# COURT OF APPEAL FOR ONTARIO

CITATION: Monk v. Farmers' Mutual Insurance Company (Lindsay), 2019 ONCA 616
DATE: 20190719
DOCKET: C64078

Feldman, Brown and Miller JJ.A.

BETWEEN

Diana Lynn Monk

Plaintiff (Appellant)

and

Farmers' Mutual Insurance Company (Lindsay)
and Muskoka Insurance Brokers Ltd.

Defendants (Respondents)

David A. Morin, for the appellant

Martin P. Forget and Earl J. Murtha, for the respondent, Farmers' Mutual Insurance Company (Lindsay)

Demetrios Yiokaris and Sydney Hodge, for the respondent, Muskoka Insurance Brokers Ltd.

Heard: February 20, 2019

On appeal from the judgment of Justice Edward J. Koke of the Superior Court of Justice, dated June 15, 2017, with reasons reported at 2017 ONSC 3690, 70 C.C.L.I. (5th) 94.

**BROWN J.A.:**

## I. OVERVIEW

[1] The insured, the appellant Diana Monk, owns a log house in Bracebridge, Ontario. In 2008, she wanted to refinish the exterior of the logs. To do the work, she hired Pleasantview Log Restoration Systems Inc. ("Pleasantview"). The work largely was completed by the end of 2008. During and after the restoration work, Ms. Monk noticed some damage to the interior and exterior of the house, which she attributed to the cleaning.

[2] Ms. Monk had a home property insurance policy with Farmers' Mutual Insurance Company ("Farmers'"). She had obtained the insurance through her local broker, Muskoka Insurance Brokers Ltd. ("Muskoka Insurance").

[3] There is no dispute that on September 2, 2011 Ms. Monk informed Muskoka Insurance of damage she claimed had resulted from Pleasantview's work. On September 8, 2011 Muskoka Insurance informed Ms. Monk that Farmers' regarded any claim under the Policy as time-barred. Ms. Monk's lawyer sent Farmers' a formal notice of claim on October 12, 2011 and commenced this action for indemnification under the Policy on November 14, 2011.

[4] Her claim against Muskoka Insurance sounds in breach of fiduciary duty and negligence, asserting that the company failed to ensure that she was properly advised with respect to her rights of coverage under the Policy. Ms. Monk contended that prior to September 2, 2011, she had informed Muskoka Insurance

on three occasions about the damage, but each time its representative told her that the Policy did not provide coverage.

[5] In addition to the amount of her loss, Ms. Monk sought aggravated and punitive damages against both Farmers' and Muskoka Insurance.

[6] In 2014, the respondents moved for summary judgment dismissing Ms. Monk's action on the basis that exclusions in the Policy denied coverage. The respondents were successful on their motion: 2014 ONSC 3940, 37 C.C.L.I. (5th) 92. However, this court set aside the summary judgment, holding that the resulting damage to the insured property for which Ms. Monk sought indemnification "is covered by the policy whether or not that damage is the result of faulty workmanship": 2015 ONCA 911, 128 O.R. (3d) 710, at para. 42. This court went on to state, at para. 42, that "the remaining question is whether, or to what extent, [Ms. Monk's] action is barred by operation of the *Limitations Act"*.

[7] The nine-day trial conducted in 2017 was not confined to issues relating to the timeliness of Ms. Monk's claim for loss. Coverage issues once again were raised by the respondents.

[8] The trial judge dismissed Ms. Monk's claim holding, at paras. 226 and 227 of his lengthy reasons:

> 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'.
>
> 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.

[9] Although he dismissed her claim, the trial judge assessed Ms. Monk's damages at $86,320.70: [carpets: $15,576.32 + exterior lights: $1,501.64 + door hardware: $868.88 + windows and doors: $68,373.86]

[10] The trial judge ordered Ms. Monk to pay partial indemnity costs of $175,000 to Farmers' and $115,000 to Muskoka.

[11] Ms. Monk appeals the dismissal of her claim and seeks leave to appeal the awards of costs. She asks for the following: (i) a reversal of "the trial judge's finding that Ms. Monk did not notify her broker forthwith three times upon discovering damage and further damage"; (ii) relief from forfeiture; (iii) damages for indemnification under the policy in the amount of $124,448.47; and (iv) an award of substantial indemnity damages of the action in her favour.

[12] Farmers' cross-appeals. Although it obtained judgment in its favour dismissing Ms. Monk's action, the insurer asks that that "judgment be set aside" and, instead, judgment issue declaring that Ms. Monk's claim for property damages

is excluded by the terms of the Policy. In effect, Farmers' appeals not from the judgment but from the trial judge's reasons.

[13] I will deal with the issues in the following order:

(i) whether the trial judge erred in holding that the Policy covered Ms. Monk's claim;

(ii) whether the trial judge committed reversible error in finding that Ms. Monk did not notify her broker forthwith three times upon discovering damage;

(iii) whether the trial judge erred in denying Ms. Monk relief from forfeiture;

(iv) whether the trial judge erred in assessing Ms. Monk's damages at $86,320.70, instead of the $124,448.47 she requested; and

(v) whether the trial judge erred in his award of costs.

[14] For the reasons that follow, I would dismiss Ms. Monk's appeal, grant her leave to appeal the trial judge's cost awards, vary those cost awards, and dismiss Farmers' cross-appeal.

## II. THE LOSS AND THE CLAIM

[15] Ms. Monk purchased her log home in 1997. She then discovered that the roof leaked. She sued the vendor. Her action settled at trial in 2005.

[16] Ms. Monk had insured her house with Farmers' through Muskoka Insurance since 1999. Prior to the events in this action, Ms. Monk had submitted insurance

claims regarding damage to the house to Farmers', through Muskoka Insurance: one claim was paid; coverage was denied on the other.

[17] In June 2008, she hired Pleasantview to restore the exterior logs and wooden surface areas of her home using a power wash process. Under the contract, Pleasantview was to seal all areas of the building where water from the washing process might enter the structure and then coat the exterior with a cleaning compound, agitated with bristle brushes, rinse, repeat, and then apply a neutralizer solution. As well, the contract called for Pleasantview to thoroughly ground or sand all exterior log surfaces to remove any loosened surface wood fibres. Finally, Pleasantview was to apply coats of a finisher. As part of the clean up after its work, Pleasantview agreed to clean thoroughly all windows and glass doors on the interior and exterior. The contract price for the restoration services was just under $40,000.

[18] Pleasantview warranted "the integrity of materials and workmanship for a period of 36 months after completion." However, the warranty would not come into full force until Ms. Monk paid Pleasantview in full.

[19] Pleasantview commenced its work in August 2008. With the onset of cold weather and snow in November or December 2008, Pleasantview left the site; it never returned.

[20] By December 2008, Ms. Monk had paid all but $4,851.10 of the contract price. She refused to pay the balance, taking the position that Pleasantview had not completed the work contracted for and had failed to properly clean the interior carpets stained by the power wash.

[21] According to Ms. Monk, sometime in April or May of 2009, while cleaning the exterior of her windows, she noticed for the first time that a considerable number of the glass panes in the windows and exterior doors were scratched and pock-marked. Many of the scratches were circular in shape and located close to the edges of the window sashes. She attributed the scratching to the work performed by Pleasantview but did not report the damage to the contractor.

[22] Ms. Monk noticed other damages, which included: the finishing fluid had been spilled on many of the windows, exterior doors, light fixtures, landscape rocks, and decking, and on the screens of her wooden screen doors; most of the green wood stain on her wooden window sashes and doors had been removed; 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. Ms. Monk sanded and applied a fresh coat of brown stain to the window sashes and doors during the summer of 2009.

[23] With the onset of cold weather in the winter of 2009/2010, Ms. Monk noticed that condensation was forming between the panes in many of the thermalseal

windows of her home. As well, she observed that some of the large thermalseal windows in the exterior doors had come loose and were slipping down into the interior of the doors. The frames of the doors were also loose, causing the doors to sag and lose their shape, and it was becoming difficult to open and close the doors.

[24] Ms. Monk testified that during this period of time she contacted Muskoka Insurance three times to inform the broker about the problem. The trial judge did not accept her evidence on this point.

[25] According to Ms. Monk, on July 28, 2011, knowing that the three-year warranty from Pleasantview would soon expire, she delivered a warranty claim to Pleasantview. Her claim was a detailed one: it listed the deficiencies and included 40 pages of photographs. In August 2011, Pleasantview provided Ms. Monk with a written assurance that someone would inspect her property and the company would stand behind its work. Ms. Monk testified that no one from Pleasantview ever came to her home to do so.

[26] On September 2, 2011, Ms. Monk went to the office of Muskoka Insurance and asked about making a claim. On September 8, 2011, Muskoka Insurance sent Ms. Monk an email advising that Farmers' had denied her claim on the basis that the damages to the home had occurred more than two years before.

[27] Ms. Monk thereupon retained a lawyer who, on October 12, 2011, submitted a formal letter claim to Farmers' for indemnity under the Policy. The letter contended that Ms. Monk had discovered the damage in January 2010. It stated that Pleasantview had restored the logs in a way that caused collateral damage to other property, namely: the windows and doors; exterior lights; door knobs; and indoor carpeting. Ms. Monk claimed $82,924.48 under the Policy.

[28] On November 14, 2011, Ms. Monk commenced two actions. First was this action against both Farmers' and Muskoka Insurance seeking $150,000 "for collateral damage to her home caused by a negligent contractor" and $150,000 in general and aggravated damages. Her claim for "collateral damages" covers the replacement of: damaged carpeting; exterior lights and doorknobs on existing doors; doors; windows; and additional trim repair and staining. As particularized in a July 2012 Proof of Loss, the claim totalled $105,024.92; as particularized at trial, it totalled $124,448.47, the difference turning largely on differing estimates for the replacement of doors and windows.

[29] The second action she commenced was against Pleasantview for negligence and breach of contract.

## III. THE POLICY

[30] Under the Policy, Farmers' agreed to indemnify Ms. Monk "from loss by sudden and unexpected occurrences as described and limited in the Insured Perils

section of this policy and subject to the terms and conditions set out in the policy." Coverage included "the dwelling building and attached structures". Insured Perils were defined as "direct, accidental physical loss or damage subject to the EXCLUSIONS and CONDITIONS in this policy."

[31] Farmers' denied coverage for Ms. Monk's loss based on several exclusions in the Policy, only two of which are relevant to the insurer's cross-appeal:

(i) **Losses Excluded**, s. 2: "the cost of making good faulty material or workmanship" (the "Faulty Workmanship Exclusion"); and

(ii) **Property Excluded**, s. 4: "property … (ii) while being worked on, where the damage results from such process or work (but resulting damage to other insured property is covered" (the "Property Being Worked On Exclusion").

## IV. PROCEDURAL HISTORY

### Farmers' motion for summary judgment: Part I - 2014

[32] In 2014, Farmers' moved for summary judgment dismissing Ms. Monk's claim. Muskoka Insurance brought a companion motion, which adopted the positions advanced by Farmers': 2014 ONSC 3940, at para.6. The motion judge, who later was the trial judge, identified the issues as: (i) whether some or all of the property damage fell within the Faulty Workmanship Exclusion or Property Being Worked On Exclusion; or (ii) whether the action was statute-barred: at para. 27.

[33] The motion judge held that the Faulty Workmanship Exclusion included both damage from the work that forms the subject-matter of the contract with a contractor, such as Pleasantview, as well as other damages resulting from faulty workmanship related to the work. He found that the damage to Ms. Monk's house was excluded from coverage: at para. 43. The motion judge went on to state that assuming the damage was properly categorized as resulting damage, the exclusion of resulting damage from the Property Being Worked On Exclusion could not "extend coverage for such resulting damage in circumstances where the damage is caused by faulty workmanship." The motion judge concluded that "the insurance policy issued by the defendant Farmers' Mutual excludes coverage for the damages incurred by the plaintiff, Ms. Monk": at para. 53. Given those findings, he did not address the limitations defence advanced by Farmers' and Muskoka Insurance: at para. 51. He dismissed the action against both Farmers' and Muskoka Insurance.

**The 2015 decision of this court**

[34] Ms. Monk appealed the dismissal of her action. This court reversed the motion judge: 2015 ONCA 911. It interpreted the Faulty Workmanship Exclusion as excluding from coverage only direct damage and not the resulting damage flowing from faulty workmanship: at para. 36. As well, this court rejected, as an overly narrow interpretation of the resulting damage exception in the Property Being Worked On Exclusion, the motion judge's view that it only preserved

resulting damage coverage for a narrow range of events unrelated to faulty workmanship, such as damage caused by accident: at para. 38.

[35] This court then concluded, at para. 41, that the "resulting damage to insured property is covered by the policy whether or not that damage is the result of faulty workmanship." At paras. 42 and 43, it stated:

> In light of this conclusion, the remaining question is whether, or to what extent, the appellant's action is barred by operation of the *Limitations Act*. As I have said, for reasons he explained, the motion judge did not address this issue.
>
> Accordingly, for the reasons given, I would allow the appeal, set aside the order of the motion judge, and return the question whether the appellant's action is barred by reason of the *Limitations Act* to the motion judge for determination. [emphasis added.]

**Summary judgment motion: Part II - 2016**

[36] The motion judge released supplementary reasons for the summary judgment motion in May 2016 stating that the limitation period issue and the claim of breach of fiduciary duty against Muskoka raised significant credibility issues that were not appropriate to decide by way of summary judgment: 2016 ONSC 3488, 60 C.C.L.I. (5th) 159, at paras. 14-16. He dismissed the summary judgment motion and directed the action to proceed to trial. He stated that for the trial he would be "requesting submissions with respect to the issue of to (sic) what damage is properly classified as 'resulting damage'": at para. 19. That then led to the continued litigation of the coverage issue at trial.

[37] Ultimately, the trial judge found that the Policy's exclusions did not apply to deny coverage to Ms. Monk for the loss that she claimed. Farmers' cross-appeals from those findings.

## V. THE ISSUE ON THE CROSS-APPEAL: DID THE TRIAL JUDGE ERR IN HOLDING THAT THE POLICY COVERED MOST OF MS. MONK'S CLAIMED LOSS?

[38] In its cross-appeal, Farmers' submits that the trial judge erred by failing to apply the Faulty Workmanship and Property Being Worked On Exclusions to deny Ms. Monk's claim.

### Faulty Workmanship Exclusion

[39] In its 2015 decision, this court held that "resulting damage to insured property is covered by the policy whether or not that damage is the result of faulty workmanship": at para. 41. The following year the Supreme Court of Canada, in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, held that a "cost of making good faulty workmanship" exclusion in a builders' risk insurance policy excluded from coverage only the cost of redoing the faulty work contracted for: at paras. 4 and 5.

[40] In the present case, the trial judge concluded that the "cost of making good faulty material or workmanship" language in the Faulty Workmanship Exclusion should be interpreted to mean the cost of re-doing the work which comprised the

subject matter of the contract with Pleasantview. He held that all other damage properly fell within the scope of "resulting damage": at para. 132. He went to hold that as Ms. Monk's contract with Pleasantview did not require the contractor to install carpets, replace windows, doors or thermal pane glass units and exterior fixtures, the cost of the replacement of those items constitutes resulting damage and, subject to any other applicable policy exclusions, is covered by the Policy: at para. 137.

[41] Farmers' submits the trial judge made two reversible errors in reaching that conclusion: (i) he failed to apply this court's 2015 interpretation of the Faulty Workmanship Exclusion; and (ii) he erred in equating the reasonable expectations of a *Ledcor*-type builder's risk policy with that of parties to a homeowner's policy. I am not persuaded by either submission.

[42] First, Farmers' contends that when interpreting the Faulty Workmanship Exclusion in its 2015 decision, this court contrasted "direct damage" with "resulting damage": at para. 36. This court's use of the term "direct damage", Farmers' argues, means that any damage caused by the direct application of a tool, such as an orbital sander, to a window would constitute "direct damage" and therefore be excluded from coverage, even though the contract did not call for the contractor to apply the tool to the window.

[43] I do not accept that submission. It distorts the meaning of the 2015 decision. When that decision is read in its entirety, especially in light of the arguments advanced by the parties on that appeal, it is clear that this court equated “direct damage” with the cost of redoing the faulty work originally contracted for and then distinguished that cost from “resulting damage”.

[44] Moreover, once Farmers’ misreading of the 2015 decision is put to one side, much of the remainder of its written submissions on this issue amounts to nothing more than an attempt to interpret the Faulty Workmanship Exclusion as treating “resulting damage” as excluded damage, an interpretation specifically rejected by this court. Farmers’ did not seek leave to appeal the 2015 decision. No request was made for a five-person panel to hear the cross-appeal. Farmers’ is bound by the 2015 decision of this court.

[45] Second, the trial judge followed the approach adopted in *Ledcor* to reach the conclusion that “the cost of making good faulty material or workmanship” in the Faulty Workmanship Exclusion only excluded from coverage the cost of redoing the faulty work Ms. Monk had contracted for with Pleasantview. Recognizing that the type of policy at issue in this case – a homeowner’s property insurance policy – differed from that in issue in *Ledcor* – a builder’s risk policy – the trial judge conducted an interpretative process analogous to that used in *Ledcor*. He considered: the reasonable expectations of the parties; the need to avoid unrealistic results; and the need to ensure an interpretation consistent with the

interpretation of other insurance policies. In so doing, the trial judge appropriately applied the general rules of contract construction to the Policy's language.

[46] Farmers' real complaint is that it disagrees with the trial judge's conclusion about the reasonable expectations of the parties. It thinks it is wrong. I disagree. This is what the trial judge wrote about the reasonable expectations of the parties, at para. 131:

> 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.

[47] I see no error in that analysis. I agree with it.

**Property Being Worked On Exclusion**

[48] In applying this exclusion to the particular facts of this case, the trial judge: (i) determined what property was included in “property while being worked on” by ascertaining the scope of work contracted for by Ms. Monk; then (ii) assessed what damage resulted “from such process or work”; and (iii) finally, determined what damage fell within the exception for “resulting damage to other insured property.” He found that the work Ms. Monk contracted for with Pleasantview comprised the restoration of all the wooden surfaces of the house, including the logs, board, batten, and frames and sashes of the doors and windows: at para. 149. Damage to that property constituted damage resulting “from such process or work” and was excluded from coverage: at para. 153. Consequently, the “resulting damage to other insured property”, which was not subject to the exclusion from coverage, was the damage to the thermalseal glass window units, the carpets, and exterior light fixtures: at para. 159.

[49] Farmers’ challenges those findings on several grounds.

[50] First, Farmers’ contends that the trial judge made a palpable and overriding error by finding that Pleasantview “did not work directly on the glass panes.” It contends that since the evidence showed that tools used by Pleasantview touched the window panes, any damage caused thereby was “from such process or work” and, therefore, not covered by the Policy. I do not accept this submission. Like

Farmers' submission in respect of the Faulty Workmanship Exclusion, it is based on Farmers' misreading of judicial reasons. In para. 160 of his reasons, the trial judge stated:

> 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". [emphasis added]

[51] The trial judge obviously used the phrase "not from any work carried out directly to the glass" to mean that Pleasantview had not been contracted to work directly on the glass. The trial judge was not suggesting that Pleasantview's tools did not touch the glass panes. It is patent from his reasons that he was aware of such direct contact. The trial judge made no palpable and overriding error on this point.

[52] Next, Farmers' submits that the trial judge erred in limiting "property while being worked on" to the property Pleasantview was contracted to work on. I am

not persuaded by that submission. Farmers' cites no authority in support of that proposition. Moreover, if the meaning of "property while being worked on" was extended to cover any property beyond that subject to the contracted scope of work, little property would be left to fall into the exclusion – i.e. within the language, "but resulting damage to other insured property is covered".

[53] Third, Farmers' argues that the trial judge erred in determining what property was being worked on. Specifically, Farmers' contends that the trial judge made a reversible error meriting appellate intervention by differentiating between the wooden sashes of a window and the embedded glass pane, treating the former as property worked on and the latter not. I see no reversible error. This submission is simply a more fact-focused rehash of Farmers' argument above that the trial judge improperly interpreted "property while being worked on" as that within the contracted scope of work. I rejected Farmers' earlier argument; I would also reject this recasting of the same argument.

[54] I see no palpable and overriding error in the trial judge's findings about what fell within the category of "property while being worked on" and what property fell outside. I would not give effect to this ground of appeal.

**Disposition of Farmers' Cross-Appeal**

[55] For the reasons set out above, I am not persuaded that the trial judge erred in interpreting and applying the Faulty Workmanship and Property Being Worked

On Exclusions to the circumstances of this case. Consequently, I would dismiss Farmers' cross-appeal.

[56] I shall now turn to the issue that this court, in its 2015 decision, identified as the only remaining issue for trial: whether Ms. Monk's action was barred because of her delay in reporting the loss.

## VI. FIRST ISSUE ON THE APPEAL: DID THE TRIAL JUDGE ERR IN HIS FINDINGS OF FACT ABOUT WHEN MS. MONK FIRST NOTIFIED MUSKOKA INSURANCE OF HER LOSS?

### The issue stated

[57] A key issue in Ms. Monk's claims against both Farmers' and Muskoka Insurance concerned when she first notified them of her loss.

[58] Ms. Monk testified that she noticed the damages caused by Pleasantview's work over a period of time: (i) carpet damage in late 2008 and early 2009; (ii) scratches on glass panes and damages to exterior light fixtures in April or May 2009; (iii) the fogging of glass panes with the onset of the cold weather in the winter of 2009/2010; and (iv) the deterioration of the exterior doors during that winter.

[59] There is no dispute that Ms. Monk advised a Muskoka Insurance representative, Marcia Bissell, on September 2, 2011 about the damages she contended Pleasantview had caused. However, Ms. Monk gave evidence that she had told Muskoka Insurance about the damages on three prior occasions: a

January 2009 telephone conversation with Ms. Bissell in which she informed her of the carpet damage; a conversation with some other Muskoka representative in April or May 2009, when she told the person about the glass scratches; and a January 2010 telephone conversation with Ms. Bissell in which she advised of the fogging glass and deteriorating exterior doors. It was Ms. Monk's evidence that in these conversations Muskoka Insurance informed her that the Policy would not cover such damage. Ms. Bissell denied that the three conversations ever occurred.

[60] The trial judge preferred the evidence of Ms. Bissell to that of Ms. Monk. He held that the first time Ms. Monk spoke to Muskoka Insurance about the damage was on September 2, 2011: at para. 94.

[61] Ms. Monk submits that the trial judge erred in reaching that conclusion. She acknowledges that the trial judge accurately stated the evidence. However, she contends the trial judge committed a palpable and overriding error by concluding, based on those facts, that the three conversations did not occur.

**Analysis**

[62] Ms. Monk advances three reasons why the trial judge should have made a different credibility finding: (i) he did not properly assess the evidence; (ii) he erred in ruling inadmissible certain evidence from Ms. Monk's partner, Mr. Way Lem; and (iii) the trial judge's credibility finding resulted from a course of conduct by respondents' counsel that created an animus against Ms. Monk.

**Improper assessment of conflicting evidence**

[63] Appellate courts show great deference to findings of credibility made at trial, recognizing the special position of the trier of fact on matters of credibility, including the advantage enjoyed by the trial judge of seeing and hearing the evidence of witnesses: *R. v. W.(R.)*, [1992] 2 S.C.R. 122, at p. 131; *Kiskadee Ventures Ltd. v. 2164017 Ontario Ltd.*, 2016 ONCA 955, at para. 8. As stated in *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 26: “Rarely will the deficiencies in the trial judge’s credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal”.

[64] This high degree of deference stems, in part, from the recognition that assessing credibility is not a science: often it is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20. It follows that in respect of a finding of credibility by a trial judge, an appeal court must defer to the conclusions of the trial judge unless a palpable or overriding error can be shown. It is not enough that there is a difference of opinion with the trial judge: *Gagnon*, at para. 10.

[65] Accordingly, where detailed reasons display a strong grasp of the evidence and arguments and offer a full explanation for the findings of fact required, an

appellant seeking to reverse those findings must point to clear and significant errors in the fact-finding process articulated in those reasons, as credibility findings are particularly resistant to reversal on appeal: *Peart v. Peel Regional Police Services Board*, 217 O.A.C. 269(C.A.), leave to appeal refused, [2007] S.C.C.A. No. 10, at para. 157.

[66] In the present case, the trial judge gave extensive reasons to explain why he preferred the evidence of Ms. Bissell over that of Ms. Monk: at paras. 94 to 109. He considered the evidence of Ms. Monk and Ms. Bissell, including inconsistencies therein, written communications authored by them both, and the documentary evidence contained in Muskoka's files. As well, the trial judge considered the evidence given by Ms. Shirley Macdonald, a former Muskoka employee, about a conversation she overheard, perhaps in mid-2011.

[67] Amongst the numerous reasons the trial judge gave for rejecting Ms. Monk's version of events was the lack of any reference by her to any earlier reports of loss to Muskoka Insurance "in her email correspondence with Ms. Bissell following the September 2, 2011 meeting." Indeed, Ms. Bissell had emailed Ms. Monk on September 3, 2011, following their meeting, questioning the extent to which the Policy might cover any damage. The tenor of that email was that Ms. Monk's disclosure of a loss the day before was news to Ms. Bissell. Ms. Monk sent a detailed responding email on September 7, 2011. Nowhere in it did Ms. Monk hint that she had reported the loss on three prior occasions to Muskoka Insurance. It

is understandable that the trial judge would treat this as a telling factor in his credibility analysis.

[68] Ms. Monk asks this court, in effect, to perform a fresh assessment and weighing of the evidence in order to reach a different credibility finding. In my view, the record does not reveal that the trial judge made an error of law or principle or a clear and manifest error in the appreciation of the evidence. In those circumstances, I would not give effect to this submission.

**Exclusion of certain evidence of Mr. Lem**

[69] Ms. Monk called her partner, Mr. Lem, as a witness. During his examination-in-chief, he was asked several questions about “information provided by Lynn concerning insurance coverage issues” and what information he had “that the scratches [on the windows] were reported to the insurance broker”. Mr. Lem testified that the only information he had was that which Ms. Monk had told him. He continued by stating that “it sickened me because we weren’t covered by anything. That’s my understanding.”

[70] Farmers’ counsel objected to this line of questioning on the basis that it was inadmissible hearsay as Mr. Lem had no direct knowledge about whether Ms. Monk had reported any loss to Muskoka Insurance, which was a key disputed issue in the action. The trial judge sustained the objection. Ms. Monk submits he erred in so doing.

[71] I see no error. Whether Ms. Monk had reported her loss to Muskoka Insurance prior to September, 2011 was a material fact in issue. Mr. Lem had no personal knowledge of the issue – for example, he did not overhear Ms. Monk making a telephone call to Muskoka Insurance. His only source of information on the matter came from Ms. Monk, who had already testified. It is clear Ms. Monk sought to adduce Mr. Lem's evidence for the purpose of establishing the truth of her evidence that she had reported the loss to Muskoka Insurance and that Muskoka Insurance had advised she had no coverage. The proposed use of his evidence clearly was hearsay and Ms. Monk did not demonstrate any need for Mr. Lem to testify about what she had told him out-of-court. The trial judge did not err in excluding the evidence.

**Conduct of defence counsel**

[72] Finally, Ms. Monk submits that the trial judge's finding that she did not report the loss to Muskoka Insurance until September 2, 2011 was tainted and should be set aside because "the trial judge was subjected to nine days of constant, negative, belittling comments and suggestions from *two* defence counsel who took turns hacking away at Ms. Monk's character. (emphasis in original)". This created an "animus" against her.

[73] I would not give any effect to this submission. First, Ms. Monk does not submit that the trial judge fell into error by permitting respondents' counsel to

conduct cross-examinations that were unfair to her as a witness. Second, a review of the transcripts of the cross-examination of Ms. Monk discloses no objection by her counsel that she was being treated unfairly by respondents' counsel. Finally, no such suggestion was made to the trial judge by Ms. Monk's counsel in his closing submissions.

**Conclusion**

[74] For these reasons, I see no reversible error in the trial judge's credibility finding preferring the evidence of Ms. Bissell over that of Ms. Monk and, as a result, finding that Ms. Monk did not contact Muskoka Insurance regarding a loss prior to September 2, 2011. I would not give effect to this ground of appeal.

## VII. THIRD ISSUE: CLAIM FOR RELIEF FROM FORFEITURE

### A. The issue stated

[75] In its statement of defence, Farmers' asserted two time-related defences. First, it pleaded that Ms. Monk's claim was statute-barred by reason of the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. At trial, Farmers' abandoned that defence. Instead, it relied on the defence that Ms. Monk failed to report the damage "forthwith" and provide a proof of loss "as soon as practicable", as required by Statutory Condition 6 of the Policy. That condition states, in part:

> 6. Requirements After Loss
>
> (1) Upon the occurrence of any loss of or damage to the insured property, the Insured shall, if the loss or damage is covered by the contract…
>
> > (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. [Emphasis added.]

[76] Ms. Monk sought relief from forfeiture pursuant to s. 129 of the *Insurance Act*, R.S.O. 1990, c. I.8, which states:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

[77] The purpose of allowing relief from forfeiture in insurance cases is to prevent hardship to policy 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: *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778, at p. 783.

[78] The power to grant relief from forfeiture is a discretionary one. An appellate court is not at liberty to substitute its own discretion for that already exercised by the judge of first instance. Appellate interference requires the appellant to

demonstrate that the judge below: exercised his or her discretion on a wrong principle of law; failed to take into consideration a major element of the case; disregarded, misapprehended or failed to appreciate relevant evidence; or made a finding or drew an inference not reasonably supported by the evidence: *Cervo v. State Farm Mutual Automobile Insurance Co.* (2006), 83 O.R. (3d) 205 (C.A.), at paras. 56, 79 and 80.

[79] The principles regarding relief from forfeiture in the circumstances of a claim under an insurance policy were canvassed at length by this court in *Kozel v. The Personal Insurance Company*, 2014 ONCA 130, 119 O.R. (3d) 55. *Kozel* summarized the principles as follows:

(i) Relief from forfeiture under s. 129 of the *Insurance Act* is available 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", thereby restricting the availability of the section to instances of imperfect compliance with terms of a policy after a loss: at para. 58;

(ii) Relief from forfeiture pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, is available to contracts regulated by the *Insurance Act*: at para. 57;

(iii) *CJA* s. 98 generally operates where the breach of the policy occurred before the loss took place: at para. 58;

(iv) Although relief under the *Insurance Act* s. 129 and *CJA* s. 98 are not available where the breach consists of non-compliance with a condition precedent to coverage, a court should find that an insured's breach "constitutes noncompliance with a condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other instances, the breach will be deemed imperfect compliance, and relief against forfeiture will be available": at paras. 33 and 50;

(v) Where relief from forfeiture is available, 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": at paras. 51 and 59. This three-element test often is referred to as the "*Saskatchewan River"* or "*Liscumb*" test, from two of the cases in which it was articulated, *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 and *Liscumb v. Provenzano* (1985), 51 O.R. (2d) 129, at p. 137, affirmed (1986), 55 O.R. (2d) 404n (C.A.).

[80] The trial judge held that Ms. Monk breached Statutory Condition No. 6 by failing to give Farmers' notice of her damage "forthwith": at para. 194. He regarded her failure to give timely notice of the loss as a matter of imperfect compliance with the Policy, entitling her to claim relief from forfeiture under the *Insurance Act* s.

129: at para. 208. However, the trial judge found that Ms. Monk was not entitled to relief from forfeiture because her conduct was not reasonable, Farmers' was prejudiced by her conduct, and while Ms. Monk stood to forfeit a significant amount of money, the prejudice to Farmers' from lack of timely notice was also significant: at paras. 210-222.

[81] Ms. Monk appeals that conclusion. She acknowledges that the trial judge identified the proper test for relief from forfeiture. However, she contends the trial judge erred in the findings he made for each of the three elements of the test. I shall consider each of the grounds of appeal advanced by Ms. Monk.

## B. Analysis

### The conduct of the insured

[82] The reasonableness part of the test requires a court to consider the nature of the breach, what caused it and what, if anything, the insured attempted to do about it. One circumstance is whether the conduct of the defaulting party was "willful". All of the circumstances, including those that go to explain the act or omission that caused the lapse or forfeiture of the policy, should be taken into account. It is only by considering the relevant background that the reasonableness of the insured's conduct can be realistically considered: *Williams Estate v. Paul Revere Life Insurance Co.* (1997), 34 O.R. (3d) 161 (C.A.), at p. 175; *1497777*

*Ontario Inc. v. Leon's Furniture Ltd.* (2003), 67 O.R. (3d) 206 (C.A.), leave to appeal refused, [2003] S.C.C.A. No. 506, at para. 72.

[83] Three factual findings underpinned the trial judge's conclusion that Ms. Monk's delay in reporting the loss was not reasonable: (i) although damage was first noticed in late 2008, and then through 2009 and 2010, Ms. Monk failed to inform the insurer about any damage until her September 2, 2011 conversation with Muskoka Insurance; (ii) she did not speak to anyone at Pleasantview about the damage until late July, 2011, more than 2.5 years after she began to notice the damage; and (iii) after the first indication on September 8, 2011 that Farmers' would deny coverage, Ms. Monk attempted to mislead the insurer by taking the position that she did not notice the damage until January 2010.

[84] Ms. Monk advances two main submissions. First, she contends that once the trial judge had concluded that her delay in reporting the loss amounted to imperfect compliance, within the meaning of the *Insurance Act* s. 129, she thereby became entitled to relief from forfeiture. I see no merit in that argument. The case law clearly stands to the contrary. As a matter of law, the characterization of the nature of the insured's breach of contract as "imperfect compliance" opens the door for the insured to assert a claim for relief from forfeiture under the *Insurance Act* s. 129. Having opened the door to ask for relief, it remains for the insured to demonstrate, on the facts of the specific case, entitlement to relief from forfeiture.

[85] Second, Ms. Monk argues, in effect, that this court should take a different view of the facts that the motion judge found amounted to unreasonable conduct by her. That is not our job. Each of the findings made by the trial judge was available on the evidence. Her delay in reporting her loss amounted to just about two and three-quarter years from the time she observed the first loss – the damage to the carpets – a considerable passage of time by any measure.

[86] At trial, Ms. Monk took the position that she had not delayed reporting her loss as she had reported it on three occasions prior to September 2011. The trial judge did not accept her evidence on that point. As mentioned in paras. 66-68 above, Ms. Monk has not demonstrated any palpable or overriding error by the trial judge in rejecting her evidence of prior reporting. Nor do I see any reversible error in his holding that Ms. Monk had not provided the court with a reasonable explanation for her failure to pursue the issue of the damages to her house with the contractor: at para. 212. Accordingly, I see no basis for appellate interference with his finding that Ms. Monk "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": at para. 214.

[87] Does leaving undisturbed the trial judge's finding that Ms. Monk's conduct was unreasonable and willful conclude the consideration of this ground of appeal?

Is it necessary to consider the trial judge's findings on the remaining two elements of the test?

[88] Some case law suggests that an insured must establish each of the three elements of the *Saskatchewan River/Liscumb* test to obtain relief from forfeiture. For example, in *Williams Estate v. Paul Revere Life Insurance Co.*, Osborne J.A. stated, at p. 175:

> It is clear from *Saskatchewan River Bungalows Ltd.* that to succeed in obtaining relief from forfeiture, the insured must pass all three parts of the *Liscumb* test. Major J. did not balance the *Liscumb* factors. At least with respect to the *Liscumb* reasonableness requirement, he proceeded on a "one strike and you're out" basis. He held that the applicant, having failed the reasonable conduct test, could not get relief from forfeiture.

See also: *Koutcherenko v. Queensway Homes Inc.*, 2013 ONSC 3350 (Div. Ct.), at para. 21.

[89] Other cases have limited their analysis of a claim for relief from forfeiture to the reasonableness of the claimant's conduct without expressly stating whether all three elements of the test must be met: *Saskatchewan River*, at p. 505; *Kozel*, at para. 68; *Day Estate v. Pandurevic*, 2008 ONCA 266, 61 C.C.L.I. (4th) 50, leave to appeal to SCC refused, 256 O.A.C. 391n, at para. 4.

[90] More recently, this court in *Scicluna v. Solstice Two Limited*, 2018 ONCA 176, at para. 29, did not accept that a claimant must satisfy each of the three elements of the *Saskatchewan River* test in order to obtain relief from forfeiture.

However, the *Scicluna* decision did not refer to the earlier decision of this court in *Paul Revere*, which took a different view.

[91] Although *Saskatchewan River* could be read as leaving the point unresolved, I think the better view is that expressed in the *Scicluna* case. I reach that conclusion because in *Saskatchewan River* the Supreme Court drew upon the decision of the House of Lords in *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.), in which that court reaffirmed the right of courts of equity "in appropriate and limited cases" to relieve against forfeiture for breach of covenant or condition: at p. 723. The House of Lords stated, at pp. 723-724:

> The word "appropriate" involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach. (emphasis added)

[92] In *Saskatchewan River*, the Supreme Court of Canada closely followed *Shiloh Spinners'* formulation of the test for relief from forfeiture stating, at para. 32:

> The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The *factors* to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach. (emphasis added)

[93] Reading *Saskatchewan River* together with *Shiloh Spinners*, two points emerge. First, the three-element test for relief from forfeiture requires a court to

consider and balance all three elements to determine whether equitable relief should be granted: see also, *Snell's Principles of Equity* (32nd ed., 2010), at p. 419. Second, the examination of the reasonableness of the breaching party's conduct lies at the heart of the relief from forfeiture analysis. A party whose conduct is not seen as reasonable will face great difficulty in obtaining relief from forfeiture: *Ontario (Attorney General) v. McDougall*, 2011 ONCA 363, at para. 90.

[94] Ms. Monk's failure to demonstrate an error in principle or overriding and palpable error of fact by the trial judge in his conclusion that her delay in reporting the loss was unreasonable weighs very heavily against her effort to overturn the denial of her claim for relief from forfeiture. However, I must consider the trial judge's treatment of the other two factors.

**Gravity of the breach**

[95] In assessing the gravity of the breach, a court looks at both the nature of the breach itself and the impact of that breach on the contractual rights of the other party: *Kozel*, at para. 67.

[96] The trial judge held that Ms. Monk's delay in reporting her loss resulted in Farmers' suffering several kinds of prejudice, specifically the loss of : (i) the ability to investigate the circumstances and value of the loss at the date of occurrence; (ii) the ability to take early remedial action to reduce the scope of the loss; and (iii) the right to maintain a subrogated claim against the at-fault contractor,

Pleasantview, as that action likely was statute-barred by the time Ms. Monk reported her loss: at paras. 217-219.

[97] Ms. Monk argues that the trial judge committed two errors in reaching those conclusions. First, in respect of the impact of her delay on Farmers' ability to investigate the circumstances of the loss and take early mitigation steps, she contends the trial judge overlooked the evidence of Farmers' adjuster, Mr. Gary South. In his November 1, 2011 report, Mr. South expressed the view that, based on his inspection of Ms. Monk's house, the damage would qualify as resultant damage to insured property under the Policy. Mr. South did not believe that the cost of repair had increased due to the delay in reporting the loss.

[98] I am persuaded that the trial judge's failure to consider this evidence from Mr. South calls into question the soundness of his conclusion that Ms. Monk's delay prejudiced Farmers' ability to investigate the circumstances and value of the loss at the date of occurrence. Mr. South's evidence strongly indicates that it did not. I am also persuaded that the evidence undermines the trial judge's conclusion that the delay affected Farmers' ability to take early remedial action to reduce the scope of the loss. In his report, Mr. South wrote: "The damages we have seen even though rotting has occurred would still in our opinion require replacement of the doors and or windows as opposed to a repair." This part of his report strongly suggests that Ms. Monk's delay in reporting did not affect the scope of her loss.

[99] Ms. Monk further contends that the trial judge unreasonably concluded that her delay prejudiced Farmers' right to subrogate against Pleasantview. I disagree.

[100] The trial judge relied on the reasons of this court in *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88, 118 O.R. (3d) 694, leave to appeal refused, [2014] S.C.C.A. No. 143, to observe that one means by which an insurer can protect its interests is through a provision requiring the insured to provide timely notice to the insurer when she knew or ought to have known she had a loss. In his view, Ms. Monk's breach of the statutory notice condition prevented Farmers' from seeking timely subrogation of her loss against Pleasantview: at para. 219. That conclusion was supported by the evidence.

[101] Ms. Monk did not put Pleasantview on notice of a potential claim until July 28, 2011. She commenced an action against Pleasantview on November 14, 2011, the same day she sued Farmers'. Pleasantview filed a December 12, 2011 statement of defence in which it asserted a limitations defence. According to Ms. Monk, in late 2008 or very early 2009 she told Pleasantview that she was not satisfied with its efforts to clean the stained carpets and she refused to pay the final invoice. Pleasantview did not return to the job, nor at that time did it promise to repair any of the damage. Those circumstances provided Pleasantview with a strong basis to assert that Ms. Monk's November 2011 action against it was statute-barred.

[102] An insurer's subrogated claim is subject to the same defences that the third party could have raised in an action brought by the insured: Barbara Billingsley, *General Principles of Canadian Insurance Law,* 2nd ed (Toronto: LexisNexis, 2014), at p. 351. Ms. Monk's lengthy delay in reporting her loss, which led to Pleasantview asserting a limitations defence, undermined the ability of Farmers' to advance a subrogated claim in the event it indemnified her for the loss. Accordingly, the trial judge's finding on this point was reasonable and based on the evidence.

[103] As a result, notwithstanding the trial judge's error in overlooking the report of Mr. South, his conclusion that Ms. Monk's delay caused prejudice to Farmers' ability to subrogate was reasonable.

**Disparity**

[104] The third factor a court must consider when assessing a claim for relief from forfeiture is the disparity between the value of the property forfeited and the damage caused by the breach. Examining this factor requires a court to conduct a kind of proportionality analysis which, in an insurance case, involves comparing the disparity between the loss of coverage and the extent of the damage caused by the insured's breach: *Kozel*, at para. 69.

[105] The trial judge acknowledged that the property forfeited by Ms. Monk by reason of her breach of contract was significant – approximately $100,000. At the

same time, he held that: “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”: at para. 222.

[106] Ms. Monk submits that pursuing Pleasantview earlier “would have benefitted no one.” I do not find that submission persuasive. Timely reporting by Ms. Monk would have enabled Farmers’ to consider steps against Pleasantview unburdened by the ability of the contractor to advance a strong limitations defence.

**Conclusion**

[107] The trial judge applied the correct principles in considering Ms. Monk’s request for relief from forfeiture. Although I conclude that some of his findings on the gravity of the breach were not supported by the evidence, his ultimate finding of prejudice was supported, as were his holdings regarding the insured’s unreasonable conduct and the element of disparity. The trial judge made strong adverse findings of credibility against Ms. Monk and found that she attempted “to escape the consequences of her late notice by attempting to mislead her insurer with respect to the date she discovered her damages”: at para. 214. He evidently found that her default was willful, in the sense that term is used in the relief from forfeiture cases. In light of those findings, this is one of those cases where a party whose conduct is not seen as reasonable by the trial judge cannot hope to obtain relief from forfeiture: *Ontario (Attorney General) v. McDougall*, at para. 90.

Accordingly, I see no basis for appellate intervention in his discretionary conclusion that Ms. Monk was not entitled to relief from forfeiture. I would not give effect to this ground of appeal.

[108] As a result, I would dismiss Ms. Monk's appeal.

## VIII. FOURTH ISSUE: THE TRIAL JUDGE'S ASSESSMENT OF DAMAGES

[109] Nevertheless, for the sake of completeness, I will address Ms. Monk's final ground of appeal, which concerns the trial judge's assessment of damages.

[110] At trial, Ms. Monk sought damages under the Policy in the amount of $124,448.47. The trial judge assessed her damages at $86,320.70, made up of the replacement costs for: carpets: $15,576.32; exterior lights: $1,501.64; door hardware: $868.88; and, windows and doors: $68,373.86.

[111] The difference between Ms. Monk's "ask" and the trial judge's assessment turns on the replacement costs for windows and doors. Ms. Monk relied on the 2016 replacement cost she incurred, adjusted downward to remove the price of upgrades. The trial judge based his assessment on two 2011 estimates submitted by Ms. Monk to Farmers'. He chose the midpoint between her two 2011 estimates as representing the fair and reasonable cost for replacing the windows and doors.

[112] Ms. Monk submits the trial judge erred in using 2011 replacement costs. As she was unable to afford replacing the doors and windows until 2016 – she was

spending money on other projects in and around her house – she contends the 2016 replacement costs were the more appropriate ones to use.

[113] I do not accept this submission. The valuation of a loss is made in accordance with the terms of the Policy, not Ms. Monk's ability to fund the replacement of damaged property at any particular time. The parties did not make submissions on the settlement provisions of the Policy, but they are clear: the insurer was not liable beyond the actual cash value of the property at the time any loss or damage occurs (emphasis added). Under the Policy, "actual cash value" takes into account such things as the cost of replacement less any depreciation. Given that Policy language, I see no reversible error in the trial judge assessing damages using the 2011 estimates submitted by Ms. Monk to Farmers' in October 2011.

## IX. FIFTH ISSUE: THE TRIAL JUDGE'S AWARD OF COSTS

[114] Finally, Ms. Monk seeks leave to appeal the trial judge's awards of costs.

[115] Although the trial judge observed that the respondents made a compelling case for substantial indemnity costs in light of Ms. Monk's unsupported allegations of bad faith and breach of fiduciary duty, he concluded that given the "modest claim for damages" he would not fix costs using that elevated scale: "To do so would have the effect of requiring [Ms. Monk] to pay costs totalling more than four times the value of the claim": 2017 ONSC 4511 (the "Costs Award"), at para. 29. Instead,

he awarded partial indemnity costs fixed in the amount of $175,000 to Farmers' and $115,000 to Muskoka Insurance.

[116] Ms. Monk seeks leave to appeal those awards. The crux of her submission is that the trial judge ignored her reasonable expectation that if her action failed, her costs exposure would not exceed the amount of her loss.

[117] I see no merit in that submission. Much could be said about the time it took to adjudicate this action – 5.5 years – and the attendant costs. Suffice it to say that from the start it was clear that the upper limit for recovery was in the neighbourhood of $125,000. Yet, from the materials filed on this appeal, it appears that the parties burned through close to half a million dollars in legal costs through the end of trial. The expenditure of such amounts on a modest claim does not reflect rational economic decision-making, by any party.

[118] Our costs jurisprudence does not cap a plaintiff's reasonable expectation about potential cost exposure at the amount of her claim. The amount claimed is only one of several factors that a court takes into account when assessing costs: r. 57.01(1)(a) of the *Rules of Civil Procedure*.

[119] In the present case, the most significant factor regarding Ms. Monk's reasonable expectations about trial costs was the 2015 decision of this court. In granting Ms. Monk's appeal from the summary judgment dismissing her action, this court awarded her costs of $90,000. As the trial judge noted, she had actually

asked this court to award her partial indemnity costs of $125,000: Costs Award, at para. 19. At that point, it should have been clear to Ms. Monk that continuing to trial – in this case a 9-day trial – would create potential exposure to legal fees far in excess of her claim.

[120] That said, in assessing the reasonableness of the trial costs, the trial judge erred by failing to take into account the impact of the 2015 decision of this court on the parties' reasonable expectations of the costs of the further hearing directed by this court. After interpreting the provisions of the Policy, this court identified "the remaining question" as whether Ms. Monk's action was time-barred and returned that question to the motion judge for determination: at paras. 42 and 43. In its costs endorsement, this court noted the respondents' position that the costs should be left to the motion judge "as there remains a live issue as to whether the claim is time-barred": 2016 ONCA 181, at para. 3.

[121] Given the directions by this court in its 2015 decision, I think Ms. Monk could reasonably expect that her cost exposure at trial would be confined to the "remaining question", as identified by this court. Yet, the trial judge expanded the issues for determination beyond those directed by this court to include "the issue of what damage is properly classified as 'resulting damage'", resulting, in practical terms, to the re-litigation of the coverage issue both at trial and on Farmers' cross-appeal.

[122] In my view, that resulted in the trial judge awarding costs in excess of Ms. Monk's reasonable expectations. Based on my review of the trial transcripts, I conclude that had the trial judge limited the "remaining question" to that directed by this court in 2015, trial time would have been reduced by approximately one-third. Consequently, I would grant Ms. Monk leave to appeal the award of trial costs and allow her appeal to the extent of reducing the trial judge's awards to Farmers' and Muskoka Insurance by one-third. That would result in cost awards to Farmers' and Muskoka Insurance of $116,550 and $76,590 respectively.

## X. DISPOSITION

[123] For the reasons set out above, I would dismiss Ms. Monk's appeal. I would grant her leave to appeal the trial judge's cost awards, and I would vary the awards of the costs of the action to Farmers' and Muskoka Insurance in paras. 2 and 3 of the judgment to $116,550 and $76,590 respectively.

[124] I would dismiss Farmer's cross-appeal.

[125] The parties could not agree on the costs of the appeal. Success between the parties on the key issues was divided. On the cross-appeal, Farmers', with the active support of Muskoka Insurance, sought to set aside the trial judge's finding of coverage. Although Muskoka Insurance did not file its own cross-appeal, its support of Farmers' was not of the "me-too" variety. Instead, it filed a full-length factum that to a great extent duplicated the submissions contained in Farmers'

factum. On her appeal, Ms. Monk sought to revisit the trial judge's findings regarding her compliance with the statutory conditions and relief from forfeiture. Both the appeal and cross-appeal failed. In those circumstances, I regard the costs of the appeal and cross-appeal as a wash as between Farmers' and Muskoka Insurance, on the one hand, and Ms. Monk, on the other.

[126] However, as explained, I would allow Ms. Monk's cost appeal in part. Given her partial success on the costs appeal, I would award Ms. Monk costs of that appeal in the amount of $10,000, payable $5,000 by Farmers' and $5,000 by Muskoka Insurance.

Released: "KF" JUL 19 2019

"David Brown J.A."
"I agree. K. Feldman J.A."
"I agree. B.W. Miller J.A."