

Warranties & Relief from Forfeiture and “Unjust and Unreasonable” Policy Provisions

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Paper

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Warranties & Relief from Forfeiture and “Unjust and Unreasonable” Policy Provisions¹

Warranties are an important tool for limiting the risk exposure undertaken by an insurer and historically, it has been believed that they must be ‘strictly’ complied with. But with recent amendments to the *Insurance Act* has there been a change to this traditional view?

Relief from Forfeiture

1. Where an insured’s right to indemnity has been forfeited or denied it can in some circumstances seek relief from forfeiture.
2. Such relief comes from two possible statutory sources: (i) s. 13 of the *Insurance Act* of B.C. or (ii) s. 24 of the *Law and Equity Act* of B.C.
3. Amendments to the *Insurance Act* in 2012 added the words “without limiting section 24 of the *Law and Equity Act*” to the preamble of s. 13 of the *Insurance Act*. This has settled an uncertainty in the jurisprudence as to whether relief for an insurance policy holder is limited to what comes from the *Insurance Act*. The following paragraphs should briefly explain why this may be important.
4. Section 13 of the *Insurance Act* reads,
 - 13 Without limiting section 24 of the *Law and Equity Act*, if
 - (a) there has been
 - (i) imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted by the insured with respect to the loss, and
 - (ii) a consequent forfeiture or avoidance of the insurance in whole or in part, or
 - (b) there has been a termination of the policy by a notice that was not received by the insured because of the insured's absence from the address to which the notice was addressed,

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and the court considers it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court, on terms it considers just, may

(c) relieve against the forfeiture or avoidance, or

(d) if the application for relief is made within 90 days of the date of the mailing of the notice of termination, relieve against the termination. [emphasis added]

5. Before the addition of the words in 2012, “Without limiting section 24 of the *Law and Equity Act*”, the language of s. 13 would have confined the right to relief from forfeiture to cases involving an insured’s *imperfect compliance* with an insurance policy’s *statutory* conditions that follow a loss. It would not have granted relief for failures to comply with conditions that preceded the loss: *Abell v Underwriters, Lloyd’s, London*, 2005 BCSC 1715 at para 43.
6. As can be seen, the addition of the words “Without limiting section 24 of the *Law and Equity Act*” to s. 13 raises the question whether broader rights to relief from forfeiture are available to the insured in all insurance policy situations, as it had been held for life insurance policies: *Saskatchewan River Bungalows v Maritime Life Assurance*, [1994] 2 S.C.R 490.
7. Section 24 of the *Law and Equity Act* reads,

Relief against penalties and forfeitures

24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.
8. Although it dealt with life insurance policies, *Saskatchewan River Bungalows* is instructive on the factors to be considered by the court when called upon to exercise its discretion in granting relief in cases involving *imperfect* compliance by the insured. The Supreme Court said such factors should include the conduct of the insured, the gravity of the breaches, and the disparity between the value of the indemnity forfeited and the damage caused by the insured’s breach. Because s. 24 is now mentioned in the opening words of s.13 of the *Insurance Act*, it is tempting to believe relief from imperfect compliance preceding a loss is now also available to an insured and that the same factors as

proposed in *Saskatchewan River Bungalows* should equally apply to insureds seeking relief from forfeiture in all types of insurance policies. But the discussion does not end there.

9. A key principle for granting relief from forfeiture of insurance coverage is to determine whether the insured's breach was an *imperfect compliance* or *non-compliance*. The difference between imperfect compliance and non-compliance is "akin to the distinction between breach of a term of the contract [of insurance] and breach of a condition precedent. If the breach is of a condition, that is, it amounts to non-compliance, no relief under [the *Insurance Act*] is available." *Falk Bros. Industries Ltd. v Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778 at para 17 [emphasis added].
10. The Ontario Court of Appeal expanded on the meaning non-compliance with a condition precedent to indemnity under an insurance contract, in *Kozel v The Personal Insurance Company*, 2014 ONCA 130 at paras 41, 46 and 50:

...the focus is on whether the breach of the term is serious or substantial. Where the term is incidental, its breach is deemed to be imperfect compliance; where the provision is fundamental or integral, its breach is cast as non-compliance with a condition precedent.

...

the proper inquiry is whether the relevant contract provision is a fundamental term, and whether its breach is a fundamental breach

...

A court should find that an insured's breach constitutes noncompliance with a condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other instances, the breach will be deemed imperfect compliance, and relief against forfeiture will be available.

11. The Ontario Court of Appeal has said relief from forfeiture should not be available where the insured's breach "constituted non-compliance with a condition precedent [of the policy]": *Lavoie v McGill Mortgage Services Inc.* 2014 ONCA 257, at para 43. This appears to be sound in principle. Because the Court of Appeal in *Kozel* and *Lavoie* applied this principle to claims for relief from forfeiture under the Ontario equivalent to B.C.'s *Law and Equity Act*, we can assume the B.C. courts will follow a similar approach

to claims for relief under s. 24. In other words, the B.C. courts can be expected to deny an insured relief from forfeiture in cases where it has been *non-compliant* (as opposed to *imperfectly compliant*) with a fundamental term of or condition precedent to coverage under the insurance policy.

Warranties

12. As warranties are customarily treated as 'fundamental' or 'conditions precedent' to recovery under insurance policies, it is not surprising that our extensive research has uncovered only one reported case where an insured has sought relief from forfeiture for breach of a warranty: *Abell v Underwriters, Lloyd's, London*, 2005 BCSC 1715. In *Abell*, the court considered and refused the insured's plea for relief from his breach of warranty. The court based its refusal on the relief from forfeiture provisions of the predecessor to s. 13 of the *Insurance Act* (which did not contain the introductory words, "Without limiting section 24 of the *Law and Equity Act*"), because the insured's breach was pre-loss. The insured did not make a claim for relief under the *Law and Equity Act* but made an alternative claim for relief under the 'unjust contract provisions' of the *Insurance Act*'s s. 32.

Unjust contract provisions

13. Section 32 of the *Insurance Act* reads,

Unjust contract provisions

32 If a contract contains any term or condition, other than an exclusion prescribed by regulation for the purposes of section 33 (1) or established by section 34 (2) or (3), that is or may be material to the risk, including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

14. In *Abell*, above, the insurer had avoided the insured's policy for failure to comply with a warranty that the boat would be permanently moored at a specific location. The insured argued that the provisions concerning permanent mooring were unjust or unreasonable, citing s. 129 of the old *Insurance Act*, R.S.B.C. 1996 c.226, which was the predecessor to s. 32 in the 2012 *Insurance Act*. The court disagreed: "It was manifestly reasonable

for the insurer to stipulate that its insured permanently moor the floating home – given the, well, fluid nature of a floating home’s footing, anything other than permanent moorage would surely affect the insurer’s risk. It was equally reasonable and just for the insurer to require that its insured stipulate where the home would be moored. Absent that information the insurer could not approximate its risk on the policy. This argument must fail.” *Abell*, above, at paras 44-45.

15. The court said, at paras 27-8 in *Abell*,

27 I note somewhat parenthetically that there is in this case no notion of Mr. Abell escaping the consequence of his failure by asserting that holding him to the warranty was unreasonable in the circumstances. That sort of argument prevailed for the insured in *Marche v. Halifax*, [2005] 1 S.C.R. 47, 2005 SCC 6, but it cannot help the plaintiff here. That is because the key factor in *Marche* was that the warranty breach (that the insured premises were vacant for a time) was not relevant to the loss (because the premises were occupied at the time of the loss). Mr. Abell cannot rely on *Marche* because in his case there was a nexus between his breach of warranty and the loss. The nexus was that if Mr. Abell had performed the warranty the evidence showed that it would have been permanently moored in the developed part of the Queensgate community. At that location the house would have been part of a community of floating homes which would have enhanced the chance of early detection of a fire. There would have been easy access to the house from the shore via the wharf and dock system in the development. And, critically, there were fire hydrants on the shore in the developed part of the community. None of those salutary conditions existed in the part of Queensgate where Mr. Abell allowed his house to rest from October 22 and on.

28 Mr. Abell did not comply with the warranty. The defendant was, therefore, entitled to decline to pay his claim.

16. The rationale that to find a warranty unjust and unreasonable the court must determine there was no “nexus” between the loss and the insured’s breach is found in other cases, such as *Keizer v. The Portage LePrairie Mutual Insurance Company*, 2013 NSSC 118 at para 76; *Charles v. Peace Hills General Insurance Company*, 2007 ABQB 515 at paras 35-41; *Krupich v Safeco Insurance Co. of America*, [1985] A.J. No. 759 at paras 18-19; *Hirst v Commercial Union Assurance Co. of Canada*, [1979] B.C.J. No. 824 at paras 14-17; *Marche v Halifax Insurance Co.*, [2005] 1 S.C.R. 47 at paras 30-35. The “nexus” principle marks a departure from other case law, signaling an inconsistency among the Canadian case law that may still need to be

resolved: see, e.g., *Poast v Royal Insurance Co. of Canada*, [1983] M.J. No. 67 (Q.B.).

17. *Poast* considered whether a “Fire Extinguisher Warranty” was “unjust or unreasonable”. The insured’s tractor was destroyed by fire during the course of bush clearing operations. The insured was aware of the risk of fire caused by the heat of the machine igniting the debris it created. The Fire Extinguisher Warranty provided that the insured must carry a 30 lb. dry chemical extinguisher on the equipment. The insured had only a 2 ¾ pound unit and was unable to extinguish the fire. The insurer denied coverage on the basis of the breach of warranty. The insured turned to the section of the Manitoba *Insurance Act*, which gave the court discretion to void a term which it finds ‘unjust or unreasonable’. In finding the warranty was neither unjust nor unreasonable, the court referred to these principles: (1) every case must depend on its own circumstances and no rule can be laid down applicable to all cases (para 35) (2) an ‘unreasonable’ term is one which no “sensible [person] would propose, expecting another [person] to accept it” (para 36) (3) ‘inconvenience’, ‘added difficulty’ or ‘impracticality’ of complying with the warranty is not evidence that the warranty is unjust or unreasonable (para 39) (4) reasonableness of the warranty is to be tested by the circumstances at the time the policy issues, and not against the event which in fact later occurs, i.e., was it reasonable, and not an injustice, for the insurer to stipulate that, if it was going to accept the risk of fire, the insured, for its part, would lessen the chance of loss by carrying the extinguisher called for? (5) insurers have the right to protect their own interests by reasonable restrictions on their liability and (6) the essential characteristic of a warranty is that it must be exactly complied with, *whether it be material to the risk or not*. All but the last phrase, can still be considered sound law, it is submitted. The words “whether it be material to the risk or not” are where the case law diverges and in light of the 2005 decision of the SCC in *Marche*, and other authorities mentioned above, there is an argument that this phrase may no longer be valid.
18. In *Dunningham v. St. Paul Fire & Marine Insurance Co.* (1963), 42 DLR (2d) 524 (BCCA) the insured’s policy contained a clause which stipulated that 50% of the value of property on the premises was to be kept in a locked safe. This clause was expressly said to constitute a warranty, and a further endorsement stated that “it is a condition precedent to the liability of the Insurer” that no less than 50% of the property be kept locked. A fire subsequently broke out on the premises and the insurer argued it was not liable for the loss because only 38.99% of stock was kept in the safe. While

the insured argued that the warranty was “unjust and unreasonable” (under a predecessor to s. 32) and therefore not binding upon him the BCCA held that the warranty was not unreasonable in the circumstances: 1) there was no practical difficulty in putting 50% of the value of the stock in a safe and 2) the plaintiff had given the warranty and received the benefit of coverage based on that warranty. Accordingly, the insured was held to have breached the warranty and relief was denied.

19. While not a case involving a warranty, *Rickards v. BCCA Insurance Company*, 1993 CanLII 889 (BCSC), considered the “unjust and unreasonable” contract provision predecessor to our present s. 32. The insured purchased a policy that contained an exclusion for loss caused by freezing if the insured was away for more than four days. While the insured was on holiday, the furnace failed, causing the water pipes to freeze and burst. The insurer denied coverage and the insured argued that the clause was unjust and unreasonable. The court disagreed with the insured because: 1) there was a direct causal connection between the insured’s failure to comply with the exclusion clause and the resulting loss and 2) this was not an unexplained or unexpected loss, but a real risk that the policy anticipated. On this reasoning, Court determined that the exclusion was neither unjust nor unreasonable.
20. Also dealing with an exclusion (not warranty), in the Alberta case of *Charles v. Peace Hills General Insurance Company*, 2007 ABQB 51, a husband and wife were co-insureds under a home insurance policy despite the husband having moved out. As they were in the process of getting a divorce, the family home was destroyed in the fire. The ABQB determined that the fire was a result of arson by the husband, and coverage was denied due to the criminal act exclusion. Although the wife argued that the exclusionary clause would be unjust or unreasonable pursuant to s. 552(1) of the *Alberta Insurance Act*, the Court denied relief because 1) the wife knew or ought to have known the husband remained a co-insured on the policy and 2) the terms of the exclusionary contract were made clear to her when her insurance was renewed.

[40] Mrs. Charles is in the unenviable position of being victimized as the result of her husband’s actions, actions which escalated over a period of time and which were predictable. He threatened her and her property. Her actions were a cautious reaction to the dangers presented by her husband. Unfortunately they were tentative and delayed. The dissent in *Scott v. Wawanesa* has not been followed. An insurer is entitled to assess the risk it faces when a policy of insurance is

issued. To accept Mrs. Charles' position would be tantamount to asking insurance companies to enter into a lottery when a contract of insurance is issued. Each side is entitled to certainty in determining what is the nature of the risk and who is covered by the contract of insurance.

[41] In my view the exclusion clause in this Contract is contained in the Notice of Renewal. It is one which was brought to the attention of Mrs. Charles and it is one which clearly sets out the parameters of coverage. While Mrs. Charles' circumstances are unfortunate and deserving of sympathy, the exclusionary clause in the Contract of Insurance is neither unjust nor unfair. Mrs. Charles is not entitled to relief against forfeiture.

Summary

21. The following legal principles flow from the statute and case law reviewed above:

Warranties

- a. A warranty includes an undertaking by the insured as to the performance of a specified obligation: *Reimer Farm*;
- b. The result of a breach of the warranty is to enable the insurer to avoid the policy and repudiate all liability from the date of the breach: *Reimer Farm*;
- c. As a general rule, a warranty must be strictly and literally complied with: *Anderson*; *Poast*;
- d. An exception to the strict compliance rule arises where it is impossible or manifestly absurd to require compliance: *Norlympia*.

Relief from forfeiture

- e. An insured may claim for relief from forfeiture of its insurance, where its breach amounts to 'imperfect' compliance with its obligation under the policy: *Saskatchewan River Bungalows*;
- f. But where the insured's breach amounts to non-compliance with a condition precedent to indemnity, no relief from forfeiture is available: *Falk Bros.*; *Kozel*; *Lavoie*;

Unjust or unreasonable terms

- g. A warranty should not be considered 'unjust or unreasonable' where there is a causal connection or nexus between the breach of warranty and the loss: *Abell* at para 27;
- h. 'Reasonableness' of a warranty is to be tested by the circumstances at the time the policy issues, and not against the event which in fact later occurs, i.e., was it reasonable and not an injustice for the insurer to stipulate that, if it was going to accept the risk of fire, the insured, for its part, would lessen the chance of loss by complying with the warranty? see *Poast*;
- i. Inconvenience, added difficulty or impracticality of complying with the warranty is not evidence that it is unjust or unreasonable: *Poast*.

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