[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT ;

AND

ASSOCIATED DOMINIONS ASSURANCE SOCIETY PROPRIETARY LIMITED (IN LIQUIDATION) . . . . . RESPONDENT.

H. C. OF A. 1956.

SYDNEY, *Sept.* 11 ; *Oct.* 5.

Taylor J.

Life Assurance—Policy—Premiums—Payment—Conditions of policy—Default in payment—Policy, voidable or void—Election to determine policy—Attitude of parties—Appeal—Jurisdiction of High Court—Life Insurance Act 1945-1953, *Pt. III, Div.* 8, *s.* 67 (3) (4).

A society, on 15th March 1950, issued a policy of insurance on the life of G.'s husband, S., who died on 4th August 1953. The society is in liquidation and G., who is also the executrix of S., brought an appeal from the rejection by the liquidator of her proof of debt in respect of the sum of £2,300 alleged to have become payable under the policy, the ground of rejection being that the policy had become " null and void ". The policy specified a yearly premium of £44 9s. 4d. which was expressly declared to be due and payable " at and for the time or times stated " in an appended schedule which indicated that the date of payment of premium was " 15th March " and that the duration of payments of premium was " until the death of the assured ". Endorsed conditions of the policy provided : 1. that if any premium be not paid on the due date or within thirty days thereafter the policy should be null and void and any premiums paid in respect thereof should be retained by the society unless death occurred within such thirty days in which case the overdue premiums and the unpaid premiums for the whole of the then current year of assurance should be deducted from the amount payable by the society under the policy ; 2. for the revival of the policy within two years of default in payment of the premium on such terms as the directors considered reasonable ; and 3. in the case of policies which had been at least three full years in force, for setting off the surrender value of the policy against overdue premiums. S. paid the specified yearly premium in 1950 and 1951, but in 1952 he failed to make any payment on the due date or within thirty days thereafter whereupon the society noted in its " Lapse Register " that the policy had " lapsed ", but notification thereof was not given to S. Some days after that notation had been made, on 22nd April 1952, S. paid to the society £11 3s. 2d. on account of the outstanding premium and sums of £11 2s. 4d. and £11

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respectively were paid by S. on 12th September 1952 and 4th December 1952, the receipt of each of the several sums was acknowledged by the society as "part payment" of the yearly premium due on 15th March 1952. In a letter accompanying the last-mentioned payment S., who was then residing in South Australia, made an inquiry concerning the possibility of obtaining a loan from the society on his policy. In its reply the society informed S., *inter alia*, that there still remained an amount of £11 2s. 10d. outstanding to complete the yearly premium; that it would be best for him to remit that amount as early as possible to bring the policy back into benefit; and that the society regretted that at that juncture it was unable to accede to his request, but hoped to be of service to him when he returned to New South Wales. Thereafter no further payments were made by S. and nothing more was heard from him. But on 4th September 1953 G.'s solicitors asked the society to inform them of the amount due under the policy; to which the society replied that only two years' premiums had been fully paid and an amount of £33 5s. 6d. paid towards the third year's premium which had become due on 15th March 1952, and that as less than three years' premiums had been paid on the policy it had become void.

Held (1) that upon the evidence the society became entitled to determine the policy; (2) that the evidence indicated that, early in 1953, both the society and S. treated the contract contained in the policy as at an end; and therefore (3) that the appeal should be dismissed.

The question of whether an appeal from the rejection of a proof of debt by a liquidator acting under the *Life Insurance Act* 1945-1953 lies to the High Court, referred to.

APPEAL.

This was an appeal and objection by the executrix of Eric Lionel Smith, deceased, against the determination of the Liquidator that policy of life insurance No. 85699 was on 4th August 1953 null and void, the ground of the appeal and objection being that the said policy contained a valid and enforceable contract of insurance.

The facts are sufficiently stated in the judgment hereunder.

D. A. Staff, for the appellant.

L. W. Street, for the respondent.

Cur. adv. vult.

Oct. 5.

TAYLOR J. delivered the following written judgment:—

The above-named respondent society, on 15th March 1950, issued a policy of insurance on the life of the appellant's husband, Eric Lionel Smith, who died on 4th August 1953. The society is now in liquidation pursuant to an order for winding-up made by *Fullagar* J. (1) in the exercise of the powers conferred upon this Court by Div. 8

(1) (1953) 89 C.L.R. 78.

of Pt. III of the *Life Insurance Act* 1945-1953 and the appellant, who is also the executrix of the deceased, brings this appeal from the rejection by the liquidator of her proof of debt in respect of the amount alleged to have become payable under the policy. The proof was for the sum of £2,300 and it was rejected upon the ground that the policy had become " null and void ".

The policy specified a yearly premium of £44 9s. 4d. and it was expressly declared to be due and payable " at and for the time or times stated " in an appended schedule. Reference to the schedule indicates that the " Date . . . of Payment of Premium " was " 15th March " and that the " Duration of Payments of Premium " was " until the death of the assured ". The risk under the policy commenced on 15th March 1950. The first endorsed condition of the policy, which relates to the payment of premiums, is in the following terms :

" 1. If any premium be not paid on the due date or within thirty days thereafter this policy shall be null and void and any premiums paid in respect thereof shall be retained by the society unless death occur within such thirty days in which case the overdue premium together with the unpaid premiums for the whole of the then current year of assurance shall be deducted from the amount payable by the society under the policy."

The second condition provides for the revival of the policy within two years of default in payment of the premium " on such terms as the directors consider reasonable " whilst the immediately following condition makes provision, in the case of policies which have been at least three full years in force, for setting off the surrender value of the policy against overdue premiums. That condition is as follows : " 3. When this policy shall have been at least three full years in force the non-payment of any subsequent premium shall not cause the policy to be forfeited so long as the available surrender value as fixed by the board from time to time shall after satisfaction of any lien the society may have upon the policy be sufficient to cover any such unpaid premium which shall thereupon be automatically advanced and shall together with compound interest thereon at such rate as the directors may from time to time determine constitute a lien or further lien upon the policy."

The evidence in the case shows that the deceased paid the specified yearly premium in 1950 and 1951. But in 1952 he failed to make any payment on the due date or within thirty days thereafter. Thereupon the society caused to be made in its " Lapse Register " a notation that the policy had " lapsed ". No notification of this action on the part of the society was given to the deceased. Within

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a matter of days after this notation had been made, on 22nd April 1952, the deceased paid to the society the sum of £11 3s. 2d. on account of the outstanding premium and further sums of £11 2s. 4d. and £11 respectively were paid by him on 12th September 1952 and 4th December 1952. The receipts issued in respect of these payments acknowledged the receipt of each of the several sums as "part payment" of the yearly premium which was due on 15th March 1952.

The last of these payments was transmitted to the society by the deceased under cover of a letter by which he made an enquiry concerning the possibility of obtaining a loan from the society on his policy. He added that he did not desire to cancel his policy as it was hoped that it would be beneficial to him if he should return to New South Wales. At that time he was living in South Australia and he remained there until his death. In reply to the deceased's letter the society, on 18th December 1952, wrote as follows:

"Policy *No.* 85699

We acknowledge receipt of your letter dated 29th November, together with cheque for £11 0s. 0d. towards the premium of £44 9s. 4d. which fell due on the 15th March last. There still remains an amount of £11 2s. 10d. outstanding to complete the yearly premium, and it would be best for you to remit this amount as early as possible to bring the policy back into benefit.

Should you wish to alter the policy to quarterly instalments, it will cost you £11 19s. 0d. each quarter.

Your best plan would be to complete the yearly premium of £44 9s. 4d. due on 15/3/52 on the annual basis by the payment of £11 2s. 10d. outstanding, and on the next renewal date of the policy on the 15th March 1953, alter to quarterly premium of £11 19s. 0d.

We regret at this juncture we are unable to accede to your request, but hope to be of service to you when you return to New South Wales."

Thereafter no further payments were made by the deceased and nothing more was heard from him. But on 4th September 1953—one month after his death—a firm of solicitors acting for the appellant wrote to the society and asked to be informed of the amount due under the policy. They added that they understood that a premium of £11 was due and they assumed that this outstanding sum would be taken into consideration. In reply the society advised the appellant's solicitors that only two years premiums had been fully paid and an amount of £33 5s. 6d. paid towards the third year's premium which had become due on 15th March 1952. The letter

then intimated that as less than three years' premiums had been paid on the policy it had become void.

Upon this evidence it was contended on behalf of the appellant that the policy was in full force and effect at the time of the death of the deceased and that the sum of £2,300 then became payable thereunder.

The first point which the appellant's counsel sought to make was that the failure of the deceased, upon the due date or within thirty days thereafter, to pay the yearly premium which was expressed to be payable on 15th March 1952 did not, in spite of the language of the first of the endorsed conditions, operate automatically to avoid the policy. That failure, it was said, merely constituted a default which entitled the society, at its option, to avoid the policy or to keep it on foot. In support of this proposition counsel relied on observations made in *New Zealand Shipping Co. Ltd.* v. *Société des Ateliers et Chantiers de France* (1) and upon the decision in *Newbon* v. *City Mutual Life Assurance Society Ltd.* (2). The relevant condition under consideration in the latter case was conceded by the respondent to be indistinguishable in substance from that now before the Court and, accordingly, it was agreed that the views then expressed must be taken to determine this point in the appellant's favour. As far as I can see there is no ground of substance upon which I can distinguish the two cases on this point and, in spite of cogent arguments to the contrary which may be advanced (cf. *McCormick* v. *National Motor and Accident Insurance Union Ltd.* (3)), a conclusion that the terms of the first endorsed condition did not in the circumstances operate, automatically, to avoid the policy is inevitable.

This being so the society was, upon default, entitled either to keep the policy on foot or to avoid it. On this point it may perhaps be said that if the view of the society was that the policy was automatically avoided—and that does appear to have been the view which it entertained—there is no room for a finding that it exercised an *option* to avoid it. But it is sufficient, in my opinion, if it appears unequivocally from the evidence that the society treated the policy as forfeited and no longer regarded it as being on foot (cf. *Holland* v. *Wiltshire* (4)). If, therefore, nothing more had occurred after the making of the entry in the " Lapse Register " in April 1952 it would be difficult to say that, at any time thereafter, the policy was operative. But, as already appears, a payment on account of the yearly premium was made later that month and a

(1) (1919) A.C. 1.
(2) (1935) 52 C.L.R. 723.
(3) (1934) 40 Com. Cas. 76, at p. 87.
(4) (1954) 90 C.L.R. 409, at pp. 416, 424.

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further payment was made in September. These payments were received by the society and receipts were issued as previously indicated. They were in fact received on account of the yearly premium and no suggestion was made on either occasion that the continued subsistence of the policy, or that its reinstatement, was conditional upon the payment of the full amount of the premium. There can be little doubt that after these payments had been accepted by the society it was no longer in a position to contend that the policy was void and, indeed, it was bound to accept payment of the balance of the yearly premium if, before any further action on its part, that sum had been tendered to it. However, in acknowledging the payment which was made in December 1952 the society informed the deceased that payment of an outstanding balance of £11 2s. 10d. was required "to complete the yearly premium" and that it would be best for him "to remit this amount as early as possible to bring the policy back into benefit". If, as I understand to be the case, the society intended to inform the deceased by this letter that his policy was not then in force it was mistaken. No doubt the two previous payments had, as the evidence establishes, been placed by the society in a suspense account pending receipt of the balance of the yearly premium, but the deceased was told nothing of this. He was merely told that they were accepted as part payment of premiums which had become due on 15th March previously. Such an unqualified acceptance means that there is no escape from the conclusion that at the time of those payments the policy was on foot and that the society, in effect, granted time to the deceased for payment of the outstanding balance.

On this view I think it proper to hold that the policy remained in operation at least until the end of the current year. But on 15th March 1953 another yearly premium became payable and the deceased failed to pay any part of this sum. From then until his death he made no payment on account of that premium nor did he pay the balance of the premium outstanding from the previous year. Nor did the society take any further action. It made no claim on the deceased nor did it, on the other hand, make any further entry in its "Lapse Register" or otherwise, positively evidence an election, on its part, to terminate the policy. No further entry was made in the "Lapse Register" because the entry made in the previous year was still extant and, apparently, it was thought that no further action was necessary.

The question, in these circumstances, is whether the policy continued to subsist up till the time of the deceased's death. For the

appellant it is argued that since the society did nothing to evidence an intention on its part to treat the policy as at an end the correct conclusion is that it remained on foot. Such a conclusion, however, presents itself to my mind as completely artifical. The fact is that the society, whether mistaken or not in its view as to the effect of the first of the endorsed conditions, had, in December 1952, indicated to the deceased that a further payment was required to reinstate the policy. Whether this was a correct view or not it constituted a clear warning to the deceased that his policy was, to say the least, in jeopardy. Yet he did nothing. He omitted to complete the payment of the premium which had fallen due in March 1952 and he paid nothing on account of the subsequent premium after it fell due. Nor did he seek an extension of time or, indeed, communicate with the society in any way. If the surrender value of the policy in March 1953 had been sufficient to satisfy the yearly premium which then fell due the provisions of cl. 3 would have operated to keep the policy on foot but the evidence makes it clear that it was not. But whether the deceased was aware that this was so does not appear. The plain fact is that he made no further enquiry, that he took no steps whatever to make any further payment or to convert his policy to one under which quarterly premiums would be payable. It is an understatement to say that the evidence discloses that the deceased was in default and that he had delayed for more than a reasonable time in paying premium moneys thereunder. The extent of the delay and the attendant circumstance satisfies me that he had entirely lost interest in the policy and that some considerable time before his death he made up his mind to have nothing further to do with it. Probably this occurred at or about the time when the further premium fell due in March 1953. This, I think, is the only reasonable inference on the facts and, having regard to the society's attitude, it leads to the conclusion that for some considerable time prior to the death of the deceased neither party regarded the policy as subsisting. The period of time which elapsed after December 1952, during which nothing was done by the deceased, must, when the nature of the contract is borne in mind, be regarded as quite inordinate in the sense in which that expression was used in *Pearl Mill Co. Ltd.* v. *Ivy Tannery Co. Ltd.* (1). But whether or not the reasoning in that case is applicable to a contract under seal, it is indisputable that the society became entitled to determine the policy and there is sufficient to indicate that, early in 1953, both parties, and not only the society, treated the contract contained in the policy as at an end. That this was the attitude of

(1) (1919) 1 K.B. 78.

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the society must in the circumstances have been manifest to the deceased and, in those circumstances, the appellant's claim must fail.

When this matter came on for hearing I made an enquiry of counsel concerning the jurisdiction of this Court to entertain this appeal. Neither counsel was able to indicate to me any statutory authority for the appeal but counsel for the liquidator indicated that as his client required directions in the matter he was prepared to move on the liquidator's behalf for directions or instructions pursuant to sub-ss. (3) and (4) of s. 67 of the *Life Insurance Act* 1945-1953. In those circumstances I thought it proper to consider the merits of the matter and, accordingly, refrained from further investigating the question whether an appeal from the rejection of a proof of debt by a liquidator acting under that Act lies to this Court. In view of what has been said it is, however, unnecessary that any directions should be given and I merely order that the appeal be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Minter, Simpson & Co.*, agents for *M. L. Reilly*, Whyalla, South Australia.

Solicitors for the respondent, *Hill, Thompson & Sullivan.*

J. B.