8/6/82

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

NO. A.15/80

345

BETWEEN ROBIN PATRICK SPOONER-KENYON and PHYLLIS SPOONER-KENYON

Plaintiffs

A N D YORKSHIRE-GENERAL LIFE ASSURANCE COMPANY LIMITED

Defendant

A N D NOBLE LOWNDES (N.Z.) LIMITED

Third Party

Hearing: 29 March 1982

Counsel: M.H.N. Haggitt & S.J. Grant for Plaintiffs
N.J. Carter for Defendant
K. Amodeo for Third Party

Judgment: 3 June 1982

JUDGMENT OF COOK J.

The plaintiffs are the administrators of the estate of their son Timothy John Spooner-Kenyon, who died on the 5th March 1978, and their claim relates to a policy of life assurance issued by the defendant company. The deceased in fact had two policies upon his life with this company and upon his death payment was made in respect of one but declined in respect of the other.

As a first cause of action the plaintiffs, while acknowledging that the policy in question had become voidable by reason of non-payment of premiums, alleged that it was subsequently reaffirmed by the defendant and that,while the premiums were in arrears at the date of death, the policy was still in force. As an alternative cause of action it was pleaded that, if the policy was not so reaffirmed, the defendant, by its agent Noble Lowndes (N.Z.) Limited,(subsequently joined as a third party) negligently misrepresented to the deceased that the policy

was in full force and effect and that the defendant had reassumed the risk thereunder and that, in reliance of the defendant's misrepresentation, the deceased refrained from taking any other action which would have been required to reinstate the policy or to arrange alternative assurance.

In addition to a general denial of the plaintiff's allegations, the defendant defended the action upon two grounds; first, that its obligation to pay the sum assured was subject to the payment of the premiums as provided in the schedule to the policy and that the deceased had failed to pay the premiums; alternatively, that it was a condition of the policy that, if any premium was not duly paid, the policy would lapse and that, as at the date of death, premiums under the policy were in arrear and the policy had lapsed. As indicated, the defendant joined Noble Lowndes (NZ.) Limited as third party.

Before turning to a consideration of the main issue between the plaintiff and the defendant, there are two matters which should first be decided. The defendant claims that the policy had lapsed some time before the death of the deceased. The policy which the defendant issued is expressed to be subject to the conditions contained in the document and the first and second of these are as follows:-

> "1. PAYMENT OF PREMIUMS - (a) One calendar month's grace is allowed for payment of renewal premiums (other than those payable monthly or 4 weekly). If a claim should arise during this period, the premium (if unpaid) shall be deducted from the Sum Assured.
>
> (b) Should premiums be payable monthly or 4 weekly then if at any time payment shall not be paid by Standing Order on the due date, the policy shall thereafter be subject to a yearly premium.
>
> (c) If any premium is not duly paid, the policy will lapse unless prevented from so doing by Condition 2.
>
> 2. NON-FORFEITURE - If any premium is not duly paid the assurance will remain in force for so long as the surrender value shall

> permit. Premiums in arrear, with compound interest at 7% per annum, will form a first charge on the policy."

The first question is, what interpretation is to be put upon the words "the policy will lapse". In Boynton v. Monarch Life Insurance Company (1973) 1 NZLR 606, McMullin J. considered a policy where the corresponding provision was to the effect that, in the event of a premium not being paid at the end of one calendar month after its due date (except in certain circumstances), "the policy will be null and void". He there considered Australian and Canadian decisions and elected to follow the former i.e. the decision of the High Court of Australia in Newbon v. City Mutual Life Assurance Society Ltd (1935) 52 CLR 723 and Smith v. Associated Dominions Assurance Society Pty Ltd (In Liquidation) (1956) 95 CLR 381. In the Newbon case the joint judgment of Rich, Dixon and Evatt J.J. contains the following:-

> " The first question which arises for consideration upon the appeal is whether the policy became voidable only upon the failure to pay the premiums, or was thereby ipso facto rendered void. The insurance expressed by the policy is not an annual insurance from year to year in which the cover for each year depends upon the payment of premium. It is a promise to pay upon death without any limitation as to the time in which death must occur. Although, of course, the consideration for that promise upon which it is dependent is the periodical payment of premiums, yet after two years the surrender value of the policy becomes available pro tanto to answer the recurring consideration. The condition already quoted, providing that on non-payment the policy shall be void, the benefits forfeited and the premiums retained, confers upon the Society a right the exercise of which may not always be for its ultimate benefit. It would be consistent with well-recognised principles of interpretation to treat the clause as giving an option and to read 'void' as meaning 'voidable' (New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France (1919) A.C. 1; (1917) 2 K.B. 717; Ewart, Waiver Distributed (1917), pp. 46-48; cf. McCormick v. National Motor and Accident Insurance Union Ltd (1934) 40 Com. Cas., at pp. 81, 87, 92. In the same clause occur references, which it has not been thought

> necessary to quote, to the withholding, omission or misrepresentation of information in the proposal. The proviso that the policy shall be void applies in that case as well as in the case of default in payment of premiums. It is scarcely conceivable that the policy is to be void independently of the election of the Society if an omission occurs in the proposal. For these reasons we think that the true interpretation of the policy is that it becomes voidable at the election of the Society, and not void when a premium remains unpaid for more than a month from its due date."

Having made reference to these cases, McMullin J. in Boynton's case concluded (p. 613):-

> " I am of the view that, while condition 4 of the policy refers to the fact that the policy will be null and void and all premiums paid forfeited to the company if, inter alia, any premium is unpaid at the end of one calendar month after its due date, the proper construction to place upon this condition is that the policy is voidable only at the election of the company in the event of any premium or instalment of that premium being unpaid at the end of one calendar month after its due date."

In respect of the Canadian decisions, he said (p. 614):-

> " With respect, these judgments go some distance toward removing the distinction between 'void' and 'voidable' in that they appear to treat a policy as being avoided merely because the insurer has not communicated its election not to avoid to the insured and assume in that situation that the insurer has elected to avoid. But whether a party to a contract who has a right of election does in fact elect to treat the contract at an end must be a question to be decided in the circumstances of each case and in this regard an insurance contract must be subject to the same considerations as any other type of contract."

And later (p. 615):-

> " Although the Canadian authorities suggest that there may be some presumption in favour of an insurer that a contract is at an end following upon non-payment of a premium unless there is a specific election to treat the contract on foot, no such distinction of that

> kind appears in the Australian cases which speak with greater clarity on the point."

In the present context I see no material difference between the expressions "will lapse" and "will be null and void"; in either case I take the meaning to be that the contract will be at an end; that is, if the insurer so elects.

Returning to Newbon's case, following the passage quoted above, there is the following:-

> " But an election once made by the Society and communicated to the assured is final. If an intention to disaffirm is thus evinced, the insurance is at an end, and its revival or reinstatement involves a new contract. On the other hand, if, after default, an intention to affirm the contract of insurance notwithstanding the default is communicated to him, then, although he remains liable to pay the premium, the insurance cannot be terminated unless and until he commits a new default."

All cases may not be as clear cut as that, however. In Smith's case (supra), while an entry was made by the respondent Society in its lapse register, following default on the part of the assured, to the effect that the policy had lapsed, no notification of this action was given to him. Shortly following this entry the assured made certain payments to the Society and these were acknowledged as part-payment of the premiums which had not been paid by the due date. The last payment by the assured was accompanied by a letter indicating that he did not desire to cancel his policy and in reply to this the Society wrote telling him what remained to be paid of the outstanding premiums and saying:-

> "It would be best for you to remit this amount as early as possible to bring the policy back into benefit."

A further annual premium became due on the 15th March 1953 so that a point was reached where there remained owing part of the previous years premium plus the new premium. The assured made no further payments from that time until his

death some five months later. As to this situation, Taylor J. said, after reference to the letter already mentioned:-

> "Whether this was a correct view or not it constituted a clear warning to the deceased that his policy was, to say the least, in jeopardy. Yet he did nothing. He omitted to complete the payment of the premium which had fallen due in March 1952 and he paid nothing on account of the subsequent premium after it fell due. Nor did he seek an extension of time or, indeed, communicate with the society in any way. If the surrender value of the policy in March 1953 had been sufficient to satisfy the yearly premium which then fell due the provisions of cl. 3 would have operated to keep the policy on foot but the evidence makes it clear that it was not. But whether the deceased was aware that this was so does not appear. The plain fact is that he made no further enquiry, that he took no steps whatever to make any further payment or to convert his policy to one under which quarterly premiums would be payable. It is an understatement to say that the evidence discloses that the deceased was in default and that he had delayed for more than a reasonable time in paying premium moneys thereunder. The extent of the delay and the attendant circumstance satisfies me that he had entirely lost interest in the policy and that some considerable time before his death he made up his mind to have nothing further to do with it. Probably this occurred at or about the time when the further premium fell due in March 1953. This, I think, is the only reasonable inference on the facts and, having regard to the society's attitude, it leads to the conclusion that for some considerable time prior to the death of the deceased neither party regarded the policy as subsisting."

Clearly, if there are grounds for electing to treat the policy as void and that election is made and communicated to the assured, that is an end to the matter, unless there is subsequent agreement, express or implied, to revive the contract. If, despite the default, the company indicates to the assured that it regards the contract as still in being then it remains in force until there is some fresh default - though this could include a continued failure to pay the premium the subject of the original default - and the company exercises its right to avoid the contract. While express notification of the election must surely be desirable, so that the matter is beyond doubt, it does not

appear to be essential and, indeed, there may be cases, where contract with the assured has been lost, where it would be impossible. It may be apparent from the conduct on either side that neither regards the policy as any longer in force. As in Smith's case, it may be that an assured has lost interest in the policy and has had no intention of trying to make good the arrears. It is necessary to consider all the facts and determine what the assured, at the time of his death, is likely or ought to have understood the position to be, having regard to all that had passed between him and the company; whether there were grounds which entitled him to regard the policy as being in force.

The second preliminary matter is the relationship between the plaintiff, the defendant and the third party; whether at the material times the latter was acting as agent for the plaintiff or for the defendant. Paragraph 5 of the statement of claim contains an allegation that:-

> "On 22nd day of November 1977 the defendant by its agent Noble Lowndes (N.Z.) Limited wrote to the deceased ..."

and later there is further reference to the third party as being the defendant's agent. These allegations were merely denied and there was no positive allegation on the part of the defendant that Noble Lowndes (N.Z.) Limited were not that company's agent. The third party notice set out terms of the agency agreement in force between the two companies, whereby the latter acted as agent for the former in respect of various matters relating to the life and endownment assurance,annuity and pension business. The matter was mentioned only briefly in submissions and would not be given particular mention now but for the fact that Mr Laing, the New Zealand manager of the defendant company, regarded Noble Lowndes as brokers for the assured and consequently the assured's agent. While it may well be that, in the ordinary course, an insurance broker, although remunerated by way of a commission paid by the insurer is the agent for the insured, I do not see that to be the situation in this case. As mentioned, there is a formal agreement appointing

Noble Lowndes agent of the Yorkshire General and it is to be noted that, when payment of premiums were made by the assured to Noble Lowndes, the receipt issued by the latter was the receipt of Yorkshire General. I am satisfied that so far as the present situation requires, Noble Lowndes was agent for the defendant and the knowledge it had of the policy and the intentions of the defendant cannot be attributed to the assured unless they were actually communicated to him.

I turn now to a study of the evidence. For the plaintiffs this consisted solely of documents of one sort or another which passed between the three of them, the assured, the defendant and the third party, or were held on the files of the two latter, all being put in by consent; also a resume of events prepared at the defendant's head office for internal use. For the defence evidence was given by Mr Laing, the manager for New Zealand.

Two policies were issued upon the life of the assured. The first was number 5020483 (referred to as policy 483) and the second, the one which is the subject of these proceedings, number 5031676 (referred to as policy 676). The second was issued in accordance with a voluntary group assurance scheme arranged by the assured's employer at the time, Fulton Hogan Limited, through Noble Lowndes (N.Z.) Limited, and possibly the first was also. Nothing turns on this fact, but it explains why Noble Lowndes were involved. While no question as to policy 483 arises for decision, the facts relating to both must be considered, partly to show the course of dealing between the assured and the defendant and partly because at one stage some confusion arose between the two. Policy 483 was issued in December 1973 shortly before the assured's 18th birthday. It provided for premiums payable monthly on the first day of each month. A premium payment had been made in advance on the 28th November 1973 to Noble Lowndes who issued a receipt in the name of Yorkshire General. There was an immediate failure to pay the January premium and an overdue notice was sent on the 11th February 1974. This premium was paid later that month and from that time on until November 1975 the general pattern is that some premiums were paid by automatic bank transfer but from

time to time this method failed, overdue notices were sent producing payment a month or so late. All such notices were addressed to the assured at his address in South Dunedin.

On the 27th November 1975 an overdue notice in respect of the premium due on the 1st of that month had to be sent. As this produced no payment a notice was sent to the assured on the 23rd December 1975 stating:-

> "As the premium of $10.50 due on November 1975 has not been paid the policy has lapsed.
>
> If application is made within 12 months of the abovementioned renewal date we shall be pleased to revive the policy on production of evidence of good health, satisfactory to the company and on payment of the outstanding premiums together with interest at 7% interest per annum."

It may be noted that there is no indication on the form of "the abovementioned renewal date". No formal record of this was entered in the company's books until February 1976 when an entry was made in the lapse register of the fact that policy number 483 had lapsed with effect from the 1st November 1975.

On the 11th February 1976, $21 was paid by the assured, being the November and December premiums, and the payment was acknowledged as such by Noble Lowndes in the name of Yorkshire General. A few days later a memorandum was sent to Yorkshire General asking for the premium position of this policy. It also gave a new address for the insured and sent a new bank order on the Otago Savings Bank, Dunedin branch. A memo. was sent back to the effect that to revive the policy Yorkshire General would require payment of the January, February and March premiums.

On the 24th February 1976, however, before there could be a response to this the assured signed a proposal for the second life policy, number 676, and on the following day paid $39 being the first three months premiums. This

policy is in the same terms as the other one except that the monthly premium was $13 as opposed to $10.50 and it contained the additional provision:-

> "The within-mentioned premiums shall be payable to the company in accordance with the terms of an arrangement made with Fulton Hogan Limited and if premiums cease to be paid in this manner then policies shall become subject to yearly premiums."

Under the new policy, the first premium was expressed to be due on the "commencement of contract" but, if that date should differ from what is referred to as the "office valuation date", to be the total amount that would have been payable if the contract had commenced on the office valuation date. That was given as the 1st January 1976 and, accordingly, the payment of $39 must have been for the months of January, February and March 1976. From a memorandum on the file, it appears that payments were made in respect of policy 676 of varying amounts in the months of March to October 1976 when apparently his employment with Fulton Hogan Limited ceased.

Turning back to policy 483, on the 27th February a further $21 was paid and, while it is not stated on the receipt, this must have been in respect of premiums for January and February 1976. On the 31st March 1976 there was a memo. from Yorkshire General to Noble Lowndes saying that the March premium was still outstanding and asking that this be collected so that revival could be considered. On the 1st of April of that year the new bank authority was due to commence and, on the 6th, for the first time there is a letter from Noble Lowndes to the assured setting out the position and saying that the Yorkshire General only required $10.50 in order to consider revival of the policy. On the 15th a further memo. came from Yorkshire General stating that the information contained in the previous memo. was incorrect and that they required collection of a further $21 and a declaration of unimpaired health. On 21st May $21 was paid and this produced a letter from Yorkshire General to Noble Lowndes advising that policy 483 was now reinstated,

but pointing out that bank order, which was lodged to commence in April, did not in fact commence and that therefore arrears would be advanced under the non-forfeiture conditions. Some payments must have been made because nothing further happened until 22nd September when there was a memo. from Yorkshire General to Noble Lowndes advising that the premiums for August, September and October 1976 were outstanding and again warning that, if these were not paid, the policy would be advanced to non-forfeiture. This information was conveyed to the assured in a letter from Noble Lowndes on 28th September 1976. It seems that, if it was advanced to non-forfeiture, the policy would then be subject to an annual premium with interest being charged at 7%. Payment within ten days and a new banker's order would avoid this. On the 9th December by inter-office memo. Yorkshire General informed Noble Lowndes that under the conditions of policy 483 they had now altered the mode of premium payment to a yearly basis with effect from 1st December 1977, the new premium being $120; that if payment were not made within 30 days of due date the premium would be advanced under the non-forfeiture regulations. On the 1st January 1977 a bonus was declared on each of the two policies.

Returning to policy 676, on the 17th February 1977 Yorkshire General wrote to Noble Lowndes stating that payments of premium which had been through Fulton Hogan Limited had ceased from November 1976 and asking Noble Lowndes to contact the assured and arrange for an alternative method of premium payment and collection of arrears. They set out the premium amounts and the arrears they would require, depending on whether the policy remained on a monthly basis or became quarterly, half yearly or yearly. There were certain documents which they required plus payment of arrears and a banker's order if the premiums were to remain on a monthly basis. They asked that the requirements be fulfilled within 30 days, otherwise all arrears would be advanced under the non-forfeiture rule and the policy would automatically alter to a yearly contract. For some reason nothing happened, certainly nothing is recorded on the files, until the 22nd August 1977 when Noble Lowndes wrote to Yorkshire General sending an authority for a change in the method of payment

from monthly to annual. This authority was signed by the assured so clearly Noble Lowndes had been in contact with him. The alteration was to be on and from 1st January 1977 and the change from monthly instalments to annual premium. This notification was received by Yorkshire General on 25th August and on the 29th a memo. was sent in reply advising that what was referred to as "the above policy" had been altered to yearly under the non-forfeiture conditions of the policy and stating that premiums were outstanding from August 1976. The number given on this memo., however, was that of policy 483 and a note had been added, presumably in the Noble Lowndes office, to the effect that it was wondered if they had the policy numbers mixed. There seems no doubt that they had. Two days later a letter followed the memo. and, while the latter had said that the policy had been altered to yearly, the letter, in which the reference was to policy 676, stated:-

> "We will alter the contract to an annual premium from 1/1/76 but before we make the alteration we require the balance of premiums to be paid i.e. a new annual premium of $145.79 less monthly premiums paid $39."

Nothing appears to have happened until the 18th October 1977 when a memo. was sent from Yorkshire General to Noble Lowndes advising that the annual premium would date from 1st January 1977, not 1st January 1976 as stated. The memo. went on:-

> "Would you please advise what progress has been made towards the collection of premiums as if they are not paid within 20 days the policy will automatically lapse."

This produced the following letter from Noble Lowndes to the assured on the 25th October 1977:-

> "Last year we wrote to you concerning arrears of premiums due on your Yorkshire General policy 5020483 and the fact that your policy would be made subject to an annual premium.
>
> The policy is now in arrears as from August last year and the amount owing is $172:50 which would take you up to the end of December.

> If this amount is not paid by the 7th November the policy will automatically lapse and you will not be able to claim anything back. Maybe if you surrender it immediately, you could get something back. Perhaps this time you would find the time to notify us of your intentions."

There must have been some communication between the two offices because, in the memo. dated 27th October 1977, there is the statement that Mr Spooner-Kenyon has two policies, giving the numbers and the premiums, and saying that the policy they were dealing with is 5031676; that further advice on this would be appreciated. This evoked the response from Noble Lowndes, written on the 1st November:-

> "Spooner-Kenyon, as you so rightly said, has two policies. Please accept my apologies over that. He has been off work for about three months but is very keen to keep both going. He will come in in about a week and at least give us something in the way of premiums."

so that it appears there must have been contact with him following the letter which was written on the 25th October, and that he responded quickly to that. On the 11th there was a memorandum from Noble Lowndes to say that the assured had come in and paid $20 towards the arrears of both policies. The memo. stated that they had apportioned the $20 50/50 but suggested that Yorkshire General might prefer it all to go to the 676 policy. A reply to this was by way of written memo. and from this it appears that the $20 must have been credited to policy 676 and no portion of it to 483. The total arrears remaining owing in respect of the two policies was stated. Having received this information, Noble Lowndes wrote to the assured stating that, since his payment of $20 towards the arrears of premiums due on the two policies, they had found out from Yorkshire General the state of both policies. Having stated the amount in arrears on each it was suggested that the logical thing to do would be to surrender 483, get what little might be left and then concentrate on paying off the arrears in 676. The letter ended:-

> "Please let us have your thoughts on this situation and then we can organise for you whatever you wish to do."

On the 16th November 1977, however, a policy movement detail slip had been put through the books of Yorkshire General stated that 676 had been varied as follows:-

"Lapse with effect 1/2/77."

No notification of this was sent to the assured; there is no evidence that anything further passed between him and Noble Lowndes or the Yorkshire General and on the 5th March he died as a result of an accident.

While it does not appear to be material, it should be noted that the last payment made by the assured, $20 on 11th November 1977, was acknowledged as being apportioned equally between the two policies but was in fact applied by Yorkshire General in reduction of the arrears of premium on 676. After the company had treated that policy as lapsed, it transferred the credit from the arrears owing in respect of 676 to those under policy 483 and reduced them accordingly but this may not have been done until after the assured had died. Latterly at least the whole matter was badly handled by Yorkshire General and, to a certain extent, by Noble Lowndes. The resume of events prepared in the head office of Yorkshire General records error after error. The question is, however, whether the policy is to be regarded as in force or as having lapsed at the time of the assured's death.

Yorkshire General was certainly entitled to treat the policy as lapsed and, if in November, when the policy movement detail slip already referred to had been prepared and when it can at least be inferred that an election was made to lapse the policy, formal notice of that fact had been sent to the assured, there could be no doubt about the matter. In this situation it is necessary to see what information he had at the time when he was last in contact with Noble Lowndes and consider his subsequent silence.

(1) He knew that when he had fallen into arrears with his first policy it was lapsed and he was given notification of that fact, but that after certain arrears had been made good the company was prepared to revive the policy. He was informed

in April 1976 that the final amount outstanding, $10.50, must be paid if the policy was to be revived. It must have been explained to him, when further arrears built up, that there was a sufficient surrender value for the non-forfeiture provision to apply, but he must also have known that not until premiums had beenpaid for some time did this happen.

(2) In respect of policy 676, he must have been aware of the arrears which were building up and, in August 1977, he signed an authority for an alteration whereby premiums became payable annually. The immediate effect of this was to substantially increase the amount of arrears as it meant that a 12 month premium was immediately overdue in the place of premiums for a lesser number of months. While the amount was substantial no action had been taken to lapse the policy and nothing done by Yorkshire General indicated that they regarded it at that time as having lapsed.

(3) On the 25th October 1977 he was written to giving information which was expressed to be with reference to policy 483 but in fact referred to 676. To anyone studying the letters and memos on the file that must be clear but it was not necessarily so to him. However, between that date and the 11th November 1977, when he visited Noble Lowndes, that office had been told of its mistake and I cannot believe that the assured was left in ignorance on that point. He thenpaid $20 on account and to this reference has been made. He ought to have understood at this stage that, unless something was done reasonably promptly, the policy would lapse but it seems he was anxious to keep the policy going if he possibly could.

(4) On the 22nd November he received a letter from Noble Lowndes informing him that they had found out the state of both his policies and that 676 was $97.26 in arrears while 483 was $288 in arrears. As already mentioned, it was suggested that the logical thing to do would be to surrender 483 and get what little was left and then concentrate on paying off the arrears of 676. In this generally muddled affair it is not surprising to learn that the arrears stated for 676 were incorrect but, if I understand the evidence correctly, the

true figure was substantially greater.

Despite the fact that the policy movement detail slip had been prepared on the 16th November and consequently an election made by Yorkshire General to lapse the policy, if he had died at that time, I do not consider that the company could have refused payment.

(5) So far as the evidence reveals, however, he made no further contact with Noble Lowndes during the three and a half months that elapsed before his death. In the past his response to letters and other communication appears to have been reasonably quick. What he really understood of the situation it is not possible to say, but it cannot be imagined that he believed he could do nothing for months and then find the policy still in force. Even while he was in employment, his payments had tended to be spasmodic and,as the evidence indicates, there had been many occasions when notices had to be sent to him. Setting aside the $20 paid on the 11th November 1977, the last payment he appears to have made in respect of policy 483 must have been sometime before September 1976, from then on the policy being kept alive by drawing upon the surrender value; in respect of policy 676, the last payment had been $9 in October 1976. The only inference one can draw is that he had no prospect of paying the arrears and accepted that fact; that he took no further interest in the policies.

Accordingly, I am unable to find that the plaintiffs can succeed on the grounds that the policy was not in a state of lapse at the date of their son's death.

Neither can they succeed on the alternative cause of action pleaded. Whatever may have been said to the assured concerning the policy, and whether anything so said constituted a misrepresentation or not, I am unable to see that there is any evidence to suggest that he thereby refrained from taking any action which would have been required to reinstate the policy or to arrange alternative assurance.

There is judgment for the defendant with costs,

which are set at $350, and disbursements to be fixed by the Registrar. As between the defendant and the third party, the question of costs is reserved. If it cannot be agreed, submissions may be made.

Solicitors:

Brent, Haggitt & Co., Dunedin, for Plaintiffs
McElroy, Duncan & Preddle, Auckland, for Defendant
Buddle, Weir & Co., Auckland, for Third Party