

Case 48

Non-disclosure at application stage – insurer has onus of proof – onus not discharged

Background

1. Mr N's Liberty policy provided, inter alia, disability benefits and critical illness benefits.
2. A claim was submitted for hypertension with chronic kidney disease under the critical illness benefits.
3. The claim was declined by Liberty because of non-disclosure of material information at application stage.
4. The insurer reviewed the sales process and found that an inadequate process was followed when the application was completed. It seems that the Liberty financial adviser told the complainant he only had to disclose acute or chronic conditions and not necessarily acute conditions for which he had or was receiving treatment.
5. Liberty was prepared to refund all premiums, plus interest, without subtracting their costs.

Provisional ruling

6. A provisional ruling was done which reads as follows:

"The complaint

Mr N submitted a complaint to our office on 8 April 2019. He was of the opinion that you were unfair in your decision to decline the claim on non-disclosure of medical information. He stated that, when he took out the policy, the intermediary at the time, Mr S, had only asked him whether he was suffering from any chronic diseases. Mr S allegedly did not ask him about any acute treatments with his doctor.

The insurer's feedback

The claim had been declined because of non-disclosure of

- hypertension;
- investigations for cholesterol;
- gout;
- being prescribed medication and advice by his doctor to make dietary and lifestyle changes.

You were of the opinion that an inadequate sales process was followed when the application was completed and you were prepared to refund all premiums, plus interest, not deducting any costs.

You did not challenge Mr N's version of the events in that Mr S had only asked him whether he was suffering from any chronic conditions.

Our investigation

You did not dispute the complainant's version of the events during the sales process. You have, in fact, agreed that the correct sales process was not followed and you were prepared to refund all premiums received on the policy without deducting any costs incurred.

Upon our enquiry whether Mr N would have qualified for a claim, were it not for the non-disclosed information, you responded that the complainant did not meet all the benefit criteria to qualify for a claim in terms of the Living Lifestyle benefit.

We have also obtained the input of our medical consultant to assist us with the medical technicalities of the case. According to him the complainant possibly qualifies for a claim for the Living Lifestyle benefit, even though there is no proof of persistent proteinuria. He is of the view that it is highly unlikely for persistent proteinuria not to have been present in stage III CKD. Apart from the persistent proteinuria, the complainant meets all the contractual requirements.

Our decision

After consideration of the submissions, the meeting took the view that Liberty Life has not discharged the onus of proof of non-disclosure and that the claim should be considered."

Insurer's response to the provisional ruling

7. Liberty responded to the provisional ruling as follows:

"We refer to the recent Provisional Determination received from your office for the complaint of Mr N for our further response.

Please find below our responses to your statements in italics.

Your statements below

- *You did not challenge Mr N's version of the events in that Mr S had only asked him whether he was suffering from any chronic conditions.*

In our response dated 1 April and 10 May 2019, we indicated to Mr N that the application form does not state acute or chronic conditions.

In our response dated 10 May 2019 we offered Mr N a refund of all collected premiums, because the broker followed an inadequate Sales process, please see the response to this in the 4th bullet point below.

We wish to advise that Mr N in his initial complaint stated that he was never diagnosed or given advice by Dr P, but he does not deny that he consulted and was treated by Dr P prior to inception of this policy.

We refer you to an email which Mr N sent after we sent him the decision letter dated 21 February 2019, about the outcome of his claim.

From: ...@.....com Sent: 28 February 2019 15:58:53 To: OpsClaims@liberty.co.za; ClaimsEscalation@liberty.co.za Subject: RE: BK N Your letter dated 21st Feb refers.

*I disagree with the decision of your underwriting department and wish to contest this.
As far as I am aware, Dr P has only treated me for all acute conditions. He has never diagnosed me with any chronic renal conditions.*

*I refer yourselves to the attached extract of Dr P's medical records relating to me.
For any further information, kindly contact the writer hereof.*

*Rgds
Mr N*

We attached hereto the initial medical report dated 11 January 2019, from Dr P. Mr N is not denying that he consulted Dr P. Hence, we requested specific information regarding the consultations referred to by Dr P in the medical report of 11 January 2019.

Mr N's policy commenced in May 2015, and upon our 2nd request Dr P provided a detailed report dated 24 January 2019, with blood pressure readings for the period 2013 until April 2015. Surely, he would remember these consultations?

Dr P further advised that the blood test result dated 2 December 2014 indicated that our customer's cholesterol level was raised, and he was advised to make dietary and lifestyle changes, because his uric acid was elevated, and his renal function level was abnormal.

We noted that Dr P further advised Mr N, that his kidney functions must be checked after 3 months, once the acute gout episode settled. None of this was disclosed. Mr N indicated that he was never treated for kidney or bladder conditions. The application form does not ask about acute or chronic conditions but requests if one has ever had 'any trouble with, disorder or disease of'.

In the Lancet pathology report dated 2 December 2014, it indicated raised Cholesterol, and raised Uric acid as well as raised Renal function tests. Mr N was obliged to disclose this medical history at inception, because he had trouble or disorders with his health, for which he consulted a medical professional.

- *After consideration of the submissions, the meeting took the view that **Liberty Life has not discharged the onus of proof of non-disclosure** and that the claim should be considered.*

If Mr N was asked about chronic conditions only, then he should have indicated his other medicals history, specifically his consultation with Dr P in December 2014 (he does not deny) which occurred up to five months prior to inception of his policy.

Mr N pointed out in this email dated 28 February 2019 that Dr P treated him for acute conditions. Why did he not disclose this medical information? Dr P indicated in the attached medical questionnaire dated 24 January 2019, that Mr N was treated for acute gout, was advised of dietary and lifestyle changes, had pathology investigations which showed raised cholesterol levels and his uric acid levels were also elevated. Dr P further indicated that Mr N was informed of a further kidney function test to be done three months after this consultation in December 2014, and this policy started in May 2015.

Why (if Mr S indeed asked our customer about chronic conditions only), did Mr N not disclose that he had consultations, with Dr P in December 2014 five months prior inception?

Dr P clearly responded about consultations in December 2014 and listed the conditions below which we identified at claim stage. This is regarded as material non-disclosure as they occurred prior to inception of this policy in May 2015.

- hypertension;
- investigations for cholesterol;
- gout;
- being prescribed medication and advice by his doctor to make dietary and lifestyle changes;
- raised Uric acid as well as raised Renal functions;
- advised that his kidney functions must be checked after 3 months once the acute gout episode settled.

We again point out that in the application form, we do not ask whether a condition is a chronic or acute condition. It is also not a requirement that a diagnosis has been made before disclosure. The above listed conditions are conditions which Mr N sought medical attention for because he either had '**trouble with or diseases or disorders of**'. We note that these conditions would have qualified as chronic conditions if this was Mr N's understanding.

- Mr S allegedly did not ask him about any acute treatments with his doctor.

Mr N being aware of his medical history failed to disclose his medical conditions which we identified at claim stage, specifically the consultation with Dr P in December 2014 five months prior to inception. Mr S presented the medical questions in the application form to Mr N, he should have informed and disclosed about his consultations with Dr P. Hence, we maintain the onus is on the insured to disclose his medical history. Mr N signed the Client declaration, thus we assumed he understood the policy terms and conditions.

- *The intermediary at the time, Mr S, had only asked him whether he was suffering from any chronic diseases. Mr S allegedly did not ask him about any acute treatments with his doctor.*

You were of the opinion that an inadequate sales process was followed when the application was completed and you were prepared to refund all premiums, plus interest, not deducting any costs.

The Sales process that we reviewed and found to be inadequate was as follows:

At the introduction to the medical questions presented to the Complainant, the terms *chronic* and *acute* conditions were mentioned. These terms do not form part of our application forms. This is the only reason we agreed to compensation of premiums.

Mr N was not exempted from disclosing his medical conditions, (be it acute or chronic) but he answered 'NO' to all the conditions listed in the medical questionnaire.

We however confirm that the medical questions listed in the application form were presented to Mr N. **At no point were these questions not presented.** Mr N had an opportunity to disclose his medical conditions and consultations for which he sought professional medical advice.

The onus was on Mr N to disclose any medical conditions, thereby affording our underwriters the opportunity to fully assess the risk they were asked to undertake.

The Financial Adviser was not aware of any of Mr N's existing conditions or the consultation in December 2014, and therefore imputed knowledge cannot be considered.

We would further like to state that if Mr N's understanding was to disclose chronic conditions *only*, then he failed to disclose the following conditions per the attached report from Dr P, (Please note these were specific questions raised by the assessor):

- hypertension;
 - investigations for cholesterol;
 - gout;
 - being prescribed medication and advice by his doctor to make dietary and lifestyle changes.
 - Elevated uric acid levels
 - Advised to check Kidney functions after three months after gout episode settled
- *After consideration of the submissions, the meeting took the view that Liberty Life has not discharged the onus of proof of non-disclosure and **that the claim should be considered.***

We referred your Medical consultant's input to our Chief Medical officer, and she advised.

- In the first instance, we maintain that this claim is not valid because of non-disclosure.
- Furthermore, in order to qualify, there has to be evidence of progressive chronic disease with the last GFR of 55ml/min or less with persistent proteinuria 1 + or more on dipstick and a documented decline in the GFR of greater than 5ml/min within the last 12 months despite optimal treatment.
- We received the GFR readings but we also require medical evidence of Persistent Proteinuria readings to determine whether Mr N would have qualified under Renal failure if this was a valid policy.

In conclusion, we maintain our stance that this claim was assessed in line with the stipulations in our customer's policy contract. Thus, we do not accept the outcome of the Provisional Ruling.

We now await Mr N's signed acceptance of the refund of premiums as explained in our previous response."

Our response to insurer

8. We sent the intermediary's statement, which said the following, to Liberty:

"I met with Mr N, together with his wife and children at their home in Kew. It was around 6pm.

I initially did a quote and application for his wife(Risk) and his Daughter(RA and Inv Builder). I then did the Quote and application for Mr N.

I completed the application forms myself. I went through the medical questionnaire in a generic format, that is, I asked the questions as... Is there any problem with your heart, any problems with your lungs, are you on any chronic medication for any chronic conditions, etc. I did not read the medical questions in full to the client. This was how I was asked to do it by my manager at that stage. I do the questions differently now.

I recorded all answers on the form, asked the client to sign and then left.

I hope that this explains everything."

9. We posed a question to Liberty:

"Liberty appears to me to have a different understanding of 'chronic' condition from ours. We regard a condition as chronic if it has been under treatment for an extended period e.g. a continuous 3 month period. What is Liberty's understanding of the term?"

Liberty's Chief Medical Officer responded:

"There is no requirement for any medical conditions to be described as acute or chronic on the application form specifically, so that neither one nor the other is focused on by the client. Any form of acute kidney disease can be an indicator of chronic problems in the future so this is deliberately not asked.

The same applies to heart and liver conditions.

The mere mention that there was a kidney condition present for which various forms of treatment had to be taken but did not indicate acute or chronic we should have been notified on the application form regardless."

10. This response did not take the matter any further as it did not answer the question. A hearing was conducted with the relevant parties. After a further adjudicator meeting a final determination was issued.

Final determination

1. This matter was previously discussed at an adjudicator meeting which was followed by a provisional determination that Liberty Life cannot rely on non-disclosure to repudiate the policy in question. Liberty did not accept the provisional determination and provided further submissions.
2. A hearing was subsequently held at which the Liberty Financial Adviser, Mr S, was questioned about the policy application process. Mr S answered the questions in a straightforward manner without hesitation. He was a credible witness. Mr S stated the following regarding the process he followed:
 - That he had asked Mr N at the outset about any chronic illnesses that he might have had at that stage.
 - That he was only looking for chronic conditions, not acute conditions.
 - That he understood chronic conditions to be ongoing conditions for which you take ongoing medication, such as diabetes. It is not a once off condition such as an injury.
 - That he asked the medical questions in a generic fashion. He did not read out the questions as per the application form. For instance, he would ask the complainant if there are any problems with his heart, any problems with his lungs and so on.
3. The matter was again discussed at an adjudicator meeting. We wish to point out the following: It has not been suggested by this office that Mr N had not suffered from some medical conditions prior to application of the policy. What has been determined by this office is that Liberty has not proved non-disclosure because Mr S did not, at the application stage, ask Mr N to disclose acute conditions but only whether he was suffering from chronic conditions. Mr S understands chronic conditions to be ongoing conditions for which the life insured takes medication on an ongoing basis. He stated, as mentioned above, that he was

looking for chronic conditions and not acute conditions. If the adviser understood chronic conditions in this way, then it cannot be expected of the complainant to have a different understanding.

4. The adviser also explained that the complainant did not fill in the form, the adviser asked generic medical questions and the complainant signed all the documents that required signing at the end. In other words, he did not ask the more detailed questions such as whether Mr N suffered from raised cholesterol, hypertension, gout, raised uric acid etc. It is therefore futile for the insurer to quote the exact questions as contained in the form, in their submissions, e.g. "Do you have, or have you ever had, trouble with disorders/disease relating to Your Heart or circulation?", because Mr N was not asked that question in that format. Nor was he asked the question about Hypertension or Raised Cholesterol or Gout. Mr S made it clear that he did not ask the questions as printed on the application form.
5. The test as to whether the non-disclosed information was material or not, is set out in section 59 (1) (b) of the Long-term Insurance Act of 1998:

"The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk."

The "reasonable, prudent person" is neither the actual applicant for insurance nor the actual insurer, but a hypothetical person standing in the shoes of the applicant, with the knowledge and appreciation that a lay person would possess of the factors an insurer would take into account in assessing the risk.

6. The question is therefore whether the reasonable prudent applicant in Mr N's shoes would have answered "yes" if asked whether he is suffering from a chronic condition. And the adviser having positioned the medical questions in the way he did, whether the applicant would have answered "yes" when asked whether he suffers from a heart problem. And that he would have answered "yes" when asked whether he suffers from problems with his muscles.
7. Can it be expected of an applicant who is being asked questions in the fashion as described by the adviser, to have disclosed the medical conditions, when the adviser did not ask the more specific questions? Can it be expected of an applicant to have disclosed conditions from which he was not suffering at that time nor that could be regarded as chronic (as understood by the adviser) and for which medication was not being taken on an ongoing basis? If Liberty expects that from this applicant then it expects a better understanding of what should be disclosed from the applicant, than what its own adviser, who is in an industry role, understood.
8. The meeting's view was that the reasonable, prudent applicant would not have answered the following questions, as asked by the adviser, in the affirmative:

Are there any problems with your heart? Given that he had one incident of hypertension in 2013 for which he received treatment for one month and two further instances of raised blood pressure for which he had not received medication. Nor would he have disclosed the raised cholesterol for which he did not receive medication but lifestyle advice. He would not

disclose 2 acute episodes of gout for which treatment was prescribed for no longer than a week at a time in response to the question whether he has problems with his muscles. Even if that question also included reference to bones and joints, which has not been established, he would not have disclosed the acute episodes of gout, as it was not a chronic condition. Our view is supported by the fact that the financial adviser had directed the applicant's attention to the disclosure of chronic conditions at the start of the process.

9. The application process was fundamentally flawed, which Liberty Life should have realised from the hearing, if not before then. The adviser is employed by Liberty Life and is mandated to handle the process for the application of a policy. As Liberty cannot prove non-disclosure of material information **in response to the questions that were actually asked of the complainant by the financial adviser**, it has not discharged the onus of proof. The adjudicator meeting was satisfied that in the circumstances Liberty Life cannot rely on non-disclosure to repudiate the policy. The policy must be reinstated.

This is our final determination.

10. The claim process must now be followed. The complainant will be requested to provide any outstanding claim information once confirmation is received that the policy is reinstated.

Conclusion

As the policy had been cancelled by Liberty, the policyholder had not paid premiums during the complaint process. Liberty as a goodwill gesture agreed to reinstate the policy without the complainant having to pay the arrear premiums.

However, the assessment of the claim indicated that Mr N did not in fact qualify for a benefit in terms of the policy provisions.