Court of Queen's Bench of Alberta

Citation: Community Credit Union Ltd. v. Transamerica Life Canada, 2009 ABQB 704

Date: 20091203
Docket: 0801 03696
Registry: Calgary

Between:

Community Credit Union Ltd.

Plaintiff

- and -

Transamerica Life Canada

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi

Introduction

[1] In 1988, Transamerica Life Canada ("TLC") issued a Term to 100 Life Insurance Policy numbered 618910 (the "Policy") on the life of Thomas Sunderland ("Sunderland"). The face value of the Policy was $5,000,000. Sunderland assigned the Policy to the predecessor of the Community Credit Union Ltd. ("CCU") as part of a security package to secure amounts that Sunderland and his corporations owed to CCU. TLC acknowledged its receipt of the assignment on or about March 20, 1989.

[2] CCU paid the premiums on or about September 18 in each year, the due date for the premiums on the Policy. CCU missed the premium payment in September of 2007. As a result, the Policy lapsed in accordance with its terms for the non-payment of premiums. Sunderland died on March 12, 2008. TLC refuses to pay the death benefit to CCU, as it takes the position that the Policy lapsed.

[3] The Plaintiff commenced this action in which it seeks relief from forfeiture pursuant to the *Judicature Act*, R.S.A. 2000, c. J-2, s. 10, which provides:

> 10. Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

As alternative relief, the Plaintiff sought judgment for the face value of the Policy and, in both cases, interest and costs.

Facts

[4] Following Sunderland's assignment of the Policy to CCU, TLC began sending monthly premium notices to CCU. In October of 1991, CCU requested TLC to change the premium payment mode to an annual payment of $98,410 due on September 18 of each year, commencing in September of 1992.

[5] After 1991, CCU did not expect Sunderland to make the premium payments on the Policy. CCU expected that it would be making the premium payments, which it did from 1992 through to 2006.

[6] From 1992 to 1996, TLC sent an annual Notice of Payment Due (the "Payment Notice") to CCU through the regular mail. In each of those years, CCU paid the premium on the Policy on its receipt of the Payment Notice. In 1997 and 1998, CCU stated that it had not received the Payment Notice by early September, the date on which it usually received such notice, so CCU's then chief financial officer requested that TLC send him that Payment Notice by facsimile transmission. TLC sent the Payment Notice, as requested, and CCU paid the premium.

[7] In September of 1999, CCU received the Payment Notice and paid the premium due on the Policy. In 2000, CCU stated that it had not received the Payment Notice, so CCU's chief financial officer requested that TLC send him the notice. TLC prepared a manual billing notice and sent it to CCU by facsimile transmission. On its receipt of the billing notice, CCU paid the premium.

[8] TLC sent CCU Notices of Payment Due in 2001 through to 2004 and CCU paid the premium on the Policy on its receipt of the Payment Notice. In 2005, CCU stated that it had not received the Payment Notice, so an employee of CCU requested that TLC send a duplicate copy of the Payment Notice, which TLC then sent to CCU by facsimile transmission. On its receipt of the Payment Notice, CCU paid the premium. TLC sent CCU a Payment Notice in 2006 and CCU paid the premium on the Policy on its receipt of the Payment Notice.

[9] The Policy contained the following provision concerning "grace" periods:

> We will allow a period of 31 days after the premium due date for payment of each

> premium after the first. During this grace period the policy will continue in full force and no interest will be charged on the premium date. If the Insured dies during the grace period before the premium is paid, the portion of the premium required to provide insurance from the premium due date to the date of the Insured's death will be deducted from the proceeds payable under the policy.

[10] This Court will address later in these reasons the issue of whether CCU received a Payment Notice in 2007. CCU did not pay the premium due to maintain the Policy in good standing before the end of the grace period in 2007. Accordingly, the Policy lapsed on or about October 20, 2007. TLC had an informal policy of accepting a late premium payment for a further period of 14 days after a policy lapsed. That period expired with respect to this Policy on November 3, 2007.

[11] On or about November 16, 2007, employees in CCU's accounting department discovered that CCU had not paid the premium due on the Policy. CCU issued a bank draft for the September 18, 2007 premium on November 16, 2007 and had it delivered by courier to TLC. TLC received that bank draft on November 19, 2007, but did not negotiate it.

[12] As of September 7, 2006, TLC had received approximately $1.9 million in premiums on the Policy.

Issues

[13] There are two issues before this Court:

1. Does relief from forfeiture under s. 10 of the Alberta *Judicature Act* apply, so that this Court will require TLC to pay the death benefit under the Policy even though the Policy has lapsed because of CCU's failure to pay premiums and Sunderland's death?

2. If relief from forfeiture is available, should this Court grant that relief in the circumstances? This issue engages the following sub-issues:

    (a) Was CCU's conduct reasonable in the circumstances?

    (b) Is the object of the lapse provision essentially to secure payment of money?

    (c) Is there a substantial disparity between the value of the property forfeited and the damage caused by the breach?

Analysis

The Common Law Position

[14] The common law concerning life insurance policies is clear. If the insured, in this case, the insured's assignee, fails to pay the premium, the policy lapses by its terms. In ***Frank v. Sun Life Assurance Co. of Canada*** (1893), 20 O.A.R. 564, [1893] O.J. No. 134 at para. 12 (C.A.), the Court said:

> ... if this premium by the terms of the policy had been payable by quarterly instalments, as default in the payment of any one of them, even for a day, would have released the company from payment, and no Court could relieve against it.

The court did, however, provide bases on which a plaintiff could be relieved from this strict approach. The plaintiff could, for example, show that there is something in the contract that would relieve the plaintiff of this strict burden, that the insurer waived the default or that there was some sufficient legal excuse for its failure to pay promptly: ***Frank*** at paras. 11, 19, 26.

[15] This is not simply a reflection of the strictness of the common law. There are business reasons for this approach. Long ago, the United States Supreme Court in ***Klein v. New York Life Insurance Company***, 104 U.S. 88 at para. 19 (1881) provided these business reasons, quoting ***New York Life Ins. Co. v. Statham***, 93 U.S. 24 (1876):

> ...[P]romptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company.

[16] The ***Klein*** court continued at para. 20:

> If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do...

[17] More recently, Lord Hoffman expressed a similar sentiment ***United Eagle Ltd. v. Golden Achievement Ltd.***, [1997] UKPC 5, [1997] 2 W.L.R. 341 at 344-5:

> ... [I]t is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most likely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic...

[18] The reasons expressed in these decisions remain as compelling today as when they were pronounced. In D. Norwood and J.P. Weir, *Norwood on Life Insurance Law in Canada*, 3d ed. (Toronto: Carswell, 2002) at 191, the authors summarize the Canadian position as follows: "The payment of the premium is the essential factor for bringing the contract into effect and for continuing it in force."

[19] In this case, the Policy provided for a death benefit of $5 million payable on, among other events, Sunderland's death. The Policy also sets out what Sunderland or his assignee, CCU, needed to do to keep it in force:

> To keep this policy in force, each premium must be paid in advance. … The first premium is due as of the policy date. Subsequent premiums are payable while the Insured is living and within the grace period, but not beyond age 100. If any premiums remain unpaid after the grace period, this policy will lapse. ...

The Policy defines "lapse" as "termination of the policy for non-payment of premiums." The Policy sets out the terms for Reinstatement of Lapsed Policy.

[20] CCU did not pay the premiums due September 18, 2007. Nor did it pay the premiums within the grace period that the Policy provided. By operation of the contract, the Policy lapsed on October 20, 2007. CCU did not apply for reinstatement of the Policy pursuant to its terms. Sunderland died on March 12, 2008, at a time when there was no coverage under the Policy.

[21] Pursuant to the common law, the Policy lapsed. CCU would have no remedy.

The Position in Equity

[22] The common law courts would not provide the insured with equitable relief in a case where the life insurance policy lapsed because of a failure to pay premiums. The court in ***Klein*** at paras. 13 and 14 said:

> ... the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case.
>
> We cannot accede to the view of the appellant ...

Similarly, the court in ***Frank*** at para. 11 held that, “if, therefore, any one of the quarterly instalments remain unpaid, the forfeiture is absolute.”

[23] Before discussing the application of the equitable position as it relates specifically to life insurance contracts, it is worthwhile to discuss the broad notion of relief from forfeiture, as used in s. 10 of the Alberta *Judicature Act*. In ***Snider v. Harper*** (1922), 66 D.L.R. 149, [1922] A.J. No. 27 at para. 6 (S.C.A.D.), the court said:

> The real question upon the clause is, not so much whether the extent of the jurisdiction has been enlarged, as whether, in view of the fact that we now have a statute in these wide general terms whereas there was no statutory basis to the old jurisdiction, the Court ought not to consider itself at liberty to exercise the jurisdiction in a wider field and in cases where the old Court of Chancery would not have done so. In my opinion the enactment of a statutory authority in such general terms when there was no necessity for it at all if the Court was intended to exercise the power only in the cases in which the old Court of Chancery would have done so is quite sufficient justification for extending the field within which the power may be exercised. The section speaks clearly of "all penalties and forfeitures" without limitation and I have no doubt that, the Court being given by statute a certain power, it ought to exercise that power whenever it deems it just and equitable that it should do so ...

[24] In the later case of ***Popyk v. Western Savings & Loan Association*** (1969), 3 D.L.R. (3d) 511, [1969] A.J. No. 69 at para. 15 (S.C.A.D.), the court took a similar approach:

> I can read no restriction in the statute. It gives the court power to relieve against all penalties and forfeitures. Where a contract provides for forfeiture, whether such forfeiture be provided for in express words or not, the court has the power to relieve against it.

[25] These interpretations of s. 10 of the *Judicature Act* are in keeping with the *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10, which provides that an enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects. See also ***Rolls-Royce Industries (Canada) Inc. v. Commercial Union Assurance Co. of Canada*** (1996), 8 C.P.C. (4th) 164, [1996] O.J. No. 2411 at para. 59 (Gen. Div.).

[26] Despite this very broad approach to the interpretation of s. 10 of the *Judicature Act*, the ***Popyk*** court chose not to grant the relief requested, stating at para. 22:

> ... Why should a court interfere with the terms of a contract unless the plaintiff can demonstrate that it would be unconscionable for the defendant to retain the moneys as provided for by the terms of the contract? Before a court is justified in interfering it is not sufficient for a plaintiff to show that the contract was improvident; he must show the forfeiture was unconscionable ...

[27] The court in ***Altius Centre Ltd. v. BMP Energy Systems Ltd.*** (1996), 43 Alta. L.R.(3d) 209, [1996] A.J. No. 1177 (Q.B.), when interpreting s. 10 of the *Judicature Act*, took the very broad approach that the ***Popyk*** court suggested. In that case, a commercial lease provided that the landlord would pay the tenant periodic bonuses on fixed dates, failing which the tenant could terminate the lease. The landlord made the bonus payment four days late and the tenant terminated the lease. The court found that the landlord was entitled to relief from forfeiture on the basis that the landlord's breach was minuscule compared with the landlord's lost rental revenue. The court chose not to follow the English authorities that restricted relief from forfeiture to contracts concerning the transfer of proprietary or possessory rights. It said at para. 22:

> Despite the English position, in my view s. 10 of the *Judicature Act* provides for relief against forfeiture that is wider than the position taken by the House of Lords. The *Judicature Act* provides for relief against "all" forfeitures and penalties.

[28] None of the foregoing cases involved the relief from forfeiture of insurance policies, much less life insurance policies. Thus, the question becomes, do these broad interpretations of s. 10 of the Alberta *Judicature Act* apply to life insurance policies?

[29] The *Insurance Act*, R.S.A. 2000, c. I-3 contains provisions that allow the courts to provide the insured with relief from forfeiture. However, those provisions except or do not include contracts of life insurance, see *e.g. Insurance Act*, ss. 512, 515, 521, 662(k) and 699. In ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] 2 S.C.R. 490 at para. 36, Justice Major for the court provided the following *obiter dictum*:

> As the respondents are barred by their conduct from recovering, it is not necessary to determine whether our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited ... does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

[30] The Ontario Court of Appeal in ***Williams v. Paul Revere Life Insurance Company*** (1997), 101 O.A.C. 280, 1997 CarswellOnt 2450 at paras. 44 and 47, observed:

> [Justice Major in ***Saskatchewan River Bungalows***] did not answer the question whether relief from forfeiture under a general statute such as the Alberta *Judicature Act* or the Ontario *Courts of Justice Act* is available when there are specific provisions in the relevant parts of the provincial *Insurance Act* (as is the case here). He does, however, make it clear that relief from forfeiture is available under the general provisions of the *Judicature Act* when a policy has lapsed because of non-payment of premium, at least when there are no specific relief

> from forfeiture provisions in the relevant provincial *Insurance Act*.
>
> ...
>
> For the purposes of my analysis, I am prepared to proceed without deciding that the general provisions of s. 98 of the *Courts of Justice Act* can provide the statutory basis for granting relief from forfeiture in circumstances where there is a specific relief from forfeiture provision in the *Insurance Act*. That issue can best be left to be considered in another case where it can be fully argued. I thus turn directly to the issue whether relief from forfeiture should be granted on the assumption that it is available to the respondent through s. 98 of the *Courts of Justice Act*.

[31] Since these decisions, two cases have addressed this issue head-on. The first was ***Khan v. Primerica Life Insurance Company of Canada*** (1998), 13 C.C.L.I. (3d) 171, [1998] O.J. No. 3073 (Gen. Div). In that case, the plaintiff had paid the premiums on insurance policies on the life of her deceased husband, but not before their respective due dates on several occasions. The plaintiff did not forward the July 1996 payment until August 30. The insurer refunded the premium, and took the position that the policy had lapsed for non-payment. The plaintiff argued that the court should exercise its equitable jurisdiction under the Ontario *Courts of Justice Act* to give relief from forfeiture and declare the policy in force, notwithstanding the provisions of the policy. The court held that the lapse of the life insurance policy was the result of the plaintiff's non-payment of premiums and was not a forfeiture within the meaning of the Ontario *Courts of Justice Act*.

[32] The court discussed ***Saskatchewan River Bungalows*** (S.C.C.) and ***Williams*** (Ont. C.A.) and noted that neither court specifically addressed the issue of whether a court can relieve from the "forfeiture" of a life insurance policy when the insured had failed to pay the premiums. The ***Khan*** court ruled against the insured and would not grant the insured relief from forfeiture. With respect to Justice Major's *obiter dictum*, it said at para. 29:

> ... Although the Supreme Court of Canada has held that one cannot infer from the existence of the statutory provisions that relief from forfeiture is not available under the *Courts of Justice Act*, there is even less reason to conclude that their existence suggests that such relief is available whenever other conditions are breached and especially when a policy lapses for non-compliance with the most fundamental obligation of the owner of the policy: the payment of premiums ...

The court went on to say that granting relief from forfeiture in the case of commercial contracts and, specifically, contracts of life insurance "would introduce significant uncertainty into commercial and other transactions and do further and considerable violence to the principle that contracts are binding": ***Khan*** at para. 26.

[33] The ***Khan*** court did not foreclose the availability of equitable relief in favour of an insured, when it said at para. 25:

> ... the availability of equitable relief against the lapse of the insurance policy in this case would be based on one or more of the traditional grounds of fraud, mistake and accident, or the developing principles of unconscionability and unjust enrichment. Undue influence, waiver and estoppel are subsumed under these grounds or principles. Where such a ground is established, or such a principle is applicable, it is considered to be inequitable to allow a party to enforce a contract in accordance with its terms.

[34] The other case that addressed the issue head-on was ***Pluzak v. Gerling Global Life Insurance Co.*** (2001), 52 O.R. (3d) 520, [2001] O.J. No. 34 (C.A.). The court held initially that Justice Major's *obiter dictum* in ***Saskatchewan River Bungalows*** (S.C.C.) supported the position that the court could resort to the relief from forfeiture provision contained in the Ontario *Court of Justice Act*: ***Pluzak*** at para. 11. Despite this, the court held at para. 16 that the revival of a lapsed term insurance policy was "not an appropriate application of the remedy of relief from forfeiture," reasoning as follows at para. 18:

> ... The premium is the payment for coverage for the next term. Subject to the grace provision, there is no coverage for that term when a payment is not made and the insurer arranges its commercial affairs accordingly. In these circumstances, the contract terminates on its own terms and not by a breach. There is no forfeiture in the sense of a loss of property. To be sure, the coverage has been lost, but it wasn't paid for in the first place. ... In that event, the insurer has not pocketed an extra benefit which, on equitable principles, should be returned. It has gained nothing more than that which was called for under the policy - premiums for the period of coverage.

[35] The ***Pluzak*** court at para. 20, recognized the business aspects of life insurance, which this Court discussed earlier. As well, the ***Pluzak*** court at para. 28, expressed concern that if it were to extend the notion of relief from forfeiture to life insurance policies, arguably the notion could be applied to any contract requiring the payment of money or the provision of goods and services. In conclusion, it said at para. 30:

> Life insurance claims tend to be for large sums and the beneficiaries of them are often needy, but the court cannot be in the position of re-writing a contract out of sympathy. If there is a policy reason for isolating insurance contracts from others it should be legislated, and should include appropriate criteria for granting relief which can be assessed by insurers and dealt with as a commercial factor in setting premiums.

[36] In the Court of Appeal decision in ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*** (1992), 127 A.R. 43, 1992 CarswellAlta 382 at para. 40 (C.A.), Harradence J.A. said:

> Similarly, while courts should pay heed to the intentions of the contracting parties,

> it is my opinion that proper judicial respect for the freedom to contract does not deprive the court of jurisdiction to relieve against forfeiture pursuant to the *Judicature Act*.

CCU argued that this Court should apply that reasoning, rather than the reasoning of the ***Khan*** and ***Pluzak*** courts. There are several aspects of Justice Harradence's quotation that require our attention. Hetherington J.A. did not address this issue in her reasons and McClung J.A. came to an opposite conclusion. The Supreme Court of Canada, which overruled the Court of Appeal decision, neither agreed with this statement nor did it address the issue specifically. As well, the article on which Justice Harradence based his decision, M.G. Baer in "Recent Developments in Canadian Law Insurance Law" (1985) 17 Ottawa L. Rev. 631, dealt with the concept of relief from forfeiture when dealing with what amounted to an after-loss penalty contained in *The Manitoba Public Insurance Corporation Act* and a limitation on the plaintiff's recovery under his automobile insurance policy. The quotation from that article, which was set forth in Justice Harradence's judgment did not address life insurance in any way.

[37] When a court is faced with a situation where a party is seeking relief from forfeiture, it must consider ***Shiloh Spinners Ltd. v. Harding***, [1973] 1 All E.R. 90 (H.L.). In that case, Lord Wilberforce said at 101:

> ... it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word, appropriate, involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.

This quotation tells us many things. Relief from forfeiture is available only in "appropriate and limited cases." We should be wary of broadening the circumstances in which this relief is available, for the reasons of commercial certainty and the business reasons outlined above.

[38] Courts that have considered this quotation when dealing with life insurance policies, wrestle with the "security" portion of this quotation. It is relatively easy when one puts this in the context of proprietary or possessory rights. Take, for example, a situation where a person is purchasing property by way of an agreement for sale and has made many payments towards the purchase. The "stated result" is the transfer of the property to the purchaser. The forfeiture provision is added to the agreement for sale to secure the payments. If the purchaser does not make the payments, the property is forfeited. Depending on the circumstances of the case, as outlined in ***Shiloh***, a court may relieve from the forfeiture.

[39] There are different ways to look at a policy of life insurance to fit it into the model that Lord Wilberforce provided. The "primary object of the bargain" is the insurer's obligation to pay the death benefit to the insured's beneficiaries on the insured's death. The "forfeiture provision" is the lapse of the policy to secure the payment of the premiums. Another way of looking at a policy of life insurance is that the "result" is the payment of premiums. The forfeiture provision, being the lapse of the policy, is added to secure that result. The latter is the way in which the ***Khan*** court looked at this: see ***Khan*** at para. 23; see also ***Mohr v. Paul Revere Life Insurance Co.*** (1999), 11 C.C.L.I. (3d) 249, [1999] B.C.J. No. 592 at para. 40 (S.C.). The ***Khan*** court at para. 23 said that this type of interpretation "would ... be a distorted interpretation of Lord Wilberforce's reasoning to characterize the provision for termination on non-payment of premiums as something added in order to secure payment of premiums." The Ontario Court of Appeal in ***Pluzak*** agreed with this type of analysis, when it said at para. 29:

> ... [Lord Wilberforce's] principle has no application to term life policies after death. There is no provision for security to assure a result. There has been no forfeiture of security. There has been a simple failure to pay for ongoing coverage.

[40] CCU's case might be stronger if there were an equity aspect to the Policy, similar to the purchaser's interest under an agreement for sale. For example, had the Policy had an aspect of a cash surrender value, then CCU would have been forfeiting this property on a lapse of the Policy. There was no cash surrender value in this instance. It is forfeiting nothing, except the premiums it had been paying over the years. However, it was paying for the right to receive the death benefit had Sunderland died during the year in which the Policy was in force. Once the Policy lapsed, there was nothing for it to receive. As stated by the court in ***Padua v. Massachusetts Indemnity and Life Insurance Co.*** (1999), 97 O.T.C. 261, [1999] O.J. No. 1960 at para. 24 (Sup. Ct. Just.):

> The reason for the distinction between contracts of insurance in which the premium has not been paid and other situations that might give rise to forfeiture is that where there is a default from non-payment of premium in a life policy there is no longer a contract to be breached ...

[41] We must examine the contracts that were in question in those cases where courts have given broad interpretations to s. 10 of the Alberta *Judicature Act*. None of the contracts were life insurance policies, which have their own unique aspects. The comments of McClung J.A., in dissent, in ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*** at paras. 108 and 113 (C.A.) are apposite:

> In principle, where premiums due under of contract of life insurance remain unpaid, lapse will take place unless there is some provision in the policy or some statutory enactment preventing it. That is because promptness in payment of the premium is the essence of life insurance ...
> ...
>
> Relief in equity from forfeiture, in my respectful opinion, does not lie. A contract

> of life insurance contemplates neither the transfer nor loss of property or possessory rights, either of which must introduce the granting of such relief ...

As mentioned earlier, an appeal of this case to the Supreme Court of Canada was allowed on other grounds.

[42] Thus, in the circumstances of the case with which this Court is dealing, relief from forfeiture is not available to CCU.

[43] If this Court is incorrect in its assessment of the availability of the relief from forfeiture when an insured fails to pay their premiums in accordance with the provisions of their policy, it must consider whether, in these circumstances, it should grant the relief. The analysis of this issue is simplified by the cases that have considered the availability of the remedy on the assumption that the relief is available, see *e.g.* ***Saskatchewan River Bungalows*** (S.C.C.), ***Williams Estate*** (C.A.) at para. 77. In these cases, the courts considered the factual circumstances against the test outlined in ***Liscumb v. Povenzano*** (1985), 40 R.P.R. 31 at para. 31 (H.C.J.), aff'd (1986), 55 O.R. (2d) 404 (C.A.), where the court said:

> I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

[44] It should be noted that the ***Khan*** court was critical of other courts' use of this test when they are considering whether the relief from forfeiture is available in cases involving the non-payment of premiums under life insurance contracts. It said at para. 22:

> ... that passage from the [***Liscumb***] judgment follows immediately after a quotation of the part of the judgment of Lord Wilberforce in *Shiloh Spinners Ltd.* which has been set out above and which confines relief from forfeiture to appropriate and limited circumstances. McKinlay J. did not purport to broaden the principles that govern the exercise of the Court's jurisdiction in cases of forfeiture beyond those stated by Lord Wilberforce. I believe it is clear that she was selecting from those principles the ones that she considered to be relevant to the facts before her. Thus, I do not understand her reasoning to imply rejection of Lord Wilberforce's restriction of the jurisdiction ... Nor is there anything in her judgment to suggest that a relief from forfeiture can be available in cases of breach of contract generally and is not to be confined to cases where some proprietary or possessory interest will be forfeited.

Although this Court agrees with the ***Khan*** court in this regard, based on its discussion of whether relief from forfeiture is available at all, it will nonetheless embark on the analysis that the other courts have taken.

Was CCU's conduct reasonable in the circumstances?

[45] This is a factual analysis. Accordingly, there are no principles that will guide this Court through this analysis. The court in ***Williams*** (C.A.) at para. 49, provides us with the types of things a court should consider when it undertakes this analysis:

> The reasonableness test requires consideration of the nature of the breach, what caused it and what, if anything, the insured attempted to do about it. All of the circumstances, including those that go to explain the act or omission that caused the lapse (forfeiture) of the policy, should be taken into account. It is only by considering the relevant background that the reasonableness of the insured's conduct can be realistically considered.

[46] The original assignee of the Policy was Medicine Hat Savings and Credit Union. In 1986, Medicine Hat Savings and Credit Union changed its name to Community Credit Union Ltd. On November 1, 2000, Parkland Savings & Credit Union Ltd., Community Credit Union Ltd., Ponoka Savings & Credit Union Ltd. and Crowsnest Pass Credit Union Ltd. merged to become CCU, operating under the name Community Savings. On November 1, 2008 Community Savings amalgamated with Common Wealth Credit Union and Servus Credit Union to become Servus Credit Union.

[47] This history has some importance. The missed 2007 premium payment did not occur soon after the various mergers. It occurred almost 7 years after the November 1, 2000 merger and over one year before the November 1, 2008 merger. Accordingly, one can infer that any turmoil that might follow or precede a merger of this magnitude was not present in this case.

[48] CCU assigned responsibility for the annual premium payment on the Policy to various individuals between 1992 and 2006. From 1992 to November of 2000, Gary Pigula was CCU's chief financial officer ("CFO"). The CFO was charged with authorizing the approval of and administering the premium payments on the Policy. Pigula diarized the Policy payments. Following Pigula's resignation, Daryl Christie was CCU's CFO. CCU's chief executive officer highlighted to Christie the importance of the premium payments on the Policy, so Christie, like Pigula, diarized the premium payments on the Policy. Christie resigned on July 31, 2006.

[49] Mike Drotar became CCU's CFO from August 1, 2006, until November 1, 2008. Drotar did not diarize the payment of future premium payments on the Policy. Drotar was aware of the Policy through his former role in treasury management, in which he was responsible for managing CCU's investment portfolio. The Policy was considered an investment because it had value to CCU in an amount it expected to realize on Sunderland's death.

[50] During the tenure as CFO of Pigula and Christie, Doreen Urquhart was CCU's senior accountant. Urquhart reported to the CFO. After Pigula resigned, Urquhart took over administration of the premium payments on the Policy. Urquhart did not diarize the payment of future premium payments on the Policy. It was, however, Urquhart who discovered that CCU had not made the September 2007 premium payment for the Policy, while she was updating the

working papers for the next fiscal year. She contacted TLC in Toronto to ask that it send CCU a copy of the 2007 Payment Notice. TLC advised her that the policy had lapsed.

[51] Lyle Treiber, an employee and senior manager of enterprise risk management of CCU, was a very forthright individual. He testified that he knew the importance of paying the premiums on the Policy in a timely manner and before he became involved in the risk management aspect of CCU, he would diarize this. He diarized it because he knew that the payment of the premium on the Policy might be overlooked. He knew that CCU had to pay the premiums to keep the Policy in effect. He testified that the CFO would have known that the premium on the Policy would be due in the fall of each year. In fact, from time to time, the premium on the Policy was paid before the due date and before CCU received the Payment Notice, to ensure that the premium was paid on or before its due date. He also knew that there would be no death benefit payable if the Policy lapsed. Treiber stopped diarizing this matter when CCU changed his position.

[52] Treiber learned that the Policy had lapsed in a telephone conversation he had with TLC on November 30, 2007. He advised TLC that the missed premium payment on the Policy was a clerical error. TLC told him that he should contact the agent. Originally, the servicing agent with respect to the Policy was Ken Belsher. In October of 1998, CCU requested and authorized TLC to appoint Julie R. Lauzier as agent of record of the Policy, who was associated with the Edmonton Brokerage Office. Lauzier's address was in care of Family First Financial Services Inc. In such capacity, Lauzier would receive all information from TLC dealing with the Policy. Lauzier ceased working as a life insurance agent during 1999. In December of 2003, the managing general agency for the policy was changed from the Edmonton Brokerage Office to Financial Management Brokerage Inc. An employee of Financial Management Brokerage Inc. advised TLC that it would have sent copies of notices to Lauzier.

[53] During 2007, Stephen Clutchey was the acting manager in relation to customer relations with TLC. He testified that at that time, TLC would send overdue premiums reports to the agents. The purpose of sending these report to the agents was to allow them to make contact with the insured. If the insured did not have a broker the policy would be termed an "orphan policy" and the agent itself could take action on it. Clutchley testified that the notices in this case were sent to the Edmonton Brokerage Office rather than the Financial Management Brokerage Office. Clutchley testified that this was an oversight on TLC's part. It had not updated its administration system. However, he further testified that this fact would not have entered into TLC's mind as to whether informally to reinstate the Policy. The recipient might be able to assist the insured, but Clutchey's view was that it is the insured who bears the responsibility to pay the premium. In other words, if the insured received the Payment Notice and did not pay, the fact that the agent was not there to pursue this issue with the insured would make no difference. Wayne Fletcher, the manager of TLC's customer services department testified during his examination for discovery that TCL's role was not to contact the insured directly. The agent or brokerage would do this on receipt of the overdue premium report. TLC's role was to send the notices to the insured.

[54] Treiber tried to call Lauzier, but her telephone number was out of service. The person at

TLC also told Treiber he could call the Edmonton Brokerage Office. The person at the Edmonton Brokerage Office denied any responsibility for the lapse and directed Treiber to Financial Management Brokerage Inc. Treiber never received a return call from Financial Management Brokerage Inc. Treiber received a telephone call from TLC's corporate head office and was told that the Policy had lapsed and that was the end of it.

[55] As one can see, a number of individuals in CCU knew that the premiums on the Policy had to be paid in September or, at least, the Fall of each year. Some diarized these payments, others did not. Treiber testified that he did not know whether the chief executive officer knew the premium had to be paid in September, but he did testify that every CFO knew this.

[56] Urquhart inquired of various people whether they had received the 2007 Payment Notice from TLC, including the receptionist, the executive assistant, the mail room personnel and accounts payable clerks. No one recalled seeing any type of notice and no notice was found in the file relating to the Policy. Urquhart did recall an occasion when a Payment Notice was received by a different department on a different floor of the building that CCU occupied. Treiber, as well, confirmed that this could happen and, in fact, he confirmed that any correspondence from an insurance company could go to a different floor from that which paid invoices. It should be noted that CCU receives thousands of invoices at any given time. Drotar testified that during the three-month period before he testified, the Red Deer region of CCU alone received approximately 3,000 invoices.

[57] Drotar and Urquhart testified that CCU paid the premiums in the following manner. CCU would receive the Payment Notice. The CFO would approve the payment of the premium and then CCU would pay TLC. CCU's receipt of the Payment Notice was an important aspect, as this triggered the payment process. In fact, Drotar testified that he would not authorize payment without a Payment Notice. CCU did not employ a mechanism for automatic funds transfer.

[58] TLC electronically generated Payment Notices, late premium notices and lapsed notices. It maintained a computerized business record that records the generation of such notices for each business day. TLC's practice was to mail such notices on the same day or the next business day after they were generated. If mail is returned, TLC's practice is to retain copies of returned mail in the policy file associated with the returned mail. There were no such copies in TLC's file. Neither TLC nor CCU has hard copies of the notices that TLC allegedly sent to CCU.

[59] At all material times, TLC had CCU's proper mailing address. It was possible that Canada Post wrongly delivered the 2007 Payment Notice to the wrong floor of CCU's premises. CCU had checks and balances in place to ensure that mail was delivered to the proper floor. However, as Urquhart testified, even these checks and balances failed, at times. The Payment Notices that formed exhibits in this proceeding showed that the notices were addressed to the proper floor.

[60] CCU argued that Lauzier's exit from the life insurance industry and the change in the managing general agent from the Edmonton Brokerage Office to Financial Management Brokerage Inc. was prejudicial to it, as it did not receive a reminder to pay the premiums on the

Policy from their agent, or any agent, for that matter. Clutchey was responsible for determining whether TLC would informally reinstate policies that had lapsed because of missed premium payments. Clutchey responded to CCU's argument as follows (Transcript of Proceedings, p. 195, ll. 20-31):

> Well, that would actually have little impact because the notices going to the agency are informational. They are trying to tell the advisor that, ... This is a policy, this is a client of yours, and ... you may want to take some action. But for us, or for my decision at that time, the onus is really on the client to pay the premium and if I had known at that time ... that ... the agency notice had been sent to the wrong agency, ... it wouldn't have entered into my decision process because there still was nothing coming back to me saying that there was a problem with the notices that went out to the client directly, and in the end, it's the client's obligation to pay the premium, it's ... not the agent's, so ... The agent may offer some assistance in ... some scenarios, in ... calling the client and ... saying ... You're missing this premium, but whether they do or they don't, it's still the client that has to pay.

[61] The onus is on CCU to show on a balance of probabilities that TLC did not send it the 2007 Payment Notice or that CCU did not receive the 2007 Payment Notice and in either case that its conduct was reasonable in the circumstances. The same holds true for the various reminders and lapse notice. There is no onus on TLC to prove that it sent the 2007 Payment Notice or the other notices.

[62] This Court finds that TLC did indeed send the 2007 Payment Notice and the various reminders to CCU. It had CCU's correct address and, in fact, CCU had received copies of the notices in the past, except, perhaps, the 2005 Payment Notice. Even then, this Court questions whether the 2005 Payment Notice was misplaced by someone in CCU's organization.

[63] Up to 2006, CCU ensured that it would pay the premiums on the Policy by having its CFO diarize this matter. This matter was not diarized in 2007, which resulted in the missed payment. TLC cannot be blamed for this breakdown. As the court in ***Williams*** (C.A.) stated at para. 25:

> No issue is taken with the general proposition that the insured is responsible for paying the required premium ... by the stipulated premium payment date, or at least within the 31-day grace period ... In addition, there is no obligation on the insurer to tell the insured that the required premium has not been paid or that the contract has lapsed. Riddell J.A. put it this way in ***Teasdall v. Sun Life Assurance*** *Co.* (1926), [1927] 2 D.L.R. 502 (Ont. C.A.) at 508 :
>
>> ... Contracts of life insurance such as this promise that on payment upon fixed dates of stated amounts, called premiums, certain amounts will be paid to certain persons. There is no undertaking on the part of the company to notify the assured when these premiums

> are due, and, if he does not pay them when they are due,...
>
> The company has the right to consider that the contract is at an end — and there is no obligation on its part to notify the assured that it is at an end.

Thus, TLC had no duty to ensure that its clients receive the Payment Notices; that is the client's responsibility. The client's primary responsibility is to ensure that the premiums are paid, whether or not it receives the Payment Notice.

[64] As well, the checks and balances for mail delivery within CCU's organization were faulty. On at least one occasion, the Payment Notice went to the wrong floor. Treiber was concerned that there was a risk that the Payment Notice could go astray, so he established his own diary system. One could attempt to blame Canada Post, but this Court finds it unlikely that Canada Post could have failed in delivering the 2007 Payment Notice, the reminders and the lapse notice. That is far-fetched even if one has a certain cynicism about Canada's postal system.

[65] What did CCU do after it learned of the Policy's lapse? It paid the premium on the Policy by way of bank draft, albeit 16 days after the Policy had lapsed. Bank drafts do not stale-date. On its receipt of the bank draft, TLC checked its records, including the Policy, to determine if it should accept the late payment. In accordance with its practice, the Policy had lapsed, so TLC returned the premium payment to the managing general agency. Drotar was under the impression that the Policy continued in force. This Court finds that TLC had not accepted the bank draft. Nor had it waived CCU's breach of the terms of the Policy. In ***Kubanowski v. Primerica Life Insurance Co. of Canada***, [1997] S.J. No. 364 at para. 33 (Q.B.), aff'd 10 September 1998 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 528, the court said:

> The insurer may waive lapse of the policy be reason of the non-payment of a premium in time by subsequently accepting that premium so that the assured believes coverage subsists; but this is not always indicative of waiver. In MacGillivray & Parkington at para 962 (p. 394) it states:
>
> > . . . But the mere acceptance of a premium after forfeiture is not in itself conclusive. Thus, in a South African case, [*Steyn's Estate v. S. African Mutual Life* (1948), 1 S.A.L.R. 359] where the conditions of the policy provided for reinstatement of a lapsed policy on payment of arrears and production of a health certificate, the acceptance of a premium after forfeiture was held insufficient to revive the policy.

This case is even stronger, as this Court has held that TLC did not even accept the bank draft.

[66] CCU then tried to plead with TLC to reinstate the Policy informally. TLC rebuffed CCU's pleas. TLC had occasion informally to reinstate life insurance policies, but did so rarely. The two cases in which it reinstated policies involved situations where the insured had paid or intended to pay the premiums on or before the due date, but through error on the part of the agent

in one case and a bank in the other, TLC did not receive the premium payment. In this case, there was no payment or intention to pay on or before the due date; payment was missed and there were no other extenuating circumstances.

[67] The Policy contains the following provisions with respect to the formal reinstatement of a lapsed policy:

> If this policy lapses, it may be reinstated subject to the following conditions:
>
> 1. The request for reinstatement must be made in writing within 2 years after the date of lapse and before the end of the term period.
>
> 2. The Insured must continue to be insurable by our standards.
>
> 3. All overdue premiums must be paid with interest compounded annually at the reinstatement interest rate shown in the policy data.
>
> 4. The premium due at the time of reinstatement must be paid.

Treiber reviewed this provision on learning that the Policy had lapsed. CCU did not seek any advice from any insurance agent or broker related to the requirements for reinstatement. However, Treiber advised TLC that he felt that reinstatement would be difficult because Sunderland was now 80 years old and CCU and Sunderland had a very acrimonious relationship. Treiber did, however, confirm that Sunderland was still alive and that Sunderland "seemed to be okay." CCU did not attempt to secure Sunderland's cooperation through a financial incentive or otherwise.

[68] As well, Drotar was aware of the reinstatement provisions. CCU's legal counsel was also aware of the reinstatement provision, through a letter it received from TLC dated January 28, 2008. Drotar contacted CCU's legal counsel but received no direction on whether CCU should reinstate. Drotar did not see reinstatement as an emergency situation, as CCU had 2 years to effect reinstatement, provided Sunderland was still alive. CCU did not apply for reinstatement.

[69] Helene Chatelain, TLC's chief underwriter, provided testimony concerning TLC's requirements for reinstatement of life insurance policies. The requirements for reinstatement are not as stringent as those required for someone seeking a new policy. The insured simply had to show that they would be in the same medical condition as any person in that age group. However, the insured would be required to undergo a medical examination, through one of TLC's "service providers." As well, the premiums for the reinstated policy would remain the same as the original policy. In most cases, the premiums would be less than for a new policy.

[70] CCU's legal counsel replied to the correspondence dated January 28, 2008, which it received from TLC. The exchange of correspondence between legal counsel and TLC related to copies of the Payment Notices and lapse notice. The exchange did not discuss reinstatement. In the end, CCU did nothing to effect or attempt to effect formal reinstatement.

[71] CCU argued that it had submitted the payment immediately on learning that it had missed the premium due date. It argued that TLC received the payment 16 days after the grace period expired. That may be so, but this was almost 2 months after the premium payment was due. Furthermore, CCU did nothing to reinstate the Policy because of its acrimonious relationship with Sunderland. It made no attempts to seek Sunderland's cooperation. As stated in ***The Northern Life Assurance Company of Canada v. Florence Reierson***, [1977] 1 S.C.R. 390 at 398:

> ... I do not think there can be any doubt that the coverage under the contract came to an end ... with the expiry of the days of grace, subject to the possibility of reinstatement upon compliance with certain conditions which were never satisfied.

[72] Like ***Saskatchewan River Bungalows*** (S.C.C.), ***Williams*** (C.A.) and ***Padua***, this Court finds that CCU has not satisfied the first prong of the ***Liscumb*** test and this Court finds that CCU's conduct was not reasonable in the circumstances.

[73] This should end this analysis, as the three prongs of the ***Liscumb*** test are conjunctive, see ***Saskatchewan River Bungalows*** (S.C.C.) at para. 35, ***Williams*** (C.A.) at para. 78. However, this Court will briefly discuss the second and third prongs.

Was the object of the lapse provision essentially to secure the payment of money?

[74] This Court has already discussed this aspect of the ***Liscumb*** test and agreed with the ***Pluzak*** court's conclusion at para. 29:

> ... [Lord Wilberforce's] principle has no application to term life policies after death. There is no provision for security to assure a result. There has been no forfeiture of security. There has been a simple failure to pay for ongoing coverage.

Practically, CCU had no obligation to continue paying the premiums on the Policy and TLC had no right to demand those payments.

Is there a substantial disparity between the value of the property forfeited and the damage caused by the breach?

[75] CCU strongly argued that there is a substantial disparity between the value of the property forfeited and the damage caused to TLC by the breach. The loss to CCU is either the loss of the $5,000,000 death benefit or the $1,900,000 capitalized annual premiums. It further argued that TLC can be made whole by the payment of the late premium payment plus interest on that payment.

[76] There is some appeal to CCU's argument. However, on the other side of this argument is the concern that life insurance policies will lose some measure of predictability in the sense that

life insurers base the pricing of their products on mortality rates, expense assumptions, investment assumptions and lapse assumptions. Joseph Kordovi, TLC's vice-president and pricing actuary for the life product development area, described the lapse assumption as "the assumption we make as to how many policy holders will cancel their policies or let their policies run out at any future duration in our projections" (Transcript of Proceedings at p. 168, ll. 3-5). He then explained how the lapse assumption could be affected if TLC accepted late premium payments without reinstatement:

A Well, there are a multitude of reasons. One of the key ones is ... an insurance rule called "anti-selection," where - - that basically says that if a client will act to their benefit in the detriment to the company, they will. So, if we accept late payments and for people to bring their policies back in force whenever they want without reinstatement application, then we have to assume that those people are going to be less healthy than what we price for in - - in our products, and that will deteriorate our ... mortality experience, and will be detrimental to the company and to our policy holders. That's being one effect.

And the second effect is it's also going to change our lapse experience, and as I mentioned earlier, it will lower the lapse experience and what we expect to be the lapse experience, and that will also be detrimental.

Q You had mentioned earlier in your evidence that the investment assumption impacts how much you expect to earn on reserves, is there any impact from accepting the premiums on that aspect of the assumptions?

A Well, actually, I should probably note that, when a policy lapses, the company will release the reserves back in that policy. A release of reserves flows directly through the income statement of the insurance company and goes to ... the bottom-line profits, which are then reported to shareholders. If a policy is reinstated, then the company has to put ... those reserves back up, and at that point that's taken from ... our revenues and directly ... would reduce our ... net income and therefore that would also flow to the shareholders. So, allowing people ... to pay their late premiums and reinstate policies will have a direct impact on the bottom-line profits of the company from period to period.

Q What impact, if any, would there be if the time for acceptance of premiums ... was extended?

A Well, our experience, our mortality experience, is based on the rules that we have had in place for many, many years. Changing that would then require us ... to make an assumption change our mortality and we would have to assume that our mortality at that point in time for those type of policies, and policies would increase and therefore we would have to

increase our - - premiums.

As one can see from this exchange, the disparity is not so one-sided. If this Court were to grant equitable relief, it could have a chilling effect on the life insurance industry. It is difficult to estimate that damage. In the view of the testimony of Kordovi, which this Court accepts, the disparity is not as substantial as CCU argues.

Section 15 of the *Judicature Act*

[77] CCU argued that this Court should apply s. 15 of the Alberta *Judicature Act* in this case. That section provides:

> 15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

This Court finds that there is no conflict or variance in this case, as the application of either gives us the same result.

Conclusion

[78] As a result of the foregoing, CCU's action against TLC is dismissed. TLC is entitled to its costs. If the parties are not able to agree on costs, they may arrange to appear before this Court to resolve any issues related to them.

Heard on the 21st day of September, 2009 to the 23rd day of September, 2009.
Dated at the City of Edmonton, Alberta this 30th day of November, 2009.

K.D. Yamauchi
J.C.Q.B.A.

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