COMMONWEALTH OF THE BAHAMAS **2020/CLE/gen/00206**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

BETWEEN:

ANTOINE STRACHAN

Plaintiff

AND

BAF FINANCIAL & INSURANCE (BAHAMAS) LTD

Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Travette Pyfrom for the Plaintiff

Attorney Glenda Roker for the Defendant

Date of Hearing: 9th February, 2022

DECISION

FACTUAL SUMMARY

[1] The Plaintiff is the beneficiary under a life policy taken out by Tara Cooper on 20th December 2014. That policy included a term that permitted the Defendant to reject a claim for non-payment of premiums or where fraud was discovered on the part of the insured. The policy also provided

that except in cases of fraud and non-payment of premiums, the policy would be incontestable after it had been in force for two years from the effective date, which was 3rd November 2014. In the application process, the insured gave negative answers to questions relating to her medical history, namely whether she had ever been treated for or told that she had asthma, chest pains and shortness of breath. The insured also expressly authorized the release of all medical or medically related records to the Defendant for the purpose of verifying the information contained in the policy and for connected purposes.

[2] Ms. Cooper died on 22nd May 2019, following which a claim was submitted. The authorization to retrieve the medical records was then exercised, and it was discovered that the insured had in fact been treated for asthma, shortness of breath, and chest pains eighteen months prior to applying for insurance. Thereafter, by letter dated 2nd August 2019, the Defendant denied the claim, stating that "as a result of non-disclosure of material information, it is our company's position to deny the claim and refund all premiums paid…"

[3] By Summons filed 29th September 2021, the Plaintiff seeks the determination of a preliminary issue, namely "the issue raised by paragraphs 7 and 13 of the Statement of Claim and paragraph 5 of the Defence vis-à-vis whether the Defendant should be barred from contesting the admissibility of the policy on the grounds of fraudulent misrepresentation and material non-disclosure after the expiration of the incontestability period." The relevant paragraphs read as follows:

> 7. The policy also provides that except in cases of fraud and non-payment of premiums the policy will be incontestable after it has been in force for two years from the policy effective date…
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> 13. The insured died on 22nd May 2019, approximately 4 years and 6 months after the effective date of the policy and well outside the 2 years contestability period."
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> 5. "Paragraph 13 of the Statement of Claim is admitted insofar as the insured died on 22nd May, 2019. The Defendant denies that the contestability period is applicable and maintains that the claim in relation to the policy was denied on the basis of material non-disclosure and fraudulent misrepresentation."

THE PLAINTIFF'S CASE

[4] The Plaintiff contends that as the policy was in effect for more than 4 years, the incontestability period applies, and the Defendant can only deny the claim if fraud is proved. They submit that material non- disclosure (even if proved) is not available to the Defendant after the incontestability period.

[5] The Plaintiff further submits that by virtue of clause 3 of the life insurance policy, the medical records of the deceased are deemed to have been included in the application form and constitute representations by the deceased for the purposes of the application. That clause states as follows: "The statements made in this application and in any other documentation submitted in connection with this application form the basis of the policy applied for and shall constitute all representations made as a basis for the said policy." They therefore submit that there can be no fraud in the circumstances of this case as the Defendant had in its possession the medical records of the deceased by virtue of the authorization clause, and those records disclosed that the insured was treated for asthma and chest pains prior to the start date of the policy.

[6] The Plaintiff submits that the court must look at the contract as a whole, that clause 3 amounted to a representation that the Defendant would conduct its own investigation, and clearly did not intend to rely solely on the representations of the insured. They therefore submit that there was no material non-disclosure, and therefore no fraud, which must in any event be proved to a very high standard. They rely on the House of Lords authority of ***Derry v Peek H.L.(E) 1889***, in which Lord Hershell said as follows:

> "I cannot assent to the doctrine that a false statement made through carelessness, and which ought to have been known to be untrue, of itself renders the person who makes it liable to an action in deceit. This does not seem to me by any means necessarily to amount to fraud, without which the action will not, in my opinion lie. [pg 373].
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> At page 374 the court said: In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on

> insufficient grounds…the whole current of authorities…shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed."

And finally His Lordship concluded as follows:

> "The test which I purpose employing is to inquire whether the defendants knowingly made a false statement or whether, on the contrary, they honestly believed what they stated to be a true representation of the facts."

THE DEFENDANT'S CASE

[7] The Defendant emphasizes that contracts for insurance are based on the utmost good faith, and require an applicant to be honest and transparent in applying for insurance. (see ***Gaye Corilee Huyler v B.A.F. Financial & Insurance (Bahamas) Ltd. 2018/CLE/gen/01781***, citing the decision of Lord Mansfield in ***Carter v Boehm (1776), 3 BURR 1905***. They further submit that the Defendant is entitled to deny the claim based on material non-disclosure, even though the contestability period has passed. They submit that the test with respect to non-disclosure of material is whether the applicant honestly believed that he was answering the questions truthfully. The Plaintiff cites a number of authorities in which Bahamian courts have upheld the disallowance of a claim for material non-disclosure, even after the end of the incontestability period, including ***Drucilla Munnings et al v Colina Insurance Limited 2016/CLE/gen/285***, a decision by Winder J, and ***McPhee v The Family Guardian Insurance Company Limited 2014/1/BHS/J. No. 44.*** They therefore submit that, in the instant case, the Defendant issued the contract for insurance without further inquiry into the medical history of the applicant, or any further medical examinations, which might have impacted the decision of whether the Defendants would assume the risk at all, and on what terms. They submit that the Plaintiff is not entitled to rely on the incontestability period as a shield against the defence of material non-disclosure, as the Plaintiff ought to have known that she had been treated for various ailments within the timeframe mentioned on the application, and failed to disclose the same.

LAW

[8] The law with respect to the avoidance of an insurance contract for non-disclosure has been comprehensively traversed by the Court of Appeal in ***Colina v Enos Gardiner SCCivApp & CAIS No. 117 of 2015***, in which Madame Justice Crane-Scott said as follows beginning at paragraph 37:

> "37. The general rule is that subject to certain qualifications, the assured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the assured, but which are neither known nor deemed to be known by the insurer. Breach of the duty by the assured entitles the assurer to avoid the contract of insurance so long as he can show that the non-disclosure induced the making of the contract on the relevant terms.
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> 38. Proof of Non-disclosure, Materiality and Inducement: A comprehensive statement of the principles in this area may be found in the House of Lords decision in Pan Atlantic Ins. Co. Ltd v. Pine Top Ins. Co [1995] A.C. 501 which the House held that in order to be entitled to avoid a contract of insurance (or reinsurance) the insurer or reinsurer must show that the fact not disclosed was material and that the non-disclosure induced the contract. See para 17-5, "MacGillivray on Insurance Law" (above) and generally the text: "Life Insurance Law in the Commonwealth Caribbean", 2nd Edition, by Claude Denbow, LLM, PhD (Lond) Chapter 5 under the heading 'Non-disclosure, misrepresentation and misstatement".
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> 39. At page 52 of his text, Denbow observes that in insurance law, two questions invariably arise in relation to the burden of proof; firstly, the nature of the evidence which the insurer must adduce in order to discharge the burden; and secondly, the powers and duties of the Court in relation to such evidence. We found this observation particularly apposite to the current appeal since, as will shortly appear, the vast majority of Colina's complaints related to the judge's treatment of the evidence which was before him and his finding that Colina had not proved its case.
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> 40. The onus of proving the fact of non-disclosure by the assured rests on the insurer. See para 17-24, MacGillivray (above). Whether a material fact is known by an assured who is a natural person is simply a question of fact. As Staughton LJ said in PCW Syndicates v.

PCW Reinsurers [1996] 1 All ER 774, 781: "...the person seeking insurance must first disclose what is known to him. If he is a natural person that means known to him personally..."

41. An insurance company which is seeking to avoid liability under a policy on the ground of non-disclosure of material facts also has the burden of proving the materiality of the undisclosed facts. See Pan Atlantic (above). Also Joel v. Law Union and Crown Insurance [1908] 2 K.B. 863; and generally Denbow (above) at pages 52-54.

42. The questions which an insurer puts to an assured in its proposal forms to be completed before a policy is issued can sometimes have a bearing on the issue of materiality and whether in any particular case, the assured's duty of disclosure has been enlarged or limited. As a general rule, the fact that particular questions have been put to the proposer does not per se relieve the assured of his or her obligation to disclose all material facts. See Joel (above) pp. 878, 892; para 17-14, MacGillivray (above) and Denbow (above) at pages 51-52.

43. In Condogianis v. Guardian Assurance Co Ltd [1938] 2 AC 125, the appellant sued respondents upon a policy issued by them which insured certain laundry premises against fire. A proposal form filled out by appellant when he applied for the policy contained the following question: "Has proponent ever been a claimant on a fire insurance company in respect of the property now proposed, or any other property? If so, state when and name of company." The appellant's answer was "Yes. 1917. 'Ocean." That answer was literally true, as in 1917 he had made a claim against the Ocean Insurance Company in respect of the burning of a motor car, but in 1912 he had made a claim against another company in respect of a similar loss.

44. The proposal form expressly stated that it was the basis of the policy, and that the particulars given by appellant were to be express warranties. The policy also contained a condition that if there was any misrepresentation as to any fact material to be known in estimating the risk, the respondents were not to be liable upon the policy: It was held that:

(i) the answer provided by the appellant was untrue since the question could not reasonably be read as being intended to have the limited scope which would render the answer true; (ii) there was a breach of warranty, whether or not the misrepresentation was as to a material fact; and (iii) the appellant could not recover on the policy.

45. Lord Shaw explained the significance of the answers provided by an assured to questions put to him/her in the insurer's proposal form in the following terms:
"In a contract of insurance it is a weighty fact if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exits, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise, the ambiguity would be a trap against which the insured would be protected by Courts of Law. But on the other hand, the principle of a fair and reasonable construction of the question must also be applied in the other direction – that is to say, there must also be a fair and reasonable construction of the answer given; and if on such a construction the answer is not true, although upon extreme literalism it may be correct, then the contract is equally avoided." [Emphasis ours]

46. As the common law stands, the test of materiality is what the prudent insurer would consider material. The test is identical to that developed in the common law of marine insurance now embodied in section 18(2) of the English Marine Insurance Act, 1906 which is that "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." See per Lord Mustill in Pan Atlantic (above); and generally Denbow (above) at pages 41-54.

47. Inducement: To succeed in a defence of non-disclosure the insurer must prove not only that a material fact was not disclosed, but also that the non-disclosure induced it to enter into the contract in the sense that it would not have issued the policy if full disclosure had been made. See generally para 17-26, MacGillivray (above); Pan Atlantic (above) pp. 549-550; St. Paul Fire & Marine Ins. Co. v. McConnell Dowell Constructors [1995] 2 Lloyd's

Rep. 116, 124-125; Marc Rich v. Portman [1996] 1 Lloyd's Rep. 430, 442; Decorum Investments Ltd v. Atkin (The Elena G) [2001] 2 Lloyd's Rep. 378, 382 and Alan Bate v. Aviva Insurance UK Limited [2014] EWCA Civ 334.

48. The mere fact that the non-disclosure is material does not give rise to an automatic presumption that the non-disclosure induced the particular underwriter to write the risk. It will therefore generally be necessary to call the individual underwriter who wrote the risk to give evidence of that inducement. See Pan Atlantic (above) pp. 542 and 551 per Lord Mustill; and Assicurazioni Generali SpA v. Arab Insurance Group (BSC) (2003) 2 CLC 242.

49. Court may infer inducement from the very nature of the undisclosed fact: However, it is open to the court to infer from the facts that a particular insurer was induced in particular circumstances. Put differently, in the absence of evidence from the underwriter concerned, the very nature of the undisclosed fact may create a factual presumption in favour of finding inducement. See Pan Atlantic (above); St. Paul Fire & Marine (above) per Evans LJ at p. 127; Alan Bate (above) at para 35 per Tomlinson L.J.; Assicurazioni Generali (above) per Clarke L.J. at p. 265 letter G.; and Brit UW Limited v. F & B Trenchless Solutions [2015] EWHC 2237 per Carr J at para 114."

CONCLUSIONS

[9] While no evidence has been led in this matter, certain facts are readily discernible from the Agreed Bundle of Documents, which would constitute evidence in any trial of this matter. One of those documents is the application for insurance completed by the insured on 20th October 2014. In the area designated for health questions, Question 1(c) states "If you have consulted or been examined by any other doctor within the last five years give name, address, diagnosis and treatment. The applicant answers "None". Question 3 asks "Do you have any health problems or are you taking treatment or medication of any kind? The applicant ticks "No". Question 6 asks "Have you ever been told that you have…(b) asthma, bronchitis, spitting of blood, tuberculosis, or any disease or disorder of the lungs or respiratory system; (c) high blood pressure, chest pain, heart attack,

shortness of breath … To both of these the applicant answers "No". The form also contains a declaration, signed by the applicant, the third of which says that "The answers in this application are complete and true."

[10] Also included is a medical summary of the applicant, which, on the evidence, was received after her unfortunate demise. That medical summary indicates that on September 5th 2011, the applicant was treated for chest tightness and shortness of breath, and was prescribed Prednisone and a Ventolin inhaler. On 26th September, 2012, the applicant was again prescribed a Ventolin inhaler, having complained of shortness of breath. Finally, on 13th June 2013, the applicant was diagnosed as having asthma, having complained of a cough and shortness of breath. Again, Prednisone and a Ventolin inhaler were prescribed.

[11] In considering this matter, and in keeping with the principles stated in ***Enos Gardiner***, I note that the insurer is required to provide proof of the non-disclosure, that the information not disclosed was material, and that the non-disclosure induced the contract. Having regard to the answers given in the application, and the medical information retrieved after the death of the insured, there is clearly evidence of non-disclosure. The insured was diagnosed with asthma after having been treated for symptoms and prescribed medication prior to seeking insurance. Therefore, to answer questions on the insurance application in the negative regarding doctor visits, being diagnosed with asthma and having chest pains were all untrue and done with an intent to avoid disclosing that information to Colina.

[12] With respect to materiality, in applying the test as stated at paragraph 46 of ***Enos Gardiner***, a witness statement has been provided from Roy-Ann Ford, a Senior Manager of Compliance with responsibility for underwriting at the Defendant company. At paragraph 8 of that witness statement, Ms. Ford states that " if the insured was truthful on the application by disclosing the history of asthma, shortness of breath and respiratory issues, the Defendant would have required additional medical history, examinations, and additional underwriting for the policy which may have increased the premiums or modified the terms of the contract, if the Defendant decided to undertake the risk at all." It is my view that there is clearly prima facie evidence that the material

would influence the judgment of the insurer in fixing the premium, or determining whether to undertake the risk. The information not disclosed is therefore clearly material.

[13] The law also requires the Defendant to prove that the material induced the Defendant to enter into the contract. While materiality does not give rise to a presumption of inducement, the same may be inferred from the circumstances, and the Court of Appeal in ***Enos Gardiner*** cited with approval the decision of ***Assicurazioni Generali SpA v Arab Insurance Group (BSC) (2003) 2 CLC 242***, and noted at paragraph 52 that "The facts may, however, be such that it is to be inferred that the particular insurer or reinsurer was so induced even in the absence of evidence from him"; and further that " he must therefore show at least that, but for the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms." Again, the witness statement of Ms. Ford provides prima facie evidence to satisfy this requirement. It should also be noted that, in oral submissions, counsel for the Plaintiff indicated that there would be no attempt to argue that an applicant who made false statements in applying for insurance would not have by so doing intended to induce the insurance company to enter into the contract.

[14] In this case the Plaintiff contends that the Defendant cannot rely on material non-disclosure, as, by virtue of clause 3 of the contract, the medical records were "documents submitted in connection with the application." They suggest that, because the Defendant was authorized by the application form to retrieve any medical records, those records should be deemed to have been in the possession of the Defendant, who would therefore have been aware of the true state of affairs. They further submit that the Defendant ought to be presumed to have verified for itself the accuracy of the statements made by the insured, and that if they failed to do so, it was as a result of their own negligence, for which the insured would be blameless.

[15] To my mind, this submission ignores the very words of clause 3, namely documents "submitted" with the application, and not documents authorized to be retrieved and reviewed. There is no basis for the contention that, by virtue of clause 3, the documents could be deemed to have been submitted with the application because of the authorization. Likewise, in the absence of any evidence that the application was subject to verification of the medical information, or that the application would be held in abeyance pending that verification, or that the medical information

was retrieved prior to the approval of the application, there is no basis for the contention that the Defendant should be deemed to have represented that they would review the information as part of the application process. This is particularly so where, because of the untruthful answers, there was nothing to put the Defendant on notice that they should exercise any particular care in processing the application.

[16] While I emphasize that no witnesses have been cross-examined in this matter, and no findings of fact are being made, it is inconceivable that, on the evidence contained in the Bundle of Documents, the Plaintiff could succeed in arguing that there was no material non-disclosure, and that the insured believed that she was answering the referenced questions honestly and truthfully. On the evidence, she had in each of the three years preceding the application been treated for asthma and shortness of breath, and had been prescribed medication for the same. It would seem an insurmountable task to convince a court that she believed she was being truthful in answering "No" to the questions specifically directed to these types of issues.

[17] While counsel for the Plaintiff has creatively argued the points, in the circumstances of this case, I find that the Defendant would be entitled to contest the validity of the policy on the grounds of fraudulent misrepresentation and material non-disclosure, and would not be precluded from doing so by virtue of the fact that the non-contestability period specified in the contract of insurance had passed the usual rule being that costs should follow the event, and there being no reason to depart from that rule, I award fixed costs of $5,000.00 to the Defendant.

Dated this 24th day of January, A.D. 2023

Neil Brathwaite
Justice