

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S.; Pace and Matthews, JJ.A.

BETWEEN:

METROPOLITAN LIFE INSURANCE)	David R. Chipman, Q.C.,
COMPANY)	and Elizabeth M. Haldane
)	for appellant
Appellant)	
)	
- and -)	
)	
DONALD PAUL BOUDREAU and)	S. Clifford Hood
HEATHER FAITH BOUDREAU)	for respondents
)	
Respondents)	
)	Appeal heard:
)	June 17, 1986
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)	Judgment delivered:
)	June 26, 1986
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THE COURT: Appeal dismissed with costs as per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S., and Pace, J.A., concurring

MATTHEWS, J.A.:

The sole issue before us is whether the trial judge was correct in finding that a policy of life insurance was reinstated.

The pertinent facts were set out by the trial judge, Mr. Justice Kelly, in his decision dated November 29, 1985:

"There was substantially no disagreement on the facts of the matter and counsel for the three parties agreed upon a statement of facts and as well there were a number of agreed exhibits and certain witnesses gave further viva voce evidence.

"In 1981 Boudreau purchased two policies of life insurance from the insurance company. One of these policies continued in force and was not disputed by the company and the proceeds of this accidental death policy was paid to the widow as beneficiary.

"Boudreau apparently decided that the cost of the premiums on the other policy was more than he could pay and, after some vacillation, determined to enter into a decreasing term life policy which had much lower premiums. As the insurance company had already received a number of premium payments on the more costly policy, they deducted from these funds the first six month premium of \$125.00 on the new policy, which was payable on January 16, 1982. In May of 1982 the insurance company forwarded to Boudreau a cheque for the balance of his overpaid premium in the amount of \$336.62. The next premium payment date on the new policy, which is the policy now in dispute, was to be made on the 16th of July, 1982. Boudreau failed to make the premium payment on this date and never cashed the cheque from the insurance company for the refunded premium in the amount of \$336.62. The terms of the policy provided, among other things, that it would lapse 31 days from the date the premium was due, July 16, 1982, unless it was reinstated.

"In the meantime, Boudreau had separated from his wife early in 1982 and commenced a common-law relationship with Heather Faith Boudreau, who was also, along with Boudreau's brother, the representative of his estate in this matter.

"One of the senior officials of the company gave evidence in this matter and among other things indicated that the company had a procedure whereby a document would be sent to parties who had not paid their premium approximately 48 days after the premium was due indicating the manner in which the policy could be reinstated...."

That official testified that the notice simply said "This is to remind you the premium shown below has not been paid". He also said that the notice did not stipulate that the company might not consider the policy valid upon receipt of the payment, nor did the notice indicate to Mr. Boudreau that his policy had lapsed or that it would be necessary for him to apply for reinstatement. He agreed that the notice solicited the premium of \$125.00 and "it would have meant to him [Boudreau] that upon payment of it he was still in good standing".

The trial judge continued:

"Apparently such communication was sent to Boudreau and a payment was forwarded to the company in the amount of \$125.00 for the overdue premium and the insurance company provided to Boudreau a 'a provisional receipt' dated the 21st day of October, 1982. The document which the insurance company referred to as a 'provisional receipt' advised Boudreau to 'apply for reinstatement' of the policy and requested that he complete an enclosed reinstatement application and return it to them. The document asked Boudreau to pay particular attention to the 'description of any

sickness or injury which might have occurred since the end of the grace period'. The document also listed certain conditions as follows:

'Pending the submission of the application for reinstatement and action thereon by the Company, the sum tendered is held, subject to the order of the payer, without obligation or waiver of any rights on the part of the Company, and with the understanding that:

(a) If the application for reinstatement is submitted and is approved, the said sum will be applied to the payment of any amount required to effect the reinstatement, and an official receipt will be issued in place of this provisional receipt which shall thereupon become null and void. If your Premium Receipt Book was submitted, it will be held temporarily, pending action for reinstatement.

(b) If the application for reinstatement is not submitted promptly or if the Company declines to reinstate the said policy, the said sum will be returned and this provisional receipt shall thereupon become null and void.

(c) Any cheque or draft received may be handled for collection in accordance with the practice of the collecting bank or banks, and this receipt shall be void if the full amount of such cheque or draft is not received by the Company.'

The evidence indicates that Boudreau completed and signed this application form, the information thereon generally indicating that he had no health problems and that there was no change of the risk. There appears to be no question that at the time of his accidental death on November 15, 1982, Boudreau was in good health....This signed application was witnessed by his common-law wife, Heather Boudreau, and was dated the 30th day of October, 1982. Apparently this document was placed in the envelope provided by the company but never mailed to the company prior to Boudreau's death. The day following his death, his solicitor, Andrew Nickerson, presented the document to the branch office of the insurance company in Yarmouth.

"The company official who gave evidence, Mr. Roy, indicated that the application form was not provided in all instances where reinstatement was desired by a policy holder. If the face amount of the policy was less than \$50,000.00, the policy would be automatically reinstated upon payment of the outstanding premium and the form would not be required to be completed. As this was a policy with a face amount in excess of \$50,000.00, the insurance company, as a matter of policy, required the completion of this document primarily to determine if there had been any changes in the risk, particularly health changes...."

It is significant that the Company also produced in evidence an internal memo which indicated that if the Company had received the application form prior to the death of Boudreau, the policy would have been reinstated.

The obligation of an insurance company to reinstate is provided in s. 148(2) of the Insurance Act, R.S.N.S. 1967, c. 148 (the Act):

"Where a contract lapses and the insured within two years applies for reinstatement of the contract, if within that time he

(a) pays the overdue premiums and other indebtedness under the contract to the insurer, together with interest at the rate specified in the contract, but not exceeding six per centum per annum, compounded annually; and

(b) produces

(i) evidence satisfactory to the insurer of the good health; and

(ii) other evidence satisfactory to the insurer of the insurability,

of the person whose life was insured, the insurer shall reinstate the contract."

The terms of the policy concerning premium payment and reinstatement are similar:

"Premium Payment -- The benefits provided by your policy depend on the payment of premiums when due. Premiums are payable while the insured is alive, on or before their due dates as shown in the premium schedule on page 3. Premiums may be paid at our Head Office in Canada or any other office we designate or to your sales representative. A receipt signed by our President or Secretary and countersigned by the sales representative will be given for a premium paid to the sales representative.

"You may change the frequency of payment with our approval.

"Reinstatement -- If you have stopped paying premiums, you may reinstate the policy while the insured is alive if you:

1. Request reinstatement within 5 years of the due date of the first unpaid premium;
 2. Provide evidence of insurability satisfactory to us;
- and
3. Pay all overdue premiums to the date of reinstatement with compound interest at a rate set by us not exceeding the maximum, if any, specified in the statutes of the Province in which this policy is issued or delivered."

In respect to reinstatement, the trial judge said:

"If Boudreau complied with the terms of the policy and the Act in effecting reinstatement, the terms could not properly be changed by words on a 'provisional receipt' forwarded to him after he had substantially complied with the terms of the policy, a contract of adhesion.

"Boudreau impliedly requested reinstatement by forwarding his premium, apparently upon the request of the company. The only aspect of the

requirements in the policy and in the Insurance Act not complied with by Boudreau was that he was to provide evidence of insurability satisfactory to the insurance company. It appears clear that by forwarding the reinstatement application the insurance company was requesting from Boudreau some information on matters affecting his insurability such as his occupation and health. Although Boudreau completed and signed this form before a witness prior to his death, it clearly was not delivered to the insurance company until after his death. It is just as clear from all of the evidence, and indeed, particularly the evidence of the witness for the defendant, that Boudreau was insurable prior to his death and the company would have reinstated him if they had received the form in question properly completed. In a consideration of reinstatement, the fact of late delivery, or the delivery of the document after Boudreau's death, should not affect the position of the plaintiffs in this matter."

The appellant argued that in Zurich Life Insurance Company v. Davies, [1981] 2 S.C.R. 670, cited by the trial judge, Chief Justice Laskin was simply interpreting the provisions of the agreement before him and, as such, it has no application here. He also contended that the maxim contra proferentem had no application as we are not only dealing with the insurance contract but the provisions of the Act. With those arguments I agree.

This case has its own unique facts. It is clear that nothing was said to Mr. Boudreau in any of the correspondence that lapse of one premium would necessitate that Boudreau apply for reinstatement. Boudreau was only so informed after he forwarded the premium. The notice

was silent on this important point. The Company's policy to send notice of reinstatement with the required conditions if the face value of the policy was over \$50,000.00, with no such requirement where the value was under \$50,000.00 was never communicated to Mr. Boudreau, nor apparently to any other insured. The appellant argued that this was irrelevant. Although appellant's counsel urged that the cases cited by the trial judge were not applicable to the facts of this case, he was unable to cite any helpful case law.

The appellant also argued that "the sum of \$125.00 was simply a sum tendered to pay a premium if there was to be reinstatement". That is, however, not in accord with the reminder notice which simply said, "This is to remind you the premium shown below has not been paid".

By letter dated May 3, 1982, the appellant Company informed Boudreau "Your Policy is now paid to July 16, 1982, and the premium due at that time will be \$125.". The policy also provided for a grace period of 31 days and, as mentioned, a provision for reinstatement. Boudreau did not pay the premium within the period of grace.

There was nothing in the premium reminder notice to indicate to an insured that he would not continue to be insured upon payment of the overdue premium. The evidence

is clear that, in circumstances such as here, when the premium is paid after receipt of the reminder notice the appellant only requires the completion of the application for reinstatement where the amount of the insurance exceeds \$50,000.00, and further that the appellant routinely and administratively reinstates the policy upon receipt of that application provided there are no medical impairments noted.

Section 148(2) of the Act sets out three conditions to bring about reinstatement:

1. The overdue payment is to be paid together with interest;
2. The insured is to produce evidence satisfactory to the insurer of good health;
3. Other evidence satisfactory to the insurer of the insurability of the insured.

Upon these conditions having been met "The insurer shall reinstate the contract".

It will be recalled that the premium payment in issue was the first to be paid by Mr. Boudreau, the premiums up to that time having been deducted from funds which the Company had to his credit. As the trial judge said, it is apparent from the evidence that the appellant sent a reminder notice to Boudreau. Very shortly thereafter Boudreau paid the \$125.00. The first condition was thus met.

It was only after receipt of the \$125.00 that the Company forwarded to Boudreau its form "Provisional Receipt", dated October 21, 1982, together with the application form for reinstatement. The provisional receipt set out the amount due as \$125.00 and that "Additional amount required - Nil". Therefore, it is clear that the appellant waived any requirement of interest.

In that communication of October 21, 1982, the appellant required that Boudreau produce evidence that he was in good health. There was nothing said as to when that information would have to be filed with the Company or that any deadline had to be met. There is no question, Boudreau completed and signed that form. The evidence is that this was in form satisfactory to the appellant and that it "Would have been approved as there are no medical impairments mentioned". Conditions 2 and 3 of s. 148(2) were met with the information contained in the form. There only remained that the form be sent to the appellant. As well there was no question, Mr. Boudreau was in good health up until the time of his death. The form was placed in the envelope provided by the appellant to be mailed by his common-law wife. A few days intervened; Mr. Boudreau died as a result of an accident. All of the conditions stipulated by the insurer were met within a reasonable time. There was no undue delay.

The appellant relied upon the reasons of Dickson, J., (as he then was) in Northern Life Assurance Co. of Canada v. Reiersen (1977), 1 S.C.R. 390. However, there the facts differed substantially from those before us. In Reiersen one of the provisions of the group policy stated, "If any premium be not paid within the days of grace this policy shall automatically terminate". The notice sent to the insured read, "This premium must be paid not later than March 1, 1972, in order to continue this contract in effect". No such warning was given to Boudreau. Further, in Reiersen the cheque in payment of premium was returned by the bank "N.S.F.". The insured was then informed that the insurance was out of force because the days of grace had expired. This was one of the facts characterized by Mr. Justice Dickson as "of critical importance". The following day one of the insured persons, Mr. Scobie, died. The overdue premium was paid one week later. Mr. Justice Dickson commented at p. 397-98:

"If the Scobie Company had given Shelemey the sum of \$69.20 immediately after March 3 following expiry of the days of grace, other questions might arise as to waiver but the difficulty which remains, so far as the respondent is concerned, is that nothing whatever was done in response to the demand until after the death of Scobie and after advice that the insurance coverage was no longer in force...."

The facts in Reiersen differ in important aspects from those before us.

Although I recognize that the provisional receipt does set out certain conditions, I am mindful of the comments

of Dickson, J., in Duplisea v. T. Eaton Life Assurance Co.
(supra) at p. 454:

"There is a further reason for this conclusion. In Blanchette v. C.I.S. Ltd. (1973), 36 D.L.R. (3d) 561 at pp. 575-6, [1973] S.C.R. 833, at p. 838, [1973] 5 W.W.R. 547, my brother Pigeon rejected out of hand the suggestion that an insurance company should have the benefit of a premium without having been at risk. If the argument of the company in the case at bar is valid, the company would have the benefit of the moneys represented by the cheque received from Mr. Duplisea from date of receipt until date of payment - a full month - without having been at risk. That is what was found objectionable in Blanchette."

From the facts, as found by the trial judge, it is reasonable to conclude that the appellant was simply informing Boudreau that upon completion of the form in accord with s. 148(2)(a) and (b) the policy would be reinstated. I am of the opinion that the conditions of that section were met by Mr. Boudreau. For these reasons, I would dismiss the appeal with costs.


J.A.

Concurred in -

Clarke, C.J.N.S. 

Pace, J.A. 