1984 November 19

[L. LOIZOU, HADJIANASTASSIOU, SAVVIDES, JJ.]

CHARALAMBOS ANDREOU MAVRIDES AND ANOTHER AS ADMINISTRATORS OF THE ESTATE OF DECEASED ANDREAS MAVRIDES,

Appellants–Plaintiffs,

v.

AMERICAN LIFE INSURANCE CO.,

Respondents-Defendants.

(Civil Appeal No. 5807).

Insurance—Life insurance—Duty of intending assured to disclose to the insurer material facts—Failure to discharge such duty can avoid the policy—Question of materiality is one of fact to be decided by the Court—Test to be applied regarding knowledge by the assured of material facts is that of a "reasonable man" —Assured failing to disclose facts about the poor condition of his health which were within his knowledge and were material to the risk about to be undertaken by the insurer—And such failure vitiates the policy.

Civil Procedure—Pleadings—Life insurance policy—Avoidance of, for non-disclosure of material facts—Whether such defence sufficiently raised in the pleadings.

The appellants were the administrators of the estate of the deceased Andreas Mavrides. The deceased prior to his death applied for a policy of life insurance in the sum of £12,000.— which was issued by the respondent company on the 6th May, 1975. The insured died on 30th September, 1975 at the age of 52 of lung cancer. On 10th December, 1975, the respondents wrote a letter to the appellants disclaiming any liability under the policy. At the same time by the said letter they refunded the amount of £421.220 mils which was the first premium paid by the insured, and explained the reasons for disclaiming any liability under the policy on the ground that there was material

misrepresentation as to the state of health of the deceased when the application for insurance was made.

In an action by the appellants against the insurers (the respondents) the trial Court found that with the exception that the deceased knew that he had cancer and was suffering from cough the remaining facts on which the respondents relied to establish their defence of non-disclosure were within the knowledge of the deceased. The trial Court, further, found that when applying for insurance on the 22nd and 23rd April, 1975 the deceased knew that he was repeatedly X-rayed; that he received treatment in Nicosia Hospital from the 14th February, 1975 to the 22nd March, 1975; that the treatment continued in Larnaca Hospital where he was seen as an out-patient and that he had consultations with his family doctor and with a doctor in Athens and at Dhekelia Hospital; that he was aware that he was not in a good state of health; that he knew or he ought to know that he was in a bad state of health; and that he failed to disclose these facts to the defendants who had no knowledge of any one of them.

The trial Court, also, found that the facts which were concealed were material facts and that the respondents rightly repudiated liability under the policy.

The respondents in their defence* alleged that the deceased prior to his application for the policy was suffering from chest pain and had cancer and that he failed to disclose material facts to the respondents.

Upon appeal by the administrators of the estate of the deceased:

Held, that there is a duty cast upon an intending assured to disclose to the insurer any fact which he actually knows and which is material and that failure to discharge such duty can avoid the policy; that the question of materiality is one of fact to be decided by the Judge in each case; that the test to be applied regarding knowledge by the assured of material facts appears to be that of "a reasonable man"; that considering the findings of the trial Court based on the evidence before it this Court is in full agreement with the trial Court that the facts

* The relevant passages appear in paragraphs 10 and 11 of the defence which are quoted at p. 615 post.

mentioned in its judgment as to the poor condition of the health of the assured, though he was not aware that he was suffering from cancer, were within his knowledge and that such facts were material to the risk about to be undertaken by the respondents; that his failure to disclose such facts vitiates the policy; and that, therefore, the appeal must be dismissed.

Held, further on the procedural objection raised by Counsel for the appellants that in the state of the pleadings the defence of non-disclosure was not open to the respondents as such defence was not properly and/or sufficiently pleaded:

That the defence of non-disclosure of material facts was sufficiently raised in the pleadings and that the trial Court rightly concluded that appellant's objection in this respect was not sustainable.

Appeal dismissed.

Cases referred to:

Carter v. *Boehm* [1558–1774] All E.R. Rep. 183 at pp. 184, 185;

Lindenau v. *Desborough*, 108 E.R. 1160 at p. 1162;

Seaton v. *Heath*, *Seaton* v. *Burnard* [1899] 1 Q.B. 782 at pp. 792, 793;

Joel v. *Law Union and Crown Insurance Company* [1908] 2 K.B. 863 at pp. 878, 880;

London General Omnibus Co. Ltd. v. *Holloway* [1912] 2 K.B. 72 at pp. 85, 86;

Rozanes v. *Bown* [1928] 32 Ll. L.R. 98 at p. 102;

Godfrey v. *Britannic Assurance Co. Ltd.* (1963) 2 Ll.L.R. 515 at pp. 529, 530;

Glicksman v. *Lancashire and General Assurance Co.* [1925] 2 K.B. 593 at p. 609.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (Demetriades, P.D.C. and Nikitas, D.J.) dated the 4th February, 1978 (Action No. 279/76) whereby their

claim against the defendants for £12,000.- claimed under a life policy was dismissed.

L.N. Clerides, for the appellants.

K. Michaelides, for the respondents.

Cur. adv. vult.

L. Loizou J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

Savvides J.: The appellants are the administrators of the estate of the deceased Andreas Mavrides, late of Xylophagou and their appeal is directed against the judgment of the Full District Court of Nicosia dismissing their action on behalf of the estate of the deceased for a sum of £12,000.- claimed under a life policy.

The respondents are an insurance company carrying on business in Cyprus.

The facts of the case are briefly as follows:

The deceased Andreas Mavrides, to whom reference will be made in this judgment as the insured, prior to his death applied for a policy of life insurance in the sum of £12,000.- which was issued by the defendant company on the 6th May, 1975. The insured died on 30th September, 1975 at the age of 52. It was a common ground that he died of lung cancer. On 10th December, 1975, the respondents wrote a letter to the appellants disclaiming any liability under the policy. At the same time by the said letter they refunded the amount of £421.220 mils which was the first premium paid by the insured, and explained the reasons for disclaiming any liability under the policy on the ground that there was material misrepresentation as to the state of health of the deceased when the application for insurance was made.

Before the policy was effected the insured had signed a document entitled "application for insurance" which was in effect a proposal form. By express stipulation in the policy of insurance the application was incorporated into the policy and was made part thereof. In addition it is stated therein that the

policy "is made in consideration of the application for the policy". At the top left corner of the application form the words "Part I" appeared on top of the words "application for insurance" and the second page, which is headed "Statements made to the medical examiner or authorized company agent", is described as Part II thereof. A separate photocopy of each page was made available to the Court. Both parts of the application which are printed in English contain a series of questions and answers and bear the signature of the insured.

The respondents relied on two grounds in contesting appellants' claim. The first that the insured made fraudulent misrepresentations in the application of insurance about a number of facts which were to form the basis of the contract, particulars of which appear in the statement of defence as amended, and, in the alternative, that the insured failed in his duty to disclose certain material circumstances to the respondents. Paragraphs 10 and 11 of the amended statement of defence, read as follows in this respect:

"Para 10: The defendants say that the answers of the deceased to the aforesaid questions put to him were false and/or incorrect to the knowledge of the deceased in that the deceased prior to his application was suffering from cancer. The deceased prior to his said application to defendants, was suffering from chest pain and had cancer, he was X-rayed, he was observed and/or treated at the Larnaca and/or Nicosia General Hospital and he had consultations with various other physicians. He was not at the time of filing of the said application in good health.

Para 11: In the alternative the defendants say that the deceased by his said answers to the said questions failed to disclose material facts to be known to the defendants in or about the making of the said policy and/or the deceased failed to disclose the aforesaid material facts which the deceased should have known were relevant for the defendants to know".

The condition of health of the insured shortly before and at the time of the signing of the proposal form as found by the trial Court on the medical evidence before it and which has not been contested was as follows:

"In order to have the events in chronological order, the evidence of Dr. Hadjiloannou will be outlined first. The insured called at Dr. Hadjiloannou some time in November, 1974, complaining of dyspnoea. On examination the doctor found that the insured suffered from spasm of the bronchi which he attributed to smoking and for which he prescribed some pills. A month later, the insured resturned still complaining of dyspnoea, and the X-Ray of the chest, which was taken on the doctor's recommendation, revealed a shadow on one of the lungs. This prompted Dr. Hadjiloannou to tell the insured that he had to see Dr. Soteriou in respect of the shadow to his lung. Later on, probably early in January, 1975, the insured visited Dr. Hadjiloannou again and told him that he had travelled to Athens where he was medically examined. In fact Dr. Hadjiloannou had a telephone conversation with the doctor who attended the insured while in Athens and whose name Dr. Hadjiloannou learned from the insured. Some time afterwards, Dr. Hadjiloannou gave him a few injections, intended for the treatment of tuberculosis, that the insured had brought along with him from Athens. Dr. Hadjiloannou did not use all the injuctions because the insured himself asked him to stop this line of treatment. The complaint about dyspnoea recurred after the insured stopped having the injections and Dr. Hadjiloannou once more advised him to go to Dr. Soteriou.

This was the medical situation of the insured, as we find it, from November, 1974 till the beginning of January, 1975. We are satisfied from his evidence that the insured had knowledge of the facts recited above except, perhaps, the telephone call to Athens and that he was treated for tuberculosis, on which the evidence is not altogether clear. We are satisfied further that the insured was not told that he was suffering from cancer because Dr. Hadjiloannou himself did not know what was the matter with the insured.

On February 12th, 1975, the insured was admitted at the Nicosia Hospital where he was kept until the 22nd March, 1975. The insured told Dr. Demetriades that before that he had stayed at Dhekelia Military Hospital. He was, presumably, X-Rayed there and furnished with

a report because after his admission to Nicosia Hospital he handed over to Dr. Soteriou the X-Rays and the report of investigations carried out at Dhekelia.

X-Rays were taken at Nicosia Hospital every one or two weeks till after April 23rd, 1975, the date of the proposal form. Dr. Soteriou diagnosed lung cancer and applied radiotherapy in an effort to reduce the size of the tumor.

Before Dr. Soteriou had taken over, Dr. Demetriades had also diagnosed cancer by means of bronchoscopy and other tests. Radiotherapy was applied daily except on week-ends. In fact Dr. Soteriou told us that the patient had 25 days of treatment. He also had aspiration of fluid for relieving his breathlessness and other symptoms. This happened on more than two occasions. Dr. Soteriou was quite positive that one occasion was on April 23rd, 1975 in the morning when one litre of fluid was removed from his chest. Another occasion which the witness recollected was on the 6th May, 1975. There was aspiration of fluid in Athens as well. Dr. Demetriades stated that the insured told him so. Despite the doctors' efforts, there was not much progress in the condition of the insured when discharged from the Hospital, but only "some improvement" to use Dr. Soteriou's own words. After his discharge, the insured attended Larnaca Hospital as an out-patient at least every two weeks upto probably July, 1975 and during this period he was again under the care of Dr. Soteriou.

Neither Dr. Soteriou nor Dr. Demetriades ever told the patient that he was suffering from cancer. Dr. Soteriou had no recollection of what she told the insured. She stated that she must have told him either that he had 'some sort of tumor or inflamation of the lungs'. The attitude of the other doctor was to tell the insured that his condition was due to an irritation of the lung. In cross-examination Dr. Demetriades was asked:

Q. Did he (the insured) mention anything to you about his illness?

A. He tried. He thought that there might be something serious but for psychological reasons I alleviated him.

Dr. Soteriou stressed that the insured 'was extremely anxious and worried' about his condition which she described in these words:

'As I remember it, he was throughout a very ill–looking man. He was a very ill man. Not only looking but he was suffering from a very severe condition' ".

The trial Court after expounding on the medical evidence concluded as follows:

"There can be no doubt on the medical evidence, which is accepted without hesitation, that the insured had actual knowledge of the fact that he was a patient at Dhekelia Military Hospital; that he remained in Nicosia Hospital as an in–patent from the 12th February, 1975 to the 22nd March, 1975; that he was repeatedly X–Rayed there, underwent examinations and received continuous treatment including aspiration of fluid; that fluid was previously removed from his lungs in Athens; that he suffered from a severe condition which was manifested by various symptoms; that, as Dr. Soteriou testified, he had cough; that on his discharge from the Nicosia Hospital his condition did not really change; and that on the very day he was to visit the defendants' doctor, he had an aspiration. Dr. Soteriou gave it as her opinion and we accept her opinion that he must have been quite ill then. However, it is equally clear from the evidence that the doctors did not reveal to the insured his true condition, that is to say that he had cancer".

Then the trial Court proceeded to examine the circumstances under which the proposal form was signed, to which we find it necessary to refer. According to the trial Court:

"Mr. Mouskos who was in the service of the defendants as an insurance salesman and had interviewed the insured at Xylophagou where the latter lived was called by the plaintiff. His evidence refers to Part I of the application.

On April 22nd, 1975, Mouskos had met the insured at Xylophagou in a coffee shop and suggested to him to take

out a life policy, a matter which Mouskos had frequently pursued in the past, but which the insured used to postpone. On this occasion, however, the insured agreed to insure his life with the defendants and discussed with Mouskos the terms of the policy. Eventually the amount of the policy was settled at £12,000.-.

The insured, to the knowledge of Mr. Mouskos, did not know English at all. So he obtained the signature of the insured on exhibit No. 1 in blank after putting questions to him. In cross-examination Mouskos clarified that he had in effect asked the insured all the questions listed in exhibit No. 1, with the exception of questions 16 and 17. He explained that he thought it unnecessary to put these questions since the insured told him earlier, in answer to a specific question, that he did not effect any other life policy. We may remark here that the insurers do not complain of any misstatement occurring in exhibit No. 1. Mr. Mouskos put the questions to the insured and obtained his signature on exhibit No. 1 when they had left the coffee shop which became too noisy and got into the car of Mouskos, which was parked outside the coffee shop. The answers of the insured were noted down by Mouskos on a piece of paper and later on in his office he filled up exhibit No. 1 in his own hand-writing.

It is important to mention that at the end of exhibit No. 1, above the signature of the insured, there is a declaration which again is printed in English. Its material part reads as follows:-

> 'I hereby agree that there shall be no contract of insurance unless a policy is issued and delivered on this application and the full first premium actually paid during the life time and good health of the proposed insured, provided however, that if any payment of premium is made in cash at the time of signing this application and the receipt is detached therefrom, the terms of the receipt shall apply hereto and are agreed to; that all statements and answers in this application, as well as those made or to be made to the medical examiner or the agent in Part II, are full,

complete and true and bind all parties in interest under the policy herein applied for .. ..'

The contents of the statement just quoted were not, admittedly, translated to the insured, nor were his answers to the questions read over to him.

During the interview, Mouskos also asked the insured whether he suffered from any disease and whether he had undergone an operation. The reply of the insured was in the negative. These two questions were not included in the list of questions set out in exhibit No. 1 but were part of a confidential report which Mouskos ultimately forwarded to the defendants together with the proposal form exhibit No. 1.

Before their meeting was over, Mouskos informed the insured that he had to see Dr. Kassianides, the defendants, doctor, for a medical examination in connection with the policy, adding that the insured should visit the doctor immediately if he wanted a cover as from the following day. The evidence which has been recited so far is not in dispute and is of course accepted.

On April 23rd, 1975, at 9.30 in the morning, the insured called at the consulting rooms of Dr. Kassianides in Nicosia. Dr. Kassianides was called by the defendants. His evidence relates to the filling in of Part II of the application for insurance. At the bottom of this form, and again above the insured's signature, there is a warranty in the following terms:

'All of the above answers are full, complete and true; are a continuation of, and form a part of the application for insurance of my life to American Life Insurance Co.

I hereby for ever waive to such extent as shall be lawful, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, any and all provisions of Law forbidding any physician or other person who has attended or examined me from disclosing any knowledge or information thereby acquired and I hereby authorise to such extent as may be lawful any such physician

or person, at the instance of the insurer freely and fully to disclose of such knowledge or information'.

The above declaration, on the doctor's own admission, was not translated to the insured, though the doctor informed him that he was obtaining his signature to the effect that the examination had taken place and that the answers on the form were really those that he had given to the doctor.

Dr. Kassianides made a clinical examination of the insured and passed him as a fit person for life insurance purposes. Actually he recommended him as 'a first class life' in his confidential report to the defendants—see exhibit No. 4 which is the reverse side of Part II of the application where the classification just mentioned appears.

Dr. Kassianides stated and we believe him that cancer of the bronchi, from which the insured died, was undiscoverable by means of the clinical examination he carried out on the insured. It will be remembered that on the day of the exaination the insured has had aspiration of fluid from his lungs at the Nicosia General Hospital, but the evidence does not show if this happened before his visit to Dr. Kassianides or afterwards. Be that as it may, the doctor did not observe any evidence of aspiration having taken place on that day, nor did the examination disclose to him the presence of fluid in the chest of the proposed insured. The net result of Dr. Kassianides' evidence is that he did not diagnose cancer and so we find.

We have said at the outset that the fraudulent misrepresentations complained of are given in para. 2 of the Defence. It is convenient now to quote that paragraph in full, but we have added, for the sake of easy reference, the number of each question which corresponds to the actual number of the question in Part II of the proposal form.

'Para. 2:— The statements made to the medical examiner contained the following questions to and answers by the said deceased. First sentence of question 9(B): Have you ever had high or low blood pressure, chest pain, shortness of breath, palpitation? Answer: No. Question 9(C): Have you ever had haemorrhage, habitual cough,

chronic hoarseness, asthma, pleurisy, tuberculosis or disorder of respiratory system? Answer: No. Question 9(H): (part thereof). Have you ever had goitre, tumor, cancer? Answer: No. Question 9(I): Have you ever had treatment or observation in any Hospital or Institution? Answer: No. Question 9(J): Have you ever had X-Rays or Electrocardiogram? Answer: No. Question 9(K): Have you ever had consultations with any physicians or practitioners other than as stated above within the last three years? Answer: No. Question 8(B): Are you now in good health? Answer: Yes".

The trial Court after a detailed examination of the evidence of Dr. Kassianides found as follows:

"In this state of evidence, we are not prepared to find that Dr. Kassianides put to the insured the specific questions mentioned in para. 2 of the Defence. On the other hand, we are satisified that he did ask whether the insured suffered from any serious disease and that the answer to that question was in the negative. This brings us to the consideration of the first contention of the defendants, namely, that they are entitled to avoid the policy and refuse the claim under it, on the ground of the misstatements in Part II of the application for insurance which amounted to a breach of the declarations of 22nd April, 1975 and 23rd April, 1975, upon which the policy was based and which were signed by the insured".

And after reviewing the legal principles emanating from the English case law on the question of the legal effect of the answer of an assured in a proposal form and whether such answers should be given the force of warranties concluded as follows on the question as to whether the insured made fraudulent misrepresentations in the application of insurance:

"We have already held that it has not been established that the defendants' medical examiner has put to the insured the crucial questions referred to in the Statement of Defence. It follows, therefore, that since those questions were not asked, there could be no warranted answers by the insured. The other element which has a bearing on this aspect of the case is the failure to translate the

declarations. The insured did not read English. As the evidence goes, he was ignorant of the contents of the declaration of April 22nd and of material parts of the subsequent declaration. In our opinion these factors are fatal to the first contention of the defendants which must fail".

Though the appeal is not directed against such finding of the trial Court, we have no hesitation in saying that we find ourselves in agreement with the conclusion reached by the trial Court that there was no fraudulent misrepresentation on the part of the insured as alleged by the appellants, for the reasons explained in its judgment.

We shall now proceed to examine the second leg of appellant's defence that of failure by the insured to disclose material facts. The trial Court in considering the argument advanced by counsel for appellants that the defence of non-disclosure was not sufficiently pleaded by appellant's defence found as follows:

"We come now to consider the defence of non-disclosure. Learned counsel for the plaintiffs argued that this defence is not open to the defendants on the pleadings because in para. 11 the defendants rely on the questions and answers in support of their plea of non-disclosure. Counsel would be right if para. 11 ended there, but there is a further averment which is preceded by the disjunctive word 'or'; we read it again:

> 'Or the deceased failed to disclose the aforesaid material facts which the deceased should have known were relevant for the defendants to know'.

The argument of counsel, therefore, is not sustainable".

Such finding of the trial Court is challenged in this appeal. The trial Court after an elaborate exposition of the law on the principles governing the duty of disclosure of material facts within the knowledge of the insured came to the conclusion that the insured failed to disclose material facts which were within his knowledge and as a result dismissed appellants' claim under the policy on this ground.

The appellants as a result filed the present appeal and the following grounds were relied upon in support of same.

"(a) The judgment of the Court dismissing appellants' claim is erroneous in law and in fact and is against the weight of evidence.

(b) The Hon. Court erroneously came to the conclusion that the deceased failed to disclose material facts and that on such basis respondents had the right to repudiate liability on the Policy in that:-

(i) The Hon. Court failed to direct its mind to the fact that the onus of proof for such non-disclosure was on the respondents and that they failed to discharge such onus.

(ii) Since the Hon. Court rejected respondents' allegation that the deceased had in fact made the fraudulent misrepresentations pleaded in para. 10 of their defence, and once the alleged concealment of material facts on which respondents relied in para. 11 of the Statement of Defence are based on the same set of facts the Hon. Court erroneously came to the conclusion that the appellants failed in law to disclose material facts to respondents.

(iii) Once the Court found that respondents and/or their agents failed to translate to the insured (deceased) the declaration and/or recital at the end of the proposal form and the answers of the deceased to the said questions and/or otherwise were never read over to him and further that the said declaration and/or recital as well as all other documents which deceased executed were in English, the Court could not in law have found concealment of material facts by him.

(iv) Respondents failed to prove the existence of the circumstances alleged in para. 11 of the Statement of Defence, that deceased knew of them, materiality of such circumstances, the deceased's failure to disclose them and consequently the finding of the Hon. Court that deceased was guilty of concealment of material facts is erroneous both in law and in fact and should be set aside".

Learned counsel for appellants in summing up his argument that the finding of the trial Court that the insured failed to disclose material facts made the following submissions:

(1) Since Court rejected the ground of fraudulent misrepresentation there was no room for finding concealment of material facts.

(2) No duty cast on insured to disclose facts which were subject-matter of questionnaire which the doctor failed to ask.

(3) On the facts there is no evidence that he knew he was suffering from any serious disease which made it incumbent upon him to disclose to the insurance that he was suffering from something.

(4) Once everything was in English and it was not read to him or translated to him the Court must find in favour of the appellant.

Before embarking on the substance of this appeal, we shall deal briefly with a preliminary procedural objection raised by counsel for appellants in the course of his argument, that in the state of the pleadings the defence of non-disclosure was not open to the respondents as such defence is not properly and/or sufficiently pleaded.

We have carefully examined the statement of defence and considered the finding of the trial Court on this issue and we are satisfied that the defence of non-disclosure of material facts is sufficiently raised in the pleadings and that the trial Court rightly concluded that appellants' objection in this respect is not sustainable.

We shall now proceed to consider the issue before us whether in the circumstances of the present case there was a duty on the part of the assured to disclose material facts within his knowledge and whether that duty was fulfilled or broken.

A contract of insurance is a type of contract of the utmost good faith which is commonly described, in a convenient way, as a contract of "uberrimae fides". The general principles upon which an assured is required to disclose all material facts

within his knowledge and which are applicable to all branches of insurance whether marine, life or other non-marine insurances, are well known and have been stated and restated time and again in a long line of cases. As early as 1766, Lord Mansfield in the case of *Carter* v. *Boehm* (1766) 3 Burr. 1905 [1558-1774] All E.R. Rep. 183 at pp 184, 185, stated such principles as follows:

> "First, insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Keeping back such circumstance is a fraud, and, therefore, the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement
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> Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon Aliud est celare; neque enim id est celare quicquid reticeas; sed cum quod tuscias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire: CICERO, DE OFF., lib. 3, c.12,13 This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favour of the party misled by his ignorance of the thing concealed".

In the case of *Lindenau* v. *Desborough*, 108 E.R. 1160 at p. 1162, Bayley J. had this to say:

> "I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the

assured, and that the proper question is, whether any particular circumstance was in fact material? And not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to shew that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach".

In *Bates* v. *Hewitt* [1867] L.R. 2 Q.B. 597 at p. 607 the following statement of Cockburn C.J. is reported:-

"It is also well established law, that it is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known".

Another instructive authority is the judgment of Lord Justice Romer in *Seaton* v. *Heath, Seaton* v. *Burnard* [1899] 1 Q.B. C.A. p. 782 which at pp. 792, 793, reads as follows:

"There are some contracts in which our Courts of law and equity require what is called 'uberrima fides' to be shewn by the person obtaining them; and, as that phrase is short and convenient, I will continue to use it. Of these, ordinary contracts of marine, fire, and life insurance are examples, and in each of them the person desiring to be insured must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him. . . . . Contracts of insurance are generally matters of speculation, where the person desiring to be insured has means of knowledge as to the risk, and the insurer has not the means or not the same means. The insured generally puts the risk before the insurer as a business transaction, and the insurer on the risk stated fixes a proper price to remunerate him for the risk to be undertaken; and the insurer engages to pay the loss incurred by the insured in the event of certain specified contingencies occurring".

The question as to whether the duty of disclosure applies to a contract of life insurance and the extent of such duty has also

been considered in *Joel* v. *Law Union and Crown Insurance Company* [1908] 2 K.B. 863 where we read the following in the judgment of Vaughan Williams, L.J. at p. 878:

> "I have now only to deal with the question whether the policy is vitiated by concealment or non-disclosure of facts material to the risks insured against. This to my mind is the most difficult question in this case. First, I ask myself, does the obligation to make full disclosure apply to a contract of life insurance in the same sense that it applies to a contract of marine insurance? In my opinion it does".

And at page 880:-

> "The matters to be disclosed must be matters within the knowledge of the applicant.....The onus of proving non-disclosure or concealment is on the insurance office".

Lord Justice Fletcher Mouton said this (ibid at pp. 883, 885):-

> "The contract of life insurance is one of uberrima fides. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord Blackburn in *Brownlie* v. *Campbel* (5 App. Cas. 925 at p. 954): 'In policies of insurance, whether marine insurance or life insurance there is an understanding that the contract is uberrima fides, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you whether you thought it material or not, avoids the policy'. There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. The duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of

that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so.

But in my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclosure, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is, was the knowledge you possessed such that you ought to have disclosed it? Let me take an example. I will suppose that a man has, as is the case with most of us, occasionally had a headache. It may be that a particular one of those headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache undistinguishable from the rest. Now no reasonable man would deem it material to tell an insurance company of all the casual headaches he had had in his life, and, if he knew no more as to this particular headache than that it was an ordinary causual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material or of a character to influence the insurers in their action. It was what he did not know which would have been of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know".

In *London General Omnibus Company Ltd.* v. *Holloway* [1912] 2 K.B. 72 at pp. 85, 86, Lord Justice Kennedy had this to say:

" no class of case occurs to my mind in which our law regards mere non-disclosure as a ground for invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in deference to the plain exigencies of this particular and most important class of transactions. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and, generally is, as to some of them, the only person who has the knowledge: the underwriter, whom he asks to take the risk, cannot, as a rule, know, and but rarely has either the time or the opportunity to learn by inquiry, circumstances which are, or may be, most material to the formation of his judgment as to the acceptance or rejection of the risk, and as to the premium which he ought to require".

In *Rozanes* v. *Bowen* [1928] 32 Ll. L.R. 98 at p. 102 Lord Justice Scrutton said:

"It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is contract of the utmost good faith—uberrima fides".

The duty of disclosure was also expounded in *Godfrey* v. *Britannic Assurance Co. Ltd.* (1963) 2 Ll. L.R. 515 where Roskill, J., after reviewing a number of decided cases on the point, said the following at pp. 529, 530:

"I do not wish to multiply the citation of decided cases, but the position is, I think, stated by Lord Justice Scrutton in *Greenhill* v. *Federal Insurance Company, Ltd.* [1927] 1 K.B. 65, at pp. 76 and 77; [1926] 24 L.L. Rep. 383, at p. 388:

'Now, insurance is a contract of the utmost good faith, and it is of the gravest importance to commerce

that that position should be observed. The underwriter knows nothing of the particular circumstances of the voyage to be insured. The assured knows a great deal, and it is the duty of the assured to inform the underwriter of everying that he is not taken as knowing, so that the contract may be entered into on an equal footing".

Then the learned Lord Justice goes on to quote from Mr. Justice Park's well known book on marine insurance. ("A System of the Law of Marine Insurance"), and summarized the position as follows:

"The assured must disclose to the insurers before the contract is concluded every material circumstance which is known to him. Moreover, it is clear that he must disclose not only every material circumstance of which he has actual knowledge, but every material circumstance which he ought to know. Further, it is well established that every circumstance is material which would influence the judgment of a prudent underwriter in fixing the premium or in determining whether or not he will take the risk. It is also well established that the opinion of the assured whether or not a particular fact is material is irrelevent. Even if the assured fails to disclose a fact because he does not think it is material when in fact it is, that does not avail him.

The question is whether any particular circumstance is in fact material and not whether a particular assured believed it to be material. It is not necessary in this case, though the point was touched upon in argument, to consider possible differences between the obligations of an intending assured regarding disclosure in the course of effecting a policy of marine insurance and the obligations in the course of effecting a policy of non-marine insurance. See the recent judgment of Mr. Justice McNair in *Australia & New Zealand Bank, Ltd.* v. *Colonial & Eagle Wharves, Ltd.*; *Boag* (*Third Party*), [1960] 2 Lloyd's Rep. 241, at pp. 251 to 253, where the relevant authorities are conveniently set out.

It is well established that what may be called the basic obligation with regard to disclosure applies equally to

contract of life insurance.....

It is thus clear that if an intending assured actually knows a fact and that fact is material and he fails to disclose it, the insurer can avoid the policy".

We do not wish to make further citation to leading authorities on the principle of disclosure as from the cases mentioned above, it is quite clear that there is a duty cast upon an intending assured to disclose to the insurer any fact which he actually knows and which is material and that failure to discharge such duty can avoid the policy.

The question of materiality is one of fact to be decided by the judge or jury in each case. In *Mc Gillivray & Parkington on Insurance Law*, 6th Edition, para. 754, p. 313, we read:

"*Evidence of materiality*. Although it is proper for the Court to formulate legal tests governing the materiality of facts, the question whether a given fact is or is not material is one of fact to be determined by a jury or a judge as the trier of fact. The decision rests on the judge's own appraisal of the relevance of the disputed fact to the subject-matter of the insurance; it is not something which is settled automatically by the current practice or opinion of insurers".

Scrutton L.J., explained the question of materiality in the case of *Glicksman* v. *Lancashire and General Assurance Co.* [1925] 2 K.B. 593, 609 as follows:

"It was argued that before a Court can find that a fact is material, somebody must give evidence of the materiality. That is entirely contrary to the whole course of insurance litigation; it is so far contrary that it is frequently objected that a party is not entitled to call other people to say what they think is material; that is a matter for the Court on the nature of the facts".

As to the test to be applied regarding knowledge by the assured of material facts appears to be that of "a reasonable man". Roskill, J., in *Godfrey* v. *Brittanic Assurance Co. Ltd.* (supra) at p. 532 put the standard required by law as follows:

"I have sought to exclude from the consideration of this problem and to avoid attributing to the assured anything

which could fairly only be said to be within the knowledge of a lawyer, a doctor or a man with long experience in a life office. But wherever one pauses in order to apply the standard which the law requires to be applied, I cannot think that a reasonable man, with no specialist knowledge of any kind, could have failed to appreciate that he was possessed of knowledge and information relating to his health in the respects which I have already described which were of materiality and which were calculated to influence the mind of a life office in considering and deciding on the risk".

Having dealt at some length with the principles of law, we revert to the case under consideration.

The trial Court, in its elaborate judgment concluded as follows:

"We remind ourselves of our previous findings on the medical history and state of health of the insured and conclude that with the exception that the insured knew that he had cancer and was suffering from cough, the remaining facts on which the defendants rely to establish their defence of non-disclosure were within the knowledge of the insured. When applying for insurance on the 22nd and 23rd April, 1975, the insured knew that he was repeatedly X-Rayed; that he received treatment in Nicosia Hospital from the 14th February, 1975 to the 22nd March, 1975; that the treatment continued in Larnaca Hospital where he was seen as an out-patient and that he had consultations with his family doctor, with a doctor in Athens and at Dhekelia Hospital. Lastly, he was aware that he was not in a good state of health. Actually he knew or he ought to know that he was in a bad state of health. It is to be noted that the duty of disclosure extends up to the time when a binding contract is concluded, that is, on the 6th May, 1975 in this case. At any rate, the obligation existed on April 22 and April 23rd, but the insured failed to disclose these facts to the defendants who had no knowledge of any one of them.

Having in mind the principle which determine materiality, we find that the facts which were concealed were material facts and that the defendants rightly repudiated liability

under the policy. We have described these facts in detail and we need not repeat them. We think that if the facts in question were within the knowledge of a reasonable person applying for insurance, he would not fail to realise from their grave nature that he ought to communicate them to the insurers concerned. Especially when, as in the present case, the insured was asked whether he suffered from any disease by Mr. Mouskos or any serious disease by Dr. Kassianides and had thus an indication of what the defendants regarded as material".

In the light of all the material before us and having carefully considered the above findings of the trial Court based on the evidence before it, we find ourselves in full agreement with the trial Court that the facts mentioned in the judgment as to the poor condition of the health of the assured, though he was not aware that he was suffering from cancer, were within his knowledge and that such facts were material to the risk about to be undertaken by the respondents. His failure to disclose such facts vitiates the policy.

In the result, the appeal fails and is hereby dismissed with costs in favour of the respondents.

Appeal dismissed with costs.