THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No CV2015-01468

BETWEEN

SCAFFOLDING MANUFACTURERS (TRINIDAD) LIMITED

Claimant

AND

NAGICO INSURANCE (TRINIDAD AND TOBAGO) LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr Prakash Deonarine instructed by Ms Karuna Ramsaran for the Claimant

Mr Keston McQuilkin instructed by Mr Ramnarine Mungroo for the Defendant

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DECISION ON CLAIMANT'S APPLICATION FOR SUMMARY JUDGMENT AND DEFENDANT'S APPLICATION TO STRIKE OUT CLAIM

I. **Background:**

[1] The Claimant, described as the leading supplier of scaffolding for the construction and energy industry throughout the Caribbean, has brought a claim against the Defendant, its insurer, seeking, essentially, payment of the sums of: (i) $2,273,796.85 (the "Judgment sum"), representing indemnification for the judgment sum obtained by one Mr Ian Gonzales in CV2009-03527, against the Claimant and NU Iron Unlimited ("Mr Gonzales' claim"); and (ii) $196,686.92, representing the legal costs incurred in Mr Gonzales' claim.

[2] The Claimant's case is that it procured its insurance coverage for Employer's Liability and Workmen's Compensation from GTM Insurance Company Limited through its brokers, Comprehensive Insurance Brokers Limited (the "Broker").

The Defendant's involvement in this matter occurred as a result of its subsequent acquisition of the said GTM Insurance Limited, which occurred sometime in October, 2011. By this acquisition, both the Workmen's Compensation Policy and the Employer's Liability Insurance, in force at that time, were absorbed by the Defendant.

Under its Workmen's Compensation Policy, the Claimant was insured for the sum of **$2,415,520.00** for the period 28th August, 2005 to the 28th August, 2006 in consideration for a premium of **$28,099.54**.

While these policies were in force, it was pleaded, that Mr Gonzales, an employee of the Claimant, sustained injuries in the course of his employment at the premises of NU IRON Unlimited on the **8th October, 2005**. Several months after the accident, on the 21st May, 2006, GTM Insurance had paid to the Claimant the sum of **$14,818.19** in workmen's compensation.

Mr Gonzales issued his **pre-action protocol letter** through his attorneys, Dalton's, Attorneys-at-Law, on the **28th September, 2009** to the Claimant. This letter was then forwarded both to the Claimant's attorneys, Messrs Girwar & Deonarine, and the Broker. The Broker then issued a letter dated the **9th October, 2009**, enclosing the pre-action letter and requesting instructions from GTM Insurance as to the next step.

No doubt due to the fact that his claim would become statute-barred by the 8th October, 2009, Mr Gonzales instituted proceedings in this Court against the Claimant and the said NU IRON Unlimited on the **30th September, 2009**, a mere two days after issuing his pre-action letter.

It is the Claimant's case that the Defendant's predecessor, the said GTM Insurance, was at all times informed of both the filing as well as the progress of Mr Gonzales' claim through the Broker, in particular, via its employee, Ms Psyki Abhan, who acted as a medium between the parties. In fact, it was Ms Abhan who, on instruction from GTM Insurance, told the Claimant to proceed in its defence of Mr Gonzales' claim.

Further, the Defendant was at all times aware of both the claim documents as well as the settlement negotiations emanating from Mr Gonzales' claim. It was therefore the Claimant's case that the Defendant was fully aware that Messrs Girwar & Deonarine were representing the Claimant yet no objections, either by virtue of Condition 5 of the Policy of Insurance or otherwise, were ever made.

The judgment in Mr Gonzales' claim was given on the 23rd July, 2014 by the Honourable Mr. Justice Andre Des Vignes, who found in his favour. The Claimant was therefore held liable to pay to Mr Gonzales:

(i) **Special Damages in the sum of $111,707.00 together with interest at the rate of 6% from the 8th October, 2005 or the date of the accident, to the date of the Judgment and 12% thereafter.**

(ii) **Damages for Pain and Suffering and Loss of Amenities in the sum of $450,000.00 together with interest at 9% from the 30th September, 2009, when the claim was filed.**

(iii) **Damages for Loss of Future Earnings in the sum of $1,065,532.00.**

(iv) **Medical Expenses in the sum of $54,600.00.**

(v) **Damages for Loss of Earning Capacity in the sum of $75,000.00.**

(vi) **Costs pursuant to Part 67.5 of the CPR in the sum of $159,271.51.**

Aside from this debt, the Claimant also incurred significant **legal costs** in defending **Mr Gonzales' claim**, in the sum of $**163,941.97**.

The judgment was duly forwarded to the Defendant and a meeting was held on the 28th August, 2014. Ms Angela Z. Mohammed, a representative of the Defendant's Legal Department, was present and the possibility of an appeal was discussed. It was agreed that the Defendant would give its response to the discussions in a timely manner.

In the interim, the Claimant filed its appeal to the judgment on the 2nd September, 2014, which is still pending.

The conflict between the parties arose when, by letter dated the **4th September, 2014**, the Defendant issued its response accusing the Claimant of breaching the Conditions in the Workmen's Compensation Policy of Insurance (the "Policy") and therefore, denying any liability to indemnify the Claimant for the Judgment sum.

Notwithstanding its predicament, the Claimant, in good faith, paid to Mr Gonzales, the sum of **$500,000.00** and proceeded to file an Application for a further stay of execution of the judgment on the 14th October, 2014.

It is the Claimant's case that, pursuant to the findings from its hired private investigator, Exponential Investigation Services, it was discovered that Mr Gonzales had made false claims to the Court during his trial. Such falsities would have, in the Claimant's estimation, impacted on the Judgment sum and as a result, the Claimant intended to adduce fresh evidence at the hearing of the pending appeal.

Consequently, the Claimant replied to the Defendant's letter reminding the Defendant that the Broker had duly informed them of the status of the proceedings in Mr Gonzales' claim. In those circumstances, there were simply no reasonable grounds for the Defendant's denial of liability.

The Application for the stay of execution of the judgment was heard on the 8th December, 2014. It was recorded that NU IRON Unlimited had made a confidential payment to Mr Gonzales on the Judgment. Pursuant to this hearing, the Claimant also made a payment liquidating the outstanding sum of $1,773,796.85.

Attendant to this payment were the legal costs for filing the appeal, which, on the Claimant's version amounted to $22,137.50 plus $9,500.00, for hiring the private investigator amounting to a total of $31,637.50.

Nevertheless, the Defendant remained resolute in its refusal to indemnify the Claimant as evidenced in its letter dated the 29th December, 2014.

It is in these circumstances that the Claimant's claim herein was filed against the Defendant on the **7th May, 2015**, seeking the Judgment sum and its attendant legal costs.

[3] Prior to the filing of the Defendant's Defence, the Claimant applied for **Summary Judgment by Application filed on the 13th July, 2015** (the "Claimant's Application") on the grounds that the Defendant had no realistic prospect of success in defending the claim. The Claimant stated that the Defendant cannot elect to deny liability after the judgment had already been given. Further, it averred that such a denial of liability amounted to a breach of the Defendant's contractual obligation to the Claimant as contained in the Policy.

Attendant to the Claimant's Application were two affidavits, one of Mr Troy Gosine, a Director of the Broker and the other of Mr Phillip Archie, the Claimant's Corporate Secretary.

[4] Mr Gosine stated that he had access to the files, documents and records of the Claimant. He confirmed that the Claimant was insured with the Defendant for the period August, 2005 to 2006 for the sum of **$2,415,520.00**. He maintained the Claimant's pleaded case in his affidavit and reiterated that either himself or persons employed with his company corresponded with the following persons from GTM Insurance in relation to Mr Gonzales' claim, namely: (i) Ms Petranella Ahamad; (ii) Ms Salisha Jobity; (iii) Ms Garcia; and/or (iv) Mr Ackbar Hosein.

He deposed that Ms Abhan, a then employee with the Broker, informed him that she had several discussions with the Defendant and notified them that the matter was going to Court. However, he stated that while Ms Abhan was no longer employed with the Broker, he is aware that she was told by the Defendant that the Claimant should *"go*

through the process as they were aware of the matter." In fact, it was his evidence that the Claimant notified the Broker each time a matter came up in Court so that its employees would convey this information to the Defendant.

Further, it was his evidence that upon being informed that there had been 'without prejudice' attempts to settle the matter in September, 2011, he contacted Mr Ackbar Hosein of GTM Insurance for instructions who, in turn, requested of him copies of the claim documents and indicated that the Claimant should proceed to deal with Mr Gonzales' claim and that the Defendant would thereafter send a representative.

Mr Gosine deposed that the Broker's Claims Department Manager, Mr Darren Gosine, forwarded all claim documents to Mr Ackbar Hosein by letter dated the **30th September, 2011**, a copy of which was attached to the Statement of Case.

[5] Mr Archie, in his affidavit, confirmed that the Broker was at all times the intermediate between the parties with respect to the Policy that existed between them. Further, he stated that the Claimant dealt primarily with Mr Troy Gosine of the Broker, who informed him that he, Mr Gosine, had forwarded the Claimant's letter of the 8th October, 2009 that enclosed Mr Gonzales' pre-action letter to the Defendant.

He also confirmed that Mr Gosine dealt directly with the four listed employees of the Defendant.

In his opinion, the Judgment sum was due and owing by the Defendant to which there can be no adequate defence.

[6] The **Defence** was filed on the **14th July, 2015,** being the day after the Claimant's Application was filed. In it, an averment was made requesting that the Statement of Case be struck out on the grounds that it disclosed no cause of action.

It was admitted that the accident occurred on the 8th October, 2005 but pleaded that it was not formally reported to GTM Insurance until the 12th October, 2005.

The Defendant added that the insurance coverage provided by GTM Insurance was subject to a Policy of Insurance that provided for the reimbursement of compensation paid by the Claimant to the said Mr Gonzales in accordance with the **Workmen's**

Compensation Act, Chap 88:05. As evidence of Mr Gonzales' accident and loss, it was pleaded that the Broker provided copies of sick leave certificates, wage receipts and Workmen's Compensation during the period 3rd November, 2005 to 15th August, 2006.

Thereafter, the said GTM Insurance made two payments to the Claimant as compensation: (i) **$14,818.19** on the 5th June, 2006; and (ii) **$134.62** on the 15th May, 2007.

Subsequent to these payments, it was the Defendant's case that no further notification from the Broker or the Claimant was given until the **9th October, 2009** when it was notified by the Brokers that the Claimant had received Mr Gonzales' pre-action protocol letter. At the time of receiving same, GTM Insurance was not informed of any High Court Action having been filed and, therefore, was of the opinion that none had yet been filed. Considering that Mr Gonzales' claim had, by that time, become statute-barred, a decision was made to close the file sometime in September, 2010.

Thereafter, the Defendant's case departed materially from that of the Claimant's. For one, it was pleaded that the Claimant's decision to appoint Messrs Girwar and Deonarine as its attorneys was not sanctioned by GTM Insurance. Secondly, the letter issued on the 12th October, 2009, by which the Claimant's attorneys requested instructions on whether to defend or admit Mr Gonzales' claim was never conveyed to GTM Insurance. In any event, this letter never even sought GTM's consent on any aspects of Mr Gonzales' claim.

It therefore followed, that the said GTM Insurance was completely ignorant of both the filing of Mr Gonzales' claim on the 30th September, 2009 as well as the Defence purporting to deny liability filed in response by this Claimant in the Gonzales' claim. It is the Defendant's case that from the period of the 25th November, 2009 to the 4th February, 2010, the Claimant instructed its attorneys in their handling of Mr Gonzales' claim without any consent or approval from GTM Insurance. Accordingly, the Claimant was put to strict proof of its claim that the Broker, by way of its employee, Ms Abhan, or otherwise, ever notified the Defendant of Mr Gonzales' claim or that the Defendant ever instructed the Claimant, through the said Ms Abhan, to proceed with its Defence.

Even as the case progressed through the Case Management stages, GTM Insurance was never consulted nor did they give consent to the appointment of an independent medical assessor. No communication was afforded to GTM Insurance when the Claimant made its various offers to settle Mr Gonzales' claim. As such, the Defendant required proof of any letter of the 30th September, 2011 that purportedly attached the claim documents.

In fact, on the Defendant's version, it was not until the **4th October, 2011**, some two years after the claim was filed, that GTM Insurance received from the Broker, the claim documents from Mr Gonzales' claim contained in the letter dated the 30th September, 2011. In any event, the Defendant averred that *"From the search of the Defendant's predecessor's file it is not clear whether they received copies of the claim filed by Mr Gonzales in the High Court."*[1] Further, it was also not until the 15th August, 2014 that the Brokers wrote the Defendant informing it of the judgment, a copy of which was received by the Defendant on the 28th August, 2014.

In support of its denial of liability to the Claimant, the Defendant purported to rely on **Conditions 4, 5, 8 and 9 of the Policy**, which, in its opinion, evidenced that the Claimant was in breach and such breach was not waived by the Defendant.

Most importantly, **Condition 8 of the Policy of Insurance** requires that all differences arising out of the Policy be referred to Arbitration. Therefore, it follows that the Claimant's Claim herein is incorrectly initiated and should be struck out.

The Defendant also claims that it advised the Claimant that the appeal should not be initiated until it was properly advised on its likelihood of success. Therefore, in addition to the above, it maintains that the decision to file an appeal or to appoint a private investigator was done without its consent. In those circumstances, the Policy does not provide for indemnity to the Claimant for legal fees or expenses incurred in the absence of the Defendant's consent or that of its predecessor.

[7] An Amended Defence was filed by the Defendant on the 9th October, 2015 to include that the Defendant's letter of the 4th September, 2014, which denied liability under the Claimant's claim, had also indicated that Condition 8 of the Policy required that the

[1] Para 1 (q) of the Amended Defence

dispute herein be referred to Arbitration, which is expressly stated as being a condition precedent to the filing of any claim. On this ground, it reiterated that the Claim be struck out.

[8] When the parties met before this Court on the 12th October, 2015, permission was granted for the Defendant to file its affidavit in response to the Summary Judgment Application by the 19th October, 2015. Further, the Defendant was directed to file its proposed Application to Strike Out the Claim by the 19th October, 2015. Reply affidavits on new matters only were to be filed by the Claimant by the 2nd November, 2015.

[9] On the **19th October, 2015**, the **Defendant filed its Application to Strike Out the Claimant's Claim** (the "Defendant's Application") on the grounds that, in breach of **Condition 8 of the Policy of Insurance**, the Claimant has initiated this Claim without first referring the dispute to Arbitration proceedings and that its failure rendered the present claim un-recoverable.

[10] In support of the Defendant's Application, the affidavit of Angela Mohammed was filed. As the manager of the Defendant's Legal Department, Ms Mohammed deposed that she had personal knowledge of the records, files and documents of both the Defendant and its predecessor, GTM Insurance.

She referred to the broker's slip issued by the Broker on behalf of the Claimant to GTM Insurance that served to renew the Workmen's Compensation and Employer's Liability Insurance coverage for the Claimant for the period of the 28th August 2005 to the 28th August, 2006.

In all aspects of her evidence, she reiterated the Defendant's case as pleaded. She maintained that no consent was given to the Claimant's decision to appoint Messrs Girwar and Deonarine as its attorneys or that the Claimant notified the Defendant of its intention to defend Mr Gonzales' claim. Further, she reiterated that the Defendant was never consulted throughout those proceedings.

She confirmed that she was the one who wrote the letter of the 4th September, 2014 to the Claimant denying the Defendant's liability to make any payments toward them on

the grounds of the Claimant's failure to notify GTM Insurance or the Defendant in accordance with the Policy of Insurance.

Finally, she deposed that in breach of Condition 2 of the Policy, which requires that all notification must be in writing, both of the Claimant's affidavits in support of its Application for Summary Judgment fail to annex evidence of such written notification.

[11] The Claimant then filed an Application for permission to Reply to the Defendant's Amended Defence. Such request was granted by Court Order dated the 12th November, 2015.

[12] The Reply to the Amended Defence was filed on the 27th November, 2015. In it, the Claimant pleaded that the Defendant had waived its rights to enforce the Conditions under the Policy and therefore, was estopped from relying on same.

It was pleaded that this purported Waiver was evidenced by the fact that: (i) the Defendant had knowledge of Mr Gonzales' claim as well as the fact that Messrs Girwar and Deonarine was acting for the Claimant yet never objected under Conditions 4, 5 and 9 of the Policy; (ii) the Claimant, through its letters and the letters of the Broker, duly notified the Defendant of Mr Gonzales' claim long before the trial was completed; (iii) the Defendant failed to respond to the Broker's letter dated the 30th September, 2011 and such failure led the Claimant to believe that it had full conduct of the matter; and (iv) the Defendant's letter denying liability dated the 4th September, 2014 only came into being after the judgment was delivered.

With respect to Condition 8, which necessitated the resolution of any disputes by Arbitration proceedings, the Claimant responded that the Defendant, by filing its Defence and attending the hearings of this matter, had effectively waived its right to rely on same. Reference was made to **Parts 9.7 and 10.3(4) of the CPR** in support. In any event, the Claimant averred that the Defendant chose not to avail itself of the remedy in **section 7 of the Arbitration Act, Chap 5:01** and therefore, could not rely on the said Condition 8.

The Claimant then sought to challenge the enforceability of **Condition 8** on two bases: (i) that it was not a binding agreement and/or was an optional Condition; and (ii) that neither party took any steps to comply with it and therefore, it was inapplicable.

[13] The Court, by Order dated the 30th November, 2016, directed the parties to file and serve their submissions by the 25th January, 2016 and for response submissions to be filed and served by the 22nd February, 2016. Accordingly, both the Claimant's and the Defendant's Applications were adjourned to the 15th April, 2016.

In pursuance of this Order, the Claimant filed its written submission on the 22nd January, 2016 and the Defendant filed theirs on the 25th January, 2016. The Claimant then filed their submissions in reply on the 19th February, 2016 and the Defendant filed their reply on the 29th February, 2016.

[14] Prior to the hearing scheduled for the 15th April, 2016, the Claimant filed a Notice that it intended to rely on a further authority connected to its earlier written submissions of the 22nd January, 2016.

[15] At the hearing of the parties' Applications, the Court gave permission for the Defendant to file and serve Further Submissions in relation to the learning in **MacGillivray on Insurance Law**[2] with an explanation as to its application to the issue of waiver by the 20th April, 2016. The Claimant was permitted to file their response to the Defendant's Further Submissions by the 29th April, 2016.

In pursuance of this Order, the Defendant filed its Further Submissions on the 20th April, 2016 and the Claimant filed their response on the 29th April, 2016.

II. Submissions:

[16] Counsel for the Claimant, Mr Prakash Deonarine, provided great assistance on the legal issues. His first submission was that the Defendant's Defence amounted largely to bare denials and therefore, failed to offer any alternative interpretation of the facts.

He contended that such a Defence did not comply with **Parts 10.5 (3) & (4) of the CPR** or the dicta of Kokaram J in **Mercury Marketing Limited v VB Enterprises**

[2] 13th Edition, 2015, pages 624-626

Limited[3], a case that essentially stated that a Defence that merely puts the Claimant to proof without more does not allow the Court to conclude whether a trial is necessary.

At the outset, the Court disagrees with Mr Deonarine's submission on this point. By virtue of paragraphs 1 (a) – (v) of the Amended Defence, the Defendant fully complied with **Part 10.5 of the CPR** by putting forward its version of events and stating why it put the Claimant to proof of its allegations.

Counsel then proceeded to list the facts from the pleadings which, in his opinion, remained undisputed between the parties. However, in perusing this submitted list, the Court noted that many of the facts were not at all agreed on the pleadings.

In particular, it was not admitted by the Defendant that: (i) Ms Psyki Abhan of the Broker (a) notified the Defendant that the matter was going to Court or (b) was told by the Defendant that the Claimant should go through the process in response[4]; (ii) the claim documents were sent to the Defendant by letter dated the 30th September, 2011[5]; (iii) Mr Troy Gosine of the Broker ever spoke to Mr Ackbar Hosein of GTM Insurance who indicated that the Claimant should go ahead with the matter[6]; and (iv) the Defendant or its predecessor ever received immediate notification of Mr Gonzales' claim to allow them to exercise their right under Condition 5 of the Policy of Insurance[7].

Despite counsel's error as to the undisputed facts, his submissions on the legal issues below were more persuasive.

[17] After setting out the relevant Conditions of the Policy, counsel addressed, what he considered to be, the two main issues as follows: (i) Did the Claimant breach Conditions 2, 4 and 5 of the Policy of Insurance by failing to forward immediate written notice of Mr Gonzales' claim?; and (ii) Whether the Defendant is not only responsible to satisfy the Judgment sum but also, to indemnify the Claimant of his costs of the appeal?

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[3] **CV 2014-02694**
[4] Para 17 of the Amended Defence
[5] Para 19
[6] Para 21
[7] Para 22

[18] Under issue (i), counsel submitted that despite the fact that on the 12th October, 2009, the Claimant had given written notification of the accident a mere four days after its occurrence, no response was forthcoming from the Defendant. Instead, upon receiving the pre-action letter, the Defendant unilaterally made an ill-informed decision to close the file on a mistaken belief that no High Court Action had been initiated and thus, that the claim had become statute-barred. Having notified the Defendant of Mr Gonzales' pre-action letter, it was submitted that the Claimant fulfilled its requirement under Conditions 2 and 4.[8]

[19] Counsel's second submission under this issue was curious. He at first stated that his client notified the Defendant both orally and in writing every time the matter came up in Court. However, he conceded that the Defendant had denied, in his pleading, ever receiving written notification. He later contended, however, that it was an undisputed fact that oral notifications were given to the Defendant, and as a result, *"the same would apply to the written notification, namely the Insurance Brokers letters dated the 9th October, 2009 and the 30th September, 2011".*[9] This submission had little merit.

Nevertheless, he accepted that while non-compliance of a condition precedent by the Claimant would provide the Defendant with a complete defence, the learning in **Toronto Railway Company and Others v National British and Irish Millers Insurance Company Limited**[10] states that in certain circumstances, the Defendant's conduct can amount to a waiver of such conditions. This is especially so if the Defendant's conduct led the Claimant to believe that the requirements in the Conditions had been waived and as a consequence, the Claimant proceeded to expend resources and time, which it would not have done had it not been so led.

Moreover, if it was the Defendant's desire to rely on the lack of written notification of Mr Gonzales' claim to avoid liability, then the case of **Webster v General Accident Fire and Life Assurance Corporation Ltd**[11] would effectively "estop" such a defence. Applying this case to the present facts, counsel submitted that the Defendant engaged in

[8] Para 23 of the Claimant's closing submissions
[9] Para 25
[10] (1914-1915) All ER Rep Ext 1437
[11] (1953) 1 QBD 663

ongoing discussions with the Broker every time the filed action came up in Court, yet never *"…communicated to the Claimant that they had to formally give written notice to the Defendant."*[12] Therefore, the Defendant had lulled the Claimant into thinking that the requirement of notice in writing had been waived.

[20] In the alternative, Counsel advanced a third argument. He submitted that the Defendant's delay in informing the Claimant of its intention to repudiate any liability under the Judgment was fatal to its defence.

In support, reliance was placed on the dicta of Fenton Atkinson L.J. in **Allen v Robles**[13], who essentially stated that upon a Claimant's breach of a condition, the Defendant as Insurer had to decide within a reasonable time whether it would refuse liability or waive the breach and accept liability to indemnify. If there is unreasonable delay, the Defendant could lose its right of election and be compelled to accept liability in certain circumstances. Such a circumstance, as submitted by counsel, was present in the case at bar considering that the claim documents had been sent to the Defendant since the 30th September, 2011, yet the Defendant failed to indicate its intention to refuse liability at that opportune moment. Such failure has prejudiced the Claimant by exposing it to the expense of trial and the resulting Judgment sum[14].

[21] Finally, counsel cited the case **Barrett Bros (Taxis) Ltd v Davies**[15], the facts of which, he submitted, were on all fours. In **Barrett** *supra*, similar breaches of the conditions in the policy of insurance were made. The reasoning from **Barrett** was applied by Mr Deonarine to submit that the Defendant's decision, upon receiving the pre-action letter, to close the file on its misguided assumption that it had become statute-barred was erroneous and done without proper legal advice. Therefore, no fault could be placed at the Claimant's feet as it fulfilled its duty in supplying the relevant information about Mr Gonzales' claim available at that point. Therefore, any decision to invoke **Condition 2** should have been expressly stated to the Claimant upon receipt of the pre-action letter.

[12] Para 38 of the Claimant's closing submissions
[13] (1969) 3 All ER 154
[14] Para 63
[15] (1966) 1 WLR 1334

[22] With respect to the provision in **Condition 8** that required all disputes to be referred to arbitration, counsel submitted that the language of that Condition was clear in its requirement that both parties had to mutually agree to appoint an Arbitrator. Therefore, the parties' failure to so agree rendered this Condition ineffectual. In any event, he submitted that neither party opted for Arbitration in writing.

As an alternative argument, counsel referred to **Section 7 of the Arbitration Act Chap 5:01**, which permitted the Defendant to apply to the Court to stay these proceedings on the grounds that the matter should have been referred to Arbitration. This provision allowed such an application to be made after the filing of the Appearance but prior to the filing of the Defence. This provision is in consonance with **Part 9.6 of the CPR**, which allows a party to challenge the Court's jurisdiction after entering an appearance but before filing a defence. By opting not to make such an application and instead, applying for an extension of time to file its Defence, the Defendant took a further step in the proceedings and thus, accepted this Court's jurisdiction to hear the matter. Therefore, the Defendant has failed to avail itself of the remedy in Section 7 while also waiving its right to rely on Condition 8.

[23] Finally, it was submitted that based on the well-known principles of summary judgment, the Defence does not evidence a realistic prospect of success. For one, the various letters sent by the Broker to the Defendant indicated that the Defendant was informed of the proceedings in Mr Gonzales' claim. Secondly, the affidavit evidence of Ms Mohammed, who would likely be a witness for the Defendant should the matter proceed to trial, was that all necessary information about Mr Gonzales' claim was available from the files kept at the Defendant's premises. **It was, however, conceded that the Defendant did not consent to the appeal and therefore, the Claimant would not be seeking costs respective thereto.**

[24] Mr McQuilkin for the Defendant, gave submissions in support of the Defendant's Application, which largely focused on the provision in **Condition 8.** He cited case law to submit that the failure to refer this dispute to arbitration within a year from the Defendant's denial of the claim by letter dated the 4th September, 2014, made this claim unrecoverable.

His submissions in reply to the Claimant's Application were far more significant.

[25] He began by challenging Mr Deonarine's submission that his Defence contained bare denials and/or that there were no factual issues in dispute that justified a trial. To the contrary, Mr McQuilkin submitted that the main issue in dispute is indeed factual and revolves around whether the Claimant or the Broker ever notified the Defendant that Mr Gonzales' claim had been initiated and/or whether they received the Defendant's consent to take any step in the Defence of that claim.

Specifically, it was submitted that the Defendant does not deny that it had knowledge and notification of certain aspects of Mr Gonzales's claim but rather, disputed that any written notification of Mr Gonzales' claim filed in Court was ever given to the Defendant. This fact, it was submitted, was in dispute and could only be resolved at trial. Further, the Claimant's deponents, while they all say that written notification was sent, failed to annex any documentary evidence of such written notification in support.

Such a lack of notification, if accepted by this Court, would be, in Mr McQuilkin's opinion, a complete defence to this claim.

Accordingly, the issue of the lack of notification pursuant to **Condition 2 and 4 of the Policy** was factual and could only be decided after trial. In those circumstances, it was submitted that the Claimant's Application was premature and should be dismissed.

[26] Counsel for the Claimant replied to the Defendant's submissions in support of its Application to Strike out the Claim. He challenged the applicability of the case of **Super Chem Products Ltd v American Life and General Insurance Company Ltd and others**[16], by arguing that (i) the arbitration clause therein was materially different from the one in Condition 8 and (ii) that Mr McQuilkin failed to properly analyse the applicability of the **Super Chem** case to the instant facts.

Unlike the clause in **Super Chem** *supra*, counsel submitted that **Condition 8** places a mutual obligation on the Claimant and the Defendant to refer the matter to an arbitrator. In support, the authorities of **Andre Cie SA v Marine Transocean Ltd**[17] and the dicta

[16] (2004) UKPC 2
[17] (1981) 2 All ER 993

of Lord Diplock in **Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corpn**[18] were cited, which, according to Mr Deonarine's interpretation, all stated that the obligation is mutual and that each party must cooperate to progress the arbitration.

[27] By Notice filed on the 11th April, 2016, the Claimant applied for permission to rely on a Further Authority to make the submission that a condition requiring immediate notice, such as **Condition 4**, can be waived by the Defendant's conduct.

[28] Mr McQuilkin for the Defendant filed his Further Reply Submissions in support of the Defendant's Application. In it, the Privy Council decision of **Nasser Diab v Regent Insurance Co Limited**[19] was cited, in which their Lordships construed a Condition 11 which, in similar fashion to Conditions 2 & 4, required that the claim for recovery be submitted in writing without which, the insurer would be relieved of any liability. In their ruling, the Board found that the claim was unrecoverable due to the insured's failure to comply with Condition 11, and thus, he submitted that a similar finding should be made on the Claimant's failure to comply with Condition 8.

Counsel then highlighted specific comments of Lord Scott of Foscotte in **Diab** *supra* to support his submissions on this point. However, in this Court's opinion, these comments failed to address the more pressing issue of waiver raised by the Claimant, i.e. whether, by filing the Defence, the Defendant had conducted itself in a manner that led the Claimant to believe that it had waived the requirement for arbitration. Further, no part of Mr McQuilkin's Further Reply Submissions dealt with the contention that the invocation of **Condition 8** must be mutual and that on the facts, no mutual appointment of an arbitrator occurred.

[29] Mr Deonarine, in his submissions in support of his Further Authority sought to attack and distinguish Mr McQuilkin's authority of **Diab** *supra*, which this Court has already found unhelpful on the core issues.

[18] (1981) 1 All ER 289
[19] (2006) UKPC 29

What was noteworthy, was Mr Deonarine's reference to paragraphs 14 – 17 of **Diab** *supra*, wherein it was stated that the insured, i.e. the Claimant, is not subjected to a strict adherence to the condition precedent. In fact, he submitted that the Board in **Diab** opined that strict conditions as to time ought to be weighed against the principle of equity. It followed that the Defendant could extend the time for the Claimant to comply with the Condition requiring immediate notice of Mr Gonzales' claim and that such extension of time ought not to be unreasonably withheld.

III. Law & Analysis

[30] Accordingly, before the Court are two Applications for determination— the Claimant's Application for Summary Judgment and the Defendant's Application to Strike Out the Claimant's Claim. Each Application shall be dealt with in turn.

The Claimant's Application for Summary Judgment:

[31] **Part 15 of the CPR** sets out the procedure by which the Court may decide a claim or part of a claim without a trial i.e. by summary judgment. The grounds for summary judgment are set out in **Part 15.2**, which allows same to be granted if the Court considers that—

> *a) "On an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue…"*

The meaning of the words *"no realistic prospect of success"* has been well traversed in the common law. Our Court of Appeal in **Credit Union Co-operative Society Ltd v Ammon**[20] set out the principles as follows:

> (ii) *"The Court must consider whether the defendant has a realistic as opposed to fanciful prospect of success: Swain v Hillman 2001 2 All ER 91;*

[20] Civ App No 103 of 2006 [3] per judgment of Kangaloo JA

(iii) *A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ED & F Man Liquid Products v Patel (2003) E.W.C.A. Civ 472 at 8;*

(iv) *In reaching its conclusion the court must not conduct a mini trial: Swain v Hillman;*

(v) *This does not mean that the court must take at face value and without analysis everything that a defendant says is in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man supra at 10;*

(vi) *However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond No. 5 2001 E.W.C.A Civ 550;*

(vii) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd 2007 F.S.R. 63."*

[32] The principles at (iv), (v) and (vi) have particular relevance to the case at bar and when applied, guide the Court as follows:

(i) the Court will not take at face value every allegation pleaded by the Defendant and will examine same with the affidavit evidence and the documentary evidence to test its veracity;

(ii) the Court will also consider, in addition to the above, the evidence that will likely be available to the Defendant at trial; and

(iii) the Court must consider the extent of the facts in dispute and thus, whether the matter is one that is ripe for a fuller investigation by trial.

[33] By its Amended Defence, the Defendant denied its liability to indemnify the Claimant for the Judgment sum on the grounds that the Claimant had breached certain Conditions precedent to any recovery under the Policy. In particular, **Conditions 2, 4, 5, 8 and 9** were highlighted. For ease of reference the Conditions are set out below:

> *"2. Every notice or communication to be given or made under this Policy* ***shall be delivered in writing*** *to the insurers."*
>
> *"4. In the event of any occurrence which may give rise to a claim under this Policy the insured shall* ***as soon as possible*** *give notice thereof to the insurers with full particulars.* ***Every letter claim writ summons and process shall be notified or forwarded to the Insurers immediately upon receipt****. Notice shall also be given to the Insurers immediately the Insured shall have knowledge of any pending prosecution, inquest or fatal injury in connection with any such occurrence as aforesaid."*
>
> *"5. No admission offer promise or payment shall be made by or on behalf of the Insured* ***without the consent of the Insurers who shall be entitled if they so desire to takeover and conduct in his name the defence*** *or settlement of any claim or to prosecute in his name for their own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the*

settlement of any claim and the Insured shall give all such information and assistance as the Insurers may require."

"8 All difference arising out of this policy ***shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference*** *or if they cannot agree on a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meeting and the making of an Award shall be a condition precedent to any right of action against the insurers.* ***If the insurers shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."***

"9. The due observance and fulfilment of the terms and conditions and endorsements of this Policy so far as they relate to anything to be done or not be done by the Insured and the truth of the statements and answers in the Proposal ***shall be conditions precedent to any liability of the Insurers to make any payment under this Polic****y."* [Emphasis added]

[34] In summary, by virtue of **Conditions 2 and 4**, the Claimant was required to notify the Defendant of Mr Gonzales' claim immediately upon its filing or upon its receipt of the claim. Further, such notice must have been in writing.

By **Condition 5**, the Claimant was precluded from making any payment in settlement of Mr Gonzales' claim without the consent of the Defendant and the Defendant had the authority to take over the defence of Mr Gonzales' claim, which included the hiring of its own attorneys, with full assistance from the Claimant.

Condition 8 requires that all disputes be first referred to the decision of an Arbitrator to be appointed in writing by both parties. Further, the Claim herein, whereby the Defendant has refused liability to the Claimant for Mr Gonzales' claim, must be referred to the said Arbitrator within 12 months of the Defendant's notification of its refusal or else this claim is not recoverable.

Finally, **Condition 9** essentially stated that the preceding Conditions were to be considered conditions precedent and therefore, the Defendant would not be liable to make any payment under this Policy unless the preceding Conditions were complied with.

[35] It followed that breach of **any one** of these conditions would render the Claimant's claim unrecoverable. Therefore, once the Defendant can show that it has a realistic prospect of success in proving that the Claimant breached **any** of these Conditions, the Claimant's Application for Summary Judgment would be dismissed.

Conditions 2 & 4:

[36] Mr Deonarine's case was twofold on this issue:

First, he denied that the Claimant breached these conditions and averred instead that by way of written as well as oral notification, the Claimant had notified the Defendant of the filing of Mr Gonzales' claim through its Broker.

Secondly, in the event that the Claimant failed to notify the Defendant in writing of Mr Gonzales' claim, the Defendant, by its conduct, waived such breach by (i) failing to immediately notify the Claimant that it required written notification of the filing of Mr Gonzales' claim; and (ii) failing to notify the Claimant that it intended to refuse liability on Mr Gonzales' claim and permitting the Claimant to carry on with its defence.

[37] In his submissions, he focused heavily on the issues of law as it relates to a waiver. However, where the Court found Mr Deonarine to be less convincing was his submissions with respect to the factual disputes of the matter.

[38] With respect to **Conditions 2 & 4**, Mr Deonarine supported his case that the Claimant notified the Defendant of the filing of Mr Gonzales' substantive claim by virtue of, what he considered to be, the agreed facts between the parties as follows:

(i) the fact that Ms Abhan of the Broker had several discussions with the Defendant and informed them that the matter was going to court;

(ii) the fact that the Defendant told Ms Abhan that the Claimant should *"go through with the matter"*;

(iii) the fact that every time the matter came up in Court, the Broker would notify the Defendant of same;

(iv) the fact that the Broker also informed the Defendant of the without prejudice attempts to settle the matter;

(v) the fact that by letter dated the 30th of September, 2011, the Broker sent the claim documents to Mr Hosein of the Defendant's predecessor; and

(vi) the fact that Mr Hosein indicated to Mr Gosine of the Broker that the Claimant should go ahead with the matter.

[39] However, as analysed above in paragraph 16 *ante*, on an examination of the Amended Defence, the Court finds that no admissions were made to any of these allegations. It therefore followed that, contrary to Mr Deonarine's submissions, these were all facts that remained in dispute between the parties. Moreover, these facts were pivotal in assisting the Court in determining whether Conditions 2 and 4 were breached by the Claimant and whether the Defendant waived such breaches.

For instance, the Court cannot make any finding of whether the Claimant gave written notice of Mr Gonzales' claim unless it resolves the factual dispute as to whether the Broker did send the claim documents to the Defendant by letter dated the 30th September, 2011, which is not admitted.

Further, Mr Deonarine's alternative argument that, in the event that written notification was not sent, the Defendant waived that requirement by engaging in oral discussions while led the Claimant to believe that written notification was not necessary, cannot be

determined unless and until it is first found that the Defendant did communicate orally with Ms Abhan or Mr Hosein of the Broker, which is also not admitted.

Mr Deonarine, therefore, seems to be mistaken as to the Defendant's case on the issue. The defence is not merely that written notification was not received; rather, it is that the Defendant was *never* notified at all of Mr Gonzales' claim, and therefore put the Claimant to proof of any notification whether oral or written.

[40] Having said that, the Court remains guided by the principles discerned from **Ammon**[21] *supra,* which instruct that the Defendant's pleadings not be accepted at face value but rather, be examined along with the documentary and other evidence.

In this light, it is noted that the Defendant, while it admitted that the Claimant indeed notified it of the pre-action letter[22], averred that it had never been notified that Mr Gonzales had filed his substantive claim in Court.[23]

Therefore, the Defendant's case is essentially that notification of the pre-action letter was insufficient to meet the requirements in **Conditions 2 and 4**. Rather, the Claimant needed to do more and notify the Defendant of Mr Gonzales' substantive claim.

The wording in **Condition 4** seems to coincide with the Defendant's view. It expressly states **"…*Every letter claim writ summons and process shall be notified or forwarded to the Insurers immediately upon receipt…"*** Thus, the Claimant had a duty to notify the Defendant of the filing of the substantive claim of Mr Gonzales, which occurred on the **30th September, 2009**. Further, such notification needed to be sent immediately upon receipt of same by the Claimant.

[41] The Claimant's case on this issue is that it had notified the Defendant of the filing of Mr Gonzales' claim by virtue of (i) the oral discussions between Ms Abhan and Mr Gosine of the Broker with the Defendant and (ii) letter dated the 30th September, 2011 sent to Mr Ackbar Hosein of the Defendant's predecessor enclosing the claim documents from Mr Gonzales' claim[24]. In support, a cover letter of even date was annexed as "G" to the

[21] Civ App No 103 of 2006 [3] per judgment of Kangaloo JA
[22] Para 12 of the Amended Defence
[23] Para 1 (i) of the Amended Defence
[24] Para 17 of the Statement of Case

Claimant's Statement of Case. This documentary evidence was indeed drafted by Mr Darren Gosine of the Broker and addressed to GTM Insurance.

The Defendant, however, did not admit to receiving this letter and put the Claimant to proof that it and its attachments were delivered[25]. Further, it pleaded that if such can be proven, this letter was delivered 2 years after the claim was filed and therefore, did not amount to immediate notification.[26]

[42] On examination of the letter attached, it is noted that the claim documents were not annexed to the Statement of Case and therefore, the Court cannot make a finding that the claim documents were included when the letter was sent. However, while the Defendant has not admitted receiving this letter later on in its Amended Defence[27], it contradicted itself earlier by stating that *"on or about 4th October, 2011 the Defendant's predecessor received a letter of 30th September 2011 from Comprehensive annexing all of what was called 'the claim documents'"*[28]. However, in line with the Court's examination above, the Defendant pleaded that it was not clear whether they received copies of the claim filed in Court by Mr Gonzales. Thus, it remains a factual dispute as to whether Mr Gonzales' High Court claim was ever sent to the Defendant.

[43] Mr Deonarine, in his oral submissions to the Court on the 15th April, 2016, focused heavily on the letter dated the **9th November, 2009** sent by Messrs Girwar & Deonarine to the Claimant. This letter was attached as "H" to the Amended Defence and was also referred to in Ms Mohammed's affidavit as being a letter in the Defendant's files. By this letter, the Claimant was informed that its attorneys have completed the Appearance in Mr Gonzales's claim and intends to defend the matter. Mr Deonarine submitted that the mere fact that Ms Mohammed expressly deposed that this letter was in the Defendant's file[29] meant that same had been delivered to the Defendant by the Claimant.

[25] Para 19 of the Amended Defence
[26] Para 19 of the Amended Defence
[27] At para 19
[28] At para 1 (q)
[29] Para 18 of Angela Mohammed's Affidavit

However, on this point, the Court found Mr McQuilkin's response more persuasive. While it is true that Ms Mohammed deposed that the letter of the 9th November, and indeed, all of the other letters referred to in her affidavit, were in the Defendant's file, she denies that these letters were sent to the Defendant by the Claimant upon their receipt as is required by **Condition 2 and 4** of the Policy[30]. To the contrary, Mr McQuilkin admitted that these letters formed part of the 'claim documents' enclosed in the letter of the 30th September, 2011, which was received by the Defendant on the 4th October, 2011. Therefore, Mr McQuilkin clarified that the factual dispute here is whether the Defendant was notified of Mr Gonzales' High Court claim by the Claimant at the time that the Claimant said they were[31].

It follows that prior to addressing the issue of whether the Defendant waived the requirements in Conditions 2 & 4 by its failure to immediately notify the Claimant that the letter did not amount to immediate notice, **it must first be determined: (i) the exact date, if any, that the Defendant first became notified of Mr Gonzales' High Court claim, which is heavily disputed between the parties; and (ii) whether the 'claim documents', inclusive of Mr Gonzales's High Court claim, were indeed included in this letter dated the 30th September, 2011, which is not evident from the attachments to the Statement of Case**.

These live issues are undoubtedly factual, which can only be resolved by cross-examination at trial.

Accordingly, the lack of definitive proof by the Claimant that it notified the Defendant in writing or otherwise of the filing of Mr Gonzales' High Court Action means that the Defendant does have a realistic prospect of success at trial.

[44] Mr Deonarine also submitted that his client averred that throughout the course of Mr Gonzales' claim, the Defendant was frequently updated by the Claimant. Further, he submitted that this *"**has not been positively refuted in the Defendant's Defence, and***

[30] See para 15 of her affidavit
[31] NOE Page 16, lines 11 - 16

as previously noted in Ms Angela Mohammed's affidavit, there is evidence of these notifications on the Defendant's file."[32]

Both these arguments appear to be misleading when the Amended Defence and Ms Mohammed's Affidavit are examined. The Defendant did not admit this fact in its Amended Defence and put the Claimant to strict proof of same.[33] Further, Ms Mohammed expressly deposed in her affidavit that:

> *"I am also aware from my examination of the files of the Defendant…* ***that unknown to the Defendant's predecessor a Claim was filed on the 30th September, 2009*** *and the Claimant through Messrs Girwar and Deonarine…entered an appearance denying liability. The Defendant's predecessor* ***did not receive immediate notice or notice at all of the filing of the claim by Mr Gonzales****…"*[34]

There is, therefore, nothing from either the Defendant's pleading or the affidavit of Ms Mohammed to support either of these submissions. In fact, they are expressly contradicted. It therefore cannot be submitted that the Defendant's insistence on relying on **Condition 2** should have been communicated to the Claimant whilst Mr Gonzales' claim subsisted[35] because it has not yet been proven that the Defendant was aware that the said claim had been filed or was in progress.

[45] Based on this analysis, the Claimant's Application for Summary Judgment, which asks for judgment for the Claimant against the Defendant for the entire claim of $2,273,796.85[36] must be dismissed. There is no need to do further analysis on the Defendant's prospect of success on the alleged breach of the remaining Conditions 5 & 8 of the Policy as the above finding is dispositive of the Claimant's Application**.**

In any event, the alleged breach of **Condition 8** is the main issue in the Defendant's Application, which will be analysed below:

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[32] Para 61 of the Claimant's Closing Submissions
[33] Para 18 of the Amended Defence
[34] Para 17 of Angela Mohammed's Affidavit
[35] Para 62 of the Claimant's Closing Submissions
[36] See Claimant's Application filed on the 13th July, 2015 along with the Draft Order

The Defendant's Application to Strike out the Claim:

[46] The grounds for the Defendant's Application are that the Claimant has breached **Condition 8** of the Policy and that such breach makes the Claimant's Claim unrecoverable pursuant to **Condition 9**.

[47] Condition 8, as stated above, required that this matter be referred to arbitration within 12 months of the Defendant's refusal of liability. It is undisputed that such refusal was communicated to the Claimant by letter dated the 4th September, 2014[37]. Further, the Claimant has not denied that it failed to refer this matter to arbitration within the 12-month period.

However, the Claimant's response is that the Defendant waived the requirement of Condition 8 by: (i) its failure to avail itself of the remedy in **Section 7 of the Arbitration Act, Chap 5:01**; and/or (ii) failing to comply with the provision in Condition 8, which required both parties to appoint an Arbitrator.

On the pleadings, it is undisputed that the Defendant did not apply to have the proceedings stayed nor did the Defendant agree or engage in any communication with the Claimant to appoint a mutual Arbitrator. **Therefore, the issue of whether the Defendant waived the requirement in Condition 8 by its conduct is one of law and not fact**.

[48] Mr Deonarine's submission at (ii) required an interpretation of the provision in Condition 8. As set out above, it requires that the parties in difference, i.e. the Claimant and the Defendant, mutually appoint an Arbitrator within 12 months from the date at which the Defendant disclaimed liability.

Mr McQuilkin responded by placing blame solely on the Claimant for choosing to file the instant claim on the 7th May, 2015 instead of referring the matter to Arbitration[38].

Mr Deonarine sought to distinguish Mr McQuilkin's authority of **Super Chem** *supra* from the instant case. The relevant clause in **Super Chem** was contained in Condition 19, which stated:

[37] Para 27 of the Statement of Case
[38] Para 17 of the Defendant's Closing Submissions

> *"In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage* ***unless the claim is the subject of pending action or arbitration."***

The Clause in **Super Chem** does not appear to specifically impose the same mutual obligation on the parties to appoint an Arbitrator as does Condition 8 of the instant Policy. However, similarly, it also does not place the onus on either party to refer the matter to arbitration. Nevertheless, as Condition 8 makes an express requirement that both parties appoint an Arbitrator to start the arbitration process, little application and/or comparison could be made between the Privy Council's interpretation of Condition 19 in **Super Chem** and Condition 8 in the case at bar.

[49] Mr Deonarine then sought to rely on the dicta of Lord Denning MR in **Andre & Cie** *supra*, where he referred to the speech of Lord Diplock[39] in the **Bremer Vulkan** case[40]:

> *"… the obligation is, in my view, mutual: it obliges each party to co-operate with the other in taking appropriate steps to keep the procedure in the arbitration moving, whether he happens to be the claimant or the respondent in the particular dispute …."*

However, this Court does not agree with Mr Deonarine's submission that Lord Denning MR *"approved the words of Lord Diplock…"*[41] in his ruling in **Andre & Cie**. To the contrary, Lord Denning MR seemed to disagree, as evidenced by his commentary immediately thereafter[42]:

> *"This mutual obligation comes as something of a surprise to everyone…Nothing of this kind was propounded before the judge or before us in the Court of Appeal…It is I suppose, too late for any words of mine to make any difference. It is for us to come to terms with it. It is said to be based on an implication. As such, it goes beyond anything that*

[39] At page 996, para g
[40] 1981 1 All ER 289
[41] Para 12 of the Claimant's Written Submissions in Reply
[42] Page 996, paras h and i

I have hitherto understood. To my thinking the implication is neither obvious, nor reasonable, nor necessary. Nor does it accord with reality. If the claimant does not pursue this claim, if he makes no application to the arbitrator, it is said that the respondent is bound himself to do so. Who even hears of a respondent doing such thing?"

It is clear that Lord Denning MR thought that Lord Diplock's words were not realistic. In his opinion, it cannot be expected that if, in the instant case, the Claimant failed to refer the matter to arbitration, the Defendant was required to do so out of some implied mutual obligation.

[50] In any event, the issue in **Andre & Cie** was not whether the arbitration clause required both parties to mutually appoint an Arbitrator. Rather, in **Andre & Cie** both parties had already appointed an arbitrator but nothing further occurred in the arbitration for 8 years. Thus, it was determined by the Lordships that the arbitration had been frustrated. The argument in the appeal— that the judge was not open to decide that the arbitration had been frustrated because of a mutual obligation of both parties to keep the arbitration moving, was dismissed[43].

This case therefore, did not assist the Court much with the issue at hand. The issue is not whether the arbitration has been frustrated because, in the case at bar, no arbitration was commenced in the first place.

The issue is whether there was a duty on the Claimant alone or on both parties mutually, by virtue of Condition 8, to refer the matter to arbitration.

The Defendant, in response, failed to submit any authorities on this issue of the interpretation of Condition 8. In those circumstances, the Court is not yet convinced that a breach of Condition 8 has occurred.

However**,** a more definitive finding can be made on Mr Deonarine's submission at (i), which related to the applicability of **Section 7 of the Arbitration Act, Chap 5:01.**

[43] Page 993, paras f and g

[51] **Section 7 of the Arbitration Act** clearly states that the Defendant, after filing his Appearance, but prior to filing its Defence, had the opportunity to apply to have these proceedings stayed on the ground that it should be referred to arbitration:

> *"If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in the Court against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings* ***may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings****, apply to the Court to stay the proceedings, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."*

By filing its Defence on the 14th July, 2015, the Defendant elected not to avail itself of this opportunity.

[52] The question to be answered therefore, is whether such a failure by the Defendant lulled the Claimant into thinking that the Defendant no longer intended to invoke Condition 8. Mr Deonarine's authorities seem to suggest so.

As stated by Scrutton L.J. in **Toronto Railway Company and Others** *supra*, in certain circumstances, the Defendant's action, by continuing with the Defence in these proceedings, amounted to a waiver:

> ***"Conditions precedent may be waived by a course of conduct inconsistent with their continued validity, even though the contracting party does not intend his conduct to have that result. This is especially so, if the course of conduct leads the other party to spend time and incur expense in a proceedings which it would not have undertaken***

had he not been so led, by the action of the other party, to think that he was relieved…"

To amount to a waiver therefore, two requirements are to be met: (i) that by refusing to make use of **Section 7**, the Defendant had, by such inaction, lulled the Claimant into a belief that it waived the requirement of **Condition 8;** and (ii) that in reliance on such a belief, the Claimant expended time and resources in these proceedings that it would not have done had the Defendant applied for the stay.

[53] In this Court's opinion, especially considering that the result of the Defendant's conduct need not be intended, its failure to make use of **Section 7** would have led the Claimant to believe that it accepted this Court's jurisdiction to hear this matter and would not be invoking the requirement in Condition 8. Moreover, as a result of this inaction, the Claimant proceeded to prejudice itself by spending time and resources in filing, not only a Reply to the Amended Defence, but also its lengthy closing submissions and submissions in reply. Had the Defendant applied for the Stay, these filings would not have been necessary.

Based on the foregoing, the Court is of the opinion that the Defendant waived its right to rely on the Claimant's purported breach of Condition 8 by filing a Defence in this Claim.

[54] In those circumstances, the Defendant's Application to Strike Out the Claimant's Claim on the grounds that the Claimant breached Condition 8 must be dismissed.

IV. Disposition:

[54] Having considered the pleadings of the parties, the respective Applications before the Court, the attendant affidavits in support as well as all the submissions of both parties, oral and written, together with authorities, the order of the Court is as follows:

ORDER:

1. **That the Claimant's Notice of Application for Summary Judgment filed on the 13th July, 2015 be and is hereby dismissed.**

2. **The Claimant shall pay to the Defendant costs of the Application of the 13th July, 2015 to be assessed pursuant to CPR Part 67.11, in default of agreement.**

3. **That the Defendant's Notice of Application to Strike Out the Claimant's Claim filed on the 19th October, 2015 be and is hereby dismissed.**

4. **The Defendant shall pay to the Claimant costs of the Application of the 19th October, 2015 to be assessed pursuant to CPR Part 67.11, in default of agreement.**

5. **That the matter shall proceed to a Case Management Conference to be held on the 23rd March, 2018 at 9:45 in the forenoon in Courtroom SF10 for further directions.**

Dated this 5th day of February, 2018

Robin N Mohammed
Judge