On the Payment of Premiums and the Lapsing of Long-term Insurance Policies*

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1 In General

1.1 A typical long-term policy has two parties and two parts to it: the insured (or policyholder) who undertakes to pay the premium, either by way of a lump sum or periodically, and the insurer who undertakes to render the policy benefit if and when the insured event occurs.
1.2 Premiums are thus the counterpart of and the insured's consideration for the policy benefit promised by an insurer on the occurrence of the insured event.
1.3 The payment of premiums by the insured is invariably conceived as a prerequisite for performance by the insurer of the policy benefits due to the policyholder or the beneficiary. It follows that the insurer would normally be entitled to decline to render the promised counter-performance (payment of the benefits) if the insured should be remiss in paying the premiums in time, in full or at all.
1.4 But is there a legally enforceable duty on the part of the insured (or the premium payer when a third party assumes that duty) to pay the premiums? Can he be sued for non-payment? And is the insurer relieved of liability if the insured event should occur while payments of premiums are in arrears?
1.5 The first of these issues is analogous to another one also sometimes mooted in the context of long-term policies – analogous because it also relates to the payment of premiums and depends on the intention of the parties as expressed in their contract – namely whether the contract of insurance or the cover under it only *commences* when the first payment of the premium is actually received by the insurer.[1] A provision to that effect would imply that the initial decision as to the inception of the risk would be in the hands of the insured.
1.6 Depending on the intention of the parties, a duly concluded contract of insurance can be either bilateral (reciprocal) or unilateral (non-reciprocal). In a bilateral (or synallagmatic) contract the lump sum or the periodical payments owed by the insured as

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1 See Gordon & Getz *The South African Law of Insurance* 4 ed (1993) by DM Davis at 193; and MFB Reinecke, Schalk van der Merwe, JP van Niekerk & Peter Havenga *General Principles of Insurance Law* (2002) in par 287. Cf s 51 of the Long-term Insurance Act 52 of 1998 ('the Act'), which is discussed in par 3.3 below and, in respect of a short-term contract of insurance, *Parsons Transport (Pty) Ltd v Global Insurance Company Limited* 2006 (1) SA 488 (SCA).

premiums serve as the reciprocal counter-performance for the policy benefits promised by the insurer. Non- or late payment would thus not only be a prerequisite for the enforcement of the reciprocal policy benefit by the insurer, entitling the insurer, if sued, to raise the exceptio non adimpleti contractus, but would, at the same time, constitute a breach of contract on the part of the insured (mora debitoris) entitling the insurer, where appropriate, to claim payment and interest or damages or the cancellation of the contract.

1.7 Many modern long-term insurance contracts are not, however, bilateral in this sense. Thus it was stated in *Steyn's Estate v South African Mutual Life Assurance Society*[2], in respect of a whole life policy with profit,[3] that

> '[a] *life policy is in effect a continuing contract* at the will of the insured, *and whether it be regarded as an annual contract with the privilege of renewal or an insurance for the whole life subject to the forfeiture upon non-payment of the annual renewal premium, the ordinary rule is that punctual payment of the renewal premium is a condition precedent to the continuance of the risk'* (my emphasis).

1.8 If the 'renewal premiums' referred to in the dictum are intended by the parties to be conditions precedent to the *continuance* of the risk, the likelihood is that the first premium would likewise be intended as a condition precedent to the *inception* of the risk.[4]

1.9 When punctual payment of any premium is thus construed as a condition precedent to either the inception or the continuance of the risk and such initiation or continuance is 'at the will of the insured', it would follow:

- that the inception and continuance of the risk for the insurer is dependent on prompt payment of premiums by the insured;
- that the decision whether the premium will be paid and the risk is to commence or continue is primarily that of the insured;
- that the risk for the insurer would not commence and, once it had commenced, would cease the moment a premium is in arrears;
- that the insurer would thereafter no longer be liable to be sued for payment of the policy benefit even if the risk should thereafter materialise; and
- that the insured, who is at liberty either not to commence or not to continue with payment of any premium and hence the risk, can never be liable to be sued for payment of any arrear premiums or for interest thereon or for damages or for the cancellation of the contract due to such non-performance. That is because the insured cannot, at one and the same time and in respect of one and the same

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[2] 1948 (1) SA 359 (C) at 364.

[3] See too *AJ Shepherd (Edms) Bpk v Santam Versekerings Maatskappy Bpk* 1985 (1) SA 399 (A) at 417; Reinecke, Van der Merwe, Van Niekerk & Havenga op cit note 1 in pars 121-3, 250-1, and 325-8; Gordon & Getz op cit note 1 at 196; and cf generally, MacGillivray & Parkington *On Insurance Law* 10 ed (2003) by Nicolas Legh-Jones (gen ed), John Birds & David C Owen in par 7.40-7.43; Malcolm Clarke *The Law of Insurance Contracts* 4 ed (2002) in par 13.8; and *Houseman & Davies Law of Life Assurance* 12 ed (2001) by BPA Davies, RJ Surridge & B Murphy in par 1.119.

[4] See too par 1.5 above.

obligation, be both bound and not bound.

1.10 In short, while the payment of premiums by the insured is the counterpart of the assumption of risk by the insurer, that is only so if the risk vests and only for as long as it continues to do so.
1.11 In this scheme of things premiums would be payable but not legally enforceable. In effect it would allow the insured to walk away from a policy of this nature with impunity and immunity, save for the loss of all potential future benefits.
1.12 Where payment of the premiums is thus a condition precedent to the inception and the continuance of the risk, the contract, being binding at the will of only one of the parties, is not bilateral in the sense and with the consequences described in par 1.6 above.
1.13 Whether the payment of the premiums is a condition precedent to the inception and continuance of the risk, or merely the counterpart of a bilateral contract, is essentially a matter of intention and hence of interpretation.
1.14 What is true for whole life policies may not necessarily be true, in what follows, for pure endowments or sinking fund policies; and what may be true for reversionary bonus policies may not necessarily be true for universal life products. Policy provisions vary, from insurer to insurer, from product to product, and from generation to generation. My remarks are mainly concerned with risk-based contracts but, depending on the intention of the parties as expressed in their contract, the payment of premiums may conceivably also be construed as conditions precedent to the continuance of the investment insofar as it relates to potential future benefits.

2 Prototypes

2.1 Contracts, even standard contracts, differ from one insurer to another and from one generation to the next. Non-reciprocal contracts are typically characterised by clauses such as those following.

2.2

> ‘Company A will, in return for the payment of the applicable premiums, pay the appropriate benefits on the terms and conditions of this policy’.

2.3

> ‘Company B acknowledges having received an application for a Family Plan as described in this document and agrees to pay the benefits of the plan to the applicant or, if another person is entitled to receive it, to such other person provided all due premiums or contributions have been paid and any other conditions laid down in this document have been met.’

2.4

> ‘Premiums are to be paid regularly for the duration of the policy …. The life cover, bonuses and other benefits under the policy are based on the assumption that these premiums will be paid regularly and the onus is on the Life Assured to ensure that they reach [Company D] as and when due.
> Should premiums not be paid within 30 days of the premium due date, the following will apply:
>> (*i*) if the policy has not acquired a cash value, the policy will lapse and all benefits will fall away;
>> (*ii*) if the policy has acquired a cash value, premiums will be debited to the investment

account as an automatic premium loan. The policy will remain in force for a period of up to 12 months, provided that the cash value of the policy is sufficient to cover such loan.

If the premium is being paid by an approved stop order and the first premium deduction is received up to 6 months later than the specified date, the company will automatically adjust the inception date accordingly. If the premium is received more than 6 months after the specified date, the policy will be void from the outset and all premiums refunded.'

2.5

'No claim will be paid (by company D) within the first three months of entry except accidental death. For dependants 65 years of age and over, the waiting period is 6 months. In all the above mentioned cases the participant in this scheme must maintain its policy by paying the monthly premiums.'

2.6 Company E's policy provides:

'Premiums are always payable monthly in advance and thus payable on the first day of the month. If the premium is not paid before the first of the next month, the policy lapses. Should the policy lapse as a result of a late payment and is reinstated, a new waiting period of 3 months from the re-instatement date will apply for all the assured.

When a policy is more than 3 months in arrears it cannot be reinstated and a new policy must be issued.'

2.7 Company F's policy provides:

'*Payment of Premiums*

The first premium is due on the commencement date and the premium is due every calendar month thereafter. If the premiums remain unpaid for more than 1 calendar month then the policy will be deemed to have lapsed.

Automatic Renewability

The policyholder may automatically renew this policy for its duration by the timeous and regular payment of premiums.

Reinstatement

If the policy lapses, it may be reinstated upon such terms and conditions as the company may reasonably choose to impose. The initial period shall reduce by the number of premiums already paid if the company has received an acceptable reinstatement form.'

3 Consequences of Non-payment of Premiums Where Payment *Is* a Condition Precedent to the Continuance of the Risk and the Contract is Accordingly Non-reciprocal

3.1 The inclusion in a contract of provisions catering for its lapsing if any payment remains in arrears for longer than a permitted period will normally be a strong indication that payment is indeed conceived as a condition precedent in the sense used in the *Steyn's Estate* case referred to earlier.

3.2 Where the policy provisions requiring payment of the premium do not import an obligation but a condition, two features are prominent:

- The insured cannot be compelled to make payment of any premiums. The decision to prolong the contract accordingly lies in the first instance with the insured.
- The insurer cannot be compelled to make payment of the policy benefits if premiums are in arrears. That is because the payment of the premiums is a precondition to any claim on the policy by the insured. If the insured event had in

the meantime occurred, the insurer would be within its rights to decline the claim and to reject any subsequent offer to cure the shortfall.

3.3 These features are both strengthened and tempered by the statutory and contractual provisions discussed more fully below. Section 51 of the Act[5] for example, confirms that payment of the policy benefits is suspended until the insurer has received the initial premium, while s 52 deals with the situation where premiums remain in arrears.

4 Consequences of Non-payment of Premiums Where Payment *Is not* a Condition Precedent to the Continuance of the Risk and the Contract Is Reciprocal

4.1 The absence of lapsing provisions in a contract is an indication that it is reciprocal in nature and that the insured may be sued for non-payment of the premiums and interest.
4.2 Moreover, the contract may be terminable at the instance of the insurer. That will depend on its terms, its provisions, and on such misconduct on the part of the insured as would entitle the insurer to rescind or cancel the contract. For example, a premature notice of termination by the insured (as opposed to mere non-payment of premiums) may constitute a breach of contract, entitling the insurer to invoke all its common-law remedies, including that of cancellation. But when the policy provisions allow the insured to surrender the policy or to convert a policy which is to run for a set term to one that is paid-up, due notice by the insured to surrender or have the policy made paid-up, being permitted, would not be a breach of contract.
4.3 Cancellation of the contract differs from its lapsing in this important respect. Lapsing requires no intervention from the insurer; it follows as a matter of course from the terms of the policy and the failure of the insured to effect timeous payment of premiums due. The contract comes to an end of its own accord. Cancellation, by contrast, demands positive intervention on the part of the insurer (the election to cancel) pursuant to wrongful conduct on the part of the insured (breach of contract of such a nature as to justify cancellation) with certain consequences which are absent in the case of a lapse of a policy, such as mutual restitution and a possible claim for damages.
4.4 The importance for an insurer of incorporating lapsing provisions into its contract is illustrated by posing two questions.
4.5 The first question: Is the insured (or his successor in title) disqualified from claiming benefits under the policy if he was in arrears with the payment of any premiums at the time the insured event occurred? And the answer is 'yes' because payment is a

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[5] Section 51 reads:

> 'Policy suspended until payment of first premium –
> The undertaking of a long-term insurer to provide policy benefits under a long-term policy, other than a fund policy or a re-insurance policy, shall be suspended until the long-term insurer has received it, if there –
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> (*a*) is to be one premium, that premium, or
> (*b*) are to be two or more premiums, the first of those premiums,
>
> or until arrangements to its satisfaction have been made for the provision of the premium by debit order, stop order, credit card or other instrument approved by the Registrar generally bo notice in the *Gazette*.'

prerequisite to a claim under the policy.[6]

[6] See pars 1.3, 1.6, 1.9 (point 3) and 3.2.

4.6 The second question: Can the insured *cure* the default by tendering the arrears after the insured event had occurred? If the contract contains lapsing provisions and is thus not bilateral, the answer is 'no'.[7] The insured cannot as of right cure the default once the policy has lapsed. But if the contract is bilateral, he can. In that case the ordinary principles of contract law apply. Should the insured claim the benefit when his payments are due and unpaid, his claim may be met with the exceptio non adimpleti contractus.[8] If the insured should thereafter tender the shortfall, that dilatory defence will no longer avail the insurer. And since the contract will still be in force the insured would not be precluded from so tendering after the insured event had occurred. If the insurer wishes to guard against that eventuality, it must either include lapsing provisions into its contract or it must cancel the contract before the insured event occurs. In short, the insurer's risk will continue and will cease only when the contract either lapses or is duly cancelled.

5 The Mechanism of Lapsing

5.1 As appears from some of the clauses quoted earlier, the following three situations may be distinguished in a typical case where periodical payments are required to be made:

- The policy provides for an initial period of grace of 15 or even 30 days in respect of every payment due. The period of grace in effect extends the time for payment. A payment of the arrears made during that time will technically be a payment made in time. The policy remains 'in force'. Should the insured event occur during that extended period the benefit will be payable by the insurer but only against tender of the arrear premium by the insured.
- The policy provides that if two monthly payments are late the policy will lapse but that it may be reinstated by a payment by the insured of the outstanding amount, without renewed proof of insurability but perhaps with a fresh waiting period. Non-payment for two months would accordingly cause the policy to lapse and the insurer would not be liable to the insured if the insured event should occur. If the insured event had not yet occurred, payment of the two arrear payments would automatically reinstate the contract. The reinstatement would therefore be at the instance of the insured and the policy will remain 'in force' on the same terms as before, although perhaps with a fresh waiting period. If the insured event should occur thereafter, the insurer would be liable but only if the premiums were up to date at the time and the waiting period had elapsed. If neither, the insurer would be entitled to decline any claim even against a subsequent tender of the arrear payments.
- The policy provides for a final cut-off point of, say, three months or three payments. If three monthly premiums are in arrears, the policy would lapse automatically and the insured would no longer have the freedom to resuscitate it

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[7] See par 3.2.

[8] See par 1.6.

unilaterally by a tender of payment of the arrears. In such a case it is for the insurer and not the insured to allow reinstatement. The insurer would be entitled to insist that application be made for a renewal of the policy, in which event the insured may be required to submit to a new medical examination and new terms, conditions and waiting periods may be imposed. Should the insured event occur after the cut-off date, the insurer would be fully entitled to decline payment of the benefits even against a tender of all the arrears.

5.2 The policy provisions may of course dispense with the second phase prior to lapsing and move directly from failure to meet the payments due within the period of grace[9] to a lapse situation.[10]

5.3 What is said above is to be read in conjunction with what is said below[11] about the effect of s 52 of the Act.

6 The Legal Construction

6.1 How is this process to be legally construed? At the outset there is the distinction between the non-payment of the first premium and the non-payment of subsequent renewal premiums. Payment of the first premium is a condition precedent to the *inception* of the risk.[12] Its non-payment accordingly operates suspensively: the inception of the risk is suspended until payment is received. In the case of renewal premiums, their non-payment operates resolutively to the *continuance* of the risk:[13] the risk ceases if payment is not made. To the extent that the non-payment of the renewal premium results in the actual lapsing of the policy, the non-payment would be a resolutive condition not only to the continuance of the risk but also to the continuance of the policy as such.

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[9] See par 5.1 (point 1).

[10] See par 5.1 (point 3).

[11] See pars 9-11.

[12] See pars 1.5 and 1.8.

[13] See Pars 1.7-1.9.

6.2 The lapsing provisions discussed above accordingly introduce a two-stage resolutive condition into the contract, which, while weak during the first phase, becomes strong during the second. During the first period, when two monthly payments are in arrears, the effect of the condition is to cause the operation of the contract to be in a state of suspension: it remains ‘in force’ but it cannot be enforced by the insured.[14] Once the arrears are paid by the insured and the contract is thus reinstated, it immediately becomes fully operational once again, although perhaps subject to a fresh waiting period. But if the two arrear premiums are not paid during the second or third period and the delay is thus extended to the end of the third month, so that three payments are now due and unpaid,[15] the resolutive condition is fully fulfilled and the contract simply comes to an end. The insured cannot cure the failure to pay or arrest the fulfilment of the condition.

7 Waiver

Because the resolutive condition, with all its ramifications, is inserted in the policy in the interest and for the benefit of the insurer, the insurer is at liberty not to enforce it. For instance, the insurer may decide, in the example described earlier,[16] to accept payments of three or more arrear premiums and not to insist on a new application for insurance. It may even, if convinced that the insured’s failure to make payment was not a case of anti-selection (where the insured is privy to knowledge that the insured event had or is about to occur), decide to honour the balance of the claim for the payment of the benefit after deducting the outstanding payments, notwithstanding that the insured event occurred while payments were still outstanding. The decision remains that of the insurer.

8 Payment from the Cash-in Value of the Policy

An insured may fail to make one or more payments and yet not be in arrears as far as the policy is concerned. That is because s 52 of the Act, normally augmented by policy provisions, allows the insurer to employ the cash-in or surrender value in the policy to compensate for such non-payment. This situation is more fully described in the paragraphs that now follow.

9 Section 52 of the Act

[14] See par 5.1 (point 2).

[15] See par 5.1 (point 3).

[16] Ibid.

9.1 Section 52[17] is designed to assist the insured. Its scheme, if not its exact wording, is relatively straightforward. If the insured defaults with a payment of a premium the insurer is to give him due notice (s 52 (1)); if the default, notwithstanding the notice, persists, the 'remaining value' in the policy is to be applied to the outstanding premium debt in accordance with the insurer's actuarial rules (s 52(2)); once the remaining value has been depleted, the policy provisions will determine whether the policy lapses or terminates, as the case may be. The section thus works in tandem with the policy provisions.

9.2 For as long as there is a remaining value in the policy and due notice has been given, the insured will technically, if not factually, never be 'in arrears' so that the question of lapsing will not arise for as long as that state of affairs endures.

10 Section 52(1)

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[17] It provides as follows:

> 'Failure to pay premiums
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> (1) If a premium under a long-term policy, other than a fund policy or a reinsurance policy, has not been paid on its due date, the long-term insurer shall notify the policyholder of the non-payment, and the policy shall, notwithstanding anything therein to the contrary, in the case of a long-term policy under which there are to be two or more premium payments at intervals of –
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> (*a*) one month or less, remain in force for a period of 15 days after that due date; or
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> (*b*) longer than one month, remain in force for a period of one month after that due date,
>
> or for such longer period as may be determined by agreement between the parties, and if the overdue premium is not paid by the end of any such period, the policy shall be dealt with in accordance with subsection (2).
>
> (2) In the case of a policy contemplated in subsection (1) the remaining value of which, after the satisfaction of any claim of the long-term insurer which is secured solely by the policy benefits to be provided under the policy, is greater than half of the aggregate amount of the premium payments due thereunder during the period of 12 months commencing on the due date of the unpaid premium, the long-term insurer shall –
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> (*a*) inform the policy-holder, in the medium prescribed by the Registrar, of the amount of that remaining value and notify him or her that the policy will remain in force, in accordance with the rules of the long-term insurer, until –
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> (*i*) the policy no longer has any such remaining value, whereupon it will lapse;
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> (*ii*) the payment of premiums is resumed;
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> (*iii*) the provisions of the policy are amended, in accordance with the rules of the long-term insurer, so that it becomes a policy which is fully paid-up; or
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> (*iv*) if the policy-holder so requests, the policy is surrendered, in accordance with the rules of the long-term insurer, and so much of the remaining value as then remains is, subject to section 54, paid to the policy-holder; and
>
> (*b*) deal with the policy accordingly.
>
> (3) A long-term insurer shall have rules which to the satisfaction of its statutory actuary prescribe a sound basis on which, and the methods by which, a long-term policy is to be valued and otherwise dealt with for the purposes of subsection (2).'

10.1 The difficulty with s 52 (1) is that it introduces a duty (notification) but prescribes no sanction for its non-compliance. The sub-section, which is in general terms, is silent as to when and how the required notification is to be given by the insurer and in particular whether the policy will *not* lapse if notification is *not* given. Two possibilities suggest themselves.

10.2 The first possibility is that an assumption is to be made that the section is to be given the interpretation that would be most favourable to the insured, namely that the policy, contrary to its terms, will not lapse if prior notification had not been given. Assume that the insured is in arrears, that no notice was given, and that the insured event occurs. Can the insured claim? Premiums are admittedly in arrears but the contract has not (on the assumption made) lapsed because prior notice had not been given. Even so, the non-payment cannot simply be ignored. The reason is that the non-lapsing only has an effect on the continuance of the policy; it does not excuse the non-payment of premiums due. The insurer would accordingly still be able to raise the non-payment as a defence (by way of the exceptio non adimpleti contractus) to a claim for the policy benefits.

10.3 However, the fact that the policy had not lapsed does have the further logical consequence that the non-payment can be *cured* by a subsequent tender of payment of the arrears. And if that is so it would mean:

- that an insured who is in arrears can insist on reinstatement of the policy against payment of the arrears; and
- that if the insured event should occur before he has done so he can *ex post facto* and, against tender of the arrears, claim the benefits of the policy.

10.4 This last consequence, that a policy with a lapsing provision on non-payment is nevertheless not to lapse on non-payment with the result that the default may be rectified after the event, may be so incongruous as to discredit the assumption made in par 10.2.

10.5 The second possibility may accordingly be more acceptable, namely that this assumption is not to be made and that the policy will lapse even if no notice was given. And if that is so, it simply means that s 52(1), apart from affording the insured some breathing space to make up the arrears, is a mere prelude to s 52(2). In the final analysis that may indeed be the better conclusion.[18]

11 Sections 52(2) and (3) Read with Actuarial rules and Policy Provisions

11.1 Section 52(2) is silent as to how the 'remaining value' in the policy is to be applied when payment of premiums ceased prematurely and notice was duly given. This aspect is normally governed by the provisions of the policy, read with the actuarial rules.

11.2 This may be done in different ways. One method entails a straight deduction of the arrear premiums from the cash-in value of the policy until its positive balance has been depleted, in which event the lapsing provisions of the policy would intervene. Another and more generally accepted method, true in particular for reversionary bonus policies, is

[18] See par 14.2.

structured as an internal accounting exercise according to which arrear premiums are credited to the policy account against the security of its cash-in value and posted as a debit to a parallel account on which interest is levied. In effect the cash-in value is not immediately reduced and the contract remains fully 'in force' for purposes of growth and benefits until the debt in the parallel account equals the cash-in value, whereupon that value is utilized to redeem it. If non-payment continues, the policy will lapse.

11.3 In both situations the 'fat in the policy' is utilized to compensate for arrears in the premium payments. By the first method the insured's own accumulated capital in the policy is employed to effect the payment; by the second the insurer commits its resources, at least nominally, to create a credit for the insured in the policy account with a corresponding interest-boosted debit in a parallel account which is eventually redeemed from the cash-in value of the policy.

11.4 The disadvantage of the first method is that the intrinsic value of the policy is reduced with a corresponding diminution in bonuses and growth benefits which would otherwise have accrued to the insured if the value of the policy had been maintained. Such reduction would thereafter have to be calculated separately in each individual instance.

11.5 The second method is designed to neutralise the erosion in value in the individual policy. Its value is notionally preserved. Inasmuch as the insurer cannot sue for payment of arrear premiums[19] and may for sound business reasons be disinclined to do so, a different strategy is adopted: a sum equal to the unpaid premiums is earmarked to artificially maintain its value for the purpose, inter alia, of calculating growth and bonuses overall for the entire class of policies including the policy in question. But this model does come at a cost to the insured – and that cost is conveniently termed interest.

11.6 Such interest fulfils a dual purpose. In the first instance it constitutes the insured's quid pro quo for the insurer's forbearance in accommodating the non-payment of premiums, that is, in prolonging the contract and preserving its value despite the arrears. In the second instance it serves as the equalising agent between those insured who regularly pay their premiums and those who do not. To ignore the non-payment by some premium debtors and to treat both classes on an equal footing for purposes of s 52(2), would be fundamentally unfair to those insured who keep to their contracts. Unless interest is charged it would mean that non-payers are subsidized by payers. The differential between payers and non-payers is represented by the interest.

11.7 The actuarial rules prescribed in s 52(3), in accordance with which the insurer must execute s 52(2), must be approved as actuarially sound by the insurer's statutory actuary in terms of s 46.[20] Section 46 also prohibits that a distinction be drawn between different

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[19] See par 3.1.

[20] Section 46 provides:

> A long-term insurer shall not –
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> > (*a*) enter into particular kind of long-term policy unless the statutory actuary is satisfied that the premiums, benefits and other values thereof are actuarially sound;
> >
> > (*b*) make a distinction between the premiums, benefits or other values of different long-term policies unless the statutory actuary is satisfied that the distinction is actuarially justified; or
> >
> > (*c*) award a bonus or similar benefit to a policyholder unless the statutory actuary

policies that is not actuarially justified. To ignore the non-payers of premiums, and treat them the same as the punctual payers, would accordingly not be actuarially justified.

11.8 Because the word ‘interest’ is used this procedure is sometimes misleadingly referred to as a loan. There is no loan because there is no agreement to that effect and no funds are in fact advanced. It is in fact a progression of book entries to ensure that the insured, notwithstanding the non-payment of premiums, will continue to share in the benefits of the policy. But if the sum of interest levied exceeds the gains in bonuses and growth, the defaulting insured will stand to lose.

11.9 Section 52 (2) is silent on the recovery of interest. It neither sanctions nor prohibits it. Insurers, in supplementing the sub-section with their own more elaborate contractual structures, believe that ss 46 and 52(3) of the Act entitle them to charge interest where their own resources are thus taken into account in prolonging the contract for the benefit of recalcitrant insured.

11.10 Sub-sections 52(2) and (3) refer specifically to the insurer’s ‘rules’. Every insurer has duly approved actuarial rules, the chip, so to speak, of the metaphorical computer which co-ordinates the type of products to which the policy in question belongs. Such rules must for the purpose mentioned in the sub-sections be deemed to be superimposed on the contract. To the extent that the actuarial rules may legitimately provide for interest to be exacted in such circumstances, it could thus be said to be sanctioned by the Act itself. That being so, insurers who favour this model ought not to be exposed to the criticism, sometimes expressed in other contexts, that all cost items, such as the interest debt in question, should not only be sign-posted but spelt out in the policy.

12 The Consistent and Prolonged Acceptance of Late Payment by the Insurer

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is satisfied that it is actuarially sound and that a surplus is available for that purpose.’

As stated earlier,[21] the insurer can expressly waive the lapsing of a policy. This it may do expressly or by conduct. The conduct may consist of the regular acceptance of late payments over a prolonged period. Such conduct, even if not intended to serve as a waiver, may be treated as such if the insured was reasonably justified in believing, on the strength of the insurer's past conduct, that it would not insist on strict and prompt payment in future and that even accumulated arrear payment could accordingly be remitted after the lapse of some months. Take this case. The insured event occurs. The insured claims under the policy. The insurer raises the defence that the insured was in default at the time. The insured rejoins that the insurer's past conduct, in consistently accepting late payments without objection or caution, misled him into thinking that the punctual payment of premiums was not an issue between them. The insured's position should prevail.

13 The Problem of the Recurring Waiting Period

13.1 The problem of recurring waiting periods occasionally arises in practice as follows:

- Premiums are payable in advance on the first of the month.
- The policy provides: 'Monthly premiums must be paid every month in which they are due. If premiums are in arrears no claim will be considered. Arrear premiums can be paid to reinstate your policy.'
- The policy further states that on reinstatement of a policy a new three months waiting period would be imposed.
- The insured, wrongly believing the payments to be due monthly in arrears, consistently pays them on the second or third day of the month following. The insurer accepts such payment without objection or caution.
- The insurer's attitude is: 'The premiums were being paid monthly in arrears. On each late payment the policy was reinstated but attracted an additional three months waiting period.'

13.2 On that approach, if all payments were consistently made in arrears, it would follow that the insurer, while accepting payments every month and treating it as reinstatements, would invariably be entitled to invoke the three months waiting period, irrespective of when the insured event such as the death of the life assured occurred. Such a consequence, even if correct in strict law, would not in the exercise of its equity jurisdiction be countenanced by the Office of the Ombudsman for Long-term Insurance.

14 Two Concluding Suggestions

From the preceding discussion two main points emerge:

- insurers should be encouraged to caution their policyholders in bold terms that the non- or late payment of any premium will disqualify them, where the policy

[21] See par 7.

contains lapsing provisions, from claiming any benefits under their policies should the insured event occur while any payments are in arrears; and

- steps should be taken by the relevant authorities to render s 52(1) of the Act more effective and s 52(2) less cumbersome.
