

1957
*Feb. 12, 13
May 13

NORMAN F. FIRTH (*Plaintiff*) APPELLANT;

AND

THE WESTERN LIFE ASSURANCE
COMPANY (*Defendant*)

}

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Life—Non-payment of renewal premium—Days of grace—Due date of premium falling on non-juridical day—The Insurance Act, R.S.O. 1960, c. 183, s. 146.

A term policy of life insurance provided for payment of renewal premiums on April 13 in each year. April 13, 1952, was Easter Sunday and the following day, April 14, was a holiday. The insured died on May 14, the renewal premium for that year being then unpaid. The insurer repudiated liability under the policy on the ground that it had lapsed because of non-payment of the renewal premium by May 13. The beneficiary contended that the death occurred within the days of grace allowed under the policy and under s. 146 of *The Insurance Act*.

Held (Rand and Cartwright JJ. dissenting): The action must fail. The “due date” of the premium was April 13, and this was not affected by the fact that it was a Sunday. The days of grace ran from “the day on which the premium is due” and therefore expired on May 13.

Per Rand and Cartwright JJ., *dissenting*: The insurer could not legally have accepted payment of the premium on April 13 by reason of the provisions of the *Lord’s Day Act*, R.S.C. 1952, c. 171, particularly ss. 4 and 14. Had the policy contained no provision for a period of grace, the premium could have been paid as of right on April 14. It followed from this that the words “the day on which the premium is due” in s. 146(1) of *The Insurance Act* meant April 14 and not April 13. The days of grace had therefore not expired when the insured died.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of Spence J. (2). Appeal dismissed.

T. Sheard, Q.C., and W. H. Powell, Q.C., for the appellant.

C. F. H. Carson, Q.C., and J. B. S. Southey, for the respondent.

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The judgment of the Chief Justice and Taschereau and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—This is an action on a term policy of insurance, dated April 13, 1951 (ex. 1), issued by the respondent on the application of Meridian Timber Co. Ltd. on the life of James G. White for a five-year period from its date. The appellant sues as assignee of the timber company. While a policy bearing the same date had been issued earlier it was found to be incorrect and there is, in my opinion, no doubt that the appellant must rest his case on the terms of ex. 1. The details in connection with both policies were explained to us and are set forth in the reasons for judgment of the trial judge (1) and of the Court of Appeal (2). We are relieved from considering the claim (first advanced in the Court of Appeal) for rectification of the policy by substituting April 30 as being the date for payment of renewal premiums instead of April 13, since on the argument Mr. Sheard stated that he abandoned any such contention. The problem may therefore be viewed without regard to any of the attendant circumstances except those now mentioned.

The policy is dated April 13, 1951, and was made in consideration of the annual premium of \$1,092 to be paid in advance to the respondent on the delivery of the policy and of the payment thereafter of a like amount on each succeeding 13th day of April in every year during the continuance of the contract. The first premium was paid on or about April 30, 1951. The insured died May 14, 1952, and after the receipt of information of that occurrence the appellant, with his solicitor, attended at the offices of the respondent about 7 o'clock on the evening of that day with a certified cheque in favour of the respondent for \$1,092. The offices were, of course, closed, but a letter, with the cheque, was put under the door, or in a letter-box, of the building in which the respondent's offices are

(1) [1955] O.R. 56, [1955] I.L.R. 1-170, [1955] 2 D.L.R. 457.

(2) [1956] O.R. 455, [1956] I.L.R. 1-222, 4 D.L.R. (2d) 284.

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located. This cheque was returned the following day with a letter, pointing out that the policy had lapsed prior to the receipt of payment.

April 13, 1952, was Easter Sunday and the appellant contends that, apart from any question of grace, he was entitled to pay the second premium on April 15, because of the 14th being Easter Monday.

Section 146 of *The Insurance Act*, R.S.O. 1950, c. 183, deals with days of grace and is as follows:

146. (1) Where any premium, not being the initial premium, under any contract is unpaid, the insured, his assign or agent, or any beneficiary, may, within a period of grace of thirty days or, in the case of an industrial contract, four weeks from and excluding the day on which the premium is due, pay, deliver or tender to the insurer at its head office, or at its chief agency in the Province, or to its collector or authorized agent, the sum in default.

(2) The payment may be made by sending a post office order or postal note, or a cheque payable at par and certified by a bank doing business in Canada under *The Bank Act* (Canada), or a draft of such bank, or a money order of an express company doing business in the Province, in a registered letter duly addressed to the insurer, and the payment, delivery or tender shall be deemed to have been made at the time of the delivery and registration of the letter at any post office.

(3) Payment, delivery or tender as aforesaid shall have the same effect as if made at the due date of the premium.

(4) The period of grace hereinbefore in this section mentioned shall run concurrently with the period of grace, if any, allowed by the contract for the payment of a premium or of an instalment of premium.

(5) Upon the maturity of the contract during the period of grace and before the overdue premium is paid, the contract shall be deemed to be in as full force and effect as if the premium had been paid at its due date, but the amount of such premium with interest, not in excess of six per cent per annum, and the balance, if any, of the current year's premium, may be deducted from the insurance money.

(6) Nothing in this section shall deprive the insured of the benefit of any period of grace allowed by the contract in excess of the period of grace allowed by this section.

The terms of the policy with reference to this question read:

GRACE.—In the payment of all renewal premiums hereunder, a grace of one month (of not less than 30 days) will be allowed from the actual due date of the premium herein stated. During the period of grace the Policy shall continue in force, but in the event of the Policy becoming a claim during the said period of grace, and before the overdue premium or deferred premiums, if any, of the current Policy year are paid, the amount of such premiums will in settlement of the claim be deducted from the sum insured.

The appellant argues that under subs. (1) of s. 146 of *The Insurance Act* it cannot be said that the premium was "due" on Sunday, April 13, 1952, because the respondent, being a company engaged in the insurance business, was prohibited from carrying on that business on the Lord's Day and that, in any event, the offices were closed. It is also contended that it could not be said that the premium was "the sum in default" if it was not paid before Sunday, April 13. In my view, the subsection is quite clear and is not capable of that construction. All it provides for is a period of grace of 30 days and in the circumstances the dates fixed by the Act and by the policy are the same. Therefore, on Sunday, April 13, 1952, the second premium was unpaid. With respect to other views, it is beside the point to consider a case where a statute or the contract did not provide for a period of grace and the last day for paying a premium happened to expire on a Sunday, because we are not concerned with that problem and I find no assistance in *Landrigan v. Missouri State Life Ins. Co.* (1) or in general statements that days of grace are days allowed for making a payment after the time limited has expired. I agree with the Court of Appeal that, in this connection, there is no difficulty in the construction of subs. (1) of s. 146 of *The Insurance Act*.

The appellant then contends that, even if the above be the result under the Act, the grace provisions in the policy enlarged the rights of the appellant and that some meaning must be given to the word "actual" in the phrase "a grace of one month (of not less than 30 days) will be allowed from the actual due date of the premium herein stated". Again, with respect, I have no difficulty in deciding that this word had not the effect of making April 14, 1952, the due date from which the period of grace is to be counted. It was so held by the Supreme Court of Texas in *Aetna Life Ins. Co. of Hartford v. Wimberly* (2) and, even if that case may be distinguished, as suggested by the appellant, I would have come to the same conclusion in the present appeal.

The second contention of the appellant is that even if the grace period began to run on April 14, 1952, the policy when properly interpreted gave 31 days of grace.

(1) (1922), 245 S.W. 382.

(2) (1908), 112 S.W. 1038.

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I can find no substance in this argument. I agree with the Chief Justice of Ontario that the appellant was not entitled to a period of grace in excess of either one month or 30 days, whichever was the greater.

Finally, I can find no ambiguity in the policy that would give rise to the application of the maxim *contra proferentem*. It is stated that this would be in direct conflict with the provisions of the policy stating that the premium is to be an annual one. Of course it is annual but the date for its payment was distinctly stated in the policy and the premium was not paid within the days of grace allowed. As to the so-called rule in *McMaster v. New York Life Insurance Company* (1), it is sufficient to say that the extent of its application has been canvassed in the Courts of the United States in later cases and has been considered in *The Provident Savings Life Assurance Society of New York v. Mowat et al.* (2). In my opinion, the policy is clear and under its terms the payment of the second annual premium, whether made on May 14 or May 15, 1952, was too late.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario (3) affirming a judgment of Spence J. (4) by which the appellant's action was dismissed. The relevant facts are fully stated in the reasons for judgment of the learned trial judge, and a brief summary will be sufficient to make clear the reasons for the conclusion at which I have arrived.

The action was brought on a policy issued by the respondent on the life of one James G. White, which was filed as ex. 1 at the trial. In the view that I take of the matter, the fact that this policy was issued in substitution for one which had been prepared and delivered earlier becomes irrelevant. It is conceded that, if the policy was still in force at the time of the death of White, the

(1) (1901), 183 U.S. 25, 22 S. Ct. 10. (2) (1902), 32 S.C.R. 147.

(3) [1956] O.R. 56, [1956] I.L.R. 1-222, 4 D.L.R. (2d) 284.

(4) [1955] O.R. 455, [1955] I.L.R. 1-170, [1955] 2 D.L.R. 457.

appellant is the person to whom the insurance moneys are payable. The policy is dated April 13, 1951; by its terms the respondent agrees to pay \$100,000 immediately upon receipt and approval of proofs of the death of White, during the continuance of the contract, provided that his death occurs before April 13, 1956. The policy reads in part as follows:

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THIS CONTRACT is made in consideration of the Application for this Policy, a copy of which is hereto attached, and of the statements and agreements therein contained, hereby made a part of this contract, and of the annual premium of One Thousand and Ninety-Two Dollars to be paid in advance to the Company, on the delivery of this Policy, and of the payment thereafter of a like amount on each succeeding Thirteenth day of April in every year during the continuance of this contract.

* * * *

GRACE.—In the payment of all renewal premiums hereunder, a grace of one month (of not less than 30 days) will be allowed from the actual due date of the premium herein stated. During the period of grace the Policy shall continue in force, but in the event of the Policy becoming a claim during the said period of grace, and before the overdue premium or deferred premiums, if any, of the current Policy year are paid, the amount of such premiums will in settlement of the claim be deducted from the sum insured.

It is common ground that the first premium of \$1,092 was paid on or about April 30, 1951 and that no further premium was paid or tendered during the life of White. White died on May 14, 1952. The sole defence is that at the time of White's death the policy had lapsed for non-payment of the annual premium claimed by the respondent to have been due on April 13, 1952. The last-mentioned date was a Sunday.

I find it necessary to deal with only one of the grounds relied upon in support of the appeal. Counsel for the appellant contends that, under s. 146(1) of *The Insurance Act*, R.S.O. 1950, c. 183, May 14 was the last day of the period of grace and consequently, by virtue of subs. (5) of the same section, the policy was in full force and effect when White died on that day. Whether or not this contention is sound depends on the construction of the words of the section. Counsel were unable to refer us to any decisions in which the precise point has arisen and I have found none.

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Section 146 reads in part as follows:

146. (1) Where any premium, not being the initial premium, under any contract is unpaid, the insured, his assign or agent, or any beneficiary, may, within a period of grace of thirty days . . . from and excluding the day on which the premium is due, pay, deliver or tender to the insurer at its head office, or at its chief agency in the Province, or to its collector or authorized agent, the sum in default.

* * * * *

(3) Payment, delivery or tender as aforesaid shall have the same effect as if made at the due date of the premium.

(4) The period of grace hereinbefore in this section mentioned shall run concurrently with the period of grace, if any, allowed by the contract for the payment of a premium or of an instalment of premium.

(5) Upon the maturity of the contract during the period of grace and before the overdue premium is paid, the contract shall be deemed to be in as full force and effect as if the premium had been paid at its due date, but the amount of such premium with interest, not in excess of six per cent per annum, and the balance, if any, of the current year's premium, may be deducted from the insurance money.

(6) Nothing in this section shall deprive the insured of the benefit of any period of grace allowed by the contract in excess of the period of grace allowed by this section.

In 1952, April 13, the date stated in the policy for the payment of the second annual premium, fell on a Sunday. By reason of the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, particularly ss. 4 and 14, it would have been unlawful for the respondent to receive payment of the premium on that day, and its office was in fact closed. In these circumstances the cases cited by Mr. Sheard make it clear that, had the policy contained no provision for a period of grace, the insured or beneficiary would have been entitled as a matter of right to pay the premium on April 14. In my opinion, it follows from this that when applied to the circumstances of this case the words in subs. (1) "the day on which the premium is due" mean April 14 and not April 13. The matter may be tested by supposing that the premium had in fact been paid on April 14. How, if this had happened, could it have been said to be "the sum in default", the words with which subs. (1) concludes? A party who pays a sum on the day on which he is by law entitled to pay it cannot be said to be in default. How could April 14 be properly described as a day of grace when if payment were made on that day it

would be made as a matter of right and not of indulgence? As is pointed out by Daues J. giving the judgment of the Court in *Landrigan v. Missouri State Life Ins. Co.* (1), the term "grace" is used in contradistinction to "right". I find convincing the reasoning in the following passage in the judgment in that case, at p. 387:

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The days of grace cannot begin at a time when the policy is alive and in force under the paid premium, but begins only when the policy has run its limit under the paid premium, and runs as days of grace above and beyond the time during which the policy was in force under the premium. The insured had insurance as a matter of right under the premium until September 17, 1918, and during the period that he had insurance as a matter of right he could not be given insurance as a matter of grace, for grace is used in contradistinction to right. Thirty-one days of grace was a time of indulgence granted, and it was not an indulgence until after the expiration of the insurance as a matter of right.

The following definition in Byrne's Law Dictionary (1923) p. 277 is, in my opinion, accurate:

Days of grace are days allowed for making a payment or doing some other act after the time limited for that purpose has expired.

It would be anomalous to reckon as part of a period of grace allowed to a party a day upon which no grace was required.

I find some further support for the view I have expressed in the fact that in subs. (1) the Legislature has used the word "day" rather than the word "date" which is used in subs. (3) and in subs. (5).

Having concluded that April 14, 1952 was "the day on which the premium is due" it follows that the period of "thirty days from and excluding" that day would include May 14, 1952, the day on which the life insured died. Consequently, the contract matured during the period of grace, the rights of the parties are governed by subs. (5), and the appellant is entitled to judgment for the sum of \$100,000 less \$1,092, that is \$98,908, with interest at 5 per cent. from the date of the receipt by the respondent of proofs of the death of the life insured. If the parties are unable to agree as to the date from which interest should be computed the matter may be spoken to.

I would allow the appeal, set aside the judgment in the Courts below and direct that judgment be entered for the appellant for \$98,908 with interest as above set out. The appellant is entitled to his costs throughout.

(1) (1922), 245 S.W. 382.

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*Appeal dismissed with costs, RAND and CARTWRIGHT JJ.
dissenting.*

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*Solicitors for the plaintiff, appellant: Byrne & Dixon,
Hamilton.*

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*Solicitor for the defendant, respondent: David A. Robin-
son, Hamilton.*
