February 16th, 2010

The Availability of Relief from Forfeiture for Non-Payment of a Life Insurance Premium

By Jonnette Watson Hamilton

Cases Considered:

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

This is a well-researched and clearly written decision by Justice Keith Yamauchi on an unresolved issue in insurance law. The question is whether relief from forfeiture is available when a life insurance policy lapses for non-payment of premiums. Since 1994, the usual approach of the courts confronted by this question has been to merely assume relief from forfeiture was available and decide on the easier basis that, even if it was available, it was not appropriate to grant it on the facts of the case before them. In this decision, however, Justice Yamauchi decided the legal point and determined that relief from forfeiture was not available. This decision has several points of interest from a property law perspective, which is the perspective I am adopting for these comments. The aspects of this decision that interest me the most are two. The first is the perceived tension between statutorily regulated life insurance contracts and the body of law known as equity, also known as the classic tension between certainty and justice in the individual case. The second is the sharp line drawn, obliterated, and then re-drawn between property and contract.

For my purposes, the facts can be briefly stated. In 1988 Transamerica Life Canada issued a term life insurance policy with a face value of $5,000,000 on the life of Thomas Sunderland. Sunderland assigned the policy to the predecessor of the Community Credit Union Ltd. (CCU) as part of the security given for loans made by the CCU to Sunderland and companies he owned. Premiums of about $94,000 were due in September each year and CCU paid those premiums. CCU missed the premium payment due in September 2007. There was a great deal of evidence as to why the CCU missed that payment, but those facts are not relevant to the issue of whether relief from forfeiture is available (as opposed to whether it is appropriate to grant it on the facts of this case). Sanderson died in March 2008 and Transamerica refused to pay the death benefit to the CCU, taking the position that the policy lapsed for non-payment of the premium.

CCU sued Transamerica, seeking relief from forfeiture under section 10 of the *Judicature Act*, R.S.A. 2000, c. J-2. The question of whether relief from forfeiture is available when a life insurance policy lapses for non-payment of premiums was thus squarely before Justice Yamauchi.

Justice Yamauchi begins his reasons with a look at the consequences of the non-payment of life insurance premiums. The relevant provision of the life insurance policy at issue provided that "[i]f any premiums remain unpaid after the grace period, this policy will lapse." The common law rule is that if the insured or his assignee fails to pay the premium the policy lapses by its terms and the insurer is released from any duty to pay on the death of the insured. Justice Yamauchi cites three very old Ontario, English and American precedents for this strict common law position and the reasons for it. There is nothing wrong with relying on cases more than 100 years old for relevant rules if the rules have not changed. It is, however, less persuasive to rely on 100-year-old cases for the reasons justifying those rules. In this case, the reasons centre on economic efficiency. Economic efficiency may be, for its proponents, a timeless and placeless universal, but surely the economy and its context have changed since 1876. The collection of data necessary for the profitable calculation of premiums, for example, is not the same process today as it was in the year that Alexander Graham Bell was granted a patent for the invention of the telephone.

The business reasons for the strict common law position that Justice Yamauchi relies upon were provided by the United States Supreme Court in *Klein v. New York Life Insurance Company*, 104 U.S. 88 at para. 19 (1881), 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. . . . Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment.

The U.S. Supreme Court in *Klein* also asserted (at para. 20) that "[t]he companies must have some efficient means of enforcing punctuality."

What these business reasons seem to boil down to is two things. The first is the fact insurance companies are only profitable if they are paid and paid promptly. This fact seems to be equally applicable to every type of for-profit enterprise. The second is that forfeiture of the policy and their obligation to pay out is the only way insurance companies have to protect themselves from losses. This reason has a bit more appeal, although many profitable businesses seem to do well when their only resort is to lawsuits to get payments they are owed. This second reason is also an oblique reference to forfeiture acting as "security" for payment, a theme that reoccurs in this area and in Justice Yamauchi's decision.

Justice Yamauchi also quotes one recent English case to justify the common law rule, but the justification offered in *United Eagle Ltd. v. Golden Achievement Ltd.*, [1997] UKPC 5, [1997] 2 W.L.R. 341 is merely typical of the certainty justification for any strict legal rule and not dependant on the life insurance context. Lord Hoffman in *United Eagle* (at 344-5 W.L.R.) stated:

> [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. (emphasis added).

Certainty is always the justifications for rules which operate in an "on/off" fashion, with a metaphorically hard or bright line between the cases to which they apply and those to which they do not. They are usually tied to economic efficiency and they are usually trotted out in opposition to equity with its concern to do justice in individual cases.

Of course the decision does not end with the common law and insurance policy forfeiture for non-payment of a premium. The common law is not all that there is to law. There is also the centuries old idea that sometimes the application of general rules results in bad consequences and these bad consequences cannot be allowed to stand. As Aristotle wrote in *The Nichomachean Ethics*, Book 5, Chapter 10 (trans.W.D. Ross) about the concept of *epieikeia*, equity denotes a correction of strict generalities to produce a better fit with particular circumstances:

> [T]he equitable is just, and better than one kind of justice — not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.

Thus the issue arises: is relief from forfeiture available when a life insurance policy lapses for non-payment of premiums? The reasons that the relief from forfeiture issue is still an outstanding issue in life insurance matters is easier to understand with a little knowledge of the historical development of relief from forfeiture in equity, in the *Judicature Act*, in the insurance statutes and in one 1994 Supreme Court of Canada case. It is also important to bear in mind throughout that there are two different issues that are best kept analytically separate:

(a) Is relief from forfeiture available?
(b) It is appropriate to grant relief from forfeiture in this particular case?

1) Relief from Forfeiture in Equity: Equity — that body of law born to deal with difficult cases and provide more discriminating resolutions when the common law's general rules appeared to be inapt and inappropriate — sometimes excuses claimants from performing the obligations they have undertaken. (See Sarah Worthington, *Equity* (Oxford: Oxford University Press, 2003) at xiii and 202 – 208.) One of Equity's concerns is with overly onerous expressly-agreed-to remedies for breach of contract. Equity will not enforce a term that specifies what is to happen on breach of contract if the consequences are all out of proportion to the loss suffered by the other party. In particular — and first as a matter of history, beginning in the 15th century — equity sometimes protected mortgagors against forfeiture of their interests in land. The rationale was that the forfeited property was only ever intended to provide security, usually security for payment. (This security aspect surfaces several times in Justice Yamauchi's decision.) The relief gradually

became more generalized, with equity intervening in appropriate circumstances to give more time when a contract term provided for forfeiture of a proprietary or possessory interest — but only a proprietary or possessory interest — if the owner did not perform on time. In England, relief from forfeiture is still confined to forfeitures of property interests.

2) Relief from Forfeiture in the *Judicature Act*: The *Judicature Act*, which mainly deals with the jurisdiction and powers of the superior courts, provides in section 10 that:

> 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. (emphasis added)

The question that arises in Alberta in connection with section 10 (and in other provinces with equivalent legislation) is whether the statutory provision merely re-states equity or whether it expands the availability of relief from forfeiture. Not surprisingly, in answering this question the emphasis is on "all penalties and forfeitures." As will be discussed below in more detail, relief from forfeiture has not been confined to cases where a proprietary or possessory interest is forfeited in Alberta.

3) Relief from Forfeiture in the *Insurance Act*, R.S.A. 2000, c. I-3: There are provisions in the Alberta *Insurance Act* (as there are in most provincial statutes governing insurance contracts) which excuse insureds from their breaches of contract in certain circumstances. These provisions are much more specific than those in either the *Judicature Act* or in equity. Most of them are located in Part 5. Part 5 of the *Insurance Act* begins with section 512, which provides:

> 512. Except where otherwise provided and where not inconsistent with any other provision of this Act, the provisions of this Subpart apply to every contract of insurance other than a contract of life insurance to which Subpart 4 applies. (emphasis added)

The focus of the specific *Insurance Act* provisions is on statutory conditions and post-loss behaviour. Therefore, based on the wording in sections 512, 515, 521, 662(k) and 699 (in Part 6 dealing with accident and sickness insurance), the availability of relief from forfeiture under the *Insurance Act* is limited to fire, automobile and accident and sickness insurance. There has been a question about whether the absence of a specific provision for relief from forfeiture in the life insurance context meant that a general provision such as section 10 of the *Judicature Act* is available or not. In other words, do the specific statutory provisions “occupy the field” of relief from forfeiture in the insurance context.

4) *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (1994), 115 D.L.R. (4th) 478: In this case, the Supreme Court recognized the existence of the question of whether section 10 of the *Judicature Act* was available for contracts governed by the *Insurance Act* but did not decide it. The Court provided some guidance in *obiter dicta* on the issue, but refused to answer the question because the plaintiffs were not eligible for relief against

forfeiture in the circumstances of the case in any event. The Court did 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" (at para. 36). The Court also went on to state:

> The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards in the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

Note that the Supreme Court stated only that the provisions in the *Insurance Act* did not preclude application of section 10 of the *Judicature Act* to life insurance contracts. Other factors which might conceivably preclude the availability of the equitable relief were not discussed. Nevertheless, the Ontario Court of Appeal in *Williams Estate v. Paul Revere Life Insurance Co.* (1997), 101 O.A.C. 280, interpreted *Saskatchewan River Bungalows* as stating that relief under the more general provincial judicature acts was available for those types of insurance, such as life insurance, where there were no relief from forfeiture provisions in the provincial insurance statute (at para. 44):

> [Justice Major in *Saskatchewan River Bungalows*] 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.* (emphasis added)

Returning now to the specific case, when Justice Yamauchi turned his attention to the position in equity, he began by considering section 10 of the *Judicature Act* and the opinion of the Alberta appellate court in *Snider v. Harper* (1922), 66 D.L.R. 149 as to the effect of section 10 on equity. *Snider v. Harper* had decided (at para. 6) that the court's power to relieve from forfeiture was expanded by section 10:

> 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 ... (emphasis added)

The emphasis in *Snider v. Harper*, and in the later cases of *Popyk v. Western Savings & Loan Association* (1969), 3 D.L.R. (3d) 511 (Alta. S.C.A.D.) and *Altius Centre Ltd. v. BMP Energy Systems Ltd.* (1996), 43 Alta. L.R.(3d) 209 (Q.B.), was on section 10's use of "all penalties and forfeitures." Unlike the UK courts, the Alberta courts did not restrict relief from forfeiture to forfeitures of property interests. If a contract provided for forfeiture, the court could relieve

against it. However, although these cases considered contracts in general, none of the cases interpreting section 10 of the *Judicature Act* dealt with insurance contracts in particular. Justice Yamauchi makes much of this point later in his judgment, after he considers the *Insurance Act* provisions and *Saskatchewan River Bungalows* and after he emphasizes the forfeiture of property interests aspects of Ontario case law considering *Saskatchewan River Bungalows*. Indeed, it appears that, despite *Snider v. Harper*, *Popyk* and *Altius Centre*, Justice Yamauchi reintroduces the contract/property distinction into this area of law in Alberta.

Before returning to this point, however, Justice Yamauchi considers the relevance of the insurance context and, specifically, the provisions in the *Insurance Act*. In this regard, what the Supreme Court had to say about that context in *Saskatchewan River Bungalows* was relevant. It was *dicta*, but that Court said that the relief from forfeiture provisions in the statute that governed other types of insurance did not rule out section 10 of the *Judicature Act* applying to life insurance policies. What to make of this? Justice Yamauchi spends quite a bit of time answering this question. He begins by referring to the Ontario Court of Appeal decision in the *Williams Estate* case, the decision that treated *Saskatchewan River Bungalows* as saying that relief from forfeiture is available. Then he notes that two other more recent Ontario cases considered the issue: *Khan v. Primerica Life Insurance Company of Canada* (1998), 13 C.C.L.I. (3d) 171, [1998] O.J. No. 3073 (Gen. Div) and *Pluzak v. Gerling Global Life Insurance Co*. (2001), 52 O.R. (3d) 520, [2001] O.J. No. 34 (C.A.).

In *Khan*, the court held that the lapse of a life insurance policy was the result of the plaintiff's non-payment of premiums and it was not a forfeiture within the meaning of the Ontario equivalent of section 10 of Alberta's *Judicature Act*. Echoing Lord Hoffman's appeal to certainty in *United Eagle*, the court in *Khan* (at para. 26) asserted that granting relief from forfeiture in the case of commercial contracts such as life insurance contracts "would introduce significant uncertainty into commercial and other transactions and do further and considerable violence to the principle that contracts are binding."

The Ontario Court of Appeal in *Pluzak* also questioned whether the lapse of a life insurance policy for non-payment of premiums was a "forefeiture." They held (at para. 18) that there was "no forfeiture in the sense of a loss of property", thereby adopting the UK position that relief from forfeiture was only available if a proprietary or possessory interest was forfeited. The Court of Appeal worried (at para. 28) that extending relief to life insurance policies was the start of a slippery slope: the relief might then be applied to any contract. The position in Alberta, however, under *Snider v. Harper*, *Popyk* and *Altius Centre* is that relief from forfeiture is <u>not</u> confined to relief from forfeiture of a property interest. Although Justice Yamauchi discussed these three cases in an earlier portion of his judgment (at para. 23 -28), where he noted that they did not address insurance contracts specifically, he does not consider whether the Ontario position that there is "no forfeiture in the sense of a loss of property" can be transplanted into a province where loss of property is not required before relief from forfeiture is available.

Instead, Justice Yamauchi turned to a 1973 decision of the House of Lords in *Shiloh Spinners Ltd. v. Harding*, [1973] 1 All E.R. 90 (H.L.). Justice Yamauchi quotes (at para. 37) from a

passage in *Shiloh Spinners* (at 101) that emphasized the English property restriction on relief from forfeiture, a passage written by Lord Wilberforce that states:

> [I]t 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. (emphasis added).

This reference to security harkens back to the position equity took to relief from forfeiture by a mortgagor beginning in the 15th century. Equity sometimes protected mortgagors against forfeiture of their interests in land because the forfeited property was only ever intended to provide security, usually security for payment. "Security" for payment is, as Justice Yamauchi notes (at para. 38), relatively easy to consider in the context of proprietary rights. But how does one fit Lord Wilberforce's statement to a policy of life insurance? The court in *Khan* (at para. 23) and Justice Yamauchi noted (at para. 39) it could not be done. To put it plainly, as did the court in *Pluzak* (at para 29):

> [Lord Wilberforce's] principle has no application to term life insurance 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.

The idea is that because the policy and the obligation to pay out on death is not security, but is instead the essence of the insurer's contractual obligations, there is no forfeiture. It is possible to imagine forfeiture in a life insurance case. As Justice Yamauchi notes (at para. 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 value on a lapse of the Policy."

In relying on *Shiloh Spinners* and the security rationale, Justice Yamauchi comes close to ignoring the expansion of relief from forfeiture beyond the property context that *Snider v. Harper*, *Popyk* and *Altius Centre* all saw as being achieved by section 10 of Alberta's *Judicature Act*. Justice Yamauchi does return (at para. 41) to consideration of these cases. However, he merely looks to the dissenting judgment of Justice McClung in the Alberta Court of Appeal decision in *Saskatchewan River Bungalows*, (1992), 127 A.R. 43 (C.A.) at para. 113. Justice McClung gave two reasons for thinking that relief from forfeiture is not available on the lapse of a life insurance policy due to non-payment of premiums: (1) because "[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 . . ."; and (2) because there is some authority that the general principles of equity in this area do not apply "where the field is occupied by a statutory scheme". (emphasis added). The Supreme Court of Canada explicitly disagreed with Justice McClung on the second reason and held there was no "occupation of the field", but said nothing about his first reason. It is the first that Justice Yamauchi relies upon. However, without

discussing the matter further, Justice Yamauchi simply "follows" this dissenting conclusion to hold (at para. 42) "[t]hus, in the circumstances of the case which this Court is deciding, relief from forfeiture is not available to CCU."

The dissent of Justice McClung on a point not discussed by the Supreme Court when it overruled the Alberta Court of Appeal decision is not a precedent that must be followed. If it is persuasive, then ideally we should be told why it is persuasive, especially when it falls back on the UK position that was not followed in *Snider v. Harper*, *Popyk* or *Altius Centre.* True, those three cases were not life insurance cases, but what is so special about the statutorily regulated life insurance contract that takes them outside the ordinary instances of contract when discussing relief from forfeiture? Why does it justify a return to the UK position and confinement of relief from forfeiture to the forfeiture of property interests? Given both the longstanding nature and the appellate level of some of the Alberta cases' interpretation of the scope of section 10 of the *Judicature Act*, more reasons needed to be given.

In his reliance on *Shiloh Spinners*, Justice Yamauchi also appears to conflate the two different issues of whether relief from forfeiture is available for life insurance contracts and whether it would be appropriate to grant it in the particular case. The sentence following the passage from *Shiloh Spinners* quoted above (at 101) expands upon their use of "appropriate and limited cases" for relief from forfeiture by stating that "[t]he 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." These are factors that go to the second issue, of whether relief is appropriate in the particular case. Justice Yamauchi, however, states (at para. 37) that this passage tells us that "[r]elief from forfeiture is available only in 'appropriate and limited cases.' We should be wary of broadening the circumstances in which this relief is available. . .". With respect, the test for the second issue about the availability of the relief in the particular case cannot be used to determine the scope of the relief and whether it applies to life insurance in general.

Of course, Justice Yamauchi does not stop with his holding on the first issue, that relief from forfeiture is not available on lapse of a life insurance policy for non-payment of premiums. He continues on to consider the second issue, namely, that of whether, assuming relief is available, it should be granted in these circumstances. As an exercise of equitable discretion, this issue is very fact specific, with the law providing only guidelines as to factors a court should consider in exercising its discretion.

As Justice Yamauchi notes (at para. 43), the factual issue of applicability in the particular case is much easier, in part because of all the cases which assumed relief from forfeiture was available at law and only discussed the second issue. Nevertheless, the types of things a court should consider when undertaking its analysis are not well settled.

The Supreme Court of Canada decision in *Saskatchewan River Bungalows* adopted (at para. 32), the House of Lord's three-prong formulation in *Shiloh Spinners*:

> The factors to be considered by the Court in the exercise of its discretion are the conduct of the appellant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach.

Saskatchewan River Bungalows also quoted the Ontario High Court decision in *Liscomb v. Provenzano* (1985), 40 R.P.R. 31 at para. 31 (H.C.J.), where that court said, also relying on *Shiloh Spinners*:

> 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?

The first guideline in both formulations looks at the conduct of the applicant for relief. It is a requirement for reasonable conduct and this factor was approved of by the Supreme Court of Canada in *Saskatchewan River Bungalows* (at para. 34). The third factor in each case asks the court to consider the difference between the value of the property forfeited and the damage caused to the other party by the applicant's breach. However, the second factor does not appear to be the same in both versions. According to *Saskatchewan River Bungalows*, a court should consider "the gravity of the breaches" and according to *Liscomb*, a court should consider whether "the object of the right of forfeiture [was] essentially to secure the payment of money." Inquiring into whether security was the purpose does not appear to be the same as inquiring into the gravity of the applicant's breach. The *Liscomb* version harks back to the origins of relief from forfeiture in the equity of redemption and ties its use to a property interest (i.e., the security). The problems I have with relying on this second factor in the *Liscomb* version of what a court should consider in deciding the factual issue are the same as the problems I have with insisting on a property interest before relief from forfeiture is available. The Supreme Court in *Saskatchewan River Bungalows* did not comment on the second or third factors in *Liscomb* because it decided the case on the first.

Justice Yamauchi applies the first factor — the question of reasonable conduct — by fleshing it out (at para. 45) with what the Ontario Court of Appeal said in *Williams Estate* about what to look at in assessing reasonable conduct:

> 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.

After thoroughly considering what caused the non-payment of the premium in this case and what CCU tried to do about it (at paras. 46-71), Justice Yamauchi concluded that CCU had not satisfied the first factor in the *Liscomb* formulation and the CCU's conduct was not reasonable in the circumstances.

He could have stopped there, as did the Supreme Court in *Saskatchewan River Bungalows*, but Justice Yamauchi continued on to consider the second and third factors from *Liscomb*. The second factor was one he noted (at para. 74) he had already dealt with, in considering whether relief was available in law. There is therefore no consideration of whether this aspect of a UK test is suitable in a province where relief is not confined to the loss of a property interest.

As for the third factor, the disparity factor, Justice Yamauchi admits (at para. 76) the appeal of CCU's argument that they have lost either the $5,000,000 death benefit or the $1,900,000 capitalized annual payments. On the other side of the scales Justice Yamauchi places (at para. 76) "the concern that life insurance policies will lose some measure of predictability", thereby taking a very expansive view of "the damage caused the vendor by the breach." In assessing this, Justice Yamauchi relies on the testimony on Transamerica's pricing actuary. Predictability of price, and hence profitability, is based on mortality rates, expense assumptions, investment assumptions and lapse assumptions (i.e., how many policy holders will cancel their policies or let their policies run out in the future). If the time for payment was extended by relief from forfeiture, then that would require a change in the insurance company's assumptions. They would have to assume their mortality rates would go up which would require them to increase their premiums in order to maintain the same degree of profitability. And that is "the damage caused the vendor by the breach". Just what is the damage cause to the vendor based on those facts? Some recalculations, the cost of which would be recouped in increased premiums? It seems to me that Justice Yamauchi was placing more than the damage caused to the vendor on the other side of the scales, thus ensuring that CCU's side came up light.

Perhaps it would be better — more efficient or more just — to include the cost of the breach to more than the insurer. Perhaps the cost of increased premiums to all of us should be factored in. My point is merely that this expansive view is not part of the *Liscomb* test and the analysis was said to be an application of the *Liscomb* test. It is because Justice Yamauchi includes more than the damage caused the vendor that he can conclude, as he does (at para. 76) "the disparity is not so one-sided" and that "the disparity is not as substantial as CCU submits."

On the second issue of application, Justice Yamauchi may well be correct in determining that CCU's conduct was not reasonable. One might expect a financial institution such as CCU to have diarizing systems in place, with backups, to ensure they made annual premium payments. However, the second factor is an inappropriate one, and the third factor is inappropriately applied. Nevertheless, if Justice Yamauchi is correct in his application of the first factor, then he is correct in determining that relief from forfeiture, if it was available, was not available on the facts of this case.