SUPREME COURT OF NOVA SCOTIA

Citation: Keizer v. The Portage LaPrairie Mutual Insurance Company - 2013 NSSC 118

Date: 20130611
Docket: Hfx. No. 328506
Registry: Halifax

Between:

Paul Keizer and Barbara Keizer

Plaintiffs

-and-

The Portage LaPrairie Mutual Insurance Company and **Founders Insurance Group Inc.**

Defendants

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: March 19,20,21,25 and 26, 2013 at Halifax, Nova Scotia

Written Decision: June 11, 2013

Counsel:

Counsel for the Plaintiffs - Derrick Kimball and Nash Brogan
Counsel for the Defendant Portage LaPrairie Mutual Insurance Group - James L. Chipman, Q.C. and Tipper McEwan
Counsel for the Defendant Founders Insurance Group Inc. - Brian Awad

Wright, J.

INTRODUCTION

[1] The plaintiffs Paul and Barbara Keizer are homeowners residing in Centreville, Nova Scotia. Their home, in which they have lived ever since it was built about 35 years ago, consists of a bungalow with an attached garage in a rural setting.

[2] Mr. Keizer is a carpenter by trade. When planning to take early retirement in October of 2008 from his employer Sodexo (to whom Acadia University contracted out its maintenance work), Mr. Keizer began setting up a woodworking shop in his garage. His intention was to use that space in carrying on his own post retirement business doing carpentry and furniture repair work.

[3] Those plans came to fruition in October of 2008 when his regular employment ended and he undertook his first job doing carpentry work for a customer. By that time, Mr. Keizer had registered the business name K&S Carpentry Enterprises (back in August of 2007) and acquired a number of large power tools, including a table saw, band saw and a drill press, which were placed in his garage. In addition, he had lined up part time contract work from Home Depot doing kitchen cabinet and countertop installations in its customers' homes.

[4] Almost a year went by with the intermittent use of the garage as a woodworking shop when, on the morning of September 17, 2009, Mr. Keizer decided to use his garage space to apply a topcoat of varnish on a number of chairs from Acadia University he had just repaired. He therefore went into his garage

and lit the wood stove, which was its sole source of heat, and which was intended to help speed up the drying process of the varnish. The wood stove had been regularly used in that location for some 18 years without incident.

[5] Mr. Keizer then went back into the house to do some paperwork and about 15 minutes later, his smoke alarm sounded. He immediately went to investigate and quickly discovered that a fire had broken out in his garage. Deciding to evacuate the house immediately, he jumped into his truck and drove to a neighbour's house where he called 911.

[6] Fortunately, the fire department arrived in time to knock down the fire before the flames spread to the house. However, the damage to the residence, including the power tools located in the garage, has produced a property loss claim in the amount of $81,102.16. The quantum of that loss has been admitted by all parties.

[7] Shortly thereafter, Mr. Keizer reported the loss to Founders Insurance Group Inc. ("Founders"), the insurance broker who had placed the insurance coverages on his behalf. Founders in turn reported the loss to the underwriter, The Portage LaPrairie Mutual Insurance Company ("Portage") who in the normal course assigned an adjuster to investigate the loss.

[8] The exact cause of the fire has never been determined. However, the description of the fire damage by Mr. Keizer and the fire pattern shown in the photographs establishes that the origin of the fire was likely in the northwest

corner of the garage where the wood stove was located.

[9] At all events, once informed that the garage was being used for purposes of a woodworking shop, with a wood stove as its sole source of heat, Portage denied the plaintiffs' claim. Portage took the position that there had been a material change in risk by virtue of the change in use of the garage as a woodworking shop. Portage further asserted that it is invariably beyond their level of risk tolerance to underwrite a policy where the insured premises include the combination of a woodworking shop with a wood stove as its source of heat. The insurer therefore maintains that there was a breach of Statutory Condition 4 of the homeowner's policy and that the plaintiffs therefore have no right to indemnity.

[10] The plaintiffs initially brought this action against Portage as sole defendant, claiming the right to indemnity for their property loss. As events unfolded, however, the plaintiffs later added Founders as a second defendant, alleging breach of contract and negligence on its part for failing to obtain and confirm the proper insurance coverages which the plaintiffs needed, based on the information they had provided. Founders denies any negligence on its part and maintains that Portage is liable to indemnify the plaintiffs for their loss.

REVIEW OF THE EVIDENCE AND INITIAL FINDINGS OF FACT

[11] I begin by expanding upon the evidence of Mr. Keizer concerning his plans for self-employment after taking early retirement in October of 2008. Indeed, his first efforts in that regard date back to May of 2007.

[12] At that time, Mr. Keizer made a written proposal to his employer to do some extra freelance work repairing furniture for Acadia University for whom there was a significant backlog of work. After being advised by his supervisor that he would need extra insurance coverage if successful in getting this work, Mr. Keizer took it upon himself to make the necessary inquires to his long time broker, Founders.

[13] The documentary evidence confirms that on June 13, 2007 Mr. Keizer spoke with Mr. Ken Geddes, an insurance broker employed by Founders. Mr. Keizer testified that he told Mr. Geddes of his ongoing talks with Acadia University about doing furniture repair work, some of which would be done in his own garage and therefore involve furniture transportation. He explained to Mr. Geddes that he was not ready to proceed as yet but wanted to know what his insurance needs would be for such work and whether the obtaining of the necessary insurance coverage was doable.

[14] Mr. Keizer said that Mr. Geddes asked questions about the prospective work and that he responded with the answers. Based on the information given to him by Mr. Keizer, Mr. Geddes handwrote on a broker's application form for a commercial lines policy that the business of the applicant was furniture repair in a home based business in a separate building. The building then described on the application form matches the description of Mr. Keizer's attached garage. Mr. Geddes noted that the estimated receipts from this business would be $25,000 and he recommended to the underwriter that the risk be accepted.

[15] The recommended coverages, under a commercial lines policy, were twofold. First, the coverage was to extend to Contents, namely, Mr. Keizer's tools while in the garage and while in transit, and also to furniture when in transit to and from the client's premises. Secondly, the proposed policy was to provide liability coverages.

[16] It should be noted that the line in the application form under the heading "Heating" was left blank. Mr. Keizer in his testimony recalled no discussion about that piece of information and the blank line is indicative that the question was never asked of him by Mr. Geddes. It should also be noted, however, that the presence of the wood stove in the garage had been disclosed by Mr. Keizer when obtaining his homeowner's insurance policy and it is common ground that Portage underwrote the homeowner's policy for many years with knowledge of that risk.

[17] In any event, it is also common ground that once Mr. Geddes otherwise completed the broker's application form, he sent it to a Mr. Janes at Portage requesting a quote for the proposed new business. Shortly thereafter, Portage provided a quote to Founders, offering to accept the requested coverages for a total annual premium of $680. Because Mr. Keizer was not yet ready then to undertake such work outside of his regular employment (his proposal for Acadia furniture repair never having been accepted), the placement of the proposed insurance was not pursued at the time and the quote was never bound.

[18] As noted earlier, in the ensuing months in 2007 Mr. Keizer nonetheless proceeded with the registration of the business name K&S Carpentry Enterprises and began acquiring heavy power tools for his garage.

[19] Sometime in 2008, Mr. Keizer engaged in discussions with Home Depot who were then opening a new store in New Minas. He was ultimately hired by Home Depot around October of that year to do kitchen cabinet and counter-top installations for its customers. That work actually began in early January of 2009.

[20] In the meantime, Mr. Keizer was also trying to establish and promote his home based business in carpentry and furniture repair work. In the fall of 2008, he prepared and distributed an advertising flyer which was entered in evidence. That flyer details over a dozen different types of carpentry and furniture repair work services offered by K&S Carpentry. It was intended by Mr. Keizer that this work would be partly performed at customers' job sites and partly performed in his own garage, depending on the nature of the work.

[21] In his earlier discussions with Home Depot, Mr. Keizer was informed of its own insurance requirements to be satisfied before any work could be performed on its behalf. Home Depot provided him with a written list of its requirements, including the types of insurance required and its need to be named on the policy. With that direction, and the direction he had received earlier from his work supervisor as above noted, Mr. Keizer again approached Founders to look after his new insurance needs.

[22] The documentary evidence discloses that it was on October 16, 2008 that Mr. Keizer telephoned Founders and spoke with one of its brokers employed there. He did not know the name of the lady he spoke to (or at least cannot now recall it) but we now know from the evidence that it was Ms. Paulette Josey.

[23] Mr. Keizer was firm in his testimony that in describing his insurance needs to Ms. Josey, he mentioned both aspects of the post-retirement work he was intending to engage in. Firstly, he informed her of the kitchen cabinet and countertop installation work he was going to be doing for Home Depot which would involve the transporting of Home Depot products to customers' job sites and also to his garage to some extent as part of the work. He testified that he had in hand during this conversation a paper from Home Depot outlining its own insurance requirements, including being named as an insured on the policy. He said that Ms. Josey asked him questions about those requirements which he answered.

[24] Secondly, Mr. Keizer testified that he advised Ms. Josey that he was setting up a home business in his attached garage where he intended to do carpentry and furniture repair work. He went on to say that he advised Ms. Josey that this would entail the transportation of furniture and wood products to his garage to be worked on. He also told her of the tools that would be involved in doing that work. Mr. Keizer maintained that he told Ms. Josey of the name of the business which he had registered a year earlier and the work activity he intended to do. He further recounted telling Ms. Josey of the need for insurance coverage of his tools (including tools in transit) and for transporting furniture items to and from his

garage.

[25] Mr. Keizer was very explicit in his evidence that he told Ms. Josey that he would be bringing work to his garage and that he needed insurance coverage for doing that work, including the transportation of furniture or wood products to and from.

[26] Having informed Ms. Josey of his insurance needs, Mr. Keizer testified that he relied on Founders to place the insurance coverage he needed. He left it to Founders to select and approach the appropriate underwriter(s).

[27] A few days later, Mr. Keizer received a telephone call from Ms. Josey informing him that Founders had received a quote from Portage for the coverage sought. Mr. Keizer accepted the quote whereupon Portage issued a Contractors Pro policy for a one year period commencing October 20, 2008. That commercial line policy provides coverage for the insured's tools (including tools in transit) as well as various liability coverages. It did not provide any building coverage, as that was separately insured under Mr. Keizer's homeowner's policy. The insured's work classification under Portage's quote was that of "carpenter".

[28] As is standard practice in the industry, at no time did Mr. Keizer ever speak with anyone at Portage . His reliance was upon Founders and as he put it upon receipt of the insurance policy, "I thought I got the coverage I was looking for".

[29] There is a sharp contrast between the foregoing evidence given by Mr. Keizer and the evidence of Ms. Josey concerning the scope of the insurance coverages requested.

[30] Unfortunately, Ms. Josey did not testify at trial. She disobeyed a subpoena issued on behalf of Founders and that failure to attend has subsequently been dealt with by the Court. During the trial, however, rather than face an adjournment of uncertain duration because of Ms. Josey's failure to attend, the court permitted, with the concurrence of counsel, the admission and use of the transcript of Ms. Josey's discovery evidence taken on September 7, 2012 (pursuant to Civil Procedure Rule 18.20).

[31] In her discovery evidence, Ms. Josey recounted that she had accepted an assignment to Founders' office in Wolfville (essentially a secondment from a related company in Dartmouth) in the fall of 2008. She said that she was brought in to straighten up the mess in the Wolfville office by clearing the backlog of files and getting on top of the piles of work that had not been done. She worked in the Wolfville office full time for the months of September, October and November of 2008 after making occasional work visits there in the preceding months.

[32] Ms. Josey's evidence was that she recalls Mr. Keizer calling her and asking for a quote for commercial insurance coverage. This was her first contact with the Keizers which she was able to pinpoint on the basis of an e-mail as having occurred on October 16, 2008.

[33] It was Ms. Josey's evidence that Mr. Keizer informed her only of his intended work activity for Home Depot doing kitchen cabinet and counter-top installations at their customers' job sites. According to her, nothing was said by Mr. Keizer about his intention to set up a home based carpentry and furniture repair business in his attached garage. When specifically asked whether Mr. Keizer told her about doing work at home, she replied "He did not. Not to my knowledge, no." She added that if he had done so, she would have told him that he would have thereby needed two different insurance quotes because of the very different nature and location of these two work activities.

[34] With that understanding, Ms. Josey composed an e-mail to the attention of Ms. Kim Livingston at Portage which was sent on October 16, 2008. In that e-mail, Ms. Josey wrote that the "insured is going to work for Home Depot installing kitchen cabinets and possibly floors in residents only, no commercial" with estimated gross receipts of $60,000. She requested a commercial quotation on coverage for tools and liability, noting that the plaintiffs' home insurance was also with Portage. Only that barebones information was provided to Portage in that single communication.

[35] Ms. Josey acknowledged that there does not exist any notes or papers of her own making that day. She said that there "would have been" handwritten notes she used to prepare that e-mail but that she "would have" destroyed them. She said that she was not in the habit of keeping her scribbled intake notes and simply transformed what Mr. Keizer wanted into her e-mail to Portage. She added that it was not accepted practice to retain such handwritten notes of conversations with

clients to confirm the coverage needs, evidence that was contradicted by Ms. Suzanne MacLellan, the current president and CEO of Founders, whose testimony will be referred to later.

[36] There is another anomaly to be noted in Ms. Josey's evidence. When first asked whether or not she had seen the broker's application form prepared by Mr. Geddes in June of 2007 in the file while she was speaking with Mr. Keizer, she answered in the affirmative. Later on, she contradicted herself by saying that she would not have seen that document while speaking with the plaintiff, adding later that "I did not see it". She said that Mr. Keizer did not mention that document to her during their telephone conversation.

[37] This sharp contrast between the evidence of Mr. Keizer and that of Ms. Josey requires the court to make a critical finding of credibility. I found Mr. Keizer to be a reliable and straightforward witness, both by the substance and presentation of his evidence. It was given in a matter of fact fashion, without exaggeration or embellishment. His version of events was not shaken in cross-examination by the two defence counsel and was consistent throughout, both internally and in respect of the evidence as a whole. It stands to reason that having clearly informed Mr. Geddes of his intention to set up a home based business in furniture repair in his initial call in 2007, that he would have supplied the same information to Ms. Josey the following year.

[38] In addition, Mr. Keizer has only the one telephone conversation to recall which was focused on his own personal insurance needs at the time. Ms. Josey, on the other hand, was working in a very busy, if not chaotic, workplace at the time fielding an immeasurable number of phone calls and electronic communications from a wide array of clients. Without having any intake notes from her conversation with Mr. Keizer, I find her memory of the extent of her conversation with Mr. Keizer to be unreliable.

[39] I do not suggest that Ms. Josey was deliberately lying in her discovery examination and, of course, the court has not had the benefit of hearing her testimony directly. However, I make the finding of fact that whether through inattention, forgetfulness or carelessness under a heavy workload, Ms. Josey failed to address, or record, the second sphere of work activity which Mr. Keizer informed her of, namely, the home based carpentry and furniture repair business he intended to carry on in his garage. Consequently, she failed to communicate that intention of the insured when requesting a quote in her e-mail to Portage.

[40] That error by Ms. Josey was later compounded by an admitted error on the part of Mr. Donald Abbey almost a year later when it was time for the policy renewal. Mr. Abbey was then president and CEO of Founders and was in charge of the Wolfville office. He was then handling most of the branch work in commercial lines of insurance but his time was largely occupied by certain business mergers or acquisitions of other insurance brokerages he was trying to accomplish.

[41] In the normal course of business, Portage sent to Founders in July of 2009 a Contractor's Pro policy renewal questionnaire for K&S Carpentry. The instructions on this single sheet questionnaire ask the broker to review with its client the 23 questions listed and to indicate the anticipated annual receipts derived from each of the insured's operations. This document came to the attention of Mr. Abbey in the Wolfville office since he was mostly responsible for the commercial lines of insurance.

[42] Mr. Abbey readily admitted that he did not review this questionnaire with Mr. Keizer at all. Rather, he completed the various information fields completely on his own, entering various monetary amounts derived from each of the insured's operations under the headings of aluminum and vinyl siding installation, off premises carpentry, fence construction and windows and mirrors. Under the information field for "Carpenters - shop only", Mr. Abbey entered the amount of $0. He then signed the questionnaire and dated it August 1, 2009 before sending it off to Portage (apparently on August 6, 2009). As Ms. MacLellan later acknowledged in her evidence, that information would clearly tell Portage that Mr. Keizer had no shop in his home generating revenue.

[43] Mr. Abbey acknowledged in his evidence that by sending the questionnaire to Founders, Portage was looking to ascertain the nature and amount of business receipts of the insured so that it could decide on making an offer of renewal of the policy and at what premium. Instead of obtaining this current information from Mr. Keizer, Mr. Abbey took a shortcut and used his own figures on the questionnaire, based on his knowledge of the kind of work he thought Mr. Keizer

was doing and his general experience with the business of small trades. He said he listed Mr. Keizer's shop income as a carpenter at $0 based on his understanding that Mr. Keizer was only doing carpentry work for Home Depot off premises. He admitted that he had hoped to review the requested information with Mr. Keizer when completing the questionnaire but did not.

[44] Based on the information in the questionnaire provided to it by Founders, Portage then offered to renew the Contractor's Pro policy effective October 20, 2009. In the meantime, however, the fire occurred during the coverage period of the initial policy.

[45] Mr. Abbey had no involvement in placing the plaintiffs' insurance coverage in October of 2008. Neither did anyone else at Founders except Ms. Josey. Mr. Abbey acknowledged that he had never spoken to Mr. Keizer about his business activities prior to the fire. After the fire occurred, however, he and Ms. MacLellan both became involved once Portage denied the claim, much to their dismay. His objective at the time was to try to determine the cause of the fire, why the claim was being denied by Portage, and what information might be available to persuade them to honour the claim.

[46] To that end, Mr. Abbey spoke with the adjusters, claims manager and the marketing manager at Portage to no avail. He also sent to Portage a copy of the 2007 broker's application form prepared by Mr. Geddes and the resulting quote in his efforts to persuade Portage that all material information had earlier been disclosed to them.

[47] Nonetheless, Mr. Abbey acknowledged that insurers generally frown upon the risk associated with the combination of a woodworking shop being heated by a wood stove and that it is hard to find an insurer to take on that risk. He admitted that once he visited the plaintiffs' home after the fire to take a look, and saw the woodworking shop set up in the garage heated by a wood stove, he thought "that's a problem".

[48] It was around this time frame that a second broker's application form, in the same template as that used by Mr. Geddes in 2007, emerged. That document is dated October 16, 2008 (the same date as Ms. Josey's e-mail to Portage requesting a quote).

[49] There is conflicting evidence surrounding the creation of this document. It was the testimony of John Christopher, who was then employed by Founders in the Wolfville office as an office or administration manager, that some time after the fire, Mr. Abbey (his superior) instructed him to complete this application form by copying the information contained on the same form used by Mr. Geddes' in 2007. He recounted that this occurred with only the two of them present in an upstairs room of the Wolfville office.

[50] The information he inserted on the form was largely the same as that contained in the 2007 form except that the wording describing the business of the applicant was expanded to read "Furniture Repair + Installations/Home-based business in attached garage". There was a further change in the description of operations where the words "Off-Premises Installations" were added to the earlier

words “Furniture Repair”. The line for the broker’s signature was left blank on the second application form.

[51] Mr. Christopher could offer no explanation for these changes which were so made. He said he was simply handed the 2007 application form by Mr. Abbey along with a blank copy of the same form. He said he was directed to copy that information and otherwise added whatever changes were instructed by Mr. Abbey.

[52] Mr. Christopher confirmed in his testimony that the handwritten information on the 2008 application form is in his own handwriting with the possible exception of the date and the formation of the letter “P”. This acknowledgment on the part of Mr. Christopher is corroborated by a forensic handwriting expert report provided by Founders. In that report, prepared by Mr. Brian Lindblom of Document Examination Consultants Inc. (who was not required to testify), it was opined that there is strong support for the view that the author of the handwriting on the 2008 application form was John Christopher. “Strong support” is defined in the report to mean that the possibility that an alternative hypothesis is true is considered to be unlikely. This conclusion was reached after comparing specimen documents written by the six other former employees of Founders working in the Wolfville office at the time.

[53] When giving his evidence, Mr. Christopher had no explanation as to why Mr. Abbey asked him to copy the information from the 2007 application form onto the second one bearing the date of October 16, 2008. He said that although Mr. Abbey did not voice any reasons for this request, Mr. Christopher’s own thinking

was that it was being done to try to help the plaintiffs with their claim against Portage.

[54] Mr. Abbey flatly denied having instructed Mr. Christopher to complete the second application form or to back date it to October 16, 2008. Mr. Abbey testified that he first saw this document when it was shown to him by counsel for Founders in preparing for this litigation. He said that it was not contained in the file when he reviewed it after the fire and that he cannot explain how it got there.

[55] After hearing the witnesses and examining the evidence in this regard, I find on a balance of probabilities that it was Mr. Christopher who completed the application form bearing the date of October 16, 2008 and that he did so on the instructions of his superior, Mr. Abbey. Mr. Christopher otherwise had no direct involvement or responsibilities in Founders' dealings with the plaintiffs. They were not his clients and there is no identifiable reason for his having completed this application form after the fire loss unless he was directed to do it by someone else. I have therefore concluded, on a balance of probabilities, that this document was created after the fire in a misguided attempt by Mr. Abbey to assist the plaintiffs with their claim against Portage, who he believed had wrongly denied its payment.

[56] In any event, the evidence of the Portage witnesses, which will be reviewed later, is that the 2008 application form was never at any time sent to the insurer. As a result, there is no suggestion that it ever came into play either in the assessment of risk at the time the insurance coverage was placed or to be renewed,

or in the assessment of the claim after the fire.

[57] In the end, the efforts by Mr. Abbey and Ms. MacLellan in trying to persuade Portage to honour the claim were unsuccessful. This lawsuit soon followed.

ISSUES TO BE DECIDED

[58] The central issues to be decided in this case can be summarized as follows:

(1) Was there a material change in risk in breach of Statutory Condition No. 4 of the homeowner's insurance policy?

(2) If so, are the plaintiffs entitled to the equitable remedy of relief from forfeiture against Portage, pursuant to s.171 of the **Insurance Act**? and

(3) Was there actionable negligence on the part of Founders by failing to place the proper insurance coverages needed by the plaintiffs?

THE CLAIM AGAINST PORTAGE

[59] As recited earlier, it was only after Mr. Keizer retired in October of 2008 that he began operating his home based carpentry and furniture repair business in his garage. At that point, Portage knew only that Mr. Keizer was going to be doing contract work for Home Depot installing kitchen cabinets and possibly floors in the residences of Home Depot's customers. That was the information conveyed to Portage by Ms. Josey in her e-mail of October 16, 2008 requesting a quote. Portage agreed to provide the requested coverage (for tools and liability claims) at the stipulated premium of $775 and issued a Contractors Pro Policy with a commencement date of October 20, 2008.

[60] Portage also knew that the garage attached to the plaintiff's home was heated by a wood stove. That was a risk which Portage accepted in underwriting a homeowners policy for the plaintiffs for many years.

[61] What Portage did not know, nor had it any reason to be alerted to, was the fact that Mr. Keizer was also starting a home based business using his wood stove heated garage as a woodworking shop. That is clear from all the evidence, both from the witnesses from Founders and those from Portage alike.

[62] The two witnesses who testified on behalf of Portage were Lois Pople, the longtime property department manager at Portage with an underwriting background, and Kim Livingston, a longtime commercial underwriter at Portage and other predecessor employers in the insurance industry. Ms. Livingston was the recipient of Ms. Josey's e-mail of October 16, 2008 and the person who provided the quote on behalf of Portage on the following day for the Contractors Pro Policy.

[63] Both these witnesses spoke to the underwriting practices of Portage and its risk tolerance for the combination of factors present in this case. Both were adamant, and unswayed on cross-examination, that the combination of a woodworking shop with a wood stove as its source of heat is decidedly beyond the level of risk tolerance acceptable to that insurer. Portage's refusal to underwrite such a risk is premised upon its non-compliance with the CSA Installation Code for Solid-Fuel-Burning Appliances and Equipment as well as various underwriting guides which Portage adheres to. Under those guides, a woodworking shop is

considered to be a hazardous location with the presence of wood products, sawdust and other combustibles.

[64] While Portage would consider insuring a woodworking shop as a home based business if its underwriting criteria were met, it will not do so if the woodworking shop is heated by a wood stove. Portage takes the view that that risk does not meet the CSA Installation Code above referenced nor its underwriting guidelines, and consequently, Ms. Pople testified that the company has never underwritten a policy that insured a woodworking shop heated by a wood stove.

[65] Portage accordingly takes the position that the use of the garage as a woodworking shop for carpentry and furniture repair work, while heated by a wood stove, constitutes a material change in risk, thereby voiding any coverage under the home owners policy. More specifically, Portage relies on Statutory Condition No. 4 in the Schedule to Part VII which reads as follows:

> Material change - Any change material to the risk and within the control and knowledge of the insured shall avoid 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 he desires the contract to continue in force, he 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 shall no longer be in force and the insurer shall return the unearned portion, if any, of the premium paid.

[66] The plaintiffs argue that there has not been a material change in risk in the startup of the woodworking shop operation because the garage was used for that purpose only occasionally and more as a hobby business than a commercial

enterprise. Evidence was adduced by Mr. Keizer, based on the review of the jobs he performed commencing in October of 2008, that he spent only about 45 hours of working time in his garage over the following year which included some of the work he did for Home Depot. His total revenue for that period (including HST) was $22,925.07 for K&S Carpentry work and a total of $21,494.60 for the entirety of his Home Depot work.

[67] In my view, this argument does not advance the plaintiffs' case against Portage. It cannot be denied that Mr. Keizer was in fact operating a woodworking shop in his garage doing carpentry and furniture repair work for commercial gain, albeit on a small scale.

[68] I am satisfied on the evidence that had Portage been made aware of Mr. Keizer's intended home based business, even on the scale above described, it would have declined the insurance coverages sought to be placed and/or maintained by the plaintiffs as being beyond its level of risk tolerance.

[69] There is a helpful review of the law on material change in risk in the decision of the Nova Scotia Court of Appeal in **Ken Murphy Enterprises Ltd. v. Commercial Union Assurance Co. of Canada**, 2005 NSCA 53. The applicable principles of law were there endorsed by the Court of Appeal as follows (at paras. 15-17):

> [15] The trial judge relied, for a statement of the law, on **Walsh v. Allstate Insurance Company** 1998 CanLII 2014 (NS SC), (1998), 169 N.S.R. (2d) 99 (S.C.N.S.) in which Boudreau, J., referring to **Henwood v. Prudential Insurance Company of America**, 1967 CanLII 17 (SCC), [1967] S.C.R. 720, stated:

> Whether a change in an insured's circumstances or in the use of the insured's property constitutes a material change in the risk insured is a question of fact to be determined in the individual case.

[16] The trial judge also referred to **Walsh** and other authorities for the following statements:

> The insurer accepts a risk for a given premium on the basis of the information received from the insured. The insurer is further protected by the insured's continuing duty of utmost good faith and the duty of the insured to notify the insurer promptly of any material change after the contract is made. Determination of whether a fact is material requires consideration of whether or not the fact would influence the insurer in assessing or accepting a risk or in fixing the premium. (See **Johnson v. British Canadian Insurance Co.**, 1932 CanLII 64 (SCC), [1932] S.C.R. 680, [1932] 4 D.L.R. 281). When property becomes unoccupied or vacant, this is a material change to the risk (**Melvin v. Pilot Insurance Co.,** [1981] 1 L.R. 1-1384 (Ont H.C.)).

[17] In my view the authorities cited by the trial judge provide a correct statement of the applicable principles of law...

[70] The application of these principles to the facts in the present case compellingly leads to the conclusion, as a finding of fact, that there was here a material change in risk. The garage became a hazardous location once it started being used as a woodworking shop whilst being heated by a wood stove. That is a risk which Portage would not have underwritten had that combination of factors been made known to it. Portage is accordingly entitled to treat that material change in risk as a breach of Statutory Condition 4 of the homeowners policy.

[71] The analysis of Portage's liability, however, does not end there. There remains to consider the question whether the plaintiffs are entitled to the equitable remedy of relief from forfeiture against Portage, pursuant to s.171 of the *Insurance Act*. That provision reads as follows:

> 171 Where a contract
>
> (a) excludes any loss that would otherwise fall within the coverage prescribed by Section 163; or
>
> (b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property, the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried. R.S., c. 231, s. 171.

[72] The leading case on the application of this statutory provision is **Marche v. Halifax Insurance Co.**, 2005 SCC 6. In that case, the insured residential property remained vacant for a period of time before a tenant moved in. It was subsequently destroyed by a fire and the insurer denied the claim, because the insured had failed to inform it of the earlier vacancy. The insurer maintained that the vacancy amounted to a change material to the risk which invalidated coverage pursuant to Statutory Condition 4 found in Part VII of the *Insurance Act* of Nova Scotia.

[73] The essential question on that appeal was whether s.171 applies not only to contractual conditions in the policy, but also to statutory conditions that are unreasonable or unjust in their application. Having found that the purpose of s.171 is to provide relief from unjust or unreasonable insurance policy conditions and that the section should be given a broad interpretation, the Supreme Court ruled that this legislative provision does apply to statutory conditions. The court went on to say that the expression “unjust or unreasonable” in s.171 allows the court to look at the application of a statutory condition. It concluded that where its application produces unjust or unreasonable results, the court can grant relief

under s.171.

[74] In the result, the Supreme Court of Canada upheld the decision of the trial judge that the court should grant relief from forfeiture under s.171 on the ground that the vacancy had been rectified prior to the loss. While this decision provided some much needed clarification of the law on the interpretation and application of s.171, it did not provide much guidance on the factors or criteria that a court should apply in deciding whether to exercise its judicial discretion to grant this equitable remedy.

[75] Apart from the decision in **Marche**, there is scant jurisprudence in this province where judicial consideration has been given to s.171. Indeed, it appears that this legislative provision has been considered in this province in only three other cases, namely, **Halifax Insurance Co., v. Killick**, [2000] N.S.J. No. 272, **Evangeline Savings and Mortgage Co., v. General Accident Assurance Co. of Canada**, [1984] N.S.J. No. 65 and **MacLean v. Dominion Insurance Corp.**, [1977] N.S.J. No. 554. Although these cases are of limited assistance here, it can be drawn from the **MacLean** decision that fairness has been considered to be compelling factor in the application of judicial discretion in the granting of s.171 relief. It can generally be said that a court should only grant relief in circumstances where it would be more fair to relieve the insured from the consequences of the breach than to hold the insured strictly accountable for the breach.

[76] Beyond that, the legal text *Insurance Law* (Irwin Law Inc., 2004) authored

by law professor Denis Boivin sets out a useful summary of the factors that courts have considered in determining whether to grant relief from forfeiture in fire insurance cases. These factors are listed (at page 206) as follows:

1. The custom in the insurance industry;
2. The rational nature of the contractual provision;
3. The causal connection between any breach and the risk that materialized;
4. The degree of the breach;
5. The ease with which the insured could have respected the provision;
6. The relationship between the contested provision and the premiums paid by the insured; and
7. The prejudice to the insurer.

[77] It is clear that the onus of proof for the granting of the equitable remedy of relief from forfeiture lies on the plaintiffs (see, for example, **MacLean**, **supra**). Indeed, the placement of that onus is not in dispute between the parties.

[78] There is certainly no basis upon which the conduct of the plaintiffs in this matter can be impugned. I have already made the finding of fact that Mr. Keizer made full disclosure to Founders of the dual nature of his new insurance needs which constituted a material change in risk. It was his expectation and understanding that the requisite insurance coverages would be placed. When they were not, through no fault of his own, he is faced with a loss of $81,102.16 in fire damage.

[79] There are, however, a number of compelling factors that weigh heavily

against the granting of this equitable relief. Firstly, unlike the situation in **Marche** where the breach of the statutory condition had been rectified prior to the loss, here the breach of Statutory Condition 4 continued throughout.

[80] Secondly, there is a nexus between the fire loss and the increased risk of fire presented by the use of a wood stove in a woodworking shop. Although the exact cause of the fire was never determined, the surrounding circumstantial evidence of the outbreak of the fire within 15 minutes of the lighting of the stove, and the fire pattern having originated in close proximity to the stove, and the combustibles present, indicates that it is probable that the source of ignition of the fire was the wood stove itself.

[81] Thirdly, the granting of this equitable remedy would work significant prejudice to Portage. It would thereby be required to pay a fire damage claim for a risk that it would never have accepted had it been made aware of the intended operation of the home based woodworking shop set up in the attached garage whilst heated by a wood stove.

[82] The collective weight of these factors is such that the plaintiffs are unable to discharge the onus upon them of persuading the court that relief from forfeiture under s.171 should be granted in this case. In the result, their action against Portage is dismissed.

THE CLAIM AGAINST FOUNDERS

[83] It is well established in Canadian law that in order to succeed in a claim for negligence, the onus is on the plaintiff to establish that it was owed a duty of care by the defendant, that the standard of care was breached by the defendant, and that the breach was the proximate cause of the plaintiffs' damages compensable in law.

[84] In the present context, the normal relationship between an insured, insurance agent or broker, and an insurer was succinctly described by the Nova Scotia Court of Appeal in the **Ken Murphy Enterprises** case above recited. In the words of Justice Freeman (at paras. 41-43):

> [41] . . . [The broker's] business was to obtain insurance coverage for the risks of its customers from insurers such as Commercial Union. It was a middleman which converted information obtained from the customer into applications submitted to the insurer. This necessarily involved some assessment of the risk the customer sought to insure, enabling the insurer to make the underwriting decisions necessary to issue the policy and fix the premium. The agency received a share of the premium by way of commission. The premium was the consideration the customer paid to have his risk covered by insurance in terms of the policy for the stipulated coverage period, usually a year.
>
> [42] The customer's duty is to provide accurate information respecting the risk, and to pay the premium. The customer is entitled to rely on the skill and expertise of the agency to obtain and deliver a policy which provides the insurance coverage his premium has paid for during the coverage period. If a material change in the risk occurs during the coverage period it is the duty of the customer, the insured, to notify the agency or the insurer. Once a customer enters a business relationship with an agency it is common practice for the agency to obtain a renewal policy and notify the customer well before the end of the coverage

> period to permit negotiations as to any changes in risk and the amount of the premium. In the usual course of events, when neither the risk nor the premium change, the customer simply pays the invoice and the coverage continues. . . .
>
> [43] Because it is the customer's duty to report material changes in risk, the agency is not called upon to actively monitor the nature of the risk during the term of the policy. Once the agency becomes aware that there has been a material change in the risk, however, its responsibility changes. The agency knows the insurer is in a position to deny coverage, but the insured may or may not be aware of that. He has paid the premium and, indirectly, the agency's commission, neither of which are still being earned if the insurer is no longer liable under the policy. Unless he is aware of material changes in risk which he has a duty ro report, he may with some justification assume that his coverage is continuing until he is notified to the contrary.

[85] I also make reference in passing to the decision of the Ontario Court of Appeal in **Fine's Flowers Ltd., et al. v. General Accident Assurance Co., et al.**, 1977 CarswellOnt. 54, which has often been described as the leading case on the liability of insurance brokers. However, that case is distinguishable on the facts where it involved a broker's failure to place full coverage of the risks associated with the client's known business at the outset, as opposed to a material change in risk during the policy period.

[86] In the present case, clearly there was a duty of care owed by Founders to the plaintiffs as the insurance agent acting on their behalf. Indeed, the existence of that duty of care is acknowledged by counsel for Founders. The duty of care owed by Founders was to place the insurance policies needed by the plaintiffs to cover Mr. Keizer's home based carpentry and furniture repair business activities. Once informed of that intended business activity, Founders had a duty of inquiry to ascertain whether it might constitute a material change in risk under the homeowners policy and to advise the plaintiffs should it become aware of circumstances that would result in a loss of coverage.

[87] As Ms. MacLellan herself put it in her testimony, the client tells the broker what their insurance needs are. The broker then takes in all the necessary information and submits it to an insurer for a quote. She acknowledged that the goal of a broker is to identify the exposures of risk of the clients and to match them up with the necessary coverages.

[88] As for the standard of care, counsel for Founders conceded in his closing submissions that the case turns on the credibility finding of whether or not Mr. Keizer disclosed to Ms. Josey his intentions to operate a home based business in his garage. I have already made that credibility finding in favour of the plaintiffs. Once Founders was so informed of this new business activity, it was clearly put on its inquiry to ascertain the nature and extent of the proposed business activity and to assess whether that activity would constitute a material change in risk.

[89] Ms. MacLellan herself readily acknowledged that if an insurance broker is informed by a client about a home based business, it is important for the broker to ask questions about it, including the nature and extent of the intended business activity and what type of heating will be used for that business. Those inquiries were never made by Ms. Josey in the present case, whether through inattention, forgetfulness or carelessness under a heavy workload.

[90] In summary, I make the following findings on the evidence:

(a) Mr. Keizer provided sufficient information to Ms. Josey on October 16, 2008 to

put the brokerage on its inquiry about a material change of risk under the homeowners policy;

(b) Had this duty of inquiry been fulfilled, Founders would have become aware of the circumstances that would result in a loss of coverage (i.e., the combination of a home based woodworking shop heated by a wood stove) and would thereby have had a duty to advise the plaintiffs of the loss of coverage;

(c) By its failure to fulfill these duties, Founders breached the standard of care to be met by brokers in the insurance industry.

[91] I would add that in the particular circumstances of this case, the court does not need the benefit of expert evidence in order to identify the applicable standard of care. The standard of care applicable here is readily discernable both from the jurisprudence above referred to and, indeed, the evidence of Ms. MacLellan herself on behalf of Founders.

[92] Clearly, it was those breaches of the standard of care that caused the loss of coverages under the plaintiffs' policies of insurance and hence, their fire damage loss in the amount of $81,102.16.

[93] That loss could have been averted had Mr. Abbey properly handled the renewal questionnaire when it was sent to Founders by Portage in July of 2009. A simple telephone call to Mr. Keizer to confirm the currency of the information sought by the questionnaire would almost certainly have alerted Founders to the home based business being carried on in the plaintiff's garage. Instead, as above referred to, Mr. Abbey decided to use his own figures, based on his general knowledge in the industry, and inserted the anticipated annual revenue for K&S Carpentry as being derived entirely from off-premises business activities.

Concurrently, he specifically inserted the anticipated annual revenue from "Carpenters - shop only" as $0.

[94] Clearly, the taking of that shortcut without contacting the plaintiffs in any manner whatsoever to confirm the accuracy of the requested information for purposes of the policy renewals was a breach of the standard of care on the part of Founders. That breach was another causative factor of the plaintiffs' loss of coverages under their insurance polices and hence, their fire damage loss of $81,102.16. In both respects, Founders is therefore liable in negligence to the plaintiffs for that amount.

CONCLUSION

[95] In the final outcome, the plaintiffs shall have judgment against Founders for the sum of $81,102.16. The plaintiffs' action against Portage for indemnity under their insurance polices is dismissed.

[96] I will first leave it to counsel to try to settle the matter of costs to be paid. If they are unable to reach agreement, I would ask that written submissions be provided to the court within 30 days of the release of this judgment.

J.