

7/3/05  
Civl.



1 IN OPEN COURT  
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
3 CAUSE NO: 174 OF 2004

4 BETWEEN:

5 DAVID ROBERT ZELLER

6  
7 AND:

Plaintiff

8 BRITISH CAYMANIAN INSURANCE  
9 COMPANY LIMITED

Defendant

12 BEFORE: THE HON. MADAM JUSTICE LEVERS

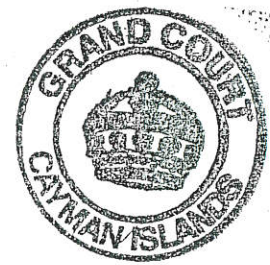
14 Appearance:

15 Counsel for the Plaintiff: A. Turner and Ms. A.  
16 Dunsby of Turner & Roulstone

17 Counsel for the Defendant: Ms. I Pierce of Walkers

19 Heard: February 2-4, 2005

20  
\_\_\_\_\_  
JUDGMENT  
\_\_\_\_\_



23 A Writ of Summons and a Statement of Claim was  
24 filed in this matter, by which the Plaintiff, Mr.

1 Zeller sues the Defendant, British Caymanian

2 Insurance Company Limited for:

3

4 1. Damages for breach of contract;

5 2. For an Order that the Defendant's  
6 cancellation of contract is invalid and of  
7 no effect;

8 3. Interest pursuant to section 34 of the  
9 Judicature Law; and

10 4. Costs.

11

12 The Defendant defends the Claim and Counterclaims

13 for the following relief:

14

15 1. That the Defendant was induced to make the  
16 policy by representations made by the  
17 Plaintiff in the application from which was  
18 misleading;

19 2. That the Plaintiff was not totally honest in  
20 the information given to the Defendant;  
21

22 And the Defendant counterclaims:

23 1. A Declaration that the Defendant was  
24 entitled to avoid the policy;

1           2. The return of all payments made to the  
2            Plaintiff for medical treatments carried on  
3           him; and

4           3. Interest on the net sum.  
5

6    Background

7

8    The Plaintiff, David Robert Zeller, came to Grand  
9    Cayman in November 2001, to work for Pool Patrol  
10   Limited, a company incorporated in the Islands.  
11   He had worked in the Swimming Pool Industry for 31  
12   years at the time. He gives evidence that when he  
13   came for the interview to the Cayman Islands, he  
14   was insured abroad, but was informed that it is  
15   essential to have insurance here and therefore  
16   joined the pool employees' health with British  
17   Caymanian Insurance Company Limited under a group  
18   contract. In order to do this he had to complete  
19   a health questionnaire.

20

1 The Plaintiff alleges that he was in good health  
2 at the time of completing the questionnaire, save  
3 and except for a thyroid problem, which he had had  
4 for some several years. The Plaintiff a 50-year-  
5 old man states that once a year he would have a  
6 blood test performed in relation to his thyroid  
7 condition in order to renew his prescription for  
8 that condition.

9  
10 On the basis of the health questionnaire, British  
11 Caymanian Insurance Company agreed to cover him as  
12 an insured with effect from the 1 December 2001.  
13 However, the Insurance Company specified an  
14 exclusion for anything in relation to  
15 hypothyroidism including complications arising  
16 therefrom.

17  
18 On the 28 December 2001, the Plaintiff visited a  
19 local physician Dr. Madden, in order to perform a

1 physical examination for a work permit  
2 application. At that examination Dr. Madden gave  
3 evidence that everything was normal and most  
4 importantly that he did not detect a heart murmur.  
5 After that, the Plaintiff saw another doctor, Dr.  
6 Last in April 2003 for, as he puts it, his thyroid  
7 medicine. At that time Dr. Last detected a heart  
8 murmur with her stethoscope and thinking that this  
9 was loud and abnormal, she decided to send him to  
10 Dr. Barefoot a cardiologist for appropriate tests.

11

12 Having obtained permission from the Insurance  
13 Company to see Dr. Barefoot, the Plaintiff saw Dr.  
14 Barefoot and was required to have an  
15 echocardiogram. This too was approved and  
16 authorized by the Insurance Company.

17

18 On 11 April 2003, the Plaintiff met with Dr.  
19 Barefoot and was diagnosed as having a valvular

1 heart disease and an atrail defect. The Plaintiff  
2 despite this diagnosis was a asymptomatic. Dr.  
3 Barefoot referred the Plaintiff to Dr. Coy a  
4 cardiologist in Miami for a second opinion.  
5 Approval was once again obtained from the  
6 Insurance Company for this visit. Dr. Coy, at the  
7 end of April 2003, confirmed Dr. Barefoot's  
8 finding and after two additional tests being taken  
9 it was concluded that the Plaintiff needed surgery  
10 to repair his heart. He was then referred to Dr.  
11 Lamelas a surgeon, who performed the surgery at  
12 Mercy Hospital. The surgical procedure replaced  
13 one valve in his heart and repaired another and  
14 patched the hole in his heart. This involved a  
15 pulmonary bypass, an expensive procedure.

16

17 On 13 May 2003, the Plaintiff was discharged from  
18 Mercy Hospital but was required to stay in Florida  
19 in order to attend follow-up visits until Dr. Coy

1 released him. He was finally released by Dr. Coy  
2 on 26 May 2003 and referred back to the Cayman  
3 Islands to Dr. Barefoot.

4

5 Very soon after his return, the Plaintiff had a  
6 set back to his illness. He collapsed. Dr.  
7 Barefoot determined that he had an irregular  
8 heartbeat. After consultation with Dr. Coy,  
9 medication was prescribed for this condition. In  
10 November 2003, he was told to cease taking all  
11 medication, as he was fit to conduct all previous  
12 activities with the possible exception of free  
13 diving.

14

15 In June 2003, the Insurance Company sent out  
16 questionnaires to the Plaintiff, as they  
17 apparently by now had received invoices from the  
18 medical providers. It would appear the  
19 information received by the insurers, as a result

1 of requesting all the medical reports for the  
2 Plaintiff indicated that the Plaintiff had had a  
3 heart murmur and a high cholesterol level  
4 considered by the Insurance Company to be a pre-  
5 existing condition, which they felt he should have  
6 disclosed on his first health questionnaire. It  
7 appears from June 1997 to December 2001, the  
8 Plaintiff had approximately 10 visits to a doctor  
9 abroad in the United States of America and he was  
10 informed that he was asymptomatic for any type of  
11 heart disease but that he did in fact have a heart  
12 murmur, which was heard on two of the occasions.  
13 The Plaintiff states the last occasion on which  
14 the heart murmur was recorded was 20 February 1999  
15 almost 3 years before he completed the health  
16 questionnaire.

17

18 Based on the medical reports of the Plaintiff's  
19 doctors abroad and here, the Insurance Company on

1 the 24 December 2003 wrote to the Plaintiff  
2 canceling the insurance cover retroactively to the  
3 original effective date of the 1 December 2001.  
4 They also sought to reclaim the benefits which  
5 they had already paid amounting to US\$7,197.91 and  
6 stated that once these had been paid, they would  
7 credit Pool Patrol with a refund of all premiums  
8 which they had collected. In order to support his  
9 case, the Plaintiff called Dr. Last, Dr. Madden  
10 and gave evidence himself.

11

12 The Defendant alleges that these were pre-existing  
13 conditions and that had they known of these  
14 conditions, one in conjunction with the other,  
15 they would not have taken the risk of insuring the  
16 Plaintiff and that he had pre-existing conditions  
17 which he knew about and should have disclosed.

18 The Defendant called an independent expert, Dr.  
19 Stewart and a representative of British Caymanian

1 Insurance Company, Mr. Scholefield in support of  
2 its case. The entire issue at hand deals with the  
3 answers given by the Plaintiff in the  
4 questionnaire that was filled up by the Plaintiff  
5 prior to health coverage being given. It is  
6 perhaps convenient at this stage to analyze the  
7 particular questions at issue. Section A of the  
8 Health Questionnaire reads:

9

10 Check each items Yes or No (if  
11 confidentiality is desired, please make  
12 arrangements with your Group  
13 Administrator). To the best of your  
14 knowledge and belief, has any person named  
15 in this application had within the last  
16 seven years, or does such person now have,  
17 any of the following? And specific  
18 questions are asked including:

19

20 Thyroid, Heart trouble, abnormal blood  
21 pressure (hypertension or hypotension),  
22 anemia, and rheumatic fever.

23

24 The Plaintiff answered the question as to thyroid  
25 in the affirmative, but the question as to heart  
26 trouble he answered in the negative, thereby

1 leading the Insurance Company to believe that he  
2 never had any heart trouble. In Section (B), the  
3 question is, "in addition to the conditions listed  
4 in Section A, to the best of your knowledge and  
5 belief, within the past five years, has any person  
6 named in this application:

7

8 (a) Had a physical examination?

9 (b) Excluding physical examination consulted a  
10 physician, health care provider, or other  
11 individual or facility for medical or  
12 surgical treatment, advice, or screening for  
13 any condition not listed in Section A? and

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

18

19 The Plaintiff answered Yes to A and No to B and C.

20 The questionnaire also had the following clause:

21

22 It is understood and agreed that:

23 The statement and answers made herein are  
24 complete and correct to the best of my

1 knowledge and belief. Should any  
2 statements or answers contained in this  
3 application be untrue (if such statements  
4 are fraudulent or material to the  
5 acceptance of this application), then the  
6 contract(s) may be cancelled by the  
7 Insurer and their obligation shall consist  
8 only of the return of any subscription  
9 charges actually paid, less the amount of  
10 any benefits paid under the contract.  
11

12 Mr. Zeller only declared that he suffered from  
13 hypothyroid disease. He did not mention the heart  
14 murmur, nor did he mention the high level of  
15 cholesterol, a condition which he had had from  
16 approximately 1997.

17

18 The Defendant's Case

19

20 It is the Defendant's case that Mr. Zeller was  
21 dishonest since he knowingly gave untrue answers  
22 to the questions, at the time of the application.  
23 Ms. Pierce for the Defendant points out that Mr.  
24 Zeller claims that at the time he completed the

1 questionnaire he was in good health but that he  
2 had been told by doctors, (this is supported by  
3 documentary evidence) that he had high cholesterol  
4 and was told to work on his diet and exercise to  
5 reduce it.

6

7 She further submits that Mr. Zeller had known for  
8 years that he had a heart murmur, certainly prior  
9 to it been detected by Dr. Pecsok his doctor in  
10 the U.S.A. The evidence is that he told Dr.  
11 Pecsok that most of his life he had had a heart  
12 murmur. This can be construed in many ways but  
13 certainly, it must mean for a long time.  
14 Antibiotics were advised for this heart murmur if  
15 surgery of any kind was to be undertaken. Mr.  
16 Zeller admitted that the doctor recommended he  
17 take an antibiotic as a precautionary measure if  
18 he ever had to have dental treatment. Ms. Pierce  
19 alleges that Mr. Zeller knew over a long period of

1 time that he had a high cholesterol problem and a  
2 heart murmur, which are abnormal conditions  
3 covered by section B of the application.

4

5 The Defendant's case is simply this, that had they  
6 known about these conditions in conjunction one  
7 with another, they would not have taken the risk  
8 to insure Mr. Zeller.

9

10 The Plaintiff's case on the other hand is that  
11 based on the evidence, the alleged high blood  
12 pressure, heart murmur and high cholesterol are  
13 not material facts at all and if I was to hold  
14 that they are in fact material facts then Mr.  
15 Zeller honestly believed they were not material.

16 The Plaintiff alleges that these were not pre-  
17 existing conditions. That the heart murmur was  
18 not an illness or a condition, and that in fact it  
19 had no ill effects on his health and that the high

1 cholesterol was such that no medication was  
2 needed. It has been conceded by the Defendant  
3 that an insurer would have taken the risk at the  
4 level of cholesterol, the Plaintiff had, if he  
5 only had had the cholesterol problem.

6

7 Mr. Turner on behalf of the Plaintiff further  
8 argues that had these questions been material,  
9 they should have been asked specifically. The  
10 Defendant responds that if one was to tailor make  
11 every questionnaire to suit the individual being  
12 insured it would be too onerous and to expect it  
13 would be unrealistic. Mr. Turner also argues that  
14 the question as constructed is ambiguous and that  
15 where there is an ambiguity it must be construed  
16 contra proferentem, the maker of the document.

17

18

19

1 The Law

2

3 The basic principle is that insurance involves the  
4 management of risks. The Insurance Law as it  
5 relates to the Cayman Islands is derived from the  
6 English case law and is supplemented by the  
7 Insurance Law (2001 Revision as amended), which is  
8 mainly concerned with licensing and other relevant  
9 CI legislation. An insurance contract is a  
10 contract *uberrima fides* or of the outmost good  
11 faith. The consequences of deliberate fraud and  
12 misrepresentation are common to all contracts.  
13 However, the parties to an insurance contract such  
14 as this are under a duty of "utmost good faith"  
15 which means that they are bound to voluntarily  
16 disclose to each other before the contract is  
17 concluded, any information that is material. The  
18 onus is greater on the insured although both  
19 parties are bound. A failure to disclose however,

1 innocent entitles the insurer to void the contract  
2 *ab initio* and upon avoidance the contract is deemed  
3 never to have existed. The rule was first  
4 explained by Lord Mansfield in Carter v Boehm  
5 (1766) 3 Burr 1905 as follows:

6

7 "Insurance is a contract upon  
8 speculation. The special facts upon which  
9 the contingent chance is to be computed  
10 lie more commonly in the knowledge of the  
11 insured only: the underwriter trusts to  
12 his representation, and proceeds upon  
13 confidence that he does not keep back any  
14 circumstance in his knowledge, to mislead  
15 the underwriter into a belief that the  
16 circumstance does not exist, and to induce  
17 him to estimate the risk as if it did  
18 not exist".  
19

20 The duty of disclosure only extends to the period  
21 in the question asked. Interesting questions  
22 arise in the determination of whether a fact is  
23 material for the purposes of non-disclosure. It  
24 is material if it would influence the formation of  
25 an opinion of a reasonable or prudent insurer

1 deciding whether or not to accept the risk or what  
2 premium to charge. Even, if, the insurer had  
3 known the fact and he would not have acted  
4 differently, the fact is material. If the insurer  
5 would have needed to know it or wanted to know it  
6 in the assessment of the risks and the premium to  
7 be charged, it is sufficient to establish  
8 materiality. In Pan Atlantic Insurance Company v  
9 Pinetop Insurance (1995) 1 AC 50, the House of  
10 Lords appeared to attempt to mitigate this  
11 harshness by saying the non disclosure of a fact  
12 must also have induced the insurer to enter into  
13 the contract.

14

15 Ms. Pierce's Submission on behalf of the Defendant

16

17 Ms. Pierce submits that an assured must not  
18 misrepresent or make material non-disclosure. The  
19 test of materiality is whether a prudent insurer  
20 might be influenced in fixing the premium or

1 taking the risk if he knew of the fact misstated  
2 or withheld. She relies on the expert witness,  
3 Dr. Stewart and submits that his evidence confirms  
4 that any insurance company would have been  
5 influenced by all three conditions and that they  
6 would in fact have been taken as pre-existing  
7 conditions. She reminds the Court that an  
8 Insurance Contract is a contract *uberrima fides*  
9 and full disclosure, (without being asked) of all  
10 the material circumstances is essential. She  
11 submits that the obligation on the assured is to  
12 disclose what he knows, whether or not he thinks  
13 it is material. She relies on the case of Bates v  
14 Hewitt (1866) LR 2 QB 595 at page 607 per Cockburn  
15 CJ:

16

17            " It is also well established law,  
18            that it is immaterial whether the  
19            omission to communicate a  
20            material fact arises from  
21            intention, or indifference, or a  
22            mistake, or from it not being

1 present to the mind of the  
2 assured that the fact was one  
3 which it was material to make  
4 known''.

5  
6 She submits strenuously that the assured's honesty  
7 is not enough. The assured should not willfully  
8 shut his eyes to the truth. Whereas the insurer  
9 has to show that the assured had the relevant  
10 knowledge, it does not have to establish knowledge  
11 of materiality. Finally, she submits that the  
12 insurer must demonstrate that on a balance a full  
13 picture of the risk was not presented to it and  
14 that it was induced to enter into a contract by  
15 the assured's false presentation of the risk.

16  
17 Mr. Turner's Submissions on behalf of the  
18 Plaintiff.

19  
20 Mr. Turner for the Plaintiff agrees that the test  
21 of whether a fact is material or not is to be  
22 determined by a reasonably prudent insurer, but he

1 does not agree that it is not for the Plaintiff to  
2 determine whether the facts are material or not.  
3 He also submits that the high blood pressure,  
4 heart murmur and high cholesterol are not material  
5 facts at all. He says that Mr. Zeller is a fit  
6 man with no history of disease or serious illness  
7 except for his thyroid problems and strenuously  
8 urges the Court to hold that the conditions  
9 allegedly not disclosed by the Plaintiff are not  
10 material for several reasons including, the fact  
11 that common sense would lead any person to  
12 reasonably assume that if they were considered by  
13 the Defendant to be material matters they would be  
14 specifically dealt with in the Defendant's health  
15 questionnaire. He submits that the non existence  
16 of any specific question, should cause this Court  
17 to conclude that these are not material matters  
18 for insurers in Cayman and/or to view with great  
19 suspicion the evidence put forward by the

1 Defendant in support of its proposition that these  
2 are material matters. In the alternative, he says  
3 that if I was to hold that these are material  
4 matters and should have been disclosed by the  
5 Plaintiff, the questions are so ambiguous that it  
6 must be construed contra proferentum, the maker of  
7 the document. He relies on the association of  
8 British Insurer's statement of general insurance  
9 practices and urges the Court to hold that those  
10 matters which insurers have found generally to be  
11 material will be the subject of clear questions.

12

13 Mr. Turner submits that when the questions contain  
14 the phrase "to the best of your knowledge and  
15 belief" the honesty of the Plaintiff is relevant.

16 He submits that the Plaintiff in this case  
17 honestly believed that he was not an ill man and  
18 he honestly believed that he did not have  
19 hypertension (high blood pressure), I agree with

1 Mr. Turner on the latter aspect of his submission.

2 I will not waste further time on the question of  
3 high blood pressure. The Plaintiff was diagnosed  
4 as having high blood pressure on two occasions in  
5 his lifetime and that to my mind is not the test  
6 for a pre-existing material condition as defined  
7 by Dr. Stewart. The test is high blood pressure  
8 over a period of time. We are now left with the  
9 question of high cholesterol and heart murmur.

10 Dr. Stewart's evidence was that all three of the  
11 above health issues were conditions and there is  
12 no doubt that they should have been disclosed to  
13 the insurance company. He like Mr. Scholefield  
14 stated that had they known this, they would not  
15 have insured the Plaintiff.

16

17 Mr. Turner for the Plaintiff places great reliance  
18 on the case of Economides v Commercial Union  
19 Assurance Company Plc [1997] 3 All ER 636. In

1 that case, a young man insured the contents of his  
2 flat for the sum of \$12,000. Later, when his  
3 parents moved into the apartment the contents to  
4 be insured increased and the insurance was  
5 increased by him in 1999 to \$16,000. The  
6 information for the quantum came from his father  
7 who suggested that he increase the value by \$4000.  
8 No one suggested that in those initial years it  
9 failed to represent the full replacement value of  
10 the contents. The issue in the case was whether  
11 the appellant had misrepresented the value of the  
12 contents, as when the premises were burgled later  
13 on, the loss was assessed at just below \$30,917  
14 and accepted at this sum. The insurance company  
15 argued that given that a contract of insurance is  
16 based on the utmost of good faith and that the  
17 insured will almost always know far more about the  
18 facts than the insurer, it was entitled to cancel  
19 the contract and that the Insurance Company was

1 entitled to cancel as the Appellant had no  
2 reasonable grounds to support his valuation of the  
3 contents and that he should not merely rely,  
4 however, honestly on his father's say so. The  
5 Respondent insured on the other hand argued that  
6 the basis of belief does not have to be an  
7 objective and reasonable one. In the  
8 circumstances of that particular case, when the  
9 appellant's father told him the value there was a  
10 sufficient basis for his representation. The  
11 insured argued he was under a duty of honesty not  
12 a duty of care. Held, there must be some basis  
13 for a representation of belief before it can be  
14 said to be made in good faith. But the  
15 requirement as stated in section 20 (5) of the  
16 Marine Insurance Act was one only of honesty. The  
17 assured however, must not blindly shut his eyes to  
18 the truth. That is of course a very different  
19 thing from imputing knowledge of a fact, to

1 someone who is in truth ignorant of it. That case  
2 also held that the appellant insured was under no  
3 obligation to make further enquires to establish  
4 reasonable grounds for his belief in the accuracy  
5 of his valuation. Mr. Turner places great  
6 emphasis on this case and urges this Court to  
7 follow it. On the other hand, Ms. Pierce for the  
8 Insurance Company relies on several authorities  
9 including Joel v Law Union and Crown Insurance  
10 Company (1908) 2 KB at page 863 and Bates v Hewitt  
11 (1867) LR2 QB at page 595 and Lee v British Law  
12 Insurance Company Ltd CA April 1972, 2 Lloyd's  
13 Rep. At page 49. Those cases outline the  
14 principles as I believe agreed between the parties  
15 and as outlined in this judgment.

16

17 The real question in issue is whether the  
18 Plaintiff in this case, if he honestly believed he  
19 was answering the questions truthfully, is guilty

1 of misrepresentation and or non-disclosure. In  
2 the case of Brownlie v Campbell, 5 App Cas. at  
3 page 925 and in particular at page 954 it was  
4 said:

5

6            ''In policies of insurance,  
7            whether marine life or life  
8            insurance there is an  
9            understanding that the contract  
10           is uberrima fides. That if you  
11           know any circumstance at all that  
12           may influence the underwriter's  
13           opinion as to the risk he is  
14           incurring and consequently as to  
15           whether he will take it or what  
16           premium he will charge if he does  
17           take it, you will state what you  
18           know. There is an obligation  
19           there to disclose what you know  
20           and the concealment of a material  
21           circumstance known to you,  
22           whether you thought it material  
23           or not, avoids the policy.''

24

25 She further relies on the case of Bates v Hewitt

26 (1866-1867) LR 2QB 595 per Cockburn CJ at page

27 607:

28

1            ''It is also well established law,  
2            that it is immaterial whether the  
3            omission to communicate a  
4            material fact arises from  
5            intention, or indifference, or a  
6            mistake, or from it not being  
7            present to the mind of the  
8            assured that the fact was one  
9            which it was material to make  
10           known''.

12    The case of Joel v Law Union and Crown Insurance  
13    Company [1908] 2 KB 863, CA per Fletcher Moulton  
14    LJ at page 883-884:

15  
16            ''There is, therefore, something  
17            more than an obligation to treat  
18            the insurer honestly and frankly,  
19            and freely to tell him what the  
20            applicant thinks it is material  
21            he should know. That duty, no  
22            doubt, must be performed, but it  
23            does not suffice that the  
24            applicant should bona fide have  
25            performed it to the best of his  
26            understanding. There is the  
27            further duty that he should do it  
28            to the extent that a reasonable  
29            man would have done it; and, if  
30            he has fallen short of that by  
31            reason of his bona fide  
32            considering the matter not  
33            material, whereas the jury, as

1 representing the reasonable man  
2 would think, hold that it was  
3 material, he has failed in his  
4 duty and the policy is avoided.  
5 This further duty is analogous to  
6 a duty to do an act which you  
7 undertake with reasonable care  
8 and skill, a failure to do which  
9 amounts to negligence, which is  
10 not atoned for by any amount of  
11 honesty or good intention. The  
12 disclosure must be of all you  
13 ought to have realized to be  
14 material, not of that only which  
15 you did in fact realize to be  
16 so''.

17  
18 This Court now has to decide:

19

- 20 (a) Did the plaintiff fail to disclose facts  
21 about his health on the questionnaire?
- 22 (b) Was the questionnaire so ambiguous that the  
23 Plaintiff could have been misled in  
24 answering the question?
- 25 (c) Were the conditions that the Plaintiff was  
26 diagnosed with, within the meaning of the  
27 questionnaire. In particular section A and  
28 B of the questionnaire and were those  
29 conditions material? and
- 30 (d) Finally, was the Insurance Company induced  
31 by that misrepresentation and non-  
32 disclosure?

1

2 The final question is perhaps the easiest to  
3 answer. There is evidence in this case that the  
4 Insurance Company was, in fact, induced by the  
5 information on the questionnaire to enter into  
6 this contract. The information given by the  
7 plaintiff was clearly representative of his health  
8 and therefore, representative of the risks, the  
9 Insurance Company was willing to assume on his  
10 behalf. The thyroid condition being excluded by  
11 the insurance company, they were willing on the  
12 basis that he was a condition free (healthy) man  
13 to insure him. Where those conditions material?  
14 As already stated, in all the authorities  
15 including those of the Plaintiff's, the test of  
16 materiality is whether a prudent insurer might be  
17 influenced in fixing the premium or taking the  
18 risk if he knew of the facts stated or withheld.  
19 An expert was called to give evidence as to the

1 materiality of these conditions, although, to my  
2 mind Mr. Scholefield's evidence alone would have  
3 sufficed. The evidence is clear that the  
4 conditions diagnosed were material to the risk  
5 taken. Even the Plaintiff's own witness, Dr.  
6 Last, gave evidence that an individual with a  
7 heart murmur would be a higher risk than someone  
8 who did not have a murmur. Did Mr. Zeller fail to  
9 disclose his health on the questionnaire and does  
10 that amount to non-disclosure and/or  
11 misrepresentation if he believed that he was a man  
12 of good health? It is common ground that Mr.  
13 Zeller had a heart murmur and high cholesterol.  
14 Only on two occasions did he have elevated blood  
15 pressure and this Court made it quite clear during  
16 the course of the trial, the question of elevated  
17 blood pressure was not going to be a factor to be  
18 considered. In Section A of the Health  
19 Questionnaire, one of the questions at issue deals

1 with specific illnesses or conditions and the  
2 Plaintiff honestly answered the question whether  
3 he had thyroid problem in the positive. Section B  
4 reads: "In addition to the conditions listed in  
5 section A, to the best of your knowledge and  
6 belief, within the past 5 years has any person  
7 named in this application had a physical  
8 examination to which the Plaintiff answered  
9 "Yes".

10

11 The next question was:

12 " (2) excluding physical  
13 examination consulted a  
14 physician, health care provider  
15 either individual or facility for  
16 medical or surgical treatment,  
17 advice or screening to any  
18 conditions not listed in section  
19 A."

20

21 And final question was:

22 " (C), had any departure from  
23 good health, not previously  
24 mentioned in any of the above  
25 questions for which treatment or

1                    advice may or may not have been  
2                    sought."

3

4    The evidence is that the Plaintiff had a heart  
5    murmur and that he had high cholesterol over a  
6    long period of time.    The Plaintiff argues that he  
7    only went to the doctor once a year for a physical  
8    examination and that he believed he was in good  
9    health as his cholesterol was only slightly  
10    elevated.    Therefore, when he answered "No" to  
11    the questions B and C, he answered honestly as to  
12    the best of his knowledge and belief that he was  
13    in excellent health.    Mr. Turner relies, as I  
14    stated previously, on the case of Economides v  
15    Commercial Union Assurance Co. plc to support his  
16    contention, that honesty is the only criteria.  
17    That case can be distinguished from the facts of  
18    this case.    In that case when the applicant made  
19    the initial application for the insurance of  
20    contents, no one suggested that in those initial

1 years he failed to represent the full replacement  
2 value of the contents.

3

4 In that case the value of the goods had been  
5 honestly assessed by the parties involved  
6 including the father of the insured at \$16,000 and  
7 the Court held that there was no requirement to  
8 enquire further into the facts provided that he  
9 did not willfully shut his eyes to the truth. The  
10 only obligation was that of honesty and there was  
11 no requirement to enquire further.

12

13 The distinguishing feature in this case is that  
14 the question asked, is whether there is any  
15 departure from good health, not previously  
16 mentioned in any of the above questions for which  
17 treatment advice may or may not have been sought?  
18 The question is not ambiguous, it is clear. The  
19 Plaintiff is an educated American citizen who was

1 diagnosed with a heart murmur and a high  
2 cholesterol condition. He was asked to exercise  
3 and diet for the cholesterol condition. He was  
4 given advice by the doctor. The Plaintiff alleges  
5 that he was diagnosed with a heart murmur but he  
6 honestly believed that he was of good health and  
7 that the heart murmur would not be of great  
8 significance in his fitness. This is not a  
9 question of the accuracy of a quantum or the  
10 accuracy of an opinion. This is a straight  
11 question as to whether there has been a departure  
12 from good health or assessment of conditions not  
13 previously mentioned in section A. Mr. Turner  
14 takes the point that it is only if the insured had  
15 gone for anything other than a physical  
16 examination and something was discovered should he  
17 have answered yes to the subsection B question.  
18 With due respect to Mr. Turner, that makes it an  
19 unrealistic proposition. If, for example, one had

1 gone for a physical examination and had discovered  
2 that one had some communicable disease and that  
3 particular disease was not mentioned in section A,  
4 is it then to be said that that should not have  
5 been disclosed by the Plaintiff. With respect I  
6 cannot agree. If the Plaintiff when undergoing a  
7 physical examination had been discovered with  
8 having a heart murmur, then I believe that is  
9 covered under section B. However, Mr. Turner  
10 submits that if it was material then a specific  
11 question would have been asked under section A,  
12 that too is unrealistic. Not every questionnaire  
13 can be tailored to meet the individual's needs.  
14 So the question must remain now for me to decide  
15 whether, when the Plaintiff answered "No" to  
16 these two questions in circumstances where he had  
17 not been alerted to any serious illness he was  
18 guilty of misrepresentation or non disclosure. He  
19 had been informed that he had a heart murmur,

1 could it have been his honest belief that he did  
2 not have a condition that made him not in the best  
3 of health or could he honestly have stated that he  
4 did not have a condition on which he did not seek  
5 advice. Realistically, after the Plaintiff was  
6 told he had a heart murmur, he must have always  
7 been aware of the fact that he would need special  
8 attention if he was to have surgery on any part of  
9 his body as he had already been told that if he  
10 had a dental condition, he would have to take an  
11 antibiotic because of his heart murmur. It is  
12 common knowledge that not everybody in the world  
13 has a heart murmur and that having a heart murmur  
14 must be a departure from the norm. Does therefore  
15 section B asks for that sort of information  
16 unambiguously, I hold that section B subsection  
17 (a) and (c) does so and invites an insured in a  
18 contract of *uberrima fides* to search his/her mind  
19 and to come up with any knowledge that he/she

1 believes may affect the insured taking the risk of  
2 insurance. One must remember that the Plaintiff  
3 in this case was already advised that Health  
4 Insurance is compulsory and he had placed great  
5 emphasis on needing health insurance when he came  
6 to the Island. He must, in my view, have been  
7 alerted to the need for a completely honest  
8 declaration. The heart murmur and high  
9 cholesterol independently can lead to  
10 complications and it is not difficult to come to  
11 the conclusion that an insurance company would  
12 want to know about these unusual conditions in a  
13 man. The fact that the Plaintiff believed that  
14 his condition did not require any great medical  
15 attention is not the question. The authorities  
16 are clear. In order to exonerate the Plaintiff  
17 there must be some reasonable grounds for belief.  
18 The question is not, are you now in good health or  
19 have you ever been in good health. The question

1 is have you ever consulted a doctor for any  
2 condition or sought advice on any condition and I  
3 find it difficult to hold that a man who has been  
4 diagnosed with a heart murmur would not have  
5 consulted a doctor as to the consequences of that.  
6 The evidence is clear on the high cholesterol that  
7 he, in fact was given advice and it was suggested  
8 that he take medication for cholesterol. The  
9 obligation to disclose must depend on the  
10 knowledge that the Plaintiff possessed and I hold  
11 that the questions are unambiguous and that the  
12 Plaintiff is guilty of non-disclosure in his  
13 responses. I therefore hold for the Defendant and  
14 declare that the policy of insurance is avoidable  
15 for non-disclosure.

16

17 I further order the return of all payments made to  
18 the Plaintiff for medical treatment carried on him  
19 and interest in the net sum.

1

2 Costs to the Defendant to be agreed or taxed.

3

4 Dated this 7<sup>th</sup> day of March, 2005

5

6

7 Judge of the Grand Court

