1980 No. 9522P

WILLIAM HARNEY

.v.

THE CENTURY INSURANCE COMPANY LIMITED

Judgment Delivered by Mr. Justice McWilliam the 22nd February 1983.

The Plaintiff's claim is for the payment of disability benefits under the provisions of a health insurance policy issued on foot of a proposal submitted by the Plaintiff on 23rd. May, 1979. At the end of the proposal form is the following statement "The Office must be notified of any changes in the health and circumstances of the life to be insured prior to the assumption of risk."

The proposal was acknowledged on a form dated 8/6/79, requiring the Plaintiff to attend for a medical examination by the Defendant's doctor and stating that a report form had been sent to the Plaintiff's doctor for completion. In June, 1979 the Plaintiff attended the doctor appointed on behalf of the Defendant and informed him that he had no complaints except head colds for which he was then taking quinine tablets, that he had had general medical examinations for adopting a child and for motor racing and that the results of both had been clear. He stated that he had had these examinations five and six years previously approximately.

The Plaintiff's proposal was accepted by the Defendant by a letter dated 24th July, 1979. This letter was described as an acceptance letter but was, in fact, an offer by the Defendant setting out terms on which a policy would be issued and enclosing an acceptance slip to be completed by the Plaintiff. The letter contained the following provision:- "Risk will be assumed only when you have fulfilled the requirements set out on the attached slip provided there has been no change in the information given in connection with this proposal. Therefore please complete and return the slip without delay, but if there has been any change in the health or other circumstances which could affect the risk we must be informed of it and written confirmation of this offer must be obtained or otherwise the contract may be void. The right is reserved to withdraw this offer at any time provided risk has not already been assumed."

As frequently happens in modern copying, the left-hand edge of the acceptance slip has not got on to the photostat before me, but the document appears to state that with it was enclosed the policy number 9521350. The acceptance slip was intended to be signed and dated by the Plaintiff under a paragraph which probably reads:- "I accept the terms set out in your letter

dated 24.07.79. I enclose a signed direct debit mandate/other remittance." The copy furnished to me does not show that it had been completed by the Plaintiff.

Whenever the policy was furnished to the Plaintiff, the first recital stated that the Plaintiff had delivered the proposal as the basis of the policy and the second recital is as follows:- "This policy is not in force until the first premium has been paid to the Company or, if the premiums are expressed in the Schedule to be payable by monthly payments, until the first such payment has been made."

In the Schedule the "Effective Date" is expressed to be 17.08.79. On the same page the "Date Risk Assumed" is stated to be 31.08.79. The date of the policy is expressed as follows:- "Date as Date Risk Assumed in the Schedule within."

I have no note of any evidence as to the date of payment of the first premium by the Plaintiff although I have a note that he paid a cheque to his broker, but it is stated in the amended defence to have been paid on 31st August, 1979, and I think I can safely assume that it was paid after what has been described as the effective date. What relevance the effective date had to the policy is not clear to me other that that it was

the date from which premiums were to be paid and calculated, but it is not suggested that anything turns on this. I feel however that the terms of the policy should have been stated in simple language rather than by reference to terms used without definition.

On 9th August, 1979, the Plaintiff attended his doctor complaining of a head cold and some pain in his chest. The doctor found that he had an infection of the throat which he considered to be a common minor illness and he put the Plaintiff on antibiotics for five days. The Plaintiff returned to his doctor on the 16th August complaining that he still had a cough and the doctor diagnosed an infection of the air passages in the lungs, a form of bronchitis, which he stated is a very common complication of a head cold and he put the Plaintiff on different antibiotics for a further five days. He stated in cross-examination that bronchitis could be serious if chronic but that he had no reason to consider that this was chronic and still considered that the Plaintiff had only a minor illness which was merely of nuisance value to the Plaintiff at work. At no time during August was the Plaintiff off work and the doctor did not make any such recommendation. Both the visits to the doctor took

place before the effective date and about a fortnight before the Date Risk Assumed. On 5th September the senior doctor in the practice, who had been on holiday during August, thought the Plaintiff's symptoms were only minor although annoying to him at work.

In the middle of September 1979 The Plaintiff's condition began to get worse and he was taken off antibiotics which the doctor thought might be the cause of the trouble. The doctor advised the Plaintiff to go ahead with a holiday to America which had been arranged for the end of October. The Plaintiff did go for his holiday but on his return, he became very much worse and did not recover until September 1980. It was accepted by the Plaintiff's doctors that what happened in August was the beginning of the illness which incapacitated the Plaintiff.

Evidence was given on behalf of the Defendant by an independent insurance representative and by a representative of the Defendant who both stated that they consider it material to the risk that the Plaintiff had a cold which had not cleared up and had visited his doctor twice notwithstanding that no significance had been attached to the original information disclosed to the Defendant's doctor that the Plaintiff had a

cold. I was somewhat unhappy about that part of the second witness's evidence which seemed to suggest that, because the Plaintiff's cold was a viral infection, he would have thought of cancer because he had heard that cancer is a viral illness, although no medical evidence was called to establish any connection and no suggestion of any connection was put to the Plaintiff's doctors. No medical evidence at all was called on behalf of the Defendant.

Both these witnesses stated that an insurance company would postpone or suspend a risk if it was made aware that the proposer was attending a doctor for a cold and that antibotics had been prescribed without success. One of them also said that, if a company was made aware that a person was suffering from a cold the company would postpone the risk until it had cleared up. He agreed that he could refuse, load or accept the risk but said he would postpone to see if the infection cleared up.

On behalf of the Plaintiff it is argued that the continuation of the Plaintiff's cold was not material to the risk, particularly as there was a deferred period of thirteen weeks before any liability for illness could arise. It was urged that the test of materiality is whether knowledge of the continuation of a cold and the visits to the doctor would at that time have caused a

prudent insurer to refuse the insurance and that the onus of proving materiality is on an insurer. I was referred to the cases of Chariot Inns Ltd. .v. Assicurazioni Generali S.p.a. & Others (1981) I.R. 199; (1981) 1 I.L.R.M. 173; and Mutual Life Insurance Co. of New York v. Ontario Metal Products Ltd. (1925) A.C. 344.

It has not been disputed that the onus is on the Defendant to establish materiality but it is urged that the evidence of the two insurance representatives does establish that the information which was withheld was material and would have been so considered by a prudent insurer. Although the amended defence suggests that this aspect was considered no argument was advanced on the basis that there was a contractual duty to disclose the Plaintiffs condition in August arising by reason of the statement at the foot of the proposal form and the recital in the policy that the proposal was delivered as the basis of the policy.

The submission and evidence on both sides related solely to the question of the materiality of the non-disclosure of the visits by the Plaintiff to his doctor in August and I propose to confine myself to a consideration of this.

The following passage from the judgment of Kenny, J., at page 226 of the Chariot Inns case sets out how I must approach my consideration of this question. He said "What is to be regarded as material to the risk against which the insurance is sought? It is not what the person seeking the insurance regards as material, nor is it what the insurance company regards as material. It is a matter of circumstance which would reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk, and, if so, in determining the premium which he would demand. The standard by which materiality is to be determined is objective and not subjective. In the last resort the matter has to be determined by the Court: the parties to the litigation may call experts in insurance matters as witnesses to give evidence of what they would have regarded as material, but the question of materiality is not to be determined by such witnesses."

In the case of the Mutual Life Insurance Co. of New York, which concerned a policy of life insurance, Lord Salvesen giving the judgment of the Privy Council, said at page 351 "the appellant's counsel .... suggested that the test was whether, if the fact concealed had been disclosed, the insurers would have acted differently either by declining the

risk at the proposed premium or at least by delaying consideration of its acceptance until they had consulted Dr. Fierheller. If the former proposition were established in the sense that a reasonable insurer would have so acted, materiality would, their Lordhsips think, be established but not in the latter case if the difference of action would have been delay and delay alone."

To this I would add that the options open to an insurer are to accept the contract, refuse the contract or make a new offer at an increased premium. There cannot be any course of accepting the premium and waiting until it was seen how the proposer's health progressed so that, if the infection cleared up the proposer would be held covered in future with his premium based for future reference as of the effective date but that if some complication developed, the proposer's premium would be returned to him and the policy cancelled.

Having regard to the decisions to which I have been referred I am of opinion that the evidence has not established the probabality that the non-disclosure of the visits by the Plaintiff to his doctor in August were material to the risk. On this assessment the Plaintiff is entitled to succeed in his Action.

Herbert R. McWilliam

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