COURT OF APPEAL FOR ONTARIO

CITATION: Pinder Estate v. Farmers Mutual Insurance Company (Lindsay), 2020 ONCA 413
DATE: 20200625
DOCKET: C64857

van Rensburg, Benotto and Harvison Young JJ.A.

BETWEEN

Clarkson Murray Pinder, Douglas Michael Pinder, Cindy Pinder, Estate Trustees of the estate of Joyce Pinder, deceased, and Cindy Pinder

Plaintiffs (Appellants)

and

Farmers Mutual Insurance Company (Lindsay)

Defendant (Respondent)

Earl A. Cherniak, Q.C. and Alfred M. Kwinter, for the appellants

Martin P. Forget, for the respondent

Heard: December 10, 2019

On appeal from the judgment of Justice Mary E. Vallee of the Superior Court of Justice, sitting with a jury, dated May 9, 2018, with reasons for decision on post-trial motions reported at 2018 ONSC 2910, and the costs judgment, dated January 25, 2019, with reasons reported at 2019 ONSC 610.

van Rensburg J.A.:

I. OVERVIEW

[1] This is an appeal of a judgment after trial by judge and jury dismissing the claims of the appellants, Joyce Pinder and Cindy Pinder and of the award of costs against them.[1] The appellants, who were mother and daughter, made a claim under their home insurance policy after a fire destroyed the house owned by Joyce and occupied by Cindy, along with most of its contents. The respondent, Farmers' Mutual Insurance Company (Lindsay) ("Farmers' Mutual" or the "insurer"), denied coverage, and litigation resulted. The appellants sued for a declaration of coverage under their insurance policy and for damages, alleging that the insurer had acted in bad faith in handling and denying their claim. The insurer also brought a claim seeking to recover from the appellants the amount it had paid out to Joyce's mortgagee.

[2] The jury answered all applicable questions against the appellants. Based on the jury's answers to these questions, the trial judge concluded that the appellants had violated statutory condition 4 of their fire insurance (by failing to notify the insurer of a material change in risk), with the effect that their policy was voided, and that they had made wilfully false statements in their Proof of Loss, vitiating their claim pursuant to statutory condition 7. The trial judge dismissed the

---

[1] Joyce passed away in July 2019, following the trial and before the hearing of the appeal. Although her estate trustees are now appellants on behalf of Joyce's estate, for ease of reference I refer in these reasons to Joyce and Cindy as the appellants.

appellants' claim under the policy, as well as their claim for damages based on breach of the insurer's duty to act in good faith, and their claim for punitive and aggravated damages. She refused to grant the appellants relief from forfeiture. She awarded damages of $97,143.97 against Cindy and Joyce (the insurer's pay-out of the outstanding mortgage on the house) and awarded the insurer costs of both proceedings in the total amount of $616,843.27. A significant portion of the costs were awarded on a substantial indemnity basis.

[3] There are several grounds of appeal that principally relate to the trial judge's instructions to the jury on the factual issues they had to determine in respect of statutory conditions 4 and 7. The appellants also take issue with the trial judge's decision to refuse them relief from forfeiture and assert that the trial judge erred in her costs award.

[4] For the reasons that follow, although there are certain issues in respect of which I would find for the appellants, I am satisfied that their claim was properly dismissed on the basis of the wilful misstatements in the Proof of Loss, and that there was no error in the trial judge's dismissal of the motion for relief from forfeiture. I would therefore dismiss the appeal of the judgment dismissing the appellants' action.

[5] With respect to the costs judgment, in my view, the trial judge erred in awarding costs on a substantial indemnity basis from the date of the insurer's offer

to settle. I would allow the costs appeal and substitute an order for partial indemnity costs in favour of the insurer in the all-inclusive amount of $430,000.

II. FACTS

(1) The loss

[6] The appellants brought an action against the insurer, seeking coverage for their losses under their home insurance policy following a fire, and asserting that the insurer had acted in bad faith in its handling of their claim.

[7] The fire took place in the early morning hours of February 2, 2004 at a house in Lindsay, Ontario that was purchased by Joyce in 1999, and occupied by her daughter Cindy and Cindy's son. Joyce paid the mortgage and property taxes and Cindy was responsible for paying utilities. Cindy owned the contents of the house.

[8] On the night of the fire, Cindy's son was staying overnight with his grandmother and Cindy was at her boyfriend's home, where they were busy sanding floors. Cindy and her boyfriend returned to her home at approximately 3:30 a.m. to find the house on fire. The fire destroyed the house and its contents, and claimed the lives of Cindy's two dogs.

[9] The house had been heated by a gas furnace. In July 2003, the gas supply to the house had been cut off. Cindy's evidence was that she was using a wood stove as her primary source of heat, supplemented by space heaters when it was very cold. She testified that when she left the house the evening before the fire,

she had left a log in the wood stove and the space heaters in three rooms turned half on.

[10] Cindy and Joyce retained Tom Yates, an independent insurance adjuster, to assist with their insurance claim. They filled out and signed a Proof of Loss, dated March 29, 2004. The Proof of Loss claimed $172,412 for the house, $104,000 for the contents, and $26,000 for Cindy's additional living expenses. Cindy prepared a Schedule of Loss that listed the contents that she claimed were lost in the fire. The Schedule of Loss was attached to the Proof of Loss. As stated in the Proof of Loss, the Schedule of Loss "forms part of [the] proof". The Proof of Loss and Schedule of Loss were prepared with the assistance of Mr. Yates.

[11] The insurer requested additional information about the items listed in the Schedule of Loss that were valued at over $500. There was a great deal of evidence at the trial about the steps taken to ascertain the existence and value of the various items that Cindy claimed to have lost in the fire.

[12] Cindy's evidence was that she indicated, to the extent she was able, where and when she had purchased or acquired each item, where each item was located in the house, and her belief as to its replacement cost. She did not provide proof of purchase for a number of items, claiming that she had paid for a significant number of items in cash and had inherited other items from family members. The insurer's evidence was that Cindy had failed to attend at the house to review the

items on her list and that she had not provided evidence of the existence or value of certain items that they had expected her to be able to provide.

[13] The insurer paid an advance to Cindy for the contents and the cost of certain alternate living expenses. The insurer also paid the sum of $97,143.97 to Joyce's mortgagee.

[14] Farmers' Mutual formally denied coverage by letter dated May 27, 2004, addressed to Mr. Yates. The reasons were that (1) the appellants failed to notify the insurer of the change in the heating system of the premises, which constitutes a material change in the risk contrary to statutory condition 4, voiding the policy; and (2) the appellants made wilfully false statements with respect to the contents claim, and the claim for alternate living expenses, contrary to statutory condition 7, vitiating their right to recover.[2]

[15] The appellants invoked the appraisal provisions of the policy under s. 128 of the *Insurance Act*, R.S.O. 1990, c. I.8. The insurer resisted and, following an order of this court, the appraisal proceeded. An appraisal award was made, dated March 30, 2007. The appellants' loss was fixed at $182,382.50 on a replacement cost basis and $104,375 on an actual cash basis for the building claim. With regard to the contents claim, the loss was adjusted at $88,808.81 and the additional living

---

[2] At trial, the focus was on the alleged wilfully false statements in respect of items listed in the Schedule of Loss.

expenses claim was fixed at $10,725.60. The parties agree that the appraisal award was provisional. Because they were involved in litigation, the appraisal did not consider whether or not the specific items listed in the Schedule of Loss existed or had been damaged or destroyed by the fire, but only established their value.

(2) The terms of the appellants' insurance policy

[16] The appellants' home insurance policy was in force for the term February 26, 2003 to February 26, 2004. The policy provided for limits of $130,000 for the house and $104,000 for the contents, on a replacement cost basis. Both Cindy and Joyce were listed as insureds.

[17] The declaration page indicated that the primary heat was "Central Furnace". It also stated: "No Wood Heating Unit in use other than an Unaltered Masonry Fireplace, Wood Pellet, Wood or Combination Furnace".

[18] Pursuant to s. 148 of the *Insurance Act*, the policy contained statutory conditions applicable to fire insurance contracts, including the following:

> **Material Change**
>
> 4. Any change material to the risk and within the control and knowledge of the insured avoids the contract as to the part affected thereby, unless the change is promptly notified in writing to the Insurer or its local agent, and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if the insured desires the contract to continue in force, the insured must, within fifteen days of the receipt of the notice, pay to the insurer an additional premium, and in default of

such payment the contract is no longer in force and the insurer shall return the unearned portion, if any, of the premium paid.

Requirements After Loss

6. (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,

(i) giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed,

(ii) stating when and how the loss occurred, and if caused by fire or explosion due to ignition, how the fire or explosion originated, so far as the insured knows or believes,

(iii) stating that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured,

(iv) showing the amount of other insurances and the names of other insurers,

(v) showing the interest of the insured and of all others in the property with particulars of all liens, encumbrances and other charges upon the property,

(vi) showing any changes in title, use, occupation, location, possession or exposures of the property since the issue of the contract,

(vii) showing the place where the property insured was at the time of loss.

> (c) if required, give a complete inventory of undamaged property and showing in detail quantities, cost, actual cash value;
>
> (d) if required and if practicable, produce books of account, warehouse receipts and stock lists, and furnish invoices and other vouchers verified by statutory declaration and furnish a copy of the written portion of any other contract.
>
> (2) The evidence furnished under clauses (1) (c) and (d) of this condition shall not be considered proofs of loss within the meaning of conditions 12 and 13.
>
> **Fraud**
>
> 7. Any fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration.

(3) The trial

[19] The trial took place over 15 days in December 2017. Cindy testified. Other witnesses for the appellants were Mr. Yates, Cindy's son, Cindy's friend and former house cleaner, as well as the police officer who investigated the fire for arson. Joyce, who was 91 years old at the time, did not testify, but some of her discovery evidence was read in as part of the insurer's case.

[20] The insurer's witnesses were Luc Coutu, the claims representative for Farmers' Mutual, Shawn Barrett, a co-owner of the restoration company Chem-Dry of the Kawarthas, Durham and York ("Chem-Dry"), a real estate agent who listed the house for sale before the fire, and a home inspector who attended the house the day before the fire.

[21] The following are the relevant jury questions and answers:

> Question 1: Did the plaintiffs use portable electric heaters as their primary source of heat after July 2003 when the gas supply to the property, 49 Rideout Street Lindsay, was cut off?
>
> Answer: Yes.
>
> Question 2: If your answer to the above question is yes, was the change of the heat source within the knowledge and control of either plaintiff?
>
> Answer: Yes.
>
> Question 3: If your answer to the above question is yes, did the change in heat source constitute a material change in risk that the plaintiffs were required to report to the defendant?
>
> Answer: Yes.
>
> Question 4: If your answer to question one is yes, did the plaintiffs report the change in heat source to the defendant promptly and in writing?
>
> Answer: No.
>
> Question 5: Did the plaintiffs make a wilfully false statement in the Proof of Loss form and the schedules?
>
> Answer: Yes.
>
> Question 6: If your answer to the above is yes, having regard to Exhibit 1 [the insurer's list of items it questioned], please indicate, on the attached sheets, the items about which the plaintiffs made wilfully false statements.
>
> Answer: [The jury checked off 39 of the 68 items listed in Exhibit 1.]
>
> Question 11: Was the conduct of the defendant insulting, high-handed, spiteful, malicious, or oppressive with

> respect to the manner in which it handled the plaintiffs' claim such that it warrants an award of aggravated damages?
>
> Answer: No.

[22] The jury did not provide answers to the remaining questions, which dealt with whether the insurer had breached its duty to act in good faith and punitive damages, in the event that the jury answered "no" to Questions 1 and 5.

[23] After the jury gave its verdict, the insurer moved for judgment dismissing the appellants' claims and an order requiring repayment of the funds it had paid to Joyce's mortgagee. The appellants brought a cross-motion requesting the following: (1) that judgment not be entered in accordance with the jury's verdict, on the basis that there was no evidence at trial to support the jury's answer to Question 1, and that its verdict was therefore perverse; (2) relief from forfeiture; (3) judgment in accordance with the property appraisal and Proof of Loss; and (4) the dismissal of the insurer's motion.

[24] The insurer's motion was granted, the cross-motion was dismissed, and judgment was entered for the insurer. In dismissing the cross-motion, the trial judge found that there was sufficient circumstantial evidence before the jury to support its answer to Question 1, that the appellants were using portable electric heaters as their primary heat source at the time of the fire. She also refused to grant relief from forfeiture on the basis that this was not a case of imperfect compliance.

[25] The parties made written submissions on costs and attended to provide oral submissions to the trial judge. The trial judge awarded costs of $616,843.27 against the appellants. Substantial indemnity costs were awarded after the date of the insurer's offer to settle, dated November 19, 2010.

III. ISSUES

[26] The appellants raise a number of issues on appeal. Although the issues were stated somewhat differently by the appellants in their factum and in oral argument, I have organized the issues, and will address them in my reasons, as follows:

1. Was there a reversible error with respect to statutory condition 4? In particular:
    a. Was there evidence to support the jury's finding (in response to Question 1) that electric heaters were the primary heat source in the house?
    b. Did the trial judge err in her instructions in response to a question from the jury about the meaning of "primary heat source"?
    c. Was there evidence to support the jury's finding (in response to Question 3) that the change in heat source constituted a material change in risk?
2. Was there a reversible error with respect to statutory condition 7? In particular:
    a. Did the trial judge err in her instructions to the jury about the evidence of certain witnesses?

b. Did the trial judge err in her instructions about the intention required for a "wilfully false statement"?

c. Did the trial judge err in failing to instruct the jury to consider separately whether each of Joyce and Cindy made wilfully false statements?

3. Did the trial judge err in refusing relief from forfeiture?

4. Did the trial judge err in her award of costs?

[27] If they are successful on appeal, the appellants ask that this court set aside the dismissal of their action and grant judgment in their favour, in the amounts set out in the appraisal award. If necessary, they ask that a new trial be ordered to resolve Cindy's claim. The appellants also ask that the costs award be set aside or reduced.

IV. ANALYSIS

(1) Was there a reversible error with respect to statutory condition 4?

[28] Statutory condition 4 required "[a]ny change material to the risk and within the control and knowledge of the insured" to be promptly notified in writing to the insurer, failing which the insurance contract would be avoided as to the part affected thereby.

[29] The insurer's position, as it went to the jury[3], was that the electric heaters, which were turned half on when the fire occurred, were used as the primary heat source, and that this was a material change in risk that was not disclosed to the insurer. Cindy testified that she was using a wood stove as her primary heat source, which she supplemented with electric heaters when it got very cold.

[30] The appellants make three arguments with respect to statutory condition 4. First, they submit that there was no evidence to support a positive answer to Question 1. Second, they argue that the trial judge misdirected the jury in her response to their question on the definition of "primary heat source". Third, they contend that there was no evidence on what constitutes a material change in risk. I would not give effect to the first argument, but I would give effect to the second and third arguments, with the result that the conclusion that the appellants were in breach of statutory condition 4 cannot stand.

(a) There was evidence to support the jury's answer to Question 1

[31] The appellants' first argument is that there was no evidence to support the jury's affirmative answer to Question 1: "Did the plaintiffs use portable electric

---

[3] The insurer's counsel argued, unsuccessfully, that the change in heat source occurred as soon as the gas was shut off, and that Question 1 should be framed accordingly. The trial judge agreed with the appellants' trial counsel that, unless the statement of defence was amended, the insurer was bound by its pleading, which claimed that the material change in risk was the use of electric heaters as the primary heat source. The trial judge refused to allow the amendment.

heaters as their primary source of heat after July 2003 when the gas supply to the property, 49 Rideout Street Lindsay, was cut off?".

[32] The appellants submit that the only witnesses to testify on this issue were unanimous that the primary heat source was the wood stove, and that the portable electric heaters were used as a supplemental heat source on very cold days. They explain that, because Cindy was not cross-examined on this point, there was no contradictory evidence. They point to the evidence of Mr. Coutu, the insurer's claims representative, who admitted that he had heard no one testify at trial that the appellants were using electric heaters as their primary heat source.

[33] This argument can be addressed briefly. The same argument was made to and rejected by the trial judge in the appellants' motion asking that she refuse to enter a verdict reflecting the jury's answer to Question 1.

[34] In her written reasons, the trial judge stated the following, at paras. 13 to 15:

> Cindy Pinder's evidence was that she left home at approximately 5:30 p.m. on Sunday, February 1, 2004 and returned at approximately 3:30 a.m. on Monday February 2, 2004 to find the house on fire. According to a statement that she gave to the insurer on Monday February 2, 2004 at 3:30 p.m. right after the fire, Cindy Pinder said that on the night of the fire, there was one stick of wood in the wood stove. It was "one of the bought wood." She agreed that it was a "fire log". Three space heaters were turned "half on". Her trial testimony was consistent with this.
>
> The fact that a witness, Mr. Coutu, testified that he had not heard any evidence at trial that the plaintiffs were

> using ceramic or electric heaters as their primary source of heat does not determine this matter. The question was for the jury to decide.
>
> There is no dispute that the defendant did not challenge Cindy Pinder on this evidence. Nevertheless, it was open to the jury to believe some, none or all of her evidence. In his closing submissions, defence counsel reminded the jury of the rooms in the house where the portable electric heaters were located (kitchen, bathroom and bedroom) and the fact that there was only one log in the wood stove at 5:30 p.m. when Ms. Pinder left. He suggested that the three portable electric heaters were used to heat approximately half of the space in the residence. He asked the jury to draw an inference that Cindy Pinder was using the portable heaters as her primary source of heat. It was open to the jury to draw that inference. Plaintiffs' counsel did not object to the defendant's closing address.

[35] I agree with the trial judge that whether the appellants were using electric heaters as their primary heat source was a question for the jury to decide, based on the evidence, and not on Mr. Coutu's recollection of the evidence. Although no witness contradicted Cindy, and she was not challenged on this point in cross-examination, it was open to the jury to conclude, based on the circumstantial evidence before them, that the space heaters were being used as the primary source of heat in the home. This circumstantial evidence included the fact that the gas had been turned off, the number of space heaters in use, and their location in various rooms of the house.

[36] Accordingly, I would not give effect to the appellants' argument that there was no evidence to support the jury's answer to Question 1.

[37] There were, however, two other problems in relation to the insurer's defence based on breach of statutory condition 4 in this case. I turn to these now.

(b) The trial judge's answer to a jury question about the "primary heat source" resulted in misdirection on a material issue

[38] In the course of their deliberations, the jury asked the following question:

> We would like to know the correct meaning of primary heat source, what is the definition? Is the only source of heat the same as primary source of heat? That is, if the wood stove is out and the electric heaters are on, they are the only source of heat, but are they now the primary source of heat?

[39] After discussing the question with counsel, the trial judge recalled the jury and provided the following response:

> There is no definition of the meaning of primary heat source. And I'm going to read to you from Exhibit 2, Page 10, which is the statement that Ms. Pinder gave to Mr. Coutu on February 2, 2004, and I'm reading from about half the way down the page.
>
> > Luke: Now, you mentioned there was a wood stove. So there was a wood fire on at that time?
> >
> > Cindy: There was one stick of wood in it and it was one of the bought wood.
> >
> > Luke: Fire logs?
> >
> > Cindy: Yes.
> >
> > [Luke:] And what other source of heat did you have in the house?
> >
> > Cindy: Had heaters on.
> >
> > Luke: What kind of heaters?

> Cindy: Space heaters. One in the kitchen. One in the bathroom. One in the bedroom. And they were turned half on.
>
> So that is the answer to your question.

[40] The appellants submit that the trial judge did not respond in any meaningful way to the jury's question, with the effect that the jury was misdirected with respect to Question 1.

[41] The insurer asserts that the jury received a proper and complete answer to their question: it was correct for the trial judge to respond that there was no definition of "primary heat source" because this was not a term that was defined anywhere in the insurance policy. Moreover, according to the insurer, it would have been inappropriate for the trial judge to provide an answer to what, in the end, was a hypothetical question.

[42] In *R. v. Grandine*, 2017 ONCA 718, 355 C.C.C. (3d) 120, this court confirmed the importance of a trial judge's full and proper answer to any question asked by the jury. Brown J.A. explained, at para. 62:

> Jury questions indicate some jurors need help. They are having a problem with an issue in the case. A question usually concerns an important point in the jury's reasoning, identifying an issue on which the jury requires direction: *R. v. W.D.S.*, [1994] 3 S.C.R. 521, at paras. 14-18; *R. v. M.T.*, 2012 ONCA 511, 289 C.C.C. (3d) 115, at para. 114. Answers to jury questions are extremely important, carrying an influence far exceeding instructions given in the main charge. The practical reality is that such answers will be given special emphasis by jurors: *R. v. Naqlik*, [1993] 3 S.C.R. 122, at p. 139;

> *W.D.S.*, at para. 16. Consequently, a trial judge must fully and properly answer a question asked by the jury: *R. v. Stubbs*, 2013 ONCA 514, 300 C.C.C. (3d) 181, at para. 95.

See also *R. v. Goudreau*, 2019 ONCA 964, at paras. 36-37.

[43] The jury's question in this case indicated that they needed help with the meaning of "primary heat source". Specifically, they requested guidance on whether a heat source that was being used at the time another heat source failed would become a "primary heat source". It was the gist of Cindy's evidence that she was using the wood stove as her primary heat source, and that the electric heaters were only used as back-up. There was also evidence that, on the night of the fire, three electric heaters were turned on halfway and that there was only one log in the wood stove from 5:30 p.m. until the time of the fire.

[44] In his submissions on the jury question, the appellants' trial counsel proposed, at one point, that the jury be told that the primary source of heat would be the main source of heat that was used to heat the home on a day-to-day basis. The insurer's counsel argued that, because "primary heat source" was not defined in the insurance policy, the jury should be informed that there was no definition, and that to go any further other than to summarize some of the evidence that was heard would be to answer a hypothetical question. The trial judge appears to have accepted the argument of the insurer's counsel.

[45] Not all errors in a jury charge will amount to misdirection. The question on appellate review is whether the charge provided the jury with adequate assistance to determine the questions it had to decide: *Samms v. Moolla*, 2019 ONCA 220, at para. 48; *Little v. Floyd Sinton Limited*, 2019 ONCA 865, 149 O.R. (3d) 38, at para. 18. The adequacy of the trial judge's response to the jury's question must be assessed in light of the fact that the jury is seeking clarification on an issue that is assumed to have taken on some prominence, at least in the mind of one juror. The trial judge's response must, however, like the rest of the charge, be considered as a whole: *R. v. Graham*, 2019 ONCA 347, 377 C.C.C. (3d) 205, at para. 35.

[46] In my view, the trial judge's response to the jury's question was inadequate to the extent that it constituted a misdirection on an important issue at trial. When the jury asked for a definition of "primary heat source", their question continued: "Is the only source of heat the same as primary source of heat? That is, if the wood stove is out and the electric heaters are on, they are the only source of heat, but are they now the primary source of heat?" It is apparent that the jury was concerned about how they should assess the evidence that, when Cindy left the home, there was only one log in the wood stove. The jury ought to have been told that the primary heat source was the source of heat that was relied on to heat the home on a daily basis, which appears to have been the common understanding of counsel.

[47] The insurer's position was that the space heaters were being used regularly as the primary heat source. No one at trial had suggested that the space heaters, which were set at 50 percent power at the time, would automatically become the primary heat source if the fire in the wood stove had gone out. Yet, this was the focus of the jury's question. The trial judge's answer was not responsive to the jury's concern. As a result, the jury may well have reasoned, incorrectly, that, because there was only one log on the fire at 5:30 p.m. the night before, the fire in the wood stove would have gone out at some point, so that, at the time of the fire the space heaters had automatically become the primary heat source.

(c) There was no evidence to support the conclusion that the change in heat source constituted a material change in risk

[48] Although it is unnecessary for the disposition of this part of the appeal, I will comment briefly on Question 3: "Did the change in heat source constitute a material change in risk that the plaintiffs were required to report to the defendant?"

[49] The breach of statutory condition 4 was not in the appellants' failure to report a change in heat source. Rather, it was in their failure to report something that would be a material change in risk. After concluding, in response to Questions 1 and 2, that there was a change in the primary heat source that was within the knowledge and control of either appellant, the jury had to determine whether the change in heat source constituted a "material change in risk". Indeed, the first four jury questions had to be answered in the insurer's favour for the policy to be voided

for breach of statutory condition 4. While a change in heat source could be a material change in risk, this was not conceded in the trial, and it was a separate question for the jury to determine.

[50] In her charge to the jury, the trial judge provided the following instructions on statutory condition 4 and the insurer's obligation to prove a material change in risk:

> Regarding what is material, every fact is material which would, if known, reasonably affect the minds of prudent and experienced insurers in deciding whether they will accept the contract or in fixing the amount of the premium to be charged if they accepted the contract. The insured is not required to believe that the change is material to her policy. A change in primary heat source may be a material change in risk. The critical point is the knowledge of the insured. Regarding it, the change is decisive.

[51] Counsel had agreed that this was the appropriate formulation of the test to establish what constitutes a "material change in risk". This test was stated in *Johnson v. British Canadian Insurance Co.*, [1932] S.C.R. 680, at p. 686. See also *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.* (2006), 267 D.L.R. (4th) 690 (Ont. C.A.), at para. 65.

[52] When summarizing the evidence relating to material change in risk, the trial judge gave the following instructions to the jury regarding the lack of evidence on the issue of materiality:

> [T]here was no evidence in this trial regarding what could reasonably affect the minds of prudent and experienced insurers in deciding whether they will accept the contract or in fixing the amount of the premium to be charged. You must keep this in mind when you are answering question three.

[53] This instruction was a response to the concern raised by the appellants' trial counsel during pre-charge discussions regarding the lack of evidence at trial on what constitutes a "material change in risk".

[54] There was no evidence at trial by an underwriter, or any other qualified witness, as to what would constitute a material change in risk for an insurer in accepting the contract or fixing the amount of the premium. Indeed, counsel for both parties objected when the other side invited their respective witnesses (Mr. Yates, in the case of the appellants and Mr. Coutu in the case of the insurer) to provide an opinion on this point. Counsel's objections were grounded in the fact that the witnesses were not qualified to provide evidence on whether the alleged change in the primary heat source would have affected the insurer's decision to provide coverage or the amount of the premium. The trial judge agreed and upheld the objections. After the trial judge ruled that Mr. Coutu could only testify that there was a change in the heating system, the insurer's counsel remarked that he "may have to call an underwriter", but no underwriter was called to testify.

[55] In his closing address, when discussing whether the alleged change in heat source constitutes a "material change in risk", the insurer's counsel argued that,

because the homeowner's questionnaire requested particulars of the type of heating, and the primary heat source was indicated on the declaration page of the policy, heating was an "important issue" for the insurer and was thus "material". However, this is not evidence that the change in heat source would have affected the insurer's decision to accept the contract or to charge a certain premium.

[56] Again, there was no evidence in this trial, as the trial judge observed in her instructions to the jury, to establish what "reasonably affects the minds of prudent and experienced insurers in deciding whether they will accept the contract or in fixing the amount of the premium to be charged." By contrast, in *Wolfe v. Western General Mutual Insurance* (2000), 21 C.C.L.I. (3d) 210 (Ont. S.C.), a case referred to by counsel, where a change in heat source was found to have been a material change in risk, the insurer tendered evidence from a retired underwriting manager who testified about industry practices in affording coverage and setting premiums: see para. 14.

[57] Without evidence to support the jury's affirmative answer to Question 3, there could be no finding that the appellants had failed to notify the insurer of a material change in risk, and that they therefore were in breach of statutory condition 4.

(d) Conclusion on statutory condition 4

[58] Accordingly, both the trial judge's failure to provide an adequate response to a question by the jury with respect to the definition of "primary heat source", and the absence of evidence to support the jury's answer to Question 3, call into question the conclusion that the appellants were in breach of statutory condition 4. If that were the only reason for denial of their claim, I would have been inclined to allow the appeal, on the basis that these errors produced a "substantial wrong or miscarriage of justice": *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6). However, as I will explain, with respect to statutory condition 7, there was no error in the trial judge's directions respecting certain evidence, her instructions on the law, or her conclusion that the appellants' wilful misstatements vitiated their claim. I turn to those issues now.

(2) Was there a reversible error with respect to statutory condition 7?

[59] The appellants argue a number of points with respect to statutory condition 7, which I have grouped as follows:

1. Did the trial judge err in her instructions about the evidence of certain witnesses?
2. Did the trial judge err in her instructions respecting the intention required for a wilful misstatement?

3. Did the trial judge err in her formulation of Question 5, by not requiring the jury to consider separately whether Cindy or Joyce made wilful misstatements?

[60] I will address each question in turn.

(a) The trial judge did not err in her instructions to the jury about the evidence of certain witnesses

[61] The appellants assert that the trial judge erred in: (1) instructing the jury not to consider whether the appellants were "honest people"; (2) failing to instruct the jury to disregard the opinion evidence of Mr. Barrett, who was not a qualified expert witness; and (3) failing to caution the jury about Mr. Coutu's credibility after he was improperly allowed to remain in the courtroom while other witnesses testified. The appellants contend that these errors compromised the fairness of the trial.

[62] For the following reasons, I would not give effect to these arguments.

(i) The trial judge properly instructed the jury not to consider whether the appellants were "honest people"

[63] In his closing address, the appellants' trial counsel repeatedly framed the issue between the parties as whether Cindy and Joyce were "honest people". He stated:

> This case comes down to whether Cindy Pinder and Joyce Pinder are honest people. Either they're honest people or they're not, and if they're not honest people then you will answer certain questions in a certain way, and that will be the end basically[.]

…

> [I]f we don't get past the first part of this case, the policy part, you won't have to consider the second part, because you'll have decided that these are honest people, if that's the case, and that'll be the end of it[.]
>
> …
>
> On one side, you have an insurance company that is acting in a certain way, and on the other hand, you have two people, because they're both being denied the claim because of wilfully false statements, both of them, what they're doing, and decide who is being dishonest. Who is being honest – Is anyone being dishonest?
>
> …
>
> They decided to call Cindy and Joyce liars, "you're liars", because that gets them off the hook on the entire claim[.]

[64] The insurer's counsel objected on the basis that it was wrong to characterize the case as whether or not Cindy and Joyce were "honest people". The trial judge agreed. At the outset of her charge, she instructed the jury that, in relation to whether a wilfully false statement was made, they were not to consider "the broad question of whether the plaintiffs [were] honest people" or "whether the plaintiffs [were] the sort of people who would scam an insurance company". She reviewed the elements required for a wilful misstatement, which she addressed in greater detail later in the charge.

[65] The appellants submit that this instruction was wrong. They assert that the trial judge ought not to have instructed the jury to disregard the submission about

whether they were honest people because they could have been honestly mistaken in making various statements in the Proof of Loss.

[66] I disagree. The trial judge recognized the difference between the “honest people” submission the appellants’ trial counsel was putting to the jury and the point of law their appellate counsel makes on appeal – that the appellants could have made an honest mistake in completing the Proof of Loss. In the course of her charge, the trial judge properly instructed the jury that honest mistakes do not amount to a wilfully false statement when she stated:

> A statement will not be a wilfully false statement if the person who made the statement had an honest belief in its truth. The honest belief in the truth must be grounded in a reasonable foundation. A person making a statement cannot shut his or her eyes to the facts or purposefully refrain from inquiring into them.

[67] While it was relevant for the jury to consider whether Cindy had an honest belief in the truth of the statements she made about the existence and value of items listed in the Schedule of Loss, it was not appropriate for the appellants’ trial counsel to simply frame the issue as whether she and her mother were “honest people”. As the trial judge pointed out, the jury was not called upon to answer the “broad question” of whether Cindy and Joyce were “honest people”. The issue was whether they had made wilfully false statements in the Proof of Loss. There was no error in the trial judge’s direction on this point.

(ii) No trial unfairness resulted from the inclusion of Mr. Barrett's opinion evidence

[68] As noted above, Mr. Barrett was a co-owner of Chem-Dry, an insurance restoration company. He had been at the house after the fire on February 3, 2004, but had no recollection of inspecting its contents at that time. Nevertheless, he testified about what was listed in a general inventory that was prepared by three of his employees during their site visit on February 16, 2004. The employees were not called as witnesses.

[69] In his direct examination, Mr. Barrett testified that the employees were instructed to prepare a list of items they could "visibly see". Many of the items on the appellants' Schedule of Loss were not on the Chem-Dry inventory list. Mr. Barrett was asked whether if certain items, such as televisions, a laptop, a printer and a scanner, had been present at the house, remnants would have been identifiable.

[70] The appellants' trial counsel objected to Mr. Barrett providing what he characterized as "almost [bordering] on expert evidence", and he made essentially the same argument that is made on appeal: Mr. Barrett, who was not present when the inventory list was prepared, ought not to have been permitted to provide evidence about whether specific items would have been identifiable in the home after the fire. This would amount to opinion evidence, without Mr. Barrett having been qualified as an expert. The trial judge acknowledged that Mr. Barrett was not

an expert, but nevertheless permitted him to provide such evidence based on his experience working in the restoration industry. Mr. Barrett was then asked whether specific items such as televisions, laptops and ghetto blasters would be recognizable after a fire. He essentially testified that it would be “very variable”, but that you would typically have some remnant that would be recognizable.

[71] The appellants argue that the trial judge should not have included this portion of Mr. Barrett’s evidence in her charge to the jury and ought to have instructed the jury to disregard it.

[72] I agree that Mr. Barrett ought not to have been permitted to offer an opinion about whether the remnants of certain specific objects would be identifiable on a site after a fire, without ensuring that he was qualified to provide such an opinion. The fact that Mr. Barrett had relevant experience might well have permitted him to be qualified. However, the trial judge would have had to consider whether it would be appropriate for him to provide such opinion evidence in a case where he was called as a fact witness, and where he had no personal recollection of the contents of the house.

[73] That said, whether or not Mr. Barrett should have been prevented from testifying about whether, in his experience, the remnants of certain objects might be recognizable after a fire, his evidence on this issue could not have greatly assisted the insurer. Mr. Barrett admitted that he personally had not been involved

in preparing the inventory list, that he had no personal recollection of any of the contents from his one visit to the site, that the direction to his employees was to list items they could “visibly see”, that the extent to which any remnants would be visible would depend on variables, including where the fire started and the extent of the damage, and that, in this case, the house was damaged by smoke and water, and some parts were difficult to access. Under cross-examination Mr. Barrett admitted that his employees prepared a “quick list”, and that they were not asked to look for the remnants of anything or to check for items such as fur coats, remnants of a laptop computer or walkie talkies.

[74] Although better direction could have been given about the proper limits and scope of Mr. Barrett’s evidence, in my view, the jury was equipped to understand the limits to his evidence with respect to what items were identified in the general inventory list prepared by his employees at the time.

[75] Moreover, the jury was also provided with the evidence of Mr. Coutu, which was much more significant. Mr. Coutu was at the house on a number of occasions after the fire, and testified about the process for confirming the contents that were claimed. He was vigorously cross-examined on what he observed and did not observe at the house, including the remnants of various objects.

[76] In light of the above, I am not convinced that the inclusion of Mr. Barrett’s opinion evidence or the trial judge’s failure to provide the jury with instructions on

this point resulted in trial unfairness or a miscarriage of justice. These errors would not have made a difference to the outcome of the trial: see *Little*, at para. 41.

(iii) The trial judge did not err in failing to caution the jury about Mr. Coutu's credibility

[77] The appellants contend that the trial judge ought to have cautioned the jury about Mr. Coutu's credibility because he had improperly remained in the courtroom, contrary to the trial judge's order excluding witnesses (under r. 52.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194). The appellants argue that Mr. Coutu had the opportunity to tailor his evidence, in particular after having heard the evidence of Mr. Barrett, who testified before him.

[78] Mr. Coutu was the claims representative responsible for the appellants' file at Farmers' Mutual from the time of the fire until 2008 or 2009. He was present throughout the trial as the insurer's representative. When the trial judge made an order excluding witnesses, Mr. Coutu was permitted to remain in the courtroom after the insurer's counsel confirmed that Mr. Coutu was his "instructing client".

[79] Mr. Coutu's role became an issue when, in the course of his cross-examination, he was questioned about the absence of certain documents in the affidavit of documents he had sworn five years earlier on behalf of the insurer. After the insurer's counsel objected, counsel debated, in the absence of the jury, whether Mr. Coutu was in fact attending the trial "on behalf of" the insurer. The appellants' trial counsel pointed to the fact that Mr. Coutu had remained in the

courtroom as the insurer's representative at the time the order excluding witnesses was made. Ultimately, the trial judge instructed the jury that Mr. Coutu was at trial as a "fact witness" called by the insurer. Mr. Coutu confirmed that he was not at the trial "on behalf of the company" but that he still worked for the company.

[80] Nothing further was said about Mr. Coutu's status as a representative of the insurer, and the appellants' trial counsel did not seek any direction to the jury with respect to their treatment of his evidence.

[81] I would not give effect to the appellants' arguments, made for the first time on appeal, that Mr. Coutu's evidence ought to have been excluded from the trial or that the trial judge ought to have instructed the jury that the fact that he remained in the courtroom while other witnesses testified should be taken into consideration in their assessment of his credibility.

[82] First, Mr. Coutu was the insurer's representative at the trial. When the trial judge made her order excluding witnesses, she properly permitted Mr. Coutu to remain in the courtroom. Mr. Coutu had primary responsibility for the appellants' claim for several years, although he was not involved after 2008 or 2009. There is no requirement that the specific decision maker for a corporate defendant attend court as that party's representative (although that may often be the case). Whether or not Mr. Coutu was the "instructing client", he was entitled to remain in the courtroom as the insurer's representative.

[83] Second, the appellants' trial counsel knew that Mr. Coutu would be testifying on behalf of the insurer. He was the claims representative who had investigated the claim. He had attended at the house, compiled lists of items he questioned, written letters expressing concern about some of the items, and ultimately denied the claim. When the order was made excluding witnesses, the appellants' trial counsel could have asked for a direction from the trial judge, under r. 52.06(2), that Mr. Coutu testify first, if there was a concern about his opportunity to hear the evidence of other defence witnesses, such as Mr. Barrett. No such request was made. Nor was there a request from the appellants' trial counsel that the trial judge direct the jury to consider, in their assessment of Mr. Coutu's credibility, the fact that he had been present for the testimony of other witnesses.

[84] Finally, the appellants do not point to any specific aspect of Mr. Coutu's evidence that might have been tailored to respond to evidence of other witnesses.

[85] Accordingly, I would not give effect to this ground of appeal.

(b) There was no error in the trial judge's instructions on the intention required for a "wilfully false statement"

[86] Although not raised in their factum, in oral argument the appellants' counsel repeated certain arguments that were made to and rejected by the trial judge: (1) that the jury should have been instructed that the insurer was not alleging fraud; (2) that the trial judge should not have told the jury that the appellants' intention

was not relevant; and (3) in the alternative, that Question 5 should not have been left with the jury.

[87] I note that there were extensive arguments before the trial judge about whether the mental element of a “wilfully false statement” was the same as that required for fraud. The insurer’s counsel had taken pains to insist that fraud was not being alleged. He pointed to the fact that statutory condition 7 spoke of “fraud or [a] wilfully false statement in a statutory declaration” (emphasis added) as vitiating a claim. There were many cases put to the trial judge, and referred to on appeal, that suggest that the same mental element would be relevant whether the misstatements in the Proof of Loss were alleged to have been fraudulent or wilfully false. The fact that the insurer was not relying on “fraud”, or avoided using “fraud” terminology in describing the appellants’ conduct was not in itself a reason to remove Question 5 from consideration by the jury.

[88] The real issue here is whether there was any reversible error in the trial judge’s instruction to the jury about what the insurer had to prove in order to make out a wilful misstatement.

[89] At the outset of her charge, after directing the jury not to consider whether the appellants were “honest people”, the trial judge stated:

> In Mr. Kwinter’s closing address you heard him make some comments to the effect that the Pinders did not intend to deceive or mislead the insurer. I am instructing you to disregard all the comments about intentions.

…

> In Mr. Kwinter's closing address, he asked you to consider whether the plaintiffs were honest people. That statement is too broad in relationship to what you must consider when reaching your verdict. After the break, Mr. Kwinter said words to the effect that a wilfully false statement is one that a person makes knowing it to be false, without belief in its truth, or recklessly without caring whether it is true or not. That is a correct statement regarding part of the law that applies to wilfully false statements. In applying this part of the test, you will have to consider these three factors and determine, in part, whether Cindy Pinder made a statement on Exhibit 1, whether she made it knowing it to be false, whether she made it without believing that it was true or whether she made it recklessly without caring whether it was true or not. You will have to consider each statement separately. You are not to consider the broad question of whether the plaintiffs are honest people. You must not consider whether the plaintiffs are the sort of people who would scam an insurance company. I will have more to say about the law that applies to wilfully false statements later on in my charge. [Emphasis added.]

[90] Later in her charge, the trial judge stated:

> A wilfully false statement is one that a person makes:
>
> 1.knowing it to be false;
>
> 2.without belief in its truth, or;
>
> 3.recklessly without caring whether it is true or not.
>
> The intention of the insured with respect to the statement is not something that you should take into account. An insured owes a duty to her insurer of honesty and accuracy.
>
> A statement will not be a wilfully false statement if the person who made the statement had an honest belief in its truth. The honest belief in the truth must be grounded

> in a reasonable foundation. A person making a statement cannot shut his or her eyes to the facts or purposefully refrain from inquiring into them.

[91] The trial judge's instruction about what was required to establish a wilfully false statement addressed the necessary mental element: that the appellants must have known that the statements in the Proof of Loss were false, or alternatively that they made the statements without belief in their truth or recklessly without caring whether they were true or not. She also explained how a statement would not be wilfully false if the person making it held an honest belief in its truth. The statement, as part of these instructions, that "intention" was not something to take into account, must be understood in context: to respond to the "honest people" submission and suggestion by the appellants' trial counsel that the insurer was accusing the appellants of being the type of people who would perpetrate an insurance scam. The jury was not required to find that, in making the statements in the Proof of Loss, the appellants were setting out to commit insurance fraud or had some other motive. As this court stated in *Gregory v. Jolley* (2001), 201 D.L.R. (4th) 729 (Ont. C.A.), at paras. 15, 20, leave to appeal refused, [2001] S.C.C.A. No. 460, citing *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.), at p. 374, the motive or purpose of the insured in making the false statement is not the issue.

(c) There was no error in the formulation of Question 5

[92] The appellants argue that Question 5 was phrased incorrectly to refer to wilfully false statements made by both Joyce and Cindy. They submit that the trial

judge ought to have instructed the jury to consider whether Cindy or Joyce made wilfully false statements. They argue that this was necessary so that it could be determined whether, as a legal matter, Joyce's claim for the house would be affected by any wilfully false statements that were made by Cindy with respect to the contents.

[93] Statutory condition 7 provides that "[a]ny fraud or wilfully false statement in a statutory declaration in relation to any of the above particulars, vitiates the claim of the person making the declaration." The "above particulars" referenced in statutory condition 7 includes the obligation in statutory condition 6 to deliver a Proof of Loss verified by a statutory declaration, "giving a complete inventory of the destroyed and damaged property and showing in detail quantities, costs, actual cash value and particulars of amount of loss claimed."

[94] Jury Question 5 stated: "Did the plaintiffs make a wilfully false statement in the Proof of Loss form and the schedules?" (emphasis added). Similarly, in Question 6, the jury was required to indicate on the attached sheets "the items about which the plaintiffs made wilfully false statements". However, on the attached sheets, the question was phrased as "[h]ave either of the plaintiffs made a wilfully false statement to the defendant in relation to their claim for any of the following items?" (emphasis added).

[95] Joyce and Cindy both signed a single Proof of Loss that asserted a claim for the building, the contents and the additional living expenses, and indicated that the payments for their claim (except for the claim for living expenses which was to be paid only to Cindy) would be made to them jointly. The Proof of Loss stated: “We Cindy Pinder and Joyce Pinder do solemnly declare that the foregoing claim and statements are to the best of [our] knowledge and belief true in every particular, and [we] make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath”.

[96] It was Cindy who had filled out the Schedule of Loss, which details the contents that she claimed were lost or damaged in the fire and provides the original and replacement cost for each item. The Schedule of Loss was attached to the Proof of Loss. The Proof of Loss specifies that “[a] particular account of the loss is attached hereto and forms part of this proof.”

[97] Because Joyce did not testify at trial, there was no evidence from Joyce to explain what she knew and her state of mind when she signed the Proof of Loss. The evidence of Mr. Yates, the appellants’ independent adjuster, was that Joyce was not involved in the preparation of the Proof of Loss.

[98] The appellants submit that Question 5 should have asked whether Joyce or Cindy made wilfully false statements because they had separate insurable interests: Joyce owned the house and Cindy owned the contents. Notwithstanding

that they both signed the Proof of Loss, they did not, and could not have, asserted a claim for property in which they had no insurable interest. The appellants contend that the only wilfully false statements that were alleged to have been made were in relation to the claim for the contents of the house, which were owned by Cindy, and no one suggested that Joyce owned or was making any claim in respect of the contents.

[99] The appellants refer to case law for authority that, in accordance with the modern approach to statutory interpretation, Joyce and Cindy had distinct and severable claims under the insurance contract: see *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445, at p. 1455, *per* La Forest J. (dissenting); *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029. The appellants note that in *Wigmore v. Canadian Surety Co.* (1996), 139 D.L.R. (4th) 164 (Sask. C.A.), the Saskatchewan Court of Appeal held that, if the insurance contract can be said to be several, the claim of an innocent co-insured is not vitiated by the wilfully false statements of a co-insured.

[100] The insurer urges the court not to give effect to this argument, made for the first time on appeal. It points out that it was the appellants' trial counsel who insisted that Question 5 be formulated to refer to both Cindy and Joyce. Moreover, the insurer asserts that the claims of Joyce and Cindy were always treated together, as they ought to have been, since, as a matter of law, when she signed and swore the Proof of Loss, Joyce was bound by any wilful misstatement made

by Cindy. The insurer relies on the British Columbia Court of Appeal decision *Sienema v. British Columbia Insurance Co.*, 2003 BCCA 669, 21 B.C.L.R. (4th) 321, which upheld a decision vitiating the claim of an innocent co-insured who signed and swore, without reading it, a Proof of Loss containing wilfully false statements made by a co-insured. The insurer notes that the Proof of Loss in this case combined the claims for the building loss, the contents loss, and the additional living expenses.

[101] In *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 414 D.L.R. (4th) 65, at para. 69, leave to appeal refused, [2017] S.C.C.A. No. 343, the court described the failure to object to a civil jury charge as fatal to a request for a retrial on appeal based on misdirection or non-direction, except where the error has resulted in a substantial wrong or a miscarriage of justice. In *Montepeque v. State Farm Mutual Automobile Insurance Company*, 2017 ONCA 959, 75 C.C.L.I. (5th) 1, Laskin J.A. explained that "[i]n a civil case, the failure to object at trial is usually fatal on appeal because 'it is an indication that trial counsel did not regard as important or necessary the additional direction now asserted'": at para. 34, citing *Marshall v. Watson Wyatt & Co.* (2002), 209 D.L.R. (4th) 411 (Ont. C.A.), at para. 15. This is especially the case where trial counsel not only neglected to object to what is criticized on appeal, but specifically endorsed the approach taken at trial: *Goodwin (Litigation guardian of) v. Olupona*, 2013 ONCA 259, 205 O.A.C. 245, at para. 95.

[102] The appellants ask the court to determine that Joyce had a separate insurable interest and to intervene on the basis that to do otherwise would result in a grave injustice to Joyce: she was the owner of the house, with a separate insurable interest, and her claim in respect of the house ought not to be vitiated by reason of Cindy's wilful misstatements about the contents. The appellants seek the court's intervention notwithstanding the position of their trial counsel, including his insistence on the formulation of Question 5, which they say was in error.

[103] I am not prepared to intervene in this case. The appellants' trial counsel's insistence that Question 5 refer to both Joyce and Cindy, along with his failure to request that statutory condition 7 be addressed separately for Cindy and Joyce to reflect their separate insurable interests in the contents and the house, did not result from oversight. It was part of a deliberate trial strategy. The appellants should not be entitled to resile from a position that their counsel actively advanced at trial: see *Goodwin*, at para. 95.

[104] Moreover, as I will explain, when the opportunity arose to address the very issue the appellants seek to raise here, the appellants' trial counsel indicated that this was not necessary, with the result that the issue was removed from consideration by the trial judge. The question of separate insurable interests was not overlooked. It was, in effect, conceded. In these circumstances, even if it is open to this court to intervene in certain cases notwithstanding the failure of trial counsel to object, I would not do so.

[105] As noted above, it was the appellants' trial counsel who asked that Question 5 be phrased to refer to "the plaintiffs". When discussing the language of Question 5, the appellants' trial counsel stated: "Well, would be 'Plaintiffs' because they both signed – they both claimed to have signed the declaration, so it should be plural" (emphasis added).

[106] The appellants' trial counsel's insistence that Question 5 refer to both Cindy and Joyce is consistent with the way that he presented the case at trial. He dealt with Cindy and Joyce throughout the trial as though their interests were the same.

[107] The appellants' trial counsel repeatedly referred to the alleged wilfully false statements as relating to both Joyce and Cindy. Indeed, at various points throughout the trial, he stressed that both Cindy and Joyce had signed the Proof of Loss, attesting to the truth of what was stated. For example, when the insurer's counsel questioned Mr. Yates regarding the fact that there was no discussion or information from Joyce as to the existence of the ring that Cindy claimed to have owned, the appellants' trial counsel intervened and made the following statement: "Joyce did swear the proof of loss along with Cindy. I think that should be very clear to the jury. Both of them swore to the truth of the proof of loss." Moreover, in his closing address, the appellants' trial counsel stated the following in an effort to enhance Cindy's credibility as to the truth of the statements made in the Schedule of Loss: "Cindy Pinder swears, as her mother swears, I own these items, this is what they cost or this is what it'll cost to replace [them]." While only Cindy was

responsible for preparing the Proof of Loss, the appellants' trial counsel inferred that Joyce's credibility was also at issue. This was emphasized during the trial by repeated references to whether Cindy and Joyce were "honest people".

[108] At no time did the appellants' trial counsel insist upon the separate treatment of the claims of Joyce and Cindy. As the insurer's counsel pointed out on appeal, the major thrust of the appellants' case at trial was that the insurer had acted in bad faith, and although Cindy's credibility had obvious weaknesses, Joyce's credibility did not. By the time of the trial, Joyce was 91 years old and was hard of hearing. She did not testify at trial. This may help to explain why the appellants' trial counsel chose to deal with Cindy and Joyce's claims together, and not to emphasize that only Cindy was making the alleged wilful misstatements.

[109] In his closing address, the appellants' trial counsel repeatedly referred to Joyce and Cindy together, and he noted that the insurer was alleging that <u>they</u> had made wilfully false statements. This prompted an objection by the insurer's counsel, who requested a corrective instruction. In the course of his submissions, the insurer's counsel argued that, while only Cindy was alleged to have made the misstatements, he was relying on Joyce's execution of the Proof of Loss as binding her to the wilful misstatements made by her daughter. I set out the entire discussion because it was at this point that the very issue the appellants raise on appeal was before the court and that any issue about Joyce and Cindy's interests

being considered separately ought to have been addressed by the appellants' trial counsel:

> Mr. Forget: [T]here's been no suggestion that Joyce has made, participated in the contents claim or Joyce has made a false, a wilfully false statement. By a matter of law because she executed the proof of loss, she basically owns the proof of loss and owns the false statements contained there.
>
> The Court: So you said on the one hand there's been no suggestion that Joyce did certain things … because she signed it, she owns it. So then are you saying that Joyce made wilfully false statements?
>
> Mr. Forget: Yes. She made, she …
>
> The Court: Because she signed it?
>
> Mr. Forget: This is how she made the wilfully, she executed the proof of loss without having a genuine belief in the truth of the contents … this elderly lady, she executed the proof of loss that was prepared by an adjuster and she didn't read it. The court said you own the statement that is contained, and the reason why I didn't expect that we're going to get into that, and that's why I didn't say it in my closing submissions is, get into that issue, is because, as a matter of law, she executed, she owns it, but Mr. Kwinter's now saying that there's an allegation that she made wilfully false statements suggesting to this jury that she was part of this, and she was reckless, and she was, you know, made knowingly, that's not accurate.
>
> The Court: So you're not saying that she made statements that were wilfully false?... Seems like you're going in, well I won't say in circles, but contrary to yourself.
>
> …

Mr. Forget: Okay. The law is, you execute a proof of loss, you have to have a genuine belief in the truth of the statements contained period. She signed the proof of loss. She owns the statements. To the extent that the contents of the proof of loss, including the schedule is false, she owns that false.

Mr. Kwinter: That doesn't make sense.

Mr. Forget: That's, absolutely, that's what the authorities suggest. So that avoids, if I can, that avoids a person such as, I believe it's [indiscernible] to say I didn't read it. I don't know what's in there. I didn't read it. My lawyer prepared it or my adjuster prepared it or my representative prepared it. That avoids that, because you have a duty to ensure that the contents contained therein are accurate. So that applies in this case to Joyce, because she executed the proof of loss.

The Court: But you haven't made an issue of that in this case. I understand your legal position … but there really hasn't been anything in this trial about Joyce making false statements.

Mr. Forget: No, there hasn't been.

The Court: No, so you're just saying from a legal … perspective.

Mr. Forget: Yes, and I didn't make it because she wasn't involved at all in the preparation of the schedule, and that …

The Court: Your allegation is that Cindy made wilfully false statements.

Mr. Forget: Yes, if I could kind of break it down. The schedule of loss, the written schedule, the May 12, 2004 letter, that's all Cindy, but what happens is the schedule of loss is contained, is attached to the proof of loss that's signed by Joyce. By signing it, she owns the statement, and that's, I can give you the cite for that.

The Court: I understand what you're saying from the legal perspective … but does it really make any practical difference.

Mr. Forget: It makes a practical difference, I didn't think it did, that's why I rise now, and that's why I didn't make this huge issue of it yesterday. It doesn't make a difference, except that the submissions that were made were that Joyce made wilfully false statements, acted recklessly, made statements knowing, that, as a matter of law, she did because she executed the proof of loss. So I believe, all I'm asking Your Honour, is that in your charge, that you make a comment with respect to that to respond to.

The Court: So I think maybe the difficulty we're getting into is, Mr. Kwinter made a few statements, which I will say were, perhaps overstating it, made them tongue in cheek, sarcastically, so when he said Joyce made wilfully false statements, as a question … he's not saying that Joyce made wilfully false statements. That would be contrary to his client's position.

Mr. Forget: Yes.

The Court: So that's why, you're getting into the issue now, but I don't think Mr. Kwinter made a submission that she did. In fact, I think what he said was to the opposite.

Mr. Forget: Yeah. You're absolutely correct, Your Honour, but he suggested that the insurance company's suggesting that she did.

The Court: Alright.

Mr. Forget: So, and it's not a matter of evidence. It's not a matter, because all she did, and that's acknowledged, is she executed the proof of loss which contains false statements, and that's the – I can provide you with that.

The Court: No, I read that case.

> Mr. Forget: Yes, so as a matter of practical reality, the jury should not, could, should not be going into the jury room thinking well this is all Cindy, Joyce has nothing to do with this. Joyce does have something to do as a matter of law because she executed the proof of loss.
>
> The Court: Mr. Kwinter, I'm not sure I need to hear from you on this, but if you wish to say something, of course you can.
>
> Mr. Kwinter: Well, I mean, Joyce had to sign it because it's her house. I don't think anybody applied their mind to whether she was [indiscernible] contents or not, but I don't think it matters. If they're going to reject the claims, they're going to reject them both. I think it's, practically, I don't think it matters.
>
> The Court: All right, thank you very much. I will think about this over the evening. [Emphasis added.]

[110] There is nothing to indicate that anything further was said on this issue. The trial judge's ruling on the various objections of counsel did not address this point.

[111] Whether Joyce was bound by Cindy's misstatements, and whether Joyce and Cindy had separate insurable interests that ought to have been considered separately, were legal issues that, if contested, would have had to have been determined by the trial judge. The appellants' trial counsel did not, however, take the position that Joyce and Cindy's claims should be considered separately, choosing instead to deal with their claims together, likely for strategic purposes. The insurer had provided case law to the trial judge, and was advancing his argument about why Joyce, having signed the Proof of Loss, would be bound by Cindy's misstatements. It was at this point that the appellants' trial counsel had the

opportunity to address the legal issue – to argue that Joyce was not bound by Cindy's misstatements as a matter of law, and that their interests ought to be considered separately.

[112] If the appellants' trial counsel had made this argument at this point in the trial and obtained a ruling that Cindy and Joyce's claims were separate and that, as a matter of law, Joyce was not bound by Cindy's misstatements, it would have required a rewording of Question 5, an instruction to the jury to consider the evidence separately for Joyce and Cindy, particularly on the question of what was said about the contents of the house, and a corrective instruction about the references in the appellants' closing that the insurer's counsel had objected to.

[113] However, instead of arguing that Cindy and Joyce's claims should be treated separately, the appellants' trial counsel stated, "[i]f [the jury is] going to reject the claims, they're going to reject them both … I don't think it matters". Not only did the appellants' trial counsel fail to insist that the claims be dealt with separately, he effectively conceded the point by stating his position that the claims would stand or fall together.

[114] There is no reason to interfere, essentially second-guessing the trial strategy of counsel. For these reasons, I would not give effect to this argument on appeal.

(3) Did the trial judge err in refusing relief from forfeiture?

[115] Relief from forfeiture was not addressed in the appellants' notices of appeal, and was touched on only briefly in their factum, to submit that the trial judge ought to have given separate consideration to whether Joyce was entitled to relief from forfeiture, even if Cindy was not. In oral argument, the appellants' counsel also submitted that relief from forfeiture ought to have been granted to both appellants because, once the value of the claim was determined by an appraisal, there was no prejudice to the insurer resulting from Cindy's misstatements in relation to the contents.

[116] The insurer asserts that relief from forfeiture is not available in respect of statutory condition 7, and that, in any event, there was no error in the trial judge's refusal to grant relief from forfeiture.

[117] I would not give effect to the appellants' arguments. A decision to grant or refuse relief from forfeiture is highly discretionary. Appellate intervention is warranted only where the judge below erred in principle, failed to take into consideration a major element of the case, misapprehended, disregarded or failed to appreciate relevant evidence, or made a finding or drew an inference not reasonably supported by the evidence: *Monk v. Farmers' Mutual Insurance Company (Lindsay)*, 2019 ONCA 616, 92 B.L.R. (5th) 1, at para. 78, leave to

appeal refused, [2019] S.C.C.A. No. 384. No such error has been demonstrated here.

[118] Relief from forfeiture was sought in this case under s. 129 of the *Insurance Act* and s. 98 of the *Courts of Justice Act.* Section 129 of the *Insurance Act* applies in the specific context of forfeiture or avoidance of insurance resulting from imperfect compliance with a statutory condition as to the Proof of Loss or other matter required to be done with respect to the loss. It provides:

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

Section 98 of the *Courts of Justice Act* is a general provision that provides: “A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just”.

[119] In *Kozel v. Personal Insurance Co.*, 2014 ONCA 130, 372 D.L.R. (4th) 265, at para. 58, LaForme J.A. held that s. 98 of the *Courts of Justice Act* can apply to contracts of insurance governed by the *Insurance Act*. However, he suggested, as did Brown J.A. in *Monk*, at para. 79, that s. 98 operates in respect of a breach of a statutory condition, where the breach took place before the loss.

[120] The trial judge referred to both s. 129 of the *Insurance Act* and s. 98 of the *Courts of Justice Act*. She concluded that relief from forfeiture was available in the case of imperfect compliance with a requirement. She rejected the appellants' submission that "in the absence of fraud, errors on the proof of loss were made only inadvertently or carelessly, that they constitute only imperfect compliance and, therefore, the court can grant relief from forfeiture". She concluded that this was not a case of imperfect compliance and that relief from forfeiture was thus not available.

[121] The trial judge did not err in refusing relief from forfeiture in this case. I agree that, in the circumstances of this case, relief from forfeiture was not available or warranted under s. 129 of the *Insurance Act*. Even assuming, without deciding, that s. 98 of the *Courts of Justice Act* can apply to a "post-loss" breach of a statutory condition, the appellants would not be entitled to relief from forfeiture under this provision.

[122] In addition to being limited to instances of imperfect compliance, relief from forfeiture requires the consideration of three factors: 1) the reasonableness of the insured's conduct; 2) the gravity of the breach; and 3) the disparity, if any, between the value of the property forfeited and the damages caused by the breach: *Monk*, at para. 79; *Kozel*, at para. 59. While these three elements must be considered and balanced by the court in determining whether the insured is entitled to relief from forfeiture in the circumstances of each case, the reasonableness of the

insured's conduct "lies at the heart of the relief from forfeiture analysis": *Monk*, at para. 93. Accordingly, a "party whose conduct is not seen as reasonable will face great difficulty in obtaining relief from forfeiture": *Monk*, at para. 93.

[123] Here, the appellants' conduct was not reasonable and the conduct that vitiated the appellants' claims was serious. The jury concluded, in their response to Question 6, that the appellants had made 39 wilfully false statements in the Proof of Loss. The evidence suggested that a number of the items claimed were either not owned by Cindy or did not exist at all. As noted by the trial judge, the jury's findings on Question 6 were inconsistent with the appellants' assertion of inadvertence or carelessness. Relief from forfeiture was properly refused in the circumstances of this case, whether under s. 129 of the *Insurance Act* or s. 98 of the *Courts of Justice Act* (assuming, without deciding, that s. 98 could apply).

[124] As for the appellants' contention that the insurer would not be prejudiced if relief from forfeiture were granted because the appraisal fixed the value of the contents, I disagree. The appraisal valued the contents claimed by the appellants, while assuming that they existed. The wilful misstatements here went beyond the exaggeration of the value of certain items. Accordingly, it cannot be said that the appraisal eliminates the prejudice to the insurer. In any event, this was not a case of "imperfect compliance" and the unreasonableness of the appellants' conduct, as well as the severity of their breach, preclude relief from forfeiture in the circumstances of this case.

[125] Finally, I would not give effect to the appellants' submission that the trial judge erred in failing to consider separately whether Joyce was entitled to relief from forfeiture in respect of her claim for the value of the house. There is no indication that this argument was made to the trial judge, and for good reason. As I have already explained, the appellants' case at trial assumed that Joyce and Cindy's claims stood or fell together and that, if wilful misstatements were made, they were made by both appellants. I have already concluded that there was no error in the failure to treat Cindy and Joyce's claims separately. As such, it is not open to the appellants to attempt to separate their claims for the purpose of relief from forfeiture. As a result of the jury's answers to Questions 5 and 6, which were formulated in accordance with the appellants' trial counsel's deliberate trial strategy, both Cindy and Joyce were found to have made 39 wilfully false statements in the Proof of Loss.

[126] Given my conclusion that the trial judge did not err in refusing to grant relief from forfeiture, it is unnecessary to determine whether, as the insurer submits, relief from forfeiture is generally not available in relation to statutory condition 7. In the circumstances of this case, the appellants were not entitled to relief from forfeiture in any event.

(4) Did the trial judge err in her costs award?

[127] The appellants seek leave to appeal the costs award of $616,843.27. The costs award included partial indemnity costs up to the date of the insurer's offer to settle, and substantial indemnity costs thereafter. The appellants submit that the trial judge erred in two ways. First, they contend that the trial judge incorrectly stated in her reasons for decision on costs that they had not contested the amount of costs, and that she failed to undertake any analysis of whether the amount of costs sought by the insurer was fair and reasonable in the circumstances. Second, they submit that the trial judge erred in awarding costs on a substantial indemnity scale from the date of the insurer's offer to settle to the close of trial.

[128] Since costs awards are discretionary, intervention on appeal is warranted only where the trial judge has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at paras. 19-20. Leave to appeal a costs award will only be granted where there are strong grounds to find that the trial judge erred: *Hobbs v. Hobbs*, 2008 ONCA 598, 240 O.A.C. 202, at paras. 32-33.

[129] For the reasons that follow, I would grant leave to appeal the costs award, and reduce the insurer's costs of the proceedings in the court below to the partial indemnity amount of $430,000, inclusive of taxes and disbursements. While I

would not give effect to the appellants' first argument, I agree with the appellants that the trial judge erred in principle in awarding substantial indemnity costs from the date of the insurer's offer to settle.

[130] The record on appeal contains the parties' written submissions on costs, as well as a transcript of their oral submissions. The insurer sought costs on a substantial indemnity basis for the entire proceeding (including its action to recover the mortgage pay out), in the sum of $646,842.10, on the grounds that the appellants were wholly unsuccessful in their claim of bad faith and their claim for $1 million in punitive damages. In the alternative, the insurer sought substantial indemnity costs from the date of its offer to settle made in November 2010. The alternative claim for costs (based on partial indemnity costs to the date of the offer and substantial indemnity costs thereafter) was $616,843.27. The appellants' position before the trial judge was that no costs should be awarded to the insurer notwithstanding its successful defence of the action, in light of various allegations of misconduct and delay on the part of the insurer.

[131] The trial judge denied the appellants' argument that the insurer should be deprived of its costs. She rejected the appellants' allegations that the insurer demonstrated bad faith by engaging in tactics to delay the action and wear them down. She found that the appellants had significantly contributed to the delay in the action. She further found that there was no trial unfairness caused by the insurer's failure to call a witness to speak to their decision to deny coverage, and

that there was no trial unfairness or bad faith that resulted from the fact that the insurer had not provided particulars regarding the alleged wilfully false statements.

[132] The trial judge noted that the appellants did not contest the amount of costs the insurer sought, just the entitlement. She then turned to the question of the scale of costs that should be awarded to the insurer. She noted that, on November 19, 2010, the insurer offered to settle the appellants' action and the insurer's action for the recovery of the amount it had paid out to Joyce's mortgagee, by a dismissal of both actions without costs.

[133] The trial judge considered the conduct of the insurer before it made its offer to settle. She referred, at paras. 60 and 61 of her reasons, to the insurer's refusal to attend the appraisal until after the appellants brought a motion, its unsuccessful appeal of the order that followed the motion, as well as its unsuccessful motion for summary judgment and appeal in the mortgage action. She stated that, while costs were likely addressed on these motions, this was not a case where substantial indemnity costs should be awarded from the outset of the matter, and she concluded that the insurer was entitled to partial indemnity costs up to the date of the offer.

[134] The trial judge then considered whether substantial indemnity costs should be awarded after the date of the offer. She provided her reasons for awarding such costs at para. 63, as follows:

> I agree with the defendant's submission that the plaintiffs took a very aggressive approach in their claim for punitive damages. They made hard-hitting allegations to attack the integrity of the defendant. The plaintiffs' position was that the defendant's investigation was a sham, that the defendant had called them liars and fraudsters, that they had to bring the defendant to the court kicking and screaming regarding the appraisal issue and that the defendant had dragged out the litigation in the hope that the plaintiffs would give up or that Joyce Pinder would not last until the trial. The plaintiffs knew before trial that Cindy Pinder would have credibility problems and that their own adjuster's evidence was that the insurer's approach during the adjustment period was reasonable and expected. The allegation that the plaintiffs might "give up or die" because of delay caused by the defendant was particularly reprehensible because the plaintiffs were responsible for a good part of the delay in the action. As noted above, an examination of Joyce Pinder was scheduled for August 2007. She finally attended in February 2015. The plaintiffs made bad faith allegations which they could not substantiate.

[135] The trial judge awarded costs to the insurer in the sum of $616,843.27. This represented partial indemnity costs up to the date of the insurer's offer to settle and substantial indemnity costs thereafter, in accordance with the bill of costs provided by the insurer.

[136] The appellants' first argument is with respect to the assessment of the insurer's costs. The appellants submit that the trial judge erred when she stated that they did not contest the amount requested for costs, and in failing to consider whether the amount awarded for costs was "fair and reasonable", by assessing the costs sought in the insurer's bill of costs. I disagree.

[137] Apart from asserting that the insurer should not have its costs in relation to three failed motions it brought in the course of the trial (for a mistrial after the opening address of the appellants' trial counsel, to amend the statement of defence, and to strike the jury after the appellants' closing address), the written submissions of the appellants on costs were directed solely to the question of entitlement. The appellants' position before the trial judge was that the insurer should not be awarded any costs, essentially because of the way it had treated them and their claim.

[138] The appellants' written submissions to the trial judge did not take issue with the number of hours spent by the insurer's counsel or their hourly rates. The appellants' trial counsel did not argue that the amount of costs was disproportionate to the claims made in the action or the length and complexity of the proceedings. The thrust of the appellants' response to the claim for costs was that the insurer's alleged misconduct should not be condoned by an award of costs. The trial judge was right when she said that the appellants had not contested the amount requested.

[139] I disagree with the appellants' argument on appeal that the trial judge ought to have considered whether it was fair and reasonable for the insurer's counsel to bill nearly 1,300 hours for trial preparation and attendance and over 950 hours for the pre-trial stages of the litigation. This argument was not made to the trial judge,

nor were any submissions made that would have assisted in a review of the specific time spent and hourly rates claimed at each stage of the proceeding.

[140] Typically, the total amount of costs to be awarded in a "protracted proceeding of some complexity cannot be reasonably determined without a critical examination of the parts which comprise the proceeding": *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at para. 100. However, the critical examination of the various parts of the proceeding cannot be performed in a vacuum. In the circumstances of this case, with litigation that was outstanding for 13 years, the trial judge needed the assistance of the appellants' trial counsel in her assessment of the insurer's costs if she was to make any reduction to the costs claimed by the insurer, which were supported by its detailed bill of costs.

[141] The insurer's costs submissions explained that this was not a typical insurance claim, addressing the complexity of the litigation and the various steps that were required before, during, and after the trial. There was no suggestion by the appellants that the amount sought was unreasonable or excessive. Even with respect to the insurer's three unsuccessful motions, the appellants did not propose a specific reduction. Nor did the appellants' trial counsel provide his own bill of costs, dockets or costs outline, which would have informed an assessment of the proportionality and reasonableness of the costs that were claimed by the insurer.

[142] A claim that the opposing party's costs are excessive without providing evidence of one's own costs in the litigation is "no more than an attack in the air": *Risorto v. State Farm Mutual Automobile Insurance Co.*, 2003 ONSC 43566, 64 O.R. (3d) 135, at para. 10. Counsel were intimately familiar with the issues in the case and the various procedural steps that were taken. In these circumstances, if there was a concern about the amount of time the insurer's counsel recorded in relation to a particular step, it was incumbent on the appellants' trial counsel to address it so that the trial judge could have the tools and an informed basis for assessing the reasonableness and proportionality of the costs that were claimed. Without such submissions, it was entirely appropriate for the trial judge to observe that the quantum of costs was not at issue, and to proceed to determine entitlement and the scale of costs to be awarded.

[143] I turn now to the appellants' second argument: that the trial judge erred in awarding substantial indemnity costs from the date of the insurer's offer to settle.

[144] The appellants assert that the trial judge erred in principle in awarding substantial indemnity costs from the date of the insurer's offer. They submit that she failed to distinguish between zealous advocacy of the appellants' claim and true reprehensible conduct deserving of sanction. The appellants contend that their conduct was not reprehensible; rather they advanced a valid and arguable claim of bad faith and sought punitive damages. They argue that the fact that they were

unsuccessful in these claims and that findings of fact and credibility were made against them did not warrant an award of substantial indemnity costs.

[145] The insurer asserts that the trial judge was entitled to exercise her discretion to award substantial indemnity costs because she found reprehensible conduct that was deserving of sanction. The appellants levelled allegations against the insurer that were egregious and unfounded, and were made in the hopes of securing sympathy and unjustified favour from the jury.

[146] I begin with the principle that an award of substantial indemnity costs is exceptional. Other than under r. 49.10 of the *Rules of Civil Procedure* (where a plaintiff recovers more than its offer to settle), substantial indemnity costs should only be awarded after trial[4] where the court deems that a party's conduct was reprehensible, scandalous or outrageous: *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 29. The fact that proceedings have little merit is no basis for awarding costs on an elevated scale: *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134. As noted by this court in *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766, 140 O.R. (3d) 77, at para. 8, "[s]ubstantial indemnity costs is the elevated scale of costs normally resorted to

[4] I note that r. 20.06 provides that the court may order costs of a motion for summary judgment by a party on a substantial indemnity basis if: (a) the party acted unreasonably by making or responding to the motion; or (b) the party acted in bad faith for the purpose of delay.

when the court wishes to express its disapproval of the conduct of a party to the litigation."

[147] In its written submissions to the trial judge, the insurer stated the following:

> [T]he law is settled that where an insured alleges the insurer has breached its duty of good faith and makes allegations of improper conduct required to justify an award of punitive damages and fails the insurer is entitled to its costs fixed on a substantial indemnity scale.

Similar submissions were made orally, and the insurer referred to a number of cases where bad faith claims had failed and substantial indemnity costs were awarded. The insurer's submissions to the trial judge on this point were incorrect.

[148] In *Hamilton*, the Supreme Court emphasized that the fact that a party makes unsuccessful allegations of fraud or dishonesty will not lead inexorably to the conclusion that substantial indemnity costs are warranted, since not all unsuccessful attempts to prove fraud or dishonesty on a balance of probabilities amount to "reprehensible, scandalous or outrageous conduct": at para. 26. Similarly, the failure of a plaintiff to prove a claim of punitive damages or breach of the duty of good faith against an insurer does not in itself justify an award of substantial indemnity costs. There must be a finding that the plaintiff engaged in conduct which is deserving of sanction.

[149] While there are cases where substantial indemnity costs have been awarded where plaintiffs made "empty" or "unsubstantiated" bad faith allegations,

typically there is specific conduct on the part of the unsuccessful party that extends beyond challenging the conduct of the insurer or presenting its case vigorously. For example, in *Sagan v. Dominion of Canada General Insurance Company*, 2014 ONSC 2245, 29 C.C.L.I. (5th) 284, where the plaintiff's statement of claim contained "a litany of unsupported allegations of bad faith, misconduct and incompetence against the defendant", and the plaintiff provided no evidence to support those allegations, substantial indemnity costs were awarded for the hearing of the defendant's successful summary judgment motion. In *DiBattista v. Wawanesa Mutual Insurance Co.* (2005), 78 O.R. (3d) 445 (S.C.), aff'd on other grounds 83 O.R. (3d) 302 (C.A.), substantial indemnity costs were awarded after trial against plaintiffs who made serious allegations of intentional acts undertaken in bad faith, which they disseminated in the media. In *Bustamante v. Guarantee Co. of North America*, 2015 ONSC 94, 42 C.C.L.I. (5th) 202, the court awarded substantial indemnity costs on a motion for summary judgment dismissing a claim for accident benefits, concluding that there was no foundation whatsoever for the plaintiff's claims of fraud and bad faith and that the plaintiff was trying to intimidate the insurer with exaggerated claims. In *Alguire v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2018 ONCA 202, 14 O.R. (3d) 1, this court upheld an award of substantial indemnity costs where the appellant's claim of bad faith had no "air of reality" and the appellant had fabricated his testimony.

[150] In my view, the trial judge erred in principle in awarding substantial indemnity costs in this case. The appellants' conduct did not reach the level of conduct that is deserving of sanction. The conduct that the trial judge viewed as reprehensible did not extend beyond vigorously challenging the insurer's conduct in the context of their punitive damages and bad faith claims.

[151] A fair reading of the trial judge's reasons is that she awarded substantial indemnity costs because the appellants made a number of hard-hitting allegations attacking the integrity of the insurer in the context of their punitive damages and bad faith claims. The appellants made these allegations knowing before trial that Cindy would have credibility problems and that Mr. Coutu would testify that the insurer's conduct was reasonable.

[152] The trial judge specifically referred to the following allegations made by the appellants: that the insurer's investigation was a sham; that the insurer had called them fraudsters; that they had to bring the insurer to court kicking and screaming regarding the appraisal issue; and that the insurer had dragged out the litigation in the hope that they would give up and that Joyce would not last until the trial.

[153] The allegations referred to by the trial judge were made in the context of the appellants' claims against the insurer for bad faith and punitive damages (in addition to coverage under their insurance policy). In making these claims, the appellants necessarily challenged the insurer's handling of their claim and relied

on the alleged misconduct of the insurer. Some of the allegations were made in the opening address of the appellants' trial counsel, prompting an unsuccessful motion for a mistrial.[5] There was nothing improper *per se* in the fact that the allegations were made or in the way they were stated by counsel; indeed, there is no indication that the trial judge issued any form of corrective instruction to the jury following the opening addresses. The fact that the appellants persisted with these allegations (some of which were repeated in counsel's closing address), despite certain weaknesses in their case (Cindy's credibility problems and Mr. Coutu's anticipated evidence), and were ultimately unsuccessful, is not egregious or reprehensible conduct warranting an award of substantial indemnity costs. The vigorous pursuit of an unsuccessful claim does not by itself justify an award of costs on an elevated scale: see *Upchurch v. Oshawa (City)*, 2014 ONCA 425, 27 M.P.L.R. (5th) 179, at paras. 31-33. Moreover, adverse findings of credibility do not justify an award of substantial indemnity costs: *Hunt v. T.D. Securities Inc.* (2003), 229 D.L.R. (4th) 609 (Ont. C.A.), at paras. 147-150, leave to appeal refused, [2003] S.C.C.A. No. 473.

[154] The appellants' bad faith and punitive damages claims, which were asserted in the context of seeking coverage under their insurance policy, were not empty,

---

[5] Although the initial objection of the insurer's counsel is in the record on the appeal, counsel's submissions on the motion for a mistrial and the trial judge's ruling dismissing the motion were not transcribed. It appears from the transcript that, immediately after the ruling, the first witness was called.

baseless or entirely without foundation. This case is distinguishable from those where plaintiffs made gratuitous claims of bad faith against their insurer for ulterior purposes or without any foundation or evidence to substantiate their allegations.

[155] Although the trial judge characterized the allegation that the appellants might "give up or die" because of delay as "particularly reprehensible" when the appellants were responsible for a good part of the delay in the action, this submission of counsel was not the kind of reprehensible conduct that would justify an award of substantial indemnity costs against the appellants. The insurer was responsible for some delay in the proceedings and the trial judge did not instruct the jury to disregard this submission. As this court noted in *Clarington*, at para. 45, "a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counterproductive conduct, on the other".

[156] The trial judge's findings do not support an award of substantial indemnity costs, nor are costs on an elevated scale supported by a fair reading of the record. Accordingly, I would give effect to this ground of appeal, and substitute an order for partial indemnity costs in favour of the insurer.

[157] Unfortunately, the insurer's counsel did not provide a bill of costs setting out its costs of the action on a partial indemnity basis, except to provide a proposed amount for partial indemnity costs for the period preceding its offer to settle.

Applying an appropriate discount to the substantial indemnity costs awarded by the trial judge, and accounting for taxes and disbursements, I would reduce the insurer's costs to the all-inclusive amount of $430,000.

V. DISPOSITION

[158] For these reasons, I would allow the costs appeal and reduce the trial judge's costs award to $430,000, inclusive of taxes and disbursements. I would otherwise dismiss the appeal.

[159] Taking into consideration the appellants' success on its costs appeal, I would award the insurer costs before this court fixed at $40,000, inclusive of taxes and disbursements.

Released: June 25, 2020 KMvR

K. van Rensburg J.A.

I agree M.L. Benotto J.A.

I agree. Harrison Young J.A.