at a cost of $2.5 million. Station Lands and Ledcor claimed against the policy of insurance, but the insurer denied the claim on the basis of the faulty workmanship exclusion, claiming that the damage to the windows was "faulty workmanship", not "resulting damage".

[122] The Builders' risk policy in the *Ledcor* case provided as follows:

> 1. Property Insured
> (a) Property undergoing … construction…
>
> 2. Perils Insured
> This policy section insures against "All Risks" of direct physical loss or damage except as herein provided.
>
> 4 (A) Exclusions
> This policy section does not insure
> (a) The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage.

[123] All three levels of court in *Ledcor* went about the analysis in a different way. The Court of Queen's Bench found that the undefined phrase "the cost of making good faulty workmanship" was ambiguous. It applied the rule of contra proferentem against the insurers, such that the insureds' interpretation prevailed. It held that the "cost of making good faulty workmanship" exclusion referred only to the cost of redoing the cleaning work, which is what Bristol was hired to perform. Coverage remained for all resulting damage to the windows (see *Ledcor Construction Limited. v. Northbridge Indemnity Insurance Co*. (2013) ABQB 585).

[124] The Alberta Court of Appeal reversed the trial judge's decision. It explained that because the base coverage under clause 2 of the policy was for "physical loss or damage", it followed that the exclusion clause needed to exclude from coverage some physical loss. Under this view, the "cost of making good faulty workmanship" could not be limited to the *cost* of redoing the faulty work, as determined by the Court of Queen's Bench. Rather the exclusion should be construed more broadly to exclude some type of *physical* loss or damage.

[125] The Court of Appeal perceived that the trial judge had failed to isolate the work the contractor was hired to perform from the accident which caused damage to property. It realized this difference was something physical, and it formulated a "physical or systemic connectedness test" to determine the dividing line between the faulty workmanship and the resulting damage. In applying this test, the Court of Appeal determined that the damage to the windows was faulty workmanship, because it was caused by intentional motions to the window and there was no "accidental or fortuitous" aspect to the loss (see

Ledcor Construction Limited. v. Northbridge Indemnity Insurance Co. (2015) ABCA 121).

[126] The Supreme Court of Canada did not apply the "physical or systemic connectedness test". It held that the premise from which the Court of Appeal proceeded was flawed and the "faulty workmanship" exclusion was not required to encompass physical damage. Instead, it employed the general rules of contract interpretation in order to resolve what it felt was an ambiguity in the term "the cost of making good faulty material or workmanship" and it arrived at the conclusion that (1) the damage to the windows was resulting damage and (2) the cost of making good faulty workmanship exclusion referred only to the cost of redoing the work which Bristol was hired to do.

[127] The Supreme Court's analysis can be summarized as follows:

The clause is ambiguous. Both the insureds and the insurers found the exclusion clause unambiguous, which to the court suggested ambiguity. The insureds believed that only the cost of redoing the faulty work, i.e., cleaning the windows, was excluded from coverage. The consequences of the faulty work, i.e., damage to the windows, was covered as "resulting damage." The insurers, on the other hand, believed that resulting damage must relate to some other part of the property, and since the subject of the work and the subject of the damage were the same, it was all excluded from coverage. The Supreme Court was of the view that the phrase "the cost of making good faulty workmanship" could be construed as either including or excluding consequential (resulting) damage where the subject of the faulty work is the very thing being worked on and not some other part of the insured property. The policy did not define these terms, and nothing else in the policy resolved the ambiguity. Consequently, it employed the rules of insurance contract interpretation contained in its 2010 decision in *Progressive Homes Ltd. v. Lombard General Insurance Co.* 2010 SCC 33, 2010 CarswellBC 2501 at paras. 21-24.

Briefly, these rules of interpretation can be summarized as follows:

a) When the language of the policy is unambiguous, give effect to clear language, reading the contract as a whole.

b) Where the language of the policy is ambiguous, apply the general rules of contract construction, which are:

> *Step one…*Prefer the interpretation which is consistent with the reasonable expectations of the parties.
>
> *Step two...*Avoid interpretations that would give rise to an unrealistic result or would not have been in the contemplation of the parties at the time the policy was made.
>
> *Step three...*Ensure that similar insurance policies are construed consistently.

c) When these rules of construction fail to resolve the ambiguity, construe the policy contra proferentem – against the insurer, one corollary of which is that coverage provisions are interpreted broadly, and exclusion clauses narrowly.

Step One: Look to the reasonable expectations of the parties. Since the Supreme Court determined that the language of the exclusion was ambiguous, it attempted first to ascertain the parties' reasonable expectations. In determining the intentions of the parties, it decided that:

(1) The circumstances surrounding the insurance contract's formation may assist in determining the parties' reasonable expectations.

(2) The purpose of a builders' risk policy is crucial to determining the parties' reasonable expectations. The purpose is to provide broad coverage for construction projects. In exchange for a relatively high premium, it provides certainty, stability, and peace of mind on a construction site. Since this is the purpose of the policy, the interpretation of an exclusion clause should be narrow: to exclude from coverage only the cost of redoing the faulty work itself; - re-cleaning the windows.

(3) The policy covered only fortuitous contingent risk involving accident or damage on the construction site arising as a result of a party's careless or negligent acts, which are the most common source of loss on construction sites.

(4) "All-risk" coverage in builders' risk policies is intended to be broad, and the faulty workmanship exclusion is intended to be narrow. Thus, the insureds' interpretation of the exclusion clause best reflects the original intent of the clause.

(5) The words of the service contract between Station Lands and Bristol are not helpful in interpreting the meaning of the exclusion. Ledcor and the insurers were not parties to the contract between Station Lands and Bristol, and that contract was made several years after the contract of insurance was established. Even if the service contract was relevant, a contractor's stipulated responsibility for various loss or damage does not necessarily preclude coverage under a builders' risk policy.

Step Two: Avoid unrealistic results. Interpretations which do not align with commercial reality should be avoided. The interpretation which promotes a sensible commercial result is the interpretation which supports the purpose of a builders' risk policy, which is to exclude from coverage the "cost of making good faulty workmanship", but to cover physical damage that results from that faulty workmanship. This interpretation would not inappropriately spread the risk, nor would it allow contractors to perform their work improperly or negligently. Further, this interpretation accords with the approach taken in construing similar exclusions in CGL policies, which covers the risk that the insured's work might cause bodily injury or property damage.

Step three: Ensure an interpretation which is consistent with the interpretation of other insurance policies. The insureds' position is consistent with case law. What is excluded from coverage is the cost of redoing the cleaning work, which is the work Bristol undertook to perform. Bristol's contractual obligation was to clean the windows after they had been properly installed. The service contract itself usually indicates the scope of the work. In this case, the scope of the work was to clean the windows. It was not to replace the windows if they were ruined. Installing the windows was another contractor's job. Bristol ruined another contractor's work in the course of doing its work. Bristol's mistake, and the cost of replacing the windows, was covered. The Supreme Court referred to cases which were consistent with this approach, namely that the exclusion for faulty workmanship and the costs of making good faulty workmanship were directly related to the scope of the work which the contractor was required to perform. Examples of cases referred to by the Supreme Court included:

a. *Sayers & Associates v. Insurance Corp. of Ireland, 126 D.L. R. (3d) 681*. An electrical subcontractor installed ducts for transmitting power. By allowing rain water mixed with concrete to enter the ducts, the ducts malfunctioned. The Court of Appeal held that by the terms of its contract the work was to install working ducts. Since the damage was to the ducts he was installing, the damage could not be considered resulting damage. Why – because the electrical ducting did not work.

b. *Ontario Hydro v. Royal Insurance, 1981 CarswellOnt 2363 (Ont. H.C.)* A contractor designed a boiler system, acquired the material and supervised its initial operation. To test the system, an acid wash was used, but it was done improperly and ruined the boiler's reheater and cracked its tubing. The contractor claimed that the only excluded work was the cost of redoing the wash, but the court held that the cost of replacing the boiler's tubing was also excluded because the tubing was an integral part of the procedure of designing, supervising and commissioning the boiler.

c. *Bird Construction v. United States Fire Insurance Co.* 1985 CarswellSask 172 (Sask. C.A.) A contractor built and installed roof trusses but, because it failed to properly erect them, one collapsed. The cost of repairing the truss was not resulting damage because its installation was the work the contractor was hired to perform.

Conclusion on the Supreme Court's Interpretation of the Exclusion Clause. Because of ambiguity in the language of the faulty workmanship exclusion, the meaning of the clause had to be discovered by considering the parties' reasonable expectations, which were informed by the purpose of builders' risk policies. This examination pointed to the faulty workmanship exclusion serving to exclude from coverage only the cost of redoing the faulty work. In this case, re-cleaning the windows was the "cost of making good faulty workmanship" and that was excluded. The cost of replacing the damaged windows, however, was covered as "resulting damage."

Step 4: Applicability of contra proferentem rule. The court held that in the event they had determined that the general rules of contractual interpretation did not clarify the ambiguous exclusion clause, they would reach the same conclusion on the basis of the *contra proferentem* rule.

Application of *Ledcor* to Monk

[128] Ms. Monk submits that the analysis and conclusions reached by the Supreme Court in interpreting the exclusion clause in *Ledcor* should be applied to the coverage issues arising in relation to her homeowner's policy.

[129] Farmers' argues that Ms. Monk's policy is not a Builder's Risk policy and the Alberta Court of Appeal's "systemic or physical connectedness test" is the appropriate test for a homeowner's policy. This test, with its focus on the well-known common-law concept of foreseeability, should guide the court in its interpretation of the "faulty workmanship" exclusion.

[130] In my view, the language of the policy excluding losses for damage caused by faulty workmanship is ambiguous and the proper approach is the approach adopted by the Supreme Court in *Ledcor;* in other words this court should employ the general rules of contract interpretation to determine whether (1) some or all of the damage to Ms. Monk's home was resulting damage and (2) whether the cost of making good faulty workmanship exclusion refers only to the cost of redoing the work which Pleasantview was hired to do.

[131] In interpreting the contract, I have come to the following conclusions.

Reasonable Expectations of the Parties: In my view, when Ms. Monk purchased her all-risk homeowner's policy from Farmers' her expectations aligned in many ways with the expectations of an insured who purchases an all-risk builders' insurance policy. Both parties are purchasing broad coverage for their buildings. They are both looking for protection from a loss which is fortuitous to the insured. They are both seeking protection from damage caused by a third party. They are both looking for coverage which gives them stability, certainty and peace of mind. In the case of damages caused by faulty workmanship, a homeowner is no more interested in or able to engage in expensive and time-consuming litigation pending the completion of work than is a contractor. A homeowner expects to be covered for unexpected or resulting damages which are not directly related to the scope of his or her contract with a contractor. In the circumstances, a homeowner who purchases an all risk policy should be entitled to expect that the exclusion for faulty workmanship or for property while being worked on will be interpreted narrowly and the exception for resulting damage will receive a broad interpretation.

Avoid unrealistic results. As is the case with a builders' risk policy, the court must strive to interpret a homeowner's policy in a manner which promotes a sensible result and supports the purpose of such a policy. In my view, an interpretation which excludes from coverage the "cost of making good faulty workmanship" i.e. the cost of re-doing the work

which comprised the scope of the original contract, but provides coverage for unexpected physical damage that results from that faulty workmanship meets this objective. Such an interpretation is consistent with the objectives of an "all perils…all risks" homeowner's policy. Furthermore, this interpretation does not inappropriately spread the risk, nor would it allow contractors to perform their work improperly or negligently. A contractor remains liable for direct or non-resultant damage and an insurer has the option of exercising rights of subrogation.

Ensure an interpretation which is consistent with the interpretation of other insurance policies. In *Ledcor*, the Supreme Court referred to cases which were consistent with the approach it adopted in that case, namely that the exclusion for faulty workmanship and the costs of making good faulty workmanship were directly related to the scope of the work which the contractor was required to perform. Although the decision in *Ledcor* referred primarily to builders' risk policies, I see no reason why a standard clause in a homeowner's all risk policy should engage different principles of interpretation than a similar clause found in a builders' risk policy…to do so would result in ongoing confusion and uncertainty.

[132] In conclusion, I find that the analysis and conclusions reached by the Supreme Court of Canada in *Ledcor* can be applied to the circumstances of this case. In summary, this means that the line between covered and resulting damage must be determined in relation to the scope of the work performed by the contractor. The exclusion for faulty workmanship and for property while being worked on should be interpreted narrowly and the exception for resulting damage should receive a broad and liberal interpretation. Therefore, the "cost of making good faulty material or workmanship" should be interpreted to mean the cost of re-doing the work which comprised the subject matter of the work Pleasantview was contracted to perform. All other damage properly falls within the scope of "resulting damage", which should be defined broadly in keeping with the all-perils/all risks nature of the insurance policy.

[133] In *Ledcor* the Supreme Court held at para. 84:

> Whether certain damage falls within the resulting damage exception to the faulty workmanship exclusion will greatly depend on the scope of the contractual obligation pursuant to which the faulty workmanship was carried out.

[134] In deciding whether some or all of Ms. Monk's damages are covered therefore it is necessary to determine the scope of the work to be performed by Pleasantview.

[135] The contract signed by the parties stated:

> Scope of Work
>
> Restoration of exterior of logs and board and batten structure using the Envirowash Wood Restoration System described in more detail hereafter.

[136] In *Ledcor* the contractor was hired only to clean the glass, and in doing so it scratched the glass. The damage was so severe that all the windows in the building required replacement. In deciding that the damage to the glass was resulting damage and therefore an exception to the exclusion the Supreme Court summarized its position as follows at par. 85 of the decision:

> 85. In the appeals before us, Bristol's obligation under its service contract with Station Lands was limited to cleaning the Tower's windows after they had been properly installed. Redoing Bristol's faulty work did not require Bristol to install windows in good condition. As such, the cost of the windows' replacement represents "resulting damage" and is covered under the policy. Conversely, if Bristol had been responsible for the windows' installation, and the windows had been damaged in the course of the installation process, the damage done to the windows in such circumstances would not have constituted "resulting damage". Indeed, redoing the faulty work would have required installing windows in good condition, as per Bristol's (hypothetical) contractual obligation.

[137] Similarly, Ms. Monk's contract with Pleasantview did not require Pleasantview to install carpets, replace windows, doors or thermal pane glass units and exterior fixtures; it merely required Pleasantview to restore the wooden exterior portions of the house. Accordingly, I find that the cost of the replacement of the carpets, doors and door hardware, windows and exterior lighting fixtures is resulting damage and, subject to any other applicable policy exclusions, the cost of replacement of these is covered by the policy.

2. The "Property while being Worked On" Exclusion

[138] This exclusion as stated in the policy is as follows:

> "Property Excluded"
>
> We do not insure loss or damage to:
> 2. Property…
>
> (ii) while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered)

[139] Questions which arise in relation to this exclusion include:

a) What property is included in "property while being worked on"?

b) What damage comprises "damage resulting from such process or work"?

c) What damage comprises the exception for "resulting damage to other insured property"?

a) What property is included in "property…while being worked on"?

[140] The "scope of work" as set out in the contract with Pleasantview is helpful in determining the meaning of the phrase "property while being worked on" in the insurance contract.

> Scope of Work
>
> Restoration of exterior of logs and board and batten structure using the Envirowash Wood Restoration System described in more detail hereafter.

[141] In my view, the clear and simple language of the contract required Pleasantview to strip the existing sealer and coating from the exterior surfaces of the wooden logs and board and batten of the home, and replace this with a new sealer ("Cetol") and caulk all interfaces of similar or dis-similar material.

[142] Ms. Monk testified that the scope of the contract did not include the removal of the green stain from the wooden window sashes and exterior doors and the restoration of the doors and windows. All of the damage to the doors and windows therefore constituted resulting damage.

[143] Notwithstanding the fact that the written contract did not specifically require Pleasantview to restore the wooden window frames and sashes and the wooden doors, the photographs which were taken while the work was being performed reveal that Pleasantview undertook the labour-intensive task of stripping the green stain from all of the approximately 60 wooden window sashes and frames, as well as from the exterior doors.

[144] In his report, Mr. Pedersen stated that the insured told him that Pleasantview used an orbital sander on the window sashes. In his First Report at Page 3 Mr. Pedersen identified that over half the windows had scratch marks. He explained the "marks are consistent with the motion of an orbital sander held at an angle to the glass. This would be the case if someone were trying to machine sand the wood around the glass".

[145] Mr. Gasson stated in his examination for discovery, in the action against him, that part of the work his company agreed to perform included restoring the window frames (sashes). He stated: "You know, the window frames had to be -- had to be treated. So, you know, we can't seal completely off the window" (see examination transcript of John Gasson, October, 10, 2012, page 34, question 189).

[146] In support of her position that Pleasantview's restoration work did not include the restoration of the wooden doors and window frames Ms. Monk testified at trial that she did not even notice that the green paint or stain had been stripped from her doors and windows until the spring of 2009. I find it difficult to accept her evidence in this regard. Ms. Monk was a conscientious homeowner who had personally negotiated the contract

with Pleasantview. She took photographs while the work was in progress and she was not reluctant to complain when she was not pleased with some aspect of the work. In her cross-examination at trial she explained that she worked long days and so it was dark when she left for work in the morning and when she came home in the evening; therefore, she could not keep a close eye on the work. In my view, she would still have had the opportunity to view the work during daylight hours on weekends and holidays.

[147] Moreover, at her examination for discovery, Ms. Monk complained that the green stain was not completely stripped and "you could still see it in the door frames or if you opened the doors you could still see a swatch of green stain." (see examination transcript of Diana Lynn Monk, July 9, 2012, page 65, question 308). She repeated that statement again at her examination on October 26, 2012, when she said: "some of the places we would see big pieces of the green stain still there". The complaint by Ms. Monk was not that the green stain had been stripped – it was that it was not properly stripped (see examination transcript of Diana Lynn Monk, October 26, 2012, page 90, question 308).

[148] Although not clearly spelled out in the written contract, I find that the parties had mutually agreed that Pleasantview would also restore the wooden portions of the windows and doors.

[149] In summary, I find that the scope of the work can generally be described as the "restoration of all of the wooden surfaces of the house, including the logs, the board and batten, and the frames and sashes of the doors and windows".

[150] Work which I will refer to as "ancillary" to the main scope of the work included "inspecting and temporarily sealing" all "areas of the building where water from the water process could enter the structure" and "caulking and sealing" "around windows and doors" and "all other areas or interfaces where water could enter the structure" and generally cleaning up the site upon completion of the work, including cleaning the windows.

b) What damage is included in the term "Damage resulting from such Process or Work"?

[151] Mr. Sparling was of the opinion that since the doors and windows were not masked during the stripping process the stripping solutions found their way onto the doors and windows, attacking and weakening the joints. This eventually led to their failure. Additionally, given that the windows were likely of the same construction, it was his view that the window joints were also damaged by the stripping process.

[152] Mr. Pederson was also of the opinion that the cleaner used by Pleasantview attacked the glue, allowing the joints in the doors to separate and the doors to sag.

[153] In my view, since the restoration of the wooden doors and windows were included within the scope of the contract the damage to the wooden door and window frames constitutes "damage resulting from such process or work" and is therefore excluded from coverage.

[154] With respect to the sudden and dramatic fogging of the thermoseal windows I have already indicated that I prefer the evidence of Mr. Sparling to that of Mr. Pedersen, namely that the log stripping process likely accelerated the failure of the thermoseal units.

[155] With respect to the scratching of the glass, I have concluded that this too was caused by the methods and processes which were used in restoring the window sashes and door frames i.e. the use of orbital sanders in close proximity to the glass.

[156] Finally, I find that the damage to the carpets and the exterior light fixtures was also caused by the work and processes employed by Pleasantview. The damage to the carpets was caused by the failure by Pleasantview to properly protect and seal the entry ways to the house and the damage to the light fixtures was caused by the failure by Pleasantview to cover up and protect the fixtures while applying stripping compound and Cetol.

c) What damage comprises the exception for "Resulting Damage to other Insured Property"?

[157] As noted above, it is my view that the scope of the work can generally be described as the "restoration of all of the wooden surfaces of the house, including the logs, the board and batten, and the frames and sashes of the doors and windows". Damage which was not within the scope of this work constitutes "resulting damage to other insured property".

[158] In my view, the tasks which I refer to as "ancillary" were included in the contract for the purpose of preventing "resulting damage to other insured property". Therefore, any damages resulting from Pleasantview's failure in carrying out these tasks, such as the damage to the carpets, properly constitute "resulting damage".

[159] Pleasantview was not retained to work on the thermoseal glass window units, the carpets, or the exterior light fixtures. The damage to this property resulted from the restoration work to the wooden portions of the house as set out in the scope of the contract and this damage is therefore properly classified as "resulting damage to other insured property" and is not subject to the "property while being worked on" exclusion.

[160] It can be argued that since the court has found that restoration of the doors and windows was included within the scope of the contract, then it should also find that the damage to the glass thermoseal units should be included in the "property while being worked on" because these units comprised part of the doors and windows. I have decided against adopting such an interpretation. Pleasantview was retained to refurbish and restore the exterior *wooden* portions of the house, and not any other portions of the house such as the

light fixtures, door fixtures or glass. The scratching to the glass thermoseal units in the windows and doors resulted from Pleasantview's attempts to restore the wooden perimeter areas around the glass and not from any work carried out directly to the glass. Exclusion clauses should receive a narrow interpretation and exceptions thereto should be interpreted broadly. The glass units should therefore be covered as "resulting damage to other insured property".

3. The "Scratching" Exclusion…Is the damage to the thermoseal units excluded because it is subject to the "Scratching" Exclusion?

[161] The defendants claim that the policy excludes damage caused by scratching. There is no dispute that all windows, doors and light fixtures were scratched and pock-marked, or marred.

[162] The policy provides as follows:

> LOSSES EXCLUDED
>
> We do not insure:
>
> wear and tear, mechanical breakdown (except as provided by Food Freezer Coverage), scratching, marring, gradual deterioration, latent defect, dampness or dryness of atmosphere, corrosion, rust, wet or dry rot, moulding, extremes of temperature (except for exterior dwelling building glass), and inherent vice.

[163] The plaintiff submits that this exclusion is sometimes referred to as the "wear and tear" exclusion. Policies of property insurance do not cover wear and tear because they are not unforeseen or unexpected occurrences. They are not fortuitous or accidental.

[164] In his text on property damage claims, Richard Krempulec Q.C. comments that an all-risk property policy should not really have to specifically exclude wear and tear because the words establishing coverage in an all-risk policy, such as "accidental", "sudden", and "unexpected", already preclude damage caused by wear and tear. Richard Krempulec Q.C. states:

> … damage caused by wear and tear is not caused by an 'occurrence', that is to say, a single happening or event, it is caused by a gradual process of external erosion or internal decay and, as such, is not covered by [the policy] conditions.
>
> Richard Krempulec Q.C., Property Damage Claims Under Commercial Insurance Policies (Toronto: Canada Law Book, looseleaf update to Sept. 2012) at para. 7:50, quoting from Nourse L.J. in The "Alexion Hope", [1988] 1 Lloyd's L.R. 311 at 319 (C.A.), Respondent's Authorities, Tab 2.

[165] The word "scratching" is not defined in Ms. Monk's policy of insurance. Because it is grouped in the same sentence as "wear and tear", however, it is my view that it should be interpreted in relation to the *ejusdem generis* principle ("of the same kind, class or

nature"). Accordingly, the "scratching" referred to in the exclusion refers to scratching "caused by a gradual process of external erosion or internal decay". All of the terms in the wear and tear exclusion refer to a gradual wear process as opposed to a sudden and fortuitous event.

[166] At paragraph 15 of Mr. Sparlings March 14, 2013 report he states:

> The scratches on the window surfaces had multiple swirls or linear abrasions. The scratching was common along the edges of window panes. This damage pattern was likely caused by sanding equipment. … Based on the damage to the windows at the monk residence, the masking was either not present or was insufficient to prevent sanding damage to the windows. … the scratches to the glass of the doors and windows occurred due to the failure of Pleasantview to follow industry standard practice and mask the doors/windows prior to beginning the restoration process.

[167] At page 2 of his August 30, 2013 report Mr. Pedersen states:

> The cinch marks are consistent with the motion of an orbital sander held at an angle to the glass. This would be the case if someone were trying to machine sand the wood around the glass… The window damage was caused by sanding.

[168] In my view, the scratching of the windows was not a result of wear and tear, it was the result of an intentional act i.e. the use of an orbital sander intended for the refinishing of wooden sashes. It is therefore not excluded as per the terms of the "scratching" exclusion.

[169] With respect to the window scratching, I note that it was not seriously contested at trial that the windows and doors were rendered a total loss by the scratching alone. At page 16 of his report Mr. Sparling states:

> "..this scratching warranted removal and replacement of the affected windows/doors. As the majority of the windows and doors were affected, we would recommend that all doors and windows be replaced to maintain uniform appearance of the residence"

The Policy Exclusions: Summary and Conclusions

[170] Farmers' relies on three exclusions to deny coverage to the damage to Ms. Monk's log home.

[171] Ms. Monk's policy was an all risk-all perils policy and as such the coverage provisions are to be construed broadly, and the interpretation of the exclusion clauses is to be narrow.

[172] With respect to the "faulty workmanship" exclusion I find that this exclusion does not apply to deny coverage. Consistent with the interpretation given to this exclusion by the Supreme Court in *Ledcor*, this exclusion only provides indemnity to a homeowner for the cost of re-doing the faulty workmanship, which in this case was the cost of restoring the logs, the board and batten and the wooden portions of the doors and windows. The damage to the home did not fall within the scope of this work. Accordingly, the damage constituted "resulting damage", and the damage is not included in this exclusion.

[173] With respect to the "property while being worked on" exclusion, I find that the damage to the carpets and the light fixtures was not excluded from coverage because the carpets and light fixtures did not constitute property which was being worked on. This damage comprises "resulting damage to other insured property". I find as a fact that the parties had agreed that the wooden frames and sashes of the doors and windows were to be included in the restoration work, and that they were destroyed as a result of the stripping processes used by Pleasantview. Accordingly, this damage is subject to the "property while being worked on" exclusion. However, Pleasantview was not retained to work on the glass thermal pane units and the damage to these units therefore constituted "resulting damage to other insured property". I also find that the thermal pane glass units in the windows and doors had been so seriously damaged by Pleasantview, as a result of scratching and seal failure, that Ms. Monk had no recourse but to replace all of her windows and doors and the cost of this replacement is therefore covered as "damage to other insured property".

[174] With respect to the "scratching" exclusion, I find that this exclusion does not apply to deny coverage to the damage to the windows. This exclusion applies to scratching caused by wear and tear over a period of time, not to fortuitous damage caused by faulty workmanship to other portions of the house.

[175] In conclusion, I find that these three coverage exclusions do not apply to deny coverage to Ms. Monk for the damages to her home.

IV. Assessment of Damages (on a Replacement Cost basis)

[176] As noted above, Ms. Monk has claimed damages totalling $124,448.87.

[177] The evidence is that Ms. Monk replaced her first and second floor carpets at a total cost of $9,180.30 in October, 2010. She has not yet replaced the basement carpet but provided the court with an estimate to replace this carpet in the amount of $6,396.02. I find the assessment of these replacement costs to be fair and reasonable.

[178] Ms. Monk replaced her exterior lights for a cost of $1,501.64 and I find the cost of replacing these lights to be reasonable as well.

[179] When Ms. Monk began to experience difficulties with her exterior doors she replaced the hardware on these doors in order to ensure that they would stay closed, at a cost of $868.88. I accept this amount as being reasonable.

[180] Ms. Monk replaced her doors and exterior doors in the summer of 2016. She replaced her wooden doors with fiberglass doors at a cost of $26,871.40. She provided an invoice dated June 23, 2016 indicating that she replaced her windows with aluminum clad clear pine windows (inswing) at a cost of $83,254.57, inclusive of installation costs. However, because the windows she purchased were an upgrade she is claiming the lesser sum of $63,306.27 for her windows. This lesser amount is supported by an estimate from Window Works Muskoka which Ms. Monk alleges are for windows of similar quality and kind to the windows which she replaced. The cost of replacing the hardware on the doors was $3,542.52. In addition, she claims the sum of $4,140.84 as additional costs for labour and materials re doors and hardware and the sum of $8,640 for additional trim repair and staining of the windows.

[181] I calculate that the total claimed by Ms. Monk for the replacement of her windows and doors, including HST and labour is $106,501.83.

[182] I note that the amount Ms. Monk now claims for the replacement of her windows and doors is significantly more than the amount she initially claimed. In a letter from her lawyer dated October 12, 2011 she claimed the amount of $68,373.86. This sum was the average of two estimates enclosed with that letter.

[183] One of these estimates enclosed with the letter was from Window World, a Bracebridge, Ontario company. This estimate totalled $60,087.75, inclusive of tax and installation for the replacement of her windows and doors. The second estimate was from Muskoka Window and Doors and totalled $76,659.17, inclusive of labour, material and taxes.

[184] Ms. Monk testified that she was not prepared to purchase her replacement doors and windows from Window World because this company did not have a showroom where she could see the windows.

[185] Mr. Albert Willis, the owner of Window World testified that the windows referenced in his estimate were manufactured by Ross Windows and Doors, a local Muskoka based company. The windows and doors were of similar kind and quality to the windows in Ms. Monk's house. He stated that he would have been pleased to make arrangements to have Ms. Monk attend at the premises of Ross Windows and Doors and view the windows and doors for herself in its showroom; in fact if she was interested he would have made arrangements for her to have a tour of the manufacturing facility.

[186] Clearly, the windows and doors purchased by Mr. Monk represented an upgrade from her existing windows and doors. In my view, the initial estimates which accompanied Ms. Monk's lawyer's letter in 2011 represent a fair and reasonable cost for replacing Ms. Monk's doors and windows. They are of similar kind and quality and represent the costs

of replacement in 2011. I assess the replacement cost at $68,373.86, being the midway point between the two estimates and being the amount she initially claimed.

V. Has the Plaintiff failed to comply with Statutory Conditions? If so, is she entitled to relief from forfeiture?

[187] The defendants submit that Ms. Monk's claim should be denied because she failed to comply with the following two statutory conditions of the policy:

> **Statutory Condition #6**
>
> Upon the occurrence of any loss of damage to the insured property, the insured shall, if the loss or damage is covered by the contract, in addition to observing the requirements of conditions 9, 10, 11:
>
> a. forthwith give notice thereof in writing to the insurer;
>
> b. deliver as soon as practicable to the insurer a proof of loss verified by a statutory declaration,
>
> (i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amounts of loss claimed,
>
> **Statutory Condition #11**
>
> APPRAISAL – In the event of disagreement as to the value of the property insured, the property saved or the amount of the loss, those questions shall be determined by appraisal as provided under the Insurance Act before there can be any recovery under this contract whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefore is made in writing and until after proof of loss has been delivered.

1. Notice Condition

a) Did Ms. Monk give notice of her damages "Forthwith"?

[188] I have already given reasons for rejecting Ms. Monk's evidence that she notified Ms. Bissell of the damages to her property on three occasions prior to September 2, 2011, and

for my finding that the first time Ms. Monk gave notice of this claim to Muskoka was during the meeting at Muskoka's offices on September 2, 2011.

[189] The evidence is that Ms. Monk became aware that the staining of her carpets could not be removed in late December, 2008 or early January, 2009. In my view, the terms of her insurance policy triggered an obligation on her part to report the damage to her insurer at that time, but she failed to do so.

[190] By April or May, 2009 Ms. Monk was aware that the scratching of the glass was serious enough to warrant the repair or replacement of her windows and doors.

[191] Ms. Monk was under an obligation to report this damage to her insurers in April or May of 2009. She failed to report this damage forthwith as required.

[192] By January, 2010 Ms. Monk was aware that the structural integrity of the wooden frames of her doors had been compromised and that she had a serious problem with her thermal glass window pane units fogging up. She also failed to report this damage to the insurer at that time.

[193] The evidence which I accept is that Ms. Monk waited more than two and a half years from the time she first realized she sustained damages i.e. the carpet damage before reporting this damage to her broker. She waited more than two years before reporting the scratching damage and she waited approximately 20 months before she reported the damage to the doors and thermal glass seals.

[194] In my view, Ms. Monk failed to provide notice of her damage "forthwith" as required by Statutory Condition No. 6 and she is therefore in breach of this condition.

b) Is Ms. Monk entitled to Relief from Forfeiture in relation to her failure to provide Notice Forthwith?

i. Relief from Forfeiture Generally

[195] Equity provides some relief from forfeiture. This relief has been codified in s.129 of the *Insurance Act* and s. 98 of the *Court of Justice Act*. These sections are reproduced as follows:

> Section 129 of *Insurance Act*
>
> 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. R.S.O. 1990, c. I.8, s. 129.

Section 98 of the *Courts of Justice Act*

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

[196] In *Ontario (Attorney General) v. 8477 Darlington Crescent*, 2011 ONCA 363, the court explained the purpose behind the statutory provisions providing for relief from forfeiture in the following terms:

> 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. (at para. 86-87)

[197] 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…see *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.,* [1989] 2 S.C.R. 778, at p. 783.

[198] Section 129 can be distinguished from Section 98 in that it provides relief only with respect to the failure to comply with the statutory or contractual condition as to proof of loss in an insurance policy. It does not apply to all policy conditions. Section 98 provides for relief from forfeiture generally.

ii. Is the Plaintiff's failure to comply with the statuary condition "Non-compliance" or Imperfect compliance"?

[199] With respect to the application of section 129, courts have held that relief is only available in circumstances where there has been *imperfect* compliance with a statutory condition. This section does not apply in circumstances were there has been *non-compliance*.

[200] In *Kozel v. Personal Insurance Co*. [2014] O.J. No. 753 ("*Kozel*") LaForme J.A. of the Ontario Court of Appeal addressed the non-compliance/compliance distinction and its applicability to sections 129 and 89 as follows:

> 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. 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.

[201] The defendants argue that Ms. Monk's failure to provide notice prior to September 2, 2011 constitutes a case of non-compliance and relief from forfeiture is therefore not available under either section 129 or section 98.

[202] I agree that the difference between imperfect compliance and non-compliance is crucial for the purposes of the relief against forfeiture analysis. However, I am not convinced that Ms. Monk's failure to give notice of her claim in a timely manner constitutes non-compliance in the circumstances of this case. In my view, the facts and circumstances giving rise to the decision in *Stuart v. Hutchins,* referred to by LaForme J.A., can be distinguished from the facts and circumstances which are before the court here.

[203] In *Falk Brothers Industries Ltd* v. *Elance Steel Fabricating Co*., [1989] 2 S.C.R.778 ("*Falk Brothers"*) McLachlin J. (as she then was) explained at par. 19 that 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". In the context of relief from forfeiture, the focus should be 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.

[204] In *Falk Brothers* the court was considering s. 109 of the *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26 which is a similar provision to s. 129 of the *Ontario Insurance Act*. 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. After reviewing the case law McLachlin J. observed that there is a difference between the failure to give timely notice of a claim and the failure to institute an action with the prescribed time period. At par. 20 of her decision she states that "case law has generally treated failure to give notice of claim in a timely fashion as imperfect compliance

whereas failure to institute an action within the prescribed time period has been viewed as non-compliance, or breach of a condition precedent".

[205] McLachlin J. concludes her discussion at paragraphs 24 through 26 with the following comments:

> 24 I agree that failure to give notice of claim within a given period is a less serious breach than failure to bring an action within a stipulated time. I also agree that it relates to "proof of loss" or "other matter or thing required to be done or omitted by the insured with respect to the loss". I am therefore of the view that relief from forfeiture can be granted in respect of delayed notices of claims.
>
> 24 For these reasons, I conclude that the failure to give notice of claim within the prescribed time period constitutes imperfect compliance rather than non-compliance and that Elance is eligible to claim relief from forfeiture in this case.
>
> Conclusion
>
> 25 In summary, I conclude that s. 109 of the Saskatchewan Insurance Act is not confined to statutory conditions, and that failure to provide notice of claim in a timely fashion is imperfect compliance under s. 109. It follows that the court has the power to grant relief under s. 109.

[206] In my view, *Stuart v. Hutchins* can be distinguished from the case involving Ms. Monk on the basis that the insurance policy under consideration in *Stuart and Hutchins* was a "claims made and reported" policy. Ms. Monk's policy was an occurrence based policy. In his decision in *Stuart and Hutchins*, Moldaver J.A. stressed the conceptual difference between "occurrence" policies and "claims made and reported" policies. He referred to the notice provision in the "claims made and reported" policies as "integral". In *Stuart v. Hutchins* the plain language in the contract identified the relevant contractual term as a condition precedent, and the failure to comply barred a right of action, and was therefore more than just imperfect compliance with a term of the contract.

[207] In *Kozel, supra,* LaForme J.A. made the following comments in considering the applicability of the *Stuart and Hutchins* decision to other cases:

> 50 I believe the decision in *Stuart* should be given a narrow application. A court should find that an insured's breach constitutes non-compliance 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.

[208] As in the *Falk Brothers* case, Ms. Monk's failure was a failure to give timely notice; it was not failure to bring an action within a prescribed time. On the above analysis, I find that Ms. Monk's breach of Statutory Condition No. 6 constitutes imperfect compliance rather than non-compliance and she is therefore eligible to claim relief pursuant to section 129 of the *Insurance Act*.

c) Application of relief from forfeiture factors (with respect to the failure by Ms. Monk to comply with Statutory Condition regarding Notice)

[209] A court must consider three factors in exercising its discretion to grant relief from forfeiture: (1) the conduct of the applicant, (2) the gravity of the breach, and (3) the disparity between the value of the property forfeited and the damage caused by the breach…see *Saskatchewan River Bungalows v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.) ("*Saskatchewan River Bungalows*").

i. The Conduct of the Applicant - Was it Reasonable?

[210] This first consideration "requires an examination of 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" …see *Buurman v. The Dominion of Canada General Insurance Company*, 2015 ONSC 6444, 2015 CarswellOnt 15902 ("*Buurman*") at para. 30.

[211] Ms. Monk submits that she acted reasonably toward Farmers'. She testified that she spoke to her broker, Marcia Bissell with respect to this loss, in January 2009, April or May 2009, and in January 2010. I have provided reasons above why I reject this evidence. I find as a fact that the first time she spoke to Ms. Bissell about the damages caused by Pleasantview was on September 2, 2011. This was a period of approximately 2 years and 9 months after she discovered the damage to her carpets.

[212] Notwithstanding the fact that Ms. Monk alleges that Ms. Bissell informed her on each of these three occasions that the damage was the responsibility of Pleasantview, she admits that she did not take any steps to seek recovery for her damages from Pleasantview following these three alleged conversations. In fact, she agrees that she did not even speak to anyone from Pleasantview from early January, 2009 until July 28, 2011, a period of more than two and a half years. Moreover, she has not provided the court with a reasonable explanation for her failure to pursue the issue of the damages to her house with the contractor. The fact that Mr. Laskey's employment was terminated in 2009 and that Mr. Gasson was a "nice man" who sang in a community singing group does not constitute a reasonable explanation.

[213] Ms. Monk was notified on September 8, 2011 that her claim was denied because "the situation regarding damages to the home were at least two years ago". Thereafter, she consistently referred to the date of discovery of her damages as 2010 in her correspondence and communications with Farmers'. I have found that her evidence with

respect to the date of discovery and her alleged reporting of the damages to her broker was contradictory and inconsistent, and that it was self-serving.

[214] In my view, Ms. Monk's conduct, including her conduct in the aftermath of her breach of condition No. 6 does not meet the reasonableness test. She has failed to provide a reasonable explanation for her failure to provide notice of her potential claim "forthwith", and she has attempted to escape the consequences of her late notice by attempting to mislead her insurer with respect to the date she discovered her damages.

ii. Gravity of the Breach…Prejudice

[215] Assessment of the gravity of the breach "requires an assessment of both the nature of the breach itself and the impact of that breach on the contractual rights of the other party" …see *Buurman*, *supra*, at para. 35.

[216] In my view, the insurer has suffered prejudice as a result of Ms. Monk's delay in reporting the loss in a number of ways.

[217] Firstly, Farmers' lost the ability to investigate the circumstances and value of the loss at the date of occurrence.

[218] Secondly, the insurer has lost the ability to take early remedial or mitigating action to reduce its potential exposure, and the scope of the loss. The insured admitted at trial that by the time the loss was reported she had already replaced her carpets, light fixtures, and painted her windows, and therefore the insurer's independent adjuster could not inspect these damages.

[219] The insurer also suffered prejudice as a result of the potential loss or its right to subrogate against the at-fault contractor, as that action was likely statute barred when she reported the damage. Even if the insurer had been able to bring a subrogated claim against Pleasantview, its position would have been prejudiced by the lengthy delay in bringing such an action. I note for example that Mr. Gasson has passed away and he would not have been available to testify. Although there was evidence at trial that Ms. Monk issued a claim against Pleasantview on November 14, 2011, Ms. Monk led no evidence concerning the prospects of any recovery against this company or whether it was insured for damage claims.

[220] This is the type of prejudice from lack of notice that the court in *Schmitz* v *Lombard General Insurance Company of Canada*, 2014 ONCA 88 ("*Schmitz*") was addressing, when it commented on the insurers' ability to rely on a timely notice provision in the context of an OPCF 44R claim. Applying s. 5 of the *Limitations Act*, 2002, S.O 2002, c.24 the court found that the limitation period does not begin to run until a day after the insured makes a claim for indemnity.

[221] The insurer in *Schmitz* expressed concern that ruling as such would allow an insured to delay the triggering of the limitation indefinitely at significant prejudice of the insurer. In response to that concern, the Court of Appeal stated that an insurer can protect itself by

including a timely notice requirement in the policy. The court stated the following at par. 21 of the decision:

> [21] Furthermore, we do not agree with Lombard's submission that this interpretation prejudices underinsurers facing claims under the OPCF 44R. There are a number of ways in which underinsurers can protect their interests including those provided in s. 14 of the OPCF and through *a provision requiring the insured to provide timely notice to the insurer when he knew or ought to have known he was underinsured* [emphasis added].

iii. The Proportionality Analysis: What is the Disparity between the value of the property forfeited and the damage caused by the Breach?

[222] I estimate the value of the property forfeited to be approximately $100,000. Although this is a significant amount of money, in my view the prejudice to Farmers' resulting from Ms. Monk's failure to provide timely notice is also significant. Farmers' may very well have been able to take steps or make arrangements with Pleasantview to recover or mitigate its loss if it had received timely notice of the claim.

[223] In conclusion, I have considered the factors set out in *Saskatchewan River Bungalows, supra*, and on the facts before me I am not satisfied that this is an appropriate case to grant relief from forfeiture.

2. Appraisal Condition

[224] I have found that the plaintiff has breached the statutory notice condition and is not entitled to relief from forfeiture in relation thereto. In the circumstances, it is not necessary for me to decide whether Ms. Monk has failed to comply with this condition.

[225] If it was incumbent on me to do so, I would decide this issue in Ms. Monk's favour. The majority of the damage sustained by Ms. Monk was in relation to her doors and windows. At the time Ms. Monk replaced her windows and doors she was engaged in litigation with Farmers', which had denied her claim. In the circumstances, I find that it was not unreasonable for her to replace these items without first seeking an appraisal.

E. FINAL DECISION

[226] Although I am satisfied that Ms. Monk has coverage under her insurance policy for her losses, her failure to provide timely notice of her damages constitutes unreasonable conduct on her part and has resulted in substantial prejudice to the insurer. She is therefore not entitled to relief from forfeiture and I am therefore dismissing her claim against Farmers'.

[227] Furthermore, I do not accept Ms. Monk's evidence that she informed Muskoka on three occasions, prior to September 2, 2011 that she had sustained damages and that she was

informed by Muskoka representatives that she did not have coverage for her damages. Her claim against Muskoka is also dismissed.

F. COSTS

[228] If the parties cannot agree on costs, they can make written submissions in relation thereto. Submissions are not to exceed 3 pages, exclusive of attachments. The parties have 15 days from the release of this judgment to file such submissions with the court and serve each other. Thereafter they have an additional 15 days to file responding submissions. If no submissions are received within 15 days, this judgment is deemed to be without costs.

E.J. Koke (SCJ)

Date: June 15, 2017

CITATION: Monk v. Farmers and Muskoka Ins., 2017 ONSC 3690

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Diana Lynn Monk,

Plaintiff (Responding party)

– and –

Farmers' Mutual Insurance Company (Lindsay),

Defendant (Moving party)

– and –

Muskoka Insurance Brokers Ltd.,

Defendant (Moving party)

REASONS FOR JUDGMENT

E.J. Koke SCJ

Released: June 15, 2017