
**Hilary Term**
[2023] UKPC 8
**Privy Council Appeal No 0106 of 2021**

# JUDGMENT

# Dorsey McPhee (Appellant) *v* Colina Insurance Ltd (Respondent) (Bahamas)

## From the Court of Appeal of the Commonwealth of The Bahamas

before

**Lord Hodge**
**Lord Leggatt**
**Lord Stephens**
**Lady Rose**
**Lord Woolman**

**JUDGMENT GIVEN ON**
**2 March 2023**

**Heard on 6 October 2022**

*Appellant*
Daniel Feetham KC
Rowan Pennington-Benton
(Instructed by Sheridans)

*Respondent*
Jawdat Khurshid KC
James Bailey
(Instructed by Reynolds Porter Chamberlain LLP (London))

**LORD WOOLMAN:**

## Introduction

1. In August 2003 Dorsey McPhee, an attorney in The Bahamas, took out a $150,000 life insurance policy (all sums are in Bahamian dollars and have been rounded up). Soon afterwards Mr McPhee applied to convert the policy to a 'universal life insurance policy'. The insurer accepted his proposal and issued a new policy in October 2003. Colina Insurance Ltd took over the insurer's rights and obligations as from 1 January 2004.

2. The policy continued for ten years. Colina increased the charges each year. On 18 August 2014 Colina sent him a notice of pending cancellation. It stated that Colina had not received payments required to ensure that the policy remained in force and, unless he remedied matters, the policy would lapse on 7 September 2014. Mr McPhee did not comply with that requirement. Instead he tendered payment the following day. Colina maintains that he was too late - the policy had already lapsed.

3. Mr McPhee contends that the increases were unlawful. There was no contractual underpinning to justify what Colina had done. In these proceedings, he seeks declaratory orders and damages. He submits that, rather than a shortfall, the policy had a cash surrender value in excess of $7,000 in September 2014. Accordingly, it did not lapse.

4. After trial, the Supreme Court of The Bahamas (Charles J) found in favour of Colina. The Court of Appeal upheld her judgment. Both courts held that the increased charges were justified and that the policy lapsed on 7 September 2014. Mr McPhee appeals to the Board with the permission of the Court of Appeal.

## Nature of universal life insurance

5. Universal life policies originated in the United States in the 1970s. They have twin aims: flexibility and tax-efficiency. Typically, they operate as follows. The net premiums (after tax) are paid into a savings account. From there the insurer deducts sums to meet the cost of the insurance, together with other miscellaneous charges.

6. Because the cost of insurance is linked to the policyholder's age, the premiums at the outset will exceed the deductions. Later, the position will reverse. By then,

however, there should be an accumulated surplus in the account to meet any shortfall or to cover a missed premium payment.

**Inception of this policy**

7. In advance of the conversion to a universal life policy, the insurer sent Mr McPhee an application form, which contained a policy illustration and an owner's statement. It drew attention to five points. First, the illustration had to be reviewed with the policy. Second, the illustration assumed that the premiums would be paid as scheduled. Third, the policy would be for a "yearly renewable term". Fourth, the "cost per $1,000 of coverage increases annually". Fifth, the owner's statement contained "important explanatory notes".

8. The material parts of the owner's statement can be summarised as follows:

(i) All the illustrated values depended on several factors and were not guaranteed.

(ii) The premium payments required to keep the policy in effect might be higher or lower than those illustrated.

(iii) Any changes in the insurance amount, in the cost of insurance option, or in the death benefit, would be based on (a) the rates in effect and (b) the insured's attained age at that time.

(iv) No death benefit would be payable in the event of a policy lapse.

9. Mr McPhee signed the owner's statement on 5 September 2003. In doing so, he confirmed that he had "reviewed this entire illustration" and it had been explained to his satisfaction. His insurance adviser signed on the same date, likewise confirming that he had (i) reviewed the illustration, (ii) explained it to his client's satisfaction, and (iii) given him a copy.

**Scope of the contract**

10. The owner's statement stated that the illustration was not a contract nor an offer to provide insurance and that the terms of the policy should prevail. It was not, however, superseded because the policy contained the following term:

> "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."

The "application" must refer to the earlier document signed by Mr McPhee, encompassing the form, the policy illustration, and the owner's statement. Put short it is an "entire agreement" clause of wider scope than usual.

**Terms**

11. The policy defined five key terms (here put in lower case to aid readability):

| | |
|---|---|
| "account value" | the amount of net premiums plus earnings paid less monthly deductions taken out of the policy to cover all benefits |
| "guaranteed cost of insurance" | the deduction from the account value used to pay for the insurance under this policy |
| "lapse" | the termination of the life insurance coverage due to nonpayment of monthly deductions |
| "monthly deductions" | the deduction made each month from the account value to pay for all benefits under this policy |
| "reinstatement" | the restoration of a lapsed policy |

12. Some features of the policy require explanation. First, Mr McPhee could request to change the guaranteed cost of insurance "to the level rate applicable to his … attained insurance age in the table". Next, the policy lapsed 30 days after the account value was insufficient to pay the monthly deductions. But that was not the whole story. There was a 30 day grace period during which the policy remained in force.

13. Finally, the policy allowed Colina to reinstate a policy within three years of the date of a lapse if it received: (i) satisfactory evidence of insurability; (ii) sufficient premium to cover all past due monthly deductions, plus interest; (iii) the greater of the target premium and the monthly deductions due in the next three months; and (iv) any amounts borrowed on the policy, plus interest. There was an important fifth condition. Mr McPhee had to comply with "any additional company requirements in effect on the date of application for reinstatement".

**Financial arrangements**

14. The initial quarterly premium rate was $528, which Mr McPhee had to pay on the ninth day of February, May, August and November. Colina made an initial monthly deduction of $97 from the investment account. That comprised the guaranteed cost of insurance ($75), a waiver of premium on disability ($13), and an administration charge ($9). The waiver of premium yielded benefits if Mr McPhee became disabled in specific circumstances. It is not material for present purposes.

**Tracing the life of the policy**

15. Colina maintained a ledger recording each transaction relating to Mr McPhee's policy. It shows that the guaranteed cost of insurance rose from $75 in 2004 to $204 and then $224 in 2014, with two increases in 2006 ($108 then $115).

16. Colina increased the monthly deductions (i) on an annual basis from 2006 onwards, (ii) on the five occasions it says it reinstated the policy, and (iii) in particular, by applying a one-off 'plus 75% rating' in 2006. It is useful to map the increases against the dates when the policy lapsed and was reinstated:

| **Lapse** | **Reinstatement** |
|---|---|
| 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 |

(It is not clear how the policy could have lapsed on 18 January 2006, which is the same date as the reinstatement, but those are the concurrent findings of fact.)

17. From 2005 until 2014, Colina provided Mr McPhee with annual statements. They showed the opening fund balance, the premiums paid, the monthly deductions, any withdrawals, premium tax, interest earned, the closing fund balance, the surrender charges, and the cash surrender value. They made the financial position clear - the account was not performing in line with expectations.

18. On 18 February 2014, Colina sent a notice of pending cancellation to Mr McPhee. It reminded him that although premiums had been paid up to November 2013, insufficient payments had since been made and the policy would lapse if he did not rectify matters by 7 March. He cured the problem by making a payment on that date. Three days earlier, however, he had written to Colina to raise two matters. He stated that it was in breach of contract by charging him a "mortality tax". He also asked it to confirm that his policy had a cash surrender value of at least $5,654. Colina replied on 1 April giving a full account seen from its perspective:

> "… we have interpreted … "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: …
>
> iii. the COI is a calculated amount that pays for the life insurance benefit of the universal life policy …
>
> iv. the COI option for your policy is the yearly renewable term (YRT). This COI option is based on the life insured's attained age, sex, smoking status and current rate class. The

YRT COI increases every year on the policy anniversary date. The policy will remain in force as long as the target premium is paid quarterly when due, no loans or withdrawals are taken and the minimum interest rate is earned.

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 at age 65. As per the contract, COI and expense charges will continue to be deducted from your policy fund value."

19. Around this time, Mr McPhee retained Desmond Edwards as his counsel. On 3 and 29 April, Mr Edwards requested more information about the cash surrender value. Colina replied on 11 June 2014. It summarised the relevant policy provisions and appended a schedule showing a summary of transactions from 9 August 2003 until 30 April 2014. On the latter date the account had a credit balance of $54 (which reflected slight upwards adjustments made by Colina in respect of interest and tax).

20. On 18 August 2014, Colina sent another notice of pending cancellation after the account value was insufficient to meet the quarterly premium due on 9 August. This was because, as at 9 July 2014, the account value was $140, while the monthly deductions totalled $201. It warned Mr McPhee that the policy would lapse if he did not make payment of the premium by 7 September 2014. Mr McPhee did not make payment on that date. Instead, he tendered the premium the next day.

**The issues**

21. There are two intertwined issues. The first is one of contractual interpretation. Did the policy empower Colina to increase the monthly charges? The second relates to the application of the contract to the facts. Did the circumstances justify the increases and give rise to the lapse of the policy?

**Did the policy allow increases?**

22. Colina had the right to apply an annual uplift. That is clear from the terms of the policy. Mr McPhee took it out on the basis that he would pay at the "yearly renewable rate". He had the right, however, to request a transfer to a "level rate". Each of those two terms must have a different meaning. It runs counter to common sense to suppose that the parties intended to give him an illusory choice. A level rate must mean a fixed rate. The ineluctable inference is that a yearly renewable rate must mean an increasing one.

23. The policy illustration puts the matter beyond doubt. It expressly states that the "cost per $1,000 of coverage increases annually". It formed part of the contract, but is in any event admissible as part of the matrix. As there is no ambiguity, there is no room to apply the *contra proferentem* rule: *Burnett or Grant v International Insurance Co of Hanover Ltd* [2021] UKSC 12, [2021] 1 WLR 2465, per Lord Hamblen at para [29].

24. What about the occasions when the policy lapsed? The answer to that question is also yes. Colina could impose "any additional company requirements in effect on the date of application for reinstatement". That included the right to increase the charges on reinstatement. Mystery attached to the one-off uplift of the "plus 75% rating" in 2006. It is a mystery because the arithmetic suggests a lower figure and because Colina could not explain how the uprating gave rise to that lower figure.

**Did the relevant circumstances occur?**

25. Mr McPhee maintains that he was not (a) provided with the table of insurance charges, (b) notified of the policy lapses and reinstatements, (c) issued with annual statements, or (d) sent the February 2014 notice of pending cancellation.

26. Taking them in turn, (a) was not put in issue as a disputed fact so no finding was made about it. So far as (b) is concerned, Mr McPhee made his position clear in the Statement of Claim: "… if a premium ever went unpaid and the policy lapsed he had it reinstated within a week or so upon such notification." That conceded the position. The trial judge found against him in respect of (c) and (d). These matters cannot now be reopened.

27. The owner's statement signed by Mr McPhee warned him about the non-payment of premiums. He ought to have been aware of the adverse trend from the

annual statements. They charted the decline in the policy value, which gave rise to the default and occasioned the lapse of the policy on 7 September 2014.

28. In the written argument lodged on his behalf, Mr McPhee submitted that the policy lapsed later than 7 September 2014. Counsel (correctly) did not press this point at the hearing. The contract and the notice pointed inevitably to 7 September 2014 as being the date of lapse (in accordance with the 60 day lapse period contained in the policy).

**The contrary view**

29. What of the argument that the burden of proof lay on Colina? Significantly, that was not the focus of Mr McPhee's challenge, either at first instance, or before the Board. In the absence of full submissions, there is a concern about holding that he did not have the onus of establishing his case. Even if the burden of proof was on Colina, however, there were four strands of evidence that entitled the trial judge to hold that the deductions were "justified" by the contract.

30. First, Mr McPhee's central case was one of fraud. The trial judge rejected that assertion. She held that the Universal Life Policy did authorise Colina to increase the guaranteed cost of insurance each year in line with the age of the insured.

31. Second, Colina's only witness was Ms Chatlani, whom the judge described as "knowledgeable and sincere". Her evidence was as follows. She had prepared the figures set out in the defence using Colina's computerised administration system. She adjusted some figures to correct minor errors relating to interest and tax rates. The annual increases were based on the relevant risk class, although she did not know how they were calculated. The increases would be as per the policy stipulations. The transcript of her cross examination does not provide a basis for the judge's summary (at para 58 of her judgment) that Ms Chatlani was "unable to say by how much" the figures increased annually. Properly construed, her evidence was that the sums increased as per the policy, but she could not say how the rates applicable to the relevant risk group had been calculated.

32. Third, the table in Colina's letter of 11 June 2014 shows the annual increases in guaranteed cost of insurance. They range from 7.5% in the early years to 9.5% in year 10. Clearly Ms Chatlani saw nothing remarkable in those figures apart from 2006, which is discussed in para 35 below.

33. Fourth, Mr McPhee did not contend that the figures for guaranteed cost of insurance increases in Colina's computer programme were not based on the appropriate risk group. The judge was therefore entitled to infer that they did provide an accurate record.

34. In short, regard must be had to the nature and scope of the contest before the judge. While the best evidence of the contractual terms was not produced, there was material on which she could rely for her conclusion.

35. Turning to the events of 2006, it is accepted that the lapse and 75% surcharge remain a mystery. But the same general observation may be made. In the context of the issues argued out before her, the judge was entitled to conclude that the policy had lapsed and Colina could impose the surcharge on reinstatement, for the following reasons:

(i) Mr McPhee's acceptance that "if a premium ever went unpaid and the policy lapsed he had it reinstated within a week or so upon such notification".

(ii) On several occasions, non-payment of premiums led to insufficient funds to meet the charges, thus triggering a lapse.

(iii) The computer entries showing charges during the period of lapse are evidentially neutral. Ms Chatlani explained that Colina's practice was to enter the charges once the policy had been reinstated. To hold that there was no lapse would be to discredit her evidence. That course is not open to the Board, standing the trial judge's acceptance of her credibility.

(iv) Ms Chatlani's evidence that after the 2006 lapse Colina imposed a 75% rating on reinstatement was not explored further on cross-examination. In particular, there was no examination of whether condition 5 of the requirements for reinstatement extended to such a surcharge. Ms Chatlani is an actuary with extensive experience of Universal Life Insurance. It is notable that she appears not to have been concerned about the surcharge. That suggests that she saw no irregularity in what happened.

**Conclusion**

36. The Board will humbly advise His Majesty that the appeal should be refused.

**LORD LEGGATT AND LORD STEPHENS (dissenting):**

37. We gratefully adopt Lord Woolman's summary of the facts and agree with his summary of the issues. We disagree, however, with the conclusions of the majority of the Board on points which determine the outcome of this appeal.

**The dispute**

38. When Mr McPhee began this action, he was disputing that his universal life insurance policy with Colina had lapsed and thereby terminated on 7 September 2014, as Colina maintained, and that his account with Colina was in deficit at that time, as Colina also maintained. The two matters were linked, as whether the policy had indeed lapsed depended on the true state of account between the parties. But whether or not the policy had lapsed is no longer of any practical relevance. This is because Mr McPhee has never sought to continue or reinstate the policy and on any view is now long out of time for doing so. What is left is a dispute about the account value on 7 September 2014. If on a correct analysis of the parties' respective contractual rights Mr McPhee's account had a positive value at that time, then Colina owes him money.

**Ascertaining the account value**

39. The "account value" is defined in the policy as the amount of net premiums plus earnings paid less monthly deductions made to pay for all benefits under the policy. The main monthly deduction, and the only one relevant on this appeal, is a charge made for the death benefits provided by the policy, referred to as the "cost of insurance".

40. There is no dispute about the amount of net premiums plus earnings paid by Mr McPhee. Nor is there any dispute about what charges were in fact deducted by Colina in calculating the account value. Colina included in its defence a summary, which the trial judge (Charles J) accepted as accurate, showing all sums credited and debited to the account from the inception of the policy on 9 August 2003 to 9 August 2014.

41. The summary shows that the initial monthly cost of insurance deducted from the account value was $74.62 - which corresponds to the description of initial deductions shown on the front of the policy document. This monthly charge was increased on each anniversary of the policy date. Thus, on 9 August 2004 the monthly charge was increased to $80.25, and on 9 August 2005 to $86.37, with further increases made on each subsequent anniversary. In addition to these yearly increases,

there was a further one-off increase made on 9 July 2006. The amount charged as the monthly cost of insurance was increased on that date to $108.25, and was then further increased to $114.75 a month later at the policy year end.

**The issues**

42. What is in issue is whether Colina was entitled under the terms of the policy to make these increases in the monthly charges for the cost of insurance - that is to say (1) the yearly increases and (2) the one-off increase made in July 2006. (There is an interaction between the two, as it appears that the one-off increase was used as the baseline for the next and all subsequent yearly increases.) In relation to each type of increase, two questions arise: (a) did Colina have a contractual right to make any increase of that type in the monthly charge; and (b) if so, was Colina entitled to make the increase(s) that it did?

**The burden of proof**

43. Before addressing these questions, there is a preliminary point of law that needs to be determined: in so far as Colina's contractual entitlement to increase its charges for the cost of insurance depended on matters of fact, which party bore the burden of proving the relevant facts at the trial? This question does not seem to have been considered in the courts below and counsel on this appeal were not able to cite any authority on the point. But in principle we think the legal position is clear.

44. Although it is not in law a bank account as a life insurance company is not authorised to take deposits, the savings account which forms part of a universal life policy is intended to operate as if it were a bank account. Premiums paid to the insurer are added to the account value. When sums owed by the insured to the insurer - including the ongoing costs of buying life insurance - fall due, the insurer collects payment by deducting them from the account value. If the account value becomes negative, the negative value represents a debt owed by the insured to the life insurer.

45. As the right to be paid the cost of insurance is a right asserted by the insurer, then, in accordance with the general rule that whoever asserts must prove, it is the insurer who bears the burden of proving any facts necessary to establish that right. This means that where, as here, the insured disputes liability to pay amounts charged and deducted from the account value, it is the insurer who must demonstrate its right to make those charges and prove any facts on which the existence of that right depends.

46. The judge found that Mr McPhee received policy annual statements on each anniversary date which showed (amongst other information) the total amount of monthly deductions made during the year. If Mr McPhee had compared this amount from one year to the next, he would have seen that it was increasing. He could also have divided the amount shown by twelve, in which case he would have seen that, after the first year, it was higher than the initial monthly amount deducted. It was not until 2014 that Mr McPhee disputed the amounts deducted for the cost of insurance. It has not been suggested, however, that his failure to dispute the right to charge those amounts sooner gives rise to an estoppel or any other legal reason which dispenses with the need for Colina to show that it was indeed entitled under the terms of the policy to charge the amounts that it did. It is well settled that a customer is under no duty to examine bank statements and therefore cannot be estopped from disputing liability merely because of failure to notice their inaccuracy and draw it to the attention of the bank, even if a prudent and careful customer would have done so: see eg *Encyclopaedia of Banking Law* (2022) Division C, paras 384, 407; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80. The same reasoning must apply by analogy in this case.

**The right to make yearly increases**

47. We first consider the yearly increases in the amounts charged. Mr McPhee's primary case is that under the terms of the policy Colina had no right to make any yearly increase in the charge made for the cost of insurance at all. We agree with the majority of the Board that this contention is unsustainable.

48. The policy provided that on each monthly deduction date there was to be deducted from the account value (along with a flat administration charge) the guaranteed cost of insurance for the primary life insured multiplied by the amount of insurance at risk. The policy further provided that "the monthly guaranteed cost of insurance is one-twelfth the rate shown in the table of guaranteed cost of insurance charges at the end of this policy".

49. The dispute about the amount of the guaranteed cost of insurance charge applicable on any given date could have been easily resolved if either party had produced a copy of this table. However, neither party did so. Although the lawyer then acting for Mr McPhee asked Colina in pre-action correspondence to provide a copy of the table, it was not provided. It is fair to infer that Mr McPhee did not at that stage have a copy of the table in his possession, as he was asking Colina for it and it was not included in the policy document that he produced either in his evidence for the trial or when he made his original policy document available for inspection at the request of the Court of Appeal. It does not follow, however, that Mr McPhee was not provided

with the table when the policy was issued or that no table ever existed. We agree with Lord Woolman that, although Mr McPhee has asserted on this appeal that he never received a copy of the table, he did not put this in issue as a disputed fact at the trial. The judge was in these circumstances entitled to assume that the original policy did incorporate such a table even though neither party had produced it.

50. Under the heading "Change in Cost of Insurance", the policy provided as follows:

> "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. …"

51. Even without sight of the table of guaranteed cost of insurance charges, some information about its contents can be deduced from the policy provisions that refer to the table. In particular, it is apparent that the table specified (a) a "yearly renewable term" rate and (b) a "level rate" applicable to the age of the insured in any given year. It is a matter of common knowledge that the risk of mortality increases with age and it is therefore obvious that, on each yearly renewal, as the age of the insured increased, the yearly renewable guaranteed cost of insurance rate shown in the table must have increased. That is also implicit in the option to switch to the "level rate" applicable to the age of the insured. Manifestly, if a request was made to change from the yearly renewable rate to the level rate and the insurer approved the change, the rate would thereafter remain level (ie constant). The corollary is that the yearly renewable rate was a rate that did not remain constant but increased from year to year. It is also apparent that, to enable the rate to remain constant if the level rate option was chosen, the level rate must in any given year have been higher than the yearly renewable rate applicable to the age of the insured.

52. It is not suggested that Mr McPhee ever made a request for his guaranteed cost of insurance rate to be changed from the yearly renewable rate to the level rate. It follows that the judge was right to conclude that, under the terms of the policy, the monthly guaranteed cost of insurance charge was not a fixed amount but was an amount which increased annually. We agree with Lord Woolman that yet further support for this conclusion is provided by the policy illustration signed by Mr McPhee before taking out the policy. This contained an express statement that under the cost of insurance option chosen by him, which was yearly renewable term, "the cost per $1,000 of coverage increases annually".

**The amounts of the yearly increases**

53. This is not the end of the matter, however, as in order to show that the yearly increases in the guaranteed cost of insurance charged by Colina were justified by the terms of the policy, Colina needed to prove what the yearly renewable rates specified in the table incorporated in the policy for each relevant year were. The best evidence would of course have been the original table itself or a copy of it; but, as stated, this was not produced. In the absence of the table, it was open to Colina to prove its contents in other ways. The company could, for example, have adduced evidence of the standard rates applicable to someone fitting Mr McPhee's general description (male, non-smoker) at the time when the policy incepted and have invited the court to infer that these were the rates contained in the table. However, this was not done. Indeed, no evidence at all was given about the rates which the table contained. The judgment of Charles J (at para 57) records Mr McPhee as arguing that Colina could not "demonstrate any formula as to how they calculated the mortality charge." It seems that Mr McPhee was right. The following paragraph of the judgment (para 58) records that the only witness called by Colina, Ms Chatlani, explained that the cost of insurance in the policy was the same as the mortality charge and that "this figure increases annually per thousand of coverage but *she was unable to say by how much*" (emphasis added). Later in the judgment (at para 82) the judge found as a fact that "the rate of increase is unknown".

54. It is not open to the Board to go behind these unchallenged findings. But in any event the transcript of Ms Chatlani's cross-examination amply bears them out. It is plain from the transcript of her evidence that she was unable to say that the annual increases made corresponded with those provided for in the policy, as she did not know what the rates provided for in the policy were.

55. The inability of Colina either to produce the table or to demonstrate what the rates specified in the table were is not just a formal or technical point. It raises real uncertainty about how Colina was in fact deciding what annual increase to make throughout the period when the policy was in force, including the final year when Mr McPhee was challenging the basis of the yearly increases. Thus, on 9 August 2014, just a few weeks before on Colina's case the policy lapsed, the monthly charge made by Colina for the guaranteed cost of insurance was increased from $204.13 to $223.99. Unless Colina either had a copy of the table or knew what it contained, it could not apply the correct increase. The same applies to every yearly increase made. The failure of Colina to show what the contractual yearly rates were indicates either incompetence in its conduct of this case or that Colina was not in fact applying the contractual rates but was using some other, perhaps current rather than historic, rating table.

56. The judge did not explain how in these circumstances she could conclude, as she did at para 67, that the annual increases in the guaranteed cost of insurance were justifiable under the policy. She seems not to have distinguished between the question whether the policy provided for annual increases and the question whether the annual increases actually made by Colina were those for which the policy provided. Had these questions been separately considered as they should have been, the judge would have been bound to conclude that, as Colina had adduced no evidence of what increases were provided for by the policy, it had failed to show that the increases in the guaranteed cost of insurance charges actually made on each policy anniversary were increases that Colina was contractually entitled to make. The same error was made by the Court of Appeal.

**The one-off increase**

57. We turn to the one-off increase in the guaranteed cost of insurance charges made by Colina in July 2006. As this increase was not made on an anniversary of the policy date, it cannot have been justified by the table incorporated in the policy. Indeed, it is clear that this increase was inconsistent with the charges shown in that table. As discussed, it is apparent that the table specified a rate for each year that the policy remained in force which depended on the age of the insured in that year and did not change until the next yearly renewal date. Any increase in the rate charged made during a policy year must therefore have resulted in an amount charged which was inconsistent with the contractually guaranteed cost of insurance.

58. The explanation for the one-off increase pleaded in Colina's defence to the claim was that:

> "when the policy lapsed and was subsequently re-instated in 2006, a plus 75% rating was applied thereon which effectively increased both the premiums and guaranteed cost of insurance relative to that in the original policy."

When asked what is meant by a "plus 75% rating", Colina's witness, Ms Chatlani, said it means that Mr McPhee's premiums were increased by 75%. That explanation is unsatisfactory for several reasons. First, under the terms of the policy, there was no premium amount which the insured was obliged to pay. One of the selling points of a universal life policy is its flexibility in allowing the insured to choose how much money to pay into the policy provided that the account value is always sufficient to pay monthly deductions. There is a "scheduled" or "target" premium, which is calculated as the amount which, if paid, would ensure that the account value is always sufficient

to cover the monthly deductions so that the policy will remain in force for the entire lifetime of the life insured. The policy annual statements and other documents put in evidence, however, show that the scheduled premium payable by Mr McPhee never increased - either in July 2006 or at all. For example, a premium reminder notice dated 22 October 2013 identified the quarterly premium amount payable as $526.88. So did notices of pending cancellation dated 18 February 2014 and 18 August 2014. This figure (for reasons that are not apparent) is very slightly less than the quarterly premium amount during the early years of the policy, which was $528.12. What is clear is that Mr McPhee's premiums were not increased at all in July 2006, let alone by 75%. Logically, this amount would only increase if the charges made by Colina increased above those specified in the policy.

59. Although not mentioned by Ms Chatlani, the passage in Colina's defence quoted above asserted that the "plus 75% rating" increased both the premiums and guaranteed cost of insurance relative to that in the original policy. There was indeed an increase in the charges for the guaranteed cost of insurance made by Colina, which is the matter in dispute. It was not, however, an increase of 75%. The size of the increase (from $86.37 to $108.25) was in fact in percentage terms approximately 25%. Colina's evidence and pleaded case therefore does not correspond to, let alone give any coherent explanation for, what actually happened.

**The reinstatement clause**

60. Although unable to explain the increase, Colina nevertheless argued that it had power to impose it pursuant to the reinstatement clause in the policy, which was in these terms:

> "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; and

> 4. any amounts borrowed on this policy plus interest (otherwise the loan will be re-established); and
>
> 5. *any additional Company requirements in effect on the date of application for reinstatement*." (emphasis added)

Colina's case is that condition 5 in this clause gave it a contractual right to increase the guaranteed cost of insurance as a condition of reinstatement. The trial judge accepted this contention and the Court of Appeal (without giving any reasons) affirmed that decision.

61. The nature of a reinstatement clause in a life insurance policy is explained in the following passage from a textbook on the law of insurance contracts quoted by the judge (at para 72 of her judgment):

> "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."

A similar explanation can be found in *MacGillivray on Insurance Law*, 15th ed (2022), para 7-050.

62. Lord Woolman has set out at para 16 of his judgment a series of dates pleaded in Colina's defence on which Mr McPhee's policy is said by Colina to have (a) lapsed and (b) been reinstated. For present purposes, however, we need only be concerned with Colina's allegation that the policy lapsed on 18 January 2006 and was reinstated on 21 June 2006. That is because on each of the other four occasions pleaded no increase was made in the monthly charge for the guaranteed cost of insurance (another matter which Colina failed to explain).

63. Whether or when the policy lapsed, or was reinstated, is not a question of fact. It is a question of law which depends on the correct interpretation of the relevant policy provisions and their application to the facts found by the judge.

**Did the policy lapse?**

64. The policy provisions relating to lapse are as follows:

> "**Lapse**
> This policy will lapse 30 days after the account value is insufficient to pay the monthly deductions.
>
> **Grace Period**
> We allow a grace period of 30 days after the account value is insufficient to pay monthly deductions. During that time, the policy stays in force. If a premium is not paid by the end of the grace period so that the policy has a positive account value, the policy will terminate. …"

65. Although Colina's witness, Ms Chatlani, understood these provisions as allowing the insured a total of 60 days to restore the account value to a positive balance after it was insufficient to pay the monthly deductions, and the trial judge accepted this assertion, we think it was unduly favourable to Mr McPhee. On the plain wording of these provisions there is only one period of 30 days after the account value is insufficient to pay the monthly deductions during which the policy stays in force. This "grace period" of 30 days starts to run when the account value is insufficient to pay monthly deductions. If after 30 days the account value remains negative and therefore insufficient to pay monthly deductions, the policy will "lapse" or "terminate" (terms which mean the same thing).

66. The account summary produced by Colina (which we will assume in Colina's favour for the purposes of this issue is an accurate statement of the account value at the relevant time) shows that the account value was insufficient to pay monthly deductions charged on 9 October 2005 and did not return to credit until Mr McPhee paid three instalments of premium all on 21 June 2006. It follows that the policy lapsed on 8 November 2005. Colina nevertheless continued to charge monthly deductions such that by 21 June 2006 the account had a negative value of $954.04.

**The reinstatement conditions**

67. The conditions which Mr McPhee had to fulfil to reinstate the policy, if he wished to exercise the option to do so, were those set out in the reinstatement clause quoted at para 60 above. It may be noted that each condition is stated to be an item

which Colina must “receive” and that condition 5 contemplates an “application for reinstatement”.

68. The first condition is “evidence of insurability … satisfactory to us”, which we take to mean evidence satisfactory to Colina that the life insured is in good health. Condition 2 is a requirement to pay (with interest) all past due monthly deductions. Condition 3 is a requirement to pay in advance the greater of the target premium and the monthly deductions due in the next three months. The purpose of requiring payment of this sum is presumably to ensure that the policy will not immediately lapse again. There is nothing in this condition which justifies increasing either the target premium or the monthly deductions for the cost of insurance payable in the next three months from those which were payable before the policy lapsed. Condition 4, which relates to amounts borrowed on the policy, is not applicable in this case as there is no suggestion that Mr McPhee took out any such loan.

69. Colina’s argument, which the courts below accepted, is that condition 5 entitled the insurer on receipt of an application to reinstate the policy to review the evidence of insurability provided by the insured to determine if there was an increase in risk associated with continuing the policy and, if it considered that there was, to apply a higher rating to the future cost of insurance. An immediate problem with this argument is that there was no evidence: (1) that Mr McPhee applied to reinstate the policy in June 2006 (or at any time); (2) that he provided any evidence of insurability; (3) that there had been any deterioration in his health in the period of less than three years since the policy incepted; (4) that any determination was made by Colina that there had been any increase in risk (other than the increase with age already provided for by the terms of the policy); or (5) how the alleged increase in the guaranteed cost of insurance charge was calculated. These deficiencies are themselves fatal to Colina’s case that the increase made in the amount charged for the cost of insurance was justified by the terms of the policy.

70. In addition to these evidential failures, Colina’s case is untenable as a matter of law. Condition 5, on which Colina relies, cannot rationally be construed as giving the insurer power to impose any requirement that it likes as a condition of reinstatement. “A contract where one party truly found himself subject to the whim of the other would be a commercial and practical absurdity”: *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685, para 26.

71. It is clear, first of all, from the words used - as well as the unreasonableness of any other interpretation - that to fall within the scope of condition 5 “any additional Company requirements” must be “in effect on the date of application for reinstatement”. That means that any such requirement must be one which the

company has already established as a general rule and not one that it simply decides that it wishes to impose when it receives an application for reinstatement. Further, for the policy to be workable, the stipulation that the requirement is "in effect" must be construed as requiring it to have been promulgated to the insured. The insured cannot decide whether he or she wishes to exercise the option to reinstate the policy, and could not exercise the option even if he or she wished to do so, unless he or she has been told what the conditions are which need to be fulfilled in order to reinstate the policy.

72. An increase in the amount of future monthly deductions is not in any case a matter that is even capable of falling within the scope of condition 5. Read in the context of the clause as a whole, "any additional Company requirements" must be requirements, over and above those set out in conditions 1 to 4, to provide items to the insurer as a condition precedent to reinstatement of the policy. These could in principle include a requirement to make an additional one-off payment, in the nature of a fine, as a condition of reinstatement. But it is not suggested that Mr McPhee was required to make any such payment. The suggestion is that Colina was entitled to make higher monthly charges in future. That could only be a condition of reinstatement and something the insurer could "receive" if it was formulated as a requirement to *agree*, and for the insured to communicate his or her agreement, to such an increase in charges. Self-evidently, Mr McPhee could not agree to such an increase without being asked to do so and told that he would have to communicate such agreement if he wanted to reinstate the policy.

73. More fundamentally, if Colina insisted on such an increase in charges it would not be reinstating the policy. The guaranteed cost of insurance was, as its description indicates, a cost which was guaranteed not to change (other than in accordance with the table included in the policy) for the duration of the policy. The whole point of a reinstatement clause is that it gives the insured a contractual right in the form of an option to reinstate the original policy if the conditions precedent to reinstatement are satisfied. It would not be a reinstatement of the policy if the future charges for the "guaranteed" cost of insurance differed from those stated in the table.

74. In our opinion, therefore, condition 5 of the reinstatement clause cannot be construed as giving Colina a power to require an insured to agree to an increased cost of insurance if he or she wished to have further life insurance cover. That would defeat the right conferred by the reinstatement clause and place the insured in the same position as someone who did not satisfy the requirements of the clause and was simply applying for a new life insurance policy.

75. It should go without saying that the interpretation of policy conditions is a matter of law for the court on which witness evidence is inadmissible. No criticism can therefore properly be made of Mr McPhee for not exploring in cross-examination of Ms Chatlani whether on the correct interpretation of the policy condition 5 gave Colina power to impose an increase in the cost of insurance. Any such cross-examination would have been irrelevant and improper. For the same reason whether Ms Chatlani was concerned about the increase made or saw any irregularity in what happened is equally irrelevant.

76. In any event, there was no evidence given at the trial: (1) that Colina had any company requirement in effect in July 2006 that said anything about increasing the cost of insurance on reinstatement; (2) that any such requirement, even supposing it existed, had been or was ever communicated to Mr McPhee; or (3) that Mr McPhee agreed that the terms of the policy should be varied by increasing the guaranteed cost of insurance (as was anyway impossible in the absence of any request to agree to such an increase).

77. There are yet further reasons why Colina's attempt to rely on the terms of the reinstatement clause is flawed. There was no evidence that Mr McPhee ever made any application for reinstatement of the policy. He never claimed to have done so. Colina adduced no evidence that he did so. There is nothing to indicate that he provided any "evidence of insurability" to Colina. It appears, therefore, that Colina waived these requirements and allowed Mr McPhee to reinstate the policy by clearing the arrears on his account and restoring the account value to a positive balance. As noted in *MacGillivray on Insurance Law*, 15th ed (2022), para 7-050, "conditions of the revival of a lapsed policy may be waived by the company and prima facie would be waived by acceptance of the premium in arrear tendered after the expiration of the days of grace". That is what happened when Mr McPhee made payments into his account on 21 June 2006. The same appears to have happened on each of the other occasions when the policy lapsed and was later reinstated, until the policy was treated as terminated on 7 September 2014. The only difference between the reinstatement in June 2006 and the other reinstatements is that, after the reinstatement in June 2006, Colina made an increase in the monthly charges for the "guaranteed" cost of insurance which it has been unable to explain or justify.

78. For all these reasons, the case put forward by Colina at the trial, and accepted by the judge and by the Court of Appeal, for the one-off increase in charges made with effect from 9 July 2006 was unfounded. On a correct interpretation and application of the policy provisions the increase was not permitted by - and indeed was contrary to - the terms of the policy.

**Conclusion**

79. Mr McPhee did himself no favours in the courts below by making allegations of fraud with no proper basis, sacking his legal representative at the start of each hearing and representing himself, and advancing a hopeless argument that the yearly renewable rate that he had agreed to pay for the cost of life insurance was a fixed level rate which did not increase from year to year. But unmeritorious litigants can sometimes have the law on their side. Mr McPhee put squarely in issue the entitlement of Colina to make the increases in the monthly guaranteed cost of insurance charges that were made yearly and also, as a one-off, in July 2006. Colina - on whom the burden of proof lay - adduced no evidence at all to show that any of these increases was in an amount authorised by the terms of the policy; and the one-off increase made in July 2006 has been exposed as inconsistent with the policy terms. It follows, in our opinion, that the appeal should be allowed and the account value recalculated on the basis of the initial monthly guaranteed cost of insurance of $74.62.