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

Date of Delivery: Tuesday 12 April 2022

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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JUDGMENT

I. Introduction

1. The facts of this case have been compendiously stated in a previous judgment delivered by this Court on 5 February 2018. That judgment dealt with the Claimant's Application for summary judgment and the Defendant's Application to strike out the claim. In this regard, this judgment should be read together with the judgment handed down on 5 February 2018 for a procedural background of the facts of this case which proceeded to trial.

2. The brief facts to bring some context to this judgment are that the Defendant's predecessor (GTM) was the initial insurer of the Claimant. A former employee of the Claimant, Ian Gonzales, was injured on the job, for which the insurer paid Workmen's Compensation. Three years later, the former employee filed a common law claim in negligence and judgment was granted in his favour. The Defendant has since refused to indemnify the Claimant citing breaches of Clauses 2, 4 and 5 of the Policy of Insurance.

II. Issues

3. **The agreed issues in this matter are:**
    - **(i) Did the Claimant breach Conditions 2, 4 and 5 of the Policy of Insurance?**
    - **(ii) If the Claimant breached Conditions 2, 4 and 5 of the Policy of Insurance, did the Defendant waive its right to enforce any such breach and/or is the Defendant estopped from relying on any such breach?**
    - **(iii) In the event that the Defendant is liable to indemnify the Claimant herein, what is the quantum of damages payable to the Claimant?**

III. Evidence

4. The Claimant relied on the evidence of Phillip Archie and Troy Gosine who were cross-examined. The former is the Corporate Secretary of the Claimant and the latter is a Director of the Broker, Comprehensive Insurance Brokers Limited. A Hearsay Notice was filed by the Claimant for Psyki Aban, who was once employed at GTM.

5. The Defendant relied on the evidence of Salisha Sandy, Carlene Garcia, and Angela Mohammed. All the witnesses were employed at GTM at some point.

IV. Submissions

<u>Claimant's submissions</u>

6. The Claimant submitted that the conditions were complied with by the Claimant and this was proven at the trial through evidence adduced by Mr Archie and Mr Gosine.

7. It is submitted that their evidence confirms that the Claimant informed the Broker of every step they took in the High Court Claim, including retaining its Attorneys, filing the Defence, attempts to negotiate settlement, as well as what transpired each time the matter came up in Court. Mr Archie stated that the Claimant ensured that the Defendant was aware since they knew the Defendant *"would be liable to indemnify any claim Ian Gonzales succeeded against [the Claimant]."* Mr Gosine confirms notification of the Claim was sent in writing through emails and letters as well as verbally through telephone conversations.

8. At no point during the subsistence of the High Court claim did the Defendant raise any objection with the manner with which the claim was progressing and as such, the Claimant *"continued to incur the trouble and expense of defending the claim."*

9. The Claimant accepted that it did not produce documents to support their averment of strict compliance of the conditions for written notification.

10. The Claimant submitted that the Defendant also did not adduce any version of events to cast doubt on the Claimant's evidence and that the evidence of the Defendant's witnesses was punctuated in evidence of the difficulty the Defendant had in putting together their file.

11. The Claimant pointed out what it described as inconsistencies in the Defendant's evidence as follows:

(i) In spite of their internal disarray, by paragraphs 1 (m)-(o) of the Amended Defence, the Defendant also accepted that there were letters on their file and/or their predecessors file in the years 2009 and 2010 showing correspondences between the Claimant and their Attorneys in the Gonzales High Court claim. Ms Mohammed also admitted that she came into possession of these letters around 2014, and since she came into the organisation in 2014, she cannot say whether these letters were in fact received through the Broker's September 20, 2011 letter to Ackbar Hosein or contemporaneous to the dates they were written.

(ii) The Defendant was forewarned from the Claimant's pleading that on or around September 2011 their representative, Ackbar Hosein, told Troy Gosine that the Claimant should go ahead and defend the claim as the Defendant would send a representative later on. The Defendant led no evidence to contradict these pleadings. As such, an adverse inference ought to be drawn against the Defendant for this failure to call Ackbar Hosein. The Court ought to infer that the reason why the Defendant chose to withhold evidence on this issue and furthermore did not call Ackbar Hosein is because his evidence would have supported or confirmed the Claimant's case.

(iii) Given the Defendant's previous acceptance of knowledge of the September 2011 letter as well as the correspondences between the Claimant and their Attorneys in 2009 and 2010, it follows that Ms Mohammed's email confirming that the Defendant is the insurer of the Claimant serves to ratify the company's position in having knowledge of the claim and its intention to honour the claim. This goes to further discredit the Defendant's averment that the file was closed since, if this was so, there would have been no need for Ms Mohammed to make enquiries for the purpose of the Defendant setting up a reserve.

12. The Claimant submitted that the Defendant failed to say who was responsible for the Claimant's account at the Defendant Company during 2009-2013 and why that person wasn't called to give evidence as to what transpired.

13. The Claimant submitted that 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. If one party by his conduct leads another to believe that the strict rules under the contract will not be insisted upon, intending that the other should act on that belief, and he does so act on it, then the first party will not afterwards be allowed to insist upon the strict rights when it would be inequitable for him to do so: **Lickiss v Milestone Motor Policies at Lloyds [1966] 2 All ER 972** per Lord Denning.

14. This is especially so if the course of conduct leads the other party to spend time and incur expense in a proceeding which he would not have undertaken had he not been led, by the action of the other party, to think that he was relieved, by concurring in those proceedings, from the other's course of conduct and conditions prescribed by the policy: **Toronto Railway Company and Others v National British and Irish Millers Insurance Company Limited, [1914-15] All ER Ext 1437**.

15. The Claimant submitted that considering the first time the Claimant was given notice of the Defendant's denial was by letter dated September 4, 2014, the conduct of the Defendant throughout the years 2009-2014 amounts to a waiver of strict reliance of said conditions, as there were four opportunities prior to this late stage where they could have avoided the policy. These opportunities were:
    - (i) Receipt of pre-action letter received from the Broker via enclosure dated 9 October 2009;
    - (ii) Receipt of September 30, 2011 letter;
    - (iii) Receipt of letter dated 25 November 2009; email dated 2 February 2010; receipt of letter dated 3 February 2010; and letter dated 28 April 2010.

(iv) Email correspondences engaged in by Ms Mohammed and the Claimant's Attorneys on 28 January 2014; 7 February 2014; and 6 March 2014.

16. The Claimant submitted that on the face of the 2009-2010 correspondences, it was clear that (i) the Gonzales High Court claim was assigned a civil suit action number and therefore before the Court; (ii) the Claimant had retained its own Attorneys; and (iii) active steps were being taken by the Claimant to enter an appearance, settle the Defence and build its case for a possible trial.

<u>Defendant's submissions</u>

17. Having regard to the issues in the case, it would be incumbent on the Claimant to lead evidence demonstrating that they had notified GTM consistent with the terms and conditions of the Policy.

18. The Defendant submitted that the Claimant failed to provide evidence to demonstrate that it immediately notified the insurers in writing upon receipt of the common law claim filed in September 2009. The Defendant relied on the evidence of Mr Archie in cross-examination to support this.

19. The Defendant brought to the Court's attention the difference in specificity by the Broker in the correspondences relating to the Workmen's Compensation claim and the common law claim. That is, the former was specific and referred to the documents that were attached. The latter did not. The Defendant submits that this was due to the realisation by the Broker of its error in failing to inform the insurers, and were now attempting to use their familiarity with Mr Hosein to demonstrate proper notice.

20. A further lack of notice to GTM was their lack of participation in the claim. This lack of participation was noticed by Mr Archie, which led him to inform Mr Gosine.

21. GTM was also not involved in the negotiation, a fact confirmed by Mr Archie in cross-examination. There is no evidence from the Claimant that they ever informed GTM of the negotiation process and requested their input.

22. The Claimant has also not provided any evidence to support its assertion that it spoke to employees of GTM concerning the common law claim.

23. The Claimant attempts to assert that Mr Hosein said that the Claimant should go ahead and deal with the claim and at a later date they would send a representative. However, the witness statement of Mr Hosein which was accepted by both Mr Archie and Mr Gosine during cross-examination does not state that. So that Mr Hosein, if he testified, was never going to provide evidence that he said those words.

24. The Claimant did not have the consent of the Defendant to file the appeal of the judgment and any costs incurred as a result does not fall for the Defendant's account.

25. In conclusion, the Defendant submitted that the insurers were not informed of the common law claim and gave no consent to the Claimant to defend or instruct Attorneys to act on behalf of the Claimant. Further, the Claimant failed to prove the first issue, that is, that GTM was notified immediately and/or consistent with the Policy of Insurance.

26. The Defendant relied on **Kosmar Villa Holidays PLC v Trustees of Syndicate 1243 [2008] Lloyd's Rep I.R. 1** to say that waiver by affirmation is not available for conditions under a policy of insurance but that waiver by estoppel is.

27. The Defendant submitted that there must have been an unequivocal representation by GTM that they would honour the claim and that they did not intend to rely on the breach of the immediate notification clause. But, there was in fact no unequivocal representation.

Claimant's reply submissions

28. The Claimant submitted that the Broker handled this claim on the Claimant's behalf. Therefore, the Court should treat with notification between the Broker and the Defendant and not in relation to Mr Archie.

29. The Claimant suggested that the cases referred to by the Claimant are unlike the instant case.

30. The Claimant concluded that the most critical issue was never addressed by the Defendant, that is, why did they wait until after judgment to deny liability on the basis of breaches of conditions 2, 4 and 5?

Defendant's reply submissions

31. The Defendant denied that it had notice of the correspondences between the Claimant and its Attorneys dated 25 November 2009; 2 February 2010; 3 February 2010; and 28 April 2010.

32. The Defendant submitted that no adverse inferences should be drawn against it for failing to call Ackbar Hosein as a witness. The Claimant also filed a witness statement that was prepared for Mr Hosein but was unable to secure him as a witness. Further, the witness statement of Mr Hosein does not support the Claimant's assertion that he told them to go ahead and pursue the claim.

V. Law and Analysis

Issue 1- Did the Claimant breach Conditions 2, 4 and 5 of the Policy of Insurance?

33. The relevant Conditions of the Policy of Insurance are as follows:

> *"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."

34. Clause 9 goes on to state that they are conditions precedent.

35. According to **Halsbury's Laws of England**:

"The legal burden (or the burden of persuasion) is a burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case, or persuading the tribunal of the correctness of a party's allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. ***The incidence of this burden is usually clear from the statements of case, it usually being incumbent upon the claimant to prove what he contends.***

*The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue****; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side****. It has been said that the evidential burden shifts from one party to another as the trial progresses according to the balance of*

evidence given at any particular stage, but it may be more accurate to say that it is the need to respond to the other party's case that change.[1]*" [Emphasis mine]*

"The legal burden (or the burden of persuasion) of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case. There may therefore be cases where different parties bear the burden on different issues.

*...**and in a claim on an insurance contract the burden of proving a breach of condition which would relieve the insurer of liability is on the insurer.***[2]***"*** [Emphasis mine]

*"The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden. However, **rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage. If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts.***[3]***"*** [Emphasis mine]

[1] Civil Procedure (Volume 12 (2020) > 18. Evidence > (4) Burden and Standard of Proof > 697. Meaning and general incidence of the burden of proof.
[2] Ibid 698. Incidence of the legal burden
[3] Ibid 698. Incidence of the evidential burden

36. In **<u>Bond Air Services LD. v Hill</u>**,[4] Lord Goddard CJ held *that as it was always for an insurer to prove an exception, so it was for him to prove the breach of a condition which would relieve him from liability in respect of a particular loss; accordingly, the onus was on the underwriters to prove, if they could, that the claimants had failed to comply with the conditions.*

37. He stated at page 428:

> *"But, in my opinion, much clearer words than are used here would be necessary to change what I think,* ***certainly for a century and probably for much longer, has always been regarded as a fundamental principle of insurance law, that it is for the insurers who wish to rely on a breach of condition to prove it."*** [Emphasis mine]
>
> *"**As a general principle, the onus is on the insurers to prove that a condition has been broken, not on the insured to prove compliance on his part with each and every stipulation**. It may well be that, if there is a question as to whether a contract of insurance has ever come into existence or begun to be operative, the insured has to prove the happening of any events necessary to its existence or operation,* ***but where the question is as to the insurers' liability under an admittedly effective policy, the rule as to the burden of proof is axiomatic in insurance law.*** *It is open to the parties to alter this result by making an express stipulation that the onus of proof is to be on the insured, but very clear words are necessary to achieve such a result."*[5]
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> ***"It is for the insured to prove that a loss has taken place and that this loss falls within the insuring clauses of the policy. Once that has been done, it***

[4] [1955] 2 Q.B. 417

[5] Halsbury's Laws of England > Insurance (Volume 60 (2018)) > 2. General Principles of Insurance > (7) Conditions of the Policy > (iv) Performance of Conditions > 110. Onus of proof.

is for the insurers to establish that the loss falls within one of the exceptions , or that there has been a relevant breach of condition.*"*[6] [Emphasis mine]

38. From the learning above, it is clear that in insurance law, it is for the Claimant to prove that there was loss suffered and then it is for the Defendant or insurer, if relying on an exception or a condition precedent, to prove that that has been breached.

39. The Claimant has proven that loss was suffered as there was judgment against it and monies were paid out to Ian Gonzales. The onus was then on the Defendant insurers to prove the breach of the conditions.

40. In arriving at a conclusion on this issue, it is necessary for the Court to determine by way of the evidence: **(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.**

41. In my previous judgment in this matter, the Court noted that these were live issues, which were undoubtedly factual, which can only be resolved by cross-examination at trial. In that judgment, I held that 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 meant that the Defendant had a realistic prospect of success.

42. The main evidence of the Defendant came from Angela Mohammed, who was the Manager of the Legal Department of Nagico Insurance (Trinidad & Tobago) Limited for the period January 02, 2014 to July 08, 2016.

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[6] McGee: The Modern Law of Insurance > Part D The insurer's liability > Chapter 19 The claims process and indemnity > Proof of loss > Burden of proof

43. Ms. Mohammed's evidence was that from her review of the Defendant's predecessor files, the incident was reported in writing on 12 October 2005 as required by the policy. The records show that Comprehensive Insurance Brokers Limited was the Broker and had provided the necessary documents relating to the Workmen's Compensation claim. There is no dispute that this was paid out by the Defendant's predecessor.

44. The Broker also gave notice to GTM that Mr Gonzales had quit his job and the Claimant requested reimbursement of compensation by them to Mr Gonzales. This was paid. This notice was on 1 March and 11 April 2007 and payment was made on 15 May 2007.

45. Based on her further review of the file, the Defendant's predecessor did not receive any further notification from the Broker or the Claimant about any additional claim by Mr Gonzales until on or about 9 October 2009. On this date, the Broker notified the Defendant's predecessor that the Claimant was in receipt of a pre-action protocol letter dated 28 September 2009 and the predecessor was provided with a copy. The predecessor noted on file that no pre-action letter or High Court action was ever served on the Defendant's predecessor. On inspection of the notes, since the date of injury was 8 October 2005, and no further action had been taken, the limitation period for initiating a claim would have expired.

46. From her examination of the file, a decision was taken about one year later, in or around September 2010 to close the file since they received no notification and/or service of any High Court action and the limitation period had expired.

47. The Claimant wrote on 8 October 2009 to the Broker attaching a copy of the pre-action letter and requested their advice. On 12 October 2009, Girwar & Deonarine responded to the Claimant's letter of 8 October 2009. The Claimant's appointment of Girwar & Deonarine occurred without the consent or approval of the Defendant's predecessor.

48. The letter of 12 October 2009 from Girwar & Deonarine advised the Claimant to provide copies of any action to them immediately upon receipt so that they could protect the Claimant's interests. The letter also requested the Claimant to provide instructions to Girwar & Deonarine on whether to admit liability defend or raise contributory negligence. There is no record of such letters being issued by the Claimant to the Defendant's predecessors.

49. The letter did not advise the Claimant to advise the Defendant's predecessor of any action filed nor did the letter request any consent from the Defendant's predecessor before any admission, defence or contributory negligence was raised. The letter only advised to inform the Defendant's predecessor that Workmen's Compensation had not been paid.

50. Unbeknownst to the Defendant's predecessor, a Claim was filed on 30 September 2009 and the Claimant through its Attorneys on 20 November 2009 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. They also did not provide consent or approval to the Claimant to appoint Girwar & Deonarine to represent their interest or file an appearance denying liability.

51. By letter dated 25 November 2009, Girwar & Deonarine informed the Claimant that they had entered an appearance denying liability and requested copies of all documents from the Claimant to assist in preparation of their Defence.

52. Based on Ms Mohammed's examination of the letters between the Claimant and Girwar & Deonarine, and her examination of the predecessor's files, between 25 November 2009 and 4 February 2010, the Claimant provided instructions to Girwar & Deonarine and approved the contents of the Defence without the consent of the Defendant's predecessor.

53. By letter dated 28 April 2010, Girwar & Deonarine wrote to the Claimant requesting further instructions based on an amendment to Mr Gonzales' claim and the Defence of Nu Iron, the Second Defendant to that claim. The Defendant's predecessor again never received immediate written notification of the Amended Claim of the Claimant. Therefore, the Defendant's predecessor had no opportunity to provide either consent or approval to the conduct of the Claimant's case nor did they have an opportunity to consider how to handle the Defence of the Amended Claim.

54. Krishna Maharaj was appointed as an independent medical assessor without the consent and/or knowledge of the Defendant's predecessor. Further, between February 2011 and September 2011, attempts at amicably resolving Mr Gonzales' claim were made by the Claimant. Those offers and promises during the aforesaid negotiations were also done without the consent and/or knowledge of the Defendant's predecessor.

55. From her examination of the files, she is also aware that the predecessor on 4 October 2011 received a letter dated 30 September 2011 from the Broker annexing all of what was called "the Claim Documents." From her search of the Defendant's predecessor file, she is able to say that copies of the claim documents filed by Mr Gonzales in the High Court were not in the file.

56. Since the file had been closed since 2010, and was resurrected when the Defendant was carrying out file and storage clean-up operations, she came across the file and made enquiries from Girwar & Deonarine who informed her that they were awaiting judgment. Nu Iron had entered into a consent agreement endorsed on Counsel's brief so there was no way she could calculate the possible contribution.

57. After judgment on 23 July 2014, the Broker wrote to the Defendant informing them of the judgment. On 4 September 2014, she wrote to the Claimant denying that they were liable to make any payments on behalf of the Claimant to Mr Gonzales since the Claimant failed to notify their predecessors or the Defendant in accordance with the Policy of Insurance.

58. She attended a meeting in good faith on 8 September 2014 with Girwar & Deonarine. Her attendance at the meeting was not a waiver of the Defendant's denial of the claim made by the Claimant on the Policy of Insurance. At the meeting, the Claimant indicated an intention to appeal the decision and having read the judgement she was surprised since she could not see the possible prospect of success. She asked what the costs were for the appeal which was not yet calculated. She also asked the Attorneys whether any legal opinion had been prepared as to determine the scope of their chances of success in appeal and they said they did not have one.

59. In cross-examination of Ms Mohammed, the Claimant did not elicit any evidence that can satisfactorily show that she was being dishonest or that she was hiding information or documentation that would show the predecessor had notice.

60. Ms Mohammed admitted that she had issues putting together the Claimant's file since files were not in order but this is not enough for the Court to draw any adverse inferences on the issue of whether their predecessor was ever informed of the Gonzales' High Court Action.

61. While the Claimant submitted that there was inconsistency with Ms Mohammed's evidence as to when she became aware of the Gonzales' Action, this again is not sufficient for the Court to draw any conclusions, as it does not assist the Court in determining when the predecessor was made aware in writing of the matter, if at all.

62. In cross-examination of Ms Sandy, the Defendant's witness, she testified that she could not recall dealing with the Workmen's Compensation claim but it is possible that she did. She worked with GTM until 2005. She testified that at that time the supervisor was Donna Wallace. This witness was therefore of no assistance to the Claimant's claim as it relates to the common law action.

63. Cross-examination of Ms Garcia, the Defendant's other witness, was also of no significant assistance to the Claimant. Ms Garcia testified that she was involved in the Workmen's Compensation claim in 2006 when she worked at the Broker. She testified that while at GTM she would not handle any documents coming from the Broker due to what she deemed was a conflict of interest, since she prior worked for the Broker.

64. She testified that she could not recall getting the pre-action letter even though it was addressed to her, but that if she did get it, it would have gone to the manager or the supervisor. The manager at that time was either Donna Wallace or Ackbar Hosein. The supervisor was Keon Gandalal.

65. She did testify that in her experience, as an officer working with GTM, that she would have expected GTM to advise of the next step. This alone however does not allow the Court to draw any conclusions as to whether the Defendant's predecessor was ever served.

66. The Claimant did not elicit any evidence or similar evidence from the Defendant's witnesses from which the Court can draw inferences of the predecessor being served.

67. The Court must now look at the evidence of the Claimant to determine whether it has presented any evidence, which could counter the Defendant's evidence.

68. I will first look at the evidence of the Claimant's main witness Mr Archie.

69. He admitted in cross-examination that the handling of the Workmen's Compensation matter by GTM was different from their handling of the common law claim as they were very involved in the former. In fact, in his evidence he stated that it was due to his observation of GTM's non-attendance at Court during case management that he enquired of Mr Gosine (Troy), as to why GTM was not present.

70. He was referred to the letter of 8 October 2009 sent by the Claimant to the Broker informing them that a pre-action letter from Mr Gonzales was received. He also confirmed that the Claimant forwarded a copy of the letter to Girwar & Deonarine but he did not have the consent of the insurer to send that pre-action letter to them.

71. He admitted in cross-examination that the letter of 12 October 2009 from his Attorneys did not advise him to send the common law claim to his insurers to determine whether he should admit liability, defend or raise contributory negligence. He admitted that the letter from his Attorneys, however, did advise him to bring the issue of unpaid Workmen's Compensation to his insurer's attention. He also admitted that the said letter was advising him to bring to his Attorneys' attention any action that is filed. He testified that he did not seek the insurer's consent to send the claim to Girwar & Deonarine.

72. He was referred to the letter of 25 November 2009 from his Attorneys advising that an appearance had been entered on the Claimant's behalf, indicating that the Claimant intended to defend the matter. He testified that he did not get the consent of the insurer to enter an appearance. He also testified that he does not have a letter from the Claimant annexing a copy of the appearance being sent to the insurer.

73. He testified that he has no letter attached to his witness statement informing the Broker and/or GTM that Girwar & Deonarine had entered an appearance for the Claimant.

74. He was referred to the email of Janelle Mendoza sent to the Claimant attaching a draft defence following a meeting of the Claimant's representatives with Girwar & Deonarine. He testified that he did not have the consent of the insurer to have Girwar & Deonarine draft a defence. He also testified that he has no emails indicating that the defence was forwarded to the insurers for their notification. He further testified that he had no letters from the Broker to GTM forwarding this draft defence to GTM for their consent or their notification.

75. He was referred to letter dated 3 February 2010 written by his Accounts Clerk to Girwar & Deonarine confirming the draft defence. He testified that he did not seek the consent of GTM before confirming the defence. He testified that he had no correspondence forwarding this letter to GTM.

76. Mr Archie was referred to a letter dated 20 April 2010 from his Attorneys advising that Mr Gonzales had amended his claim. He testified that he did not attach to his witness statement any document sent to GTM indicating that an amended claim had been filed. He testified that he did not seek the consent of the insurer about the terms and conditions of the amended defence nor did he seek consent of the insurer to have Girwar & Deonarine continue to represent the Claimant's interest in the filing of the amended defence.

77. He testified that he understood that his Broker was his agent and that when he informed them of what transpired in Court they had the responsibility to inform the insurer. He however testified that he has not attached any correspondence to his witness statement showing that he informed his Broker of what transpired each time the matter came up in Court.

78. He testified that he has not attached any correspondence sent to the Broker informing them of the filing of the defence or of the attempts to negotiate a settlement of the claim with Mr Gonzales.

79. He testified that he was aware that as part of the Policy of Insurance, any settlement had to be agreed by the insurer and that if negotiating a settlement the insurer had to be notified.

80. In his witness statement, he stated that the Claimant was informed by Ms Psyki Aban that they should go ahead and defend the claim and at the appropriate time GTM would step in. He testified that he did not know at what time they would have stepped in, but

it was around September 2011, when his Attorneys were negotiating a settlement that he became concerned about the insurer's non-involvement.

81. At that time, he did not know that the insurer did not have any notice of the proceedings because as far as he was concerned, he was going upon what his Broker told him. He testified that he therefore could not verify the accuracy, as to whether or not the Broker was told what Ms Psyki Aban said.

82. In his witness statement, he stated that he called Mr Troy Gosine of the Broker who told him he would speak to GTM and get back to him. A few days later he received a call from Mr Gosine saying that GTM was aware of all that was happening and that the Claimant should go ahead and deal with the claim and that GTM would send a representative later.

83. He testified that he did not receive any letter from Mr Gosine after this conversation confirming what Mr Gosine had said. He stated that he did however receive a phone call from GTM stating that they were aware of the case, but admitted that that is not contained in his witness statement. He testified he did not include it in his witness statement because he could not remember the lady's name at the time.

84. He was referred to a letter dated 30 September 2011 from the Broker to GTM. The letter stated, *"Please find attached copies of all Claim documents we have on file."* He accepted that the letter did not set out what documents were attached.

85. As to the second line of the letter, which states, *"Kindly review and advise on GTM's position on this Claim,"* he admitted that it does not give consent to the Claimant to carry on the claim and that they would come in and send a representative later. He accepted that the letter did not provide any update on the matter to GTM.

86. He also accepted that in these proceedings, there are no documents from the Broker informing GTM of the progress of the Gonzales' action, other than the letter of 30 September 2011.

87. Mr Archie accepted that by letter dated 4 September 2014 from Ms Mohammed, in which she stated she had no knowledge of the litigation until their meeting, this corroborates his evidence that there was no correspondence in this matter from the Broker to GTM.

88. He testified that he was not aware of whether the Defendant was ever sent an opinion on the success rate or the legal scope of an appeal, as suggested by Ms Mohammed in her letter above. He accepted that Ms Mohammed had said not to pursue an appeal unless the legal scope and success rate was advised in any such appeal. He agreed that the Claimant therefore did not have the consent of the Defendant to pursue an appeal in the matter.

89. He accepted that any costs arising from an appeal would have been without the Defendant's consent.

90. He was referred to a letter dated 10 November 2014 from Girwar & Deonarine to the Defendant. He testified that he gave instructions to send a response to Ms Mohammed's letter of 4 November 2014. He accepted that the letter did not state that his Broker informed GTM of the developments of the matter.

91. He accepted that in the process of negotiations to settle Mr Gonzales' claim, GTM and Nagico were never involved.

92. He also accepted that in that letter, it does not state that GTM or Nagico, at any point in time, informed the Broker that the Claimant could go ahead and deal with the claim and that they would come in at some time later in the matter. He also accepted that it also does not say anything about a conversation between Mr Gosine and Mr Hosein.

93. The witness was referred to the witness statement that was prepared for Ackbar Hosein attached to his own witness statement. He accepted that in the draft witness statement prepared for Mr Hosein it does not say that the Claimant should proceed to deal with the matter and that the insurer would send a representative later.

94. Mr Gosine, in cross-examination, also accepted that with respect to the Workmen's Compensation claim, GTM took an active role. He testified that the hands-off approach they took with the common law claim is unfamiliar with their way of operation in general.

95. He accepted that despite his witness statement stating that Ms Aban had ensured that notification of claims was forwarded to GTM, there is no correspondence in these proceedings from Ms Aban forwarding the claim documents, the Claim Form and Statement of Case, to GTM.

96. He testified that there was no correspondence from Ms Aban informing the Claimant that they should proceed with the claim because it was done verbally.

97. Mr Gosine accepted that despite stating that Ms Petronilla Ahamad was one of the persons at GTM who was informed of the matter, she left GTM's employ in February 2006, predating even the Workmen's Compensation claim.

98. He accepted that there are no letters coming from Comprehensive Insurance Brokers to GTM informing them of the progress of the common law claim but testified that this was due to most of it being done verbally.

99. Mr Gosine was referred to the letter of 30 September 2011 from his company to the Defendant. He testified that the reason the letter is worded as it is, is because Mr Hosein told him he could not find GTM's file and he was resending the documents to Mr Hosein. He accepted that the letter does not refer to a previous correspondence

indicating that the documents are being resent for the second time. He also agreed that it does not say what documents are being attached. He agreed that from reading the letter, one could not tell whether the Claim, Defence, List of Documents and Witness Statements, or any of these documents, were sent to GTM.

100. He accepted that the letter does not assert a previous position by GTM in relation to the claim where it asked for advice on GTM's position on the claim. He also accepted that the letter does not provide an update on the progress of the matter.

101. He testified that he was told by the Claims Department at GTM that the Claimant should go ahead with the Claim but that is not part of his witness statement because he could not remember the name of the person to whom he spoke.

102. Mr Gosine further testified that he personally did not send a letter to either Keon Gandalal or Dyan Loutan, after he was informed by Mr Hosein that they would usually deal with filed actions. He testified that he did not write to Ms Loutan to get any information from her on what instructions would have been.

103. He testified that there are no letters from Comprehensive to GTM confirming their position as alleged, which was that the Claimant should proceed with the claim and they would send a representative later. He stated that he was told this by Mr Hosein.

104. He also accepted that the draft witness statement of Ackbar Hosein does not state that Mr Hosein informed him that the Claimant should go ahead with the matter and a representative would be sent later by GTM.

105. In re-examination, Mr Gosine stated that the reason some of the documents were not exhibited is because his company digitalised files and there was a systems crash, so the digital files are no longer available.

106. From the Defendant's evidence, particularly that of Ms Mohammed, there were no documents sent to the Defendant's predecessor giving immediate notice of the Gonzales' High Court Action. This is supported by the Claimant's witnesses.

107. Mr Archie's evidence does not in any way counter the evidence of Ms Mohammed. In fact, his evidence works only against him. He accepted and testified that in this matter, he has provided no documentary evidence showing that any notice was sent to GTM. He accepted that on every account of what transpired from pre-action stage to trial, he did not have the consent of the insurer. He could not point to a single document that could assist his case that the insurer had notice. He could only say that he sent documents to his Broker, who had the responsibility to send same to the insurer. He had no correspondence from his Broker that all the documents were in fact being sent. He accepted that the letter of 30 September 2011, did not state what documents were in fact sent or resent to the insurer.

108. While the Claimant's submissions alluded to the Court looking at the chain of events and correspondences, which was in the possession of the insurer/Defendant, to conclude that there was in fact notice, Mr Archie's own evidence does not support this. Mr Archie admitted that from the beginning he acted on his own accord and did not seek the consent or seek to enquire from his Broker whether he had the consent of the insurer to do anything. It was only at the stage of negotiations and when he was incurring expenses that he sought to enquire.

109. The Claimant's witness, Mr Gosine, was also not of assistance to its case. Mr Gosine could not point to a single piece of documentary evidence to show that he had forwarded the Gonzales' High Court Action to the insurer, thereby giving notice as was required by the Policy of Insurance. He accepted that his company's letter of 30 September 2011 was not of assistance, as it did not list the documents that were being sent to the insurer.

110. The evidence of Mr Gosine does not provide any clarity on what were the documents contained in the letter of 30 September 2011 even though he was best placed to assist the Court in knowing what was annexed therein. In any event, the claim was filed in 2009, therefore, this could not amount to immediate notice to the insurer of the Gonzales' High Court claim, even if the documents were annexed therein.

111. The task of this Court was to ascertain from the evidence elicited at trial, the exact date, if any, that the Defendant first became notified of Mr Gonzales' High Court claim. From the Defendant's evidence, it was never immediately notified. As to the Claimant's case, there was simply no evidence that the insurer was immediately notified.

112. The Practice Direction on pre-action protocols states:

"<u>GENERAL</u>

1.4 The objectives of pre-action protocols are:

(1) to encourage the exchange of early and full information about the prospective legal claim,

(2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings,

(3) to support the efficient management of proceedings under the CPR where litigation cannot be avoided."

113. The effect of sending the pre-action letter to the insurer does not amount to notice of the Gonzales' High Court claim. A pre-action letter is no assurance or confirmation that an actual claim will be filed. The purpose of a pre-action letter is to encourage negotiations and settlement of a prospective legal claim: it is not a claim. The name "pre-action" is self-explanatory.

114. In conclusion, the Court is not convinced that the insurer at the time was given immediate notice of the Gonzales' High Court claim. The Defendant has provided the documents in its possession, and the Claimant was not in a position to provide

any additional documentation to prove that there was in fact immediate notice to the Defendant.

115. In fact, there is no evidence as to whether the insurer was ever notified of the Gonzales' High Court action until possibly September 2011. Even this is uncertain, as the letter of 30 September 2011 was not of assistance.

116. Accordingly, the Court finds that the Claimant breached Conditions 2, 4 and 5 of the Policy of Insurance.

Issue 2- If the Claimant breached Conditions 2, 4 and 5 of the Policy of Insurance, did the Defendant waive its right to enforce any such breach and/or is the Defendant estopped from relying on any such breach?

117. The right to rely upon breach of a condition precedent can be lost only by estoppel and not by waiver.[7]

118. According to **Halsbury's Laws of England**, "***Estoppel takes place when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly.*** Once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."[8] [Emphasis mine]

119. The Claimant relies on the following particulars of waiver:

(i) At all material times, the Defendant well-knew that litigation was afoot and the firm of Girwar & Deonarine was acting on behalf of the Claimant and

[7] Halsbury's Laws of England > Insurance (Volume 60 (2018)) > 2. General Principles of Insurance > (7) Conditions of the Policy > (v) Waiver in Relation to Conditions > 112. Estoppel distinguished from waiver.
[8] ibid

did not exercise their rights pursuant to Conditions 4, 5 and 9 of the said Policy of Insurance.

(ii) The Claimant would rely on its letters dated 8 October 2009, its broker's letter dated 9 October 2009 and the 30 September 2011 in support of this contention. In particular, the Claimant would further contend that by the broker's letter dated 30 September 2011, wherein the Defendant was called upon to "kindly review and advise" on their position as to the claim brought by one Mr Ian Gonzales, the Defendant well-knew of this claim long before the trial had even been completed.

(iii) The Claimant would further contend that the Defendant failed and or neglected to respond to its broker's letter dated 30 September 2011, and by their silence, this conduct induced the Claimant to believe that the Claimant could have full conduct of the matter through their Attorneys-at-Law, Girwar & Deonarine.

(iv) In relation to conditions 4, 5, 8 and 9 of the Policy of Insurance, the Claimant would further contend that the Defendant's letter dated 4 September 2014 only came into being and/or crystallised after judgment was delivered by which time third-party rights (i.e. one Mr Ian Gonzales) had accrued and the Claimant therefore would be prejudiced at this stage of the proceedings to honour the third party's judgment at its own expense.

120. I have already concluded that there was no immediate notice to the insurer of the Gonzales' High Court claim and so it follows that the insurer's right to rely on the breach is not lost by estoppel. There was no immediate notice allowing the insurer to have knowledge of the claim, therefore there can be no estoppel. The Claimant has failed to prove that their Broker had conversations with GTM and had verbal consent to do anything relating to the Gonzales' High Court claim. Even the representative of the Broker was unable in his own evidence and under cross-examination to provide

concrete and accurate evidence as to whom he would have spoken to at GTM, if at all, and who would have given consent.

121. The onus was on the Claimant to show that the Defendant had knowledge of the claim and despite this the Defendant made ***a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly.***

122. The Claimant failed to prove both aspects. The Claimant also failed to provide any evidence that it would not have spent time and incurred expense in the proceedings had it known that the insurer would not consent.

123. Since the Claimant has failed on issues 1 and 2, issue 3 on the quantum of damages is now rendered nugatory. In light of my analyses and findings above, the Claimant's claim shall be dismissed.

VI. Costs: Entitlement and Quantification

124. On the question of entitlement to costs, the general rule that costs follow the event shall apply in this case as I can see no justification for departing from the principle set out in **Part 66.6(1) CPR 1998** that the Court must order the unsuccessful party to pay the successful party. Accordingly, the Claimant shall be ordered to pay the Defendant's costs to be quantified on the prescribed scale. Before such costs can be quantified the "**value" of the claim must first be determined** in accordance with **Part 67.5(2) of the CPR 1998.**

125. On the basis that (i) the Defendant is the successful party; and (ii) the matter having been determined after a full trial, the value of the claim is to be determined in accordance with **CPR Part 67.5(2)(b)(i)**, that is, by the amount claimed by the Claimant in the Claim Form, which is **$2,273,796.85 + $196,686.92 = $2,470,483.77**. Prescribed costs on this value are therefore quantified in the sum of **$170,762.00** in

accordance with the **<u>Scale of Prescribed Costs in Appendix B of Part 67 CPR 1998.</u>**

VII. Disposition

126. Given the reasoning, analyses and findings above, the Order of the Court is as follows:

<u>ORDER</u>

1. **The Claimant's Claim be and is hereby dismissed.**

2. **The Claimant shall pay to the Defendant the costs of the Claim quantified in the sum of <u>$170,762.00</u> in accordance with the <u>Scale of Prescribed Costs in Appendix B of Part 67 CPR 1998</u>.**

3. **Stay of execution 42 days.**

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Robin N. Mohammed
Judge