IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-5272
[2015] NZHC 2273

BETWEEN	GREGORY IVAN BANICEVICH Plaintiff
AND	AMP SERVICES (NZ) LIMITED First Defendant
	THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED Second Defendant

Hearing:	10-14 November 2014 and 10-12 December 2014
Appearances:	M Black and S I Perese for the Plaintiff D McLellan QC and D Durovich for the Defendants
Judgment:	21 September 2015

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 21 September 2015 at 4:00 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Counsel/Solicitors:
Mr M C Black, Barrister, Auckland
Mr D Dennis (plaintiff's solicitor), Hammonds, Solicitors, Dargaville
Mr D McLellan QC, Barrister, Auckland
Mr D A Campbell and Ms D I Durovich (defendants' solicitors), Kensington Swan, Solicitors, Auckland

[1] Mr Banicevich has brought claims under or arising out of an insurance policy written by the second defendant, National Mutual. The first defendant, AMP, has administrative responsibilities. The defendants can be referred to collectively as AMP.

[2] The cover in issue is $2 million for specified major health "traumas". Mr Banicevich claimed that he had had a "pancreatic neuroendocrine tumour and cancer" and that this entitled him to a payment because it was "cancer" as defined in the policy. Surgery to remove the tumour took place on 22 November 2012. Notice of intention to make the claim was not made until 14 August 2013. AMP declined the claim on the grounds that the policy had been cancelled on 18 November 2011.

[3] Mr Banicevich's primary claim is that he is entitled to payment under the policy because the contract was not validly cancelled, or it was reinstated. There are three further and alternative causes of action, but the substance of these is that the policy remained in force, or should be treated as if it had remained in force. The focus of much of the evidence was on events leading up to and immediately following a notice of intention to cancel the policy dated 5 November 2011.

[4] AMP defended the claim on a number of grounds, but two only need to be outlined at this point. They are summarised below. AMP also advanced six affirmative defences. Only one of those needs to be noted at this point, and is also summarised below.

[5] National Mutual traded as AXA from 1999 until it merged with AMP in 2012. Almost all of the events requiring consideration occurred before the merger and I will refer to acts of the insurer as being those of AXA.

[6] The outlines of AMP's defences, and the affirmative defence, are as follows:

(a) AMP says the policy was cancelled on 18 November 2011 as a consequence of persistent failure by Mr Banicevich to pay the premium on the due date, and continued failure to pay within a further grace period allowed by AXA. Mr Banicevich says that, although

AXA may have given notice of cancellation, cover was reinstated on its original terms following payment by him of an overdue premium. I am satisfied that AXA did validly and effectively cancel the policy. Cover came to an end on 18 November 2011. Mr Banicevich therefore had no cover when he made the claim almost two years later.

(b) AMP contends in the alternative that, if the policy was still in force when Mr Banicevich made his claim, the medical condition in respect of which he made the claim did not qualify as "cancer" as defined in the policy. As I indicated to Mr Banicevich's counsel, Mr Black, during the course of his closing submissions on this issue, it is clear from the policy terms and the evidence that Mr Banicevich's condition does not come within the terms of the policy for a number of reasons. The evidence establishing this includes evidence from experts called for Mr Banicevich.

(c) AMP's affirmative defence is that it had validly avoided the trauma component of the policy, with avoidance effective from its inception in November 2010, on the grounds of breach by Mr Banicevich of his duties of upmost good faith, disclosure and fair dealing. The essential contentions were:

(i) The trauma cover application was made not to obtain the benefit of the cover, but to generate commission income. The commission was available because Mr Banicevich was also an insurance agent. AMP says that Mr Banicevich was in desperate need of substantial income because of a seriously adverse financial position.

(ii) The adverse financial position was not disclosed.

(iii) Mr Banicevich did not intend to pay premiums on due date or, at least, knew that he would be likely to miss payments and would rely on the grace period for payment.

(iv) Mr Banicevich established a recurring credit card payment authority with AXA which he knew could not be honoured.

I am also satisfied that this defence is made out.

The facts

[7] This outline of the facts is, in large measure, a chronological summary up to and including the central events in November and early December 2011. The evidence relating to Mr Banicevich's medical condition is dealt with in a later section of this judgment.

[8] In November 2010, when Mr Banicevich applied to AXA for the trauma cover, he had been an insurance agent, or insurance adviser, for approximately 25 years. He was a shareholder and director of Whiteman Group Consultants Limited (Whiteman Group), which held a master agreement with, as Mr Banicevich put it, "AXA\AMP". His evidence was that he had received numerous achievement awards from industry bodies involved in financial planning and insurance. I inferred from this evidence, although it may not have been the intended purpose of the evidence, that as a result of this experience Mr Banicevich would have had a very good understanding of the rights and obligations of policy holders and insurance companies, including matters central to this proceeding, such as the consequences for policy holders if there is extended default in payment of premiums. The weight to be attached to that inference was reinforced by my findings of fact on central issues which are outlined below.

[9] Mr Banicevich had had life insurance of $2 million under an AXA policy since August 2003. The trauma cover for $2 million was added to this policy. Before the trauma cover was added there had been a number of notices issued by AXA to Mr Banicevich that he had failed to pay the premium on the due date, which was the 6th of the month. On two occasions, in January 2006 and September 2010, this had been followed by a cancellation warning and then a cancelled policy notice, but with the policy subsequently being reinstated on the terms recorded in the cancellation notice. The second cancellation followed by reinstatement occurred between 6 September and 10 November 2010.

[10] On 16 November 2010 Mr Banicevich submitted a written application to AXA to add trauma cover of $2 million to the existing life policy. Mr Banicevich already had trauma cover of $2 million provided by a different insurer. The additional cover was accepted on 23 December 2010. On 29 December 2010 commission of $80,196.48 was paid to Whiteman Group for the addition to the policy. If the policy came to an end within a specified period this sum was recoverable.

[11] Premium payments were due on the 6th of the month. There were some issues about this, raised by or on behalf of Mr Banicevich, but the evidence is clear. What is more, on 11 November 2010, one day after the policy had been reinstated for the second time, Mr Banicevich phoned Mr Tua of AXA to confirm the commencement date of the policy, which is the premium payment date. Mr Tua advised Mr Banicevich that it was 6 August 2003, asked if that sounded right, and Mr Banicevich said that it sounded "perfectly right".

[12] The premium of $4,704.22 due on 6 February 2011 was not paid. On 9 February 2011 AXA issued a payment dishonour notice. This was approximately seven weeks after the addition of the trauma cover was accepted. This means that only the first payment for the increased premium had been made on time. The notice required payment by 23 February, but payment was not made. On 9 March 2011 AXA issued a cancellation warning notice to Mr Banicevich. This notice included the following:

> Unfortunately your policy now has insufficient funds to cover ongoing costs.
>
> **What can I do?**
>
> If you have recently paid your premium, thank you and please ignore this notice. If not, please pay $8,871.29 by 21 March 2011, returning it with the payment slip below.
>
> **What happens if I do not pay my premium?**
>
> Unfortunately, if we do not receive any payment by 21 March 2011, your policy will be cancelled and all entitlements discontinued.

Important Note

If you allow this police to cancel it will be for the third time. The first three cancellations maybe reinstated within 3 months of the cancellation date without health evidence. However, a fourth cancellation will be treated as a new application, and would require full underwriting including current medical evidence. …

Can we help?

For further help or advice please call your adviser Whiteman Group Ltd on (09) 439 4300. Alternatively you are welcome to call Customer Services on 0800 106 652, 8:00 am – 6:00 pm weekdays.

Address changes

If the address on this notice is incorrect, please complete the change of address details on the slip below and return it with your payment. Alternatively you may contact Customer Services. …

[13] The content of the notice, apart from the amount due, was identical to the second cancellation warning issued on 6 September 2010. This included the explicit advice that up to the third cancellation the policy could be reinstated within three months without health evidence, but a fourth cancellation would require full underwriting with current medical evidence. The sum required to be paid of $8,871.29 was the total for two premiums – the premium that had been due on 6 February and the further premium that had been payable on 6 March.

[14] On 23 March 2011 AXA issued notice to Mr Banicevich confirming that the policy had been cancelled. This notice included the following:

What can I do?

® Pay your overdue premium before 23 June 2011.

® If this is the 4th request for a reinstatement of your policy, current medical evidence and full underwriting will be required.

There was advice, as before, to contact Whiteman Group as the adviser or to phone Customer Services. The material parts of this notice were identical to those in the second cancellation notice of 20 September 2010.

[15] On 31 March 2011 Mr Banicevich contacted an AXA employee and arranged for future payments to be made by credit card. On 1 April AXA gave notice to Mr

Banicevich that the policy had been reinstated. Formal particulars were recorded, including the policy commencement date of 6 August 2003 and the monthly payment required of $4,704.22.

[16] On 9 June 2011 another payment dishonour notice was issued and a cancellation warning notice was sent to Mr Banicevich personally. The content of these notices was in material respects the same as the content of the payment dishonour and cancellation warning notices issued on 9 February and 9 March 2011, apart from one material change. This change arose from the fact that this was the fourth cancellation warning as a result of which there would be need for full underwriting with current medical evidence if cancellation occurred. Cancellation would occur automatically if the sum required to be paid had not been paid in full by the cut-off date which, for this cancellation warning, was 21 June 2011. The "**Important Note**" section of the notice was tailored to the circumstances as follows:

> If you allow this policy to cancel it will be the fourth time and this would result in a new application being required, with full underwriting including current medical evidence.

[17] Mr Banicevich did not pay the overdue premium by the grace period date of 21 June 2011. On 23 June 2011 a cancelled policy notice was given to him. This was in the same terms as the earlier notices, including advice that a fourth request for a reinstatement would require full underwriting with current medical evidence.

[18] The following day Mr Truman Macarthy interceded with AXA on Mr Banicevich's behalf. Mr Macarthy was a business development manager employed by AXA (and subsequently by AMP). He had had a lot of dealings with Mr Banicevich in relation to insurance business. On 24 June Mr Macarthy contacted another AXA employee, Mr Dileva, at the AXA call centre. He said that Mr Banicevich was not getting "the renewal notice" or "the lapsed notices" and asked whether the policy could be reinstated.

[19] Two separate matters arise from this. The first concerns Mr Banicevich's advice to Mr Macarthy that he was not receiving notices. There was a reasonable amount of evidence from Mr Banicevich, and from his administrative assistant, Mr Weston, that various notices, critical to AMP's case, had not been received, or there

had been delay in receipt. This applied in particular to notices in the November period. I am satisfied that notices on which AMP relies were received by Mr Banicevich, or by Whiteman Group as the insurance adviser (which in substance also means Mr Banicevich), promptly after the date of issue of the notice. I have referred to this issue at this point because the timing of Mr Macarthy's call to the AXA service centre indicates that there was no delay at all in Mr Banicevich's receipt of the notice on this occasion. Mr Banicevich and Mr Weston also gave evidence of requests to AXA staff to send communications by email, and that notices sent by ordinary mail were not sent or were misdirected. I am also satisfied that the way in which this was dealt with by AXA was consistent with its contractual obligations and that, as a matter of fact, there was no material delay or other error.

[20] The second point arising from Mr Macarthy's intervention relates to the fact that this was the fourth cancellation. Mr Dileva could not deal with it and contacted a more senior employee, Wanda Borowicz, who in turn advised Mr Dileva that he should need to speak to Ruth Gardiner, a senior underwriter. Mr Dileva spoke to Ms Gardiner (with all of these discussions recorded) and, after she obtained some information, authority to reinstate was given. There was an instruction that Mr Banicevich should make direct contact to put the necessary arrangements in place.

[21] The policy was reinstated with a formal notice issued to Mr Banicevich on 29 June. This was sent to PO Box 275, Silverdale. This was in accordance with instructions given by Mr Banicevich in discussions with AXA call centre employees on 24 June. Further notices of relevance went to that address and, I am satisfied, were received within a day or so of the date on the notice.

[22] The evidence relating to this fourth reinstatement establishes that the reason it occurred without full underwriting and current medical evidence being required was because Mr Banicevich was an insurance adviser, as well as a policy holder, because of the intervention of Mr Macarthy, and because of Mr Banicevich's relationship with Mr Macarthy.

[23] The events giving rise to cancellation of the policy on 18 November 2011 followed a further default in payment of the premium on 6 October. The payment

default on 6 October was the sixth default since the trauma cover had been added on 23 December 2010. In other words, at 6 October there had been default in payment on due date of six out of nine of the premiums that were payable from the date of addition of the trauma cover. It was the third default after the special reinstatement on 29 June, with the first of those three defaults being on 6 August, barely five weeks after the reinstatement.

[24] There was a lot of evidence, documentary and oral, relating to events following the default on 6 October. I will set out the sequence of events in a fairly summary way. The date of a document in the chronology that follows is the date recorded on the document. All of the dates are in 2011.

10 October:	Notice from AXA to Mr Banicevich that a credit card payment was declined. Payment required by 24 October. Notice sent to PO Box 275, Silverdale. The notice received and read by Mr Banicevich soon after 10 October. This was established in cross-examination contrary to Mr Banicevich's pleading.
5 November:	Cancellation warning notice from AXA to Mr Banicevich on the same terms as earlier notices except that this notice was tailored to the fact that if cancellation occurred it would be the fifth and that full underwriting with current medical evidence would be required. The notice required payment of $9,408.44 by 18 November, being the payment missed on 6 October and the further payment due on 6 November. The notice was sent to Mr Banicevich at PO Box 275, Silverdale. I am satisfied, contrary to Mr Banicevich's pleading and initial evidence, that he received this notice soon after it was issued, and the notice of 6 November referred to next. Evidence in this regard is discussed more fully below.
6 November:	What is called an "adviser report" was sent to Whiteman Group by AXA on 6 November. This recorded that the cancellation warning notice had been sent to Mr Banicevich on 6 November. It recorded the essential requirements and consequences of non-payment. It also recorded that if cancellation occurred commission "may be reversed".
17 November:	Thomas Weston was employed as office manager by Mr Banicevich. He provided a lot of assistance to Mr Banicevich in relation to his personal affairs, including matters relating to the AXA policy. He was also Mr Banicevich's son-in-law. Mr Weston sent to Mr Macarthy documents from specialists in relation to Mr Banicevich's health, and in particular in relation to a heart condition. Mr Macarthy sent these to another AXA employee for advice as to whether a partial claim on the trauma policy could be made.

19 November: AXA issued what was the fifth cancelled policy notice to Mr Banicevich. This was in the same terms as earlier cancelled policy notices. It was sent to the address stipulated by Mr Banicevich, PO Box 275, Silverdale.

20 November: An adviser report with this date was issued by AXA and directed to Whiteman Group. This is one of two documents relied on by Mr Banicevich in support of his contention that the policy was not cancelled.

The most relevant part of this report was as follows:

> A Cancelled Policy notice was sent to your client on 20.11.2011 as their policy has lapsed.
>
> If this policy is reinstated within the next 3 months, no further health evidence is required. After this time, the client will need to apply for a new policy and provide new health evidence. …

Unlike the 5 November cancellation warning and the 19 November cancelled policy notice, this adviser report was generated by an AXA service centre in Bangalore, India. AMP says that this notice was issued in error and that it was clear from the notices relied on by AMP that it was issued in error. The second document relied on by Mr Banicevich also was issued out of the Bangalore service centre. For convenience I will refer to these as a "Bangalore report". I am satisfied that it would have been quite apparent to Mr Banicevich, and in fact was apparent to Mr Banicevich, that at the very least the Bangalore reports might not be able to be relied on given the content of the 5 November cancellation warning, the 19 November cancelled policy notice, and subsequent express written and oral advice confirming that the policy remained cancelled.

The evidence of Mr Weston establishes that this report was not received, or at least read, until 29 November. Mr Weston also knew that this notice was probably wrong, as he confirmed in evidence.

21 November: Mr Banicevich phoned the AXA service centre and spoke to Huia Webster. This is one of a number of phone calls by Mr Banicevich to the call centre in which I am satisfied he made misleading statements. I am also satisfied that he did this because he hoped he could provide a foundation from which he might retrieve the position without need for full underwriting and up to date medical evidence. Following this conversation, on the same day, Mr Banicevich made a direct credit payment to AXA for one month's premium, the sum of $4,704.22. AXA put it in a suspense account.

22 November: Advice was sent by AXA to Whiteman Group. This was sent by email. It records the requirements for full underwriting, including particulars of medical reports required.

24 November: On the morning of 24 November Mr Banicevich had two conversations with Sheree Lawrence from the AXA service centre, the first call initiated by Mr Banicevich and the second made by Ms Lawrence back to Mr Banicevich. In the second call Ms Lawrence

said, in effect, that she had looked more fully into matters relating to Mr Banicevich's policy and found that, contrary to her initial understanding, the policy had not been reinstated and full underwriting was required. This was recorded in an "active note entry" accessible to Ms Lawrence when she first spoke to Mr Banicevich but which she had not seen. Mr Banicevich acknowledged that he had got an email and that is when he had realised there was something wrong. Mr Banicevich expressed his displeasure and stated in essence that AXA had failed to give proper notice.

24 November: Mr Banicevich, using Mr Weston's business email address, sent an email to Ms Borowicz at AXA. This was at 10:54 am. Mr Banicevich said that he had just been informed by Ms Lawrence that he needed "to complete re-assessment including full bloods and medicals". Mr Banicevich said the only notification he had received was a letter stating that he had missed one premium. He stated that this was not the first lapsing of a policy by AXA without any warning to him as a policy holder or to him as an adviser. He referred to earlier discussions he and Mr Weston had had with AXA staff, including staff responsible for distribution of notices. He requested reinstatement "effective immediately without the need for medical assessment". The grounds upon which Mr Banicevich was arguing that the policy should be reinstated without need for full underwriting, as just summarised, were in broad terms similar to arguments he advanced in phone calls to the service centre and then in evidence. In essence, the contentions were that all of the fault was with AXA. I am satisfied that the contentions are unjustified. What is more, at this point Mr Banicevich was not arguing, as he argued in this proceeding, that the Bangalore reports meant that the policy had in fact been reinstated. At least up to the date and time of this email it is clear that Mr Banicevich himself had no knowledge of either of the Bangalore reports. The second one is noted next.

24 November: The second Bangalore report is an adviser report to Whiteman Group dated 24 November 2011. Mr Banicevich said in his evidence that he did not receive it until "a couple of days after" the date on the document. This notice states: "We are pleased to confirm that this policy has been reinstated." Particulars of the policy are then recorded.

25 November: Ms Borowicz sent an email to the email address used by Mr Banicevich on 24 November. Ms Borowicz's email is addressed in a formal sense to Mr Weston, but the email is, in effect, addressed in the first person to Mr Banicevich. It records particulars of events from the fourth reinstatement on 28 June 2011 and concludes with advice that the policy "remains lapsed" until the underwriting requirements "are to hand".

25 November: AXA advised Mr Macarthy that the medical condition earlier notified by Mr Macarthy (on 17 November) was not included in the

trauma cover.

27 November: The commission paid to Whiteman Group of $80,196.48 was reversed in the account maintained by AXA for Whiteman Group.

28 November: Mr Weston sent an email to Ms Borowicz referring to a phone conversation with Ms Borowicz that morning and stating that "there are still issues at play here that AXA must address". Mr Weston stated: "*No notices* were received regarding the pre-lapse of this policy due to the error with AXA's mailroom" and stating that AXA had not addressed a "raft of correspondence" asking for notices to be emailed to Whiteman Group. Mr Weston referred to Ms Borowicz's advice of previous "lapses". He said, obviously in reference to the fourth cancellation in June: "The most recent lapse was due to the same lack of notification; so to say that it is out-of-your-hands because it has lapsed too many times is not addressing the issue." I am satisfied that, whatever the state of Mr Weston's direct knowledge, these are statements made on instructions from and on behalf of Mr Banicevich. The factual assertions are not borne out by the evidence. The important factual assertions, advanced to support Mr Banicevich's position, were in fact contradicted in the course of the hearing by evidence from Mr Banicevich himself. The assertions are also inconsistent with evidence of Mr Banicevich's actual knowledge from some of his phone conversations with the AXA call centre personnel.

13 December: Mr Weston sent an email to AXA requesting refund of the premium direct credited on 21 November and held in suspense by AXA. The full sum of $4,704.22 was refunded by AXA to Mr Banicevich on 14 December 2011.

[25] From 21 December 2011 AXA sent to Whiteman Group a number of standard form letters referring to requirements previously advised in respect of what is referred to as a "new policy"; that is to say, the full underwriting and updated medical reports. There were five notices to that effect through to 1 February 2012.

[26] Following Mr Weston's email of 14 December 2011 requesting the refund there was no further communication from or on behalf of Mr Banicevich until 14 August 2013. This was a letter to AMP from Mr Banicevich's solicitors advising that they would be lodging a claim under the policy on his behalf. The letter records instructions on matters of fact received from Mr Banicevich, with the assertions of fact being in respect of matters which I have found, in the preceding summary, to be incorrect. The broad thrust of the letter is that, in reliance on the first Bangalore report, Mr Banicevich paid what was said to be the overdue premium and the policy was then reinstated. As I have already recorded, on the date of payment of one

month's premium, 21 November, Mr Banicevich had not seen either of the Bangalore reports. There had been no payment of any premium by Mr Banicevich after November 2011 and the November premium had been refunded. Notwithstanding this, Mr Banicevich, through his solicitors, maintained that the policy was still in force. There was a request that AMP notify "the outstanding premium which has accrued since Mr Banicevich's payment of 22nd November 2011" and payment of that sum would be arranged.

[27] AMP responded in a letter dated 12 September 2013. It set out relevant particulars of the policy and relevant events from AMP's perspective and advised that AMP was unable to consider Mr Banicevich's claim. Mr Banicevich's solicitors notified AMP on 4 October 2013 that counsel had been instructed to issue proceedings. This proceeding was filed in December 2013.

[28] Mr Banicevich had undergone the surgery on 22 November 2012 when a tumour was removed, together with part of Mr Banicevich's pancreas and his spleen. The specimen was sent for a formal histology report, and this provided the basis for Mr Banicevich's claim. The details are discussed below when considering whether the medical condition would have been covered by the trauma policy.

Was the policy validly and effectively cancelled by AXA?

[29] The question on this first issue is directed to effectiveness as well as validity of cancellation because of the breadth of Mr Banicevich's contentions. Mr Banicevich contended that AXA was not entitled to cancel but that, in any event, there was no effective cancellation because of steps taken by AXA inconsistent with cancellation, or the policy was reinstated.

[30] I received reasonably extensive submissions on points of law from Mr Black, in support of Mr Banicevich's alternative arguments. However, the primary issue can be answered by considering four related questions, the answers to which turn on findings of fact. The legal position was either not in issue, or turned on basic principles of law. These four questions are the following:

(a) Was AXA entitled to issue the 5 November cancellation warning notice?

(b) Did AXA issue the notice?

(c) Did Mr Banicevich get it soon after it was issued?

(d) What was its effect? Did it mean that if he did not pay by 18 November the policy would be at an end, or did AXA have to issue another notice recording that it had at that point elected to cancel?

Entitlement to issue the 5 November cancellation notice

[31] Whether AXA was entitled to issue the 5 November cancellation warning gives rise to two further issues. The first is whether, as a matter of contract, AXA was entitled to issue such a notice if there had been default in payment of a premium. The second is whether there had been a default.

[32] It would be surprising to find a provision in the policy preventing issue of such a notice, and there is no such provision. The issuing of a warning notice is in fact required as a matter of principle. Clause 2B of the general policy conditions provided that the policy would automatically terminate without need for notice if a premium instalment was not paid within one calendar month of the date on which it first became due. AMP accepted from the outset that, as a matter of principle, it was bound to issue a notice notwithstanding the policy condition.[1] AMP also accepted that, in effect, it was bound to give notice having regard to the practice it had adopted with Mr Banicevich on earlier occasions of default in payment.

[33] It is clear that there had been default justifying issue of a cancellation warning on the terms of the 5 November notice. I have come to that conclusion notwithstanding contentions of fact by or on behalf of Mr Banicevich on the question of default. These arguments ranged over a number of matters, including contentions of inconsistency of approach on the part of AXA. I am satisfied that AXA was

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1 See, for example, *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723 (HCA); *Aetna Life v ANZ Banking Group Ltd* [1984] 2 NZLR 718.

consistent in its approach over a lengthy period of time. Mr Banicevich knew that premium instalments were due on the sixth of the month (and again notwithstanding arguments to the contrary) and, in consequence, he knew, without need for notice from AXA, that a premium instalment should have been paid on 6 October and that a further one was due on 6 November. The evidence establishes clearly that there was a failure to pay the instalment due on 6 October and the instalment due on 6 November, the day after the date of the critical notice, also was not paid on due date.

[34] I am in fact satisfied that Mr Banicevich knew in advance that it was likely, and probably knew that it was certain, that the payments would not be made. After the fourth cancellation in June 2011 Mr Banicevich, with quite a bit of discussion accompanied by suggestions of administrative failings on the part of AXA, had put in place a credit card facility for automatic payments. As earlier recorded, payments due on 6 August and 6 September 2011, under the credit card facility, were not met and the 6 October payment, also due under this facility, was not met. On each occasion, prior to the 5 November cancellation warning, notice had been given to Mr Banicevich of default under the "Recurring credit card payment arrangement". I am satisfied on the evidence that all of these notices also were received and soon after they were issued (10 August, 8 September and 10 October).

[35] The points just made were directed to factual contentions of Mr Banicevich directed to his much broader argument that AXA regularly failed to give adequate notice of particular events. Here, of course, it was an alleged failure to give notice to Mr Banicevich that he had failed to do what the contract required him to do and which he knew very well he was bound to do. The 5 November cancellation warning could have been issued without any previous advice to Mr Banicevich. But he had got previous advice of the default.

[36] At the close of business on 6 November 2011 the October premium instalment had not been paid within one calendar month of due date. AXA would have been entitled to give notice the following day of an election to cancel. The election can be made if premiums not paid "within one calendar month of the date on which it first becomes due."

[37] AXA elected to grant a further grace period to Mr Banicevich. It did so notwithstanding the history of defaults, with four previous cancellations, all of which in my judgment were effective, but subject to reinstatement. What Mr Banicevich had to do was clearly stated in the 5 November cancellation warning notice. In addition, Mr Banicevich already had knowledge that he had not made the payment and a very clear understanding of what he had to do to avoid cancellation, and a clear understanding of the consequences of a failure to pay before the expiry of the grace period.

Was the 5 November cancellation warning issued?

[38] Mr Banicevich, in his reply, not only denied receiving the 5 November cancellation warning, but denied that it was sent. A party is entitled, in a technical sense, to put another party to proof, but this was an example of pleading to no purpose. The notice was contained in AMP's initial disclosure and nothing was advanced by Mr Banicevich to question what was plainly implicit from production of a copy of the document – it was issued on 5 November. I have paused to note this particular issue not simply to clear away one point relating to the main issue, but to illustrate another aspect of the way in which Mr Banicevich presented his case. There were assertions in pleadings which would obviously be contentious, and were intended to support Mr Banicevich's case, but in respect of which he provided no supporting evidence.

Did Mr Banicevich receive the 5 November cancellation warning?

[39] In his evidence Mr Banicevich did initially seek to establish that he had not received the notice. In the summary of facts I have recorded my finding that Mr Banicevich did receive the notice. It is appropriate to expand on this, because of the significance of the issue relating to the particular notice, and because it illustrates in more detail why I have concluded that I have been unable to accept Mr Banicevich's evidence on central issues.

[40] Mr Banicevich initially gave evidence that he had not received the 5 November cancellation warning or the 6 November adviser report to Whiteman Group stating that the cancellation warning had been given. This was evidence in

apparent conflict with recorded telephone conversations between Mr Banicevich and AXA call centre employees. He made statements in these conversations which could only have been references to these notices**,** or at least one of them, but in the circumstances a distinction between the notice to Mr Banicevich personally and a notice effectively to him as the insurance agent is not material.

[41] In cross examination Mr Banicevich expressly acknowledged that he had received the cancellation warning. Mr Banicevich, in the course of this cross examination, extending over a number of pages, had been referred to the 5 November cancellation warning addressed directly to him, and to the adviser warning addressed to Whiteman Group. Because of this his acknowledgement was that he had received notice that the policy would be cancelled if AXA was not paid $9,408.44 by 18 November 2011. Immediately following this acknowledgement in cross-examination, he further acknowledged, contrary to earlier pleadings and evidence, that he had also received AXA's written confirmation of cancellation, dated 19 November. His evidence at this point was that he had received the notice but he did not accept it. It is apparent from this evidence that he had got it on or about 20 November 2011. He also said that he may not have immediately read it, but that is a proposition which is of no assistance to him.

The effect of the 5 November cancellation warning

[42] The 5 November cancellation warning met AXA's obligation, arising from the contract and the judicial gloss on it, to give notice of an election to cancel notwithstanding the literal meaning of clause 2B of the general policy conditions. Mr Banicevich was on express notice, soon after 5 November 2011, that his cover would be at an end if he did not make the payment by 18 November 2011. It is not in issue that he did not make the payment on or before 18 November. In consequence the policy was validly and effectively cancelled as at midnight on 18 November 2011.

Was the policy reinstated?

[43] The pivotal submission for Mr Banicevich was, in effect, that AXA, and AMP, were bound by the two Bangalore reports of 20 and 24 November. It was put in the written submissions in closing as follows:

> The plaintiff's position is that the cancellation notice [being the notice dated 19 November] was not a cancellation of the policy, but a suspension of the policy. During this suspension period, the policy could be reinstated, and if reinstated, cover or entitlement to the benefits of the policy would recommence from the time and date of reinstatement. The plaintiff says – the evidence unequivocally demonstrates that the policy was reinstated during the period of suspension. The defendants' letter (the Bangalore letter) of the 24th November 2011 later confirmed or ratified the reinstatement.

[44] Read in isolation, the Bangalore reports provide a possible foundation for that submission. But they cannot be read in isolation. When they are put into context it is clear that AXA did not in some way modify the consequence of the 5 November cancellation warning; the contract was at an end.

[45] The relevant context, to begin with, is what may be called the historical sequence of events preceding the 5 November cancellation warning. Notwithstanding Mr Banicevich's evidence and arguments on his behalf, the consequences of default had been made abundantly and unambiguously clear in previous notices from and actions of AXA. Mr Banicevich was materially better informed, as a consequence of his long involvement in the insurance industry, his first-hand experience of consequences, having been the recipient of four earlier cancellation warnings resulting in cancellation, and his additional knowledge as the recipient of notices or reports as the insurance adviser – additional notices to him in his other capacity.

[46] This historical aspect was reinforced, in terms of getting to an irretrievable point, by what had occurred over the fourth cancellation. Special efforts were required to get the policy reinstated without the requirement, of which he had ample knowledge, of full underwriting accompanied by current medical reports. That dispensation was granted only for the reasons earlier recorded – Mr Banicevich's position as an insurance adviser and, it seems, a person who enjoyed a good relationship with Mr Macarthy of AXA. It may reasonably be inferred that Mr

Banicevich, in the course of the unhappy history of the policy, at least from December 2010 when the trauma cover was added, was hoping that he could rely on these special relationships for an extended period.

[47] The second relevant matter of context is that the policy came to an end when the required payment was not made by 18 November. The central submission for Mr Banicevich, earlier quoted, proceeds on the premise that the policy would remain in force unless and until AXA issued a cancelled policy notice, such as the one that was issued on 19 November. As indicated by my conclusion as to the effect of the 5 November cancellation warning, I do not agree with that proposition. The cancelled policy notice was simply confirmation of the effect of the 5 November cancellation warning. But that point of distinction does not matter in this case. I am satisfied Mr Banicevich did receive the cancelled policy notice within a day or so of its being issued; that is to say he had it by 20 or 21 November.

[48] The importance of the conclusions in the preceding paragraph is that, although Mr Banicevich had received written confirmation of cancellation by about 21 November, he did not read either of the Bangalore reports, which are pivotal to his case, until 26 November at the earliest.

[49] Mr Banicevich's own evidence in relation to the 24 November Bangalore report, was that he did not receive it until "a couple of days after" the date on the document. It is that evidence which provides the 26 November date noted above. There was also evidence from Mr Banicevich that sometimes he did not read mail for some days. Given Mr Weston's evidence about the second Bangalore report, and this evidence from Mr Banicevich, it is possible that the second Bangalore report was not read by Mr Banicevich until around 29 November, but the precise date does not matter. The critical point is that, before 26 November, Mr Banicevich had further unequivocal advice confirming what followed from the 5 November cancellation warning, the 19 November cancelled policy notice, and everything that Mr Banicevich clearly knew from all of his prior dealings and general knowledge – the policy had been cancelled and could not be and would not be "reinstated" unless and until there had been satisfactory full underwriting and a current medical report

satisfactory to the underwriters. This was given in subsequent advice from AXA, both in writing and by telephone, as recorded in the chronology.

[50] On 21 November Mr Banicevich had made the direct credit transfer to AXA for one month's premium, the sum of $4,704.22. But this was not a payment made in reliance on anything conveyed to him by or on behalf of AXA to the effect that, if the payment was made, it would result in reinstatement without need for underwriting and current medical reports. The transfer of this sum had no legal effect unless and until AXA accepted it on unequivocal terms connected with "reinstatement". That never happened.

[51] There were some statements made by AXA call centre employees which could have been taken, in isolation, as possibly indicating AXA's willingness to reinstate without underwriting. However, when those statements are put into the necessary context, they do not help Mr Banicevich. At best from Mr Banicevich's point of view, specific statements by call centre staff were equivocal. In addition, it is apparent that Mr Banicevich was seeking to manipulate the position, in conversations with employees who were not authorised to make final decisions, and that he was manipulating the position by knowingly bending the truth. I agree with the reasonably detailed submissions for AMP in this regard. Given the conclusions I have reached on the substantive issues, it is unnecessary to elaborate on this.

[52] I am satisfied that the statements on a few occasions by AXA call centre staff could not be relied on by Mr Banicevich as indicating any modification of what was made clear by the 5 November cancellation warning. And whether the Bangalore reports caused a degree of confusion or uncertainty is, given all the other clear advice, of no assistance to Mr Banicevich in terms of the legal position.

[53] One of Mr Banicevich's contentions was that the only reason AXA was unwilling to reinstate the policy was because of the advice of his medical condition sent to AXA on 17 November, as recorded in the chronology. The fact that AXA had that advice by 17 November does not advance Mr Banicevich's case, and again because of the fundamental point that cancellation followed from the 5 November cancellation warning. The receipt of the advice on 17 November had no bearing at

all on what was put in train from 5 November and which could only be rectified by Mr Banicevich's meeting all of the conditions of the 5 November cancellation warning. He did not do that. It may be that Mr Banicevich's health problems prompted him to take desperate steps to try and retrieve the position. The health problems are likely to have been an added burden and worry for Mr Banicevich, on top of serious financial difficulties (as more fully outlined below). But these circumstances do not assist Mr Banicevich to avoid the conclusion that the policy came to an end on 18 November 2011.

[54] I am also satisfied that Mr Banicevich, notwithstanding the contentions he now makes, accepted by early December 2011 that AXA had cancelled the policy and that he had no rights, contractual or otherwise, to get it reinstated without a full underwriting and current medical reports. His own actions made clear that he accepted that AXA was entitled to proceed as if Mr Banicevich was making an original application for insurance cover. This is borne out by the request for return of the premium payment, the fact of repayment by AXA, and the acceptance of it. The conclusions from those immediate acts by Mr Banicevich are reinforced by the fact that, for almost two years, he did nothing remotely consistent with a belief that an insurance policy was on foot, or that AMP had some other obligation to him arising out of AXA's actions in November 2011.

[55] The policy was validly and effectively cancelled by AXA on 18 November 2011. Given this conclusion it is unnecessary to consider the alternative causes of action advanced by Mr Banicevich which are all founded on an essential proposition that AMP is bound by the Bangalore reports. These are alternative causes of action alleging estoppel by misrepresentation, negligent misstatement and misleading or deceptive representations contrary to the Fair Trading Act 1986.

Was Mr Banicevich's medical condition covered by the trauma insurance?

[56] Although that conclusion is sufficient to dismiss the proceeding, it is appropriate to consider whether Mr Banicevich's medical condition would have been covered by the trauma insurance. This is because my conclusion on this provides alternative grounds for dismissing Mr Banicevich's proceeding, but in this regard

relating directly to Mr Banicevich's primary objective in bringing the claim: his condition did not come within the terms of the policy.

The definition of "cancer" in the policy

[57] Mr Banicevich claimed that he had had "cancer" as defined in the trauma insurance provisions of the policy. The definition of "cancer" in the policy was:

> **Cancer**
>
> Means the occurrence of an invasive malignant tumour. Included will be the following:
>
> - Prostate tumour classified as T1 (all categories) under the TNM classification system or of an equivalent classification if the tumour is confirmed by histological examination and requires the person insured to undertake major interventionist therapy including radiotherapy, brachytherapy, chemotherapy, biological response modifiers or any other major treatment, or if the tumour is completely untreatable.
>
> - Carcinoma in situ of the testicle, where one or both testes are removed by radical orchidectomy.
>
> - Tumours classified as carcinoma in situ of the breast or other organ requiring Radical Surgery.
>
> - Leukaemia, lymphoma, Hodgkin's disease and malignant melanomas of at least Clark Level 3 or 1.5mm Breslow thickness or greater, unless specified below:
>
> The following are excluded:
>
> - tumours classified as carcinoma in situ unless a tumour specified above requiring Radical Surgery,
>
> - prostate tumours classified T1 (all categories) under the TNM classification system and/or of an equivalent or lower classification other than those specified above;
>
> - lymphocytic leukaemia less than Rai Stage 1;
>
> - malignant melanomas and other skin cancers other than those specified above; and
>
> - tumours that are a recurrence or metastases of a tumour that first occurred within the 90 day qualifying period.
>
> Carcinoma in situ means focal new growth of malignant cells that have not yet invaded normal tissues and have been diagnosed by biopsy.
>
> Radical Surgery means, in respect of a diagnosed malignancy, an operation or surgery which:

(i) is intended to arrest the spread of the malignancy,

(ii) involves the removal of the entire breast or organ affected by the malignancy, and

(iii) is considered by a Medical Practitioner to be medically necessary to halt the spread of the malignancy^.

^ *Prophylactic surgery where there is a family history of breast cancer is specifically excluded.*

The claim and the facts

[58] Mr Banicevich filed three statements of claim, the most recent being filed shortly before the hearing. In all of them he claimed that he had had "pancreatic neuroendocrine tumour and cancer" and that this had been removed by "radical surgery". He claimed that "pancreatic cancer" had been identified in a report of 28 November 2012 from his principal medical adviser, Professor John Windsor.

[59] The report, which is dated 29 November 2012, is in fact a report prepared by an anatomic pathologist, Dr Mee Ling Yeong, of Diagnostic Medlab Ltd and sent to Professor Windsor. This was an histology report on Mr Banicevich's spleen and part of his pancreas (variously referred to as "distal pancreas" and "pancreatic tail") which had been removed during surgery on 22 November 2012. Professor Windsor was the surgeon. Dr Yeong's report was that there was "no evidence of perineural or vascular invasion" and that "a total of five small lymph nodes [were] identified in the specimen and none of these shows evidence of tumour metastasis". It was described as a "well differentiated neuroendocrine tumour (7mm) WHO 2010 G1". "WHO 2010" is a World Health Organisation classification system and aspects of this are discussed below.

[60] There was expert evidence for AMP from Mr Goswin Meyer-Rochow. He summarised relevant aspects of Dr Yeong's report as follows:

> As Dr Mee Ling Yeong has outlined in her statement (para 9), and as is apparent from the histological report, Mr Banicevich had an incidental small (7mm) pancreatic neuroendocrine tumour which was localised within the pancreas, with no evidence of local invasion into surrounding tissue, no evidence of vascular, lymphatic or perineural invasion, and no evidence of lymph node invasion within five lymph nodes.

Evaluation

[61] In the evaluation that follows I have taken account of Mr Black's submissions for Mr Banicevich and those of Mr McLellan QC for AMP. This includes Mr Black's submissions on principles of interpretation and further written submissions filed (without leave) following the hearing.

[62] The reasons for my conclusion are conveniently discussed under headings taken from words or phrases in the definition of cancer in the policy.

Was the tumour "invasive"?

[63] The opening words of the definition refer to "an invasive malignant tumour". The tumour had to be both invasive and malignant. There is no ambiguity in that regard. The evidence of all three experts positively establishes that the tumour was not invasive.

[64] Mr Meyer-Rochow's evidence in his prepared witness statement was that the tumour was not invasive.

[65] The point was not addressed in the prepared witness statements of Professor Windsor and Dr Yeong for Mr Banicevich. I assume the reason why Professor Windsor and Dr Yeong, in their prepared witness statements, did not address the question of invasiveness, and some other relevant expressions in the policy, is that they were not asked to provide an opinion on these expressions. However, Professor Windsor, in answer to some supplementary questions in his evidence-in-chief indicated, without being directly asked, that the tumour was not invasive when he referred to "the risk of invasiveness to definitely be there". In cross-examination Professor Windsor and Dr Yeong both agreed that the tumour was not invasive. Their evidence could not have been clearer.

[66] Professor Windsor's evidence was as follows:

> Q. And once the histology was done after removal, after the re-section of the tumour, the histology showed that there was no invasiveness?
>
> A. Yes.

…

Q. Now as at the date of when histology was done following the procedure you established that there was no – you and others established that there was no spread, no invasiveness, you accept that?

A. Mhm, yes.

[67] Dr Yeong's evidence was as follows:

Q. As at the point that you were involved there had been no invasive behaviour?

A. No.

Q. There was no histological evidence of invasiveness?

A. No.

Q. No clinical or radiological evidence of distant metastasis?

A. The clinicians will have [sic] answer that, but I'm not aware that there was evidence.

Q. Have you seen Mr Meyer Rochow's brief of evidence?

A. I've read it briefly this morning.

Q. And he has concluded that the tumour that Mr Banicevich had could not be considered an invasive malignant tumour?

A. It's not an invasive malignant – well it is not an invasive tumour.

Q. Not an invasive tumour, you agree with that conclusion?

A. Yes.

[68] This evidence is sufficient to conclude that Mr Banicevich's condition was not one covered by the policy. This is not an issue on which there was any uncertainty. And it is not an issue giving rise to any uncertainty as to the meaning of invasiveness. All three medical experts were quite clear. Notwithstanding this conclusion, given the significance of this for Mr Banicevich, I will discuss some other aspects of this issue.

Was the tumour malignant?

[69] The question whether the tumour was "malignant" was a central topic in the briefs of evidence of Professor Windsor and Dr Yeong. Their opinions were that, "on the basis of" the WHO 2010 classification, Mr Banicevich's tumour was properly described as "malignant". The WHO 2010 classification replaced a WHO 2004 classification which allowed for benign and uncertain categories for neuroendocrine tumours. As Dr Yeong put it, the change in 2010 was "based on the knowledge that if left untreated, NETs [neuroendocrine tumours] will eventually invade surrounding tissue and spread, even if some may take a long time to do so".

[70] Mr Meyer-Rochow explained the WHO 2010 classification in some detail. He also explained reasons for the changes from 2004 to 2010 which had been noted in the evidence of Professor Windsor and Dr Yeong. Mr Meyer-Rochow produced a copy of the relevant part of the WHO 2010 classification. This includes the following:[2]

> **NETs**
>
> Other than neuroendocrine microadenomas, which are benign neoplasms [3012] (there being no evidence for progression to clinically relevant malignant NETs outside the setting of NEN1), all pancreatic NETs are regarded to have malignant *potential*.
>
> (emphasis added)

[71] The neuroendocrine microadenomas excluded at the beginning of that statement are tumours less than 5mm in size. This would not apply in Mr Banicevich's case because his tumour was 7mm in size.

[72] The WHO 2010 classification is relevant, but the question that arises in this proceeding is whether Mr Banicevich's tumour was "malignant" in the sense that that word is used in the insurance policy, not the way in which particular grades of neuroendocrine tumour, now including pancreatic tumours, are classified by the World Health Organisation. Mr Meyer-Rochow's opinion was that the tumour in this case was not a "diagnosed malignancy"; it was not in fact malignant although it had the potential to become malignant in a clinical sense.

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2 At p 326 of the WHO document, being part of chapter 12 "Tumours of the pancreas".

[73] The wording of the definition of cancer in Mr Banicevich's policy was effective from 11 June 2011, and therefore after (or I assume after) introduction of the WHO 2010 classification. On the other hand, the wording of the policy does refer to and rely on classification systems, such as the "TNM classification system" (also discussed in the evidence) but it does not refer to the WHO 2010 classification. On the face of it, the word "malignant" means a tumour which, on full examination, is found to be malignant in fact, not one that is potentially malignant.

[74] The onus was on Mr Banicevich to establish that his tumour was malignant. It is open to question as to whether Mr Banicevich did establish that his tumour was malignant in the sense that the expression is used in the policy. However, because the answer is not determinative of the claim, I consider that this matter is best left for another case where the issue is determinative of a claim and likely to be the subject of more detailed attention than the issue was given in this case on behalf of the insured.

Was it "carcinoma in situ ... requiring Radical Surgery"?

[75] The definition in the policy refers to four types of cancer. The relevant category is the third which, for present purposes, may be summarised as "tumours classified as *carcinoma in situ* of … [an] organ requiring *Radical Surgery*". Neither of the expressions I have italicised applies to Mr Banicevich's case.

[76] Professor Windsor and Mr Meyer-Rochow were in agreement that the tumour was not "carcinoma in situ". It is unnecessary to record or summarise what they said. The evidence is clear. This, again, is a conclusion on a central issue of fact which means that Mr Banicevich was not covered.

[77] Radical surgery has its own definition for the purposes of the policy. The definition of radical surgery requires three things to be established. Mr Black led evidence-in-chief from Professor Windsor, supplementary to his prepared witness statement, on elements of the definition of radical surgery, and cross-examined Mr Meyer-Rochow on it. The broad thrust of what Mr Black was seeking to establish, and for which there was some support in the evidence of Professor Windsor, was to the effect that the definition of radical surgery is inappropriate from a medical

perspective. This was because, for example, there are many conditions of a serious nature which can be treated without need to remove an entire organ, and Mr Banicevich's condition was such a case.

[78] There was no challenge to Professor Windsor's evidence that the way in which Mr Banicevich's condition was treated was the most appropriate treatment. This did not require the removal of the entire organ affected by the condition being treated; that is to say, the pancreas. But this evidence does not assist in relation to the matters I have to determine. What the evidence did clearly establish, including evidence from Professor Windsor and Dr Yeong, is that the treatment in this case did not involve "Radical Surgery" as defined.

Did Mr Banicevich breach his duties of utmost good faith, disclosure and fair dealing?

[79] I will consider this affirmative defence in case my conclusion on cancellation is wrong. This is because, if made out, it provides a complete answer to the causes of action advanced by Mr Banicevich.

[80] AMP's main contentions were recorded in the introduction at [6](c). For convenience I will reproduce the main allegations:

(a) The application for trauma cover was not made to obtain the benefit of the cover, but to generate commission income. AMP says that Mr Banicevich was in desperate need of substantial income because of a seriously adverse financial position.

(b) The adverse financial position was not disclosed.

(c) Mr Banicevich did not intend to pay premiums on due date or, at least, knew that he would be likely to miss payments and would rely on the grace period for payment.

(d) Mr Banicevich established a recurring credit card payment authority with AXA which he knew could not be honoured.

[81] As recorded in the introduction, I am satisfied that this defence is made out. The defence was summarised in the introduction because the factual foundation for part of it was contained in, and made apparent by, the summary of the facts that followed. This applies in particular to the third and fourth main allegations as just summarised. Those contentions require inferences to be drawn. The inference in respect of the fourth contention, relating to establishment of the credit card authority, was one that followed almost inexorably from what was established as to what occurred after that authority was set up coupled, with the evidence of defaults in payment by other means preceding establishment of the authority.

[82] The inference that Mr Banicevich did not intend to pay the premiums on due date or, at least, that he knew that he would be likely to miss payments, is also one I am satisfied can be drawn from the direct evidence which is sufficiently summarised in the summary of facts. In respect of both of these main elements of the defence – the third and the fourth – the ways in which Mr Banicevich sought, in effect, to manipulate matters with his various calls to the AXA call centre, or misinformation passed to AXA through other parties, lends substantial support to the conclusion to be drawn. This in turn leads to the conclusion that Mr Banicevich was in breach of the duties he owed, and which as an insurance adviser he knew very well he owed, to AXA.

[83] The other basic contentions of AMP are the first two recorded in the summary. The central question of fact was whether, when Mr Banicevich applied for the addition of the trauma cover, he was in a precarious financial position. This was established by expert evidence for AMP from Mr Jason Weir, a chartered accountant with Deloitte New Zealand. His evidence was accurately and concisely summarised in the closing submissions for AMP along the following lines:

(a) Mr Banicevich was in severe financial distress and was insolvent during 2010 and 2011.

(b) Mr Banicevich did not have sufficient cash flow to meet the monthly premiums on a sustainable basis when he took out the trauma cover in

November/December 2010, or when his condition was diagnosed in February 2012, or at the date of the claim in August 2013.

(c) Mr Banicevich had little in the way of surplus cash and some of his payments were being reversed during the relevant period.

[84] There was no evidence from or for Mr Banicevich which questioned Mr Weir's conclusions in any material respect. Mr Banicevich accepted that he had major financial problems. The main thrust of his evidence, and submissions on his behalf on this issue, was that his financial problems were the result of factors beyond his control, such as a drought in Northland. He did challenge Mr Weir's use of book values for assets. There was no expert evidence challenging Mr Weir's conclusions and I am satisfied that Mr Weir's methodology was appropriate and I accept Mr Weir's conclusions. Amongst other things, there was evidence that one of Mr Banicevich's companies that went into receivership (Finance House Ltd), and a company central to his financial arrangements, had a balance of $6.38 million owing to BNZ Bank, but the combined government valuations of four properties available to meet that debt was $305,000.

[85] Mr Dean Perkins was a former business partner of Mr Banicevich. He gave evidence that, in about November 2010, Mr Banicevich told him that Mr Banicevich's bank intended to withdraw an overdraft facility for $100,000. Shortly after that Mr Perkins saw "in horror" Mr Banicevich's proposal for the trauma cover go through. There was no challenge to Mr Perkins' evidence.

[86] The commission payment of some $80,000 by AXA, in consideration of the new trauma cover, was paid by AXA to Whiteman Group. On 30 December 2010 this was transferred to a bank account of Mr Banicevich's company, Finance House Ltd (the company which subsequently went into receivership). This took the account out of overdraft and put it in credit, for the first time for some considerable time, in a sum of $66,000. The first increased premium payment for the policy, after the addition of the trauma cover, was met out of this account. The history in relation to subsequent defaults has already been covered in detail.

[87] The principles applying to the duty of disclosure and the insurer's entitlement to avoid a policy can conveniently be taken from part of the head note to the report of Court of Appeal's decision in *State Insurance General v McHale*:[3]

> 1 (per totam curiam) Contracts of insurance are contracts of the utmost good faith on both sides. Pursuant to that principle, the insured was bound, quite apart from any terms or conditions in the insurance policy, to make full disclosure of all material facts. This duty of disclosure was not however absolute and the insurer could expect disclosure only of facts within the actual or presumed knowledge of the insured (see p 406 line 44, p 407 line 7).
>
> *Carter v Boehm* (1766) 3 Burr 1905; 97 ER 1162 followed.
>
> 2 (per totam curiam) The test in New Zealand of materiality in relation to facts that should be disclosed by insureds is whether the mind of the prudent insurer would be affected by knowledge of a particular fact, either in deciding whether to take the risk at all or in fixing the premium (see p 402 line 50, p 407 line 11).
>
> *Mutual Life Insurance Co of New York v Ontario Metal Products Co* [1925] AC 344 (PC) and *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* [1976] 2 Lloyd's Rep 631 (PC) applied.
>
> 3 (per Richardson and Hardie Boys JJ) The law is that given that a fact was within the actual or presumed knowledge of an insured it must be disclosed if the prudent insurer would regard it as material. Materiality being a question of fact, the reasonableness or otherwise of what was claimed by an insurer to be material would be a relevant consideration in determining whether indeed it was (see p 409 line 9).
>
> *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485 (CA) followed.
>
> *Joel v Law Union and Crown Insurance Company* [1908] 2 KB 863 (CA) and *Roberto v Hartford Fire Ins Co* 177 F 2d 811 (1949) (CA) discussed.

[88] Mr Perese, for Mr Banicevich, did submit that this affirmative defence of AMP amounted to an allegation of fraud on the part of Mr Banicevich. On that premise Mr Perese submitted that the evidence fell well short of establishing fraud. He submitted that fraud cannot be inferred, and cited *Schmidt v Pepper NZ*.[4] He also referred to *Americhip Inc v Dean* for the purpose of illustrating the pleading requirements for allegations of fraud.[5] These authorities are not on point. AMP was not alleging fraud. I am satisfied that AMP's pleading provided clear and full

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3 *State Insurance General v McHale* [1992] 2 NZLR 399

4 *Schmidt v Pepper New Zealand (Custodians) Ltd* [2012] NZCA 565 at [15].

5 *Americhip Inc v Dean* [2014] NZCA 380 at [4].

particulars of what it was alleging in respect of Mr Banicevich's obligations and the matters relied on by AMP as grounds for its avoidance of the policy.

[89] In respect of matters of principle applied to this case there was the following submission for AMP:

> There is no suggestion from the plaintiff that he did not know the state of his financial circumstances. The main questions are whether he intended to take out the policy for the ulterior, bad faith purpose of generating profit rather than as a genuine insured; and whether the true facts, if disclosed, were material.

[90] I agree with the opening proposition as to Mr Banicevich's knowledge. Having regard to the evidence already discussed, I am also satisfied that Mr Banicevich did intend to take out the policy for the ulterior and bad faith purpose stated in that submission. I am further satisfied that when he did so he knew that he would not be able to meet the premiums as they fell due and that that state of affairs continued through to cancellation in November 2011.

[91] The remaining question is whether the true facts, if disclosed, would have been material to AXA's decision whether or not to grant the additional cover, or to allow it to continue. I am in no doubt that these matters were material. They should have been disclosed. Mr Black's submissions that AXA could have asked for financial information does not assist Mr Banicevich.

[92] This affirmative defence was made out. AMP was entitled to avoid the trauma component of the policy *ab initio*; that is, with effect from commencement on 16 November 2010.

Counterclaim

[93] There is a counterclaim by National Mutual against Mr Banicevich for $69,491.26 and interest. This claim arises under a distributor agreement between National Mutual (AXA) and Whiteman Group. The agreement made provision for, amongst other things, treatment of commission and commission claw-backs. There was a guarantee from Mr Banicevich to meet all obligations owed by Whiteman Group to National Mutual.

[94] The evidence for National Mutual (from Mr Pana Luamata) established liability of Whiteman Group in the sum of $69,491.26. The calculation of this, arising from various credits and debits to the Whiteman Group account, was set out in detail and I accept the calculations. It may be noted that the major component of the debit balance owed by Whiteman Group arose from claw-back of the commission of $81,083.33 on Mr Banicevich's trauma cover.

[95] Mr Banicevich's liability as a guarantor is also clear.

[96] Mr Banicevich did seek to challenge the claim on a basis which had not been pleaded and which was first advanced in closing. I ruled against an oral application to amend the plaintiff's pleading to permit this defence to be advanced. There were two reasons. The first was that it was far too late, particularly given the fact that Mr Luamata's evidence had been given. The second was that, in any event, the arguments sought to be advanced would not give a right to Mr Banicevich.

Result

[97] The plaintiff's claims are dismissed.

[98] There is judgment for the second defendant in a sum of $69,491.26 with interest to be calculated in accordance with clause 11.7 of the distributor agreement from due date down to the date of judgment.

[99] The defendants are entitled to costs. If the parties are unable to agree on costs a memorandum for the defendants should be filed and served by 23 October 2015 with a response for the plaintiff to be filed and served two weeks after service of the defendants' memorandum.

Woodhouse J