JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 48/86

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

BETWEEN	K. CHURCHILL NEITA [EXECUTOR ESTATE STEPHEN O.B. McLEAN [DECEASED]	PLAINTIFF/APPELLANT
A N D	LIFE OF JAMAICA	DEFENDANT/RESPONDENT

R. Carl Rattray, Q.C., & Clinton Hines
for Appellant

Berthan Macaulay, Q.C. & Allan Deans
for Respondent

March 2 and 23, 1988

CAREY J.A.:

This was an appeal against an order of Morgan J., dated 30th July, 1986 whereby she gave judgment for the respondent in an action on behalf of the estate of Stephen Oscar Beresford McLean to recover proceeds of insurance payable under a contract between the deceased and the respondent. By agreement of the parties, the action was determined on the basis of a statement of agreed facts.

For convenience, I set out hereunder that statement in extenso:

"1. The deceased, STEPHEN OSCAR BERESFORD McLEAN, made two proposals on 18th December 1975 bearing Policy No. 040845 and No. 040846 for life insurance coverage in the sums of One Hundred and Sixty-Six Thousand Three Hundred dollars ($166,300) and One Hundred Thousand Dollars ($100,000.00) Whole Life Policies respectively.

2. On each Proposal there was a month's premium paid and thereafter three more payments were made - copy proposals attached and copy statements of payment of premium attached.

"3. The premiums were paid by the pre-authorisation payment system (PAP) which is the authorisation by the deceased to his bank to pay to his Insurance Company on a monthly basis on Vouchers presented by the Insurance Company to his bank.

4. On 13th April 1976 a Medical Examination was done by Dr. Sahoy and an E.C.G. done by Dr. James Levy. The Reports are exhibited hereto. Chest X-ray was done on the same day 13th April 1976. A copy of the Report on the Chest X-ray attached. The Report was received by the Defendant Company after the date of death of the deceased.

5. The deceased died on 17th April 1976. Probate of his Will was granted to the Plaintiff, the sole surviving Executor named therein on 6th December 1976.

6. No Contingency Receipts were ever delivered to the deceased and no Policies were ever issued to him.

7. The Plaintiff claims payment of the sums of One Hundred and Sixty-Six Thousand Three Hundred Dollars ($166,300.00) and One Hundred Thousand Dollars ($100,000.00) and the amount of any bonus accrued and interest on the above sums.

8. The question of law to be determined by the Court is whether on the facts stated and the documents attached there was in existence on 17th April 1976 contracts of insurance on the life of the said STEPHEN OSCAR BERESFORD McLEAN."

In order to appreciate the matter, it is necessary only to recite Clause 2 of the memorandum endorsed at the foot of the application for insurance which was signed by the deceased proposer:

> "That the company shall incur no liability in respect of this application unless and until a policy or policies based hereon have been issued and delivered to me during the lifetime and continued insurability of the life to be insured except as may be otherwise provided in a properly issued contingent insurance receipt."

It was submitted by Mr. Rattray that by the demands for premiums, other than the first, on the part of the Insurers and the retention thereof by them, the Insurers waived the condition precedent of obtaining a medical certificate of good health. The basis for this proposition was derived, it was said, from a view expressed by the learned author of Ivamy's General

Principles of Insurance Law (4th Edition), at page 120, where he stated:

> "Where no policy has been issued to the proposer before the loss, the receipt of the premium and its retention by the insurers, though by no means conclusive may raise the presumption, in the absence of any circumstances leading to a contrary conclusion, that the insurers have definitely accepted his proposal. In such a case they are not entitled to refuse to issue a policy to him, and they are, therefore, liable to him in the event of a loss."

He relied for support on a dictum of Lord MacLaren in McElroy v. London Assurance Corporation (1897) 24 R. (Court of Sessions) 287 at page 291, where the learned Judge stated:

> "The company are not bound to deliver a policy without payment of the premium. If they accept a premium before delivery of a policy I should be disposed to hold that the acceptance of the premium and the delivery of the receipt therefore was sufficient to create the obligation to issue a policy."

Another case in this regard, was Canning v. Farquhar (1886) 16 Q.B.D. 727, where Lord Esher M.R., at page 731 said:

> "If the premium is offered and accepted there is at once an insurance."

In the context of that case, that opinion of the learned Master of the Rolls, cannot be faulted. The terms of the proposal stipulated that no insurance should take effect until the premium was paid. Plainly, therefore, if the company had accepted the premium, a contract of insurance would have come into being, for the condition stipulated had been complied with. The facts show that there had been a proposal and an acceptance subject to the payment of the premium. The importance of these cases is doubtless as Professor Ivamy suggests, that payment may raise the presumption, but the emphasis is on may. It then becomes a question of fact whether there are circumstances leading to a contrary conclusion.

It seems to me that Clause 2 (supra) of the proposal would negative that presumption. That clause is in its terms quite unambiguous. No policy

of insurance was ever issued to the deceased during his lifetime. It is implicit in that clause that the life to be insured, must be insurable and remain so. The deceased although paying premiums, would not have been accepted as an insurable risk because he did not undergo any medical test until shortly before his death. Indeed, when the medical report was submitted to the respondent, the X-Ray section disclosed that the deceased had a "coin lesion" on his heart which would have disentitled him from having a policy issued. And at that point in time when the company received the Report the proposer was already dead. The facts are therefore that no policy was issued, and the life to be insured was not insurable. The conclusion is inescapable that the "company incurred no liability." These circumstances amount, in my view, to the contrary conclusion, suggested in Professor Ivamy's work.

The argument was, nevertheless, maintained that the time for determining when the risk was accepted, was when the demands by the company for payment of premiums other than the first were made. With all respect to Mr. Rattray, this takes the matter no further. It is the receipt or the demand for premium which may raise the presumption that the proposal has been accepted or put in other words, that the risk has been insured.

The point was really unarguable but learned counsel for the appellant did not shrink from his task. The learned Judge in the Court below cannot be faulted and her judgment must, therefore, be upheld.

It was for these reasons that I agreed that the appeal should be dismissed with costs.

WHITE J.A.:

I agreed that the appeal be dismissed and the reasoning of Carey J.A. is ineluctable.

WRIGHT J.A.:

I agree with the reasoning and conclusion of Carey J.A.