COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2009/CLE/gen/01378

BETWEEN

TAMIKA BOOTLE

Plaintiff

AND

COLINA IMPERIAL INSURANCE LTD.

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Carlton Martin with Kelsey Munroe and Alton McKenzie for the Plaintiff

E. Terry North with Ashley Williams for the Defendant

JUDGMENT

**WINDER, J**

This is an insurance claim.

1. The background to this dispute is as follows:

   (1) On 31 October 2006 the plaintiff (Bootle) and her husband, Lynden Bootle, now deceased, applied for insurance coverage from the defendant (Colina). The application was made by completing a detailed application form (the Application) by both of them.

   (2) At Section D of the Application Lynden Bootle (the deceased) disclosed that his weight at the time was 200 lbs and that the same remained unchanged for a period of 12 months. Additionally, at Section D, the deceased indicated that he did not attend a physician in the last twelve months and that he was not provided with any diagnosis and/or treatment for the said period.

   (3) At Section E of the Application the deceased was asked:

   Have you ever had symptoms of, been treated for, or had any indication of genitio-urinary disorders such as kidney disease, abnormal urine tests, sexually transmitted diseases, disorders of the prostate, uterus ovaries, breasts, cysts and/or tumors of the kidney or bladder?

   The deceased responded "No" to this question. He was also asked:

   Have you ever been advised to have any diagnostic test, hospitalization or surgery which was not completed?

   The deceased also responded "No" to this question.

   (4) The Application contained a declaration which was attested to by both Bootle and the deceased. The terms of the said declaration included *inter alia* the following clause:

   1. The Policy Owner and each Life Insured declare that all the answers to the questions in this application are true and correct to the best of their knowledge and that all material information has been disclosed.

   (5) On 14 November 2006, Policy No. 200002774 in the amount of $100,000 was issued to Bootle and the deceased. The policy also contained an accidental

death and dismemberment clause which doubled the payout under the policy, if a life insured died by virtue of an accident.

(6) The policy contained an incontestability clause which provided:

"Within two (2) years following the In-Force date of any Coverage, the Company can void the insurance provided by that Coverage because of a misrepresentation of, or a failure to disclose any fact material to that insurance. After the two (2) years, the Company cannot void the insurance provided by that coverage unless such misrepresentation or failure is made fraudulently. This does not apply to information given about age or date of birth."

(7) On the 18 April 2008, the deceased died in a traffic accident. His death occurred within the incontestability period.

(8) Bootle notified Colina of the deceased's death and made a formal application to Colina claiming the proceeds under the policy.

(9) On 23 September 2008, Colina denied the Claim providing the reasons for its denial and sought to return to her the amount of $867.42 which represented the amount of premiums paid under the Policy. Bootle refused to accept the retuned premiums.

2. Bootle has brought this claim by (Re-Amended) Statement of Claim, seeking damages for breach of a contract of insurance and specifically:
   (1) the sum of $100,000, the principal indemnity insured under the said policy;
   (2) double indemnity benefit in the sum of $100,000; and
   (3) interest to be assessed pursuant to Section 3 of the Civil Procedure (Award of Interest) Act 1992.

3. Colina defended the claim saying that it was entitled to avoid the policy in a defence which alleged material non-disclosure and inducement. The defence provided at paragraphs 4, 5, 7, 9, 11 and 12:

   4. It was also a term of the policy that:

      "Within two (2) years following the In-Force date of any Coverage, the Company can void the insurance provided by that Coverage because of a misrepresentation of, or a failure to disclose any fact material to that insurance. After the two (2) years, the Company cannot void the

insurance provided by that coverage unless such misrepresentation or failure is made fraudulently. This does not apply to information given about age or date of birth."

5. The Deceased died on the 18th April 2008 within two (2) years following the In-Force date of the coverage provided to him by the insurance.

...

7. The Defendant admits that by its letter to the Plaintiff dated the 23rd September 2008, the Defendant advised the Plaintiff that the claim had been denied due to non-disclosure of medical information and material misrepresentation on the application for life insurance as is alleged in paragraph 7 of the Amended Statement of Claim and the particulars thereunder.

9. The Defendant denies paragraph 9 of the Amended Statement of Claim. In its said letter of the 23rd September 2008, the Defendant wrote the following to the Plaintiff:

"Mr. Bootle applied for and was issued the above mentioned life insurance policy. Among the questions he answered were:

5. Have you ever had symptoms of, been treated for, or had any indication of (e) Genito-urinary disorders such as kidney disease, abnormal urine tests, sexually transmitted diseases, disorders of the prostate, uterus ovaries, breasts, cysts and/or tumors of the kidney or bladder?

9. Have you ever been advised to have any diagnostic test, hospitalization or surgery which was not completed?

Mr. Bootle answered 'No' to this question".

"We received medical information which revealed that the Insured was seen on several occasions, however on February 6, 2008, the Insured had a urinalysis which showed a trace of glucose and protein".

The Defendant also denies the allegations set forth in the particulars under paragraph 9 of the Amended Statement of Claim.

11. In order to induce the Defendant to make the said policy, the Deceased concealed from the Defendant facts then material to be known to it and of which it was then ignorant.

PARTICULARS

The fact so concealed was that the Deceased had been attended to by Dr. Swarna R. Benerji at the Marsh Harbour Clinic, Abaco on the 6th February, 2006. During this visit the Deceased had a urinalysis which showed a trace of glucose and protein. His random blood sugar was 92 mg/dl. The Deceased was advised to do a fasting blood sugar test and a 2 hour post-lunch random blood test. The Deceased was advised by Dr. Benerji to return for review with results after 2 weeks. The Deceased did not complete the test as advised.

12. The Deceased also misrepresented certain material facts to the Defendant on his application for insurance.

PARTICULARS

In Section D of the application the Deceased gave his weight as 200 lbs when at his visit with Dr. Benerji on the 6th February 2006 his weight was recorded as 266 lbs. The Deceased also answered that he had not attended a physician in the last 12 months.

4. Bootle joined issue with the defence in her Reply.

5. At trial Bootle gave evidence and called Dr. Larono Knowes as a witness in her case. Colina called Dr Gregory Carey, Angela Taylor and Millicent Wong as witnesses in its case.

6. During the cross-examination of Bootle, her counsel raised an objection in relation a letter dated 15 August 2008, which was compiled by Dr. Swarna R. Benerji ('the Benerji letter'). Bootle claims that the Benerji letter is hearsay and cannot be adduced into evidence. On the evidence, following the receipt of Bootle's claim, Colina wrote to the Marsh Harbour Clinic requesting the medical information of the deceased. Dr. Swarna R. Benerji, the District Medical Officer for Marsh Harbour, Abaco provided Colina with a report ('the Benerji letter') outlining all of the visits of the deceased at the Clinic.

7. At trial was the first time any objection to the Benerji letter was raised, during the course of the cross examination of Bootle. The document was filed in the Agreed Bundle of Documents, settled by Bootle. After hearing arguments from counsel, I ruled that the document was admissible by consent having found its way consciously into the agreed bundle of documents. Mr Martin, who did not appear at the case management conference, sought suggest an alternative understanding of an agreed bundle of documents. Bootle has raised the issue again in her closing submission and as such I will address it more fully.

8. Colina's response to the preliminary objection is as follows:
   (a.) The same forms part of a record pursuant to Section 60 of the Evidence Act and also falls under the common law exception relating thereto.
   (b.) The Benerji letter was relied upon by the expert witnesses on both sides.
   (c.) The Benerji letter was included in the Agreed Bundle of Documents with the express consent of the Plaintiff.
   (d.) The Plaintiff is estopped from denying Colina the use of the Benerji Letter due to an estoppel by convention.

9. According to Colina at paragraphs 28, 29 and 31 of its submissions:

   28. The Defendant submits that the Benerji letter was relied upon by the Plaintiff's expert witness, Dr. Larano Knowles ('Dr. Knowles'). As such the Plaintiff cannot be allowed to object to its admissibility. In the case of *H and another v. Schering Chemicals Ltd and Another [1983] 1 All ER 849,* the following was held:

   > *"Since the expert witnesses at the trial would be able to refer to the articles in question as part of the body of their expertise, and if they did so, the court would have to admit the articles in evidence in the sense of reading them and giving the factual assertions in them such weight as was thought fit."*

   29. The Defendant submits that due to Dr. Knowles' reference to the Benerji letter and the statements contained therein, the Plaintiff is estopped from claiming that the same is inadmissible. In this regard, the Defendant relies on

the obiter statement of Clarke LJ in the case of *Sunley v Gowland White [2003] EWCA Civ 240* where he stated:

> *"...In the circumstances of this case no reasonable tribunal could have excluded the RPS report on the ground that no such notice had been given. Quite apart from in the pleadings, the RPS report was relied upon in Mr. Brown's report, commented upon in Mr. Rostron's report and referred to in the skeleton arguments of both parties, as I have already indicated. In all circumstances justice required that the report be admitted."*

...

31. Further the Defendant submits that the Plaintiff agreed to allow the Benerji letter into evidence as it did not object to its inclusion into the Agreed Bundle of Documents as indicated in *Charnock*. In this regard, the Defendant relies on the letter of the Plaintiff's Counsel dated 26th January 2017, in which Mr. C.A. Martin stated the following:

> *"I have no objection to the inclusion of such documents in the Agreed Bundle except with respect to the above Nos. 11 and 12 of your List of Documents."*

10. The recent Court of Appeal decision in ***Colina Imperial Insurance Co. v Enos Gardiner* SCCivApp & CAIS No. 117 of 2015** provides a useful and conclusive discussion on this issue of documents contained in an agreed bundle. The circumstances are indeed similar to the instant case. On 25 July 2011, Mrs. Monique Gardiner applied for a life insurance policy with the appellant insurer with a face value of $150,000. She completed the company's proposal form and subsequently attended before the appellant's paramedical examiner and answered, all in the negative, specific questions designed to elicit information pertaining to her medical history. The appellant issued the policy on 8 December, 2011, however, Mrs. Gardiner died on 18 November, 2012, approximately eleven (11) months afterwards. Her husband, now Mr. Gardiner, was the named beneficiary under the policy. He submitted a claim under the policy for payment of the sum assured. As the policyholder's death occurred within the two-year contestability period stipulated in the policy, the appellant commenced its

investigations. Mrs. Gardiner's medical records were obtained from the Department of Public Health. At first instance the trial judge found that her medical record compiled in the Department of Public Health was hearsay and inadmissible.

11. On appeal the Court of Appeal held, per ***Crane-Scott JA,*** that:

(1) The inclusion of a document in an agreed trial bundle in accordance with Supreme Court Practice Direction No. 2 means that it is admitted in evidence before the judge by agreement, without the party wishing to rely on it having to call a witness to formally produce it or to authenticate it. While the document is undeniably in evidence by consent, its relevance and significance to the issues-in-dispute will usually only become evident when witnesses who are called to testify at the trial are referred to the document and give secondary evidence about its contents. Sections 41 and 43(e) respectively of the Evidence Act, permit secondary evidence of a document to be given, inter alia, through oral accounts of the contents of a document given by a witness who has seen the document.

(2) The fact that a specific document relied on by one party is contained in an agreed trial bundle, however, does not, prevent the other party from making a formal objection at the start of the trial to its contents being used or referred to witnesses in the course of the trial. However, advance notice of any objection should be given to the party wishing to rely on such a document so that the party relying on it will be alerted in advance of the trial of the necessity to call the maker of the document to authenticate it and give direct evidence as to its contents.

(3) However, if (as occurred in the court below) no such objection is taken before the commencement of the trial, and a specific document in the agreed bundle is used and oral testimony given (without objection) by witnesses who have seen it, the contents of the document are undeniably proved by secondary evidence as provided in sections 41 and 43(e) of the Act.

(4) In the circumstances of this particular trial in which the contents of the DPH Summary and the other documents in the agreed bundle were utilized and referred to (without objection) during the testimony of the various witnesses, it was not only unreasonable, but unfair and plainly wrong for the learned judge to uphold the objections to the document.

12. In the present case before me, no advance notice of any objection to the Benerji letter was given to Colina by counsel for Bootle. On the contrary, the correspondence prior to trial seems to demonstrate otherwise. Additionally, not only did Colina's witnesses rely and refer to the Benerji letter, Bootle's own medical witness Dr Larono Knowles also referred to the report in his witness statement.

13. In all the circumstances therefore, I remain satisfied that the document is admissible.

14. The Benerji letter provides, in part, as follows:

> Dated 15th August 2008
>
> From
> Dr. Swarna R Benerji
> District Medical Officer
> Government Clinic
> Marsh Harbour, Abaco
>
> To
> The Manager
> Colina Imperial Insurance Company
> Nassau.
>
> Dear Sir/Madam,
>
> RE: LATE MR. LYNDEN BOOTLE (DOB: 15TH AUGUST 1982)
>
> As per the request, I am herewith furnishing the details pertaining to the above mentioned client as follows:
>
> 22nd November 1982: Treated for laceration of left 2nd and 3rd finger of the left hand. Tetanus Toxoid was given and dressing was done.
>
> ...
>
> 06th February 2006: Presented with fever, headache, chills and cough of 5 days duration. His weight was 266 lbs. Blood pressure 140/80 mm.Hg. Urinalysis showed trace of glucose and protein. His random blood sugar was 92 mg/dl. Treated for acute pharyngitis with panadol, amoxil, Histal DM or ... Dietary advice was given, advised to do exercise and to do warm saline gargling. Sick leave for one week was given. Advised to do fasting blood

sugar and 2 hour post-lunch random blood sugar tests and to come for review with results after 2 weeks.

25th July 2006: Pain in the right shoulder of one week duration after trying to lift up his bike. Treated for soft tissue injury of the right shoulder with Ibuprofen, cuff and collar and sick leave for one week.

18th April 2008: Brought to the clinic by the ambulance with the history of being involved in a road traffic accident while riding the motorbike. Diagnosed to have sustained multiple injuries as a result of the accident. The following injuries were diagnosed clinically:

1. Closed fracture of the left femur
2. Fracture of the neck of the right femur
3. Suspected head injury
4. Suspected spinal injuries
5. Fracture of the lower ribs on the right side
6. Intra-abdominal visceral injury with intra-abdominal bleeding was suspected.
7. Hypovolemic, hemorrhagic shock

Patient was treated and air ambulance was arranged to shift the patient to Princess Margaret Hospital, Nassau for further assessment and management of his injuries. Patient has succumbed to the injuries in the government clinic, Marsh Harbour. Patient was declared dead at 10:42 p.m. on the 18th April 2008 after all attempts to resuscitate the patient failed. The body was sent for autopsy to Princess Margaret Hospital, Nassau.

I would be happy to assist you if you need any further information.

Sincerely,

_____ (Signed)
(Dr. Swarna R Benerji)

*DR SWARNA R BENERJI*
*MEDICAL OFFICER*
*MARSH HARBOUR, ABACO*

The Law on Material Non-Disclosure and Inducement

15. ***Colina Imperial Insurance Co. Ltd. v Enos Gardiner***, provides the latest and most comprehensive statement on the law of material non-disclosure in this jurisdiction. According to ***Crane-Scott JA:***

> [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.

[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".

[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.

[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.

...

[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 be 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.

Discussion and analysis

16. The Benerji letter reflects the medical history of the deceased. In my view, emanating from an independent governmental agency, it demonstrates that in breach of his duty of full, complete and truthful disclosure, and as evidenced from his negative responses to questions put to him prior to issuance of the policy, the deceased more likely than not:

    (a.) had an indication of an abnormal urine test on 6 February 2006;

    (b.) was advised to return to the clinic to have a diagnostic test conducted which was not completed.

    (c.) attended a physician twice in the 12 months prior to the application (November 2006). [On 6 February 2006 he attended the clinic and presented with fever, headache, chills and cough of 5 days duration. His weight was 266 lbs. Blood pressure 140/80 mm.Hg. Urinalysis showed trace of glucose and protein. His random blood sugar was 92 mg/dl. On 25 July 2006 he again attended the clinic complaining of pain in the right shoulder after trying to lift up his bike. He was treated for soft tissue injury of the right shoulder.]

    (d.) had misrepresented his actual weight or had experienced significant weight loss in the 12 months prior to the Application (November 2006). [He gave his weight at 200 lbs whereas on 6 February 2006 his weight had been recorded at the clinic as 266 lbs.]

17. Having found that there was misrepresentation Colina must discharge the evidential burden which rests on it, as insurer, to prove not only that material facts had not been disclosed, but that the non-disclosures had induced it to issue the policy.

18. Having heard and observed the witnesses as they gave their evidence, I am satisfied that the disclosure was material. In this regard I accept the evidence of Angela Taylor Director of Underwriting of Colina, Millicent Wong and Dr. Gregory Carey in coming to this determination.

19. In her evidence, Angela Taylor, stated that:

(a) In assessing risks, providing that full disclosure has been made by an applicant for insurance who is overweight and/or has indicated the potentiality of having a chronic illness such as diabetes, underwriters employed by the Defendant Company are required to pay particular attention to additional risk factors such as

(i) Obesity;

(ii) Smoking;

(iii) Coronary heart disease; and

(iv) High blood pressure.

(b) If an Applicant's height and weight is a concern pursuant to the internal underwriting guidelines of the Defendant Company, the Applicant would be required to complete either a paramedical or full medical before the Defendant Company would issue a policy. If an Applicant's blood sugar was of concern, the Applicant would have been required to respectively undergo both an HbA1c and a micro – albumin blood sugar test before the Defendant Company would issue a policy.

(c) ...the Defendant Company would not have issued the policy as applied for if full disclosure had been made by the deceased Insured regarding his health and would have instead either declined the issuance of a policy or instead rated his application for insurance commensurately. In other words, the Defendant Company, would have requested additional premiums to cover the extra mortality imposed by the deceased Insured's illness if rated.

(d) According to the Defendant Company's internal underwriting guidelines which was used to assess the deceased Insured's risk in 2006, the Defendant Company would not have issued the policy to the deceased

Insured had he made full disclosure to it, in relation to his medical history. The reason for this being that:

(i) The deceased Insured would have been considered overweight and/or obese;

(ii) The finding of blood pressure of 140/80 mm by Dr. Benerji albeit being considered normal blood pressure would have raised red flags in the underwriting of the deceased Insured's policy had he provided full disclosure to it in relation to his weight and the finding of a fasting blood sugar of 92mg/dl. The reason for this being that obesity and high blood pressure have been found to adversely affect the health of persons who are either pre-diabetic or diabetic (indicated by a blood sugar finding of 92mg/dl);

(iii) A failure on the part of the deceased Insured to follow the advice of Dr. Benerji to have a fasting blood sugar and two hour random blood sugar tests performed, if in the contemplation of the underwriters at the time of assessing the deceased Insured's risks would have raised additional red flags if full disclosure had been made.

20. In her evidence, Millicent Wong, Manager in the Defendant's Company Life Claims Department, stated:

(a.) At Section D of his application for life insurance the deceased Insured gave his weight as 200 lbs and his height as six feet two inches (6' 2"). As a result of the deceased Insured's stated height and weight at the time of his application, the Defendant Company did not request that the deceased Insured have a paramedical or any further medical tests conducted. Due to the representations made by the deceased Insured on his application for life insurance, the file was approved by the Defendant Company as applied for. Policy No. 200002774 was issued to the Plaintiff and deceased Insured on the 14th November 2006.

(b.) According to the report provided by Dr. Benerji dated the 15th August 2008, the deceased Insured attended the Marsh Harbour Clinic with symptoms of fever, headache, chills and cough which was ongoing for a five (5) day period. The deceased's weight at the time was recorded at 266 lbs and the

results of his urinalysis indicated that there was trace amounts of glucose and protein in his urine. The results of a random blood sugar test administered by Dr. Benerji on the deceased Insured indicated that his random blood sugar was 92mg/dl.

(c.) Notwithstanding Dr. Benerji's diagnosis of trace glucose and protein being found in the deceased Insured's urine and a finding that the deceased's weight on the 6th February 2006, was 266 lbs, the deceased failed to disclose the same to the Defendant Company when applying for the said policy of insurance.

21. Dr. Gregory Carey gave expert evidence as follows:

(a.) That in applying for life or health insurance, an applicant is expected to fully disclose all medical information to the company. The information disclosed provides the basis on which an insurance company offers insurance.

(b.) That the information disclosed by an applicant enables the company to provide a risk assessment in terms of morbidity and mortality which actuaries use to assess a premium.

(c.) The function of an insurer and its employees/agents is not to make a diagnosis and thereafter assess risk. A risk assessment can only be made on information that is provided to the insurer by the applicant and/or on information requested by the insurer which is also provided to the insurer.

(d.) In a case such as the one involving the deceased Insured where the attending physician's statement provided by Dr. Benerji indicates that traces of glucose and protein were found in his urine, an insurer will not issue insurance until it is satisfied on the full extent of the applicant's diagnosis. To accomplish this the insurer would have required that the applicant undergo further blood sugar tests to determine the extent and effect of the glucose in the deceased's urine. An insurer would have even requested that the deceased Insured undergo both pancreatic and kidney test as a finding of protein in one's urine is usually indicative of an underlying problem originating from those organs.

22. In all the circumstances I am satisfied that the matters for which the information related was material, not only because they were specifically requested of the deceased but because I have found that the matters for which the information related would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk. (See paragraph 46 of the judgment in ***Colina v Enos Gardiner***)

23. On the question of inducement, I am also satisfied on the evidence that the Insurer would not have underwritten the risk on precisely the same terms had disclosure been made of all material facts. On the evidence which I accept, Colina would not have underwritten the Policy if full disclosure was made, as such the deceased's non-disclosure and/or misrepresentation induced it to enter into a contract for insurance.

24. The evidence of Angela Taylor and Dr. Gregory Carey, which I accept, supports that the Insurer was induced. According to Angela Taylor, "had the deceased made full disclosure to Colina, he would have been required to complete a paramedical and undergo further testing as it concerns his blood sugar levels. In fact, a policy of insurance would not have been issued to the deceased Insured until such time that Colina had determined that his vitals (height, weight, blood pressure) along with his blood sugar fell into risk categories which were acceptable to it". She also added that:

    (a) as a result of the deceased non-disclosure of material medical information and/or misrepresentation as it concerned his application for insurance, Colina was induced into accepting a risk which it would not have in the ordinary course of its business.

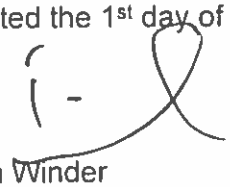
    (b) had the deceased Insured made full disclosure to the questions posed to him in Section D and E of the application for insurance Colina would have requested that he completed a paramedical or full medical to determine the effect of obesity on the deceased Insured's health and that he undergo an HbA1c and a micro – albumin blood sugar test to determine the extent and effect of glucose in the deceased Insured's urine.

Conclusion

25. In all the circumstances therefore I am satisfied that Colina has satisfied its burden of proof and that on balance, the deceased failed to disclose material particulars or misrepresented the state of his medical particulars such that Colina was induced to enter into the policy of insurance. Further, as the non-contestability period had not expired, it was open to Colina to avoid the policy as it did.

26. I therefore dismiss the claim with reasonable costs to Colina to be taxed if not agreed.

Dated the 1st day of May 2019



Ian Winder
Justice