COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2004/CLE/gen/FP184

BETWEEN

JEFFREY PAULTON BULLARD

Plaintiff

AND

ATLANTIC MEDICAL INSURANCE COMPANY LIMITED

Defendant

BEFORE: **The Honourable Mrs Justice Estelle G. Gray Evans**

APPEARANCES: Mr Jethro Miller for the plaintiff

Mrs Carol Misiewicz for the defendant

2010: 20 – 22 September

2011: 14 March; 31 May; 31 October

JUDGMENT

Evans, J.

1. The plaintiff is an employee of the Grand Bahama Shipyard Limited ("the Shipyard"), a ship care facility doing business in Freeport, Grand Bahama. The Shipyard was, at all material times, the holder of a group health insurance policy number 020036 ("the policy") with the defendant, which the Shipyard offered to its employees and their dependents.

2. Both the plaintiff and his late wife, Vernessa Bain Bullard, were covered under the policy: the plaintiff's coverage was effective from or about October 2001 and Mrs Bullard's, as his dependent, from 1 October 2002.

3. Sometime after March 2003 claims submitted to the defendant under the policy in respect of medical treatment received by Mrs. Bullard at medical facilities in Florida were rejected by the defendant who, by letter dated 10 June 2003, to the plaintiff, declared the coverage for Mrs Bullard to be null and void as of the effective date on the basis that she had failed to disclose full medical information and history. Thereafter the defendant refused to pay all such claims.

4. Mrs Bullard died on or about 10 September 2004 while hospitalized in Mount Sinai Medical Center in Florida U.S.A.

THE PLEADINGS

5. The plaintiff commenced this action on 1 October 2004 and alleges that the defendant's refusal to honor its obligations to satisfy medical claims against the policy with respect to Mrs Bullard, including expenses totaling $1,064,719.27 due to Mount Sinai Medical Center, for the failure by the plaintiff and/or Mrs Bullard to disclose that she was pregnant at the time they completed the enrollment form, was unfair and wrong "based on such matters and material information made known to the plaintiff (sic), namely:

(a) That a personnel officer with the Shipyard and a fellow employee of the plaintiff (who assisted him in completing the form) innocently ticked "no" to the question number 20 of the printed form which asked "if female, are you pregnant? If yes, what is your due date?" to both the form for Vernessa Bullard and that for the plaintiff;

(b) It stood by for six (6) months while critical care was being administered to Vernessa Bullard before denying the claim by which time all parties had acted on the understanding that an insurance coverage was in place.

(c) There was not a material misrepresentation committed by the plaintiff sufficient to void the contract of insurance and in any case even if there was an innocent misrepresentation the defendant by delay and failure to void the coverage in a timely manner is estopped from denying the coverage to the plaintiff and his spouse.

(d) The plaintiff nor his wife was aware of the error at the time the insurance forms were completed and signed by them nor was their attention drawn specifically to it when the proposal was being completed by the defendant or any of its agents."

6. The plaintiff therefore claims that he is entitled to be indemnified against any sum claimed by medical providers with respect to medical expenses incurred by his late wife and he claims against the defendant:

(a) Damages for breach of the contract of insurance as a result of its failure and or refusal to pay reasonable medical expenses incurred by the plaintiff's spouse.

(b) Inquiry to determine to what extent the failure to provide insurance coverage contributed to further deterioration of her health.

(c) An Order that the defendant pay such medical expenses to Mount Sinai Medical Center as is found to be due with respect to Vernessa Bullard's treatment and care.

(d) Cost including travel and legal expenses incurred by the plaintiff.

7. In its original defence, the defendant admits that it agreed (subject to several conditions stated in the policy), to provide medical insurance coverage for the plaintiff and his dependent/wife and says that it was a condition precedent of such coverage that the plaintiff and his dependent would provide true statements on the enrollment form. The defendant also admits that it refused to honor the plaintiff's dependent's claim and says it was entitled to do so and to cancel the coverage due to the plaintiff's and/or his dependent's material non-disclosure and material false representation of the facts on the enrollment form, namely that the plaintiff and his dependent on 30 September 2002 stated that Mrs Bullard was not pregnant when in fact she was pregnant and was due for delivery of her baby within two months of that date.

8. In its amended defence, filed with leave on 20 September 2010, the defendant added the following allegations of material non-disclosure and material false representation:

(1) Neither the plaintiff and/or his dependent disclosed on the enrollment form that she had been treated for hypertension and/or abnormal blood pressure including a hospitalization of his dependent just days before the enrollment form was completed.

(2) The plaintiff and/or his dependent misrepresented themselves when they gave a negative answer on the enrollment form regarding, inter alia: any drugs prescribed to his dependent within the past three years, hospitalization of his dependent within the past three years and his dependent consulting with or being examined by a doctor within the past three years.

9. The defendant therefore denies that its refusal to pay Mrs Bullard's medical claims and to cancel her insurance coverage was unfair or wrong.

10. Additionally, the defendant contends that the plaintiff is not entitled to the relief sought in his statement of claim because he lacks *locus standi* to sue the defendant for non-payment of a claim under the policy relating to medical services rendered to his dependent.

AGREED FACTS

11. Although each side filed its own statement of facts, from a comparison of the two, the following facts appear to have been agreed or are not disputed:

(1) The plaintiff and his wife signed an employee enrollment form, dated 30 September 2002 and submitted the same to the defendant by way of application for Mrs Bullard to be enrolled under the policy as the plaintiff's dependent.

(2) The defendant agreed to provide (subject to several conditions stated in the policy), medical insurance coverage under the policy for the plaintiff and his wife with effect from 1 October 2002.

(3) It was a condition precedent of such coverage that the plaintiff and his dependent would provide true statements on the enrollment form.

(4) The enrollment form contained a section entitled "Dependent's Medical History" which requested, in relation to several medical issues, answers to the following question: "Have you at any time been treated for or been told that you had trouble with any of the following. Please answer YES or NO".

(5) The boxes for questions 1 through 6 were left blank and the "NO" boxes were checked as the answers for questions 7 through 23.

(6) Immediately above the line where the plaintiff and his wife signed the enrollment form is the statement: "Misrepresentation or failure to disclose medical information may result in a reduction or cancellation of cover."

(7) At the date the plaintiff and his wife signed the enrollment form, she was seven months pregnant.

(8) The plaintiff's wife gave birth to a son, Javon, on 7 November 2002 and he was enrolled as another of the plaintiff's dependents on 28 November 2002.

(9) The defendant received two bills from Mount Sinai Medical Center for medical treatment provided to Mrs Bullard. One bill in the amount of US$148,589.88, dated 21 March 2003, was received on 2 May 2003 and subsequently another bill dated 20 May 2003 in the amount of US$167,129.96 was delivered to the defendant.

(10) By letter dated 22 May 2003 from Dr Lucio Pedro of the Rand Memorial Hospital, the defendant was informed that Mrs Bullard had given birth to an infant at the Rand Memorial Hospital on 7 November 2002,

(11) On 9 June 2003 Dr George Diaz of Mount Sinai Hospital reported that Mrs Bullard had a past history of a stroke, which occurred during her pregnancy.

(12) By letter dated 10 June 2003 the defendant informed the plaintiff that because full particulars of Mrs Bullard's medical history and treatments were not disclosed as required on the employee enrollment form for the policy, medical insurance coverage would not be provided for Mrs Bullard under the Shipyard's medical insurance plan.

THE TRIAL/EVIDENCE

12. Evidence at the trial was given by the plaintiff and by Annastasia Michelle Francis and Holly Verthia Margarita Ferguson on behalf of the defendant.

13. The plaintiff's evidence is that he and his late wife got married on 18 May 2002 and sometime later that year they signed the employee enrollment form, which was dated 30 September 2002, so that she could be enrolled on the policy as his dependent. He said that the form was completed by Ms Lisa Strachan, an employee in his employer's

Human Resources Department, who "ticked" the answers thereon. Thereafter, he took the form home for his wife to sign and once he returned the signed form to his employer's Human Resources Department, he heard nothing further with respect thereto until a claim was made thereunder in connection with medical expenses incurred by his late wife at medical facilities in Florida, U.S.A. The plaintiff said that neither he nor his wife read the form so they did not have "actual" knowledge of the answers provided.

14. According to the plaintiff, his wife had a normal pregnancy. In his words "just only the normal morning sickness, nauseated to the stomach and all of that. But other than that it was smooth sailing." He admitted that on a couple of occasions during his wife's pregnancy, doctors at the Rand Memorial Hospital in Freeport, Grand Bahama, said that her blood pressure was high; also that she had been admitted to the hospital because of it – one such occasion being just days before the enrollment form was signed. However, he said he was told by the doctor that elevated blood pressure during pregnancy was normal. Hence his testimony that her pregnancy was normal.

15. The plaintiff denied that his wife had a stroke during the pregnancy although he believes that she had a "pass over stroke" sometime in January 2003, after the birth of their son. The plaintiff's evidence in this regard was confirmed by Dr Frumentus Leon in the final paragraph of his letter dated 13 July 2010 where he stated:

> "After careful review I can definitely conclude that Mrs. Bain-Bullard did not suffer a prenatal stroke. However, it is possible that on January 8, 2003 she might have suffered a Transient Ischemic Attack."

16. Mr Bullard recalled that after giving birth to Javon, Mrs Bullard remained in hospital for three or four days because her blood pressure was again elevated and because of her weight; that she was eventually released from hospital but continued with her regular checkups. That on one of those occasions she was again hospitalized for more than a week because of her elevated blood pressure. The plaintiff said that his late wife gradually regained her strength so that in February or March 2003 she was able, although against his advice, to accompany her mother to the United States on a shopping trip where she fell ill and had to be hospitalized - firstly at North Shore Medical Center, then at Mt Sinai Medical Center, where she eventually died.

17. Mr Bullard said that he became aware that there was a problem with the insurance coverage when he was advised by Mount Sinai Medical Center's personnel, during one of his visits to Florida to see his wife (he did not say when), that they were having difficulty getting a response from the defendant with regard to Mrs Bullard's care. He said when he returned to Grand Bahama he met with his employer's Chief Financial Manager, the defendant's Human Resources Manager and Ms Strachan. At that meeting he was told that one of the reasons the insurance company was not paying the claim was because it was investigating the information from the enrollment form and he informed the Chief Financial Manager and Human Resources Manager that it was Ms Strachan who had ticked the answers to his dependent's medical history on the form. He said he was advised by Ms Dorothy Lockhart, the Human Resources Manager, that the "insurance company" would be dealing with the medical expenses, however, on each occasion that he visited his wife he was told by Mount Sinai Medical Center personnel that the defendant was not paying the medical expenses being incurred by his late wife and when he made inquiries of the insurance company and/or his employers in connection therewith, he was told that "they were looking into it". He eventually received the following letter dated 10 June 2003 from the defendant:

"Mr. Jeffrey Bullard
C/o Grand Bahama Shipyard
P. O. Box F-42498-411
Freeport, Grand Bahama
Bahamas

Dear Mr. Bullard,

Re: Medical coverage for Vernessa Bain Bullard

Further to our earlier correspondence, we have had the opportunity to carefully evaluate the eligibility and claim situation of Vernessa Bain Bullard.

According to our records, application for medical insurance coverage was made for the above-mentioned individual under the GB Shipyard Group Medical plan. Vernessa Bain Bullard's coverage with Atlantic Medical was effective October 1, 2002.

The coverage was extended under the above mentioned policy based on the complete disclosure of medical information on the enrollment card. Failure to disclose medical information may result in a reduction or cancellation of cover.

Upon review of additional information that included material related to medical history and treatments and the enrollment application form, we have concluded that Vernessa Bain Bullard failed to disclose full medical information and history.

Based upon this information we regret to inform you that the enrollment requirements were not met in this instance and coverage is not available for Vernessa Bain Bullard. All coverage for Vernessa Bain Bullard is null and void as of the effective date.

Applicable premium will be refunded and no claims will be paid.

Yours Sincerely

Randi Arnold
Director of Operations

Cc: Lynda Gibson, Vice President/General Manager, Atlantic Medical Insurance
Lisa Strachan, Account Executive, Atlantic Medical Insurance Freeport Office
Dorothy Lockhart, Personnel Manager, Grand Bahama Shipyard

18. Mr Bullard said the contents of that letter prompted him to seek legal advice. He did not recall being refunded any funds paid to the defendant as premium for Mrs Bullard's coverage.

19. Under cross examination, Mr Bullard made the following admissions:

(1) His late wife had been hospitalized in Grand Bahama on three occasions in 2002: in September, a day or two before they signed the enrollment form; again in November, immediately following the delivery of their son; and again in December.

(2) His wife's medical expenses prior to delivery of the baby were paid by her personal insurance with Family Guardian Insurance Company.

(3) He did not submit claims to the defendant for his wife's hospitalization in November and December 2002 or February 2003; nor did he submit any claims with respect to a doctor's visit in January 2003.

(4) The first claim made on the defendant was with respect to an invoice from Susan Baker for services provided to Mrs Bullard in late February 2003.

(5) So far as he is aware, the defendant never paid the Mount Sinai Medical Center's bill or, for that matter, any bills for medical expenses relating to Mrs Bullard.

(6) He has not paid any moneys to Mount Sinai Medical Center.

(7) He has not been sued by Mount Sinai Medical Center for medical expenses incurred in relation to the treatment for his late wife.

(8) He has not been served with any papers in relation to a claim by Mount Sinai Medical Center.

(9) Mrs Bullard continued to receive treatment at Mount Sinai Medical Center after the date of their letter requesting payment, that is, 29 March 2004, up to the time of her death in September 2004.

20. Further, although at paragraph 15 of his witness statement the plaintiff averred that his wife died on 10 September 2004 "upon suspension of medical treatment by Mount Sinai Hospital due to the fact that defendant refused or rejected to pay the medical bill incurred", under cross examination he admitted that the decision to discontinue life support to his late wife, who had been in a coma for more than eight months at the time, was made jointly with his mother-in-law.

21. Under cross examination, Mr Bullard agreed with Mrs Misiewicz's suggestion that any adverse change in his late wife's condition would have been as a result of the length of time she would have remained in hospital. He also gave evidence to the effect, as I understood, that the 2004 hurricanes that hit Florida may also have impacted the care given to Mrs Bullard as machines may not have been operating due to power outages.

22. Although Mr Bullard accepted, under cross examination, that the defendant had a right to cancel the cover if there was a failure to disclose, he maintained his position that because it was Ms. Lisa Strachan who filled out the form incorrectly, he, nor his late wife, was guilty of misrepresentation or failure to disclose. Therefore, in his opinion, the defendant was obliged to pay the aforesaid expenses.

23. Included amongst the plaintiff's documentary evidence was the following report from Dr. Frumentus M. Leon dated 13 July 2010:

> "Mr. Jethro Miller
> Nottage, Miller & Co.
> Miller's Equity Centre
> The Mall Drive
> Freeport, Grand Bahama
>
> Dear Mr. Miller,
>
> Re: Mrs. Vernessa Bain - Bullard

After careful review of the medical notes of Vernessa Bain–Bullard the following report was compiled.

Mrs. Bain-Bullard began her antenatal care at the Rand Memorial Hospital on June 4, 2002. At her initial visit her blood pressure was 135/90 mmHg. The remainder of her examination was normal. Her routine antenatal screen including complete blood count, sickle cell test, HIV, VDRI, Hepatitis surface antigen and Rubella screening were all normal. Because of her mildly elevated blood pressure she was given a follow-up appointment for two weeks.

On review her blood pressure was normal 110/80 mmHg. Her blood pressure continued to be normal until September 10, 2002 when it was noted that her blood pressure was back elevated to 140/90 mmHg. At that time she was started on the antihypertensive drug Aldomet 500mg orally twice daily.

Because of blood pressure concerns she was admitted at the Rand Memorial Hospital on September 26, 2002. During her hospital stay all investigations for pregnancy induced hypertension were normal. The blood pressure remained satisfactory and she was discharged on September 28, 2002. From then her weekly antenatal care remained satisfactory.

On October 29, 2002; she was then 38 weeks pregnant. Her blood pressure was 142/92 mmHg. She was advised to be admitted to hospital. Despite being advised of the complications of pregnancy induced hypertension namely-- seizure, stroke, placental abruption, sudden infant death, she refused admission.

On November 7, 2002 she was admitted in labour and proceeded to an uncomplicated vaginal delivery of a live male infant weighing five pounds two and a half ounces. Her immediate postpartum period was satisfactory. She was discharged on November 11, 2002 with her six week follow-up appointment.

On December 19, 2002 she was admitted under the care of the Medical team with an admitting diagnosis of Puerperal sepsis with possible postpartum depression, and hypertension. On December 20, 2002 she was reviewed by the Gynecological team. At that time there was no evidence to support the diagnosis of puerperal sepsis and her care was continued by the medical team. By December 23, 2002, she felt well; her blood pressure had settled and was discharged on Augmentin, Flagyl, Lopressor, Natrilix and ecotrin.

On January 8, 2003 she was seen in the Gynecology outpatient clinic. At that time her blood pressure was still elevated and she had slurred speech. She was still taking her antihypertensive medication. She was advised to attend the medical outpatient clinic the following day.

On January 16, 2003 she was seen in the Medical outpatient clinic. At that time she had no complaints. Her blood pressure was normal 110/80 mmHg; her Lopressor and ecotrin were discontinued BUT Natrilix was continued.

After careful review I can definitely conclude that Mrs. Bain-Bullard did not suffer a prenatal stroke. However, it is possible that on January 8, 2003 she might have suffered a Transient Ischemic Attack.

Yours sincerely,
Frumentus M Leon FRCOG, FACOG

24. As evidence of the amount due to Mount Sinai Medical Center, the plaintiff produced the following letter dated 29 March 2004:

> "Noppage (sic) Miller
> Etc.
>
> | | | |
> |---|---|---|
> | Re: | Hospital | Mount Sinai Medical Center |
> | | Patient | Vernessa Bain Bullard |
> | | Account Number | A0316900453 |
> | | **Amount Due Thus Far** | **$1,064,719.27** |
>
> Dear Mr. Miller:
>
> This letter is in regards to services provided to your client, Vernessa Bain Bullard, on the treatment dates mentioned above. Though we have attempted to contact you several times over the last three months, we have received no response.
>
> Please review the enclosed Authorization to Represent and the Department of Children and Families Request for Assistance forms.
>
> With the help of the patient or patient's husband, please have these forms completed and signed prior to April 10, 2004, or our facility will have no choice but to consider litigation as its only alternative for resolution in this matter.
>
> Your cooperation and prompt attention is appreciated.
>
> Very truly yours,
>
> Lisa Lavista
> Director

25. As indicated, evidence on behalf of the defendant was given by Annastasia Michelle Francis, the defendant's Director of Operations, a position she has held since 2005; and by Holly Verthia Margarita Ferguson, Supervisor of the defendant's Eligibility Department, a position she has held since 1997.

26. Both of the defendant's witnesses explained the process for enrolling employees and their dependents under an insured employer's group policy. They said that once an enrollment form is received by the defendant's Administration Department to enroll an employee and/or a dependent of an employee under the insured's group medical policy, the form is checked to ensure that it is completed and signed. If the answer to all of the questions is 'NO', the form is considered "clean", the application is processed and coverage is approved. If there are any 'YES' answers, the applicant is asked to complete additional forms and the matter is referred to the defendant's medical team for assessing the responses to the various questions and consideration of the nature of the disclosed information, after which a determination is made by the defendant's underwriting personnel whether or not the defendant should accept the risk and, if so, at what level. If the defendant is willing to accept the risk, the application is processed by the Administration Department and the employer is notified that the applicant is formally enrolled onto the Group Policy. In both cases, once the application is approved, the employer is billed for the monthly premium, and an ID card is issued to the applicant.

27. Both witnesses said that in cases where the enrollment form is incomplete, it is returned to the "employer group" to ensure that all questions are answered.

28. In relation to Mrs Bullard, Ms Ferguson said that as part of her duties, she reviewed Mrs Bullard's enrollment form; noticed that the front section had been completed; that the medical information appeared to be completed and that the back of the form had both Mr and Mrs Bullard's signatures, as well as the date. She, therefore, considered the form to be "clean" and proceeded to enroll Mrs Bullard as Mr Bullard's dependent with effect from 1 October 2002; that the enrollment form was then locked away. Ms Ferguson said she made no further inquiries regarding the form because "all of the questions appeared to be (answered) 'NO'". She admits that that was an error on her part.

29. Ms Francis said that as the defendant's Director of Operations, she is primarily responsible for the day-to-day management of the defendant's Claims, Customer Service, Clinical and Eligibility Departments and her responsibilities include ensuring that the staff administers benefits according to the policies sold by the defendant.

30. Her evidence is that in May 2003, the defendant would have received medical claims for service rendered by Mount Sinai Medical Center to Mrs Bullard in late March 2003 and because she would have been under what the defendant terms its "pre-existing period", the defendant conducted an investigation into those claims.

31. The "pre-existing period", Ms Francis explained, is the period after the effective date of an employee's and/or his dependent's enrollment under the policy during which the defendant would investigate any claims that it received for that individual where the diagnosis in respect to that claim was not noted on the enrollment form. In the case of an employee of the insured, the period is six months and in the case of a dependent of such employee, the period is twelve months.

32. Under the heading "Preexisting conditions" on page 20 of the policy are the following provisions:

> "A covered person may have received medical care or treatment for an injury or sickness at any time during the 3 months before coverage starts under this Plan. In this case, coverage under this benefit will be postponed for the injury or sickness until the earliest date below.
>
> .....
>
> For a Dependent, when that person has been covered under this Plan for 12 months."

33. In relation to Mrs Bullard, Ms Francis said that the defendant's "pre-existing period" investigation, produced a report dated 10 April 2003 from Dr Babu Pavuluri at the Rand Memorial Hospital regarding Mrs Bullard's medical records from 19 December 2002 to 16 January 2003 and a letter dated 22 May 2003 from Dr Lucio Pedro confirming Mrs Bullard's admission to the maternity ward at the Rand Memorial Hospital and delivery of a male infant on 7 November 2002.

34. Ms Francis said that following the results of the investigation, the defendant decided to rescind Mrs Bullard's coverage and consequently none of the claims received by the defendant for Mrs Bullard's medical expenses were paid. She said that until coverage was rescinded, the defendant would have notified service providers that claims had been received and were being actively investigated.

35. Since no claims were paid and the coverage rescinded, Ms Francis said that the premiums paid with respect to such coverage would have been refunded to the employer, as indicated in the 10 June 2003 letter notifying the plaintiff of the aforesaid rescission.

36. As for why the "pre-existing period" investigation was not triggered by the enrollment of Mrs Bullard's newborn infant in November 2002, Ms Francis said that such investigation is not initiated unless a claim is submitted within the "pre-existing period"; that since the defendant was only being asked to enroll a newborn infant and no claim was being made under the policy with respect to Mrs Bullard, there was no reason for the defendant to initiate an investigation.

37. Ms Francis explained that special provisions apply for the enrollment of newborns. Those provisions set out on page 4 of the policy state that the applicant for dependent coverage for a newborn need not give proof of insurability for the child so long as a written request therefor was received by the defendant within 31 days of the infant's birth, which is what happened in the case of Javon.

38. According to Ms Francis, the only correspondence the defendant had with Mount Sinai Medical Center with respect to the claims for Mrs Bullard would have been firstly, to advise the hospital that the defendant had received the claim and was investigating the same; and secondly, to provide an explanation of benefits indicating that the claim was denied and the reason therefor. She said that the plaintiff's employer would have received copies of that correspondence as well.

39. Copies of the correspondence were also included in the defendant's documentary evidence and headed "Explanation of benefits reprint". Prior to 10 June 2003 they contained the note: "further processing pending medical review." After 10 June 2003 they contained one of the following notes: "claim denied due to receision (sic) of insurance coverage"; and "expenses submitted are not payable as coverage has been rescinded."

40. According to Ms Francis, in her experience, the defendant's decision not to pay the claim would not have affected Mrs Bullard's care, and that such care would have continued to be administered while the insurer was conducting its due diligence.

THE LAW

41. 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. There is also a duty not to misrepresent facts.

42. 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."

43. Then In the House of Lords case of Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd [1995] 1 AC 501 ("Pan Atlantic") their Lordships agreed 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."

44. 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'.

45. However, in *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.

46. According to Lord Lloyd:

> "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."

47. 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).

THE ISSUES

48. From the foregoing, the following issues arise for determination:

(1) Was there non-disclosure and/or misrepresentation of the plaintiff's dependent's medical history on the enrollment form? If so, were the plaintiff and his late wife responsible for such non-disclosure and misrepresentation?

(2) Was such non-disclosure and/or misrepresentation material? If so, was the defendant entitled to rely, and did rely, on them to cancel the medical insurance coverage for Mrs Bullard? If so,

(3) Did the defendant waive its right to rescind or cancel such insurance coverage and is therefore estopped from doing so?

(4) Does the plaintiff have *locus standi* to bring this action?

Was there non-disclosure and/or misrepresentation of the plaintiff's dependent's medical history on the enrollment form and if so, were the plaintiff and/or his late wife responsible therefor?

49. On the evidence, the true state of affairs at the time the plaintiff and his late wife signed the enrollment form was that: (i) Mrs Bullard was approximately seven months' pregnant; (ii) she had been told on three occasions (4 June 2002; 10 September 2002: and 26 September 2002) prior to signing the enrollment form that her blood pressure was elevated; (iii) she had been prescribed antihypertensive medication therefor on 10 September 2002; and (iv) she had been hospitalized (26-28 September 2002) because of "blood pressure concerns" just a few days prior to the date of the enrollment form. However, that information was not disclosed on the enrollment form and in fact, some of the information was misrepresented in that the relevant questions were answered in the negative.

50. Nevertheless, the plaintiff says that neither he nor his late wife is to blame for failing to disclose and/or misrepresenting the true state of affairs to the defendant because, although they signed the enrollment form, it was actually completed by an employee in the Shipyard's Human Resources Department.

51. The plaintiff contends further that the fact that the 'NO' box was ticked as the answer to the question on the enrollment form as to whether or not the plaintiff's dependent was pregnant was a clerical error, not intended to be dishonest or to deceive.

52. In counsel for the plaintiff's submission, the defendant ought not to be permitted to rely on such error to cancel Mrs Bullard's insurance coverage, as, he argues, there should be evidence of dishonesty to bar recovery of insurance claims. In support of that argument, counsel relies on the cases of Zeller v British Caymanian Insurance Company Ltd [2008] UKPC 4 ("Zeller") and Economides v Commercial Union Assurance Co PLC [1997] 3 All ER 636 ("Economides"),

53. I accept the plaintiff's evidence that he and his late wife were assisted by Ms Lisa Strachan in completing the enrollment form. Indeed, Ms Francis also testified that the defendant's enrollment procedure provides for the applicant to "sit with the Group Administrator, who is usually the head of the insured's Human Resources Department, who would assist such new employee with completing the form".

54. I also believe the plaintiff when he said that both he and his late wife signed the form without reading it and therefore did not have "actual" knowledge of its contents.

55. However, I agree with Mrs Misiewicz that the plaintiff's assertion that he nor his late wife read what they signed does not absolve either of them of responsibility for the consequences that flow from their having signed the enrollment form since, as counsel pointed out, the defendant relied on the representations contained therein in issuing dependent's coverage to Mrs Bullard. See Gaillie v Lee (1969) 2 WLR 901 at page 924 where Salmon J. expressed the following view, with which I respectfully agree:

> "If...a person signs a document because he negligently failed to read it, I think he is precluded from relying on his own negligent act for the purpose of escaping from the ordinary consequences of his signature."

56. And, like Scrutton LJ in Newsholme Bros v Road Transport and General Insurance Company [1929] 2 KB 356 at 376. I, too, have "great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance," and which, in this case, contains a declaration as to the consequences of providing untrue statements "can escape from the consequences of his negligence by saying that the person he asked to fill it up for him" was to blame for the answers provided.

57. Moreover, the plaintiff's evidence is that while completing the form Ms Strachan did ask him certain questions. According to him: "*she asked my name and my date of birth et cetera. And she asked me if I have any illness, sickness. Obviously I don't. I never was hospitalized with any symptoms. I don't drink. I don't smoke, et cetera, et cetera. And the same principles applied with Vernessa. I told her also that she don't drink, she don't smoke, et cetera, et cetera.*" And although the plaintiff said that Ms Strachan did not ask him if his late wife was pregnant, it was his and/or his late wife's responsibility to verify the accuracy of the answers provided on their behalf.

58. In my judgment, in failing to read the completed enrollment form or to verify that the answers provided were correct, Mr Bullard and his late wife were negligent. Further, by signing the form, they accepted that they were the persons who should take responsibility for its contents and it is not enough for the plaintiff and his counsel now to say that it was merely an innocent clerical error for which the plaintiff nor his late wife should be held responsible.

59. Further, I agree with counsel for the defendant that *Zeller* is distinguishable from the present case and in my view, *Economides,* the other case on which counsel for the plaintiff also sought to rely, does not assist the plaintiff.

60. In *Zeller* the evidence was that although his doctor had noted certain medical conditions on Mr Zeller's medical file, he had not shared that information with Mr Zeller and the Court concluded that since Mr Zeller did not know of the illnesses noted by the doctor, he completed the form, as required, "to the best of his knowledge and belief" and, therefore, there was no failure to disclose. No such qualification was placed on the enrollment form in this case.

61. In *Economides*, although Lord Justice Simon Brown expressed the view that the test for non-disclosure is the same as that for misrepresentation, that of honesty, he nevertheless recognized the duty of the insured to disclose those material facts known to him, which any reasonable man might suppose could in any way influence the insurers in considering and deciding whether they will enter into the contract.

62. In any event, the question asked on the enrollment form in this case was "have you at any time been treated or been told that you had any trouble with the following?" and on the evidence, the plaintiff cannot say that he nor his late wife, at the time they signed the form did not know that Mrs Bullard was pregnant or that she had recently consulted with a doctor or that she had been told that her blood pressure was elevated or that she had been prescribed medication and hospitalized as treatment for such elevated blood pressure just a few days before 30 September 2002. Although, I note here that both the plaintiff and his counsel sought to make a distinction between chronic hypertension and pregnancy-induced hypertension, the fact is that Mrs Bullard was treated for hypertension prior to her signing of the enrollment form, which also provided a space for her to explain, had she provided a "YES" response to the question relating to hypertension/abnormal blood pressure.

63. Hence, I find that there were non-disclosures and misrepresentations of the facts relating to the plaintiff's dependent's medical history on the enrollment form and that the plaintiff and/or his late wife, having signed the enrollment form, were responsible therefor.

Were such non-disclosures and misrepresentations material? If so, was the defendant entitled to rely, and did rely, on them to cancel the medical insurance coverage for Mrs Bullard as the plaintiff's dependent?

64. Counsel for the plaintiff submits that since the defendant's witnesses said the defendant never covers pregnancy, the disclosure or non-disclosure of Mrs Bullard's pregnancy was not a

material non-disclosure at the date the enrollment form was signed. As for the other items of non-disclosure or misrepresentation, as I understood counsel for the plaintiff's submission, the defendant ought not to be permitted to rely upon them because of the lateness of their inclusion in the defence and because those were not the reasons on which the defendant relied to cancel the plaintiff's dependent's coverage.

65. Mr Miller submits further, that even if the defendant was entitled to rely on the non-disclosure and misrepresentation regarding Mrs Bullard's pregnancy to avoid the coverage agreed to be provided to Mrs Bullard, it was estopped by its conduct from asserting that by June 2003 such non-disclosure was material in that the defendant:

(1) Failed to cancel Mrs Bullard's coverage when adding Javon as a dependent.

(2) Paid at least one claim made by the Rand Memorial Hospital on behalf of Mrs Bullard before refusing to pay the medical expenses incurred by her in Florida.

(3) Permitted the medical facilities in Florida to administer treatment to Mrs Bullard for months before deciding to rescind the insurance coverage.

66. Mrs Misiewicz, on the other hand, argues that the fact that the plaintiff's dependent's pregnancy would not have been covered is actually evidence of its materiality, since, in her submission, under the policy Mrs Bullard would have received coverage for something for which, had it been disclosed, the defendant would not have provided cover.

67. Mrs Misiewicz argues further, that even if this Court were to find that the misrepresentation of, or failure to disclose, Mrs Bullard's pregnancy was immaterial or that the defendant had waived its right to rescind the coverage on that basis, the defendant had not waived its right to rescind coverage on the other grounds of non-disclosure or misrepresentation set out in its amended defence, all of which, she argues, were material to the risk to be undertaken by the defendant, who was being asked to provide medical insurance to Mrs Bullard as Mr Bullard's dependent.

68. 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 plaintiff and his dependent applied to the defendant for medical/health insurance coverage, any information regarding the applicant's medical condition and/or medical history at the time of such application would be material.

69. Therefore, in my view, the fact of Mrs Bullard's pregnancy and date of delivery; the fact of her elevated blood pressure, the fact that she had been prescribed medication and had been hospitalized in connection therewith in the three years prior to the date of the enrollment form, although apparently related to the pregnancy, were all 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 Mrs Bullard as the plaintiff's dependent and if so, on what terms and for what premium.

70. 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 to proof firstly, that the defendant was induced thereby to approve the insurance coverage which it did for Mrs Bullard as Mr Bullard's dependent on the terms on which it did; and secondly, that the defendant had not waived its right to rescind such coverage.

71. 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).

72. The defendant sought to discharge its burden by the testimony of Ms Ferguson and Ms Francis. Both witnesses said that the reason for the disclosure of medical information on the enrollment form was to enable the defendant to determine whether or not and upon what conditions, if any, to accept the risk of insuring the applicant, so that had the true facts of Mrs Bullard's medical history been disclosed the application would have been referred to the defendant's underwriting department for their determination as to whether or not to approve the coverage and on what terms or as Ms Ferguson said under cross examination to make "a note of whatever exclusion or whatever details we need or information on that."

73. Although neither of the defendant's witnesses could, or did, say what those terms were likely to be, or why the pregnancy, had it been disclosed, would not have been covered, both said that in their experience, where the defendant agrees to approve coverage for an applicant who was pregnant at the time, that pregnancy would not have been covered.

74. In her witness statement Ms Ferguson at paragraph 40 stated:

> "Based on my knowledge of the underwriting policies and practices of the defendant at the time, had full and proper disclosures been given regarding Mrs Bullard's pregnancy, all related medical costs relating to her pregnancy would have been excluded from the medical insurance coverage approved for Mrs Bullard."

75. And under cross examination, Ms Francis, in response to counsel for the plaintiff's question as to why the fact of Mrs Bullard's pregnancy was material to the defendant's decision to rescind rather than simply reduce coverage as contemplated by the declaration on the enrollment form, responded as follows:

> "I could not answer that. That is basically a medical underwriting decision. But in terms of any new enrollees coming into the plan that are pregnant, if we did extend coverage prior to them giving birth, we would always exclude pregnancy; the pregnancy is never covered."

76. I understand the defendant's evidence to be that the fact of Mrs Bullard's pregnancy may not necessarily have been a bar to the defendant granting her coverage as the plaintiff's dependent under the policy, but that her pregnancy and related illnesses would not have been covered, which indicates that the failure of the plaintiff and/or his late wife to disclose her pregnancy led to different terms being offered by the insurer, since "pregnancy" is a "covered expense" under the policy.

77. Therefore, Mrs Misiewicz submits, and I accept, that in this case the coverage which was approved for Mrs Bullard was, in fact, different from that which would have been approved had the fact of the pregnancy been disclosed.

78. Further, although I agree with Mr Miller that in light of the testimony of the defendant's witnesses, it seems that the defendant's underwriter would have been the better person to give evidence as to whether the defendant was in fact induced by the misrepresentation regarding Mrs Bullard's pregnancy to approve the coverage it did, as this is a case involving health insurance and, as I have stated, all issues relating to the applicant's medical condition and/or history would have been material, similarly, in my judgment, this is a case, where the facts are

such that it may be inferred that the defendant was induced to approve the coverage it did, particularly as it turned out that the claim against the insurance company was with respect to expenses incurred by Mrs Bullard's in regard to an illness which appears to have been associated with her pregnancy.

79. I find that the non-disclosure and misrepresentation of the plaintiff's dependent's pregnancy on the enrollment form was not only material but also that, on a balance of probabilities, the defendant was induced thereby to approve the coverage which it, in fact, did for Mrs Bullard as the plaintiff's dependent.

80. The parties agree that it was a condition precedent to the defendant providing the aforesaid coverage that the plaintiff and his late wife would provide true statements on the enrollment form.

81. Counsel for the defendant therefore submits that the false statements on the enrollment form rendered the insurance contract *void ab initio* and therefore the defendant was entitled to rescind the same. For that proposition, she relied on the case of Legal and General Assurance Society Ltd v Drake Insurance Co Ltd [1992] 1 QB 887.

82. I accept that submission and find that the defendant was entitled to, and did rely, on the material misrepresentation and material non-disclosure regarding Mrs Bullard's pregnancy to rescind the coverage which it approved for Mrs Bullard with effect from 1 October 2002.

83. As regards the other items of non-disclosure and misrepresentation, I am not so persuaded.

84. The evidence of the defendant's witnesses is that in the event a question on the enrollment form was left unanswered, the form would be returned to the "employer" for completion. Ms Ferguson admits that the fact that that did not happen in this case was an error on her part.

85. It seems to me that where a question in the proposal form is left entirely unanswered, the issue of the policy without further inquiry is a waiver of that information. I find support for that proposition in the case of Armenia Fire v Paul, 91 Pa. 520 (1879). See also paragraph 16-31 of MacGillivray on Insurance Law where the learned authors state the principle as follows: "an insurer who issues a policy despite a wholly unanswered question in the proposal form waives his rights to repudiate liability unless the blank answer must be read as 'No'". Hence, in my judgment, the defendant could not rely on the defendant's failure to answer the question relating to hypertension/abnormal blood pressure to rescind the aforesaid coverage to Mrs Bullard as the defendant admitted that it was at fault for not returning the form for completion of the unanswered questions thereon.

86. Further, although in its letter of 10 June 2003 the defendant did not say what specific information the plaintiff's late wife failed to disclose, in its defence, as originally pleaded, the defendant said it was the fact of her pregnancy. On the admission of its counsel, the defendant was not aware of the other items of non-disclosure and misrepresentation at the time it cancelled the policy. In my view, although the defendant could also rely on those items to rescind the policy, the evidence is that it did not. Further, since the defendant has not sought by way of counterclaim any declaration as to its entitlement to rely on the ground of the other non-disclosures or misrepresentations which came to light after it cancelled Mrs Bullard's coverage, in my judgment it is not entitled to rely on them to defend the plaintiff's case.

87. I therefore find that the only item of non-disclosure and/or misrepresentation the defendant could and did rely on at the time it cancelled the coverage extended to Mrs Bullard was the fact of her pregnancy.

Did the defendant waive its right to rescind such insurance coverage and is therefore estopped from doing so?

88. The plaintiff contends that by:

(1) Enrolling Javon as Mr Bullard's dependent;

(2) Paying at least one claim made by the Rand Memorial Hospital on behalf of Mrs Bullard before refusing to pay the medical expenses incurred by her in Florida; and

(3) Permitting the medical facilities in Florida to administer treatment to Mrs Bullard for months before deciding to rescind the insurance coverage;

the defendant has, indeed, waived its right to cancel Mrs Bullard's coverage.

89. Counsel for the defendant submits that there was no waiver by the defendant when it issued the automatic insurance coverage to Javon; that the defendant has made no payment for medical expenses incurred by Mrs Bullard and that there was no representation by the defendant that it knew of or would cover Mrs Bullard's hospital stay in Miami.

90. As a general rule, there can be no waiver unless the insurers have full knowledge of the material circumstance (McEntire v Sun Fire Office (1895) 29 ILT 103). See also M.P.R. Ltd v Bahamas First General Insurance Co. [1991] BHS J. No. 156 in which Sawyer, J. (as she then was) cited with approval the Australian case of Khoury and Another v Government Insurance Office of New South Wales [1985] LRC (Comm) 178 in which it was held that "before any election, express or implied, can be made out, it must be shown that the party alleged to have affirmed the contract, was aware of the facts giving rise to the right to avoid the contract."

91. **Enrolling Javon.** The evidence is that the first time the defendant became aware of the non-disclosure of the plaintiff's dependent's pregnancy on the enrollment form was after it conducted its pre-existing period investigation which was initiated after the defendant received a claim for payment of medical expenses incurred by the plaintiff's late wife at a Florida-based medical facility in March 2003.

92. The defendant contends that at the time it enrolled Javon as another of the plaintiff's dependents, it was not aware that the plaintiff's dependent had misrepresented the fact of her pregnancy on the enrollment form. Therefore, counsel for the defendant submits, there was no waiver by the defendant in enrolling Javon.

93. The evidence is that the policy has special provisions for enrolling newborns. Javon, as a newborn, was entitled to be covered as the plaintiff's dependent in his own right without the completion of any forms, once a request for his enrollment was made within 31 days of his birth. He was born on 7 November 2002. The request for his enrollment was received by the defendant from the Shipyard on 22 November 2002. He was enrolled on 28 November 2002, and since no claim was made by Mrs Bullard in connection with his delivery, Mrs Francis said there would have been no reason to inspect her enrollment form at that time, and, therefore, the defendant was not aware of the non-disclosure and misrepresentation thereon.

94. Counsel for the plaintiff argues that the defendant, having added Javon as the plaintiff's dependent, must have known or is deemed to have known that Mrs Bullard had misrepresented the fact of her pregnancy on the enrollment form. Perhaps so, but, as pointed out by counsel for the defendant, there is no evidence on which this Court can make such a finding. That is, there

is no evidence that the defendant was, in fact, aware at the time of Javon's enrollment that the fact of Mrs Bullard's pregnancy had been misrepresented on the enrollment form but, nevertheless, elected not to rescind her coverage at that time.

95. **Paying at least one claim.** As regards the plaintiff's contention that the defendant had made at least one payment under the policy with respect to Mrs Bullard's medical expenses, the evidence is to the contrary.

96. Although at paragraph 37 of her witness statement, Ms Ferguson makes the following statement:

> "The first time medical insurance coverage was sought for treatment arising from the undisclosed pregnancy was in or about 19 December 2002 when Mrs. Bullard was treated at an Emergency Unit in Rand Memorial Hospital."

under cross examination, she admitted that she could not say whether any payments had, in fact, been made by the defendant with respect to claims on the policy for Mrs Bullard's medical expenses. Indeed, her testimony is that she made the statement on the basis of information she obtained from the file to which she had access, but that she had no prior knowledge thereof.

97. Nevertheless, that statement, coupled with both of the defendant's witnesses' testimony that they could not say whether or not any payments had been made, no doubt led to counsel for the plaintiff making the following closing submissions: "recognizing that the admission of such payments would give rise to issue estoppel (i.e. whether any payments were ever made in connection with Mrs Bullard) they steered away from the answer to this question".

98. However, the plaintiff's evidence is that no such payment was made and no other evidence to support the allegation was provided.

99. The plaintiff's evidence is that the first claim made against the defendant under the policy for Mrs Bullard's medical expenses was with respect to her hospitalization in Florida in March 2003. The following exchange between Mrs Misiewicz (Q) and the plaintiff (A) is noteworthy:

Q: Now, with this hospitalization in November 2002, did you submit a claim to Atlantic Medical...for when your wife was in hospital in November 2002 when she had Javon and they had to keep her because of her pressure?

A: No ma'am.

Q. And when she was admitted in hospital in December 2002, you didn't submit a claim then either? Did you? You did not submit a claim to Atlantic Medical under the policy when your wife was admitted to the hospital in December of 2002?

A: No ma'am.

Q. Nor did you submit a claim in February of 2003 when your wife was admitted to hospital did you?

A. No ma'am. I don't recall.

Q. You don't recall or you didn't?

A. No, I didn't.

Q. And you didn't when she was attending the doctor in January in '03? You did not submit a claim in respect of that either and she did not submit a claim for that?

A. No, she didn't.

Q. So the earliest date, that's according to these, according to the bills that are produced here, the earliest date that a claim was made in respect of Vernessa Bain Bullard's hospitalization by Atlantic Medical would have been in May 2003 for Mount Sinai Medical Center.

A. May or June

78. And, the plaintiff's evidence-in-chief is as follows: Mr Miller (Q); the plaintiff (A):

Q. When she first started attending medical or let's say pre-delivery, were there any medical accounts or claims made at that stage, or do you remember, before she went to Mount Sinai, let's say during the pregnancy stage, were there any medical bills building up or being incurred?

A. I clearly remember when she was admitted at the Rand Memorial Hospital, after that week period – first of all, she was covered under two insurances, under my insurance and also her mom had her covered under Family Guardian Insurance which is her personal insurance. And they paid her medical fee at the Rand Memorial Hospital. I clearly remember that. But at the time Atlantic Medical did not cover her medical fee at the Rand. Her own personal insurance did that.

Q. And do you recall the trip to Nassau, that was also paid for by somebody else?

A. Yes, sir. That was also paid by her private insurance.

Q. So the first time that you made a claim on your insurance for her would have been when she was at Sinai?

A. Yes sir.

100. In the light of the plaintiff's testimony, I reject counsel for the plaintiff's submission that the defendant paid for medical expenses incurred by Mrs Bullard in December 2002 or at all and find that there was no such payment which would operate as an estoppel against the defendant rescinding the coverage previously approved for Mrs Bullard as Mr Bullard's dependent.

101. **The defendant's delay in avoiding the policy.** In its statement of claim, the plaintiff alleges that the defendant "stood by for six months while critical care was being administered to Mrs Bullard before denying the claim" and his counsel submits that the defendant knew that Mrs Bullard was in hospital and waited too long to avoid the policy, intimating that such delay also negatively impacted the care given to Mrs Bullard by hospital personnel.

102. The evidence is that the first claim made under the policy was with respect to medical expenses incurred by Mrs Bullard for medical treatment in Florida sometime in late March. The exact date on which the defendant became aware of Mrs Bullard's hospitalization is unclear and although the evidence is that the first invoice with respect to such medical expenses was received by the defendant on or about 2 May 2003, there is also evidence that the defendant's

first request of the Rand Memorial Hospital for information regarding Mrs Bullard's medical records was made on 20 March 2003 (see letter in defendant's bundle of documents dated 10 June 2003 from the defendant to Ms Sharon Williams, Rand Memorial Hospital Administrator), which leads me to believe that the defendant was aware of the claim on or before 20 March 2003.

103. In the first paragraph of that letter Ms Ursula King, the defendant's Assistant Claims Manager, wrote, inter alia, as follows:

> "We wrote to the Rand Memorial Hospital for medical records on 3.20.03 on the above-named..."

104. According to Ms Francis, because the claim relating to Mrs Bullard was received during the "pre-existing period", that is, within 12 months of Mrs Bullard's enrollment as the plaintiff's dependent, the defendant conducted an investigation which yielded the letter from Dr. Babu Pavulri dated 10 April 2003 and one from Dr. Lucio Pedro dated 22 May 2003. Dr Pavulri's letter provided information about Mrs Bullard's medical records at the Rand Memorial Hospital for the period 19 December 2002 to 16 January 2003 – a period after the date of the enrollment form and Dr Pedro provided information regarding Mrs Bullard's admission to the maternity ward on 7 November 2002 for the birth of Javon.

105. Further, according to the agreed facts, the defendant was also advised by one Dr Diaz on or about 9 June 2003 that Mrs Bullard had a "history of strokes...during pregnancy" which likely prompted the aforesaid letter dated 10 June 2003 to the Hospital Administrator which was a further request for "the complete medical records for Vernessa for the last three years." There is no evidence that any reply to that second request was received by the defendant and although Dr Leon's report refuted Dr Diaz's statement regarding strokes, his report was not provided until some seven years later, specifically 13 July 2010, a few months before the trial, by which time the defendant had already cancelled Mrs Bullard's coverage by letter dated 10 June 2003. Dr Diaz was not called as a witness and his unsigned report was not admitted into evidence.

106. It appears from the evidence, therefore, that the period between Mrs Bullard's hospitalization in Florida and the date the defendant notified Mr Bullard of the cancellation of coverage was approximately three months.

107. The plaintiff has, therefore, failed to prove that the defendant waited for six months before denying the plaintiff's dependent's claim. Further, I am unable to say, on the evidence, and no authorities were provided to show, that three months was an unreasonably long time for the defendant to conduct its aforesaid investigation, before cancelling coverage. I note here that counsel for the plaintiff also lamented the fact that he had difficulty obtaining information from the hospital in Grand Bahama, including the report from Dr Leon, which was only received two months before the trial.

108. In the circumstances, I am unable to find that the defendant waited too long to notify the plaintiff of its intention to rescind Mrs Bullard's coverage and thereby waived its right to do so.

109. Consequently, I find that the defendant did not, by its conduct, waive its right to cancel the coverage previously approved for Mrs Bullard as Mr Bullard's dependent under the policy on the ground of non-disclosure and/or misrepresentation of Mrs Bullard's pregnancy.

110. I, therefore, hold that the defendant was entitled to cancel the coverage previously approved for Mrs Bullard on the ground of material non-disclosure and material misrepresentation of Mrs Bullard's pregnancy on the enrolment form.

SUMMARY OF FINDINGS

111. In summary my findings are as follows:

(1) There was non-disclosure and misrepresentation on the enrollment form for which the plaintiff and his late wife were responsible.

(2) Such non-disclosure and misrepresentations were material.

(3) The defendant was induced by such material non-disclosure and material misrepresentation to approve the coverage in the terms which it did for Mrs Bullard as the plaintiff's dependent under the policy.

(4) The defendant was entitled to rely on those material non-disclosure and misrepresentations to cancel the said coverage.

(5) However, by not returning the enrollment form for completion of the questions for which no answers had been provided at the time the enrollment form was signed by Mr and Mrs Bullard, the defendant waived its right to rely on the non-disclosure of Mrs Bullard's medical condition relating to hypertension/ abnormal blood pressure.

(6) At the time the defendant cancelled Mrs Bullard's coverage the only misrepresentation or non-disclosure of which it was aware related to Mrs Bullard's pregnancy.

(7) The defendant only relied on the non-disclosure and misrepresentation regarding Mrs Bullard's pregnancy to cancel the coverage.

(8) The defendant did not, by its conduct, waive its right to cancel the coverage previously approved for Mrs Bullard as Mr Bullard's dependent under the policy on the ground of non-disclosure and/or misrepresentation of Mrs Bullard's pregnancy.

(9) As the other items of non-disclosure and misrepresentation only came to the defendant's attention after it had cancelled the policy, it did not rely on them to cancel the aforesaid coverage.

(10) In order for the defendant to rely on the additional items of non-disclosure or misrepresentation it had to file a counterclaim seeking the relief of rescission on those grounds and the defendant having failed to do so cannot rely on those grounds to defend the plaintiff's claim.

112. In the result, I would dismiss the plaintiff's claim and order that the plaintiff pay the defendant's costs, such costs to be taxed if not agreed.

THE LOCUS STANDI ISSUE

113. In the light of the decision to which I have arrived, it is not necessary for me to consider the issue of *locus standi*. Nevertheless, in the event I am wrong in my conclusion on the substantive claim, I will now consider the defendant's contention that the plaintiff lacks *locus standi* to bring this action.

114. Initially, counsel for the defendant, relying on the decision of Gonsalves-Sabola, J. (as he then was) in the case of Family Guardian Insurance Co v Brown [1989] BHS J. No. 102, had submitted that the plaintiff could not bring this action because the contract of insurance was

between the Shipyard and the defendant and that there no privity between the plaintiff and the defendant. However, she seemed to have resiled from that submission. She submitted instead that Mrs Bullard, as a member of the class of insured persons under the policy was the person to whom a cause of action, if any, against the defendant for breach of contract in failing to pay Mrs Bullard's medical expenses would have accrued and which would have survived for the benefit of her estate and not Mr Bullard personally. Therefore, she submits, the plaintiff lacks *locus standi* to bring the action on behalf of Mrs Bullard in his personal capacity.

115. Further, counsel points out, on Mr Bullard's own evidence, he has not paid any of Mrs Bullard's medical expenses, hence he has suffered no loss or damage and, in her submission, only Mrs Bullard or her estate can maintain an action in negligence against the defendant with respect to claims relating to her.

116. Mr Miller argues that the plaintiff does have *locus standi* as there is nothing in the defendant's evidence precluding the plaintiff from suing on behalf of his dependent. He pointed out that in the case of *Zeller supra* Mr Zeller successfully brought an action against the insurer under a group health insurance contract between his employer and the insurer, taken out by the employer for the benefit of its employees.

117. Consequently, Mr Miller submitted, as I understood him, that there was a contractual relationship between the plaintiff and the defendant and that it would be "both unjust and an act of deceit" for the defendant's counsel to argue otherwise.

118. As evidence that the policy permits the plaintiff to sue the defendant regarding his own health claims and not that of a third party, in this case his dependent/wife, Mrs Misiewicz referred to the following provision at page 28 of the policy:

> "Legal actions: You may not sue on your health claim before 60 days after proof of loss has been given to the company. You may not sue after two years from the time proof of loss is required unless the law in the area where you live allows a longer period of time."

119. As I understood counsel for the defendant's submission, although the plaintiff as an insured under the policy has *locus standi* to bring an action against the defendant for claims relating to himself personally, he has no such standing to bring an action in his personal capacity where the cause of action under the policy would have accrued to his late wife during her life and to her personal representatives after her death.

120. There is no evidence that the plaintiff, nor anyone else, has been appointed as Mrs Bullard's personal representative nor is there any evidence that letters of probate or administration have been granted in her estate. In any event, as pointed out by counsel for the defendant, even if the plaintiff had sought leave, when his counsel was alerted to the position intended to be taken by the defendant, to amend his pleadings to change the name of the plaintiff from his personal to a representative capacity, which he did not, he would have had to overcome the hurdle of the provisions of the Limitation Act, 1995.

1. In the circumstances, I accept the submission of counsel for the defendant that the plaintiff lacks *locus standi* to bring this action for breach of contract or in tort against the defendant for its refusal to pay medical expenses relating to his late wife.

General Observations

121. I note here, however, that even if I had found for the plaintiff in this case, the plaintiff has failed to prove its claims for:

(a) Damages for breach of the contract of insurance as a result of its failure and or refusal to pay reasonable medical expenses incurred by the plaintiff's spouse.

(b) Inquiry to determine to what extent the failure to provide insurance coverage contributed to further deterioration of her health.

(c) An Order that the defendant pay such medical expenses to Mount Sinai Medical Center as is found to be due with respect to Vernessa Bullard's treatment and care.

(d) Cost including travel and legal expenses incurred by the plaintiff.

122. Counsel for the defendant points out that there is no evidence that the plaintiff has paid or is responsible for paying any sums in respect of his wife's hospitalization or medical expenses to Mount Sinai Medical Center or otherwise; nor is there any evidence to support the plaintiff's allegation at paragraph 12 of his statement of claim that Mount Sinai Medical Center is requiring him to satisfy the expenses due to it if the defendant fails to do so. Indeed, the plaintiff admitted that not only has he not paid any such medical expenses, but he has not been served with any claim or legal process by Mount Sinai Medical Center to recover any sums due to it with respect to Mrs Bullard's care.

123. Hence the plaintiff has suffered no damages as a result of the defendant's alleged breach of contract in failing to pay his late wife's medical expenses.

124. I also note that Mount Sinai Medical Center's letter of 10 June 2004, is addressed not to the plaintiff but to counsel for the plaintiff in his capacity as counsel for Mrs Bullard. The letter states that it is "in regards to services provided to your client, Vernessa Bain Bullard". Of interest are the following paragraphs:

> "Please review the enclosed Authorization to Represent and the Department of Children and Families Request for Assistance forms.
>
> With the help of the patient or patient's husband, please have these forms completed and signed prior to April 10, 2004, or our facility will have no choice but to consider litigation as its only alternative for resolution in this matter."

125. Yet, more than six years later, it appears that no action has been taken against the plaintiff or the estate of his late wife to recover those costs.

126. I note further that according to the aforesaid letter of 10 June 2004, the sum of $1,064,719.27 was the "amount due thus far". The evidence is that Mrs Bullard died three months later on 10 September 2004, but no evidence was led as to whether there was any change in that amount – up or down.

127. I say that because the evidence also is that Mrs Bullard had medical insurance coverage with Family Guardian Insurance Company. Both the defendant and Family Guardian Insurance Company appear on the invoices from Mount Sinai Medical Center as insurers and it is unclear from the evidence whether Family Guardian Insurance Company has paid any part of Mrs Bullard's medical expenses.

128. With regard to the claim for an inquiry, Mrs Misiewicz submits, and I accept, that that claim must also fail because the plaintiff has produced no evidence to show lack of care given to Mrs Bullard nor has he led any medical evidence as to the nature of her care, or as regards her

medical condition throughout the nineteen months of her stay in hospital to support an allegation that there was "a deterioration" in her health. Added to that is the plaintiff's admission in cross-examination that a negative change in his late wife's condition would have been as a result of the length of time she would have remained in hospital.

129. It appears from the evidence, both viva voce and documentary that Mrs Bullard's illness and subsequent death may have been associated with her pregnancy. However, the only "medical report" in evidence is that of Dr Frumentus Leon which was done, not as a result of his personal examination of Mrs Bullard, or even after she was hospitalized in Florida, but rather as a result of a "careful review" of Mrs Bullard's medical notes made during her various visits to the hospital during her pregnancy and post-delivery up to 16 January 2003. However, other than Mr Bullard's testimony of his late wife's illness and hospitalization post 16 January 2003, coupled with invoices for medical attention by persons and/or facilities in the United States, there is no evidence as to what illness Mrs Bullard had or the cause of her death. No death certificate was put into evidence. According to the plaintiff "the day-to-day caring for our baby was the reason that my wife's pressure elevated and got worse; she was admitted to hospital in February 2003 where her diagnosis was said to be passing of a mild stroke on the left side of her body." Mr Bullard under cross examination admitted that he may have been mistaken about that date and preferred to rely on Dr Leon's report which stated that the incident to which he referred occurred on 8 January 2003, although Dr Leon referred to it as a "transient ischemic attack."

130. Mr Bullard also appeared to have attributed some of the deterioration in Mrs Bullard's health to problems with the hospital's medical equipment following the hurricanes in 2004.

131. According to Mrs Francis, in her experience, a patient's medical care is not adversely affected by an insurance company's failure to pay a claim and that in this case, the hospital would have been advised that the claim was being investigated. No evidence was led to the contrary, although the evidence is that Mrs Bullard remained in hospital for more than a year after the defendant notified the plaintiff that coverage had been rescinded.

132. No evidence was led as to any expenses incurred by the plaintiff for travel expenses.

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

Delivered this 14th day of November 2011

Estelle G. Evans
Justice