22-07-05

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 7/2005
Grand Court No. 174/04

BETWEEN

DAVID ROBERT ZELLER

PLAINTIFF/APPELLANT

AND

BRITISH CAYMAN INSURANCE CO. LTD

DEFENDANT/RESPONDENT

BEFORE: **The Rt. Hon. Mr. Justice E. Zacca, P**
The Hon. Mr. Justice M.R. Taylor, J.A.
The Hon. Mr. Justice Ian Forte, J.A.

Appearances: Alan Turner and Andrea Dunsby instructed by Turner & Roulstone for appellant. Ingrid Pierce and Timothy Cooke instructed by Walkers for the Respondent.

Heard: April 5th & 11th, 2005 Delivered: 22nd July, 2005

FORTE, J.A.

Judgment and Reasons

I have had the opportunity of reading, in draft, the judgment of Taylor, J.A. and unhappily because of my opinion in respect of one aspect of the appeal, find myself unable to agree with his conclusion.

As Taylor J.A. has admirably summarized the evidence in the case, it will be unnecessary for me to do so, except in relation to those aspects upon which my conclusion will be founded.

I begin by emphasizing that Insurance Contracts, such as that in the instant appeal, are governed by the principle of uberrima fides. They depend on the utmost good faith of the applicant. In my view, the issues in this appeal ought to be decided on that basis.

In this regard, I agree with the learned trial judge in her reliance on the quoted dicta from the cases of ***Brownlie v. Campbell*** 5 A.C. 925, ***Bates v. Hibbert*** [1866-1867] L.R. 2 Q.B. 595 and ***Joel v. Law Union and Crown Insurance Co.*** [1908] 2 K.B. 863. In particular I reproduce hereunder the dicta of ***Fletcher Moulton in Law Union v. Crown Insurance*** case (supra) with which I agree. He states at pages 883-884:

> "There is therefore something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it, and, if he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing the reasonable man would think, hold that it was material, he has failed in his duty and the policy is avoided ... The disclosure must be all you ought to have realized to be material, not of that only which you did in fact realize to be so."

In my view, applying the above stated principle the resolution of the issue in this case is quite simple. An examination of the application form in the insurance contract in question, reveals the following. Under the section headed "Health Questionnaire" the appellant was asked:

> "To the best of your knowledge and belief has any person named in this application, had within the last seven years, or does such person now have any one of the following?"

Here follows numerous forms of illnesses which are specified, and to which the applicant must answer "yes" or "no". To these questions the appellant answered "no," except with respect to "Goiter Thyroid" trouble, diabetes, to which he answered "yes" and wrote in the word "thyroid". At the time of answering these questions, the appellant knew that he had been diagnosed with "heart murmer," but nevertheless answered in the negative the question as to whether he had then or in the last seven years heart trouble, abnormal blood pressure (hypertension or hypotension) anemia, rheumatic fever. It is debatable whether "heart murmer" could be accurately described as "heart trouble" or that the appellant did not reasonably believe that the heart murmer was in fact "heart trouble". However, having regard to the conclusion at which I have come in relation to the appellant's answers to Section B of the application form I need not address that issue at this time.

It is in relation to the appellant's treatment of Section B, that I am unable to arrive at the same conclusion as Taylor, J.A. For a clear understanding of that section I hereafter set out in relevant detail the information sought of an applicant in Section B. It reads:

> "In addition to the conditions listed in Section A to the best of your knowledge and belief within the last five years has any person named in this application -
>
> (a) Had a physical examination
> (b) Excluding physical examinations, consulted a physician, health care provider or other individual

> or facility for medical or surgical treatment, advice or scanning for any condition not listed in Section A?
>
> (c) Had any departure from good health not previously mentioned in any above questions for which treatment or advice may or may not have been sought?

It is clear and unambiguous from the questions asked in (a) to (c) that the Insurers were concerned with ascertaining whether an applicant had any medical history, not covered in Section A, which may be relevant to their accepting the applicant as an insured.

To the first question (a), the appellant answered "yes", but in respect of (b) and (c) he answered "no".

Section C states:

> "If you have checked "yes" to any part of Section A or Section B please provide complete information in this section and provide medical report (if you need more space please attach a separate sheet of paper).

In this section also, the directions are clear. If the applicant has had as in (a) "physical examination" in the last five years prior to his application he is expected to provide complete information as requested in the following paragraph as follows:

> The Patients name, the diagnosis and treatment, the date of diagnosis and the physician's name and address or if relevant, the hospital's name and address.

In addition, the applicant is required to provide Medical Report(s).

In this Section, having answered yes to having had a physical examination, the appellant sets out only his diagnosis for Thyroid (Hypo) and

treatment from "1980 to present". There is no mention in this Section either of his heart murmur or his diagnosis of high cholesterol level.

Under a heading "PLEASE READ CAREFULLY – THIS SECTION MUST BE DATED AND SIGNED," the following statement appears:

> "The statement and answers made herein are complete and correct to the best of my knowledge and belief. Should any statements or answers contained in this application be untrue (if such statements are fraudulent or material to the acceptance of this application) then the contract(s) may be cancelled by the Insurer and their obligation shall consist only of the return of any subscription changes actually paid less the amount of any benefits paid under the contract."

The appellant thereby had notice of the consequence of any deception practised, in the giving of the requested information.

It is not disputed that the appellant, having answered positively to having had a physical examination, did not reveal that the examination by his physician(s) had alerted him to his heart murmur and the high level of cholesterol.

In my view, to maintain that "to the best of his knowledge and belief" he did not have a disease illness or condition, cannot avail him in respect of his treatment of the question in Section B (a) to which he answered "yes" and which required him, thereafter, to give information which he failed to do. There was abundance of evidence of the many physical examinations he had had within the relevant period, as well as the diagnosis of the physicians and the suggested treatment. The appellant cannot therefore truthfully say that it was not to his knowledge that he had been diagnosed with heart murmur and high cholesterol

as a result of his physical examinations. The mere fact that the questions were asked in the application form must have indicated to him that the answers would be material to the decision of the insurers as to whether he would be offered insurance at all, or at an elevated premium. To put it another way, any reasonable person acting in utmost good faith, attending as the appellant did, for physical examinations which resulted in his being told of his heart murmur and high cholesterol level, would have revealed that information in Section B.

In this regard, I agree with the reasoning of the learned trial judge in coming to her conclusion as to whether the non-disclosure was material to the acceptance of the Insurers of the applicant. Speaking of the appellant, she said:

> "He must in my view, have been alerted to the need for a completely honest declaration. The heart murmur and high cholesterol independently can lead to complications and it is not difficult to come to the conclusion that an Insurance Company would want to know about these unusual conditions in a man. The fact that the plaintiff believed his condition did not require any great medical attention is not the question; the authorities are clear. In order to exonerate the Plaintiff there must be some reasonable grounds for belief."

In the instant case, it must be remembered, that the application form obviously referred to circumstances where a "group" is applying for insurance, as is evident in the wording "to the best of your knowledge and belief has any person named in this application." The applicant, however, answered questions in relation to his own medical history. Consequently, his medical history, the disclosure of which was required in Section B, must have been to his knowledge. In my opinion, the question whether he believed that his "heart murmur" and high

cholesterol were diseases or illnesses became irrelevant, as what he was being asked to declare was his visits for physical examinations, and the diagnosis at each of these examinations. This he did not answer and therefore his "statement and answers made "herein" (the application form) were not complete and correct "to the best of [his] knowledge and belief." Consequently, the appellants were entitled to cancel the policy.

For these reasons I would dismiss the appeal and affirm the orders made below.

Forte, J.A.

ZACCA, P.

I have had the opportunity of reading, in draft, the judgments of Taylor, J.A. and Forte, J.A.

I find myself in agreement with the conclusion and reasons of Forte, J.A. I would dismiss the appeal and affirm the Order of the Grand Court Judge.

Zacca, P.

JUDGMENT AND REASONS

TAYLOR, J.A.

David Zeller appeals from the dismissal of his claim against his employer's group health insurer for some $250,000 in medical expenses incurred for open-heart surgery and from the judgment given against him at trial on the insurer's counterclaim for some $7,000 in medical expenses that it had already paid before cancelling his coverage.

The trial judge's decision rejecting Mr. Zeller's claim and allowing the company's counterclaim is based on a finding that in his application for coverage Mr. Zeller misrepresented his medical condition by failing to disclose that on physical examinations during the previous five years he had been found to have an elevated cholesterol level and on two occasions a heart murmur. There was no evidence connecting either condition with the heart problem for which he ultimately had to undergo surgery. The company's position was that, when combined with a hypothyroid condition that Mr. Zeller disclosed and for which coverage was excluded, these findings would have influenced a reasonable insurer either in deciding whether to accept his application or in setting the premium, and that had it known of them it would itself have refused coverage in Mr. Zeller's case. The

judge held that there had been non-disclosure and material misrepresentation entitling the insurer, when it discovered the facts, to declare the coverage void *ab initio*.

At trial the company cited failure to disclose high blood pressure as an added factor, but the trial judge did not accept that Mr. Zeller's blood pressure had been such as to require disclosure. The point was not taken on appeal.

(a) The Health Questionnaire

Central to the issues raised is an understanding of the "Health Questionnaire" contained in the company's "Group Enrolment Information Form" which Mr. Zeller, previously a United States resident, was required to complete in November, 2001, before commencing employment on the Island, his acceptance for health insurance being essential to obtaining the work permit that he required in order to be employed in a managerial capacity by a company here in the swimming pool business.

The questionnaire seeks answers with respect to each person to be covered, which in his case meant Mr. Zeller alone, because he did not seek coverage for any dependants. Section "A" requires "yes" or "no" answers to 15 questions that ask whether he suffers, or has during the last seven years suffered, from certain specifically-named conditions. Section "B" seeks "yes" or "no" answers to three general questions that do not refer to specific medical conditions. Section "C", which has particular relevance in the present

case, asks the applicant to provide specified information, on a form that follows, and also to supply medical reports, in the event that the applicant has answered "yes" to any of the questions contained in Sections "A" or "B".

With one exception, the questions contained in Section "A" refer to specific health problems, the exception being a question relating to current pregnancy. To Section "A" question (d), which asks whether he suffers, or has within the last seven years suffered, from "Goiter, thyroid trouble or diabetes", Mr. Zeller answered "yes", adding the word: "Thyroid". He answered "no" to every other Section "A" question including question "A(k)" which asks whether he has, or has had, "heart trouble, abnormal blood pressure (hyp*er*tension or hyp*o*tension), anemia, rheumatic fever".

Section "B" names no specific medical problems. It asks three general and, at first glance, somewhat puzzling questions with which the argument below was particularly concerned, as are the trial judge's reasons for judgment:

> SECTION B -- In addition to the conditions listed in SECTION A, to the best of your knowledge and belief, within the last five years, has any person named in this application:
>
> (a) Had a physical examination?
>
> (b) Excluding physical examinations, consulted a physician, health care provider, or other individual or facility for medical or surgical treatment, advice, or screening for any condition not listed in SECTION A?

(c) Had any departure from good health not previously mentioned in any of the above questions for which treatment or advice may or may not have been sought?

Mr. Zeller answered "yes" to "B(a)", thereby indicating that he had undergone at least one physical examination during the previous five years. He answered "no" to "B(b)", indicating that "excluding physical examinations" he had not during the previous five years consulted anyone in the health care field for "advice or screening for any condition not listed in Section A". He answered "no" also to "B(c)", thereby indicating that, with the exception of the previously-mentioned hypothyroid condition, he had not during the previous five years had "any departure from good health".

Following the questionnaire appears a clause in which the applicant acknowledges that the "statements and answers made herein are complete and correct to the best of my knowledge and belief", and that should any "such statements or answers be untrue" and "fraudulent or material to the acceptance of this application" the insurance may be cancelled. There is no suggestion that the applicant has any obligation of disclosure beyond responding to the questionnaire completely and correctly to the best of his knowledge and belief. The clause says only that the insurance coverage may be cancelled if any material statement made or answer given is untrue.

Mr. Zeller was then 52. His evidence was that except for his thyroid condition, which had been effectively controlled by medication, his health had been excellent. He

said that he engaged in "extreme" sports, including sea diving to 70 feet without air supply. He did not believe that he suffered, or had suffered, from any other condition of a sort to which he understood the questionnaire to refer. With respect to elevated cholesterol and the heart murmur that had twice been detected during the previous five years, he did not consider either to be a "condition not listed in Section A", for the purpose of "B(b)", which in any event excluded conditions discovered on physical examination, or a "departure from good health" for the purpose of "B(c)".

Having answered "yes" to "A(d)", with reference to his thyroid condition, and "yes" also to "B(a)", which asked whether he had "had a physical examination", Mr. Zeller was then required to address Section "C", which says:

> SECTION C -- If you have checked "YES" to any part of SECTION A or SECTION B, please PROVIDE COMPLETE INFORMATION ON THIS SECTION AND PROVIDE MEDICAL REPORT.

Below appears a four-column form in which the applicant is asked to state: (i) "Patient's Name", (ii) "Diagnosis and Treatment", (iii) "Date:" "from" and "to", and (iv) "Physician's Name and Address or Hospital's Name and Address". In the first column Mr. Zeller entered his name. In the second, under "Diagnosis and Treatment", he wrote: "Thyroid (hypo)". In the third he wrote: "1980 to Present". In the fourth, under "Physician's Name and Address", he wrote his thyroid medication, instead of the name of his doctor. He provided no medical reports.

Although he had answered "yes" to question "B(a)", indicating that he had received at least one "physical examination" during the last five years, Mr. Zeller did not in the Section "C" form say anything with respect to the results of such examination other than the reference to his thyroid condition. It was because of this condition that he had for many years undergone physical examinations in order to renew a prescription. He made no mention in the Section "C" form of the heart murmur or elevated cholesterol identified during, or as a result of, such physical examinations.

When asked why he sent no medical reports, Mr. Zeller said that he had none and it would be difficult to get them from his doctor in the United States. He does not appear, from the notes of evidence that we have seen, to have been asked why, having said in answer to "B(a)" that he had been physically examined during the last five years, he did not record in Section "C", under "Diagnosis and Treatment", the heart murmur and cholesterol level of which he had been told as a result of such examinations.

From the evidence we have seen it must be concluded that he did not believe this to be information of the type that the questionnaire sought.

?

(b) <u>The Construction Issue</u>

As already noted, Section "A" lists specific conditions, question "B(a)" asks whether Mr. Zeller has undergone physical examination, question "B(b)" excludes

physical examinations in asking whether he has sought attention for "any condition not listed in Section A", and question "B(c)" enquires whether he has had "any departure from good health" that has not previously been mentioned.

The information then sought in Section "C" relates to the "Diagnosis and Treatment" of conditions, and the period of time during which they have been diagnosed and treated. "Diagnosis" is defined in the Shorter Oxford English Dictionary as:

> Determination of the nature of a diseased condition; identification of a disease by investigation of its symptoms and history; also the formal statement of this.

Section "C" is to be completed in the event that the applicant has answered "yes" to any previous question, including question "B(a)", asking whether the applicant has had a physical examination. It could thus be said to seek information regarding any diseased condition, the nature of which has been medically determined, or any disease identified through investigation of symptoms and history, the treatment given for either, and the period during which the disease or diseased condition prevailed. "Disease" is defined in the same dictionary as a condition of some part of the body in which "its functions are disturbed or deranged", "illness", "sickness" or "ailment".

Since completion of Section "C" is required in the event of a positive answer to any of the earlier questions, it forms a useful part of the context in which those questions are asked. In this context one must ask whether Mr. Zeller's heart murmur and elevated

cholesterol would be understood by a reasonable person in Mr. Zeller's position to be the sort of conditions to which the questionnaire refers.

In approaching this question of construction the trial judge makes no mention of Section "C". Its significance may not have been emphasized in argument below and was drawn to our attention only during argument by counsel for the Respondent. It is in Section "C" that an affirmative answer to the question asked by "B(a)" -- whether the applicant has had a "physical examination" -- is given meaning. It must be because findings made on or as a result of physical examination are to be disclosed in Section "C" that question "B(b)" *excludes* physical examinations in asking whether the applicant has consulted anyone in the health care field for any condition not listed in Section "A". The consequence also of an affirmative answer to "B(b)" is that the applicant must provide the information sought in Section "C", and this is true too of an affirmative answer to question "B(c)", regarding "any departure from good health not previously mentioned". It is Section "C" that makes sense of these earlier questions. When its significance was drawn to our attention, counsel for the Appellant complained that the point had not been raised before. We later resumed the hearing so that the significance of Section "C" might be more fully dealt with in combination with the question whether this could properly be raised by the Respondent in the absence of a Respondent's Notice.

It then became apparent that the significance of Section "C" *had* in fact been mentioned before, that the absence of a Respondent's Notice could not have resulted in

any prejudice, and that the appeal could not properly be decided without Section "C" being taken into account. It is unfortunate that its significance was not emphasized in argument below, and thus understandably not dealt with by the trial judge.

Combined with the reference to "departure from good health" in question "B(c)", the words "Diagnosis and Treatment" in Section "C" suggest that Section "B" is concerned with medically-diagnosed illnesses, sickness or ailments.

(c) The Appellant's Health History

Mr. Zeller's health history was introduced at trial through a series of 14 reports prepared by doctors in the United States and the Cayman Islands to record the results of examinations conducted during a six-year period from June, 1997, to April, 2003, when he was admitted to hospital in Florida for heart surgery.

A summary of these reports prepared by counsel for the insurer shows: (i) two visits in 1997 at both of which elevated cholesterol was noted, but no heart murmur; (ii) two visits in 1998, at the first of which no heart murmur was detected but elevated cholesterol found, and the possibility that Mr. Zeller might need medication for this mentioned -- in response to which he indicated that he did not wish to take medication, and he was warned of the risks involved -- and at the second of which a heart murmur was noted and Mr. Zeller said he had had this most of his life; (iii) two visits in 1999 at

both of which elevated cholesterol was recorded, but no heart murmur; (iv) no visits in 2000; (v) four visits in 2001 at three of which elevated cholesterol was recorded but no heart murmur; (vi) no visits in 2002, by which time his Cayman health coverage had commenced; and (vii) four visits in 2003, at the first of which a loud murmur was detected, and as a result of the second of which he was referred for an echocardiogram, and then to the specialist who recommended surgery.

Dr. Thomas Pescock, of Norfolk, Va., examined Mr. Zeller on nine occasions between June 1997 and October 2001, the month before he filled out the insurance questionnaire. It was on two of these occasions, in November 1998 and February 1999, that Dr. Pescock noted a heart murmur. For subsequent visits by Mr. Zeller in June 1999, and in January, February and October 2001, Dr. Pescock makes no mention of any murmur; in respect of two of these the doctor expressly notes that Mr. Zeller was "without murmur". When Mr. Zeller was examined by a doctor in the Cayman Islands for immigration purposes in December 2001, no heart murmur was found. On the first of the two occasions on which Dr. Pescock detected a murmur, on October 30, 1998, the doctor notes that Mr. Zeller said he had been told in the past of a murmur, the doctor notes that he had not himself detected a murmur before, says that he will check for it again on Mr. Zeller's next visit, and notes that Mr. Zeller "may need echocardiogram at some point". On the second occasion, three months later, Dr. Pescock notes the murmur but that it had not changed, and that he will "follow for now", that he had recommended to

Mr. Zeller that he take an antibiotic as a precaution before undergoing dental surgery, and that this suggestion was made "empirically", that is to say was not made on any scientific basis. Finding no murmur on Mr. Zeller's subsequent visits, Dr. Pescock appears not to have considered that further investigation was necessary.

In a written statement prepared for the present litigation Mr. Zeller's Cayman general practitioner, Dr. Zoe Last, says that Mr. Zeller's electrocardiogram, taken in November 2001, was normal, that a person can have a heart murmur without any abnormality, that is to say a "benign" or "innocent" murmur, and that she understood Mr. Zeller to view his longstanding intermittent murmur in this way.

All but two of Mr. Zeller's visits to Dr. Pescock were for physical examination, or as "follow-up" to physical examination, the exceptions both being consultations for advice on a sore throat. The physical examinations appear to have been prompted by Mr. Zeller's need for medication for his hypothyroid condition, but on one such visit he sought treatment for a sore throat and on two advice concerning a swelling on his leg, which seems thereafter to have resolved itself. His cholesterol level readings were dealt with on "follow-up" visits, when results of his blood tests had been received. On his third visit to Dr. Pescock, in July 1998, Mr. Zeller was cautioned that if the reading proved "high", medication might be necessary. The doctor's notation says: "Even if high, he doesn't want any meds. He understands the potential risks." Dr. Pescock noted on that occasion that there had been cardiac problems in Mr. Zeller's family. We were not

directed to any evidence that Mr. Zeller's readings were ever high enough to require medication. The next reading showed a decrease in cholesterol from 230 to 222. There is no further mention of medication. In February, 1999, Mr. Zeller's reading was 233, in January 2001 it was 205, just above the prescribed "range", but in November 2001 it had risen to 248. There are references in the October 1997 and February 2001 notes to Mr. Zeller working on diet and exercise to lower his cholesterol level.

As mentioned, there appear to have been two occasions on which Mr. Zeller consulted Dr. Pescock for specific advice, on both occasions for a sore throat, a condition not said to be relevant to the coverage. All of his other attendances were for physical examinations, or "follow-up" to physical examinations, and during these he appears to have sought advice again for a sore throat and also for a sore on his leg, a condition not alleged to be material to the coverage.

In such circumstances it does not appear that Mr. Zeller was, in any event, required to answer question "B(b)" affirmatively. That question is concerned only with consultations not associated with physical examinations. The remaining question, "B(c)", is concerned with conditions involving "departure from good health". Mr. Zeller had to decide from the document as a whole what is meant by that expression. The matter of consequence seems to be whether, having had physical examinations, and for this reason having answered "yes" to question "B(a)", Mr. Zeller was required to state in Section "C" the two conditions central to this litigation.

If he was not required to disclose these conditions in Section "C" as a result of his affirmative answer to "B(a)", it does not seem that they would constitute a "departure from good health" so as to require an affirmative answer to "B(c)", and for this reason that he would have to provide information regarding them in Section "C".

The last-mentioned point is further dealt with below.

(d) The Decision at Trial

The trial judge found both conditions to be "material", that is to say relevant to the risk, and accepted that while neither condition would alone have resulted in refusal of coverage, taken together with Mr. Zeller's thyroid condition they would, if disclosed, have resulted in the defendant declining coverage in his case.

The judge did not find that Mr. Zeller should have answered "yes" to question "A(k)", which asks whether he has, or had had, among other things, "heart trouble". It is with respect to his failure to answer "yes" to questions "B(b)" and "B(c)" that the judge found him to have been guilty of non-disclosure. These questions ask whether, to the best of his knowledge and belief, he had within the last five years:

> (b) *Excluding physical examinations*, consulted a physician, health care provider, or other individual or facility for medical or surgical treatment, advice, or screening for any condition not listed in SECTION A? [Emphasis added]

(c) Had *any departure from good health* not previously mentioned in any of the above questions for which treatment or advice may or may not have been sought? [Emphasis added]

In concluding that no ambiguity is involved in these questions, and that they ought to have been answered affirmatively, the judge said:

> The distinguishing feature in this case is that the question asked, is whether there is any departure from good health, not previously mentioned in any of the above questions for which treatment advice may or may not have been sought? The question is not ambiguous, it is clear. The Plaintiff is an educated American citizen who was diagnosed with a heart murmur and a high cholesterol condition. He was asked to exercise and diet for the cholesterol condition. He was given advice by the doctor. The Plaintiff alleges that he was diagnosed with a heart murmur but he honestly believed that he was of good health and that the heart murmur would not be of great significance in his fitness. This is not a question of the accuracy of a quantum or the accuracy of an opinion. This is a straight question as to whether there has been a departure from good health or assessment of conditions not previously mentioned in section A. Mr. Turner takes the point that it is only if the insured had gone for anything other than a physical examination and something was discovered should he have answered yes to the subsection B question. With due respect to Mr. Turner, that makes it an unrealistic proposition. If, for example, one had gone for a physical examination and had discovered that one had some communicable disease and that particular disease was not mentioned in section A, is it then to be said that that should not have been disclosed by the Plaintiff. With respect I cannot agree. If the Plaintiff when undergoing a physical examination had been discovered with having a heart murmur, then I believe that is covered under section B. However, Mr. Turner submits that if it was material then a specific question would have been asked under section A, that too is unrealistic. Not every questionnaire can be tailored to meet the individual's needs. So the question must remain now for me to decide whether, when the Plaintiff answered "No" to these two questions in circumstances where he had not been alerted to any serious illness he was guilty of misrepresentation or non disclosure. He had been informed that he had a heart murmur, could it have been his honest belief that he did not have a condition that made him not in the best of health or could he honestly have stated that he did not have a condition on which he did not

> seek advice. Realistically, after the Plaintiff was told he had a heart murmur, he must have always been aware of the fact that he would need special attention if he was to have surgery on any part of his body as he had already been told that if he had a dental condition, he would have to take an antibiotic because of his heart murmur. It is common knowledge that not everybody in the world has a heart murmur and that having a heart murmur must be a departure from the norm. Does therefore section B asks for that sort of information unambiguously, I hold that section B subsection (a) and (c) does so and invites an insured in a contract of *uberrima fides* to search his/her mind and to come up with any knowledge that he/she believes may affect the insured taking the risk of insurance.
>
> . . . . .
>
> In order to exonerate the Plaintiff there must be some reasonable grounds for belief. The question is not, are you now in good health or have you ever been in good health. The question is have you ever consulted a doctor for any condition or sought advice on any condition and I find it difficult to hold that a man who has been diagnosed with a heart murmur would not have consulted a doctor as to the consequences of that. The evidence is clear on the high cholesterol that he, in fact was given advice and it was suggested that he take medication for cholesterol. The obligation to disclose must depend on the knowledge that the Plaintiff possessed and I hold that the questions are unambiguous and that the Plaintiff is guilty of non-disclosure in his responses. I therefore hold for the Defendant and declare that the policy of insurance is avoidable for non-disclosure.

The Appellant says that the trial judge erred in finding the questionnaire unambiguous, and contends that the judge ought to have applied modern authority establishing that when using questionnaires in offering "consumer insurance", as opposed to business insurance, insurers must ask clear questions on material matters.

The Appellant says also that any ambiguity in such a questionnaire should be resolved against the insurer by application of the *contra proferentem* rule.

(e) The Authorities

Four English decisions appear to have particular relevance: *Joel v. Law Union and Crown Insurance Co.* [1908] 2 K.B. 637 (C.A.); *Zurich General Accident and Liability Insurance Co. Ltd. v. Morrison et al.* [1942] 2 K.B. 53 (C.A.); *Hair v. Prudential Assurance Co. Ltd.* [1983] 2 Lloyds L.R. 667 (Q.B. Div.); and *Economides v. Commercial Union Assurance Co. p.l.c.* [1997] 3 All E.R. 636 (C.A.).

In *Joel*, Vaughan Williams, L.J. states (at p. 879) that an assured "is always bound, not only to make a true answer to the questions put to him, but spontaneously to disclose any fact within his knowledge which it is material for his assurer to know". This principle, on which the Respondent relies, flows from the duty of utmost good faith, and is stated to apply to life insurance as well as marine insurance. Counsel for the Appellant questions the applicability of that rule today in cases of "consumer insurance", and cites authority in support of that view. *Joel* stands also for the proposition (at p. 880) that the onus of proving non-disclosure lies on the insurer. In the *Zurich* case the point in issue was the materiality of a mis-statement contained in a motor-vehicle insurance application. Goddard, L.J. (as he then was) dealt with the insurer's assertion of misrepresentation in an answer given by the applicant to the question: "How long have you driven motor cars?" To this the applicant replied: "Three years". It transpired that the applicant had never had more than a temporary licence and that he had driven little on public roads, although he had driven on private roads. Goddard, L.J., while recognizing the rule

regarding disclosure as stated in *Joel*, observes (at p. 64) that if the insurers wished to know for how long the applicant had driven on public roads, or had held a licence, "they should ask the question in plain terms".

In the *Hair* case, a claim on a fire policy, Woolf, J. (as he then was), applied (at p. 673) the following passage from *McGillivray on Insurance Law* (reproduced in the same terms in the 10th edition, 2003, at para. 17-19):

> It is more likely, however, that the questions asked will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers to them are warranted, it may be inferred that the insurer has waived his right to information either on the same matters but outside the scope of the questions or on matters kindred to the subject-matter of the questions. Thus, if an insurer asks, "How many accidents have you had in the last three years?" it may well be implied that he does not want to know of accidents before that time, though these would still be material. If it were asked whether any of the proposer's parents, brothers or sisters had died of consumption or been inflicted with insanity, it might well be inferred that the insurer had waived similar information concerning more remote relatives, so that he could not avoid the policy for non-disclosure of an aunt's death of consumption or an uncle's insanity. Whether or not such waiver is present depends on a true construction of the proposal form, the test being, would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue?

In *Economides* the insured had placed a value on personal property for the purposes of a burglary policy that proved to be much less than the true value. The Court of Appeal held the valuation to be a statement of belief within the meaning of s. 20(5) of the *Marine Insurance Act*, 1906, and therefore 'true' if made in good faith. The Court held the sole

obligation on an insured in this connection to be that of honesty, that is to say belief in the accuracy of the valuation that had been made by his father. The Court held that where an individual seeks insurance for private as opposed to business purposes he or she need only disclose those material facts of which he or she has knowledge. Simon Brown, L.J., observed (at p. 646) that if householders were obliged to make inquiries not specified in the form in order to support their valuation, they would be "left entirely uncertain of the obligations put on them and at risk of having insurers seek to avoid liability under the policies". The judge added (at p. 646):

> In my judgment, if insurers wish to place on their assured an obligation to carry out specific inquiries or otherwise take steps to provide objective justification for their valuations, they must spell out these requirements in the proposal form.

The facts in that case are in important respects different from the present, but the decision lends support to the Appellant's submission that, in light of what Simon Brown, L.J., calls (at p. 646) "practical and policy considerations", the obligation on a private individual seeking insurance in an application form containing specific questions goes no further than that of honestly answering the questions that the insurer asks. The judge cites with approval (at p. 648) from the *General Statement of Insurance Practice* published by the Association of British Insurers: "Those matters which insurers have generally found to be material will be the subject of clear questions in proposal forms".

Thus there is modern authority dealing with non-business, or "consumer", insurance -- insurance offered to private individuals whose knowledge of what must be disclosed will be gained from the questionnaire -- that significantly qualifies the rule that applicants for insurance have an obligation of disclosure going beyond the scope of an insurer's questions. It seems from these authorities inconsistent with the duty of candour resting on the parties that an insurer should in some circumstances assert as relevant, that is to say material to the risk, information not sought by questions that it has chosen to ask in a questionnaire in regard to related matters.

(f) The Ultimate Question

The difficult question of whether the insurer's form calls in this case for disclosure of the heart murmur and elevated cholesterol of which Mr. Zeller had been informed thus turns in the end on whether these would appear to the reasonable reader in his position to be matters to which the questionnaire is addressed.

The learned trial judge concluded that the questionnaire called for disclosure of "any departure from good health", adopting these words of question "B(c)", and that this expression means any condition that rendered the applicant "not in the best of health". The judge said that if when undergoing physical examination Mr. Zeller were found to have a heart murmur "then I believe that is covered under section B". The judge notes that Mr. Zeller had been advised to take an antibiotic as a precaution before undergoing

dentistry, and says that "having a heart murmur must be a departure from the norm". The judge concludes that questions "B(a)" and "B(c)" unambiguously seek such information, and invite the applicant "to come up with any knowledge that he or she believes may affect the insurer taking the risk of insurance". The judge expresses the same view with respect to elevated cholesterol readings, for which the judge says that it had been suggested to Mr. Zeller that he take medication.

The view adopted by the judge, that the duty of utmost good faith resting on the applicant requires disclosure of any knowledge that the applicant believes may affect the insurer in taking the risk, must be qualified by the view expressed in the authorities above cited regarding the limitation imposed on that duty where 'private' insurance coverage is sought by completion of an insurer's questionnaire.

In the present case, the expression "departure from good health" contained in question "B(c)", as the trial judge observes, provides assistance in determining the nature of the "conditions" covered by "B(b)" and "B(c)" and the extent of disclosure required in the event of an affirmative answer to "B(a)". The judge construes the expression as extending to such conditions as heart murmur and elevated cholesterol, which raise questions with respect to future health, although not involving any diagnosis of present illness, or interference with the applicant's present functions or well-being. This gives to the expression a broader meaning than it would normally bear. Certainly when Section "C" is taken into account, an aspect of the questionnaire that does not seem to

have been fully canvassed before the trial judge, the expression "departure from good health" bears in this context a narrower meaning. Section "C", which calls for statement of "Diagnosis and Treatment", suggests that Section "B" is concerned with cases in which there has been a finding of what can properly be called a disease. Elevated cholesterol may be seen as a factor increasing the risk of development of disease, and investigation of a heart murmur may be known to lead in some cases to discovery of some disorder, but it does not seem likely that either condition would be regarded by the ordinary applicant in Mr. Zeller's position as in itself amounting to a disease, that is to say a sickness, illness or ailment from which he or she has been diagnosed to be suffering.

Had the insurer wished to know of conditions that involved no diagnosed illness or sickness, but rather increased risk that disease might in future develop or be identified, such information could readily have been sought by general, and not necessarily specific, questions. These the insurer chose not to ask.

At the time that he completed his application form it seems to be accepted that Mr. Zeller was not suffering from "heart trouble" for the purposes of the question "A(k)". The murmur that Dr. Pescock identified on two occasions was not such as to cause the doctor to regard further investigation as necessary. The doctor's suggestion that Mr. Zeller take an antibiotic before undergoing dentistry was precautionary, not made on any scientific basis, and made only in respect of dental work. Not hearing the murmur on later examinations, Dr. Pescock seems not to have been further concerned in this regard.

So far as Mr. Zeller's cholesterol readings are concerned, Dr. Pescock suggested at one point that medication might be required if the readings were "high". He does not thereafter appear to have pursued the matter. Whether this was because Mr. Zeller was resistant to the idea of medication, or because Mr. Zeller's cholesterol readings were never sufficiently "high", is not apparent from the evidence to which we have been referred. Dr. Last said they were "not particularly high", but her evidence was objected to on the ground that she had not been qualified to give expert opinion evidence in the field. We know that Mr. Zeller was advised to exercise and control his diet, and it appears that his cholesterol was at one point almost within the "range".

The judge found the two conditions concerned to be relevant to the risk which the insurer had under consideration, but the same would, no doubt, be true of other factors that the questionnaire does not address at all. The critical issue must be whether, in light of the recent authorities referred to, the questions asked were such as to constitute a waiver by the insurer of disclosure of these conditions.

(g) Conclusion

With the benefit of a more complete review than was available to the trial judge, the answer seems to be that these conditions are not covered by the questions, and thus that the insurer should be taken to have waived their disclosure.

Neither from the advice he had received nor from his own observations, as disclosed by the evidence we have seen, could it be said that he ought to have been aware that he was suffering from any illness, sickness or ailment contemplated by Section "C". The conditions in question were not conditions to which question "B(b)" could properly be taken to refer, nor could they be said to constitute "departure from good health" for the purposes of question "B(c)", these being expressions that refer to some form of disease that had been medically diagnosed, or in the case of question "B(c)" had been brought to the applicant's attention without the need of medical advice.

On a proper construction of Sections "B" and "C", in the context of the questionnaire as a whole, it appears: (i) that the "yes" answer correctly given by Mr. Zeller to question "B(a)" did not require that he disclose in Section "C" the heart murmur at times identified on physical examination or the cholesterol readings noted on or as a result of such examinations; (ii) that since the heart murmur and cholesterol readings had been noted during or as a result of physical examinations, Mr. Zeller was, in any event, correct in answering "no" to question "B(b)"; and (iii) that since neither resulted in awareness of any disease constituting a present "departure from good health", he was correct also in answering "no" to question "B(c)". In these circumstances it cannot be said that the Appellant was guilty of misrepresentation or non-disclosure, and it follows that the insurer would not be entitled to cancel his coverage.

The decision below should for these reasons be set aside and judgment entered for the Appellant on claim and counterclaim. The Appellant should have his costs here and below, to be taxed if not agreed. The terms in which judgment is to be entered, if not agreed, should be spoken to at the next sitting of the court.

M. R. Taylor, J.A.