COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2008/CLE/GEN/00294

BETWEEN

GLENN HIGGS

Plaintiff

AND

COLINA IMPERIAL INSURANCE (BAHAMAS) LIMITED

Defendant

BEFORE: The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Mr Richard Boodle for the plaintiff
Mr E. Terry North with Ms Keri D. Sherman for the defendant

HEARING DATES: 2014: 3 October; 2015: 11 June 2015

Written Closing Submissions:

Defendant: 2014: 15 October

Plaintiff: 2014: 29 October

JUDGMENT

Gray Evans, J.

1. The plaintiff is one of the beneficiaries of a life insurance policy number 003040298 ("the said policy") dated 9 March 2006 issued by the defendant to Jennet Gibson ("the insured"). The said policy has a face value of $200,000.00.

2. The defendant is an insurance company doing business within the Commonwealth of The Bahamas.

3. The insured died on 25 September 2007.

4. By letter dated 26 September 2007 the plaintiff wrote to the defendant providing formal notice in accordance with the said policy that the insured had died at the Rand Memorial Hospital in Freeport, Grand Bahama, on 25 September 2007.

5. By letter dated 16 April 2008 from Mr Hal O. Tynes, counsel and attorney, to the defendant, Mr Tynes wrote, inter alia, as follows:

> "Re: Jennet E. Gibson – Policy Number 003040298
>
> We represent Glenn and Travis Higgs, the beneficiaries named in the captioned policy issued by your company to Jennet E. Gibson on the 9th March 2006.
>
> According to the Certificate of Death issued by The Bahamas Registrar General's Department, Jennet E. Gibson died on the 25th September 2007 at Rand Memorial Hospital of Colon Cancer. A copy of the Certificate is enclosed herewith for your reference.
>
> We have been advised by Glen Higgs that the aforementioned policy was in order at the date of the insured's death and that the requisite documentation was submitted to the proper persons at Colina Imperial several months ago.
>
> In the circumstances, we should be grateful to receive the sum of $200,000.00, being the face amount due to the beneficiaries from the insurer under the aforementioned policy, on or before the 1st May 2008."

6. In response, the defendant, by letter dated 18 April 2008, wrote, inter alia:

> "Re: Jennet E. Gibson, deceased – Policy No. 3040298
>
> We acknowledge receipt of your letter dated April 16, 2008.
>
> Please be advised that the captioned file is presently being reviewed. The effective date of this policy is March 9, 2006. Ms Jennet Gibson died September 25, 2007, approximately a year and a half subsequent to the issuing of this policy.
>
> Contractually, we have a right to contest all claims for life insurance coverage should the insured die within two years of the issue date.
>
> Once we would have completed our review, we will advise you accordingly.
>
> Should you have any questions, please feel free to contact our office."

7. By letter dated 27 June 2008, addressed to the plaintiff, the defendant wrote, inter alia, as follows:

> "Re: Jennet Gibson – Policy No. 3040298

We have reviewed the death claim submitted on the above-references policy and regret to advise that the claim has been denied due to non-disclosure of medical information and material misrepresentation on the application for life insurance.

Ms Gibson applied for the above life insurance policy. Among the questions she answered were:

24. So far as you know, have you had or been told by a doctor that you had:

a. Chest pain, shortness of breath, heart murmur, high blood pressure?

Ms Gibson answered 'NO' to this question.

We received medical information which revealed that the deceased was diagnosed and prescribed medication for hypertension on January 9, 2004 and January 6, 2006. This was not disclosed on the application for insurance.

We therefore enclose our cheque No. 41674 in the amount of One thousand four hundred and twenty dollars and forth-two cents ($1,420.42) which represents refund of the monthly premiums plus interest.

Please confirm that this payment releases Colina Imperial Insurance Ltd from any and all further payments regarding the life benefit in the death of Jennet Gibson, under policy No. 3040298, by signing the enclosed copy of this correspondence.

Yours sincerely,

Life Claims Unit

Employee Benefits Department

Enc."

8. The plaintiff commenced this action on 18 December 2008 and pleads his case as follows:

"STATEMENT OF CLAIM

1) By a policy of insurance No. 003040298 dated the 9th day of March 2006 and made between Jennette E. Gibson and the defendants the defendants in consideration of the premiums then paid and to be paid as mentioned herein to them by the said Jennette E. Gibson agreed to insure Jennette E. Gibson in the sum of Two Hundred Thousand Dollars against death and upon proof of death to pay the said sum to the beneficiaries named therein.

2) On the 25th day of September 2007 and while the policy remained in force Jennette E. Gibson died of Colon Cancer at Rand Memorial Hospital, Freeport, Grand Bahama.

3) Proof of death of Jennette E. Gibson was given by the plaintiff to the defendants several months ago but the defendants have not paid the plaintiff the said sum or any part thereof.

AND the plaintiff claims:

i) A declaration that the defendants are liable to pay the beneficiaries the said sum in respect of the death of Jennet E. Gibson.

ii) An order that the defendants do pay the beneficiaries all sums due from the defendants under policy.

iii) Interest thereon pursuant to the Civil Procedure (Award of Interest) Act 1992.

iv) Costs

v) Further or other relief

9. In its defence filed 8 April 2009 as amended with leave on the day of the trial, the defendant admits paragraphs 1, 2 and 3 of the statement of claim and avers that by its letter dated 27 June 2008 to the plaintiff the defendant offered to refund the premiums paid by the insured and did tender its cheque therefor in the sum of $1,420.42 which offer and tender was refused by the plaintiff.

10. The defendant avers further that:

1) In order to induce the defendant to make the said policy the insured concealed from the defendant facts then material to be known to it, that is to say, that the insured had been treated for hypertension on the 9th January 2004 and the 6th January 2006 respectively, but of which the defendant was ignorant;

2) In the premises the defendant is entitled to avoid the policy.

3) Further and alternatively, the plaintiff as beneficiary under the said policy has no locus standi to bring the action for the enforcement of the same as he was not a party thereto.

11. Evidence at the trial was given by the plaintiff on his behalf and by Ms Colette Darville and Ms Angela Cecile Taylor on behalf of the defendant. Each of the witnesses provided witness statements and each was cross-examined.

12. The facts as gleaned from the evidence are simple and do not appear to be in dispute.

13. The insured applied to the defendant on 26 January 2006 for a life insurance policy in the sum of $200,000.00. Along with the application, the Insured completed and submitted a medical questionnaire provided by the defendant and answered the questions below as follows:

i) Question 21: Name and address of your personal physician or last attending doctor – Rand Memorial Hospital; government doctor.

ii) Question 22: Reason last consulted; give dates and result – annual physical (2005) – Result: good.

iii) Question 23: Describe treatment and/or medication – None.

iv) Question 24: So far as you know, have you had or been told by a doctor that you had:

a) Chest pain, shortness of breath, heart murmur, high blood pressure, stroke, irregular heartbeat, or any other disease or disorder of the heart or arteries – *No.*

14. At the foot of the application just before applicant's signature, the Insured declared:

> "I have read the above statements and they are completed and true to the best of my knowledge and belief. I hereby agree that they shall form part of the application for life insurance for which this medical evidence was required by Colina Insurance Company Ltd."

15. No answer was provided by the Insured to Question 30 on the application form which asked: "Are you in good health and free from all symptoms of illness and disease?"

16. On an application amendment document dated 22 February 2006 which included the following:

> "This document shall form part of the application for this policy previously made by the undersigned and it is agreed that the application shall be deemed to be amended to accord with the following:
>
> Q: 30 Yes."

17. At the foot of the application amendment document above her signature, the Insured declared:

> "The statements contained in the application as so amended are true and complete and there has been no change in the health or insurability of the life or lives to be insured since the making of the application. The statements and the signatures recorded below are identical on the copy of the application amendment document attached to this policy and the copy for Head Office."

18. The defendant approved the insured's application for life insurance at the face amount of $200,000.00 for the consideration of a monthly premium to be paid by the Insured of $72.56, the first of which premium was due and paid on 9 March 2006 and the policy was issued and put into effect on that date.

19. Features of the policy were as follows:

i)	Life Insured:	Jennet Gibson
ii)	Policy #:	03040298
iii)	Universal Life:	Non–participating; non-smoker; Accidental Death; Dismemberment.
iv)	Initial Face Amount:	$200,000.00
v)	Accidental Death & Dismemberment:	$50,000.00
vi)	Owner:	Insured
vii)	Beneficiaries:	Mr Glenn Higgs (Common Law Husband); Mr Travis Higgs (son).

20. The policy also contained the following terms and provisions:

i) "25 – Contract:

The entire Contract is made up of the Application form, any other written statement which has been made by the life insured; insured/owner, and the Policy document including the policy specifications and any indorsement thereto.

The policy is issued on the basis of the details given in the application form and any other written statement which has been made by the life insured and by the owner if other than the life insured. The policy document contains all the terms of the contract and the company accepts liability solely in accordance with its terms. Except as otherwise provided in this policy, no provision or condition of this policy may be revised or modified except by an endorsement issued by the company an signed by the President, Secretary or Actuary thereof.

ii) "26 – Validity:

We cannot contest the validity of the policy after it has been in force during the life insured lifetime for two years from its issue date. However, this is subject to the following:

a) We can contest if the policy has been reinstated and has been in force during the life insured's lifetime for less than two years from the reinstatement date.

b) We can contest at any time in respect of a misstatement of age, or a total disability benefit or fraud."

21. The insured died approximately 18 months after the issuance of the said policy and within the two-year contestability period.

22. The plaintiff notified the defendant of the insured's death by letter dated 26 September 2007 and on 18 October 2007, the plaintiff submitted to the defendant at its Freeport Branch a notification of the death claim for the Insured, providing the following documents:

i) Claimant Statement

ii) Death Certificate

iii) Passport copies for the Insured and Beneficiary

iv) Physician's Certificate

v) Birth Certificate for Travis Higgs.

23. Those documents were subsequently delivered to the defendant's Life Claims and Disability Section at No. 308 East Bay Street, New Providence on 22 October 2007.

24. By letters dated 23 October 2007, Kimley Saunders of the defendant's Life Claims Department and addressed to Ms Sharon Scavella of the Rand Memorial Hospital and Dr Elaine Lundy, the Director of Clinical Services, Eight Mile Rock Clinic, Freeport, respectively, the defendant made enquiries and requested information from their medical records, results of scans, including any adverse findings and therapies in respect of the insured.

25. By letter dated 20 December 2007 addressed to Ms Saunders by Dr Elaine Lundy, Dr Lundy reported, inter alia, that the Insured had been seen at the Eight Mile Rock Clinic on 9 January 2004 at which time she was examined and her blood pressure measured 140/70. Her weight was 211 lbs and the Insured was prescribed Aldomet 500 mgs per day; that another examination took place on 6 January 2006 and the insured's blood

pressure reading at that examination was 147/90. She was started on Vasotec 10 mg per day and it was recommended that she follow a low salt and low fat diet and exercise.

26. Ms Taylor's uncontroverted evidence is that both Aldomet and Vasotec are anti-hypertensive drugs.

27. By letter dated 27 June 2008 from Ms Darville to the plaintiff, Ms Darville informed the plaintiff that the death claim he had submitted with respect to the Insured's policy had been denied due to non-disclosure of medical information and material misrepresentation in the application for life insurance. In particular, that the Insured in answer to question 24 (a) on the medical questionnaire said that she never had or was never told by a doctor that she had, inter alia, high blood pressure.

28. In that letter, Ms Darville also advised the plaintiff that the defendant had received medical information which revealed that the Insured had been diagnosed with and prescribed medication for hypertension on 9 January 2004 and 6 January 2006.

29. Thereafter the defendant issued to the plaintiff a cheque in the amount of $1,420.42 representing a refund of the monthly premiums paid by the insured plus interest.

30. The plaintiff did not accept the cheque. Instead the plaintiff commenced this action.

31. In support of the plaintiff's case, counsel for the plaintiff in addition to the evidence of the plaintiff also relied on the cases of Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Ltd [1994] 3 All ER 581; Joel v Law Union & Crown [1908] 2 KB 863; and Osein and Bache v Gulf Insurance Ltd TT2005 CA47.

32. Counsel for the defendant, in support of the defendant's case in addition to the evidence of Ms Taylor, Ms Darville also relied on the cases of Bell v Lever Brother's Ltd [1932] A.C. 161; Carter v Boehm (1766) 3 Burr. 1905 cited in Insurance Disputes 2nd edition 4.24; McPhee (Personal Representative in the Estate of Alva V. McPhee, Deceased) v The Family Guardian Insurance Company Limited [2012] 1 BHS No. 46; Bowe v British Fidelity Assurance Ltd. [2003] BHS J. No. 124; Joel v Law Union & Crown supra; St Paul's Fire and Marine Insurance Co. (UK) v McConnell Dowell Contractors [1995] Lambert v Co-Operative Insurance Society Ltd [1975] 2 Lloyds Report 485; and Seaton v Heath and Seaton v Burnand [1899] 1 QB. 782

33. It is well settled that in contracts of insurance, the law demands a high standard of good faith between parties. Such contracts are often referred to as contracts of the utmost good faith, *'uberrimae fidei'*, and the parties thereto are required, before the contract is concluded, to make full disclosure of all material facts known to them. A failure on the part of either party to make full disclosure may result in the avoidance of the contract of insurance by the other party.

34. In that regard, Lord Mansfield in the case of Carter v Boehm *supra* said:

> "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement."

35. The learned editors of Insurance Disputes second edition at page 668, paragraph 23.18 wrote:-

> "The general contract law provides that parties to a contract need not provide each other with information which if known might possibly influence their judgment...However, there is an exception to this in the case of insurance contracts. This is because the party seeking to cover the risk has information about the risk which the insured is not and cannot be acquainted with unless it is disclosed. A proposer cannot, by non-disclosure of material information, validly induce an insurer to enter into a contract which it would not otherwise do had it further knowledge of the risk...A proposer must voluntarily disclose without misrepresentation all material facts known to him." See Carter v Boehm supra and Seaton v Burnand *supra."*

36. The question whether a fact not disclosed or misrepresented is or is not material is a question of fact in each case (Glicksman v Lancashire & General [1927] A.C. 139,144) and in the case of Mutual Life Insurance Co. of New York v Ontario Metal Products Co. Ltd. [1925] A.C. 344 the Privy Council determined that materiality would be established where, if the fact concealed had been disclosed the insurers would have acted differently. At page 352 of that case, their Lordships expressed the following view:

> "It is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium."

37. Further, it was thought, following the decision in Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep 476 ("CTI"), that an insurer who sought to avoid a policy of insurance on the ground of material non-disclosure or material misrepresentation merely had to prove that the representation or non-disclosure was 'material'.

38. However, in the House of Lords case of Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd *supra* ("Pan Atlantic"), their Lordships rejected what was known in CTI as the 'decisive influence test' in favour of the 'actual inducement test' and decided that before an underwriter could avoid a contract of insurance for non-disclosure or misrepresentation of a material fact he had to prove that he had actually been induced by the non-disclosure or misrepresentation to enter into the contract on the relevant terms.

39. In their Lordships' view, "every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

40. According to Lord Lloyd of Berwick at page 638 of Pan Atlantic:

> "Whenever an insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions: (1) Did the misrepresentation or non-disclosure induce the actual insurer to enter into the contract on those terms? (2) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded? If both questions are answered in favour of the insurer, he will be entitled to avoid the contract, but not otherwise."

41. The law in the Bahamas is, in my view, as stated by their Lordships in Pan Atlantic and applied in later decisions. (See Bowe v British Fidelity Assurance Ltd [2003] BHS J. No. 124).

42. "Material facts" are said to be those facts which would be likely to influence the judgment of a hypothetical prudent insurer in deciding whether and on what terms to accept the risk. Lambert v Co-Operative Insurance Society Ltd [1975] 2 Lloyd's Rep. 485 CA.

43. It is common ground that the onus is on the insurer/defendant to prove not only the non-disclosure of a material fact, but also that the non-disclosure induced the insurer to make the contract of insurance in the sense that the insurer would not have made the same contract if full disclosure had been made. Consequently the burden is on the insurer to prove the non-disclosure, materiality and inducement.

44. It is also common ground that the insured failed to disclose to the defendant that she had or had been told by a doctor, prior to the completion of the application for life insurance form, that she had high blood pressure or that she had been prescribed medication therefor.

45. The issues for determination then, are firstly, whether such non-disclosure was material? And secondly, whether the defendant was induced by the said non-disclosure to make the contract of insurance when issuing the aforesaid policy to the insured?

46. The evidence is that the insured had attended the Eight Mile Rock Clinic in Grand Bahama on 6 January 2006, approximately three weeks prior to signing the aforesaid application form, for a health certificate when her blood pressure was recorded as 147/90; she was started on Vasotec 10 mg per day and prescribed a low-salt-low-fat diet and exercise. In 2004 her blood pressure reading was 149/70 and she had been prescribed Aldomet 500 mg. She did not disclose that information to the defendant when she applied for a life insurance policy in the sum of $200,000.00.

47. In his closing submissions, counsel for the plaintiff makes the following statement:

> "The plaintiff was of the view that Colina's underwriter had Ms Gibson's blood pressure reading before she underwrote the policy in 2006, but because they wanted to maintain their pleading that Ms Gibson concealed her blood pressure reading in order to induce the underwriter to make the policy, they denied having Ms Gibson's blood pressure reading and their underwriter denied having an underwriting standard."

48. Except to say that that was not pleaded or evidenced by the plaintiff, I say no more about that statement.

49. Counsel for the plaintiff also points out that although the insured had answered "No" to the question relating to AIDS, the defendant still required her to submit to an AIDs test and similarly, he argues, the defendant could have, notwithstanding the insured's negative response to the question regarding high blood pressure, requested a verification of her blood pressure reading.

50. Having failed to do so, Mr Boodle argues, the defendant waived verification of the insured's blood pressure reading, height and weight from their agent Chela-Tech Laboratory.

51. I do not accept that argument. As indicated, contracts of insurance are based upon the utmost good faith. The obligation was on the insured to answer the questions honestly

and truthfully. The fact that the insurer chose not to request that the insured take a blood pressure test did not, in my view, absolve the insured from that responsibility.

52. On re-direct Ms Taylor said that the reason there was no need to ask Ms Taylor to do a blood pressure test was because the particulars of the case dictated whether or not they made that request; that the defendant would look at certain aspects of the case when an applicant for insurance is asked to do a blood pressure check. If the applicant is older and applies for a lot of insurance then the defendant would get medical and paramedical tests, which include a blood pressure test. However, she said, at the time of Ms Gibson's application she thought Ms Gibson was a very young person (a little over 25 years); that the amount of the policy was "only $200,000.00"; there was no history of hypertension or anything that warranted the defendant to ask for a blood pressure check. By "no history", Ms Taylor said that the application was "completely clean" in that all the questions were answered "No", including the question for "Have you ever been treated for hypertension or high blood pressure?"

53. In my judgment, then, the insured cannot expect to be relieved of her obligation to answer the questions on the application form honestly and truthfully by saying that the insurer/defendant could have conducted its own investigation to determine the truthfulness of her responses on the medical questionnaire.

54. So, bearing in mind then, that "every circumstance which might influence the mind of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions" is material, it seems to me that as the insured applied to the defendant for life insurance coverage, any information regarding her medical condition and/or medical history at the time of such application would be material.

55. Therefore, in my view, the fact of the insured's elevated blood pressure and the fact that she had been prescribed medication therefor as recently as three weeks prior to her application for life insurance were matters that would have been material for the defendant or any prudent insurer to know in determining whether or not to accept the risk of insuring Ms Gibson and if so, on what terms and for what premium.

56. I, therefore, find that the aforesaid non-disclosures and misrepresentations were material and, in my judgment, the defendant was entitled to avoid the policy on the ground of material non-disclosure and material misrepresentation, subject, of course, to proof that the defendant was induced thereby to approve the insurance coverage which it did for Ms Gibson on the terms which it did.

57. The question, then, is whether the defendant's underwriter would have made the same contract had the fact of the insured's blood pressure reading and prescription for medication for hypertension in January 2004 and two years later in January 2006 been fully disclosed?

58. In that regard, counsel for the plaintiff submits that the defendant has failed to prove that their underwriter would have made a different contract had the aforesaid information been fully disclosed and in his submission, the defendant has, therefore, failed to prove the materiality of the aforesaid non-disclosure.

59. As I understand the decision in *Pan Atlantic*, the onus is on the defendant to prove, on a balance of probabilities, that it was induced by the material non-disclosure and/or material misrepresentation to enter into the contract of insurance on the terms which it did, unless, of course, the non-disclosure or misrepresentation is such as would give rise to the presumption of inducement (Smith v Chadwick (1884) 9 App Cas 187).

60. The defendant sought to discharge its burden by the testimony of Ms Taylor, director of new business and underwriting at the defendant company, and an employee of the defendant company for 33 years.

61. In her witness statement filed 31 May 2013, Ms Taylor deposes, inter alia, as follows:

1) I am a member of the defendant's Life Claims Committee and reviewed the claim submitted by the plaintiff herein in respect of the deceased insured, Jennette Higgs. The file on the matter was referred to me by the defendant's Life Claims Unit on the 5th June 2008 for review as part of the adjudication process.

2) The file was approved as applied for on the 27th February 2006. In my view, there was no significant information noted in the file that warranted the defendant asking for additional information such as an attending physicians' statement, or for making a counter-offer to the insured, or declining the risk. In particular, there was no need to increase her premium based on any documented risk factors such as her height, weight and vitals. Her height (given as 5'7" in her application) and weight (given as 180 lbs in her application) were acceptable at the premium quoted to her by the Sales Representative and we had no blood pressure readings or history of hypertension that concerned us at that point.

3) In completing the adjudication process, I took note of Dr Elaine Lundy's (the attending physician) letter/statement dated the 20th December 2007 addressed to the defendant whereby she revealed significant material information regarding the insured's health prior to her making application for insurance with the defendant which information was not disclosed in the application, the medical questionnaire or otherwise. The undisclosed information was as follows:

   i) 9th January 2004 – weight 211 pounds; blood pressure 140/90 and on Aldomet; Aldomet is an anti-hypertensive drug.

   ii) 6th January 2006 – weight 233 pounds; blood pressure 147/90; started on Vasotec 10mg per day; low salt and low fat diet and exercise recommended (Vasotec is also an anti-hypertensive drug).

4) In assessing risks and provided that full disclosure has been made by an applicant for insurance who has a chronic illness such as hypertension, underwriters pay particular attention to risk factors such as:

   i) Age of on-set

   ii) Current and past blood pressure readings

   iii) Other cardiovascular risk factors

   iv) Compliance by the applicant with follow-up visits to his/her doctor and with taking his/her medication.

5) Given the above, the defendant would not have issued this risk as applied for if full disclosure had been made by the insured regarding her health and would instead have rated the case. In other words, the defendant would have requested additional premiums to cover the extra mortality imposed for the following reasons:

   i) The age of the insured at the on-set of hypertension

ii) The height and weight of the insured (233 pounds on the 9th January 2006 as opposed to 180 pounds which the insured gave as her weight when she completed the application for insurance on the 26th January 2006).

iii) The insured's lack of compliance with follow up visits to her doctor and medication (no visits between 2004 and 2006 and doctor states "started" on Vasotec in 2006 but was on Aldomet in 2004).

iv) Blood pressure reading 147/90 taken of the insured on the 6th January 2006.

6) According to the 'Build and Blood Press' Chart that would have been used to assess the risk in 2006, a blood pressure reading of 147/90 in January 2006 would have resulted in an extra mortality of 40% and a height and weight of 5'7" and 233 lbs respectively would have resulted in an extra mortality of 50%; therefore the risk of insuring the insured would have been accepted at a total extra mortality of 100% or an increase of premium of 100%.

7) As a result of the non-disclosure of the material information given by Dr Lundy, the defendant life claim unit determined that this claim should be denied.

62. Under cross examination Ms Taylor said that whether an applicant's blood pressure reading is considered material to the pertaining life insurance would be dependent on the pressure reading and a number of other risk factors; that it depends on the particular case; that the defendant looks at all the risk factors in the particular case, so that not all hypertensive cases are underwritten equally.

63. Counsel for the defendant submits that the evidence presented for the defendant establishes that the answers given by the insured in her application were false and that she did not disclose facts related to her health. Counsel submits further that the issue as to whether they were made fraudulently or dishonestly does not arise as the insured's death occurred within the contestability period, that is, within two years following the in-force date of coverage.

64. Counsel for the defendant argues that the plaintiff by his counsel never contested the defendant's position that the insured's non-disclosure was material and never put the case to the defendant's witness, Ms Taylor, that the non-disclosed information was not material. Therefore, counsel for the defendant submits, insofar as this Court has no evidence from the plaintiff's witness to say that the non-disclosure was immaterial, the Court is bound to, on a balance of probabilities, accept the defendant's position on this issue.

65. Moreover, Mr North for the defendant submits, the defendant has discharged its onus of proving that the undisclosed facts were material and induced it into making the insurance contract with the insured, while the plaintiff has failed to produce any evidence to demonstrate that the undisclosed facts were immaterial and would not have been relied on by the defendant in fixing the risk.

66. I understand Ms Taylor's evidence to be that the fact of the non-disclosure of the insured's blood pressure reading induced the defendant to issue the policy that it did. In that regard, Ms Taylor's evidence, which has not been controverted by the plaintiff, is that had the aforesaid information been disclosed by the insured to the defendant prior to the issuance of the aforesaid policy, the defendant would have used its "Build and

Blood Pressure' Chart to assess the risk in 2006 and a blood pressure reading of 147/90 in January 2006 would have resulted in an extra mortality of 40%. Further, that had the additional information of the insured's correct height and weight of 5'7" and 233 lbs respectively been disclosed, it would have resulted in an extra mortality of 50%; so that the premium which the defendant would have charged to provide the coverage sought by the insured at the time would have been doubled.

67. Counsel for the plaintiff argues that the fact of the insured's height and weight were not pleaded by the defendant in its defence.

68. I agree.

69. However, the evidence still is that had the fact of the insured's high blood pressure reading been disclosed, the defendant would have charged a higher premium to provide the coverage sought by the insured.

70. I, therefore, find that the non-disclosure of her medical history, specifically her failure to disclose that she had high blood pressure and had been prescribed medication therefor, on the application for life insurance form was not only material but based on the evidence of Ms Taylor, which I accept, the defendant was, on a balance of probabilities, induced thereby to approve the coverage which it, in fact, did for the aforesaid life insurance policy.

71. I find further, that the defendant would not have entered into the contract on the same terms had the defendant been aware of that information immediately before the contract was concluded. In that regard, I accept Ms Taylor's evidence that had the fact of the insured's blood pressure reading and medication been disclosed, given her age at the time, the premium which the defendant would have charged would have been more than was in fact charged to and paid by the insured for the said policy in the sum of $200,000.00.

72. I, therefore, hold that the defendant was entitled to avoid the policy on the ground of material non-disclosure and material misrepresentation of the insured's high blood pressure reading and medication prescribed therefor on the application for life insurance form.

73. In the result, the plaintiff's claim is dismissed with costs to the defendant, to be taxed if not agreed.

Delivered this 11th day of June 2015

Estelle G. Evans

Justice