

Privy Council Appeal No. 101 of 1913.

**The Australian Widows' Fund Life Assurance
Society, Limited** - - - - - *Appellants,*

v.

**The National Mutual Life Association of
Australasia, Limited** - - - - - *Respondents.*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 23RD APRIL 1914.

Present at the Hearing :

THE LORD CHANCELLOR.	LORD MOULTON.
LORD DUNEDIN.	LORD PARKER OF WADDINGTON.
LORD SHAW.	

[*Delivered by* LORD PARKER OF WADDINGTON.]

The facts out of which this appeal arises are shortly as follows. The respondent association, having granted to one Patrick Moran a policy of assurance on his life for 5,000*l.* with profits, re-insured his life with the appellant society for the same amount without profits, the liability of the re-insurers being expressly limited to what was paid (irrespective of bonus additions) under the original policy. Patrick Moran, died and the respondent association, having, notwithstanding the protest of the appellant society, paid to his legal personal representative the sum of 5,000*l.*, sued the appellant society for that amount under the policy of re-insurance. The appellant society contended that its liability under the

policy of re-insurance, as also the liability of the respondent association under the original policy, was conditional on the truth of certain statements made by Patrick Moran when he effected the original policy, and that these statements were false, and false to his knowledge. The respondent association put the falseness of these statements in issue, and further alleged that whether the statements in question were true or false it had acted reasonably and in good faith in admitting and settling the claim on the original policy and that the appellant society was under the terms of the policy of re-insurance bound by such settlement and could not rely on the untruth of the statements in question. The action was tried before the Chief Justice of Victoria and a special jury. The jury found the statements in question to have been false, and false to the knowledge of Patrick Moran, but they also found that the respondent association in settling the claim on the original policy acted reasonably and in good faith and in the honest exercise of its discretion to settle such claim so as to bind the appellant society, if it in fact had any such discretion. On these findings the Chief Justice dismissed the action, holding that on the true construction of the policy of re-insurance the liability of the appellant society was conditional on the truth of the statements which the jury had found to be false, and that the appellant society was not bound by the settlement effected by the respondent association of the claim against it on the original policy. On appeal the Full Court of Victoria by a majority reversed the decision of the Chief Justice, and directed judgment to be entered for the respondent association for the amount claimed. The High Court of Australia by a majority confirmed the decision of the Full Court and the appellant society is by special leave appeal-

ing from the order of the High Court. The result of the appeal depends entirely on the construction to be placed on the two policies and in particular on the policy of re-insurance. Their Lordships will therefore proceed to examine the terms of these documents in greater detail.

The original policy was dated the 2nd January 1908. It recited that the assured had lodged with the respondent association a proposal and declaration and had made a personal statement to a medical officer of such association, which proposal declaration and personal statement formed the basis of this contract. By the operative part of the policy the respondent association contracted to pay the sum assured or other the monies payable thereunder within one calendar month after the death of the assured, with a proviso postponing payment until such proof of the identity of the claimant, the validity of the claim, and the age of the assured as the directors should consider necessary had been deposited with the association. The policy contained a clause to the effect that the policy should be avoided and all monies paid thereunder forfeited to the association in any of the events therein specified, that is to say (a) if any premium should be unpaid for 30 days after it became payable but so that if the policy had a surrender value such surrender value should be applied by the directors in payment of the premium in arrear; (b) if the proposal or any document on the faith of which the policy was granted contained any untrue statement, or if the person making the proposal had with a view of obtaining the policy made any false statement or been guilty of any concealment or misrepresentation, and (c) if the person assured committed suicide within 13 months from the date of the policy, with a proviso for the protection of *bonâ*

vide assigns for value. The policy also contained a clause reducing the sum assured and the amount payable in respect of profits, if the age of the assured had been understated.

It is not, and in their Lordships' opinion, having regard to the principle laid down in *Thomson v. Weems* (9 Ap. C. 671), could not be disputed, that under this policy the liability of the respondent association was conditional on the truth of every statement of fact contained in the several documents made the basis of the contract, except the statement as to the age of the assured, with regard to which special provision is made. The assured had, as a matter of fact, made two personal statements, one to Dr. Stokes and one to Dr. Warren, each of these gentlemen being a medical officer of the respondent association. Both statements were substantially to the same effect, and one of them (it does not matter which) is no doubt the statement referred to in the policy.

The policy of re-insurance was dated the 29th January 1908. It recited that the respondent association having an interest in the life of the assured had, by a proposal and declaration dated the 2nd January 1908 applied to the appellant society to have such life assured in the appellant society by effecting a policy on such life payable within one month after proof of the death of the assured. It also contained a recital that the statements contained in the proposal and declaration, together with the statements contained in the personal statements made to Doctors Stokes and Warren already referred to, were the basis of the contract, and were to be deemed to be part thereof and incorporated therewith. It further contained a recital that the appellant society had agreed to accept the proposal of the respondent association. By the operative part of the policy the

appellant society contracted that in the event of the death of the assured while the premiums under the policy were duly paid the society would pay to the association the sum of 5,000*L.* within one calendar month after such evidence as the Board of Directors of the appellant society might consider necessary to establish the age, identity, and death of the assured, had been supplied to the society. Provided that under no circumstances should the amount payable by the society exceed that paid by the association under the original policy irrespective of any amount payable thereunder by way of bonus.

Apart from any inference to the contrary to be drawn from the recital that the appellant society had agreed to accept the proposal of the respondent association, it was not, and indeed it could not be disputed that the liability of the appellant society under the policy of re-insurance was conditional on the truth of the statements made the basis of the contract. Further, apart from any effect to be attributed to this recital the terms of the policy of re-insurance differ in almost every particular from the terms of the original policy. The basic conditions are different. The premiums are different. The original policy allows, but the policy of re-insurance does not allow, a period of grace for the payment of premiums. The monies assured differ in amount and are payable at different dates. The persons to determine the sufficiency of the evidence as to the age, identity, and death of the assured are different. The original policy contains a number of special provisions which are not contained in the policy of re-insurance. Everything therefore points to the policy of re-insurance being an independent contract of assurance rather than a contract of indemnity. Even the provision limiting liability under the policy of re-insurance to the amount paid under the original policy

would be unnecessary if the contract were one of indemnity only. It is in their Lordships' opinion important to remember all this in considering the effect of the recital last referred to.

It was admitted by the appellant society in the pleadings, and assumed throughout the proceedings in the Courts below and in the arguments before their Lordships' Board, that the effect of this recital was to incorporate in the policy all the terms of the proposal for re-insurance dated the 2nd January 1908. Their Lordships are not satisfied that the recital has any such effect. The recital may very well mean that the directors of the society have determined to accede to the application of the respondent society for a policy of re-insurance, leaving the terms on which such policy was granted to be specified in the ordinary way in the policy itself. According to the preceding recital the policy is to incorporate the statements contained in the proposal and not the proposal itself. Having regard however to the admission in the pleadings, their Lordships will assume that the recital has the effect of incorporating in the contract the terms and conditions of the document of the 2nd January 1908.

The document of the 2nd January 1908 contains the following clause :—

“ It is understood that in accepting the risk under this “ re-assurance the Australian Widows Fund Life Assurance “ Society, Limited,” (*i.e.*, the appellant society) “ does so on “ the same terms and conditions as those on which the “ National Mutual Life Association of Australasia, Limited ” (*i.e.*, the respondent association), “ have granted a policy “ and by whom in the event of claim the settlement will “ be made.”

Suppose then that this clause had actually been repeated in the policy itself, what would be its effect? As already pointed out the expressed terms of the policy of re-assurance are in almost

every respect different from the terms of the original policy. It would be contrary to all sound canons of construction to reject or modify the expressed terms of the policy in order that it might be made to conform to the general words of the clause in question. Such clause would almost necessarily be construed as if it were prefaced with the words "except as herein otherwise provided." It would be only less difficult to maintain that the effect of the clause was to introduce into the policy of re-insurance provisions relating to (a) application of surrender value towards payment of premiums in arrear, or (b) forfeiture of premiums already paid, if the basic conditions of the contract were not fulfilled, or (c) the allowance of days of grace. But it is enough to say that the incorporation in the policy of the clause in question cannot be allowed to contradict the express provisions of the policy. And yet this is in reality exactly what the respondent association contends for and exactly what has been allowed in the High Court of Australia and the Full Court of Victoria. The somewhat ambiguous words "by whom in "the event of claim settlement will be made" are construed as meaning that if the respondent association acting reasonably and in good faith admit, and settle, its own liability under the original policy, the appellant society is bound by such admission and settlement, and is liable under its own independent contract of re-insurance, notwithstanding the fact that according to the express terms of such contract, no liability has in fact arisen. Sir Samuel Griffith, C.J., appears to have been fully aware of the difficulty involved in so construing and giving effect to the words in question, and he endeavours to meet this difficulty in the following way: In his opinion although the *prima facie* meaning of of the clause which makes the statements which

the jury found to be false the basis of the contract, is to make the liability of the appellant society conditional on the truth of such statements, yet this *primâ facie* meaning is controlled by the incorporation in the policy of the clause contained in the document of the 2nd January 1908. In reality, he says, it is not the truth of the statements which is made the basis of the contract but the fact that the statements were made, so that there is no contradiction of any express term of the contract in giving to the incorporated clause the effect for which the respondent association contends. The policy is no longer an independent contract but a contract of indemnity, in which it would be quite reasonable to insert a provision making any *bonâ fide* settlement effected by the respondent association binding on the appellant society. Their Lordships do not dissent from the proposition that if the clause of the policy, which defines the basis of the contract, could be so construed, the difficulty would be considerably diminished if not altogether obviated. But in their opinion it is impossible to hold that the perfectly clear provision as to the basic conditions, and indeed the whole tenor of the contract, should be so profoundly altered by the terms of a clause which is incorporated by reference, which is in itself ambiguous, and which may have been inserted with a totally different intention, as for example in order to make an agreement between the respondent association and the legal personal representative of the deceased as to the amount due when the liability was undisputed, binding on the appellant society, or in order to preclude interference by the appellant society between the respondent society and its own customer.

In their Lordships' opinion, having regard to the facts found by the jury, the appellant society

is not and never was liable on the policy of re-insurance, and they will therefore humbly advise His Majesty that the appeal should be allowed, that the orders of the High Court and of the Full Court of Victoria should be discharged, and the judgment of the Chief Justice of Victoria should be restored, and that the respondent association ought to pay the costs of this appeal and the costs in the Courts below.

In the Privy Council.

THE AUSTRALIAN WIDOWS' FUND
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v.

THE NATIONAL MUTUAL LIFE ASSO-
CIATION OF AUSTRALASIA, LIMITED.

DELIVERED BY
LORD PARKER OF WADDINGTON.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1914.