COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2014/CLE/gen/01998

BETWEEN

DORSEY MCPHEE

Plaintiff

AND

COLINA INSURANCE LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Plaintiff pro se
Mr. E. Terry North and Mr. Ashley Williams for the Defendant

Hearing Dates: 19, 20 April 2016

Insurance Law - Proposal of Insurance – Breach of Contract - Terms of Policy - Late Payment of Premiums – Notice of Pending Cancellation - Lapse of Insurance Policy - Re-instatement Rating - Account Value - Mortality Charges - Increased Guaranteed Cost of Insurance - Costs - Departure from Usual Order for Costs

The plaintiff, Dorsey McPhee, is a practicing Attorney-at-Law. He brought an action for breach of contract against the Defendant, Colina Insurance Limited wherein he alleged that Colina unlawfully lapsed his Insurance Policy in February 2014 and finally, in September 2014. Colina denied the allegation and asserted that the Policy had lapsed because of untimely and/or not full payment of premiums.

At the trial, Mr. McPhee argued that Colina cannot justify lapsing and cancelling his Policy. He alleged that to do so without even notifying him was fraudulent and unjust. In Mr. McPhee's view, the Policy is still in force.

Mr. McPhee further argued that the Account Value is a savings account/ life insurance vehicle and that premiums and interest earnings are paid into it and deducted out of it monthly to satisfy the insurance premiums. He alleged that the Account Value had in excess of $7,000 whereas

Colina alleged that the Account Value was $41.69 as at 30 April 2014, rendering it insufficient to meet the monthly charges.

Additionally, Mr. McPhee argued that the 'Guaranteed Cost of Insurance' is a term of the Policy but was increased unjustifiably. He argued that the term 'mortality charges' used by Colina was not a term of the Policy and it was unilaterally imported into the Policy by Colina.

HELD, dismissing the action

(1) An insurance contract is a commercial contract and is subject to the rules of construction and is interpreted as such: See **Deutsche Genossenchaftsbank and Burnhope** [1995] 4 All ER 717.

(2) Even without an express warranty in the Policy, an insurer may be able to repudiate a contract of insurance where there has been a failure to pay premium on the due date. **Figre Limited v Mander** [1999] Lloyd's Rep IR 193.

(3) The Policy issued on 7 October 2003 to Mr. McPhee lapsed on 7 September 2014 by virtue of non-payment and/or untimely payments of premiums. Had he paid his premiums in a timely fashion, the Policy would have had a positive Account Value and would not have lapsed.

(4) The terms Guaranteed Cost of Insurance, Cost of Insurance, Mortality Tax and Mortality Charges were used interchangeably but are one and the same thing for the purpose of Mr. McPhee's insurance Policy. "Mortality Charges" is not a new term fraudulently added to the Policy by Colina. It was always a term of the contract.

(5) The yearly increase in the Guaranteed Cost of Insurance was a term of the contract and it is not ultra vires the contract.

(6) The Cash Surrender Value/Savings Account Value was not in the amount of $7145.00 as at 30 April 2014, neither up to the time of trial. The account has zero balance and it represents the true Account Value.

(7) An order for costs is in the discretion of the court to be exercised judicially: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pp. 536-537. If a judge departs from making a cost order to the successful party, the court must give reasons for so doing: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ and **Atkin LJ in Ritter v Godfrey** [1920] 2 KB 47 at page 48. This Court makes No Order as to Costs to the successful party because of certain ambiguous terms of the Policy.

JUDGMENT

Introduction

[1] **Charles J:** By a Specially Indorsed Writ of Summons filed on 2 December 2014, the plaintiff, ("Mr. McPhee"), an Attorney-at-Law sued the Defendant, ("Colina") seeking, among other things, the following:

(a) A Declaration that the Policy was unlawfully lapsed and remains in force;

(b) Aggravated Damages for the unlawful lapsing of the Policy any time after Policy Year 3 and more recently in February 2014 and November 2014;

(c) A Declaration that the contractual mortality charges are ultra vires the contract; and

(d) A Declaration that the Cash Surrender Value was $7,145.00 as at 30 April 2014 and that he has access to same.

[2] By its Re-Amended Defence filed on 5 February 2016, Colina refuted Mr. McPhee's claim. At the heart of Colina's allegation is that Mr. McPhee was the author of his own demise because he failed to adhere to the provisions of the Policy to pay his premiums in a timely manner. Colina denied that the term "contractual mortality charges" ("CMC") is not a part of the contract and averred that references to "mortality charges" or "cost of insurance" refer to the "guaranteed cost of insurance" as defined in the Policy. Colina also denied Mr. McPhee's allegation regarding the Cash Surrender Value ("CSV") and asserted that the amount calculated in 2003 as the projected CSV in the Policy at age 65 would only hold true if all premiums were paid when due. Colina asserted that Mr. McPhee failed to pay all premiums when they became due as is shown on the Ledger of his account at paragraph 10 of the Amended Defence.

Background facts

[3] Most of what I now outline reflects the uncontroverted and unchallenged evidence of the parties. To the extent that there is a departure from any agreed

facts, then what is expressed must be taken as positive findings of fact made by me.

[4] Mr. McPhee was the owner of Policy No.4297630 which was underwritten and issued by Canada Life Assurance Company ("Canada Life"). Subsequent to the issuing of Policy No. 4297630, it was converted to a Universal Life Policy in accordance with the terms of the policy contract. As a result of the conversion, a new policy contract No. N1001167 was issued by Canada Life on 7 October 2003 ("the Policy").

[5] By letter dated 27 February 2004, Colina notified Mr. McPhee that as of 1 January 2004, it had assumed all contractual obligations, responsibilities and rights associated with the Policy.

[6] The Policy had a face value of $150,000.00 and the premiums were to be paid quarterly at a rate of $528.12 on 9 February, 9 May and 9 November of each year. In accordance with its contractual obligations, the Policy was subject to a number of monthly deductions. Amongst these deductions were the guaranteed cost of insurance ("GCOI") (initially $74.62), waiver of premium of $12.76) and an expense charge of $9.00. The aggregate of these monthly deductions initially amounted to $96.38. Notwithstanding the same, the GCOI was provided at a yearly renewable term and was therefore subject to increase every year per $1,000.00 of insurance coverage.

[7] The Policy also provided a mechanism by which the GCOI could be changed from a yearly renewable term to a level rate. This is provided for at page 13 of the Policy. It states:

> **"YEARLY RENEWABLE GUARANTEED COST OF INSURANCE: If the Guaranteed Cost of Insurance rate for the Primary Life Insured is Yearly Renewable Term, you may request it be changed to the level rate applicable to his or her attained insurance age in the Table of Guaranteed Cost of Insurance Charges. The Amount of Insurance on the Primary Life Insured must have been in force for one full year. The Primary Life Insured must be less than attained Insurance age 71. We must receive your written request**

at our Head Office…. If we approve the change, it will be effective on the next Monthly Deduction Date."

[8] Suffice it to say, Mr. McPhee did not at any time choose to elect this option; the result being that the rate of GCOI continued to increase pursuant to the yearly renewable term feature.

[9] A key feature of the Policy is the low cost term insurance with an investment feature and the creation of an investment account with Account Value. The Account Value is the amount of the net premiums plus earnings paid less monthly deductions taken out of the Policy to cover all benefits. A net premium is defined in the Policy contract as "the gross amount of each premium minus the Premium Tax". The premium tax is defined in part as "the gross amount of each premium equal to the premium tax payable in your jurisdiction at the time the premium is paid. The premium tax is currently two percent (2%), but can be amended from time to time by the regulators for your jurisdiction".

[10] Colina made certain adjustments to the interest applied to the Investment Account and to account for an amendment to the Business License Act, by the Government of The Bahamas which increased the Premium Tax rate from 2% to 3% in 2004. The adjustments were as follows:

a. Correction of interest credited to 3% instead of the 1% credited from the inception of this Policy until February 2005.

b. Correction of premium tax calculation to 3% instead of 2% between 1 January 2004 and August 2004.

[11] By letter dated 11 June 2014, Mr. McPhee was informed of these changes.

[12] After the applicable government tax was deducted, Mr. McPhee's net premium was deposited into the Investment Account. The investment aspect of the Policy is such that during the term of the Policy, cash accumulates in the Investment Account which may be borrowed or surrendered. The Cash Surrender Value ("CSV") is the Policy's Account Value less any surrender charges and less the

amount of any outstanding loans and accrued interest. It is defined in the Policy as "an amount paid to you when the Policy is surrendered."

[13] Mr. McPhee took out the Policy when he was 54 years old. At the date of the filing of this Writ of Summons, he was 65 years old. Mr. McPhee never withdrew cash from the Policy but he had been tardy in paying premiums.

[14] By letter dated 4 March 2014, Mr. McPhee informed Colina that it was in breach of the terms of the Policy insofar as they were charging him a "mortality tax" which was not provided for. Mr. McPhee also asked Colina to confirm whether or not his Policy had a CSV of at least $5,654.00.

[15] By letter dated 1 April 2014, Colina responded as follows:

> **"…For the purposes of our research we have interpreted your reference to "mortality tax" to refer to the contractual mortality charges or cost of insurance (COI)**
>
> **…In accordance with your request, we have conducted an in-depth review of this matter. Our findings and response(s) are summarized below:**
>
> **v. A review of your account history highlights several periods when premiums were not paid when due. Subsequently back premiums were paid, but these amounts were not sufficient to make up for the interest lost when premiums were not paid on time.**
>
> **vi. As a result of the missed premium payments, Colina cannot guarantee that your cash surrender value will be at least $5,654.00 at age 65. As per the contract, COI and expense charges will continue to be deducted from your Policy fund value."**

[16] By letter dated 3 April 2014, Mr. Desmond Edwards, Counsel for Mr. McPhee, wrote to Colina inquiring of the CSV of the Policy. By a further letter dated 29 April 2014, Mr. Edwards requested further information: see Defendant's Bundle of Documents - Tab 11.

[17] By letter dated 11 June 2014, Colina responded to Mr. Edwards' inquiries and indicated that as of 30 April 2014, the Policy's Account Value was $53.50. Colina

also provided a table which summarized all of the transactions of the Policy: see Defendant's Bundle of Documents –Tab. 12.

[18] By letter dated 8 September 2014, Mr. Edwards again wrote to Colina requesting that Mr. McPhee's Account Value be restated to reflect the credit of $7,145.00 deducted under the ruse of increases in GCOI, plus interest, that he has a right to borrow or withdraw funds from the account and legal fees of $5,000.00 to date."

[19] By letter dated 11 September 2014, Mr. Edwards further wrote indicating that his client's policy was allowed to lapse notwithstanding that he was of the belief that there should have been enough cash in the Account Value to pay the premiums.

[20] In preparation for its Defence, Colina compiled a summary of all transactions relative to the Policy for the period 9 August 2003 to 7 September 2014: see paragraph 10 of the Amended Defence. The summary revealed that Mr. McPhee missed several premium payments. On such occasions when he missed a premium payment the withdrawal of the monthly deductions from the Account Value continued. The effect of the said deductions allowed the Policy to remain in force but it also diminished the Account Value. The Policy lapsed and was subsequently reinstated on the following dates:

Lapse Dates	**Reinstatement Dates**
8 December 2005	18 January 2006
18 January 2006	21 June 2006
8 October 2009	1 February 2010
8 August 2013	2 October 2013
9 December 2013	17 February 2014
7 September 2014	

[21] When the Policy lapsed and was subsequently reinstated in 2006, a plus 75% rating was applied thereon which effectively increased both the premiums and GCOI relative to that in the original policy: see Defendant's Bundle of Pleadings at Tab. 2.

[22] By not paying the premiums in a timely manner as required by the Policy, it negatively impacted the Policy's Account Value resulting in several deposits of net premiums not being available to be applied to the Account Value whilst the monthly deductions continued to be subtracted therefrom. Despite Mr. Edwards' letter of 11 September 2014, Mr. McPhee, an experienced attorney, ought to have been aware of the impact that non-payment of premiums had on the Policy's Account Value particularly since he had signed an Owner's Statement affixed to the Policy Illustration Summary ("PIS") dated 13 February 2003: see Defendant's Bundle of Documents at Tab 1, page 6.

[23] By Policy Annual Statements issued by Colina from 9 August 2005 to 9 August 2014, Mr. McPhee was advised of the Policy's Account Value: see Defendant's Bundle of Documents at Tabs 5 and 6. It is also clear from the Policy Annual Statements that the monthly deductions were increasing over time as a result of the GCOI increasing every year per $1,000 of insurance coverage given that the GCOI option was a yearly renewable term.

[24] By a Notice of Pending Cancellation dated 18 February 2014, Colina advised Mr. McPhee that the Policy would lapse and be cancelled if all outstanding payments were not received by 7 March 2014: see Defendant's Bundle of Documents at Tab. 7. Mr. McPhee did make a premium payment on 7 March 2014.

[25] Once again, by a Notice of Pending Cancellation dated 18 August 2014, Colina informed Mr. McPhee that the Policy would lapse and be cancelled if the requisite premium was not paid by 7 September 2014. Mr. McPhee paid the said premium on 8 September 2014. Notwithstanding the payment of the same, net premiums were not deposited to the Account Value as the Policy had already lapsed.

The evidence

[26] Mr. McPhee was the only witness to testify. Colina called its only witness, Ms. Sapna Chatlani, an Actuary who has been in Colina's employment for 7 years

and had previously been working in the insurance industry for a further 5 years. For the sake of clarity, an actuary is an individual who deals with the financial assessment of insurance policies or other financial instruments.

[27] Mr. McPhee accepted that he was consistent with his premium payments for the first two years and thereafter, from time to time, he was late in making payments. However, he insisted that his policy could not have lapsed on 7 September 2014 as there were more than sufficient funds in his Account Value to pay the premiums. He testified that the Ledger at paragraph 10 of the Defence is a fabrication except as it relates to the premiums which he paid. When asked under cross-examination as to whether he agreed that his account was delinquent, this is what Mr. McPhee said at page 19 of Transcript of 19 April 2016:

> **MR. MCPHEE:** "**My account isn't delinquent. Mr. North, the account is a saving account. I have insurance. The insurance is enforced. I determine how much interest I wish to have, but the insurance is enforced at all times. So, at times I may not have had funds, but the insurance was still enforced, because I had more than $110 in the account value at all times. This paragraph 10 is fabricated.**
>
> **THE COURT: when you say fabricated, you were delinquent in paying premiums?**
>
> **MR. MCPHEE: I was late sometimes, my lady. I was late. The Policy is due the 9th of February, 9th of May, 9th of August, 9th of November. I haven't always been on time as far as those dates are concerned. Yes, I admit that.**
>
> **MR. NORTH: Would you also agree that not only were you not on time, but on occasions you paid less than you ought to have paid?**
>
> **MR. MCPHEE: No, sir. I always paid $528.12 when I paid quarterly. I never paid less than the quarterly premium.**
>
> **MR. NORTH: You received a notice in February, 2014 from the defendant advising you that your Policy was about to lapse, is that not correct?**
>
> **MR. MCPHEE: Never. That was supposed to lapse on the 7th of March, never, I never received it.**
>
> **MR. NORTH: How did you find out about it?**

MR. MCPHEE: In discovery, during discovery. In fact, you lapsed me in March before the deadline."

[28] It is clear that Mr. McPhee did not accept Colina's Ledger and their calculation and deductions made to his Policy. Ms. Chatlani pointed out that Mr. McPhee made a payment on 8 August 2004 and thereafter, made no payment until about two years later. This delay in payments depleted the cash amount that was stored in the account that facilitated the insurance until its eventual lapse. She described that the calculation of lateness on this Policy was generated by a system software used by the defendant called Ingenium. According to the records, Mr. McPhee's Account Value as of 9 June 2014 was $140.30 and it was insufficient to meet the needed charges of $201.13 by July 2014.

[29] Ms. Chatlani was extensively cross-examined by Mr. McPhee. I found her to be knowledgeable and sincere. She explained in great detail the Ledger at paragraph 10. To a lay person, it added to the confusion particularly when premiums are not paid in a timely manner.

[30] By and large, I found Mr. McPhee to be a sincere person. However, I did not accept his evidence that he did not receive the Notices of Cancellation dated 18 February 2014 and 18 August 2014 respectively. They were sent to his address. Besides, in that Notice, Colina advised him that the Policy would lapse and be cancelled if all outstanding payments were not received by 7 March 2014. Mr. McPhee did make a premium payment on 7 March 2014.

[31] In my opinion, Mr. McPhee did not understand the true terms of the Policy, for example, Mr. McPhee's interpretation of yearly renewable term, mortality tax and GCOI are vastly different from that of Colina. Consequently, he impressed that Colina fabricated the Ledger.

[32] On the basis that he disputed the accuracy of the Ledger, the onus shifted to him to disprove any and all the allegations which he has made. He attempted to do so by calling Ms. Raquel Smith, a Certified Public Accountant, Deputy Head of

UBS Trustee, Bahamas. Colina challenged her expertise and the Court ruled that she did not possess the requisite qualifications to be deemed an expert but she could testify as a witness. At that stage, then Counsel for Mr. McPhee, Mr. Edwards, asked that her evidence be expunged from the record. Learned Counsel felt, that as a witness, her evidence would not have served any useful purpose.

The issues

[33] There are four main issues to be determined namely:

1. Was the lapse on 7 September 2014 validly effected under the terms of the Policy?
2. Was the increase in monthly deductions for GCOI justifiable?
3. Whether a plus 75% rating was a term of the Policy?
4. What was the amount contained in the Policy's Account Value?

The Proposal of Insurance

[34] It is important to understand the proposal of insurance before addressing the issues. The proposal of insurance, sometimes referred to as the application, is completed by the proposer who seeks insurance on an application provided by the insurer. According to the learned editors of **The Law of Insurance Contracts**, Service Issue No. 14 at 10-1, the proposal functions "as an offer to contract made by the proposer, as well as a statement of matters affecting the risk, which may induce the insurer to contract, and, if a contract if concluded, a basis clause in the proposal makes it a source of terms in the contract of insurance."

[35] Clause (iv) of the Owner's Statement which Mr. McPhee signed on 5 September 2003 states as follows:

> **"In signing this illustration, I confirm that I have reviewed this entire illustration and it has been explained to my satisfaction by my insurance advisor. I understand that:**
>
> **iv. The amounts and durations of withdrawals which may be available will vary with changes in the insurance amount, the cost of**

> **insurance, the management expense ratio, the premium paying period, the timing of deposits and the performance of the Investment Account."**

[36] Clause (ix) indicates that "[T]his illustration (proposal) is neither a contract nor an offer to provide insurance. In the event that a policy is applied for and issued, the terms of the contract shall prevail." Notwithstanding the same, the Policy specifically provides the following:

> **"This policy, the application (a copy of which is attached) any amendments agreed to in writing and any subsequent application for change or reinstatement of this policy form the entire contract between you and us. We are not bound by any statement that is not part of the contract and not authorized by us."**

[37] A general principle of the law of contract is that a person is bound by the contents of a document which he has signed. This principle extends to the proposal which forms part of the Policy.

[38] In **Newsholme Bros v. Road Transport & General Ins Co Ltd** [1929] 2 KB 356, the Court of Appeal held that a broker was not liable in negligence where he had incorrectly completed a proposal form on behalf of his client and then passed the completed form to his client to check the answers and sign the form. The client did not notice the incorrect answer to a question inserted by his broker and signed the form. As a result, when a loss was sustained by the insured client, the insurers avoided the policy because of the erroneous answer given in the proposal form. The client sued his broker for damages in the sum of the insurance monies rendered irrecoverable but was unsuccessful. The Court of Appeal held that it is the duty of the proposer for insurance to see and make sure that the information contained in the proposal form is accurate, it being no argument that he did not read it properly or was not fully appraised of its contents. **Scrutton LJ** stated at p. 356:

> **"…In any case a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue and a promise that they are true and are to be the basis of the contract, cannot escape from the consequences of his**

> **negligence by saying that the person he asked to fill it up for him was the agent of the insurance company."**

See also: **Biggar v Rock Life Assurance Co**. [1902] 1 KB 516.

[39] In the present case, whilst the proposal does not form part of the Policy, it can be used to ascertain the intention of the parties.

Terms of the Policy

[40] An insurance contract is a commercial contract and is subject to the same rules of construction. **Lord Steyn** in a dissenting judgment in **Deutsche Genossenchaftsbank v Burnhope** [1995] 4 All ER 717 explained the mechanism by which an insurance contract could be interpreted. He opined at page 724:

> **"It is true the objective of the construction of a contract is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention… It is therefore wrong to speculate about the actual intention of the parties in this case."**

Lapse of the Policy

[41] The key issue which falls to be determined is whether the lapse on 7 September 2014 was validly effected under the terms of the Policy.

[42] Mr. McPhee contended that the Policy could not have lapsed on 7 September 2014 because sufficient funds had been accumulated in the Account Value to pay more than seven years of monthly deductions. He opined that based on his calculations, the Account Value should have been $7,703.94 as of 9 August 2014. In any event, he submitted, he was within the 30 day grace period.

[43] Mr. McPhee next submitted that, on 28 November 2014, he attempted to pay the premium due on 9 November 2014 and it was then that he found out that the Policy had lapsed. I found this to be incredible. If Mr. McPhee was not aware that the Policy had lapsed on 7 September 2014, why then would his then Counsel,

Mr. Edwards, be writing to Colina on 11 September 2014, indicating that his client's policy was allowed to lapse notwithstanding that he was of the belief that there should have been enough cash in the Account Value to pay the premiums?

[44] As noted previously, Mr. McPhee extensively cross-examined Ms. Chatlani. She agreed that his Policy had lapsed on 7 September 2014. According to her, the lapse date was as a result of the Account Value not being sufficient to meet the monthly deductions by the terms of the contract. She testified that the Policy provides for a grace period of 30 days and also permits a further 30 days so the lapsed date of 7 September would account for the 60 days subsequent to the Account Value not being sufficient to meet the monthly deduction.

[45] Ms. Chatlani testified that, according to the records, Mr. McPhee's Account Value as of 9 June 2014 was $140.30 and it was insufficient to meet the needed charges of $201.13 by July 2014. She referred to the Ledger and explained the monthly deductions taken out for Mr. McPhee's insurance. This included the expense charge and the monthly GCOI. The monthly cost of insurance for July 2014 was $204.13.

[46] Ms. Chatlani stated that notwithstanding the acceptance of the premium on 8 September 2014, it did not reinstate Mr. McPhee's Policy as reinstatement can only occur in accordance with the terms of the Policy.

[47] She asserted that further, the premium receipt which was issued to Mr. McPhee on payment of his premiums indicated that if the Policy was lapsed that it shall not be reinstated until the conditions for reinstatement mentioned in the Policy and an application for reinstatement were completed. In the absence of fulfilling these conditions for reinstatement to the satisfaction of Colina, all premiums paid on a lapsed Policy are refunded.

[48] Ms. Chatlani insisted that Mr. McPhee missed several premium payments which had a negative impact on his Account Value. By Notice of Pending Cancellation

dated 18 August, 2014, Colina advised Mr. McPhee to make payment on or before 7 September 2014 to keep the Policy in force but he failed to do so. She maintained that had Mr. McPhee paid his premiums when they became due on 7 September 2014, the Policy would have had a positive Account Value and would not have lapsed.

[49] Mr. McPhee submitted that since 7 September 2014 was a Sunday, he was not late when he paid the following day, Monday 8 September 2014. In this regard, he quoted Lord Denning MR in **Pritam Kaur v Russell & Sons Ltd.** CA 2 JUN1972.

> **"The important thing to do is to lay down a rule for the future so that people can know where they stand…if time expires on a Sunday or any other day on which the office is closed, the act is done in time if it is done the next day on which the office is open….By doing so we make the law consistent in itself and we avoid confusion to practitioners."**

[50] In **Pritam Kaur,** the plaintiff sought damages following the death of her husband when working for the defendant. The limitation period expired on Saturday 5 September 1970. The Writ was issued on the Monday following. It was held that the Writ was issued on time. Shortly put, **Pritam Kaur** concerned the Statute of Limitation. It has nothing to do with the payment of late premiums in an insurance contract where time is of the essence.

[51] Learned Counsel Mr. North appearing for Colina submitted that "lapse" is defined in the definition section of the Policy as the termination of the life insurance coverage due to nonpayment of Monthly Deductions. Further, the Policy provides that it will lapse 30 days after the Account Value is insufficient to pay the Monthly Deductions.

[52] According to Counsel, in interpreting the lapse provision of the Policy, it has been suggested by the learned editors of **The Law of Insurance Contracts** that the words used should be given their ordinary meaning: **Service Issue No. 14 at 15-2**. On applying the ordinary meaning it becomes apparent that the question which

must be answered is whether the event (non-payment of Monthly Deductions for 30 days where the Account Value is insufficient to do so) occurred. Counsel correctly submitted that the answer must be in the affirmative.

[53] Even without an express warranty in the Policy, an insurer may be able to repudiate a contract of insurance where there has been a failure to pay the premium on the due date. **Figre Limited v Mander** [1999] Lloyd's Rep IR 193 is authority that an insurer could repudiate if:

(a) Time was stipulated to be of the essence;

(b) Circumstances of the contract or the nature of the subject matter showed that time was impliedly of the essence; or

(c) Where time was neither expressly or impliedly of the essence, but the insured had been guilty of unreasonable delay, and the insurer had given notice requiring the premium to be paid within a reasonable time.

[54] In the present case, it is undisputed that Colina lapsed the Policy on 7 September 2014. I found as a fact that Mr. McPhee received both Notices of Pending Cancellation. In the latter Notice dated 18 August, 2014, Colina advised him of the need to make payment on or before 7 September 2014 to keep the Policy in force but he failed to do so until the day after. Had Mr. McPhee paid the premium when it became due on 7 September 2014, the Policy would have had a positive Account Value and would not have lapsed. The short answer is that the Policy lapsed on 7 September 2014 and it was validly effected under the terms of the Policy. Since its lapse on 7 September 2014, Mr. McPhee has not sought to reinstate the Policy.

Increase in GCOI

[55] The next issue to be determined is whether the increase in monthly deductions for guaranteed cost of insurance ("GCOI") was justifiable.

[56] Mr. McPhee argued that the GCOI is a fixed amount and that its subsequent increase was done unilaterally by Colina. He further argued that the increases in

the GCOI are not justifiable under the Policy and that he is entitled to a finding that the 'overage' of $8,009. 14 is to be credited to his account and the Account Value as of 7 August 2014 was at least $7,703.94.

[57] Mr. McPhee further argued that Colina cannot demonstrate any formula as to how they calculated the mortality charge, which, in any event, is not a term in the Policy.

[58] In cross-examination, Ms. Chatlani explained that the charge of Cost of Insurance ("COI") in the Policy is the same as mortality charges and it was in the amount of $74.62 per month. She stated that, according to the policy agreement, this figure increases annually per thousand of coverage but she was unable to say by how much. She however stated that the COI increases depending on a particular risk class (male, smoker, non-smoker, female smoker, non-smoker) and the person's age.

[59] No doubt, the terms "GCOI", "COI", Mortality Tax and Mortality Charges are one and the same thing but Colina's agents could go a better job by referring to the correct terminology.

[60] It appeared that Mr. McPhee did not fully comprehend the terms of the Policy that he contracted. This was evident from his line of questioning of Ms. Chatlani regarding mortality charges. This can be gleaned from page 90 lines 7 – 13 of the transcript:

> **MR. MCPHEE:** "**My universal account which is supposed to be a saving is now a term Policy, because there is no way that any income could be generate, because of these mortality charges that keep rising each year. If it range from $74.62 to finally $230.00, and you say that is justifiable?**
>
> **MS. CHATLANI: As per the terms of the Policy."**

[61] Mr. McPhee was adamant that the terms "GCOI" and "Mortality Charges" could not be the same thing and emphasized that the latter was not a terminology of the contract. In fact, Mr. McPhee insinuated that Colina added a list of terms that

was not included in his original contract of insurance but he did not produce his contract.

[62] Colina refuted Mr. McPhee's allegation that the GCOI is a fixed amount and that its subsequent increase was done unilaterally by them.

[63] Learned Counsel Mr. North pointed out that the Policy defines GCOI as "the deduction from the Account Value used to pay for the Insurance under this policy": See Agreed Bundle of Documents at Tab 3 page 6. He next pointed out that the operation of GCOI is further explained in the Policy at Tab 3 page 13 as:

> **"The monthly GCOI is one-twelfth the rate shown in the Table of GCOI charges at the end of this Policy. There is a table of GCOI for each Life Insured under this Policy.**
>
> **1. YEARLY RENEWABLE GUARANTEED COST OF INSURANCE:**
> **If the GCOI rate for the Primary Life Insured is Yearly Renewable Term, you may request it be changed to the level rate applicable to his or her attained insurance age in the Table of GCOI. The Amount of Insurance on the Primary Life Insured must have been in force for one full year. The Primary Life Insured must be less than attained insurance age of 71. We must receive your written request at our Head Office.**
>
> **If we approve the change, it will be effective on the next Monthly Deduction Date."**

[64] Mr. North submitted that on reviewing the Policy Details page of the Policy, it is clear that the GCOI was a Yearly Renewable Rate. The option of converting the Policy to a level rate was available to Mr. McPhee but he chose not to exercise the said option.

[65] Mr. North implored the Court to consider using the parole evidence rule to interpret the Yearly Renewable Rate since the Policy itself is silent on its meaning. The Policy Illustration Summary indicates that the Yearly Renewable Term refers to the fact that the cost per $1,000.00 of coverage increases annually.

[66] Colina correctly asserted that a review of the Summary at paragraph 10 of the Amended Defence illustrates the annual increases in GCOI and its subsequent increases in accordance with the terms of the Policy. In addition, Colina provided Mr. McPhee with Annual Statements which illustrated the gradual increases in GCOI.

[67] Therefore, the allegation that the GCOI is a fixed amount and that its subsequent increase was done unilaterally by Colina is ill-founded. The increases in the GCOI were justifiable under the Policy.

Reinstatement Rating

[68] Mr. McPhee insisted that there is no provision for a 75% rating to be applied on the Policy. Furthermore, he stated that he had no knowledge of any such charge which was never communicated to him at the time of the contract.

[69] Colina refuted this allegation and stated that when the Policy was reinstated, Mr. McPhee should have been informed of this: see page 63 of the Transcript. According to Colina, this percentage is only added when an individual reinstates the Policy. See: "Reinstatements." It reads**:** "any additional company requirements in effect on the date for reinstatement."

[70] Colina also relies on Requirements 1 and 5 of the Owner's Statement affixed to the Policy Illustration which Mr. McPhee signed. In the Policy, reinstatement is defined as the restoration of a lapsed policy: see Agreed Bundle of Documents at Tab. 3, page 8. In order for a Policy to be reinstated it must follow the procedure outlined in its contract which is as follows:

> **"The Policy may be reinstated at any time within three years after the date of lapse if we receive the following:**
>
> 1. **evidence of insurability, for all Lives Insured satisfactory to us; and**
> 2. **sufficient premium to cover all past due Monthly Deductions plus interest at a rate we determine; and**

3. **receipt of the greater of the Target Premium and the Monthly Deductions due in the next three months;**

4. **any amounts borrowed on this Policy plus interest; and**

5. **any additional Company requirements in effect on the date of application for reinstatement."**

[71] Learned Counsel Mr. North submitted that in order for the Policy to be reinstated, Mr. McPhee had to provide Colina with evidence of his insurability. Upon reviewing the evidence of insurability, an additional requirement of Colina was to assess the same to determine if there was an increase in risk associated with continuing the Policy. In this case, he submitted that Colina determined that there was an increase in risk and provided a rating thereon in accordance with underwriting principles. So, while there is no express term in the Policy that provides for a plus 75% rating (indeed the rating could have been greater or lower) but the rating itself occurred in accordance with the requirements as stated in the Policy.

[72] According to the learned editors of **The Law of Insurance Contracts**, the position with respect to reinstatement after lapse is described as follows:

> **"In law this is an option which can be exercised and accepted by the former insured within a certain period of time and on certain conditions, such as satisfactory proof of good health. If the insured exercises the option in accordance with its terms, there is a (reinstated) contract and it is not open to the insurer to decline cover, unless the insured demands new terms not found in the lapsed Policy or declinature is authorized by the option itself"**[Service Issue No. 14 at 11-4C].

Account Value

[73] Mr. McPhee insisted that his Account Value was in excess of $7,000. This figure was formulated on the basis that (1) the GCOI was a fixed rate; (2) all premiums were paid in full and on time and (3) that the Investment Account performed as described in the Policy with interest accruing thereon at 3%.

[74] By letter dated 11 June 2014, Colina provided Mr. McPhee with a comprehensive letter including the Account Value which was $41.69 as at 30 April 2014.

[75] In addition, the Ledger produced by Colina showed all transactions from 9 August 2003 to 8 August 2014. The Investment Account Value showed a steady increase in savings for the first two years of the life of the Policy. Then there was a visible declining trend from 9 October 2005 to 6 September 2006. During that entire period, the account was in the negative and it was unable to meet the quarterly payments of the insurance. The result was a lapse in the Policy. The ledger also showed that a premium was paid on 21 June 2006 resulting in a reinstatement of the Policy. The account showed a very small progress in savings from 2006 to 2014 due to the lapse of the insurance on a few occasions; its subsequent reinstatements and the increase cost of the insurance annually.

[76] The reason for this sad state of affairs is simple. It is a fact that Mr. McPhee was inconsistent in paying the premiums in full and/or when due. As Colina correctly pointed out, this negatively impacted the performance of the Investment Account in two ways namely:

1. Due to non-payment and/or untimely payment of premiums, the Account Value was lower than it would have been had the payments been made on time; and

2. The monthly deductions from the Account Value in turn impacted the performance of the Investment Account. The amounts contained therein upon which interest was applied were significantly lower than it would have been if Mr. McPhee strictly followed the terms of the Policy and paid all premiums as and when due.

Conclusion

[77] In examining and assessing the evidence, one thing is clear. Often times, insured do not fully comprehend the understated details of their insurance policies until something adverse happens. This is a perfect paradigm of such situation. It cannot be gainsaid that the law on insurance contracts contains some rules

which are arguably pro-insurers and consequently highly prejudicial to the insured. These rules tend to defeat the very intent of insurance, i.e. the protection of the insured.

[78] That being said, this is not a difficult case. It involved a binding agreement – an insurance contract - signed by Mr. McPhee and Colina. It is clear from the Ledger that the Policy had lapsed about five times during its lifespan of about 11 years.

[79] For me, the most rewarding term of the Policy was the Investment Account Value. It allowed for an automatic saving plan to be attached to the Policy. This plan accumulated monies only when premiums are paid on time and in full. It grew steadily growing in cash value during the first two years of the life of the Policy. The purpose of this savings, as I understand it, is to allow for a reserve deposit account where Colina would have had the liberty to withdraw from the said account should Mr. McPhee be unable to pay his Policy as required by him. Following which the Policy would remain in force. But where, as in this case, there are numerous occasions when Mr. McPhee did not pay and/or pay the full premiums as required by the Policy, it depleted the reserve. For example, prior to 2014, Mr. McPhee did not pay the premium for almost a year before it lapsed. Mr. McPhee strongly believed that his Policy had savings of over $7,000 because of the plan. In reviewing the Ledger, I cannot agree with Mr. McPhee. The reality is that the Savings Account Value served its purpose. It paid all the premiums for Mr. McPhee when he was unable to do so for himself, for whatever reason. After, the account was depleted, there was no more reserve to resort to, therefore, Colina had no other choice but to lapse the Policy on 7 September 2014. The fact that Mr. McPhee paid the day after did not assist him because time was of the essence: see **Figre Limited v Mander** [supra].

[80] This is an unfortunate case because, in my considered opinion, Mr. McPhee was not fully ‘au fait’ with what appeared to be some ambiguous terms of the Policy. Needless to say, if Mr. McPhee was consistent in paying the premiums in full and/or when due, the sad state of affairs would not have ensued. On the occasions that he paid the premiums on time and in full, it did not adequately

compensate for the outstanding amount owed as the Policy increased in insurance coverage year after year. Looking at the Ledger, the only funds available is the last payment of $528.000 made on 8 September 2014; a day after the Policy had validly lapsed.

[81] Another aspect of misinterpretation arose as a result of Colina's use of the terms GCOI, COI, Mortality Tax and Mortality Charges. I accept Ms. Chatlani's evidence that they are one and the same thing. In examining the details of the Policy, it provided for GCOI. It states that it has a yearly renewable rate. Mr. McPhee felt that this meant that he had the option of setting the rate each year if he so desires. This, to my mind, is not a reasonable interpretation. "Yearly renewable rate" must mean that the rate will change yearly. Nowhere in the Policy does it state that the client has that option. If that were the case, no client would choose to increase rates. That also does not make good business sense. And insurance is a business.

[82] Although the rate of increase is unknown, I accept the explanation given by Ms. Chatlani that such an increase is based on the person's age and the risk associated with age. From Colina's standpoint, not all policies are set up in this manner but this was the one which Mr. McPhee accepted. The burden was on him to be satisfied with the terms before contracting. It appears that Mr. McPhee reinstated this Policy about three times and at no time did he write to Colina to have the terms altered. It was an option available to him. His failure to do so suggested that he was satisfied with the existing terms.

[83] I attribute some culpability to Colina for this confusion of the terms GCOI, COI, Mortality Tax and Mortality Charges as nothing precluded them from being consistent. However, the fact that a different terminology was used by a customer service agent does not negate the fact that a binding contract existed. As previously stated, I find that these terms were interchangeably used but are really one and the same thing.

[84] The other issue which impacted the Account Value of the Policy was the reinstatement rating of 75%. This was applied to the Policy when it was reinstated and resulted in an increase of the GCOI.

[85] As I see it, Colina owes Mr. McPhee the sum of $528.12 which they ought to pay to him.

Costs

[86] As a general rule, the unsuccessful party should pay the costs of the successful party. Costs are in the discretion of the Court. The Judge is required to exercise his discretion **judicially** i.e. in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All ER 529 at pp. 536-537.

[87] But that does not preclude a judge from departing from this normal practice. However, a judge ought to give reasons when deciding to make an unusual order as to costs: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ.

[88] Similarly, when a court is exercising its discretion as to costs, it is useful to bear in mind the following principles as espoused by **Atkin LJ in Ritter v Godfrey** [1920] 2 KB 47 at page 48. They are as follows:

> **"In exercising his discretion over costs a judge should be guided by the following principles. In the case of a wholly successful defendant the judge must give him costs unless there is evidence (1)that the defendant brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."**

[89] Applying these principles, I am of the opinion that I should depart from the usual order for costs. I do so because, in my opinion, the terms of the Policy are not very clear. For example, two issues could be confusing to a lay person namely (i) the meaning of the Yearly Renewable Term and (ii) the reinstatement rating of 75%. The mailing of Policy Annual Statements appears insufficient. Added to this, is the interchangeable use of GCOI, COI, Mortality tax and Mortality Charges. No doubt, this led to confusion. Consequently, I will make no order as to costs.

[90] Given the foregoing reasons, I will dismiss Mr. McPhee's action with no order as to Costs. Colina is to reimburse Mr. McPhee the sum of $528.12 by Friday, 4 November 2016.

Dated this 31st day of October A.D., 2016

Indra H. Charles

Justice