COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2016/CLE/gen/00285

BETWEEN

DRUCILLA MUNNINGS

AND

GOLDEAN MUNNINGS

Plaintiffs

AND

COLINA INSURANCE LIMITED

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Devard Francis for the Plaintiffs**

Ashley Williams for the Defendant

14 November 2019

JUDGMENT

WINDER, J.

This is the trial of a preliminary issue. By Order dated 20 October 2016, this Court ordered the trial of the said issue which was framed as follows:

> *Whether or not there was a fraudulent non-disclosure of material medical information by the Insured; if so, is the Defendant entitled to avoid the policy.*

The claim was brought by the plaintiffs' claims as beneficiaries under a life insurance policy issued to their deceased sister.

Background facts

1. Policy No.003020655 (The Policy) was issued on or around 24 September 2001 to Melody Munnings ('the deceased') by Global Life Insurance Company Limited. The defendant (Colina) was the successor to the interest of Global Life Insurance Company Limited.

2. In completing the application for insurance, dated 27 July 2001, the deceased answered "no" to the following questions asked in the application:

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

   (d) Arthritis, gout, joint, muscle or skin disorder?
   (g) Prostate or testicular disease, disease of the uterus, ovaries or breast?
   (i) Disorder of the urinary tract or kidneys, sugar, albumin blood in urine?
   (k) To be admitted to a hospital or any other health case facility for an operation, observation, diagnostic, diagnostic tests or treatment of any illness?
   (l) Any other health impairment or medically treated condition within the past five (5) years?

3. When asked at question 30 of the application, *Are you in good health and free from all symptoms of illness and disease?* the deceased answered: *Yes.* She did however respond, *Yes,* at question 24 (h) of the application which asked whether, *So far as you know have you been told by a doctor that you had Anemia, Leukemia or other blood disorder.* The deceased indicted that she was anaemic but not on medication of any kind. As a result of this response the deceased was required to attend a laboratory and complete some testing to assess her red blood count. The

test indicated that her red blood count was within the normal range for women. The insurers are said to have assumed the risk based upon the representations.

4. The deceased, who died on 26 August 2011, had been diagnosed with sickle cell disease, since 27 September 1985. Contrary to the responses of the deceased at questions 24 and 30 of the application, the accepted evidence before the Court was that the deceased regularly attended Dr Patrick Robert's office for treatment relating to her illness. Complaints ranged from generalized body pains, painful knees, groin pain, pain in left arm, pain in left hip, painful limbs, joint pain, fatigue and fever. These were pains associated with sickle cell painful crisis. The visits recorded with Dr Roberts were on: 19 April 1993; 21 April 1993; 7 July 1993; 17 June 1994; 26 February 1998; 11 November 1998; 8 January 1999 and 9 April 1999

5. On the deceased 26 February 1998 visit to Dr Roberts she was diagnosed with aseptic necrosis of the head of the femur.

6. Upon the death of the deceased, and the refusal of Colina to honour the policy, Drucilla Munnings and Goldean Munnings, two of the three named beneficiaries on the Policy, commenced this action. The Specially Endorsed Writ filed on 2 Mar 2016 provides in part as follows:
    1. Melody Munnings took out a life insurance with Global Life Assurance Bahamas Ltd in July 2001.
    2. The Defendant Company operating as an Insurance Company under the Laws of the Commonwealth of the Bahamas took out the life insurance of Global Life Assurance Bahamas Limited, and that of Melody Munnings.
    3. That Melody Munnings appointed Drucilla Munnings, Goldean Munnings and Victoria Munnings as the Beneficiaries of the life assurance with the aforesaid Global Life.
    4. The said Melody Munnings died on the 26th August 2011.
    5. The Plaintiffs, as beneficiaries of the said insurance claimed from the Defendant the stated amount of the insurance contract.
    6. The Defendant has failed and/or refused to honor the terms of the contract and pay the Plaintiffs. Beneficiaries thereunder pursuant there to.
    7. The Defendant claimed that there was a non-disclosure of material information by the late Melody Munnings and as a result denied the Plaintiff's Claim.

8. The Defendant claimed that they were unaware of the Late Melody Munnings sickle cell anemia.
9. The Defendant was well aware that the late Melody Munnings had sickle cell anemia as she was examined by their doctor, indication was made that she had anemia and the Defendant acknowledge increasing the initial premium for the contract of insurance.
10. That having accepted the risk, the Defendant now refuses to honour the Contract of insurance.

...

7. The (Amended) Defence provided in part as follows:

4 The Defendant denies paragraph 9 of the Statement of Claim. On the application for insurance the Insured disclosed that she was anemic, as such; in accordance with its usual procedure, the Defendant requested that the Insured have an anemic-specific blood test performed to determine the extent of her illness. The result of the blood test indicated that the Insured had a haemoglobin blood count of 11.8g/dl, a risk the Defendant accepted without increasing the initial premium.

5 The Policy contains a validity clause which provides:

> "We (the Defendant) cannot contest the validity of the Policy after it has been in force during the life insured's lifetime for two years from its issue date. However, this is subject to the following:
>
> ...
>
> (b) We can contest at any time in respect of a misstatement of age, or a total disability benefit, or fraud."

...

10 Additional medical information was received by the Defendant in relation to the Insured, which included a report prepared by Princess Margaret Hospital. The report revealed that the Insured was diagnosed with sickle cell disease on 27th September 1985, and that on 8th November 1997, the Insured was admitted into hospital...

11. By reason of the deceased's non-disclosure of material facts the Defendant was induced to issue the policy as applied for by the deceased and as a result of the said non-disclosure, the Defendant contends that the Policy became and is wholly void and in the circumstances denies paragraph 10 of the Statement of Claim.

8. The plaintiffs sole witness was Goldean Munnings, the sister of the deceased and one of the three named beneficiaries under the Policy. Colina called Todney Marsh, Senior Manager - Underwriter and Colette Darville as its witnesses.

9. Goldean Munnings's evidence was that she was present at the time that the deceased completed the application for life insurance with the then Global Life Insurance Company and maintained that the insurers did in fact know that the deceased had sickle cell anemia. She maintained that this was the reason for an increased premium of 50% prior to issuing the policy. In response to the deceased's response to question 24 (h) of the application:

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

   (h) Anemia, Leukemia or other blood disorder?"

   Goldean Munnings acknowledged that the deceased appeared to have answered yes to this question and the initials MM were present along with a handwritten notation which read; ***'Applicant is anaemic but is not on medical iron of any kind."***

10. Golden Munnings also acknowledged that the deceased answered *no* to the questions at 24(d), (g), (i), (k) and (l) of the application. When questioned as to whether the "no" responses to these questions to were truthfully answered, Ms. Munnings responded that she did not believe the answers given were truthful.

11. Goldean Munnings confirmed the deceased's indication in the application (question 30) that she was in good health and free from all symptoms of illness and disease. She also confirmed the many visits and consultations of the deceased at the Princess Margaret Hospital ('PMH') with respect to sickle cell disease over the years. In particular she was questioned on the admission of the deceased to the PMH for treatment of conditions not expressly related to sickle cell anemia on 8 November 1997.

12. During re-examination Golden Munnings reiterated that sickle cell was not on the list of conditions/ diseases on the application for insurance and stated that the deceased was prescribed folic acid for the condition. She maintained that the agent

who had assisted the deceased in the application process had been advised that the deceased had been diagnosed with sickle cell anemia.

13. Todney Marsh, Colina's Senior Manager – Underwriting gave evidence that she reviewed the plaintiffs' claim. She indicated that a part of her job was to assess risk on life insurance applications, which includes determining if additional information is required on an applicant. According to her this involved reviewing medical requirements and doctor's reports to determine whether an applicant's life was considered 'standard or substandard'. She explained that knowing this would allow the Insurer to set premiums and decline risk. According to her, where the deceased indicated 'anemia' the Insurer would interpret this as iron deficiency anemia. She stated that as a result of the interpretation of 'anemia' on the life insurance application by the defendant the only test requested was a CBC, which does not test for sickle cell disease, only iron deficiency. Further that the results of the CBC performed on the deceased showed that her haemoglobin was within normal range.

14. According to Marsh the insurer would have requested that a sickle cell prep test be performed had the deceased indicated she had sickle cell anemia. As persons with sickle cell disease were classified as non-insurable by Colina and the only reason for testing was to definitively determine whether an applicant had the actual disease or sickle cell trait. Marsh admitted, under cross examination, that on the life application form there was no specific question in relation to sickle cell disease or any forms of anemia.

15. Marsh pointed to question 24(n) of the life application which stated:

> "So far as you know, have you had or been told by a doctor that you had any medical condition not mentioned above?"

The note to this question on the application form stated:

> "Give full particulars, condition, dates, duration, results. Give full names and addresses of doctors, hospitals, clinics."

According to Marsh, this gave the deceased the opportunity to disclose any necessary medical information.

16. Colette Darville, Colina's Senior Claims Adjudicator, gave evidence that she and at the time the plaintiffs requested that the life insurance benefit of the deceased be paid.

17. In her evidence in chief, she deposed that she was one of the signatories to the letter dated the 27 November 2012 stating the reasons the claim was denied. She stated that a cheque was enclosed for approximately one third of the premiums paid by the deceased. Her evidence was along similar lines given by Marsh. She stated that Colina considered the deceased's responses to the application amounted to a fraudulent non-disclosure on her part.

Issues

18. The plaintiffs' case is simply that the deceased made the appropriate disclosure of her condition in her responses to questions 24 and 30 of the application for life insurance, which was completed on or about 27 July 2001. Further that on the life application the deceased answered affirmatively to question (30) inquiring whether she had been told by a doctor that she had Anemia, Leukemia or other blood disorder?

19. Colina says there was material non-disclosure as set out in their Defence. They state that the deceased would not have been offered life insurance with the company had she been truthful regarding her diagnosis of sickle cell anemia. They further contend that in addition to the material non-disclosure regarding the deceased having sickle cell disease she failed to disclose pertinent medical records which indicated that she had been seen and treated by physicians and even hospitalised prior to the policy being issued.

The Law

20. The Court of Appeal in ***Colina v Enos Gardiner*** **SCCivApp & CAIS No. 117 of 2015,** 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.

(emphasis added)

Analysis & Disposition

21. The plaintiffs rely on ***Gardiner*** which is analogous to this case in that it involved a claim by a beneficiary (in that case the husband of the deceased) to a life policy in which the Insurer contended they were induced into making. In the instant matter *inter alia* the plaintiffs submit that ***Gardiner*** substantiates that the burden of proving

non-disclosure or misrepresentation is on the Insurer. Notwithstanding that, they aver as previously stated that there was disclosure by the deceased and as such Colina is obliged to pay the value of the policy to the plaintiffs.

22. Colina also relies on ***Gardiner*** and submit that the deceased had a duty to disclose all material facts that would have allowed the Insurer to make a risk appraisal. They contend that breach of this duty by the deceased entitles the Insurer to avoid the contract of life insurance so long as they can prove that the deceased non-disclosure induced the making of the insurance contract. The Insurer also has the burden of proving the materiality of the undisclosed facts. Further, Colina says the questions asked on the life application are express warranties and as such the answers given by the deceased are in fact material.

23. The Court in ***Gardiner*** gave a two-pronged approach in relation to a finding of inducement: firstly, there should be materiality; and secondly non-disclosure to achieve a positive finding of inducement.

24. The test for materiality is set out at paragraph 46 of the judgment as follows:

> "As the common law stands, the test for 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."..."

25. In ***Gardiner*** the Court held, at paragraph 49, that inducement may be inferred 'from the very nature of the undisclosed fact'.

26. Having heard the witnesses as they gave their evidence and observed their demeanour, I preferred the evidence of the defendant's witnesses. I did not find, in the face of the answers to the questions on the application, that the deceased indicted to the insurer that she had sickle cell anemia. I did not accept Goldean Munning's unsupported evidence that she heard such a disclosure. The answers to the question (24(h)) relative to anemia and the manuscript note that the ***Applicant is anaemic but is not on medical iron of any kind.'*** suggests to me that any discussion concerned iron deficiency anemia rather than the more serious

disease of sickle cell anemia. This is also reflective in the fact that she was asked to do a CBC blood test rather than the sickle cell prep test. The evidence before the court is that sickle cell anemia is a different disease for ordinary anemia, which is an iron deficiency.

27. I am fortified in my view by the absence of any specific notation on her application by her about a disease for which she was consistently receiving medical attention in the decades leading to her application, and eventual death. As noted in the evidence of Marsh, the application provided at question 24 (n) the opportunity for the deceased to make the disclosure. In any event, ***Crane-Scott JA*** points out in ***Gardiner***, 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.

28. Putting aside the question of whether she disclosed the sickle cell disease, it is abundantly clear that the *"no"* answers given by the deceased in question 24 and her declaration in question 30, of being in good health and free from all symptoms of illness or disease were, as described by her sister, untruthful. The deceased failed to disclose that she had had several visits between Dr. Roberts' office and PMH within the 5 year period specifically asked about on the application. It is a fact that the deceased answered *'no'* to this at question 24(l). Additionally, there were no attending physicians and/ or facilities listed by the deceased, that she had attended within the 5 years leading to the life application. Indeed based on Dr. Roberts APS the deceased suffered from and was treated for several painful sickle cell crises within the relevant period.

29. Additionally, the deceased was hospitalised in 1998 according to the PMH's records. Hospitalisation for any reason, is not, in my view, something that would be so easily elided into a person's day to day routine that it could not be re-called when specifically questioned about whether or not it took place within the preceding 5 years. I am satisfied therefore that the omission was not accidental. I am satisfied that had this medical history been disclosed at the time the application was made, it would also have cleared up any ambiguity in relation to whether or not the deceased had sickle cell anemia as opposed to iron deficiency anemia.

30. I find that the deceased made an untrue statement of her knowledge and belief as regards her medical history to the Insurer and failed to disclose what she knew regarding such history. I accept the evidence of Marsh that persons with sickle cell anemia are treated by Colina, as a prudent insurer, as uninsurable, thereby making the information material. I am satisfied that Colina has satisfied the burden of proving the materiality of the undisclosed facts.

31. I also accept that 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. In the absence of the individual underwriter who wrote the risk, I am prepared to infer inducement from the very nature of the undisclosed fact. The medical history which the deceased withheld was of such a nature generally that withholding it led to the defendant being induced into a contract for life insurance. I therefore find that the deceased's non-disclosure of her true medical condition and medical history played a real and substantial role in Colina deciding to contract with her for life insurance. The evidence is accepted that Colina would not have issued the Policy if full disclosure had been made.

32. In all the circumstances therefore, with respect to the issue raised in the preliminary issue of:

> *Whether or not there was a fraudulent non-disclosure of material medical information by the Insured; if so, is the Defendant entitled to avoid the policy.*

33. I find that there was fraudulent non-disclosure of material information by the insured and as such the defendant is entitled to avoid the Policy.

34. I order that the defendant shall have its reasonable costs on the trial of the preliminary issue, such costs to be taxed if not agreed.

Dated the 12th day of August 2020

Ian Winder

Justice