2012 ONSC 6862
Ontario Superior Court of Justice

Pagliaroli v. Industrial Alliance Insurance and Financial Services Inc.

2012 CarswellOnt 15360, 2012 ONSC 6862, [2013] I.L.R. I-5372, 17 C.C.L.I. (5th) 102, 224 A.C.W.S. (3d) 474

Barbara Pagliaroli, Plaintiff and Industrial Alliance Insurance and Financial Services Inc., Defendant

Healey J.

Heard: November 26-30, 2012; December 3, 2012
Judgment: December 3, 2012
Docket: CV-10-491

Counsel: E. Gionet, for Plaintiff
A. Leckey, for Defendant

Subject: Insurance; Contracts

Related Abridgment Classifications

Insurance

III Contracts of insurance
III.2 Formation of contract
III.2.g Time when effective

Headnote

Insurance --- Contracts of insurance — Formation of contract — Time when effective

On January 16 (all dates 2009), insured completed application for universal life, term life, and disability coverage, and signed signatures form and pre-authorized cheque form — Signatures form included clause that request took effect when it was accepted by insurer without modification, first premium was paid and no change took place in insurability since signing form — On January 21, nurse conducted examination and insured signed nurse's report — On February 4, insurer denied disability coverage but accepted life insurance application — On February 3, policy was issued — On February 5, insurer sent agent confirmation stating premium would be withdrawn upon receipt of signed amendment and providing there were no other changes — On February 17, agent delivered policy; insured executed receipt, including notice to agent querying whether insured's health had changed since application; marked "no"; and insured executed amendment authorizing automatic withdrawal of premiums — On February 23, first premium was withdrawn for coverage starting February 4 — Insured's medical examination report disclosed he was referred to surgeon for gallstones — On February 2, gallstone surgeon detected heart murmur — On March 12, echocardiogram detected aneurism ascending aorta, necessitating cancellation of gallstone surgery for heart surgery — On May 6, 2009, insured died of complications — At no time prior to delivery of policy was insurer aware of heart murmur echocardiogram referral — Insurer denied plaintiff beneficiary's claim for proceeds — Beneficiary brought action for amount owing under policy — Judge ruled that there were no provisions in application or policy that were contrary to s. 180(1) of Insurance Act; therefore, Act applied to determine when or whether policy came into effect — If jury found that no change in insurability occurred between date of application (January 16) and date policy was delivered (February 17), then contract would have come into effect on date first premium was paid (February 23) — There were no provisions within signatures form to address situation which occurred here — Clause was unclear as to what steps, once application was not accepted in its entirety, must be taken before contract could come

into effect — Therefore, no effect was given to that clause because it was essentially meaningless as attempt to set out provisions that were contrary to s. 180(1) of Act — "Effective date" referred to on all contractual documents was meant to be date from which premiums, coverages, renewals and time calculations under incontestability and suicide clauses would run.

Table of Authorities

Cases considered by *Healey J.*:

Andersen Estate v. Metropolitan Life Insurance Co. of Canada (1994), 1994 CarswellOnt 1197, [1994] I.L.R. 1-3062 (Ont. Gen. Div.) — considered

Clark v. First Canadian Insurance Corp. (2011), 2011 SKPC 11, 2011 CarswellSask 6, [2011] I.L.R. I-5101, 92 C.C.L.I. (4th) 291, (sub nom. *Clark Estate v. First Canadian Insurance Corp.*) 392 Sask. R. 13 (Sask. Prov. Ct.) — considered

McClelland & Stewart Ltd. v. Mutual Life Assurance Co. (1981), [1981] 2 S.C.R. 6, 1981 CarswellOnt 624, 1981 CarswellOnt 624F, 125 D.L.R. (3d) 257, [1981] I.L.R. 1-1393, 37 N.R. 190 (S.C.C.) — considered

Wagner Brothers Holdings Inc. v. Laurier Life Insurance Co. (1992), 8 O.R. (3d) 609, 10 C.C.L.I. (2d) 9, [1992] I.L.R. 1-2874, 92 D.L.R. (4th) 747, 56 O.A.C. 365, 1992 CarswellOnt 654 (Ont. C.A.) — considered

Wawanesa Mutual Insurance Co. v. Hewson (2004), 254 Sask. R. 203, 336 W.A.C. 203, 13 C.C.L.I. (4th) 189, 2004 CarswellSask 565, 2004 SKCA 112, [2005] 1 W.W.R. 205 (Sask. C.A.) — considered

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8
s. 157(1) — considered

s. 180(1) — considered

s. 180(1)(a) — considered

s. 180(1)(b) — considered

s. 180(1)(c) — considered

Words and phrases considered:

take effect

Before embarking on a review of the law, it is important to make clear the distinction between two concepts, which are sometimes confused within the body of existing law. The first is the concept that is addressed by s. 180(1) [of the Insurance Act], which is whether a policy will "take effect". There are several terms that are used to describe this state, the most common being that the policy comes "into force". Section 180(1) [of the Act] is concerned with the date upon which the policy comes into force, in the sense of when the insurer is at risk. As set out in that section, there are three events that must transpire before the insurer can be under any risk for any of the coverages to which it has bound itself by the policy. If the insurer has placed a contrary provision in the application or policy, whatever those conditions may be, they will have to be satisfied before the policy will "take effect" or come "into force".

effective date

The "effective date" is the date marking the beginning of the computation of time for the coverages and benefits provided under the policy, impacting on everything from the running of the suicide and incontestability clauses to the measurement of the coverage periods.

RULING on determination of date on which insurance policy came into effect.

***Healey J.*:**

Nature of the Ruling

1 The court is currently conducting the trial of this action, in which the plaintiff seeks judgment for the amount allegedly owing under a life insurance contract due to the defendant's denial of her claim as the named beneficiary. This is a mid-trial ruling addressing the following 2 questions: 1) How is the date on which this policy comes into effect to be determined?; and 2) Does the answer to the first question engage the concept of whether there was a change in insurability before the policy could come into effect?

2 In the course of reviewing with counsel the proper questions to be put to the jury, it was agreed by counsel, and determined by the court, that the preceding questions are solely issues of law that should not be decided by the jury. Further, it was necessary for the ruling to be delivered before the jury questions could be finalized.

Agreed Facts

3 In January 2009, Frank Pagliaroli ("the insured") applied for the following insurance coverage with Industrial Alliance Insurance and Financial Services Inc. ("Industrial Alliance") under policy number 04-4686993-1 (the "policy"):

(a) $100,000 Genesis 5 Universal Life Coverage;

(b) $150,000 20 year Term Life Coverage; and

(c) Contribution Applicant's Disability Coverage ("CAD Coverage").

4 The insured completed his electronic application for the above insurance coverage on January 16, 2009, and the application was forwarded to Industrial Alliance on January 21, 2009. The application forms part of the policy. On January 16, 2009 the insured also signed Signatures Form E727735, which forms part of his application for insurance coverage and therefore part of the policy.

5 On his application, the insured requested that the premium payment would be made by pre-authorized cheque (PAC), payable on delivery. The target premium noted on the application was $110. On January 16, 2009, the insured also signed a PAC form and provided a void cheque for the bank account on which monthly premiums were to be withdrawn.

6 As part of the application process, Industrial Alliance arranged for the insured to undergo a paramedical examination. On January 21, 2009 a nurse from Medisys Insurance Medical Services met with the insured to conduct that examination. A Medical Examination Report was completed with the nurse and signed by the insured. The Medical Examination Report is part of the application, and part of the policy.

7 On February 4, 2009, an underwriter at Industrial Alliance reviewed the application and Medical Examination Report. The insured's application for CAD Coverage was denied by Industrial Alliance, but his application for life insurance was accepted. The policy was issued on February 3, 2009, and assigned the same policy number as found on the application.

8 On February 5, 2009, Industrial Alliance sent a Confirmation of Issue form to the agent. Industrial Alliance also provided the agent with a letter dated February 5, 2009, addressed to the insured, under cover of which Industrial Alliance provided him with a copy of the policy and the premium information. A monthly amount of $110 was noted to be the initial target premium on the policy. The Confirmation of Issue stated that the premium "will be withdrawn upon receipt of the duly signed amendment". The Confirmation of Issue contains two additional statements, as follows:

> Providing that there are no other changes (contractual or other), the subsequent bank withdrawals will be for $110 on the 04 of each month.
>
> (*) Any premium due in the meantime will be added to this amount. This policy will be placed upon receipt of the duly signed amendment.

9 The letter of February 5, 2009 also states:

> Providing that there are no other changes (contractual or other), the subsequent pre-authorized withdrawals will be for $110 on the 04 of each month.

10 The policy was delivered to the insured via his agent on February 17, 2009. The insured executed a Receipt for Delivery of Contract (the "Receipt") on February 17, 2009.

11 The Receipt contained a contained a section entitled "Change of Insurability", which set out the following question:

> Notice to agent: has the state of health or occupation of any of the insureds changed since the application was signed?

12 The answer was marked as "no".

13 On that same date, the insured executed an Amendment Page ("the amendment") to the policy, referencing the same policy number as the policy. The body of the amendment provides:

> It is agreed that the following forms part of the application submitted for the issue of this policy.
>
> > I hereby authorize the withdrawal of automatic payments (PAC) corresponding to the premium of the present policy.
> >
> > This policy is issued without the waiver of premium benefit.
>
> We agree that our signatures constitute an approval of the above clause.

14 Evidence was given at trial by the Director of individual underwriting at Industrial Alliance that the phrase "waiver of premium benefit" is terminology that was used by another insurance company acquired by Industrial Alliance, but which refers to the CAD Coverage.

15 On February 23, 2009, Industrial Alliance automatically withdrew the amount of $110 from the insured's bank account for the first monthly premium payment. This first payment covered the premium due for the first month of coverage commencing February 4, 2009. The next monthly premiums were automatically withdrawn from the insured's bank account on or about the 4 th day of every month, with the last automatic withdrawal being done on May 4, 2009.

16 The insured disclosed on his Medical Examination Report that he had been diagnosed with gallstones and was being referred to a surgeon. The insured had a consultation with a surgeon on February 2, 2009 pertaining to his forthcoming gallstone surgery. During that consultation the surgeon detected an audible grade II systolic heart murmur. On or about that same date, the surgeon referred the insured for an echocardiogram to assess the cardiac murmur. On March 12, 2009 he underwent an echocardiogram, the results of which indicated that he had an aneurismal ascending aorta. As

a result, the insured's gallstone surgery was cancelled and, following further consultation, he underwent heart surgery. The insured died due to complications on May 6, 2009.

17 At no time prior to the delivery of the policy was Industrial Alliance aware of the detection of the heart murmur or that the insured had been referred for an echocardiogram.

Statutory Provisions and Provisions in the Policy

18 Section 180 (1) of the *Insurance Act*, R.S.O. 1990, c. I.8, is a provision that sets out the conditions under which an insurance contract takes effect. It provides:

> **Contract Taking Effect**
>
> 180. (1) Subject to any provision to the contrary in the application or the policy, a contract does not take effect unless,
>
> (a) the policy is delivered to an insured, the insured's assign or agent, or to a beneficiary;
>
> (b) payment of the first premium is made to the insurer or its authorized agent; and
>
> (c) no change has taken place in the insurability of the life to be insured between the time the application was completed and the time the policy was delivered.

19 Because s. 180(1) provides that it is subject to any provision to the contrary in the application or the policy, it is necessary to determine whether there are any such provisions in the application or policy that might limit the applicability of s. 180(1).

20 Within the policy, under Genesis 5 - General Conditions, the following provisions are contained:

> **CONTRACT**
>
> This contract describes all the agreements entered into between you and us.
>
> The contract includes: the application for insurance, including the medical questionnaire, the medical examination and all answers provided in place of a medical examination, the Contract Specifications Page, as well as all riders, amendments and additional benefits purchased.
>
> In order to be valid, any modification or waiver of any provision under this contract must be made in writing.
>
> **EFFECTIVE DATE**
>
> ***Contract***
>
> The effective date of the contract is indicated on the Contract Specifications Page. It corresponds to the date of the oldest coverage still in force under the contract. Years of contract are calculated based on this date.
>
> ***Coverage***
>
> Each coverage has its own effective date, which is indicated on the Contract Specifications Page. The policy years and the monthly anniversaries of the insurance are determined based on this date. In addition, the 2-year period provided under the Incontestability and Suicide provisions of the GENERAL CONDITIONS of the contract begins on this date for each coverage.

21 The Contract Specifications states "Contract Effective Date: February 4, 2009". [1]

22 The Contract Specifications identifies "(Feb 04 2009)" as the date of coverage for the Genesis 5 - Universal Life coverage, and as the date of coverage for the term life portion of the policy.

23 The Contract Specifications state that the premiums are payable from the effective date of each coverage.

24 The Contract Specifications identify February 4, 2029 and February 4, 2049 as the 20 year and 40 year renewal dates for the term life portion of the Policy.

25 In the policy, the 2 year incontestability period runs from February 4, 2009, as does the 2 year suicide clause. The anniversary dates run from February 4, 2009.

26 Within the body of the Signatures Form is the following clause:

> We agree that the request takes effect when it is accepted by Industrial Alliance Insurance and Financial Services Inc. (hereafter referred to as Industrial Alliance or the Company) inasmuch as the latter has been accepted without modification, the first premium has been paid and no change has taken place in the insurability of the proposed insureds since the signing of this form.

Position of the Parties

The Plaintiff

27 The plaintiff's position is that a binding contract of insurance was made between the parties on February 3, 2009, when Industrial Alliance issued the policy. The plaintiff further argues that the provisions of the policy fully displace s. 180(1) of the *Insurance Act*, and that the evidence strongly indicates that the date of February 4, 2009 should be considered the date that the policy came into force, or took effect, and the date that the coverages began. In addition to the wording in the policy and the contract specification page, the plaintiff argues that the withdrawal of the first premium to cover the period running between February 4 to March 4, 2009, with no discount or pro rata reduction, shows that coverage had to be effective as of February 4. Further, the policy makes no mention whatsoever of the delivery of the policy or the policy delivery date. The plaintiff's position is that, as a result of s. 180(1) being ousted, the issue of change of insurability up until February 4 is not a consideration.

28 With respect to the clause within the Signatures Form, the plaintiff argues that it is entirely ambiguous, since at its most generous reading the word "request" means "application", and it is not possible for an application to "take effect". The doctrine of *contra proferentem* should be applied to interpret the contract in favour of the plaintiff, both by not offering Industrial Alliance any of the protections under s. 180(1), or any similar conditions sought to be enforced by Industrial Alliance, and by disregarding the clause in the Signatures Form in favour of the clear and unambiguous wording in the policy and the contract specifications.

The Defendant

29 The position of Industrial Alliance is that the legislature has offered insurance companies the protection of s. 180(1) for good reason, and that its provisions may only be ousted by very clear language in the contract showing the intent of an insurer to waive or alter those provisions. It argues that the clause in the Signatures Form has that effect, in part. First, it changes s. 180(1)(a) by replacing "delivery" with "acceptance", such that one of the conditions for the policy taking effect is that it must be accepted by Industrial Alliance without modification. On the facts of this case, it suggests that because an amendment to the application was offered to the insured, the "acceptance" must therefore be indicated by the insured before the contract can come into force. It argues that the clause in the Signatures Form has no appreciable effect on subsections 180(1)(b) and (c), as it also requires that the first premium be paid and that no change take place in the insurability of the insured's life from the time that the application was completed. However, it argues that, again, the requirement for delivery has been replaced with "acceptance".

30 Industrial Alliance argues that there is a significant difference between the term "effective date" and the "date of effect" of an insurance contract, the latter being the date that it comes into force as contemplated by s. 180(1). It states that the February 4 date is meaningless other than that it would have been the date that Industrial Alliance would have assumed the risks for the coverages under the policy, had the policy ever come into effect. However, it states that because there was a change in insurability of the insured between the date of the application and the date of acceptance by him, being February 17, 2009, the policy never came into force. It further argues that the payment of the premium from February 4 onward is not problematic because between February 4 and February 17 the insured would have received the benefits under the contract relating to the running of time under the incontestability period and suicide clause. When the claim was denied, all premiums were returned.

Formation of the Contract

31 While this issue is not central to the issues to be decided, the parties are not in agreement as to when the contract was made. As set out above, the plaintiff urges that a valid and binding contract was made February 3, 2009 when the policy was issued, and the defendant takes the position that it was made on February 17, 2009 when the amendment was signed by the insured.

32 The plaintiff's argument is based on the idea that the insured applied for three different coverages, and he was given what he requested with the exception of the CAD Coverage. The policy issued was the same policy that he applied for, and the target premium was the same. The denial of the CAD Coverage actually decreased the minimum premium, an amount which the insured had already agreed to pay, so there was no need to secure his agreement to this lesser premium, especially since the target premium remained the same. By issuing the policy, Industrial Alliance accepted the application, issuing it under the same policy number as found on the application. The amendment did not fundamentally alter the policy for which the insured applied.

33 I must disagree with the plaintiff on this point, and have determined that the insurance contract was formed on February 17, 2009 when the amendment was signed by the insured. The policy that was issued differed fundamentally from the policy applied for, as it omitted the CAD coverage. Although it is a rider to the policy, this court is unable to accept that the application for disability coverage was an insignificant part of the application. Even though the denial of the CAD coverage did not impact on the insured from a monetary point of view, the denial of the CAD coverage as part of the package of coverages applied for was significant. Faced with such a set of circumstances, it would have been open to the applicant to decide that he would attempt to secure another policy from a different insurance company. Had that been the case, it would have been an understandable affront to the applicant to find that Industrial Alliance was beginning to withdraw the premiums from his bank account even prior to his acceptance of the policy, as issued. When Industrial Alliance issued the policy without the CAD Coverage, it cannot be said that there was a meeting of the minds between the parties contracting. By issuing the policy in the form that it did, Industrial Alliance was in fact making a counter-offer to the applicant. Until the time that the applicant signed the amendment, it cannot be said that he had formed an intention to have a life insurance policy that did not contain CAD coverage. The wording of the amendment clearly signified that by signing, he was accepting the change, and it was at that point that a binding contract of insurance was entered into by the parties. This conclusion is bolstered by the wording of the Confirmation of Issue and the letter of February 5, 2009, both of which indicate to the applicant that no premium would be withdrawn until the amendment was signed. The insurer did not in fact withdraw the premium until February 23, 2009, after it had authorization from the insured to do so.

34 Although this does in fact mean that there would be no coverage for the initial period for which the premium was paid until the date of the commencement of the contract in law (February 4, 2009 to February 17, 2009), this is no different than the situation that arose when the practice in the industry was to "backdate" the application to a date corresponding to a lower age for the applicant in order to give the client the benefit of less costly premiums. See, for example, the minority decision in *McClelland & Stewart Ltd. v. Mutual Life Assurance Co.*, 1981 CarswellOnt 624 (S.C.C.) ["*McClelland*"], at para. 2:

. . .

> This practice had, of course, that necessarily disadvantageous effect of causing the first premium to be paid for a period in which there was no outstanding coverage; namely, for the period from January 23, 1968 to the date of the commencement of the contract in law, February 28, 1968. Since the deceased could not have died in the intervening period (because a death in such period would preclude a contract arising), there was no coverage.

35 However, this determination does not answer the questions that are required to be answered in this ruling, since the date of the formation of the insurance contract is not necessarily the date on which the contract is to take effect, either within the meaning of s. 180(1), or as otherwise provided to the contrary in the contract.

Case Law

36 Before embarking on a review of the law, it is important to make clear the distinction between two concepts, which are sometimes confused within the body of existing law. The first is the concept that is addressed by s. 180(1), which is whether a policy will "take effect". There are several terms that are used to describe this state, the most common being that the policy comes "into force". Section 180(1) is concerned with the date upon which the policy comes into force, in the sense of when the insurer is at risk. As set out in that section, there are three events that must transpire before the insurer can be under any risk for any of the coverages to which it has bound itself by the policy. If the insurer has placed a contrary provision in the application or policy, whatever those conditions may be, they will have to be satisfied before the policy will "take effect" or come "into force".

37 The second concept is that of the "effective date". The "effective date" is the date marking the beginning of the computation of time for the coverages and benefits provided under the policy, impacting on everything from the running of the suicide and incontestability clauses to the measurement of the coverage periods. Section 180(1) is not concerned with the "effective date"; a policy may in fact set out an "effective date" or dates that coincide with the date on which the policy takes effect, but s. 180(1) does not speak to the calculation of any of the time periods within the policy itself.

38 That these are separate and distinct concepts is made clear in *McClelland & Stewart Ltd.*. Dickson, J., writing for the majority, was dealing with the question of how to define the term "effective date" contained within a policy's suicide clause, and stated at para. 26:

> Let us examine each. The Declaration is clearly concerned with the date upon which the policy comes into force, in the sense of when the assurance company is on the risk. That date is the date of delivery of the policy, the initial premium having been paid, and no change having taken place in the insurability of the life of the applicant. At that time the policy comes into force and the company is at risk. When we turn then to the self-destruction clause, we are concerned with the period of time during which the liability of the company is limited in the event of suicide.
> That period starts to run on the effective date of the policy....

39 The minority decision in *McClelland & Stewart Ltd.* also references the two distinct concepts, at para. 10, although the following passage is an example, in my view, of the confusion in the terminology:

> The wording in issue, however, is the expression "effective date" in the self-destruction clause. It is significant that the expression "in force" is not therein employed. Instead we find the words "within two years after the effective date". This wording does not expressly make the existence of "insurance" during the two-year period a condition or requirement of this clause. The parties by a contractual term may revise the application of s. 154 as to when "a contract does not take effect". The contract clearly cannot come into effect in the sense of creating coverage for the insured if the insured is not living at the time of the alleged commencement of the agreement. The statute, however, does not prevent, and indeed contemplates, that the parties may, by a term in the contract, agree that some or all of the terms of the contract shall "take effect" or run from an earlier date than the date on which the contract is delivered to the insured or his agent. Thus a contract may "take effect" before it is actually "in force" if it so provides...

40 The distinction made by the Court in *McClelland & Stewart Ltd.* was adopted in *Andersen Estate v. Metropolitan Life Insurance Co. of Canada*, [1994] I.L.R. 1-3062 (Ont. Gen. Div.)) ["*Andersen Estate*"], at page 20:

> The plaintiffs point out that January 28, 1991 was the effective date of the policy and cite *McClelland & Stewart Ltd. v. Mutual Life Assurance Co. of Canada* (1981), 125 D.L.R. (3d) 258 (S.C.C.) to support that position. The effective date of the policy is the date from which the premiums start to run, and from which the term of the policy runs, etc. According to the plaintiffs, in light of *McClelland & Stewart*, supra, January 28, 1991 was the effective date of the policy and because under the oral binding contract of January 22, 1991, Met Life could not unilaterally alter that binding oral contract by imposing conditions as to delivery — the effective date of the policy also became the date on which the policy came into force. As to the distinction between the effective date of the policy and the date a policy comes into force see *McClelland & Stewart*, supra.

41 In the present case we are concerned with the question of whether the policy took effect, or came into force, having regard to s. 180(1).

42 In addition to *McClelland & Stewart Ltd.*, the plaintiff's counsel relies on two cases in support of his argument: *Wagner Brothers Holdings Inc. v. Laurier Life Insurance Co.*, 1992 CarswellOnt 654 (Ont. C.A.) ["*Wagner Brothers*"]; and *Clark v. First Canadian Insurance Corp.*, 2011 CarswellSask 6 (Sask. Prov. Ct.) ["*Clark*"].

43 As previously indicated, *McClelland & Stewart Ltd.* is a case in which the issue before the court was the method by which to determine the effective date in an insurance policy for the purpose of calculating the running of the suicide clause. Although the plaintiff relies on *McClelland & Stewart Ltd.* for the proposition that there is no difference between "effective date" and the date on which the policy "takes effect", I cannot agree for the reasons set out above. Further, in *McClelland & Stewart Ltd.* there was no dispute over whether the policy was in force at the time of the death of the insured. The issue in the case presently being tried is not that there are incongruent dates within the policy itself that need to be resolved, as was the case in *McClelland & Stewart Ltd.*, but rather whether there is a reason to oust the provisions of s. 180(1), in order to determine the conditions upon which Mr. Pagliaroli's policy should take effect. In *McClelland & Stewart Ltd.* there was no question that the policy had come into force upon delivery on February 28, 1968. On the facts of that case, including a reading of the contract documents in their entirety, the court found that there should only be one effective date *within* the policy for the purpose of calculating the time periods contemplated *within* the policy. In deciding that the effective date for the purpose of calculating any of those time periods was January 23, 1968, the higher court disagreed with the Court of Appeal, which had concluded:

> A fair reading of the policy which includes the Declaration of the applicant is the policy only became effective upon delivery and acceptance. This would be February 28, 1968. As there can only be one effective date that date should be used in the construction of the self-destruction clause.

44 Accordingly, *McClelland & Stewart Ltd.* could be seen as standing for the proposition that the date on which a policy can take effect can be different from the effective date found within the policy.

45 *Wagner Brothers Holdings Inc.* is a case that considered whether s. 180(1) (then s. 157(1) of the *Insurance Act*) had been displaced by provisions in the application, also in the context of an alleged change in insurability from the date of the application to, in that case, the date of delivery of the policy. The court found that there were provisions in the application that were contrary to s. 157(1), and which therefore applied to answer the question of when the contract of insurance had come into effect.

46 The facts in *Wagner Brothers Holdings Inc.* are as follows:

> i) on January 22, 1981 Mr. Wagner completed a life insurance application for $400,000 term life coverage;
>
> ii) on January 22, 1981 Mr. Wagner provided his insurance agent with a cheque for the first year's premium;

iii) from January 27, 1981 onwards Mr. Wagner had various medical consultations and procedures;

iv) on April 2, 1981 Mr. Wagner was informed that he had cancer;

v) on April 21, 1981 the insurance company approved the application and issued the insurance policies;

vi) on or after April 23, 1981 the policy was delivered to Mr. Wagner; and

vii) Mr. Wagner died in 1984.

47 In the *Wagner Brothers Holdings Inc.* case, the application provided that, where "the first premium is paid with the application, the insurance shall take effect as stipulated in the interim certificate". The interim certificate provided that the contract would come into effect on the completion of Parts 1 and 2 of the application. As indicated above, the Court of Appeal found that this wording in the insurance application dealing with the issue of when the contract would become effective, differed from the requirements of s. 157(1), and as such the wording of the insurance application applied to determine when the insurance contract took effect. The Court of Appeal held that because Parts 1 and 2 of the application were completed on January 22, 1981, the insurance contract took effect on that date, even though the policy was not yet delivered and even though Mr. Wagner was told that he had cancer before the policy was delivered.

48 In *Clark* the insured purchased a new GM truck with financing, at which time he was able to apply for insurance coverage. Through the authorized GM dealer, the paperwork was completed on October 14, 2008, and the insured also made his down payment on that date. The truck was not delivered until a few days later because some work needed to be done to the truck before delivery. The insurance contract paperwork was also completed on October 14, 2008. The insurance contract was clearly dated October 14, 2008 and the face page of the contract contained the following notation: "Effective date — 2008 10 14". However, in the definition section of the policy, "Effective Date" was defined to mean the later of the date set out in the Election of Coverage or the date that the Loan or Lease Funds are advanced. In fact, the Royal Bank did not advance the funds for the truck financing until October 16, 2008 when the truck was ready for delivery. The insurance contract contained a clause under the limitations and exclusions section which provided:

> FCIC shall have no liability, except to refund unearned premiums, where the insured is not eligible, or Death, Dismemberment or Total Disability results from or is caused or contributed to directly or indirectly by any of:
>
> (a) a Pre-existing illness, Disease or Physical Condition...

49 On October 14, 2008, after concluding matters at the GM office, Mr. Clark attended a doctor's appointment, at which he appeared mildly jaundiced but no diagnosis was made. Following that date further tests were undertaken and eventually Mr. Clark was diagnosed with pancreatic cancer. He passed away on August 17, 2009. As such, the issue for the court was whether the effective date of the policy was October 14 or October 16.

50 In *Clark* the court found that it should disregard the wording in the definition section of the policy, in part because the effective date on the face of the contract was clear and unambiguous, and because the ambiguity created between the definition section and the face of the policy resulted in two different interpretations being possible, and the doctrine of *contra proferentem* applied to resolve the ambiguity in favour of the insured. This case does not refer to any provision in an insurance statute in that province that may be similar to s. 180(1), and therefore no analysis was done of the policy provisions in relation to such as provision, as must be done in this case.

51 Industrial Alliance relies on *Andersen Estate* for the proposition that clear and unambiguous language must be used by the insurer to oust s. 180(1). In *Andersen Estate*, the applicant died before the insurance policy could be delivered to her by the agent. It was a term of the application that the policy had to be delivered to the applicant personally, as opposed to her agent, before it could take effect. In that case the plaintiffs argued that a provision in the application deprived the insurer of the benefit of s. 180(1) because it made liability conditional on delivery of the policy, and therefore contained a provision to the contrary of s. 180(1)(a). In the result, the plaintiffs argued that subsections 180(1)(b) and (c) were also

displaced. The court agreed that the requirement for delivery in the Met Life application was more stringent than that required under subsection 180(1)(a) because it confined delivery strictly to the insured, as opposed to the insured's assign or agent. However, since there was no provision to the contrary of subsections 180(1)(b) or (c), the court found there was no reason not to afford Met Life the benefits provided by those subsections. On page 16 of the decision, the court stated "clear and unambiguous language would have to be used by Met Life in paragraph 31(3) to oust the statutory efficacy of s. 180(1)(b) and (c) of the *Insurance Act*".

Analysis

52 As in *Wagner Brothers Holdings Inc.*, the analysis starts with whether there is contrary wording in the application or policy.

53 Starting with the Signatures Form, which forms part of the application, I find that this clause is capable of several interpretations. As set out in *Wawanesa Mutual Insurance Co. v. Hewson*, 2004 SKCA 112 (Sask. C.A.), an insurance contract is ambiguous when it is capable of more than one reasonable meaning. The first problem with the clause is that it refers to a "request" taking effect; clearly the clause would have greater clarity if the word "policy" or "contract" had been used. However, I do not find it commercially reasonable to interpret the word "request" as meaning anything other than either of these two things, as it is impossible for an application to take effect, even though that is the meaning urged on the court by plaintiff's counsel due to testimony heard from the defendant's director of underwriting, who testified that "request" meant "application".

54 The greater problem is that this clause purports to limit the coming into force of the policy by the condition that the insurer must accept the request without modification. It contains no terms setting out what is to happen if, as occurred in the facts of this case, the application is not accepted without modification. It contains no terms to suggest that the policy could take effect when an amendment is accepted by the applicant. It does not refer to whether, in such a situation, the amendment must be accepted only, or whether delivery to the insurer must also occur. It is acceptance by Industrial Alliance, and only Industrial Alliance, that is referred to in this clause.

55 That leads to the further problem of attempting to interpret the meaning of the last part of the clause "and no change has taken place in the insurability of the proposed insureds since the signing of this form". To what event is this condition to be linked? The acceptance of any amendment by the applicant? Delivery to the insurer? The placing of the policy, as set out in the Confirmation of Issue? What is to occur if there are ongoing negotiations over the terms of coverage?

56 In summary, there are no provisions within that clause to address the situation that occurred here. The clause is entirely unclear as to what steps, once the application is not accepted in its entirety, must be taken before the contract can come into effect. The interpretation urged on the court by Industrial Alliance is one that requires far too much "reading in" of terms that simply do not exist, coupled with an effort to attempt to guess at the insurer's intentions surrounding this clause. Accordingly, I give no effect to the clause found in the Signatures Form, because I find that it is essentially meaningless as an attempt to set out provisions that are contrary to those found in s. 180(1). However, that ambiguity does not necessarily lead to the conclusion that the contract must be interpreted in favour of the plaintiff, such that the date that the contract comes into effect was February 4, 2009, without any further requirements being fulfilled. First an examination must occur as to whether there are any other provisions in the policy or application supporting the conclusion that the insurer has contracted out of any of the protections of s. 180(1).

57 Accordingly, the next question is whether any of the other provisions and terms found within the policy and contract specifications are sufficient to override the requirements of s.180(1).

58 I have determined that the answer to this question is in the negative. I have read all of the contractual documents together, which are those documents as defined in the policy. In doing so, I have reached the conclusion that the "effective date" referred to on those documents is meant to be exactly what was referred to in *McClelland & Stewart Ltd.*, meaning the date from which the premiums, coverages, renewals and time calculations under the incontestability and suicide

clauses would run. This interpretation is bolstered by the fact that the contract's effective date is linked to the coverages, since it is said to correspond to the oldest coverage still in force under the contract. Under the heading "coverages", it is noted that each coverage has its own effective date. This wording suggests that, although not the case under this policy, the insurer has contemplated that there may be different effective dates for different coverages. Although Dickson, J. said that such a conclusion was a difficult one for him to reach in *McClelland & Stewart Ltd.*, he did not state that such an occurrence was an impossibility [para. 27], and I see no reason why the policy could not have different effective dates for the coverages than, for example, the running of the suicide clause. As we can see from *McClelland & Stewart Ltd.*, a policy can have a different effective date than the date on which it comes into effect. There is nothing in these contract documents that speaks to when the contract would come into force — no mention of acceptance, or the requirement for the premium to be paid, other than a note on the contract specifications that it would be paid by PAC, nor any clear language that is contrary to the wording of s.180(1)(c).

Decision

59 I conclude that there are no provisions in the application or policy that are contrary to s. 180(1) of the *Insurance Act*, and accordingly the answer to the first question is that the provisions of that statute apply to determine when, or whether, the policy came into effect in this case.

60 As a result, the answer to the second question is that the contract will not have taken effect unless there was no change in insurability of the life of the insured between the time the application was completed and the time the policy was delivered.

61 If it is found by the jury that no change in insurability occurred between January 16, 2009 (the date of the application) and February 17, 2009 (the date the policy was delivered), then this contract will have come into effect on February 23, 2008, when the first premium was paid to Industrial Alliance.

Order accordingly.

Footnotes

1 Page 1 of the Contract Specifications is reproduced below in its entirety.