THE HIGH COURT

Record No. 2014 2632 P

BETWEEN

MATTHEW KIRBY

Plaintiff

-and-

FRIENDS FIRST LIFE ASSURANCE COMPANY LIMITED

Defendant

Judgment of Ms. Justice Ní Raifeartaigh delivered on the 10th day of December, 2018

Nature of the Case

1. The essential question is whether the defendant insurance company was entitled to repudiate a contract for income protection entered into with the plaintiff on the basis of the failure of the plaintiff to furnish certain information concerning his medical history.

2. The defendant refused the plaintiff's claim under the income protection scheme by letter dated the 17th February, 2012. In his statement of claim, the plaintiff sought the following reliefs; an order directing the defendant to indemnify him according to the income protection scheme, a declaration that the plaintiff had discharged his duty of utmost good faith to the defendant when applying for the insurance scheme, a declaration that the defendant was not entitled to avoid the insurance contract, damages for breach of contract, negligence and/or breach of duty (including statutory duty), interest, and certain related orders.

3. In its defence, the defendant pleaded that the plaintiff had not acted according to the required standard of utmost good faith, was in breach of the express or implied conditions of the insurance policy, was in breach of warranty, and had acted contrary to his express declaration by failing to disclose material facts in relation to the insurance policy and by misrepresenting that he had in fact done so.

Preliminary matter

4. On the second day of the hearing, I decided that the issue of liability should be dealt with in the first instance and that the quantum part of the trial should be postponed. This arose in circumstances where the plaintiff had furnished the defendant with two expert reports for the first time on the first day of the hearing, one from an actuary and the other a taxation consultant. Counsel for the defendant said that he was not in a position to agree to admit these reports without first consulting his own experts, which would take some time, and also pointed out that the quantum issue would fall away in any event if the Court were to find against the plaintiff on the issue of liability. Although there had been some limited cross-examination of the plaintiff on the first day relating to matters touching upon quantum rather than liability, I decided that the best course of action would be to proceed with a liability-only phase, postponing the issue of quantum. Accordingly, this judgment deals with liability issues only.

Factual Background

5. The Plaintiff started working as bus driver with Bus Eireann in 2003. There was a group scheme available in respect of income protection, but the plaintiff did not apply to join the scheme at that time.

6. The group scheme's title was "Group Insurance Protection Policy No. G19116" and its owners were SIPTU and NBRU. The policy was open to all bus drivers under the age of 65 who worked for Bus Eireann or Dublin Bus and who were members of NBRU/SIPTU. The policy operated such that if an employee fell ill and made a claim, the policy would, after 26 weeks, of illness begin to provide 75% of an employee's annual earned income (less any social welfare payment for any dependents, early retirement pensions or any award from a tribunal or court). The payments would rise at a rate of 2.5% per annum and would cease on the date of an employee's 65th birthday or their return to work.

7. The premium for the policy varied depending on which bus company an employee worked for and was payable weekly. It was administered on behalf of the two unions by the brokers Jardine Lloyd Thompson Financial Services (hereinafter "JLT"). If any members of the policy had queries or complaints in relation to the scheme they were directed to an individual working at JLT. Similarly, if members were to obtain a second job they were directed to inform JLT of this as it would have implications for how much of the benefit they would receive should they fall ill. JLT were also the first point of contact when an employee sought to make a claim under the scheme, although of course the decision as to whether to pay out under the claim or not lay with the insurer, Friends First.

8. On the 22nd August, 2008, at a time when he had not yet applied to join the scheme, the plaintiff began complaining to his GP, Dr. Patrick Lynch, of a feeling akin to that of being stung by nettles on his hands, feet and legs, and of severe stomach pain. Dr. Lynch certified that the plaintiff was unfit for work and referred him to a consultant physician, Dr. Paud O'Regan at South Tipperary General Hospital. This signalled the beginning of both an absence from work for the plaintiff during October and November and a number of medical investigations. A key question in the case relates to how the plaintiff dealt with these events when he later came to fill out the application form to join the scheme.

9. On the 25th August, 2008, the plaintiff then began to complain of persistent itching all over his body, a rash and of not feeling very well generally. He was prescribed a number of medications by Dr. Lynch for his itch on that date, and subsequently on the 1st September in the same year.

10. On the 8th September, 2008, the plaintiff complained to Dr. Lynch of memory loss, reduced concentration, and a "lightheaded, merry feeling". He described an incident a few weeks before where he had inexplicably been €490 short on the weekend takings of passenger fares and had to make up the missing sum from his own money.

11. On the 11th September, 2008 the plaintiff was admitted to South Tipperary General Hospital complaining of generalised weakness, dizziness, lack of concentration and fatigue. It appears that at some stage he also began to complain of facial pain and numbness. Dr. O'Regan ran a full medical investigation over the course of the month which included a CT scan of the plaintiff's brain. He came to the conclusion that the plaintiff was suffering from a polyp in one of his sinuses and that his symptoms were consistent with severe sinusitis. The plaintiff was discharged from hospital on the 13th September, 2008.

12. The plaintiff was then referred to a Mr. Ali Khan, a consultant othorhinolaryngologist (a sub-speciality of medicine dealing with the

ear, nose and throat) at Aut Even Hospital in Kilkenny. On the 18th September, 2008, the plaintiff underwent an MRI scan at Aut Even, and on the 25th September, Mr. Khan examined the plaintiff himself. The results of the scan confirmed an infected nasal polyp in one of his sinuses, for which Mr. Khan prescribed a nasal spray.

13. On the 29th September, 2008, the plaintiff underwent further examination in the form of a full colonoscopy. Dr. O'Regan stated that the examination found nothing out of the ordinary beyond a patulous lower oesophageal sphincter, which, as I understand it, was not considered indicative of a serious ailment.

14. On the 16th October, 2008, the plaintiff underwent an echocardiogram at South Tipperary General Hospital's cardiac department, the results of which were normal.

15. On a number of dates, (the 15th September, the 7th October, the 9th October, the 10th October, and the 13th October, 2008) the plaintiff was also seen by a Dr. Bernadette McCarthy, a medical eye specialist, for nausea, headaches and complaints relating to his vision, the plaintiff having stated that his vision was "wavy and distorted". He tested negatively for an eye disorder known as Adie syndrome and was prescribed eye drops. Dr. McCarthy noted that the plaintiff's pupils were of an unequal size (aniscoria) but that this appeared to improve as time went on.

16. On the 30th October, 2008 Dr. O'Regan wrote to the plaintiff's general practitioner, Dr. Lynch, to inform him that overall the plaintiff was doing well but that there had recently been a recurrence of mouth ulcers, for which he was prescribing a week course of Nystatin. The sinus symptoms also persisted and led Dr. O'Regan to prescribe a different nasal inhaler and nasal drops. Dr. O'Regan also sent a letter to Dr. N Kelly, a specialist registrar in the CIE occupational health unit, enclosing a copy of his letter to Mr. Lynch and describing the plaintiff as "really quite well and fit to return to work".

17. The plaintiff returned to work in November 2008. After he did so, he applied to be admitted to the income protection scheme. He gave evidence before me that this had no connection at all to the investigations he had undergone and that it was instead entirely due to the fact that a colleague had been diagnosed with cancer. I have considerable difficulty accepting that this was the sole reason for his having applied at that particular point in time and consider it likely that his recent medical investigations were part of the reason he did so. At this stage he filled out a form which was in essence an application form but which is entitled "Statement of Health". Further details will be given below of the contents of this form as it is central to the issue in this case, namely whether the plaintiff failed to provide material information when applying to the scheme.

18. Subsequently he was asked for further details in relation to a back problem he had disclosed in the application form, and he filled out a back questionnaire form dated the 11th December 2008. Further details will also be given below of the contents of this form.

19. The plaintiff was admitted to the scheme in or about the 19th December, 2008. He was advised by Friends First that the total benefit amounted to €19,714 and that no benefit would arise for any claim relating to any affection of the spine or sacro-illiac joins or their related supporting muscular or ligamentous structures. This is referred to by those in the insurance industry as a "back exclusion". Mr. Kirby told the court that the income protection scheme premium was being deducted from his weekly wage.

20. Mr. Kirby gave evidence that in or around July 2009 he began to experience twitching and itching in his muscles and that he was experiencing problems with the brakes on several buses. He stated that this originally led him to believe there was a fault with the individual vehicles, but he later realised the problems may have been to do with his own driving. He told the Court that on foot of this he went to see Dr. Lynch, who certified him as unfit for work. This heralded a fresh series of medical investigations. In the meantime, the plaintiff contacted Friends First and as a result he was visited by a Mr. John Byrne, a claims assessor, at his home on the 16th October, 2009.

21. Mr. Byrne completed an initial claim form in Mr. Kirby's home incorporating Mr. Kirby's answers to him. Mr. Kirby signed and dated this form as well as the accompanying declarations which were to the effect that all the replies given were true and to the best of his knowledge and belief. This initial claim form outlines Mr. Kirby's employment and duties, the specialists he had been consulting with and the medication he was taking. It appears that during this time he was seeing Dr. Carey, a G.P.; Dr. Moorhouse, a neurologist; and Dr. Delaney, an ophthalmologist; and that he was being treated with a number of named medications. The form states that he was unable to complete any of his duties at this time, that treatment was proving ineffective, and that he did not know if he would be fit enough to go back to work in the future or if any other work was available. Mr. Kirby gave evidence that he was told by Mr. Byrne that if he was still out of work by the end of the deferred period then payments would begin to be paid out under the scheme.

22. On the 19th October, 2009 Mr. Byrne also wrote up a report of his visit; curiously he stated that Mr. Kirby told him one of the causes of his health worries was that he feared for his mathematical and cognitive abilities because in early-to-mid 2009 he had started to make mistakes in his weekly takings as a bus driver and that one week he was €400 short on the week's takings i.e. an identical incident to the one he recounted to Dr. Lynch during his visit over one year previously on the 8th September, 2008.

23. During this period in 2009, Mr. Kirby told the Court that he underwent a range of examinations (blood tests, MRIs and CT scans), that he was visiting the CIE Chief Medical Officer every 6 weeks, and that he was seen by various specialists, mentioning Mr. Moorhouse as well as a Professor Thompson, a dietician. He stated that he did not return to work at all during this period. He gave evidence that during his initial absence from work, his premium payments were no longer deducted from his pay.

24. On the 2nd November, 2009, an income continuance claim report was completed by CIE's Chief Medical Officer, Dr. Whelan, who stated he was "very guarded" about the plaintiff's prognosis for a return to work.

25. One of the plaintiff's doctors, a Dr. Damian Sharpe, completed an income protection insurance GP claim form on the 7th January, 2010 stating that the plaintiff had "very definite neurological signs and symptoms", was not fit for work, and that a diagnosis had not yet been made. He listed the plaintiff's symptoms at that point as being the following: confusion, visual disturbances, muscle twitching, and urinary and bowel dysfunction.

26. On the 9th March, 2010 Mr. Brian Horan, a technical claims specialist at Friends First, wrote to an underwriter at Friends First, Mr. Mark Cree, asking him to retrospectively underwrite the plaintiff's case. Mr. Cree appears to have hand written his response at the bottom of a page seen by the Court:-

> "Buried in clinical notes would have likely postponed pending further investigation of 'lightheadedness' – 'could write a letter but couldn't drive' 09/08 + 10/08…should have been disclosed when proposal signed".

27. On the 11th March, 2010 Mr. Horan contacted a Dr. Patricia Holland, a specialist in occupational medicine, and asked her to

examine and comment on various medical documents relating to the claimant. Dr. Holland responded the following day giving her opinion that she had serious concerns "re significant material non-disclosure at proposal stage" pointing out the plaintiff's medical history before he applied for the scheme as well as the non-disclosure of the various specialists. She went on to say the following:-

> "[H]ad we been aware of this admission [to South General Tipperary Hospital] it is most unlikely that we would have considered terms without obtaining all the relevant details unexplained physical, somatic or neurological symptoms would always cause huge concerns when considering a PHI application".

28. The Court had available to it a completed "claim continuance form", dated the 1st October, 2010. Mr. Kirby stated on the form that he had last been in contact with his employer on the 29th September, 2010 and that he had not returned to work at this point. He described his symptoms as "MS like" with no definite diagnosis. He described bad tremors and a weakness throughout his body and that these symptoms were exacerbated in hot weather, when he would require the use of a walking stick. The form asked Mr. Kirby if he had discussed returning to his job which he answered in the affirmative, and said: "GP said I should go back given the current employment situation, I am seeing the CMO to this end on 13th Oct 2010". He also stated "If I cannot work with Bus Eireann, I intend to start a small business so I can work with my condition".

29. The plaintiff gave evidence that he could not be sure of exactly when he returned to work, but in a later email to Friends First dated the 7th August, 2011 he stated that his return took place in October 2010. It seems likely that this took place after a meeting on the 13th October between the plaintiff and the Chief Medical Officer. He gave evidence that the scheme deductions immediately resumed within his first week back at work.

30. He subsequently left work again and gave evidence that this second departure from work led Friends First to ask him to fill out an additional claim form and to also send them every scan and lab report he had ever received, which he did. This appears to have been in June 2011.

31. The plaintiff gave evidence that the CMO referred Mr. Kirby to a "micro-specialist", Dr. Desmond Kidd, who is an expert on the condition Bechet's Disease based in London.

32. On the 7th August, 2011, the plaintiff emailed Mr. Horgan requesting an update on his policy. He stated that he had returned to work in October 2010 but had been off since June 2011 and attached a letter from Dr. Kidd who was treating him for Behcet's disease. In the same email, he said that he had had a telephone conversation with a lady in Friends First thirteen months previously and that she had told him that as far as she was aware, his claim would be paid but that it was still at committee stage. In evidence the plaintiff stated that this was a typo and he must have meant to say three months instead of thirteen.

33. On 27th October, 2011 Dr. Kidd diagnosed the plaintiff with an unusual condition known as Behcet's disease. Specifically Dr. Kidd stated:-

> "I have formally diagnosed the uncommon but severely auto-inflammatory condition, Behcet's syndrome. This causes neurological symptoms: oro-genital ulceration, skin lesions, tiredness, loss of concentration, aches and pains and arthritis, and visual problems...It is perfectly acceptable for him to say that he is unable to work, based on the severity of these unpleasant, uncomfortable and intractable symptoms".

34. On the 8th November, 2011 the plaintiff emailed Mr. Horan disclosing his diagnosis of Behcet's disease. On the 24th November, 2011, Mr. Horan sent an email stating that the committee would have to review the case further.

35. By letter dated the 17th February, 2012, the defendant refused the plaintiff's claim under the income protection scheme. Details will be set out below this letter.

The Statement of Health/Application Form

36. The form filled out by the plaintiff on the 20th November, 2008 was called "The Statement of Health and Insurability of Members of Group Life and/or Income protection schemes" (hereinafter the "Statement of Health" form). The form was two pages long and divided into five sections. The first section concerned non-contentious personal details; the plaintiff's name, address, marital status, birth date, place of birth, job, job nature, and salary. The second section dealt with the details of the income protection scheme applied for. The third section involved pensions. The plaintiff did not fill out anything here and was not obliged to do so.The most relevant section of the form for present purposes was the fourth section, entitled "Health questions".

37. Within this fourth section, some of the questions in this section sought to elicit information as to the doctors an applicant to the scheme had attended. At question 6(a), the plaintiff answered that Dr. Patrick Lynch of a particular address was his general practitioner and stated that he had known him for 24 years. Question 6(b) provided: "Please state the name(s) and addresse(s) *of any other medical practitioner*(s) you have consulted. If none, please write None". (emphasis added) The plaintiff left a blank space. In other words, he neither provided names of other doctors nor wrote the word 'None' in answer to question 6(a) on the form. Counsel on behalf of the plaintiff sought to argue that this was an inconsistency or indication that the plaintiff did not understand the form, particularly in light of his answer to question 7.

38. Question 7(a) asked if the applicant had consulted anyone (e.g. doctors, hospitals, clinics, osteopaths etc.) in connection with his physical/mental health. The plaintiff answered in the affirmative and stated that he "*had sinus review by ENT Consultant Aut Evan Hosp. Mr. A Khan*". He also answered affirmatively to the question of whether he was taking any medicine, disclosing a prescription of "*nasocort, single min TABS*". When he was asked had he undergone any time of x-ray or examination he responded that he had undergone an "*mri +ct-scan of sinus nasal polyp treated with above*".

39. The plaintiff was then asked "have you ever had or been suspected of having any of the following: "Depression, insomnia, exhaustion, an alcohol problem, anxiety state, nervous breakdown, fits, blackouts, giddiness or migraine, or other nervous or mental disorder." He responded that he had not.

40. When he was asked whether he had any backache, disc or any muscles, bony [sic] or other joint or ear problems he answered yes and stated that he had a "*back muscle tear, but joined gym and problem has gone".*

41. He was then asked whether he ever had tested positively for HIV/AIDs, Hepatitis B or C, STIs, and answered in the negative and when he was then asked had he any physical defects or condition not already disclosed on the form he stated no. He also answered negatively when asked did he (or intend to) engage in aviation, reside abroad other than for holidays, engage in hazardous sports/pastimes or engage in specialist activities such as bomb disposal or naval diving.

42. The fifth and final section included a declaration and left a space for a signature, where the plaintiff signed his name. The declaration stated:-

> "I have read over the replies to all the questions in this statement and declare that to the best of my knowledge and belief, all the information given is true and have not withheld any material fact. I consent to Friends First seeking medical information from any doctor who at any time has attended me concerning anything which affects my physical or mental health, or seeking information from any insurance office to which an application has been made for insurance on my life and I authorise the giving of such information. I understand that in the event of my being medically examined, the answers given by me to the medical examiner acting on behalf of Friends First shall be deemed to be incorporated in this application. I understand that Friends First must be notified of any changes in the health and circumstances of the life to be insured prior to the assumption of risk".

There was no description or explanation of the phrase "Material Fact" on this form.

The Back Questionnaire Form
43. Because the plaintiff had indicated that he had once suffered from a back problem, he received a further form known as the "Back Questionnaire Form". The plaintiff completed this form on the 11th December, 2008. This form requested further details connected with the back problem that he had disclosed on the first application form. The plaintiff's duty of disclosing material facts, and the consequences of not doing so, was set out in this form. A material fact was defined as being "a fact, which may influence the assessment and acceptance of the proposal by the Company" and the form went on to say "if you are in any doubt as whether certain facts are material, such facts should be disclosed." There was then a declaration that the plaintiff understood that "if any material fact [was] withheld or not truly and fairly stated the contract shall be voided" and a space for a signature.

44. The plaintiff gave details of his previous back problem and furnished the names of two doctors he had seen in relation to the pain; Dr. Lynch (his GP) and a Mr. Dartree, a specialist at Barrington Hospital. He stated that he had followed the specialist's advice and began exercising in a gym, and that the symptoms had disappeared. He then signed the declaration, which was the same as the one on the original application form, which stated "I declare that the statements and answers given, including any not filled in myself in my handwriting, are true and complete and I agree that these statements, including any written down at my dictation, together with any statements made or to be made to the Company's medical examination and signed by me, shall be the basis of the proposed contract. I understand that if any material fact is withheld or not truly and fairly stated the contract shall be voided."

The Claim Form
45. Two claim forms were subsequently filled out; the initial claim form on the 16th October 2009 and a second continuance claim form on the 29th September, 2010. In evidence, Mr. Kirby stated that the form dated the 16th October, 2009 was physically filled out by Mr. Byrne during his visit to Mr. Kirby's home, based on Mr. Kirby's oral answers to him. The form outlined Mr. Kirby's personal and employment details and the nature of his disability, to which he answered "neurological and visual problems, no diagnosis yet as still undergoing investigations". Mr. Kirby also answered that he was seeing three doctors at that time; Dr. Carey, a GP, Dr. Moorhouse, a neurologist, and Dr. Delaney an Ophthalmologist and that he was taking Nexium, Sinclair, Artelac, and Lipitor. He answered 'no' when he was asked whether these treatments were providing relief of his symptoms or if there had been any improvement, that he did not know when he would be able to return to work, and that he was unable to do all parts of his job. Mr. Kirby signed and dated declarations including that he had not withheld any material fact.

46. The second form, the claim continuance form of 29th September, 2010, was primarily focused on the plaintiff's medical details; he described his condition as having "MS like symptoms" with "no definite diagnosis". He stated, inter alia, that he suffered from bad tremors throughout his body and weakness in his arms and legs when the weather was warm. He described the tremors as being worse at night when he was in bed and in hot temperatures. He described his ability to perform everyday physical activities. He stated that the GP had told him to go back to work given the current employment situation and that he was to see the Chief Medical Officer on the 13th October, 2010. He stated that he was currently seeing a Dr. S. Hutchinson at the Blackrock Clinic in Dublin. He stated that if he could not go back to work for Bus Eireann he would start a small business so he could work with his condition. There then followed a series of declarations which the plaintiff signed to the effect that the plaintiff was the person referred to in the form, including that he had not withheld any material fact.

The Refusal of Claim letter
47. On the 17th February, 2012 Friends First sent the plaintiff the letter denying his claim, some portions of which I will set out in full:-

> "Re Income Protection Benefits
>
> I refer to your claim under the above and acknowledge the considerable time it has taken for us to complete the assessment of your claim. This was due in part to a number of delays we experienced in gathering the necessary medical information. I also note that you returned to work October 2010 but have been out of work again since January 2011.
>
> We have now received all the medical reports from the various doctors whom you have seen in relation to your health.
>
> [The letter then referred to Questions 6 and 7 on the application form and the plaintiff's replies thereto and continued:]
>
> Following our review of the medical reports we have received from your doctors, it has come to our attention that you failed to advise us of the following Doctor Attendances, Investigations and Tests when completing the State of health and Insurability.
>
> Doctor Attendance
>
> Dr Patrick Murphy – 22.08.2008 [this is an error, it should read Dr. Patrick Lynch]
>
> Symptoms described:
>
> Stinging – nettles – sensation in hands – began as small area in palms, spread to whole hands, then feet and back of tights [sic] – Stopped Nexium, no effect on stinging (but stomach killing me) – On Telfast for hayfever – Exam Nil abdnormal to be seen in hands or feet. Plan stop Telfast, try Piriton 4 mg at night.
>
> Doctor Attendance

Dr Patrick Murphy - 25.08.2008 [again this should read Dr. Lynch]

Symptoms described:

Persistent itch in hands & arms, stomach, shoulders & back of knees – faint red maculo/popular rash on arms and stomach – no itch on head – "don't feel well" – very bad at night – no burrows seen – Try Lyclear & Deltacorrtril & Piriton.

Doctor Attendance

Dr. Patrick Murphy - 1.09.2008

Symptoms described;

Still itch on lower legs & forearms – no skin lesions seen, only scratch marks – also clammy feelings, sweats – try telfast by day. Try Dapsone 50mg for one month. For CXR

Doctor Attendance

Dr. Patrick Murphy - 08.09.2008

Symptoms described:

Says Dapsone greatly helped his itch, but "I have a new symptom" – a light headedness, a merry feeling, can't concentrate" – Could e.g. write a letter, but couldn't drive – Exam 134/80 – Pulse regular – Chest clear

Episode 4-5 weeks when was €480 short on weekend takings (Bus Eireann driver) and has to make it up from his won [sic] money.

Doctor Attendance

Dr. Patrick Murphy – 29.09.2008

Duodenal Biopsy: "partially eosinophillis infiltrate extending into the submucosa"

Doctor Attendance

Dr. Patrick Murphy – 17.10.1008

Symptoms described:

Saw Dr. Bernie McCarthy about 7 times in last 3 weeks – horizontal & vertical lines were "wavy" – tested for Adies Pupil. Negative.

Hospital Attendance

South Tipperary General Hospital 11.09.2008 to 13.09.2008

Under the care Dr. P. O'Regan, Consultant Physician where you presented with generalised weakness, dizziness, headaches, personality change, recurrent memory loss for recent events over the previous three weeks.

Tests

Full set of Blood Tests 11.09.2008 to 13.09.2008 South Tipperary General Hospital

Gastropy 29.09.2008 South Tipperary General Hospital

Colonoscopy 29.09.2008 South Tipperary General Hospital

Echocardiogram 14.10.2008 South Tipperary General Hospital."

48. The letter then went on to say that his failure to disclose details of these medical and hospital attendances and tests carried out, all of which occurred in the three-month period immediately prior to his completing the Statement of Health and Insurability form, represented a serious non-disclosure of material facts and was in breach of the policy conditions for the NBRU/SIPTU Bus Drivers scheme. It referred to a paragraph of the form concerning misrepresentation and omissions of material facts. It stated that the claim was being declined and membership of the scheme terminated, with premiums paid since joining to be returned. It concluded by saying:-

> "The significance of your failure to disclose full details is such that our underwriters have confirmed that had we been aware of this information when considering your application we would not have been in a position to accept your application for membership of this scheme".

The Oral evidence

The evidence of the plaintiff

49. The plaintiff gave evidence that he was hired by Bus Eireann as a driver in 2003 and described the medical investigations he had undergone in 2008, as described above, as well as his absence from work at that time. In relation to the income protection scheme, he stated that he had originally seen the notice advertising the scheme in his workplace canteen, but that what prompted him to investigate the scheme at that particular time he did was the death of a colleague from cancer, and that it was nothing to do with his own recent medical investigations. I have already set out my view above on this particular piece of evidence from the plaintiff. He told the Court that he rang the number provided on the notice, spoke to a Mr. Michael Teehan, and was sent out an information

booklet along with an application form (the statement of health) which he filled out and sent back.

50. The plaintiff gave evidence as to his thinking while filling out the Statement of Health form. In relation to question 6(b) (the question relating to other medical practitioners an applicant may have seen), he said that he did not answer this as he "didn't think [he] would fit them on the page and I thought that I would put the most relevant information on it". He gave evidence that in his answer to question 7(a), he did make references to ENT consultant Mr. Khan, along with the nasal spray and decongestant tabs he was prescribed, his MRI and CT scan, and to his nasal polyp. He also told the Court about receiving the Back Questionnaire and how he had filled that out, including the reference to the specialist, Mr. Dartree, who he had seen at Barrington's Hospital in relation to it. He stated that he had heard in his workplace canteen that serious back disorders were automatic disqualifications for anyone applying to an insurance scheme. He accepted that he made no reference to Mr. Dartree or Barrington's hospital in his original application but that this was because he had had a conversation with an employee of JLT or Friends First over the phone who told him that a back questionnaire would be sent out. Mr. Kirby stated that he was disappointed that back injuries were excluded from the policy as he did not think his previous condition had been severe enough to warrant such an exclusion. Mr. Kirby also told the Court about developments in the lead up to his diagnosis of Bechet's Disease in 2008, 2009 and 2010 set out at above. He stated that he was never given an opportunity to dispute any of the contents of the refusal letter of the 17th February, 2012. Mr. Kirby gave evidence of his current employment and income, but I do not consider this portion of his evidence to be relevant to the liability issues under consideration in this judgment.

51. Under cross-examination, the plaintiff accepted that in 2008 he had been investigated by several doctors and specialists for "very significant and frightening symptoms" but stated he did not include these details or doctors on the form because the actual diagnosis from these investigations was sinusitis; also, he did not think their names would fit in the space allotted on the form. He also said: "I might have even had a phone call with someone and discussed this from either Friends First or JLT and they said 'well what diagnosis did you get' and I said 'sinusitis' and they said put that in". He agreed that it would have been possible for him to answer question 6(b) and disclose the names and addresses of the other medical practitioners and accepted he had mentioned Mr. Khan but again repeated that "I believe I had a telephone conversation with either the agent or someone and he said "look, I will be sending out a separate questionnaire for that, at the moment just put in this information." He accepted that this person may have been Mr. Teehan but could not be sure. When it was pointed out to him that his Statement of Claim stated that in October/November 2008 he contacted Mr. Michael Teehan of JLT in relation to the back muscle tear issue and the details of his recent medical consultations, he became firmer in his answers and said that he believed the Statement of Claim was correct and that it was Mr. Teehan and not anyone from Friends First but emphasised that the conversation took place many years ago. I should perhaps state at this point that I am satisfied from the evidence that Mr. Teehan, who was an employee of JLT, the broker acting on behalf of the union, was in law an agent of the plaintiff rather than of the defendant.

52. The plaintiff accepted that what he did disclose, the polyp, was the least concerning of all the elements that had been troubling him during these investigations but said that he had been told by the doctors that the other elements were as a result of the sinusitis created by the polyp. There was questioning as to whether the discharge letter of the 30th October, 2008 from Dr. O'Regan actually supported this interpretation, and also questioning as to whether the plaintiff could have believed that the eye problems under investigation by Dr. McCarthy were caused by a sinus problem being treated by Dr. Khan. The plaintiff continued to maintain that as far as he knew, the only problem was the sinusitis.

The evidence of Mr. Porter

53. The plaintiff called a Mr. Eamon Porter to offer an opinion in relation to the insurance documentation in the case and to offer an overview of the insurance matters generally. Mr. Porter gave evidence that he was an associate of the Chartered Insurance Institute, a qualified financial advisor, a retirement planning adviser, a certified financial planner, and that he holds a fellowship with the life assurance association as well as a Graduate Diploma in Financial Planning. He is currently the principal of Aspire Wealth Management, a position he has held for 14 years. He stated that he has been giving advice to clients for 34 years and has spent 41 years in the insurance industry. Mr. Porter accepted that he was not and did not have any experience in the practice of underwriting insurance policies, but stated that he did have substantial experience working within the insurance industry and among insurance professionals. Mr. Porter gave evidence, *inter alia*, on the following matters.

54. Mr. Porter said that the Statement of Health application form was a much shorter form than the usual application form. Typically, he said, the questioning on these types of forms would be a lot more extensive. He drew the Court's attention to similar forms from Friends First itself and from other insurance companies in order to underline this point. He said that the shortened nature of the form was in essence a marketing tool to encourage any would-be applicant to apply. He also noted the small font of the writing on the form, which he said was necessary in order to fit the entirety of the questions and information onto a two-page form.

55. In relation to the questions on the form, Mr. Porter described question 7(a) as rather open ended, and thought that different applicants could take different views as to how much detail of their medical history should be supplied in their forms. He thought there was a lack of guidance on the form and noted, in particular, the lack of a definition of a "material fact".

56. Mr. Porter was of the opinion that the internal processes within Friends First had not been sufficiently robust, particularly as the underwriters had failed to notice the inconsistency as between the answer to questions 6(b) and 7(a); and then the inconsistency between the answers to the Back Questionnaire and the answer to question 6(b) on the original application form. He was also of the opinion that the insurer's process was not in compliance with the Central Bank's Consumer Protection Code.

57. In relation to documentation involved in the underwriting process, Mr. Porter was emphatic in his view that he would have expected to see more documentation relating to the process of underwriting the plaintiff's premium than the documentation which was actually furnished in the discovery process in the proceedings, and continued to express his doubt that all documents had been furnished, notwithstanding the affidavit of discovery. Further, he was critical of the content of the documents which had been furnished.

58. He was also very critical of the length of time it had taken for the company to refuse the claim and stated that it was in breach of the Consumer Protection Code's obligation to act fairly to the customer.

59. During cross-examination, Mr. Porter conceded that there were a number of particular matters in his report that he would no longer stand over. He accepted that any failure of the form to jog an applicant's memory due to the shortness of the form was not applicable to this case, in circumstances where Mr. Kirby had said he had a conversation with an individual at the time of the application and asked him whether he should disclose his medical history. Similarly, he conceded that where he had suggested in his report that any non-disclosure may have resulted from confusion on the part of Mr. Kirby resulting from his medical condition, he could no longer stand over that in circumstances where there was no evidence Mr. Kirby filled out the form in a state of confusion. He stood over the remaining aspects of his report however.

The evidence of Mr. Maynard

60. The defendant called a Mr. Peter Maynard as their expert witness on insurance matters. He told the Court that he was an associate of the Chartered Insurance Institute and that he has been involved in the insurance industry for 40 years, beginning as an employee of the Mercantile and General Reinsurance Company. Since 2013 he has been the principal for SelectX, a company which provides an advisory service to underwriters in the areas of life insurance and disability insurance. He has also worked as a contract underwriter for several insurance companies. He also has experience writing in, and collaborating on, various books relating to insurance; authoring a chapter on life insurance for a textbook published by Oxford University Press and edited by a Dr. Brackenbridge, who, the Court was told, acted as the chief medical officer for Mercantile and General Reinsurance Company and was of the leading medical officers in the field of insurance in the United Kingdom.

61. Mr. Maynard began by emphasising the need for the insured and the insurer to possess an identical amount of relevant information, which he termed the principle of "symmetry of information". He explained that this was essential to the insurer's task of properly assessing the risk and attaching a price to it. It seems to me likely that this insurance principle is mirrored in the law by the traditional principle that the insured has a duty of disclosure and to act in the utmost good faith.

62. Mr. Maynard was also of the opinion that the paperwork relating to the plaintiff's policy issuance and claim process was "very much along the lines" of what he would expect to see in a case such as this one. He stated that all the relevant evidence was present; an "audit trail", a computerised underwriting sheet, an email to the insurance broker, as well as the back questionnaire and the application form. In relation to a document of the defendant entitled "Philosophy and Procedures" which related to the underwriting process, he stated that while this was not the most comprehensive document of its kind he had ever seen, it was adequate and fit for purpose. He also discussed a second document from the defendants, its underwriting "Manual", which he described as "pretty comprehensive" and "extensive" and which would act as a helpful guide to an underwriter.

63. Mr. Maynard noted the symptoms and investigations of the plaintiff's medical history which had not been disclosed, and said that the gastroscopy, the rectal biopsy and the duodenum biopsy all would have been of great interest to a prudent underwriter. He stated that if these symptoms and investigations had been disclosed, the insurance company would have been very concerned, given the long history of symptoms, the recency and severity of the symptoms, and the lack of a diagnosis, all of which he said would suggest a strong likelihood of a claim.

64. Mr. Maynard concluded as follows:-

> "….I felt that the gastrointestinal symptoms and investigations should have disclosed because they constituted a material fact. Ditto the neurological visual symptoms as well. And I also believe that…had Mr. Kirby disclosed those additional symptoms and investigations then a prudent underwriter would have sought further information from a – from Mr. Kirby's physician whom he had consulted. And I conclude by saying what I have already that a prudent underwriter would have made the decision to postpone the application".

65. During cross-examination Mr. Maynard was asked whether the plaintiff's disclosures that he had been seen by an ENT consultant, undergone an MRI and CT scan of his sinuses, and been diagnosed with a nasal polyp would not have put him on inquiry. Mr. Maynard replied that these facts would have put him on inquiry only in relation to the conditions Mr. Kirby had already disclosed, and that it would be unreasonable to expect an underwriter to "find a couple of disclosures and then to suspect that there might be something else which they have not been told about". He stated that underwriters have to take the information which they have been given at face value.

66. Counsel for the plaintiff drew Mr. Maynard's attention to the fact that in the defendant's underwriting manual/guide it states that "back pain will always require" a Mandatory Attendance Report (an "MAR") and then asked why an MAR was not required in a case such as this where Mr. Kirby had complained of back pain. Mr. Maynard stated that he could not, as a matter of fact, answer why it was not done. However, on foot the Friends First documentation he had seen in this case, it seemed likely that an MAR was considered unnecessary in this case because the way to handle the risk was to impose a back problem exclusion rather than seek an additional report

67. Counsel for the plaintiff drew Mr. Maynard's attention to the fact that the Mr. Kirby had mentioned Mr. Khan in another part of the application form, and Mr. Dartree in the Back Questionnaire, and pointed out that no one from Friends First contacted or followed up with Mr. Kirby in relation to these disclosures. Mr. Maynard thought it would be unusual for an underwriter to have made contact as they have to rely on the information which they have been given. He added that underwriters are instinctively hungry for information about health problems and in an ideal world they would obtain a great deal of information in order to understand the risk. However, he said that, in the real world they have to balance giving their clients a good service and keeping costs to a reasonable minimum and to "try to underwriter risks on as little evidence as is reasonably possible without sacrificing sound risk management".

68. Mr. Maynard gave his opinion that most underwriters pride themselves on the high percentage of claims which they pay out and that most would take a sympathetic view to an accidental non-disclosure by a claimant. He stated that the opposite view (and a consequent denial of a claim) would be taken by an underwriter in relation to a fraudulent or deliberate non-disclosure. Mr. Maynard was of the view that Mr. Kirby's non-disclosure was "non-accidental". When counsel queried whether this meant fraudulent, Mr. Maynard stated that that was not his word. He had simply used the word fraudulent in explaining an underwriter's approach to claims generally but not in the context of this case. He was also unwilling to use the word "deliberate".

69. Mr. Maynard accepted that had an individual applied for the same insurance policy outside of a group scheme, the application form would probably have been longer. When asked why this would be the case, he stated that a group scheme would alter the pricing of the risk involved and that in a case such as this, involving a relatively healthy cohort such as bus drivers, that may have been a factor in opting for the shorter form. He said that another factor may have been that shorter application forms are generally more attractive to applicants and easier to fill out. He described this choice as a trade-off between the "desire for risk selection on the one hand and the ease of application and attractiveness of the proposition on the other". He accepted that a lengthier application would have been a more effective risk screening tool. He also accepted that based on the documentation from Friends First, the defendant failed to follow its own procedures by failing to require an MAR in this case.

70. In re-examination, Mr. Maynard stated that although the medical reports indicated that all of Mr. Kirby's symptoms may have appeared, as of October or November 2008, to derive from sinusitis, an underwriter would not necessarily have been reassured by this diagnosis given that Mr. Kirby had a complex medical history and had taken time off work so recently. He stated that in such circumstances an underwriter would wish to wait for approximately a year in order to ensure that the symptoms had in fact settled.

The evidence of Ms. Kennedy

71. Ms. Niamh Kennedy, the senior underwriter who had processed Mr. Kirby's application, gave evidence. She stated that as this application was made in the context of a group scheme, the group administration department would have first vetted the Statement of Health, set up a group underwriting sheet (which outlined the benefits to be underwritten according to the scheme), scanned the relevant documentation, and decided if there were any further requirements. The department in this case decided to issue the Back Questionnaire and once that was received back from the plaintiff, the case was sent to the underwriting department, where the department's record system would have created a task for an underwriter to review the documentation as whole. In this case, Ms. Kennedy was assigned that role.

72. Ms. Kennedy gave evidence that she had not used the Friends First Manual in making her decision in this case. She said that this provided guidance for junior underwriters in vetting an application but as a senior underwriter, she did not use it herself.

73. In relation to the Statement of Health, Ms. Kennedy was of the view that what had been disclosed was quite comprehensive, that it provided detail that the plaintiff had suffered from a sinus problem and that it had been appropriately investigated and treated. She described the portion of the statement dealing with the statement's back pain as less detailed as it did not disclose what kind of investigations had been carried out, or treatment. She mentioned that it would have been customary to send out a Back Questionnaire once back pain was mentioned, as had been done in this case.

74. In relation to the empty space beside question 6(b) (the question asking whether the plaintiff had seen any other medical practitioners), Ms. Kennedy stated that by the time she saw that in the Statement of Health, she would have been looking at all the other documents, including the Back Questionnaire. She stated that he seemed to have given the appropriate information about the specialists for the conditions he had disclosed, that he had provided the information he was asked for, and that there was nothing to suggest any further information was required.

75. In cross-examination, Ms. Kennedy accepted that the Friends First guide mandated an MAR where back pain was disclosed. However, she stated that she did not follow these guidelines as she had enough information. She said that she had considered this to be a serious back condition given that it led to Mr. Kirby taking a significant amount of time off work, and stated that back problems are notoriously tricky and comprise a large amount of Friends First's claims. Ms. Kennedy accepted that if an MAR had been sent out, it would probably have yielded all the information that the plaintiff's GP had. She further agreed that if she had, at the time, all the information that was subsequently disclosed, she would have postponed the application for at least a year; waited to see "how things played out", left it to the applicant to re-apply, and then re-assessed the application in full, making a decision at that time in light of all the facts. Ms. Kennedy also stated that the actual decision making process probably took approximately half an hour.

76. Counsel for the plaintiff asked Ms. Kennedy whose job it was to notice that a form has not properly been completed and followed up on. She replied that it was the underwriter's job. She went on to elaborate that if the information was there inside the form in any part, she would not have been overly concerned about which box it was provided in. She stated that in this case she had reviewed the file in full, had seen that Mr. Kirby had visited ENT and orthopaedic consultants, which were both appropriate specialists for the conditions disclosed, and that there was nothing else to suggest any other condition that Friends First had not been made aware of. She disagreed with counsel for the plaintiff's suggestion that there were omissions which clearly indicated a failure to answer the questions or that Mr. Kirby misunderstood the form. She stated that the form answers were quite comprehensive and detailed and that there was nothing to indicate that he did not understand the form.

77. During re-examination Counsel for the plaintiff asked Ms. Kennedy whether she would ever require an MAR for a risk she was not prepared to insure (i.e. where she proposed to apply an exclusion, such as a back problem exclusion), and she stated that she would not.

Evidence of Mr. Brian Hosford

78. Mr. Brian Hosford, a product and technical specialist for protection products at Friends First, gave evidence on behalf of the defendant. He gave a brief history of the group scheme, explaining that it was formed in the late 1980s/ early 1990s by the unions SIPTU and MBRU for bus drivers. It was originally underwritten by Norwich Union until the administrator JLT transferred the underwriting process to Friends Firsts around 1988. Friends First underwrote the scheme until around 2014 when the administrator (Eolas Finance who had replaced JLT in the meantime) changed underwriters again.

79. Mr. Hosford told the court that the premiums were collected directly from the individual group scheme member's salary both for convenience and because the Revenue Commissioners prefer to apply tax relief for these premiums at source. The collected amounts were transferred in one lump sum to the scheme administrator who ensured the correct amount had been collected for that period. The sum was then transferred to the underwriters to pay for the risk.

80. Mr. Hosford also gave evidence that he had reviewed telephone records in relation to possible telephone conversations between the plaintiff and any representative of Friends First, and had not found a conversation in which Mr. Kirby was told by a representative of the company that his claim would be admitted. Under cross-examination, he stated that he only reviewed the telephone recordings he was given and could not say if he had heard every recording. He stated that he did hear Mr. Kirby making telephone calls requesting to speak to a Mr. Horan, in which he was told Mr. Horan would ring him back. He also heard one conversation on the 11th June, 2010, in which a female colleague of his, a Ms. Claire McGettigan, told Mr. Kirby that the matter had been referred to the claims committee for appraisal. Mr. Hosford stated that this last conversation was the only transcript he reviewed as opposed to a recording. He could not offer any evidence as to what occurred at the claims committee, or whether Mr. Horan had ever called the plaintiff back.

Discussion of the Legal authorities

81. In the leading decision of *Chariot Inns v Assicurazioni Generali S.P.A* [1981] IR 199, the Supreme Court set out the general principles relating to insurance contracts, which are repeatedly referred to in the authorities in this area. For present purposes, I think there are three important aspects to those principles. The first is the emphasis on the duty of disclosure on the part of the insured. The second is the definition of "materiality". The third is that it is expressed beyond doubt that the standard for judging materiality is objective. These principles have been authoritatively laid down by the Supreme Court and form the starting point for any discussion.

82. The subsequent cases of *Aro Road and Land Vehicles v The Insurance Corporation of Ireland* [1986] 1 I.R. 403 and *Kelleher v Irish Life Assurance* [1993] 3 I.R 393 introduced a number of additional considerations arising out of the facts of those cases. The Supreme Court in *Aro Road* discussed the situation where the insurance in question is in effect a form of "over-the-counter" insurance. This decision makes it clear that the particular circumstances in which an insurance policy is issued to an insured may limit the duty of disclosure on the part of the insured. Similarly, and there is overlap between this idea and that of "over-the-counter insurance", the decision of the insurer not to ask a particular question may limit the duty of the insured to provide information on that particular issue. In *Kelleher*, a whole section of the insurance form was crossed out, thus clearly indicating that the insured was not

being required to furnish answers to the questions in that section of the form. The principle common to both cases appears to me to be that where the insurer has chosen not to ask a particular question or questions, the principle that the insured must disclose all material facts is tempered by a principle that "materiality" in this particular context is judged by the standard of what a reasonable insured would consider relevant. I will call this the "special rule". But it seems to me that the special rule is limited to circumstances where it is apparent from the overall circumstances or the application form itself that the insurer has chosen not to ask a particular question or any questions at all. I do not think it could fairly be said that *Aro Road* or *Kelleher* relax the general principles set out in *Chariot Inns* in the ordinary situation where the insurer has chosen to ask questions about a particular matter.

83. The decision in *Keating v New Ireland Assurance* [1990] 2 I.R. 383 establishes that a person cannot be said that have engaged in a material non-disclosure if the person did not have knowledge of the information in question. This was a case in which the insured had undergone an examination on behalf of the defendant insurer which revealed a condition of angina. However, the insured's doctors did not inform him of this condition and as a result he did not disclose it to the insurer. The present case does not fall within that scenario because there the plaintiff had knowledge of the various symptoms, tests and investigations which were not disclosed to the defendant.

84. The plaintiff in the present case sought to rely upon *Coleman v New Ireland Assurance* [2009] IEHC 273. This was a case in which the insured person had suffered from eyesight problems some eight years before her insurance application. She had failed to disclose these problems, but had not been told by her doctor at the time that the eyesight problems might be linked with Multiple Sclerosis, a condition with which she was eventually diagnosed. In the course of his judgment, Clarke J. said that the relevant test was whether she had answered the questions truthfully and to the best of her knowledge. I do not think this case can be read as seeking to alter the well-established principle that, in the "ordinary case" where the insurer does ask questions about a particular topic, the issue of materiality is judged by an objective standard. Rather I see it as maintaining the objective standard of what is a material piece of information, as established in C*hariot Inns*, but addressing a different issue, namely what state of mind of an insured might excise a failure to disclose and disentitle an insurance company from repudiating. Clarke J. aligned the case before him with the Keating case and I think this is important. It seems to me that the principle emerging is that a failure to disclose a material fact (materiality being judged by an objective standard) will not lead to an entitlement to repudiate if the non-disclosure arose from lack of knowledge of the piece of information on the part of the insured (such as in *Keating*) or a genuine and (perhaps) reasonable failure to remember it at the time of filling in the application (*Coleman itself*). It seems to me that the references in the judgment of Clarke J. to the passage of eight years between the eye problems and the application form being completed, and to the insured person's doctor not having told her that the eyesight problems could be linked to Multiple Sclerosis, are references to facts which make it more credible that she simply did not remember those eye problems at the time she completed the application form i.e. they are facts relevant to an assessment of credibility rather than an indication of a variation of the *Chariot Inns* principle. I do not think the case can be read as introducing a relaxation of the general test that materiality must be judged by an objective standard to a test that materiality must be judged by what the insured considered to be material. Any such shift would be a major shift away from the test laid down by the Supreme Court in *Chariot Inns*; not only could this not be done by the High Court in any event, but I not think that the language used by Clarke J. in his judgment suggests that he was seeking to introduce any such landmark shift. Rather, the general test remains, with some limited exceptions based on where the insured did not have actual knowledge of the material fact, or genuinely did not remember it at the time of the application.

85. The plaintiff also relied upon the decision of Barrett J. in the *Earls v Financial Services Ombudsman* [2015] IEHC 536. This was a judicial review proceeding and therefore the High Court judgment discussed the principles which should be applied by the Ombudsman but did not go on to apply them to the facts, leaving this to the ultimate decision-maker. Having considered the judgment of Barrett J., I do not think there is anything in it which conflicts with the analysis set out above, or which suggests that Irish law has moved away from the *Chariot Inns* principles in the ordinary case where an insurer has asked a question and received an answer from an insured.

Application of principles to present case

86. I do not think the present case is one where the "special rule" described above comes into play on the basis that the insured had decided not to ask particular (or any) questions. The Statement of Health was, I accept, a short application form, but it did contain specific questions about what doctors the person completing the form had seen other than his or her general practitioner. The purpose of this was obviously to build up a clear picture as to any symptoms or conditions that had been reported by the insured person to doctors, whether or not there was a diagnosis as such. The identification of a named doctor would enable the insurance company to check the speciality of the doctor in question, and would therefore give a strong clue as to the condition or symptom being reported. The situation could not therefore be described as one where the insurance company had chosen not to ask questions of a particular type and I do not think the special rule identified in *Aro Road* or *Kelleher* applies. Accordingly, the relevant principles to be applied are the general principles discussed in *Chariot Inns*, subject to the principles identified in *Keating* and *Coleman*. I cannot accept that the shortness of the form of itself relieved the insured of the obligation to provide material information. From a practical point of view, an applicant could either provide an additional sheet containing the relevant details, or indicate, for example, that there are other doctors whose details could be provided on request.

87. The first question is therefore whether there was, objectively speaking, a non-disclosure of material information? In my view, the answer to this is in the affirmative. The evidence of Mr. Maynard and Ms. Kennedy was to the effect that if they had known about the various symptoms reported by the plaintiff and the doctors he had seen, they would have postponed granting insurance cover to the plaintiff at that point in time and that they would have reviewed the situation approximately one year down the line. Thus, the information that was not furnished would have influenced them in approaching the insurance decision and whether to take on the risk. In my view, this would have been a reasonable approach to take, having regard to the nature of the symptoms as described at length above and the extensive investigations undertaken. Accordingly, the relevant test is satisfied i.e. whether the information would have reasonably affected the mind of a prudent insurer in determining whether he would accept the insurance risk and if so, on what conditions.

88. The next question is whether it could be said that the insured had no knowledge of the relevant information, as in *Keating*? In my view, the answer to this is in the negative. He may not have appreciated the medical *significance* of the symptoms; but he was aware of the facts i.e. that he had suffered certain symptoms, that certain doctors had been seen by him, and certain tests and investigations had been carried out. He did not disclose these known pieces of information to the insurer.

89. Could it be said that the insured person had genuinely forgotten the information, as happened in *Coleman*? Again, I think the answer is in the negative. First of all, the symptoms the plaintiff had suffered and the tests undergone were very recent and his application to the income protection scheme was made shortly after his return to work after those investigations. Secondly, his own evidence was that he asked somebody working for JLT about whether he should disclose these details and was advised that he need not. It may be that he was ill-advised in this regard and that there are liability issues as between him and the broker, who appears, on the evidence, to have been acting as his agent. However, his recollection of this conversation shows clearly that his failure to

include the relevant information on the application form was not due to his having forgotten about it but rather due to a decision on his part, however misguided.

90. Accordingly, it seems to me that there was a material non-disclosure within the meaning of the *Chariot Inns* principles, and one which does not fall within any of the exceptional situations referred to in the other authorities referred to, and accordingly I find in favour of the defendant on the issue of liability.

91. I should perhaps add that I do not think it is helpful or necessary to discuss whether or not the plaintiff "deliberately" withheld information from the insurer or whether he was "culpable" in doing so. The authorities do not seem to me to require that a plaintiff be demonstrated to have acted "culpably" before the insurance company is entitled, as a matter of law, to repudiate. It may be that in this case, the plaintiff made a choice to withhold information in his possession because, having been so advised by the broker, he himself believed it was not material i.e. in legal terms, his subjective belief was that the information was not material. However, the only basis on which this factual matrix could underpin a successful claim on his part would be if the legal standard of disclosure is to be judged by the subjective belief of the insured as to what is material instead of the objective standard of what the reasonable insurer would consider to be material. I have already taken the view that the objective standard is the appropriate standard to apply where the insurer did in fact ask specific questions about certain matters and in respect of which material information was not furnished. I add these remarks because I wish to make clear that my conclusion is not based on any determination that the plaintiff was untruthful. I am somewhat dubious about one particular answer in his evidence, namely that his timing and motivation in taking out the insurance had no connection whatever with the numerous tests and absence from work he had experienced shortly before applying for the insurance cover. However, my overall impression from the plaintiff's evidence is that his reason for not including the relevant information on the form was not because he wished to mislead anyone but because he had a conversation with someone (although not any agent of the defendant) which led him to believe that it was not necessary to include the information in question. In my view, he was wrong in this regard, but not dishonest. However, I do not think that, on law the as set out in the authorities discussed, an absence of dishonesty *simpliciter* on the part of the insured removes from the insurer the entitlement to repudiate when a material non-disclosure has taken place.

92. Further, I am not persuaded by the suggestions on behalf of the plaintiff that the defendant was somehow itself at fault in failing to notice the discrepancies in the answers on the forms filled out by the plaintiff, or as between different forms. The duty of disclosure is one of full disclosure; not one of leaving a trail of crumbs that the insurer is supposed to follow. I also consider as entirely reasonable the evidence of Ms. Kennedy when she said that, having reviewed the application form and back questionnaire together, there was nothing in either of them to suggest to her that there were issues other than sinusitis and a back problem. In other words, in this case, there was not even a trail of crumbs unless one took a microscope to the task. In a court of law, where there is minute parsing of an application form with the luxury of time and focus, certain inconsistencies may seem obvious; but these events took place in the real world where, as Ms. Kennedy pointed out, the decision was made in a 30- minute time-frame. It seems to me that the duty of disclosure means that the onus is on the applicant filling out a form either to include the relevant details or to put out clear signals that there is further information that the insurer may be interested in.

93. Finally, I should also add that I do not consider that the lapse of time on the part of the defendant before the letter of refusal was written should, as a matter of law, disentitle it to repudiate the claim. Undoubtedly, some time must elapse while relevant documents and materials are assembled and then considered by the relevant personnel; and even if there was an unreasonable lapse of time in this regard, I do not think it leads to a claim in law where the Court finds that the ultimate decision was correct.

94. For the reasons set out above, I find in favour of the defendant on the liability issue.