

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 61/82

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A. (Ag.)

BETWEEN: THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR OF THE ESTATE OF STANLEY ROBINSON, DECEASED) - PLAINTIFF/ APPELLANT

A N D : LIFE OF JAMAICA LIMITED - DEFENDANT/ RESPONDENT

R. Codlin in association with Miss B. Lee for the appellants.

Dr. L. Barnett in association with Mr. Alan Deans for the respondent.

October 3 & 5; November 26, 27, & 28, 1984; January 4; February 13 & March 29, May 9 1985

WRIGHT, J.A. (AG.)

On the 4th day of April, 1975 Stanley Robinson entered into a contract with the respondent (L.O.J.) for a Whole Life Insurance Policy. The agreed premium was \$225.53 payable quarterly in advance and it was specifically agreed that the policy should be dated the 12th day of March, 1975. This gave the insured the benefit of paying a lower premium which was calculated on the basis of his age being twenty-nine years. Mr. Robinson died on the 18th January, 1978 - two years ten months and three days from the date 12th March, 1975. Up to that time eleven quarterly premiums had fallen due but the premium history of the policy records eighteen payments. That resulted from the fact that seven payments made by cheque were dishonoured. The quarterly payments were due on or before the 12th day of June, September, December and March of each

year. An examination of the premium history reveals that with the exception of the first premium which was paid on 10th April, 1975 only two other effective payments were made as agreed - premiums due 12th June, 1975 and 12th September, 1975. The problem requiring solution finds its genesis in this departure from the agreed time for payment. Upon being notified of the death of the insured the respondent disclaimed liability under the policy contending that the policy had lapsed because of the non-payment of the premium due 12th September, 1977.

The plaintiff, by an Originating Summons dated 30th January, 1980 sought the following reliefs:

1. A declaration that Policy of Insurance No. 35643 was in force at the death of the deceased Stanley Robinson.
2. A declaration that the plaintiff is entitled to be paid the contractual proceeds of that policy.
3. An Order that the said sum should be paid over to the plaintiff.
4. Such further or other relief as to the Honourable Court deems just.

The summons came on for hearing on the 21st of September, 1981, before Alexander, J. (Ag.) (as he then was) who, after dismissing a submission in limine by Mr. Harding for the respondent, spent that day as well as three subsequent days considering the evidence contained in the seven affidavits filed and submissions by the attorneys, and then dismissed the summons with costs to the defendant/respondent.

At the trial, as before this Court, Mr. Codlin for the plaintiff was unsparing in his efforts to secure a decision in favour of his contention that the policy was in force at the death of Stanley Robinson. This he sought to achieve by contending that the commencing date of the policy was 10th April, 1975 and not 12th March, 1975, by invoking the aid of certain provisions in the policy designed to keep it alive, and by seeking to extract from

the conduct of L.O.J. what he maintains is a waiver of certain conditions as a consequence of which, says he, L.O.J. is estopped from relying on those provisions which would otherwise entitle L.O.J. to regard the policy as having lapsed at the time of the death of the insured. Additionally he contended that Dividend Certificates issued subsequent to the death of the insured must be understood to indicate that L.O.J. still regarded the policy as being in force, up to the time of the death of the policy-holder.

It may be convenient at this point to set out certain provisions of the policy which fell to be considered at the trial and as well before us:

General Provisions

The Contract

- (a) This policy is granted in consideration of the application herefor (a copy of which will be furnished on request), and of the statements and agreements therein contained, hereby made part of this policy, which constitutes the entire contract, and also of the payment of the premiums as provided.

.....

Waiver

- (e) No provision of this contract can be changed, waived or modified except by the written agreement signed by the President, General Manager, Secretary or Actuary, and waiver of breach of any provision hereof or course of conduct by the Company shall not constitute a waiver of any subsequent breach or constitute a release by the Company of strict performance of this contract.

WHEN IN FORCE

- (f) This policy shall not be in force until the actual payment of the first premium hereon to an authorised agent of the Company, and its acceptance by him, and, unless otherwise provided, until delivery of the policy, while the Life Insured is in good health and otherwise insurable.

PREMIUMS

- (g) Each annual premium is payable in advance on or before the due date which is the beginning of each policy year. Premiums are payable at the Head Office in Kingston

4.

"but payment may be made, when not overdue, to an authorised agent. If the first or any renewal premium or any part thereof be not paid when due, this policy, except where benefits after default are provided herein, will thereupon, without any notice or act on the part of the Company, cease to be in force and shall not be in force thereafter unless and until reinstated as hereinafter provided.

GRACE

- (h) One month, not less than thirty days, will be allowed for the payment of any premium on this policy other than the first. Notwithstanding default in payment of the premium when due, the policy shall continue in force during the period of grace.

RE-INSTATEMENT

- (j) Unless the policy has been surrendered to the Company for its cash surrender value, this policy may be reinstated at any time within three years of the date of default in the premium payments upon receipt at the Head Office of evidence of good health and other evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness under the policy with interest as to both premiums and indebtedness at such rate as the Company will determine from time to time."

DIVIDENDS AND GUARANTEED VALUES

AUTOMATIC PREMIUM LOANS

Upon default in the payment of any premium and if a surrender value is then available, the Company will automatically grant a loan to pay the amount in default, provided that the granting of such loan will not result in an excess of total indebtedness over the cash value of the policy and of any dividend credits. If an excess would result, the loan granted will be equal to that fraction of the premium as will maintain the policy in force to the end of the first policy month in which the indebtedness exceeds such cash value.

Automatic premium loans shall be subject to such rate of interest as the Company will determine from time to time and to the terms of the second paragraph of the Policy Loans provision.

" ENHANCED PROTECTION PROVISION
(BY APPLICATION OF ANNUAL DIVIDENDS)

ENHANCEMENT RESERVE FUND

An Enhancement Reserve Fund for this policy will be established and will consist of dividend credits apportioned to this policy and the increases (if any) in the net annual premiums paid pursuant to the preceding paragraph and will be used to provide the benefits payable under this Provision.

If the balance in the Enhancement Reserve Fund is sufficient to purchase a participating paid-up addition to the Face Amount equal to the amount of the Enhancement, the said balance shall be so applied and this Provision shall thereupon terminate and annual dividends thereafter shall be applied under dividend option (b)."

The Grounds of Appeal, as amended, which were argued before us are as follows:

- "(1) That the Learned Trial Judge misdirected himself in holding that insurance policy numbered 035643 on the life of Stanley Robinson was not in force when the said Stanley Robinson died on the 15th January, 1978, in that:
- (a) The evidence shows that a payment was made on the 12th June, 1977 for the premium due on that day. That two other payments were made on the 3rd August and on the 11th November, 1977 respectively.
 - (b) The evidence referred to is disclosed in the Affidavit of Ivan Burnett on page 35 of the records, in the Affidavit of Beverley James on page 29 and in the Affidavit of Herbert Hall on page 46.
 - (c) That the learned trial judge in accepting the evidence of James and Hall arrived at the wrong conclusion in holding that the policy was not in force at the time of Mr. Robinson's death, because the payments referred to would have taken the effective date of the policy up to the 12th of April, 1978.

"(2) That the Learned Trial Judge mis-directed himself as to the proper construction of paragraph (f) under the heading "General Provisions" in the said policy in that it is clear from that paragraph that the policy could not have come into force until the actual payment of the first premium which said payment was not made until the 11th April, 1975.

(3) That the Defendant/Respondent by its conduct continued to demand premium even after the time when it alleges the policy had lapsed."

Ground (1) involves a detailed examination of the evidence. Not so Grounds (2) and (3) which may thus be conveniently dealt with first.

AS TO GROUND 2:

In our view it is patent that this ground is based on a misunderstanding of the provision of the policy on which it is based. The provisions is as follows:

"This policy shall not be in force until the actual payment of the first premium hereon to an authorised agent of the Company, and its acceptance by him, and, unless otherwise provided, until delivery of the policy, while the Life Insured is in good health and otherwise insurable."

The requirements of this paragraph constitute a condition precedent all of which must be fulfilled before the policy comes into force. Consequently, there would be no liability on L.O.J. and no coverage for the applicant for insurance until, i.e. before, all the requirements have been met. Because of this, despite the plain language of the paragraph Mr. Codlin, relying on the affidavit of an insurance agent, one Mr. Ivan Burnett who boasts upward of fifteen years experience in the industry, submitted that since the first premium had not been paid until the 10th of April, 1975, L.O.J. had not been at risk before that date, there being no consideration for any liability earlier than that date. Accordingly,

runs the submission, there was no basis on which the policy could be effective from an earlier date, and that, he claims, must be so despite the stipulation in the Policy. Of course, this Ground must be seen as supplementary to Ground I because, if it succeeds, then the life of the Policy would be extended for one month beyond the date of the claimed lapse. In the circumstances it would be immaterial that such a conclusion would involve a total dismantling and re-structuring of all the dealings concerning the Policy.

How the 12th March, 1975 came to be chosen as the commencing date is explained in the affidavit of Mr. Herbert Hall, the Executive Vice -President of L.O.J. with upward of twenty-one years of Life Insurance experience who castigates Mr. Burnett's affidavit thus -

"6. That my investigations reveal that the Affidavit of the said Ivan Burnett contains a number of serious inaccuracies which have led him to conclusions which not only shows a lack of understanding of Life Insurance practice but to conclusions which are totally misleading.

He then proceeds -

7. That the Policy Issue dated of 12th March 1975 is the commencement date of the policy and was in fact the date requested by the late Stanley Robinson for the following reasons:

(a) that Life of Jamaica Limited uses only four dates in any month on which to issue individual policy Contracts, namely the 5th, 12th, 20th, and 28th days;

(b) that the late Stanley Robinson was born on September 18, 1945 and therefore, under normal insurance practices, would have become one year older for the purposes of calculating his premiums on the 18th day of March of every year, that is, six months after his last birthday;

"(c) that in order to obtain the benefit of paying premiums for the duration of the policy at age 29, the late Stanley Robinson deliberately requested that Life of Jamaica date the subject policy on March 12, 1975.

(d) that the intent of the late Stanley Robinson can clearly be determined by a perusal of the application for insurance duly completed and executed by him on the 4th April 1975, wherein in answer to the question "Special Policy Dating (if any)" the date 12th March 1975 is clearly entered and I attach hereto as exhibit "A" a copy of the said Application for Insurance."

The application (Part I) shows clearly under Heading "Special Policy Dating (if any)": 12th March, 1975. The signature of the applicant Stanley Robinson and the Company's Agent appear after a comprehensive declaration as to the foregoing. This date was deliberately chosen by the insured with the concurrence of L.O.J.'s agent and all dealing thereafter were based on that date. If this date were now to be reprobated after it has been approbated, which is impermissible, a fundamental term of the policy would have been destroyed because the result would be that there would be no agreed premium since the premium paid was calculated with reference to age twenty-nine years as at 12th March, 1975. Indeed if Mr. Codlin were to succeed on this point he would, like Sampson, pull the roof down on himself.

It should be borne in mind also that the date 12th March, 1975 did not appear in the application alone. On a page of the Policy issued to the insured marked "Amendment Page" is reflected "Special Policy Dating 12th March, 1975" and this is stated to be in pursuance of the agreement in Part One of the application for the Policy. But, contrary to what Mr. Burnett's affidavit suggests, this situation is not unknown in the insurance industry. In McClelland & Stewart v. Mutual Life Assurance Co. of

Canada (1982) 125 D.L.R. 257 a not dissimilar stipulation fell to be considered. The insured had committed suicide and the liability of the Insurance Company, in keeping with a provision in the Policy depended upon whether the suicide had occurred "within two years of the effective date of the Policy." "Effective date" was not defined in the Policy. The Court had to determine what it meant. As in the instant case, the Policy had been back-dated to enable the insured to pay lower premiums i.e. at age forty-six, rather than at age forty-seven, which would otherwise have been the case. The back-dating was to 23rd January, 1968 which to all appearances would be the commencing date of the Policy. But there was included in the declaration a clause in similar vein to paragraph (f) supra and obviously calculated to have a similar effect. It read:

"I agree (1) that subject to the attached 'Receipt for Cash Payment' and policy issued on the application shall become effective when delivered to and accepted by me if the initial premium has first been paid and no change has taken place in the insurability of my life since the completion of any evidence of insurability in connection with this application;"

The policy was signed and sealed at the Head Office of the Assurance Company on February 27, 1968 and mailed to the insured by the insurance agent on February, 28, 1968. The Insurance Company relying on the clause in the declaration refused to accept liability under the policy, contending that the effective date was the date of delivery by reference to which date the suicide would have occurred within two years of the effective date of the policy. The beneficiary sued and secured judgment on the basis that the effective date was 23rd January, 1968. On appeal this judgment was reversed but on a further appeal to the Supreme Court of Canada it was decided on a majority of three to two that the effective date was 23rd January, 1968. The majority judgment was delivered by Dickson, J. who in determining the prospective in which the question ought to be seen said at p. 259:

"Taken alone and read without consideration of the scheme of the policy the kindred language of the self-destruction clause and the declaration undoubtedly create a formidable argument in support of the case for the assurance company. It is plain, however, these cannot be read in an isolated and disjunctive way. The question before us is not to be determined on a mechanical reading of two phrases set apart, but rather on a reading of the policy and the declaration in its entirety."

He continued:

"The declaration is clearly concerned with the date upon which the policy comes into force, in the sense of when the assurance company is on risk. That date is the date of delivery of the policy, the initial premium having been paid and no change having taken place in the insurability of the life of the applicant. At that time the policy comes into force and the company is at risk. When we turn then to the self destruction clause, we are concerned with a period of time during which the liability of the company is limited in the event of suicide. That period starts to run on the effective date of the policy. The period would normally commence at the delivery of the policy but in this case the company and the assured agreed that the policy would be antedated that it would have re-troactive effect, to the date upon which the assured could be said to be insurance age 46 i.e. January 23rd. That was made the effective date of the policy for all purposes, except arguably; the self-destruction clause. It seems to me incongruous, to say the least, that the policy would be partly in effect on one date and partly in effect on another date, that for some purposes the effective date of the policy would be one date and for other purposes another. Notwithstanding the wording of the declaration I do not think that the language of the policy leads inexorably to the construction for which the assurance company contends.

It is apparent upon reading the policy that it is entirely structured around the date January 23rd. The principal sum is payable on the death of the assured prior to January 23, 1988. The duration of coverage is to a January 23rd date. Policy years date from January 23, 1968. Premium calculations date from January 23rd. The conversion privilege is related to January 23rd. I have difficulty

"concluding it was the intention of the parties that the effective date of the policy for the purposes of the self-destruction clause would be February 28 but for all other purposes the effective date of the policy was January 23rd.

I am of the opinion that upon the true construction of the entire contract for the purpose of calculating any time periods contemplated, including the application of the self-destruction clause, the effective date of the policy was January 23rd, 1968."

It is interesting to observe that the instant policy contains a similar self-destruction clause and while that clause is not in issue here the question, namely, what is the effective date of the policy i.e. the date from which the liability of L.O.J. commences, is the same. It is obvious that the policy is structured around the date 12th March, 1975 which we held to be the date when the policy came into force. This Ground of Appeal accordingly fails.

AS TO GROUND III:

This Ground of Appeal is founded on the fact that after the death of the insured and notification thereof to L.O.J. the latter issued two "notices of payment due" for quarters beginning 12th June, 1978 and 12th September, 1978. Accordingly, runs the contention, this is evidence demonstrating that for some time subsequent to the death of the insured L.O.J. regarded the policy as still being in force and must therefore be estopped from maintaining the contrary. This approach was criticised, and we think rightly so, as a misuse of the principle of estoppel which operates as a shield but never as a sword such as is sought to be done by the appellant. There is in our view a short answer to this proposition. By the terms of the policy upon the death of the insured, the proceeds of the policy are to go to the insured's estate. The death of the insured puts such absolute finality to the life of the policy that the company was as impotent to extend

the life of the policy as it was to extend the life of the insured. Therefore, as Dr. Barnett submitted, it is abundantly clear that these notices (print-outs) were being issued without due regard to the actual state of affairs and were obviously issued in error. They cannot, therefore, avail the appellant as a basis for contending that the company still regarded the policy as being in force. The factual situation is so conclusively determined against the appellant that invoking the aid of authorities amount to an exercise in futility. See, however, Newbon v. City Mutual Life Assurance Society Limited (1935) 52 C.L.R. 723.

Ground I calls for a close scrutiny of the premium history. The evidence in this regard was supplied by the affidavits of Beverley James and Herbert Hall, filed by the respondent, and by an affidavit from Ivan Burnett filed by the appellant. But, as has been previously stated, the latter affidavit is inaccurate in that it omitted certain payments which were made. Observe, also, that the main thrust of this affidavit was to secure a re-structuring of the policy to arrive at the conclusion that the policy took effect from 11th April, 1975 and not 12th March, 1975 an effort which has been blunted.

Beverley James, like Ivan Burnett, does not supply the full history either. She covers the period 16th February, 1976 to September 11, 1977. This fact as well as the need to furnish a reply to Ivan Burnett's affidavit necessitated the filing of the affidavit from Herbert Hall. It will however, be necessary to refer to Beverley James' affidavit because it formed the basis of certain submissions made by Mr. Coldin leading to the amending of his grounds of Appeal and the consequential filing of two affidavits by Hilary Jardine, Vice-President of Insurance Operations at Life of Jamaica Ltd., to deal with the point in issue viz. the adequacy of funds to keep the policy alive beyond a date when the company contends the policy had lapsed.

Herbert Hall's affidavit covers the life of the policy beginning with the first payment made 10th April, 1975 to take effect from 12th March, 1975. It shows, too, that the premiums due 12th June, 1975 and 12th September, 1975 were made on time. The next payment was due on 12th December, 1975 and a payment was actually made but the cheque by which this payment was made was returned dishonoured on 19th January, 1976 and was not made good until 16th February, 1976 - sixty-six days after payment was due. Even making allowance for the Grace Period of thirty days this payment was thirty-six days late. The next premium due 12th March, 1976 was made on 12th March, 1976 by a cheque which was returned by the dishonour route on 1st April, 1976 and made good on 14th April, 1976 - thirty-three days after due date or three days after the expiration of the Grace Period. Premium due 12th June, 1976 was paid on time by a cheque which was returned dishonoured on 28th June, 1976 and made good on 20th July, 1976 - eight days after the Grace Period had expired. The cheque for premium due 12th September, 1976 was paid on time but was returned dishonoured on 6th October, 1976; eighty-one days later on 2nd December, 1976 the default was corrected. This was fifty-one days beyond the Grace Period and at this point Mr. Hall depones:

"Policy No. 035643 lapsed at this point
for late payment of premium due 12th
September, 1976. Life insured notified."

The contents of this notice were not disclosed but may be assumed to have been in accordance with the provision for reinstatement. Having regard to submissions made by Mr. Codlin on waiver and estoppel based on the conduct of the company the step taken at this stage by the company is regarded by Dr. Barnett as being of great significance. But more of this anon.

The incidence of dishonoured cheques became so recurrent in the premium history that it could not escape notice. Although it was this method of payment that had occasioned the lapse with the consequent need for re-instatement the practice continued. The very next premium due 12th December, 1976 was paid on 8th December, 1976 by a cheque which was returned dishonoured on 14th December, 1976 and not until 23rd December, 1976 was the payment sought to be regularised by another cheque which itself was returned for the same reason on 21st January, 1977. It was not until the 3rd March, 1977 that the effort to pay the premium due 12th December, 1976 bore fruit - eighty-one days after the due date and fifty-one days after the expiration of the Grace Period. The next premium due 12th March, 1977 was paid 28th April, 1977 - thirty-seven days past the due date and seven days outside the Grace Period. However, since the policy was still in a lapsed status these two late payments may not be of very much significance. The next statement in Hall's affidavit is as follows/^{on}page 646:

"At this point the late Stanley Robinson applied for Reinstatement of his policy and completed a medical examination. I attach hereto as exhibit "B1" a copy of the said Application for Reinstatement signed by the said Stanley Robinson on the 27th April, 1977, and as exhibit "B2" a copy of the Medical Examiner's Report signed and dated 5th April 1977 and as exhibit "B3" copy Application for Insurance Part Two - Medical signed by the said Stanley Robinson on the 5th day of April 1977. Thus the Policy was reinstated with the next premium due 12th June, 1977."

However, it was not until 3rd August, 1977 that the premium due 12th June, 1977 was paid - 52 days beyond the due date and twenty-two days after the expiration of the Grace Period. More will have to be said about this payment but let the history be first completed. The problem giving rise to this case was born out of the late payment of the next premium due 12th September, 1977.

A cheque for that amount was actually tendered on the due date but by 28th September, 1977 it had returned via the dishonour route and it was not until 9th November, 1977 that a payment in cash by way of substitution, was made. This was fifty-eight days after the due date and twenty-eight days beyond the Grace Period. No other payment was made. Accordingly, the payment due 12th December, 1977 which would take the policy to the next premium date 12th March, 1978 was not paid.

Because the affidavits of Miss James and Herbert Hall are not set out in identical terms it will be necessary to introduce at this point information contained in the former which does not appear in the latter. After recording the lapse of the policy for late payment of the premium due September, 1976, Miss James records against payments made 8th December, 1976 and 23rd December, 1976 - the cheque for which was dishonoured - 3rd March, 1977 and 28th April, 1977 (a credit of forty cents also appears against the date 9th March 1977) "Applied on account - reinstatement." The next disclosure is as follows:

"22/6/77 Policy reinstated. \$676.59 on account paid September and December 1976 and March, 1977. All requirements submitted and reinstatement procedure complied with.

Policy then lapsed again for late payment of June, 1977 premium.

3/8/77	\$255.53	June, 1977	<u>Policy reinstated</u> <u>because Enhanced</u> <u>Reserved Fund was</u> <u>sufficient to support</u> <u>balance of premium</u> <u>required.</u>
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Balance paid by Enhanced Reserved Fund on account.

16.

"12/9/77	\$225.53	Sept. 1977	Cheque returned Sept. 28, 1977, Sept. 1977 outstanding.
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Policy lapsed again for late payment of September 1977 premium

24/10/77	\$ 6.80		Applied on account out of which \$3.40 was due to repay Enhanced Reserved Fund used in June to reinstate. Balance of \$3.40 on account reinstatement.
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9/11/77	\$225.53		On account reinstatement. Therefore total now being held on account for refund - \$228.93.
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The words underlined (supra) together with the payment made 3rd August, 1977 provided Mr. Codlin with material for extensive submissions on the availability of funds to keep the policy alive to a date well beyond 15th January, 1978 the date the insured died. This will have to be dealt with.

What emerges from Miss James' affidavit, which would otherwise remain a matter of speculation, is the fact that the three premiums paid between September 1976 and March 1977 during the period when the policy remained lapsed were not brought into the regular accounting. Hence there was an accumulated amount of \$676.59 "applied on account re-instatement" on June 22, 1967. The computer print-out attached to the affidavit of Hilary Jardine shows this amount under heading "Billing Data" as being "held at credit." It is obvious, therefore, that during the period September 1976 to March, 1977 the policy was in abeyance with the option to have it re-instated at any time within three years of the date of default as provided under paragraph (j) relating to "Reinstatement" A matter that will call for attention is the fact that the receipts issued for premiums paid during this lapse period reflect no difference from the regular premium receipts. This will be dealt with when

dōaling with the submission on "Waiver and Estoppel."

The cash payment made on 9th November, 1977 to satisfy the premium due 12th September, 1977 was not made by Stanley Robinson but by his wife Janice Robinson. The circumstances in which she claims the payment was made are set out in paragraphs 2 - 6 of her affidavit which, because of the emphasis placed upon it by Mr. Codlin, are set out in full below:

- "2. That the late Stanley Robinson was my husband; he died on the 15th January, 1978. That prior to his death my late husband had an Insurance Policy with Life of Jamaica with quarterly premium of \$225.53 payable thereon. That is to my knowledge that a quarter's premium fell due on the 12th September, 1977. That it is also to my knowledge that a cheque for that sum was paid to Life of Jamaica but that cheque was returned dishonoured by Jamaica Citizens Bank on which it was drawn.
- 3. That immediately I became aware that the cheque was returned I got cash and took same to Life of Jamaica on the 9th November, 1977 where I paid in same to the cashier and took the cheque which was returned dishonoured by the bank.
- 4. That having paid the sum in cash I was given a receipt by the cashier No. 135032 dated 9th November, 1977.
- 5. That I am aware that my late husband had one month from the 12th September, 1977 during which time he could pay the premium without the policy going out of force. That when I paid the amount of \$225.53 on the 9th November, 1977 I enquired if the policy would be reinstated and was told that in view of the fact that such a short time has passed and also that actual payment by a cheque was made in time there was no need to complete an application for reinstatement, the same cheque being dishonoured but cash that I paid was in substitution for the cheque and therefore my husband did not have to make an application to reinstate the policy, but payment of the premium in substitution for the cheque would enable the company to make the reinstatement without my late husband being required to do anything.

"6. That having been satisfied that the policy was in force or to be reinstated without my late husband being required to do anything I left with the receipt telling the person whom I spoke to that if there was any form to be completed I would take it to my late husband for him to do so. I was assured that there was none."

By way of comment it is of interest to note that only nine of the receipts issued in respect of the policy have been exhibited and from these it is obvious that the address of the insured was not always written on the receipts although space was provided. Only three of the nine receipts contain the address of Stanley Robinson. Receipt No. 135052 dated 9th November, 1977 is one of these three. Mrs. Robinson's account (supra) was very seriously challenged by Keith McFarlane, the Insurance Salesman who sold and attended to Mr. Robinson's policy. He strongly denied Mrs. Robinson's account. His affidavit discloses that on 6th November, 1977 he received in cash from Mrs. Robinson the sum of \$225.53 to be paid on the account of Mr. Robinson's policy; that he took this sum to L.O.J. on 9th November, 1977 and paid it to the cashier, Angela Foote, who gave him a receipt with Stanley Robinson's name but not his address; that he thereupon wrote in the address, placed the receipt in a "window envelope" and posted it to Stanley Robinson. The cashier corroborates Mr. McFarlane on the question of receiving the money from him, not from Mrs. Robinson, and as to the absence of Mr. Robinson's address from the receipt when she handed it to Mr. McFarlane. She denies receiving money from Mrs. Robinson on 9th November, 1977 or any other time to reinstate the policy. Also she denies having had any conversation or discussion with Mrs. Robinson "about any matter concerning or in connection with the reinstatement of the late Mr. Stanley Robinson's policy No. 035643."

It cannot escape notice that Mrs. Robinson failed to name the person who gave her the information at paragraph 5 (supra) nor that there was no response to either Mr. McFarlane's or Miss Foote's affidavits. Elliptically, Miss Foote seems to be the un-named person who advised Mrs. Robinson and submissions before us on this point proceeded on that assumption. The receipt in question bears two distinct writings. The learned trial judge far from ignoring this fact regarded it as supportive of Mr. McFarlane's testimony. There was no positive finding on this aspect of Mrs. Robinson's evidence but the balance of probabilities were obviously against accepting it. Dealing with the evidence as related in the three affidavits he said:

"If I believe this (referring particularly to McFarlane's affidavit), then clearly Mrs. Robinson was not deponing to the truth in her affidavit and therefore could not have been told by anyone at the company that the policy would have been reinstated by the payment of 9th November, 1977."

In holding that the policy had lapsed for the late payment of the premium due 12th September, 1977 the learned judge said:

"I am satisfied that even if Mrs. Robinson spoke the truth in relation to the payment by her in November 1977 and the statements made to her by a representative of the company that representative could not bind the company in relation to the status of the policy vis-a-vis the company and the policy holder."

Before us Mr. Codlin's submissions ignore the effect of the evidence of Keith McFarlane and Angela Foote and proceeded on the basis that Mrs. Robinson's account is the acceptable one. Further he submitted that the receipt by Miss Foote is a receipt by the Secretary of the company whose printed signature appears thereon. He then extended this submission to say, despite the very clear language of paragraph (e) (supra) on Waiver, that a representation by a cashier is a representation by the company inasmuch as she was speaking for the Secretary; that the cashier

was the arm of the company with which the public came into contact. But even assuming Mrs. Robinson's account to be true nowhere can Mr. Codlin point to any "agreement in writing" and signed as provided under the "Waiver" clause. The receipt bearing date 9th November, 1977 certainly is not such an agreement. It is no more than it says - "Your official Receipt" (printed thereon) for the amount recorded as having been received by the cashier for the purpose stated thereon - "premium". It is clear that the printed signature of the Secretary on the receipts does not authorize or empower the cashier to make policy statements in the name of the Secretary and with the effect of binding the company. But what is more, by the very provision in the policy regarding Waiver, oral representations are excluded. We see no reason for holding that the trial judge misdirected himself in this regard.

What, for a brief moment did seem attractive was Mr. Codlin's submission that the premium paid on 3rd August, 1977 had not been taken into account in determining the policy status at the point where the company claimed the policy had lapsed. Therefore, said he, there was really no lapse because the company had in hand money paid in which would keep the policy alive, with the benefit of the grace period, up to 12th January, 1978. The short answer to this submission is to ascertain by reference to the premium history whether there was any payment in excess of the premiums due. As has been stated eleven quarterly payments were due from 12th March, 1975 to 12th September, 1977 - a total of \$2,480.53. Omitting the occasions when cheques tendered were dishonoured payments were made as follows: 10.4.75, 12.6.75, 12.9.75, 16.2.76, 14.4.76, 20.7.76, 2.12.76, 3.3.77, 28.4.77, 3.8.77, 9.11.77 - eleven payments. The excess fund, therefore, was not even as real as a mirage.

But that was not the only source from which Mr. Codlin sought excess funds. The remark in Miss James' premium history

against the payment made 3rd August, 1977 is one such source.

The remark reads:

"Policy reinstated because Enhanced Reserve Fund was sufficient to support balance of premium required. Balance paid by Enhanced Reserve Fund on account."

Rather than ascertaining the amount of funds in the Enhanced Reserve Fund Mr. Codlin preferred to regard the statement as indicative of some sort of 'Eldorado' out of which the premium due was paid thus rendering the premium paid on 3rd August, 1977 as surplus cash. But such an assumption is much like a shot in the dark from which much harm may result. The extract from Miss James' affidavit (supra) shows that on 24th October, 1977 the amount of \$6.80 was:

"Applied on account out of which \$3.40 was due to repay Enhanced Reserve Fund used in June to reinstate. Balance of \$3.40 on account reinstatement."

The receipt (No. 114672) for premium paid 3rd August, 1977 shows the amount received to be \$222.13 - \$3.40 short. No reason has been given for the payment or acceptance of an amount less than the quarterly premium. The policy status attached to the affidavit of Hilary Jardine discloses that at August 3, 1977 there was in the Enhanced Reserve Fund an amount of \$50.51 which was debited for the amount of \$3.40 to bring the payment up to the required amount for the premium due 12th June, 1977. The source of the \$6.80 has not been disclosed but was most likely dividend-related. The balance remaining in the Enhanced Reserve Fund was then \$47.11. It appears to us that the enigma posed by Miss James' remark is resolved but not with the result that the appellant had hoped for.

But Mr. Codlin would not be deterred. Grasping at what appeared to be the invitingly out-stretched hand of Miss James he barged into the Enhanced Reserve Fund as well as the Automatic Premium Loans and spent some time rummaging around. He came up with two submissions. One submission drew support from the fact

that, subsequent to the death of Stanley Robinson, there was received by his widow a Dividend Notice indicating that at 12th March, 1978 there was in the Enhanced Reserve Fund the amount of \$157.30. It is appropriate to note, as Dr. Barnett explained, that this was not a statement of fact but a projection against the Anniversary Date of the policy. Indeed, on the 12th March, 1978 the policy was no longer extant and so could not qualify for any dividend. But Mr. Codlin sought a way around this hurdle. His submission was that since at 12th March, 1978 the Enhanced Reserve Fund would have had \$157.30, then, at the date when the company claims the policy had lapsed, that amount must have been in the fund out of which amount the company ought to have paid one month's premium. Since, as he contends, there was no lapse, the one month's premium would keep the policy alive up to 12th January, 1978 - three days before the death of the insured and, continues the submission, because the premium history shows that the company had never treated the policy as having lapsed for three days default it would be estopped from treating the policy as having lapsed on this occasion. To deal with this submission it is important to state that the policy is a participating policy i.e. the policy under "Dividends" states in part:

"This policy is a participating policy and while in force shall be entitled to share in the divisible surplus of of the Company. Such dividends as the Company may determine will be credited at the end of each policy year other than the first."

It is clear from this provision that the amount of dividend that will accrue to a policy cannot be known before the declaration and crediting of a dividend. Until such time no claim can be made to any undeclared dividend. The submission ignores this fact. Mr. Jardine's affidavit demonstrates that the only known amount in the Enhanced Reserve Fund, which is built up from dividend credits, was \$47.11 and that the premium for one month was

\$76.20.

The second submission would take care of this situation. According to Mr. Codlin the company, in accordance with the provisions for Automatic Premium Loans and subject to the limits set, was required to make an automatic loan sufficient to keep the policy going. This he extended to include even the company making a loan from its own funds. But in all fairness to Mr. Codlin he didn't seem too serious when he made this latter submission. It must be noted that the circumstances that will invoke a recourse to an Automatic Loan are clearly stated. Two conditions must co-exist. There must be:

(a) A default in payment of a premium and

(b) There must be available a surrender value.

Condition (a) is undoubtedly fulfilled but what of condition (b)? How is a surrender value ascertained? Provision therefor is to be found under "Guaranteed Values" with reference to a table attached. Any intended reliance on an Automatic Loan is brought to an abrupt termination by just a look at the table. It shows that this policy would not have had a surrender value until the end of the fifth year. It has already been shown that the policy was not yet three years old. The submission fails.

It was further contended on behalf of the appellant that, without giving notice to the insured, it was not competent for L.O.J. to treat the policy as having lapsed. Support for this proposition was sought from Newbon v. City Mutual Life Assurance Society Ltd (1935) 52 C.L.R. 723; Fordyce v. American Life Insurance Co. Ltd 15/2/74 (an unreported case from Guyana per George, J.), and citation from Life Insurance Law in the Commonwealth Caribbean by Dr. C.H. Denbow. Dr. Barnett's response, in brief, was that the authorities cited do not support the proposition and further that the requirement for notice is inapplicable where the policy has its own provisions on the matter. It will be necessary to examine these opposing contentions.

Of the two situations postulated by Dr. Denbow (p. 76) in which he maintains that lapse will result, only one is relevant to our consideration. It is in fact the first of the two situations and is said to be:

"Where the policy has not yet acquired a surrender value and the premiums are in arrears at the expiration of the grace period."

After stating the second situation he adds:

"In the former situation it is incumbent on the insurance company wishing to forfeit the policy to take steps to communicate in an unequivocal manner to its assured that the policy has in fact lapsed; a letter to the policyholder clearly stating that the policy is no longer in force and a reinstatement is required and an entry in a lapse register would apparently suffice in this regard."

Newbon's case (supra) is cited as authority for these requirements. Newbon was insured under a policy which contained a provision that if the premiums or any of them were not paid on the due dates or within one calendar month thereafter, then the policy should be void. A premium fell due but was not paid. The company wrote to the insured informing him that the premium was overdue and that if he wished to retain the benefit of the policy he should apply for a reinstatement; an application form was enclosed. Subsequently the premium was paid but the application for reinstatement was not signed. Upon a subsequent default in paying a premium which had fallen due the company again wrote the insured acknowledging receipt of the previous payment and alerting him to the fact that he had not applied for reinstatement, which, if he did would be placed before the directors. Newbon took no steps in response and paid no further premiums. However the Society sent him every year until his death 2½ years later, reversionary bonus certificates. In an action brought by the assured's administrator to recover the sum assured and bonus additions, the society denied liability contending that the policy was not in force at the death

of the assured and that the bonus additions were not payable, because the assured had not complied with the conditions of the policy. By its reply the plaintiff joined issue upon certain paragraphs of the defence, insisting, in substance that the defendant company was estopped from saying that the policy had lapsed, because the defendant company had retained without explanation the premium paid after it had notified the assured (supra) and because the company had continuously represented to the assured that the policy was still in existence by issuing to him the annual bonus certificates. Thus the company had induced the assured to rely upon the policy as being still in existence.

It was held:

- (1) That when a premium remained unpaid for more than a month from its due date, the policy became, not void, but voidable at the election of the Society, but that the Society had elected to treat the policy as avoided, and that such election was final when communicated to the assured.
- (2) That it ought not to be inferred that the deceased had abstained from insuring his life elsewhere because he believed the policy was still in force, and no estoppel arose from the issue of bonus certificates by the Society after the assured's failure to pay premiums as they fell due.

Only the first of these two points concerns us at the moment. Does the decision on this point support the requirement of notice as postulated by Mr. Codlin and Dr. Denbow? What was in issue was the effect of the language used in that policy and, obviously, where there is a variation of such language difficulty will be encountered in applying this decision thereto. In the instant case the difference in the relevant provision is undisguised. The provision here is as follows:

"If the first or any renewal premium or any part thereof be not paid when due this policy, except where benefits after default are provided herein, will thereupon, without any notice or act on the part of the company, cease to be in force and shall not be in force thereafter unless and until reinstated as hereinafter provided." (emphasis supplied)

It would appear to us that Newbon's case is no authority for the proposition under consideration, and, a fortiori, neither is Dr. Denbow's principle which seems to be of unrestricted application.

What then of the Fordyce case? In that case the question to be resolved was whether a policy of insurance had lapsed for non-payment of premiums which were payable annually in advance in circumstances where the policy provided that:

"All premiums are payable annually, semi-annually, or quarterly in advance upon delivery of a receipt signed by an officer of the company Except as provided herein the payment of premiums shall not maintain the contract in force beyond the expiry of a grace period of thirty-one days following the date when the next premium is payable. If death occurs within the grace period any premium then due and unpaid will be deducted in settlement of the policy."

Placing reliance on Newbon's case George J. held inter alia:

"It appears to be well settled that even if it is expressly provided in the contract of insurance to the contrary, the non-payment of a premium in a life insurance policy does not make the policy void but voidable."

We have already adverted to the clear language of the instant policy which requires neither notice nor any act on the part of the company nor, indeed, interpretation by the Court. Despite Mr. Codlin's commendable efforts in obtaining copies of the judgment from Guyana we are forced to conclude that the decision does not avail his cause.

The final aspect of the appellant's case was considered under the head "Waiver and Estoppel." Here, the conduct of the company is under scrutiny. Contending that despite the provision under the Waiver Clause in the policy, and relying on Newbon and Fordyce, Mr. Codlin submitted, in general terms that by failing to give notice of its intention to treat the policy as having lapsed the company had induced in the insured the belief

that it would not so treat the policy and, that, accordingly, the company was estopped from asserting the contrary. But this was not the only plinth on which support for waiver and estoppel was sought. Other matters prayed in aid were:

- (a) Premium receipt for money paid by Mrs. Robinson being in the usual form;
- (b) Retention of this premium without any notice as to the status of the policy;
- (c) Reinstatement of the policy on previous occasions without compliance with the formalities;
- (d) The conduct of the company in not insisting on prompt payment of premiums;
- (e) Dividend notice issued after the death of the insured;
- (f) Notices of payments due issued after the death of the insured.

Newbon and Fordyce have already been dealt with and shown to be inapplicable. Again, in fairness to Mr. Codlin, he did say that in the light of the decision in Newbon he was not placing much reliance on the Dividend Notice standing by itself but included it as tending to reflect the conduct of the company in treating the policy as being extant. Of similar mould are the notices of payment due issued after the death of Mr. Robinson. We make the comment that due to the death of the policy holder the company was powerless to either revive or resurrect the policy. Also dealt with earlier is the fact that the receipt issued to Mrs. Robinson at a time when the company contends the policy had lapsed showed no difference from the regular receipts issued for premiums. But what is even more it shows no difference from receipts issued for premiums paid during the period when the insured knew the policy had lapsed and would not be reinstated without his compliance with the known requirements.

Dr. Barnett submitted that in general principles waiver of a term of a contract requires a specific intention to dispense with that term and maintained that on the evidence L.O.J. evinced no such intention. He conceded that if the company took such action as represented to the insured that it was waiving its right to treat the policy as having lapsed and if the insured relied on such conduct to his detriment so that it would be inequitable for the insurer to insist upon strict performance it would be correct to say that the insurer had waived the lapsing provision or alternatively was estopped from relying on it. Whereas waiver resulted from intentional action Estoppel operated contrary to the intention of the party whose conduct was being relied on. Further, the party who pleaded or relied on Estoppel must have relied on the conduct of the other party to his detriment. Moreover because estoppel is a principle of Equity the conduct of both parties must be examined.

In this regard it is a matter of significance that the contractual relationship was between Stanley Robinson and Life of Jamaica but no conduct of Stanley Robinson himself is being advanced as both flowing from the conduct of L.O.J. and being to the detriment of Stanley Robinson. What is being advanced is the conduct of Janice Robinson which is said to flow from the conduct of the company via the cashier and through its Secretary. But as Dr. Barnett pointed out, even accepting, for the moment, what Mrs. Robinson said she was told, the disclosure saddles her with the knowledge that the policy had lapsed. Not that the company would not so regard it but rather that the company would not insist upon the formalities for reinstatement. She must be seen as the agent of Stanley Robinson. Dr. Barnett questioned how is it she said nothing about the premium which fell due on 12th December, 1977 and which remained unpaid up to the death of her husband. And why did she not exhibit the notice issued in respect of that premium? There is no evidence that once the policy had lapsed the company

would cease issuing such notices.

It is important to bear in mind that we are not here concerned with assigning a meaning to the terms "void" or "voidable" but with a clear and unequivocal provision as to which decisions on the meaning of those terms is irrelevant. On behalf of the respondent reference was made to a citation per Bowen, L.J. in Birmingham & District Co. v. L & N.W. Railway Co. (6) (1888) 40 Ch. D. at p. 286:

"If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe such rights will either not be enforced or will be kept in suspense for some particular time, those persons will not be allowed by a court of equity to enforce their right until such time has lapsed, without at all events placing the parties in the same position as they were before."

See also Bruner v. Moore (1904) 1 Ch. 305 at p. 313 (per Farwell J.)

The contractual relationship imposed upon the insured the obligation to pay the quarterly premiums as and when due and gave to the company the right to insist upon payment accordingly. It is obvious from the premium history that the company did not harass the insured with lapse notices for every default in payment. Is this to be regarded as a waiver of the company's rights to insist on prompt payment? But the significance of the notice issued to the insured requiring compliance with reinstatement formalities which were not complied with until June, 1977 cannot be ignored. Life of Jamaica was insisting upon the contractual rights of the company and even though the company had previously shown some forbearance the insured did not raise any question of waiver. He proceeded to comply knowing full well that in the interim he had no policy in force. The primary obligation of the insured is to pay the premiums and to do so on time. It is by so doing that he secures to himself the benefits provided under the contract. If, for instance, only two of the four premiums due per year were paid in time to qualify for dividends the insured would lose.

Accordingly, it was not only an obligation to pay; it was in his interest to pay. Is it not therefore more than a little strange to contend that the company by its conduct had induced the insured to believe that it would not insist on his paying as he was obliged to do? Further, there was no evidence that the assured acted or forbore to act and by so doing changed his position to his detriment. Nor was there evidence that any such action or forbearance was due to the conduct of the company, and of such a nature as can now estop the company from insisting on its contractual rights because it would be inequitable so to do? Mr. Codlin's submission under Waiver and Estoppel may well be termed attractive but cannot at the same time be labelled well-founded.

The following cases cited in argument rest on principles which are well established. Acey v. Fernie (1840) 7 M & W 151; E.R. 717 (payment of premium after due date), J.C. Houghton & Co. v. Nothard, Lowe & Wills Ltd. (1927) All E.R. 97 (1928) A.C. 1 (category of persons whose knowledge or admissions can bind or estop a company); Smith v. Associated Dominions Assurance Society Pty. Ltd. (1956) 95 C.L.R. 381 (question of void or voidable considered). The recent decision in Peyman v. Lanjani and others (1984) 3 All E.R. 703 dealt with the question of Waiver and Estoppel and in this regard the decision was to the effect that in order that a person may be said to have waived a legal right he must be shown to have known not only the facts giving rise to the right but the right as well and then in those circumstances to have acted or made a statement unequivocally. The finding was against either waiver or estoppel. The decision is recent but not apposite to the question before us.

Finally we refer to the reinstatement of the policy on 3rd August, 1977 without the insured's compliance with the formalities for reinstatement. Did this set a precedent which could induce the insured to believe that the company had waived the prescribed requirements? We think not, for the reason that the

circumstances then obtaining were never duplicated. Barely two months had elapsed since Mr. Robinson had gone through the process of having a medical test and meeting the requirements for reinstatement and in addition there were sufficient funds to meet the premium then due. Such was not the case on 12th September, 1977. Relieving Mr. Robinson of the need to repeat a process he had only very recently undergone could not in the circumstances be regarded as a waiver of the company's right to treat the policy as having lapsed on the 12th September, 1977. At best the payment made by Mrs. Robinson on November 9, 1977 would on her version have extended the life of the Policy to December 12, 1977. There was insufficient money in the Enhanced Reserve Fund to cover even one month's premium, which under the policy was not permissible. The period of grace expired on January 12, 1978. Mr. Robinson died on the 15th outside the grace period and as the company has elected within the policy to treat the policy as having lapsed, the appeal must fail.

We must confess our sympathy that the strenuous effort made by Mr. Robinson to provide for his family in the event of his death, proved fruitless. We express our appreciation for the keenness demonstrated by counsel on both sides in seeking a solution to the issues before us the more so because there are no local cases in point.

The appeal is dismissed with costs to the respondent to be taxed or agreed.