

HARPER GREY LLP

3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: INSURER WHO RECEIVED NOTICE OF DEFAULT JUDGMENT AGAINST INSURED NINE YEARS AFTER ACTION COMMENCED NOT REQUIRED TO PAY JUDGMENT

Ontario Court of Appeal upholds ruling that the plaintiff is not entitled to recover judgment against insurer after notice of action against insured was provided nine years after action was commenced.

Insurance law – Actions – Third parties – Relief against forfeiture – Practice – Notice – Leave to appeal

Svia Homes Ltd. v. Northbridge General Insurance Corp., [2020] O.J. No. 4661, 2020 ONCA 684, Ontario Court of Appeal, October 29, 2020, P.S. Rouleau, B. Miller and B. Zarnett JJ.A.

The plaintiff brought an application against the insurer seeking payment of a judgment obtained against its insured. The plaintiff's application was dismissed and the plaintiff appealed. The appeal was also dismissed.

In separate proceedings commenced in 2008 (the "2008 Action"), the plaintiff obtained default judgment against the insured in 2013 from a claim in relation to defective installation of sewers. The insurer was not notified about the default judgment until 2017. Upon receipt of notice, the insurer obtained a Non-Waiver Agreement from its insured to allow it to investigate and consider whether the claims in the 2008 Action were covered.

In July 2017, the insurer sent a letter to the insured denying coverage for the 2008 Action. The basis for the denial was that the insurer was not provided notice of the action until nine years after it had been commenced and this breach of condition precluded coverage. The insurer's position was that even if timely notice was provided, the claims in the 2008 Action were excluded by the policy.

In March 2018, the plaintiff amended its statement of claim in the 2008 Action to include broader claims. The amended statement of claim was not provided to the insurer. Without notice to the insurer, the plaintiff obtained default judgment against the insured in April 2018. On May 25, 2018, plaintiff's counsel provided a copy of the default judgment to the insurer. After unsuccessful attempts to collect the judgment from the insured, the plaintiff sought to recover the judgment from the insurer.

The application judge dismissed the plaintiff's application. The application judge held that the plaintiff could stand in no better position than the insured with respect to dealing with the insurer. If the insurer had a defence to a claim from the insured, that would also be a defence to the plaintiff's claim. The application judge found the insured breached a condition of the policy by failing to give written notice of the claim until 2017. This was not a suitable case for relief from forfeiture as the breach of condition to give prompt notice was substantial and prejudiced the insurer's ability to respond on behalf of the insured in the 2008 Action.

On appeal, the plaintiff raised a new argument that Statutory Condition 8, under which the plaintiff provided notice of the 2008 Action to the insurer, did not include a timeliness requirement and therefore there was no late notice. The Court of Appeal held that notwithstanding that Statutory Condition 8 did not impose a timeliness requirement, this did not detract from the insurer's right to require prompt written notice under Liability Condition 5. As the insurer would have had a defence to a potential claim from the insured for the amount of judgment, it also had a defence to the plaintiff's claim.

The Court of Appeal further rejected the plaintiff's argument that the late notice did not prejudice the insurer, relying on the application judge's findings that notice was given after the insured's defence was struck, discoveries had been completed and the insured was noted in default. The Court also rejected the plaintiff's argument that the application judge should have considered relief from forfeiture from the perspective of the plaintiff and its conduct.

This case was digested by [Dominic Wan](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Dominic Wan at dwan@harpergrey.com.