

# The Duty of Full and Frank Disclosure: *Zeller v British Caymanian Insurance Co Ltd*

## Introduction

There are few reported decisions in the Cayman Islands dealing with issues relating to the duty of non-disclosure which arises in the context of insurance contracts. The recent decision of the Court of Appeal of the Cayman Islands in *Zeller v British Caymanian Insurance Co. Limited* (CICA No. 7 of 2005) now represents one of the leading decisions in the jurisdiction dealing with the application of the duty of non-disclosure.

## The Facts

David Zeller was insured under a policy provided by his employer's group health insurer. He

claimed the sum of approximately US\$250,000 under the policy in respect of medical expenses incurred in undergoing open-heart surgery. The insurers had paid just US\$7,000 in respect of these medical expenses when they avoided the policy for non-disclosure.

The insurers alleged that the insured had misrepresented his medical condition by failing to disclose prior to the inception of the policy the fact that he had been found to have an elevated cholesterol level and (on two separate occasions) a heart murmur during physical examinations that took place during the 5 years prior to the inception



of his policy. There was no evidence connecting either condition with the heart problem for which the insured ultimately had to undergo surgery. However, the insurers contended that, when combined with a hypothyroid condition that the insured had disclosed and for which coverage was excluded, these findings would have influenced a reasonable insurer either in deciding whether to accept his application for insurance or in settling the premium to be paid in this regard.

### **The Health Questionnaire**

The key issues in the claim related to the insured's responses to questions posed in a Health Questionnaire completed prior to the commencement of the policy. The Health Questionnaire sought answers to a series of questions.

Section A posed 15 questions relating to specific medical conditions. The insured answered "yes" to the question which asked whether he suffered, or had within the last 7 years suffered, from "*Goiter, thyroid trouble or diabetes*" (adding the word "thyroid" to his answer). However, he answered in the negative to the question which asked whether he suffered, or had suffered, "*heart problems, abnormal blood pressure (hypertension or hypotension) anaemia, rheumatic fever*".

Section B posed the following general questions as to whether to the best of his knowledge and belief the insured within the last 5 years had:

- "a) *Had a physical examination?*
- b) *Excluding physical examinations, consulted a physician, healthcare 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?"*

The insured answered "yes" to question (a), but answered "no" to questions (b) and (c).

Section C requested information in respect of any affirmative answer to the questions posed in Section B, including details of the "Diagnosis and Treatment". In completing this, the insured gave details of his thyroid condition but did not mention the heart murmur or the elevated cholesterol level found on his previous physical examinations.

### **The Decision at First Instance**

The insured commenced proceedings against his insurers seeking payment of the medical expenses incurred in connection with his open-heart surgery. At first instance, Levers J rejected the insured's claim, holding that there had been non-disclosure and material misrepresentations arising from his failure to answer questions (b) and (c) in Section B of the Health Questionnaire in the affirmative. Levers J held therefore that the insurers were entitled to avoid the policy.

### **The Court of Appeal's decision**

The Court of Appeal was divided in its decision. The substantive judgments were given by Forte JA and Taylor JA, with Zacca P agreeing with Forte JA's decision to dismiss the appeal. The issue which divided the Court of Appeal related to the construction of the Health Questionnaire, namely whether the insured's heart murmur and elevated cholesterol levels would be understood by a reasonable person in his position to be the sort of conditions with which the questions in the Health Questionnaire were concerned.

### **The Majority Decision**

Forte JA agreed with the reliance placed by Levers J at first instance on the cases of *Brownlie v. Campbell*<sup>1</sup>, *Bates v. Hewitt*<sup>2</sup> and *Joel v. Law Union and Crown Insurance Co*<sup>3</sup>, and quoted with approval the following passage from *Joel v. Law Union*:

*"There is therefore something more than an obligation to treat the insurer*

---

<sup>1</sup> (1879-80) L.R. 5 App. Cas. 925.

<sup>2</sup> [1866-1867] 2 Q.B. 595.

<sup>3</sup> [1908] 2 K.B. 863 CA.

*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 realised to be material, not of that only which you did in fact realise to be so."*

Applying this principle, Forte JA held that the insured's contention that to the best of his knowledge and belief he did not have a disease, illness or condition with which the Health Questionnaire was concerned could not avail him in respect of the manner in which he responded to the question in Section B(a) (to which he had answered "yes") and which required him in Section C to give further information, which he failed to do. He concluded that the insured could not have truthfully said that it was not to his knowledge that he had been diagnosed with heart murmur and high cholesterol levels as a result of his physical examinations. Forte JA stated that the mere fact that such questions were asked in the Health Questionnaire must have indicated to the insured 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. Accordingly, Forte JA concluded that the non-disclosure was material to the acceptance of the contract and that the insurers were therefore entitled to avoid the policy.

### **The dissenting judgment**

In his dissenting judgment, Taylor JA conducted a detailed examination of the questions posed in the

Health Questionnaire (in contrast to the approach taken by Forte JA).

Taylor JA held that the words "Diagnosis and Treatment" in Section C, particularly when combined with the reference to "departure from good health" in Section B(c), suggested that Section B was concerned with medically diagnosed illnesses, sicknesses or ailments. Taylor JA examined the insured's medical history and concluded that he was not required to answer question (b) in Section B in the affirmative on the basis that the medical examinations attended by him were "physical examinations".

In light of this, Taylor JA held that the key issue related to whether, having answered question B(a) in the affirmative, the insured was required to disclose details of the two conditions central to the litigation in Section C. Taylor JA held that the two conditions would not constitute a "departure from good health" so as to require an affirmative answer to question B(c) and for this reason to provide information about the conditions in Section C.

Taylor JA concluded that there was modern authority qualifying the obligations of disclosure in "consumer" insurance contracts. Taylor JA referred in particular to the judgment of Simon Brown LJ in *Economides v Commercial Union Insurance Plc*<sup>4</sup>, holding that the obligation on a private individual seeking insurance in a proposal form containing specific questions goes no further than that of honestly answering the questions asked by the insurer.

Taylor JA held that neither a heart murmur nor increased cholesterol level would be regarded by the ordinary applicant in the insured's position as amounting to a sickness, illness or ailment which he had been diagnosed as suffering. He also held that it could not be said that the insured ought to have been aware that he was suffering from any illness, sickness or ailment contemplated by Section

---

<sup>4</sup> [1997] 3 All ER 636 (CA)

C of the Health Questionnaire. Taylor JA concluded therefore that conditions of these types were not covered by the questions posed in the Health Questionnaire and held that the insurers should be taken to have waived their disclosure.

### Conclusion

Forte JA and Taylor JA clearly adopted different approaches in determining this appeal. Forte JA construed the Health Questionnaire in a broad fashion, which contrasts with the more technical (and arguably less realistic) approach to the construction of the document adopted by Taylor JA whereby he sought to ascertain the precise meaning and purpose of each question posed within the Health Questionnaire.

The Justices of Appeal ultimately disagreed as to whether the insured could have honestly answered the questions in the Health Questionnaire without disclosing details of the heart murmur and increased cholesterol level found during his previous medical examinations. It is possible to discern a slight tension between the more traditional approach adopted by Forte JA and the more modern, “consumerist” approach adopted by

Taylor JA. Although Forte JA perhaps did not feel it necessary to consider the modern authorities relied upon by Taylor JA, his reliance on *Joel v Law Union* appears to sit uncomfortably with the modern approach enunciated by Simon Brown LJ in *Economides* such that the obligation on a private individual seeking insurance in a proposal form containing specific questions goes no further than that of honestly answering the questions asked by the insurer.

It remains to be seen whether the Court of Appeal in future cases of this nature will follow Forte JA’s traditional approach, or alternatively adopt the modern English authorities and follow the “consumerist” approach adopted by Taylor JA. In the meantime, insurers with interests in the Cayman Islands will be fortified by this decision of the Court of Appeal.

This article was prepared by Chris Easdon, an Associate in the Litigation and Insolvency Practice Group in Cayman. Should you have any questions or requests for further information, please contact Chris Easdon by email at [easdon@applebyglobal.com](mailto:easdon@applebyglobal.com).

This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.

October 2005 © Appleby

## The Right People. The Right Places.

### Bermuda

Canon's Court  
22 Victoria Street  
PO Box HM 1179  
Hamilton HM EX  
Bermuda  
Tel +1 441 295 2244  
Fax +1 441 292 8666

### British Virgin Islands

Palm Grove House  
PO Box 3190  
Road Town  
Tortola  
British Virgin Islands  
Tel +1 284 494 4742  
Fax +1 284 494 7279

### Cayman Islands

Clifton House  
75 Fort Street  
PO Box 190  
Grand Cayman KY1-1104  
Cayman Islands  
Tel +1 345 949 4900  
Fax +1 345 949 4901

### Hong Kong

8<sup>th</sup> Floor  
Bank of America Tower  
12 Harcourt Road  
Central  
Hong Kong  
Tel +852 2523 8123  
Fax +852 2524 5548

### Jersey

PO Box 207  
13-14 Esplanade  
St Helier  
Jersey JE1 1BD  
Channel Islands  
Tel +44 (0)1534 888 777  
Fax +44 (0)1534 888 778

### London

2<sup>nd</sup> Floor  
2 Royal Exchange Bldgs  
London EC3V 3LF  
United Kingdom  
Tel +44 (0)20 7283 6061  
Fax +44 (0)20 7469 0540

### Mauritius

8<sup>th</sup> Floor  
Medine Mews  
La Chaussée  
Port Louis  
Mauritius  
Tel +230 203 4300  
Fax +230 210 8792