

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2020/0093

BETWEEN:

MIA CURRENCY

Claimant

AND

[1] SAGICOR LIFE (EASTERN CARIBBEAN) INC.

[2] S.V. BROWNE AGENCY LIMITED

[3] STANLEY BROWNE

**(General Manager and Principal Representative of
Sagicor Life (Eastern Caribbean) Inc.**

Defendants

BEFORE: The Hon. Mde. Justice M E Birnie Stephenson

Appearances:

Mr. Jomo S Thomas of Thomas & Barnwell for the Claimant
Ms. Paula David of Saunders & Huggins for the Defendants

2023: March 20, 22
November 29
2024: February 21
September 23
October 11
December 13 (Re-Issue)

JUDGMENT

[1]. **Stephenson J.:** This case touches and concerns whether there has been a valid repudiation of health insurance coverage of the minor son of the claimant by the defendants. The defendants put the Claimant's good faith in issue in that they claim that the claimant failed in her application to disclose her son's previous existing medical condition which entitled them to take that action that they did. This of course is denied by the claimant who essentially claims that at all material times she made all disclosures regarding her son's health challenges. She also accuses the second and third named defendants of misleading and misguiding her in the process of her application. In this process Mrs. Currency would be the insured/policy holder.

The claim

[2]. By claim form filed on the 17th August 2020 the Claimant (Mrs. Currency) brought a claim against Sagicor Life (Eastern Caribbean) Inc.(Sagicor),(SAGICOR) SV Browne Agency Limited and Stanley Browne (General Manager and Principal Representative of Sagicor life (Eastern Caribbean) Inc. (The second and third Defendants)

[3]. The claimant seeks the following remedies against the Defendants:

- (1). A declaration that at all material times she disclosed to the defendants all the necessary and relevant information for a health insurance policy.
- (2). A declaration that in the circumstances of the case the 1st and 2nd named defendant are stopped from denying a claim filed regarding her minor child of the family and cancelling coverage for her minor child.
- (3). A declaration that Health Insurance Policy Numbered H057400516 ¹(The health insurance policy) between the claimant and the first named company covering the claimant, her husband and two children is valid and legal binding.

¹ The Health Insurance Policy was duly attached and exhibited to the Statement of Claim

- (4). A declaration that the health insurance coverage for the minor child of the family remains in force in all the circumstances of the case.
- (5). A declaration that SAGICOR shall honour the claimant's request for tele-medicine services and pay damages to the value of the services denied.
- (6). A declaration that the Health Insurance Policy contains terms that are unfair or prejudicial to the rights of the claimant and these terms ought to have been brought to the claimant's attention by the second named Defendant (S V Browne Agency) and the third named Defendant (Mr. Browne).
- (7). A declaration that the failure of SV Browne Agency and Mr. Browne to bring the said prejudicial and unfair terms of the contract to the attention of the claimant therefore makes such terms invalid, null, void and inapplicable.
- (8). A declaration that Sagicor shall pay to the claimant the sum of \$20,000 (Twenty thousand EC Dollars) being the expenses incurred for the care and treatment of the minor child in Cuba.

[4]. The Claimant claims that in the alternative should the Court conclude that the minor child's expenses incurred in Cuba are barred, that the court should make a declaration that Mr. Browne is held personally liable for all expenses as the Claimant acted on his advice.

[5]. The claimant also seeks damages, interests, costs, and any other remedy that the court deems suitable in the circumstances.

[6]. The claimant contends that S V Browne Agency Limited was at all material times the principal representative of SAGICOR and acted on behalf of SAGICOR during the application and approval process for a health insurance policy made by the claimant to cover herself, husband and the minor children of the family.

- [7]. That during the process of the application for the policy, it is the claimant's pleaded contention that she was guided through the process by the S V Browne Agency Limited and particularly by Mr. Browne the Agency's principal. She contended that she discussed all material facts about the health and well-being of each member of her family. She further pleaded that she was advised by the said Defendants on how to answer each question on the application form.
- [8]. It is the Claimant's pleaded case that on the 7th January 2019 she submitted her application numbered 45619 to S V Browne Agency Limited and Mr. Browne for health Insurance coverage. That the Health Insurance policy categorised as a CariCARE Protector² was issued on the 1st October 2019³ with a monthly premium of \$487.00 (Four hundred and eighty seven Eastern Caribbean dollars)
- [9]. The claimant claims that she paid her first payment on the 5th July 2019 under payment number RSV293 3772.
- [10]. The substance of the claimant's claim is by issuing the Health Insurance Policy, SAGICOR agreed to provide health coverage for her and her family members as named and listed in her statement of claim.
- [11]. It is the Claimant's pleaded case that during the application process which took place between January and July 2019 she disclosed to the second and third Defendants and by extension the first named Defendant that the minor child has suffered from an undiagnosed illness, and he did so from time to time. It is also the claimant's case that her son was at all material times available for medical tests by the Defendants. However, it was represented to her by the S V Browne Agency and Mr. Browne that SAGICOR does not test children, and it was not necessary to have her son tested.

² Ibid

³ The claimant exhibited a letter from SAGICO under the signature representing Stanley Browne as the General Agent dated the 3rd October 2019 including the policy document for the Individual Health Policy approved on her behalf. The documents listed as included were the Receipt on delivery of Contract, the Policy Contract and Claim Forms.

[12]. The Health Data Schedule naming all the persons covered including the claimant's son was also exhibited by the claimant. The Schedule also included the Class of Policy being the CariCare Protector and the monthly premium of EC\$487.00 (Four hundred and eighty dollars EC) was also included.

[13]. The individual Health Schedule of benefits of the insured were also stated in Section two of the policy, the particulars of the policy named and included the claimant's son. The date of issue of the Policy was stated as the 1st October 2019.

The evidence:

[14]. Both the claimant and her husband gave evidence in support of the claimant's case. It is their case that their minor son from early childhood suffered from sporadic and disconnected headaches, diarrhea, and vomiting. They have for some time been trying to find out the reason for his bouts of illness, but they never received a definitive diagnosis or treatment regime for the child. It is the parent's contention that they were advised by the medical practitioners who examined their son that he would grow out of it or that it was growing pains or that it was psychological and all in the child's head.

[15]. Mrs. Currency's evidence was that she asked Mr. Browne whether there was a requirement for her son to undergo a medical examination and she was told no, that as a company policy children were not tested. Further, it was Mrs. Currency's evidence that she was encouraged by the second and third Defendants not to include the information of her son's health challenges in the application, as this would slow down the application process and that there was "*literally nothing to tell the 1st Defendant*"⁴. The witness further stated that she understood this to mean that she never received a medical diagnosis for her son, and his condition was inconclusive.

⁴ Witness statement of Mia Currency at paragraph 5

Mrs. Currency in her witness statement said that she ignored the advice rendered and stated her son's health challenge on the application form.

[16]. Mrs. Currency in her witness statement said that between the period February 2019 and June 2019 there was ongoing correspondence between herself and Mr. Browne as to the status of her application for insurance and that she provided additional information regarding herself and her family and that it was only herself and husband who were required to undergo medical examinations which was done and when those were completed she was advised that her application for health coverage for her family was successful. That during her conversations with Mr. Browne regarding her request as to the status of her application, he told her that he was awaiting a response from SAGICOR, whose head office was in Barbados.

[17]. Mrs. Currency's evidence was that she proceeded to make her premium payments upon being advised by Mr. Browne that her application was successful, however, when she requested a copy of the policy to review the terms and conditions she was told that she would receive them. Trusting in the assurances of Mr. Browne she commenced and continued making premium payments from July 2019 prior to receiving the policy documents. It was the Claimant's case that upon request for information regarding the documents, she was informed by Mr. Browne's secretary that the "*head office had to issue and finalise the contract and its parts first before it was given.*"⁵

[18]. The Claimant's evidence is that in August 2019 the child (her son) became severely ill, and he was taken to Cuba for treatment, and a diagnosis was finally received. Mrs. Currency in her witness statement said that at this time she still did not receive the written policy from the insurers so in the circumstances herself and her husband had to pay \$27,000.00 EC (twenty-seven thousand Eastern Caribbean Dollars) for their son's treatment in Cuba out of their pockets.⁶

⁵ Ibid at para 9

⁶ Copies of the receipts for the payments made for the treatments were duly admitted into evidence

[19]. In Cuba, Mrs. Currency said she received what she described as a “selective diagnosis” for her son’s condition being an *“immunological deficiency associated with histamine intolerance”*⁷. It was this witness’ continued evidence that whilst in Cuba she contacted Mr. Browne and his agency here in Saint Vincent and the Grenadines via WhatsApp informing them of what was happening and sought their advice as to the best way to proceed regarding the insurance coverage of her son’s trip to Cuba. She said she was advised by Mr. Browne’s agency that *“based on the advice of the group department her son’s situation “may be looked on as a pre-existing condition which may complicate the relationship going forward.”*⁸

[20]. Mrs. Currency told this Court that she again requested copies of the insurance policy from the second named Defendant and for advice on the way forward in relation to other claims that may arise in relation to her son. She said she also stated that she felt as if she was operating blindly and was not comfortable with that. She said she wanted to know why SAGICOR was taking so long to process her contract particularly in view of the fact that no further information was requested from her.

[21]. Mrs. Currency’s evidence was that her numerous attempts to contact the 2nd named defendant went unanswered and despite this she continued paying her premiums on what she understood to be the approved policy. Mrs. Currency in her evidence told the Court about her reaching out to SAGICOR’s head office in Barbados enquiring about the status of her policy. These inquiries were fruitless.

[22]. After contacting Barbados, Mrs. Currency said that she was contacted by the second named defendant and was discouraged from corresponding with the head office. Mrs. Currency told this Court that she was subsequently called into the office by second named defendant to sign an amended form and she was informed that her husband would be excluded from the policy at first, as this would speed up the

⁷ A copy of the Doctors report was duly admitted into evidence

⁸ Ibid at para 12

process. She said she was further told that this was the only way SAGICOR would issue her the policy and the card to use immediately for her son's doctors' visits. Mrs. Currency was told by the 2nd defendant that her husband's signature was not properly captured, and this was the cause of the delay in issuing the policy.

[23]. It was the evidence of Mrs. Currency that she considered this as strange, as the amended forms were subsequently used to make challenges to her application form, and she felt there was no need for this as she and her husband were led to believe that they were already in a confirmed relationship with the insurance company, and that the previous application forms were accepted. She said further that she also found it strange that nine months after making the application along with communication and correspondence between herself and the 1st and 2nd defendants, she was being asked to sign an amended application form.

[24]. It is Mrs. Currency's evidence that during the month of September 2019 she and her husband attended the office of the first and second named defendants and signed the amended form as requested. However, she endorsed the form with words to the effect, *"that I want my documents to be given to me immediately and I would please like to know why the amended form was necessary"*.⁹ The witness said she did not write on the form the word *"kindly proceed with application without spouse Romel Currency as dependent"*¹⁰

[25]. The witness eventually received the policy documents from the SAGICOR under cover letter dated the 9th of October 2019. She received these late in November 2019. She said that the bundle of documents included a receipt of delivery contract, the policy contract, amended forms, application forms and claim forms. The claimant exhibited these documents in support of her case. She said they requested that she review the documents and return the receipt on Delivery Contract to the SAGICOR office.

⁹ Ibid at para17

¹⁰ Ibid at para 17

[26]. Mrs. Currency said that the first thing she noted was that the amended application form which she signed and endorsed with her request for immediate delivery of the contract documents “*appeared to be doctored*”¹¹. The witness said that it appeared to her that her signature appeared to have been copied and pasted on the documents sent to her and that the endorsement she placed on the amended application was not on the said application. Further she was informed that shortly after signing an amended application form seeking that her husband be excluded from coverage of the policy, and that she would receive a policy within a six-day window including her husband on the coverage.

[27]. Mrs. Currency also stated that upon examination of the documents received, that the date on the application form was June 2019 and not January 2019 which was when she submitted the application. She further noted that the change of date was not initialed by herself, she also said that it appeared to her that her signature was cut and pasted onto the application dated June 2019 and that the application number of the form was inserted in handwriting on page 5 and not electronically as in the other documents.

[28]. Mrs. Currency asserted in her evidence in chief that the application form that was sent to her in the bundle of documents was not the one that she filled out and handed into the company, that the one returned to her, the handwriting answering the questions was not in her handwriting and the answers to the questions were incorrect, and in her view, inadequate. Mrs. Currency said she immediately questioned the defendants why her contract was stating a commencement date of October 2019 and not July 5th, 2019, when she commenced paying her premiums.

[29]. Mrs. Currency went on to say that the 2nd named defendant assured her and led her to believe that her policy was active from July 5th, 2019. She said once again she

¹¹ Ibid at para 20

reached out to Sagicor's head office in Barbados and spoke with a senior manager asking certain questions, particularly why the information on her son was not included in the documents, and requesting an investigation, and up to the time she signed her witness statement she had not received a response to her questions.

[30]. Mrs. Currency further told this Court in her witness statement that she made multiple inquiries of the defendants as to why her son's medical challenges were not acknowledged on the contract since she informed them of his trip to Cuba further, that she also queried about coverage of his medical trip to Cuba, and she was informed that the 1st and 3rd named defendant would honour the insurance coverage. A copy of the email exchange in support of this was admitted into evidence.

[31]. Mrs. Currency complained that the 2nd defendant was not honest or transparent with her in her application for health insurance coverage. She further urged on the Court that the 3rd named defendant misguided and manipulated her in the process of her making her application for the Health Insurance coverage and led her to believe things he said and did would progress her application when she sought clarity and when she raised concerns about the application process and coverage for her son.

[32]. The claimant contends that when making her application she was truthful and candid about her son's medical challenges and put them on the application form despite the fact she was informed that her son's symptoms were minor, negligible and not significant to mention. The claimant is quite adamant that the application form and the amended form included in the bundle of documents received from the company with her insurance contract were not the forms that she signed and that they were tampered with.

[33]. In the face of the defence by Mr. Browne that it is not his role to coach and or advice an applicant, Mrs. Currency insists that this was not the case when she made her application and that she was in fact coached and advised on how to complete her

application for coverage and more particularly how to handle the information about her son's symptoms which were at the time of application, not diagnosed.

[34]. Mrs. Currency further contends that at no time was it indicated to her or was she advised that the insurance contract contained terms and conditions that were prejudicial to her rights or that she should seek independent legal advice. Her contention is that she trusted the advice and guidance rendered by the third named defendant and believed that he was acting in her best interest which beliefs she held until she inquired about coverage of her son's medical trip to Cuba.

[35]. The claimant further complained that between the months of February and June 2020 she tried numerous times about accessing telemedicine services from the defendants but to no avail.

[36]. The claimant repeated her complaints about the failure and or refusal of the defendants to respond to her various questions and generally of the service she received. This culminated on the 8th of June 2020 when she was informed by email through an agent one Ms. Mapp that the medical coverage for her son was cancelled on the grounds that he had a history and pre-existing conditions which she failed to disclose to SAGICOR at the time of applying for the policy. She was also informed that they would get a formal letter of severance which up to the time of preparing her witness statement she was yet to receive same.

[37]. Mrs. Currency was cross examined by counsel Paula David. Counsel challenged the claimant as to whether she submitted a claim for her son's medical trip to Cuba, the claimant was adamant that she did submit the claim to Mr. Browne and resubmitted her claim to Mr. Browne, Ms. Alicia Pilgrim, and Ms. Sylvia Mapp, and this resubmission was by email. Mrs. Currency said that she also submitted her claim via WhatsApp and via email to the senior manager in the Barbados office. Mrs. Currency under cross examination stated that she handed copies of all her emails and documents relating to her son to her lawyer. The witness was unable to confirm

whether the documents formed part of the trial bundle when asked by counsel David. This Court pauses to note that it is not the responsibility of the client to place documents in bundles, but it is counsel with conduct of the matter to do so.

[38]. In trials, evidence is adduced by parties to prove or disprove facts which are in dispute in the trial. Evidence is also used to assist a court to decide whether a witness is truthful. The exercise of preparing and presenting evidence to the court is the responsibility of one's counsel. The decision of what documents will be exhibited in support of a party's case or to rebut the other side's case is, was and has always been the responsibility and duty of counsel. Counsel is to ensure that all documents are to be placed before the Court, it is not the duty of the party or the witness to ensure that this is done. Too many times, parties to a case or witnesses are embarrassed by failure of counsel with conduct of the matter to exhibit documents that may be relevant and would assist the finder of fact in arriving at a decision. This is not always the fault of the party or the witness and certainly the absence of a document which counsel on the other side may consider relevant and which has not been placed before the Court ought not to be used as a reason to seek to impugn a witness' evidence. The preparation of evidence and the decision of what should or should not be adduced at trial always remains with counsel.

[39]. Ms. David questioned Mrs. Currency about her interactions with Mr. Browne and whether it was her case that he coached her to lie on her application for the policy, and whether she made any complaints in this regard to SAGICOR. Mrs. Currency responded and said she did, and she also sent an email complaining to one Ms. Alicia Pilgrim. Mrs. Currency was very clear under cross examination that Mr. Browne told her not to state her son's condition on her application; however, she told this Court that she was not upset that Mr. Browne advised her to lie but she did find that it appeared odd. Mrs. Currency told the Court in response to counsel David's question as to why she continued to transact business with Mr. Browne if she found his advising her to lie as odd, that she continued doing business because he had a history of doing good business with SAGICOR and that she never had a problem with them.

[40]. Mrs. Currency was also cross examined about her son's medical trip to Cuba and the timelines relating to when he went and when the arrangements were made and what she told the medical personnel in Cuba about him suffering headaches. Mrs. Currency was very careful to say that in her view that the information was lost in translation and there were grammatical errors, so the documents were not accurate. Counsel pointed out to the witness the provisions in the insurance contract regarding seeking medical treatment overseas and the need for prior approval. This court understands her answers to be that her application for the medical insurance predated her deciding for her son to go to Cuba.

[41]. Mr. Romel Currency also gave evidence in the matter. Essentially Mr. Currency's evidence mirrored the evidence of his wife, and it is noted that it is clear to the court that she was the lead person in pursuing the health insurance for the family. Mr. Currency said that she is more organised than him and that when it comes to these kinds of matters, his wife takes care of the business. Mention will therefore be made only to those statements that this court considers to be important to the case at bar.

[42]. In his evidence Mr. Currency said *inter alia* that in June 2019 Mr. Browne called them and congratulated them on having obtained their health insurance policy and advised them to proceed with payments of the premiums. That the payments were made and that they retained the receipts issued by Sagicor's General cashier.

[43]. Regarding their son's medical visit to Cuba and the treatment he received, Mr. Currency stated that while they were in Cuba, his wife got into contact with Mr. Browne and that she apprised him of their son's new development and that they sought Mr. Browne's advice as to how to proceed with SAGICOR. He said he was sitting next to his wife when the conversation with Mr. Browne took place over the phone. He said that all the information regarding their son's stay and treatment in Cuba was submitted to SAGICOR.

[44]. He said subsequently that efforts were made by his wife to contact and follow up with the Head office in Barbados; however, Mr. Browne told them not to do this as the officials in Barbados may think that their claim is not a genuine one.

[45]. Mr. Currency said that sometime in September or October he was contacted by Mr. Browne to come to the office as his signature was not captured. He said he found this request to be a strange one. He said his wife were also called into the office to sign an amended form so that the contract documents could be received, and the cards issued and used for her son's doctor's visits.

[46]. It is this witness' evidence that when the official document package was received, he and his wife realised that the amended document was tampered with and changed, because of this they reached out once again to the Head Office in Barbados. Mr. Currency also said that he and his wife found it strange that the contract stated that it was activated in October 2019 when they were paying premiums from July 2019. He said that their son was not listed on the contract but were assured that their son's claim would be honoured which did not happen.

[47]. The defendants now seek to avoid the policy and repudiate liability thereunder as it regards coverage of the Claimant's minor son. The thrust of the defendants' case is that the claimant failed to make full and frank disclosure of her son's health conditions when applying for the medical insurance.

[48]. Mr. Browne who is the managing director of S.V. Browne Agency Ltd which is the general agent for SAGICOR in Saint Vincent and the Grenadines gave evidence on behalf of the defendants.

[49]. Mr. Browne said he had several meetings with the claimant regarding their application for Health Insurance and that he dealt with Mrs. Currency before as she held a life insurance policy with SAGICOR through him. He said she wished to cancel that policy and take out health insurance for her family.

[50]. This witness said that the application for the health insurance was made utilising the standard insurance application. He said that he did not advise her as to how she should answer the question on the application form, and that she did not require his assistance to do so, nor did she ask for his assistance. Mr. Browne asked this Court to accept that the application form was answered without any input from him.

[51]. He said that where there is an application for health insurance for a family, reliance is placed on the medical questionnaire which is filled out by the parent or guardian, and that it is not necessary for agent to see the children.

[52]. Mr. Browne said when Mrs. Currency met with him to discuss the application for the health insurance, she gave him information relative to her son that he was having little headaches and vomiting which were normal issues that children have. Mr. Browne exhibited the application form submitted by the claimant together with the related documents.

[53]. Mr. Browne told this Court that after the application was submitted to SAGICOR, a medical was requested for the husband which was delayed due to a perceived unavailability of the husband. Further, after waiting for the husband to complete the medical, the Claimant executed an amended form in September 2019 and that she requested that the application be processed without her husband as a dependent. Mr. Currency was subsequently added after he completed the medical.

[54]. Mr. Browne said that the application was accepted by SAGICOR.

[55]. Mr. Browne told this Court that he was in Miami when he was informed that the application was accepted and that when he reached out to the claimants to inform them of this, he was then informed by Mrs. Currency that they were in Cuba with the minor son and that his condition had deteriorated. Mr. Browne included in his witness

statement the content of Mrs. Currency's WhatsApp to him where she sought a lot of guidance from him as to how to proceed.

[56]. His response was also included in his witness statement which stated that whilst he believed her case to be a genuine case based on advice, he received from the group department that her case might be looked at as her son having a pre-existing condition which could complicate the relationship going forward.

[57]. Subsequently, according to Mr. Browne, that claimant sought to access a telemedicine visit and based on this request an Attending Physician Statement was requested outlining the child's medical history. In that statement from the doctor, it was stated that the child was seen by doctors both locally and overseas concerning the same complaint, and that the child had missed school due to the complaint. Following this, SAGICOR decided to remove the child from the Health Insurance Policy.

[58]. Regarding the son's medical visit to Cuba, Mr. Browne said that a claim was never submitted and further, that the son's visit to Cuba predated the policy which came into effect in October 2019.

[59]. Mr. Browne was subjected to a lengthy rigorous and thorough cross examination by counsel Jomo Thomas on behalf of the claimant.

[60]. Under cross examination Mr. Browne said that he told the claimants that the insurance contract was available to them in July or August 2019, and he agreed with counsel Jomo Thomas that the first premium was paid in July 2019. Thereafter Mr. Browne in this Court's view failed to properly answer any of the questions put to him by the claimant's counsel, citing that he was not involved in the payments; he was unable to give clear and direct evidence as to the amount of the payment and the exact date of the payment. He was also unable to give a specific date when the policy was received by the claimants. He said that there was a delay in delivery of the policy and

that it was possible that he would have informed Mrs. Currency that she was going to be covered during the period.

[61]. Mr. Browne denied that he told the Currencies that their contract was approved in July and further, that it is not correct to say that in the insurance industry no one pays a premium without having a contract. This witness told this Court that it is highly possible for a client to commence premium payments before having an insurance contract.

[62]. Mr. Browne told this Court under cross examination that Mrs. Currency did not discuss her child's health difficulties with him and that he suggested that a medical examination was not necessary. Mr. Browne, in answer to a series of questions from counsel Jomo Thomas said that it is upon confirmation from a doctor that he would decide that a child has a pre-existing condition.

[63]. Mr. Browne said that his company never received the child's medical documents from Cuba from the Claimant, but from a local doctor which was part of a report requested by SAGICOR. That SAGICOR decided to drop the child from the policy on the ground that there was a material withholding of information. Mr. Browne agreed that at the time of removing the child from coverage of the policy there was no definitive diagnosis of a pre-existing condition of the child.

[64]. Counsel Thomas then took Mr. Browne through the contents of the application and pointed to him the anomalies therein and suggested that the document was tampered with. It was pointed out to that the control number "45169" did not appear on all the pages and that there seemed to be a "shifting size of paper" which all pointed to the fact that the document was tampered with. Mr. Browne denied this. Further, it was put to the witness that in the boxes on the application form which now shows the answer no it was originally filled in by Mrs. Currency as yes. This was denied by the witness.

[65]. When challenged as to the validity of the answers to familial relationships, Mr. Browne told this Court that Mrs. Currency took the form home and brought it back. It is noted that this is different from what he said in his evidence in chief. He never said that during the application process, that Mrs. Currency took the forms away and filled them up.

[66]. Mr. Browne denied that Mrs. Currency ever discussed her son's health situation with him. However, under cross examination he did say that at the beginning of the initiation of his relationship with the Currencies that there was discussion about the minor son's health situation and about the fact that the parents were told he would grow out of it. That would have been in January 2019. He said he did not know who the "they" who would have told the Claimants that he would grow out of it, neither did he ask who "they were".

[67]. Regarding the trip to Cuba, under probing cross examination by Mr. Thomas, Mr. Browne stated that he would have thought that it could be assumed that based on his conversation with Mrs. Currency whilst she was in Cuba that she was asking about the payments for the said trip. He also agreed with counsel that based on her statement as stated in the transcribed voice note which formed part of his evidence, it was clear that Mrs. Currency was under the impression that she had medical insurance- (that was in August 2019).

[68]. Mr. Browne also admitted under cross examination that not once did he advise Mrs. Currency in the conversation which took place in August 2019, that he told her she did not have medical insurance with him. Counsel then asked this witness the following two questions:

Q: "So it would be correct to say that you left Mrs. Currency with the impression that she had medical insurance with SAGICOR isn't that so?"

A: I was the one who called her and told her the application was approved.

Q: And that was in July when you called and told her that?

A: I called her in August and told her that when she was in Cuba. ...”

[69]. Counsel then sought to elicit evidence from the witness regarding the perceived contradiction in his evidence as stated in his witness statement and in his statement of defence. Counsel further pressed the witness about the change of dates on the application form which change was seemingly not done by Mrs. Currency, but by someone whose initials was “SD” which he confirmed stood for Samaria Daniel who was his personal assistant.

[70]. It is at this stage of his evidence that Mr. Browne told the Court that he was not the sole person who dealt with the application process, that Mrs. Currency spoke to his assistant, and he denied that he was the one Mrs. Currency interfaced with regularly. Mr. Browne admitted under cross examination that both he and Mrs. Currency were able to communicate with each other by cell phone and that she communicated with him on several occasions regarding the contract and that he informed her of the progress of the contract. He also answered in the affirmative when counsel asked, “And did you advise what she should do and should not do ...”. In response, he said that Mrs. Currency would speak also to his assistant.

[71]. Mr. Browne informed this Court under cross examination that there was no policy not to test children. However, the decision regarding the health insurance policy for a family is made using non-medical testing as it regards minors.

[72]. Mr. Browne then told this Court further under cross examination that Mrs. Currency was not given a medical testing questionnaire, and it was not necessary, and admitted that there was a conversation very early about the minor’s condition, however, he could not remember the details of this conversation and many others. All in all, Mr. Browne in his answers to the court about his discussions with Mrs. Currency regarding her son’s medical situation was riddled with inconsistencies, giving this Court the distinct impression that he was endeavouring to wriggle his way out of

providing this Court with the whole truth about his interactions with the claimant and her husband regarding the boy's medical condition. It is to be noted that he said at one time that he never received a report on the Cuban visit, then he could not recall and eventually that a report was received. It is interesting to note that during cross examination, the witness recalled that Mrs. Currency indicated that she now had a diagnosis. This suggests to the court that Mrs. Currency did in fact inform Mr. Browne that she did not have a diagnosis of her son's condition.

[73]. Under cross examination Mr. Browne admitted to having in his possession a doctor's report which did not give a specific condition of the existence of a pre-existing medical condition.

[74]. Ms. Sylvia Mapp, the agency administrator for S V Browne Agency Ltd., also gave evidence on behalf of the defendants. Ms. Mapp told this Court that she was working in the insurance field before she started to work with Mr. Browne and that she has been working with Mr. Browne for some 22 years, and as the agency administrator, her job entailed managing and overseeing the staff of the agency.

[75]. Ms. Mapp told this Court that she did not know Mrs. Currency personally but knew of her. It would appear that she interacted with Mr. Currency when he inquired of her about the arrangements to be made for a tele-medicine visit. The query from Mr. Currency was duly forwarded to one Ms. Pilgrim who was the supervisor of SAGICOR Group Health Department in Barbados. She said that the Group Health Department in Barbados requested additional information and this request was communicated to Mr. Currency. This witness told the court that Ms. Pilgrim also made certain requests relative to the treatment received by the minor child of the family.

[76]. Regarding the apparent alterations on the insurance contract, Ms. King said she did not know of any situation where staff members would change documents or change the dates on an application and initial it. She told this Court that if she were to observe a change on a form in relation to a date and there was a staff initial, it would

arouse her concern, and she would enquire as to why the change was made and she would get the initial of the policy holder.

[77]. Ms. Mapp referred to a letter dated 12th May 2020 which was submitted in response to the request for information from the treating physician. In this letter under the hand of one Dr. J Christian Anderson, it was stated that the Claimant's son had a *"12-year history of sporadic stomach aches, diarrhea and vomiting with episodes usually appearing once or twice per year and disconnected"*. The letter also indicated that the episodes had disrupted the schooling of the child and that he had visited several doctors in the Caribbean in relation to his illness.

[78]. It was this witness' evidence that it was concluded by the Group Health Department that the claimant's son had a pre-existing condition which was not declared by the claimant on her application for family coverage. Ms. Mapp said she informed Mrs. Currency of this decision and informed her that the premiums erroneously paid for her son would be refunded. This she recanted and said that the premium paid was for family coverage and would have to be paid whether the minor child of the family was included.

[79]. A review of this witness' evidence shows that there was no communication through her or which she was notified of the discontinuance of the coverage of the claimant's son. But the witness spoke to being informed of the decision and that decision was made in Barbados and not by their agency.

THE LAW

[80]. This Court considers that it is convenient to set out the legal principles which are applicable that is the law regarding and which applies to contracts of insurance, the proposal forms, and to the circumstances where an insurance company can repudiate the insurance policy.

[81]. Insurance contracts are governed by the general law of contract. **Re: Cehave NV v- Bremen Handerlsgesellschaft mbH, The Hansa Nord**¹². In this case Roskill JS stated “*It is desirable that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law*”¹³. According to the learning in Halsbury’s Laws of England¹⁴,

*“The essential features of an insurance contract are: that a sum of money will be paid by the insurers on the happening of a specified event; there must be uncertainty as to the happening of the event either as to whether it will happen or not, or, it is bound to happen, like the death of human being, as to the time at which it will happen. There must be an insurable interest in the insured, which is normally that the event is one which is prima facie adverse to their interest.”*¹⁵

[82]. Most insurance contracts are categorised as indemnity contracts, in that, the insurer’s liability is limited to the actual loss which is in fact proved. In the case at bar the issue of the insurer’s liability arises out of a claim on a health insurance taken out by the Claimant with the Defendants based on a claim for indemnity of the costs of expenses incurred in taking her son who she understood was covered by the contract of insurance to Cuba for medical purposes.

[83]. One of the issues that are prevalent in litigation arising out of insurance cases is the issue of the principle of good faith. A person who seeks insurance coverage is normally required to fill out a proposal form and in doing so is required to answer questions providing information in relation to the coverage being sought. The questions asked are usually considered to be material by the insurers. **Re: Newsholme Bros -v- Road Transport and General Insurance Co Ltd**¹⁶.

¹² [1976] QB 44

¹³ Ibid at page 71

¹⁴ 5th Edition Volume 60

¹⁵ Ibid at paragraph 2 “Principles common to all insurances”

¹⁶ [1929] 2 KB 356 at 392

[84]. It is incumbent on the applicant for insurance coverage to ensure that there is no misrepresentation on their part. When an applicant fills out the proposal forms signs and submits same to the insurance broker, the person is providing information upon which the insurance company will consider whether to accept the proposal at all and if so, at what premium. The applicant, in the case at bar that would be Mrs. Currency in filling out the forms was required to make full and frank disclosure of material facts and make accurate representations as to her son's medical challenges.

[85]. It is well established if not trite law that a contract of insurance is based on the "utmost good faith" and if this is not observed by either party to the contract it could be avoided by the other party. Whether a person seeking insurance has taken reasonable care not to make a misrepresentation is to be determined by the court in light of all the relevant circumstances.

The duty of full and frank disclosure

[86]. The duty of full and frank disclosure is a fundamental principle in insurance law which requires all policyholders to disclose all relevant information about the risk they pose to the insurer when applying for coverage. This information helps the insurance company to assess the application to determine the premium to charge and whether to accept the risk. Failure to disclose material information can result in the insurer avoiding the policy, which means the policy can be treated as void *ab initio*.

[87]. In the old case of **Carter v. Boehm** ¹⁷Lord Mansfield emphasized that a contract of insurance is based on the utmost good faith and that, the special facts, upon which the contingent chance is to be computed, lies more commonly in the knowledge of the insured only; the underwriter trusts his representation, and proceeds upon the

¹⁷ [1558 - 1774] All ER 183 – 12

confidence that he has not kept back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Keeping back in such circumstances is a fraud, and therefore the policy is void. Although the suppression could happen through mistake, without any fraudulent intention; still the underwriter is deceived, and the policy is void; because the risk run is different from the risk understood and intended to be run at the time of the agreement.

[88]. The duty, however, is not one-sided; the insurance agent does also have a duty to ensure that there is no material non-disclosure on his or her part. There is a similar duty on the part of the insurers and their agents to disclose all the material facts within their knowledge since the obligation of good faith rests on them also. **Re: Bradley and Essex and Suffolk Indemnity Society:CA 1912**¹⁸ per Farwell LJ where he said *“Contracts of insurance are contracts in which uberrimae fides is required not only from the assured but from also the company assisting. ...”*

The proposal

[89]. The proposal form is the document which is filled out by the applicant and is meant to help the insurer to make an informed decision as to whether the applicant will be insured, that is whether the insurer will accept the proposer's risk. In answering the specific questions in the proposal forms the person applying for the insurance must answer the questions, so that all matters within the applicant's knowledge and which are in fact are material to the question of insurance are disclosed. It is to be noted that it is important that the insurer be fair in its dealing with the insured or the applicant.

¹⁸ [1912] 1 KB 415

[90]. In the process of acquiring insurance coverage, there is a crucial and important role that the insurance broker plays. In the insurance industry, some authorities refer to them as the proposers, that is the individual or entity who initiates the insurance contract by submitting the proposal or application to the insurance company. The proposer acts as the liaison between the insured and the insurance company and their role has been described by many commentators on insurance as a pivotal one in the successful establishment of an insurance contract. Like the insured they are responsible *inter alia* for accurate proposal submission, risk assessment, communication, negotiation and compliance. When the proposer fulfills their responsibilities diligently it is usual that the insured party's interest is effectively represented, and suitable insurance coverage obtained.

[91]. The relationship between the proposer/insurance agency and the insured ensures that there is a transparent and collaborative relationship between the insured and the insurance company providing coverage.

[92]. According to the learning available in **Colinvaux's Law of Insurance**¹⁹ "The assured is bound not only to make true answers to questions put to him but also spontaneously to disclose any fact exclusively within this knowledge which it is material for the insure to know..."²⁰

[93]. In the Barbadian case of **Joseph -v- Clico Internation General Insurance Co Ltd**,²¹ it was held *inter alia* that

"A contract of insurance was subject to the requirement of utmost good faith, to be observed by both the insured and the insurer throughout the existence of the contract. An applicant for insurance has a duty to disclose to the insurer all the material facts within the applicant's knowledge which the insurer did not know, a duty of disclosure and a duty not to

¹⁹ Sixth Edition Sweet and Maxwell London 1991 at page 103 at paragraph 5-09

²⁰ Re: Bond -v- Commercial Assurance (1930) 35 Com.Gas 171

²¹ (2006) 71 WIR 31

*misrepresent facts. In order for an insurer to avoid a policy, the alleged misrepresentation or nondisclosure had to be material and to have induced the making of the policy. ...*²²

Repudiation of insurance contract

[94]. Reference is made to **Pan Atlantic Insurance Co. Ltd. and another -v- Pine Top Insurance Co. Ltd.**²³ the question of what amounted to a material disclosure was discussed. The test was stated that where there was “...such circumstances as would affect an insurer’s mind. Did it operate as an inducement to the insurer to enter the policy”

[95]. It was held that to be entitled to avoid a contract of insurance on the ground of non-disclosure, the insurer must show that the fact was not disclosed, that it was material and that it was the non-disclosure that induced the contract.

[96]. It was further held that it is not sufficient to say that there was non-disclosure, but it must be proved that the non-disclosure was material, and it must have induced the making of the contract. That is, the material circumstances must be that it would have influenced the mind of the prudent insurer in estimating the risk to be undertaken.

[97]. Before an insurer could avoid a contract for non-disclosure, the insurer must show that he had been induced by the non-disclosure to enter into the policy of insurance. Basically, that if there was full disclosure, that either they would not have entered into the contract or would have done so on different terms.

²² Ibid headnote

²³ [1994] 3 ALL E R 581, [1995] 1 AC 50, HL 27th July 1994

[98]. Even if there was non-disclosure of a material fact, if this does not in fact influence the judgement of the underwriter, avoidance of a contract would not be justified. Per Mustill L J

“In practice the line between misrepresentation and non-disclosure is often imperceptible. ... in the general law it is beyond the doubt that even a fraudulent misrepresentation must be shown to have induced the contract before the promisor has a right to avoid although the task of proof may be more easily by presumption of inducement.”

[99]. In **Asparia Restaurants (Barbados) Limited -v- Guardian General Insurance Ltd.**²⁴ (**‘Asparia’**) what is *inter alia* “what is the right test for assessing the materiality of non-disclosed facts?” The Caribbean Court of Justice (The CCJ) in considering whether Guardian General Insurance was entitled to avoid the policy on any of the various grounds of non-disclosure as claimed by Guardian considered what is the right test for assessing the materiality of non-disclosed facts? The court held that ‘Non-disclosure of Material Facts’ accepted and applied the test as laid down in **Pan Atlantic**²⁵ that

“A fact of circumstance is material if a prudent insurer would have wanted to know about that fact or circumstance when forming an underwriting judgment on the risk (if it had been offered to them) even if the prudent insurer might have made the same underwriting decision as the particular insurer in question had done ... that a court will only allow avoidance of a policy where the actual insurer establishes by evidence that they were induced by the non-disclosure on the part of the assured to accept the risk undertaken, or to accept the risk on the terms that they ultimately did.”

[100]. It is noted that the learned judges of the CCJ agreed that this was the test. They however disagreed as to the interpretation of the word “judgment” and President

²⁴ CCJ Appeal No BBCV2022/0002 dated 22nd January 2024

²⁵ Op cit

Saunders JCCJ stated²⁶ that in the face of the equal division of the court the law in Barbados would remain as decided in the **Pan Atlantic Case**.

[101]. This Court pauses to note that, the decision of the CCJ even though it is not binding on this Court it is highly persuasive.

[102]. It is necessary in this Court's respectful view to first consider whether there was a material non-disclosure on the part of the claimant. This goes to the heart of the case and to the question of whether there is a contract which the defendants can duly deny liability or repudiate the contract as it regards the claimant's minor son. To this Court's mind, this issue decided either way is completely dispositive of the case at bar.

[103]. The second and third named defendants have certain responsibilities in the whole process of the claimant acquiring the health insurance policy for herself and family. They are, among other things responsible for providing accurate and detailed information to the insurance company in the process of preparing the application process. The second and third named defendants are required to play a supporting role to the intended insured to provide full and complete disclosure in the application forms. As insurance brokers it is the second and third named defendants' obligation to use reasonable care and skill in the performance of their duties particularly in advising the applicant regarding the coverage sought.

[104]. It is required that there must be an offer which must be accepted to create a valid contract of insurance. There must be a meeting of minds where the applicant is able to review the terms of the insurance being offered, and if they are accepted, it is the normal process that the insurance company would prepare the Policy of insurance with the schedule that informs the insured of the terms of the coverage. Of course, the insured would be required to pay the assessed premium. Normally, it is the broker (the

²⁶ Asparia op cit at paragraph 12 of Saunder's Judgment

second and third named defendants) who would inform the insurance company of the insured accepting the company's offer.

[105]. It is to be noted that the learning in Halsbury's laws 4th Edition²⁷ the learned authors said *inter alia*

"If the agent in fact has knowledge of relevant matters, it will normally be imputed to the insurers without any question. Even if the knowledge has come to the agent while acting in a distinct capacity, it will be imputed to the insurers if it would be a breach of the agent's duty, as an agent, to withhold it. If the truth as to the relevant matters ought to have been ascertained by the agent for his own inquiry in the performance of his duty the insurers are precluded from setting up their own agent's misconduct in failing to make the necessary inquiries, they will be treated as knowing what they would have known if their agent had performed his duty ..."

Payment of premiums:

[106]. Evidence was led that the claimant paid premiums and the payment was accepted by the defendant from July 2019. According to the learning as stated in the Halsbury's Laws 4th Edition, *"Although writing is necessary in marine insurance, in other forms of insurance there is no legal necessity. Re **Murfit -v- Royal Insurances Co Ltd (1922) TLR 334 and this was followed in Parker & CO (Sandbank) V Western Assurance Co [1925] WC & Ins Rep 82**. Any positive act indicative of an intention to create a contract may be sufficient acceptance; for example, receipt of a premium without demur or qualification..."* **Re: Harrington -v- Pearl Life Assurance CO Ltd (1913) 30 TLR 24 affd (1914) 30 TLR 613.**

²⁷ Volume 25 at paragraph 392 – Imputation of the Agent's knowledge

[107]. Premiums are considered in law, as consideration that passes between the insurer and the insured in exchange for the insurer's undertaking to make payment if the insured event takes place. There are several ways in which an insurance company can signify its acceptance of the proposal form. This includes acceptance and retention of a premium by an insurer. This gives rise to a presumption that the insurance policy is in place. In **Mc Elroy -v- London Association Corp**²⁸ it was held *inter alia* that "the company is not bound to deliver a policy without the payment of a premium. If they accept a premium before delivering a policy, I should be disposed to hold that the acceptance of the premium and the delivery of the receipt therefore was sufficient to create the obligation to issue the policy unless circumstances can show the contrary." ²⁹

[108]. Acceptance of premiums by insurers in law is considered as evidence of an election on the part of the insurer to accept that a policy is in effect. A brief review of current principles of insurance law has revealed that this position as stated in a case of some antiquity remains the same. It is to be noted that section 183 of the Insurance Act of Saint Vincent & The Grenadines³⁰ makes provision for the expeditious issue of a policy that is within 30 days.

[109]. It is this Court's finding that upon receipt of the premiums paid by the claimant, that there was a policy of insurance in place although a physical policy was not handed to the claimant. It is noted that it was entirely the statutory responsibility of the defendants to expedite the process of providing the written policy document to the claimant which was not done.

[110]. It is against this background that this case will be considered.

²⁸ (1894) 24 Lloyds Report 287

²⁹ Per Lord MacClaven *ibid* at page 291

³⁰ Chapter 306 of the Laws of Saint Vincent and The Grenadines (Volume 9)

[111]. It is the Court's duty to weigh all the evidence in the balance whilst being conscious of the fact that in considering factual evidence, there is a constant shifting in the evidence bringing certain facts in and out of view then back into focus. It does appear to this Court that a lot hangs on the evidence adduced by the claimant regarding the process of the application for the policy.

[112]. Mrs. Currency came across as a pleasant, courteous and decent person who is serious and cautious about her business dealings. This Court got the distinct impression that she was quite truthful and forthcoming in her evidence, and this Court was unable to detect any attempt by her to mislead the Court to secure a personal advantage. This opinion was formed based on the content of her evidence and upon an assessment of her behaviour and demeanour whilst in the witness stand and during the trial.

[113]. In this Court's judgment the Claimant was not only rock solid but also quite robust and well anchored so as to satisfy this Court that her version of the process of the application for insurance is the more acceptable version of what occurred, and it is the one accepted by this Court.

[114]. Mrs. Currency was also quite adamant and clear in her evidence that she at all material times disclosed her son's health challenges. This Court has thought carefully about this, and ultimately, has concluded that Mrs. Currency's evidence is to be believed.

[115]. It is to be noted that this Court does not accept for one moment that the claimant completed the application by herself or without the assistance or guidance and coaching from the insurance personnel. This would have been a very unusual and strange occurrence if this were so. This Court also notes with emphasis the clear discrepancies and what appeared to be the tampering with the insurance documents presented to the court.

[116]. This leads this Court to conclude that it is very likely that Mrs. Currency's application containing her disclosure of her son's health challenges was tampered with and excluded from the documents exhibited before the court.

[117]. Mr. Currency gave evidence on behalf of the claimant and essentially, he corroborated his wife's testimony as to what he knew of the dealings with the insurance company.

Courts consideration

[118]. The main issues now to be determined by the court is:

- (1). Whether there was failure on the part of the claimant to disclose material facts on her application for medical health coverage from the first named claimant or whether she failed to make full and frank disclosure about her son's health condition as was required.
- (2). Whether the first named defendant was entitled to repudiate the health insurance coverage of the claimant's minor son.
- (3). Whether the second named defendant and more particularly the third named defendant as the agency manager and "owner" is personally liable to the Claimant for monies expended by the claimant on her son's the medical trip to Cuba.

[119]. In the case at bar, it was contended by counsel Ms. David on behalf of the defendants that they were entitled to terminate the coverage of the claimant's minor son by reason of the non-disclosure of material facts in the proposal forms by Mrs. Currency when she failed to disclose in their view her sons medical challenges and history and that she had failed to give details thereof.

[120]. In this Court's view, it was contended by the Defendants, that the health insurance coverage of the minor child in question was terminated by reason of the Claimant

failing to disclose material facts in the proposal form when she failed to disclose his medical challenges.

[121]. It is generally known, so that it cannot reasonably be doubted that this Court can take judicial notice of the fact that insurance agents do assist proposed clients with filling out insurance forms and advising them of what answers to give. In full consideration of the case at bar, this Court has considered that an insurance agent usually assists his or her client to select the right insurance policy to suit their client's needs which involves interaction with their client when the client fills up their insurance form. This assists in evaluating the risks and enabling the agent to make the adequate and proper proposal for coverage of the client.

[122]. It is noted that in the case at bar, this situation has posed considerable problems as there has been cause for the question to be considered whether the insurance company represented by its agents is bound by the misrepresentations made by its agent when completing the insurance proposal. Can the purported non-disclosure be attributed to the insured? If not, can the insurance be bound by the coverage under the policy, or can the insurance agent be held personally responsible for the purported non-disclosure?

[123]. There was conflicting evidence as to the process of the filling up of the application forms. There is no dispute that the process for the application before the eventual issuing of the policy took place from January to July 2019.

[124]. It is the defendant's pleaded case that the policy only came into effect when the physical policy was delivered or accepted by the insured. The defendants also contend that by the claimant's own admission, she never received the policy until October 1st 2019 and therefore in the circumstances of the case, her son's medical visit to Cuba predated the policy and was therefore not covered. This submission considering the authorities stated above is not accepted by this Court and this Court holds that upon payment of the premiums which was accepted by the defendants, the

policy is to be considered in effect. In fact, the first named defendant was somewhat dilatory in issuing the policy in an expedited manner as is required by the Insurance Act of Saint Vincent and The Grenadines as is stated earlier up in this judgment.

[125]. In the case at bar, is the first named defendant entitled to terminate the insurance coverage for the Claimant's son on the ground of material non-disclosure on the part of the Claimant thereby rendering the contract of insurance as it applied to him null and void. Is this the situation in this case?

[126]. It is the claimant's contention, that in filling up the application in the presence of the second named defendant and that she at all times conveyed her son's medical challenges and that she discussed it the second and third defendant with interactive discussion between them and that at all material times she disclosed her son's medical challenges which were undiagnosed, it is the second and third named defendant that this was not so, so much so that this was against company policy. This Court prefers and accepts the evidence of Mrs. Currency. This Court therefore finds that there was no non-disclosure on her part.

[127]. It is well established law that the obligation to disclose is based on the knowledge possessed by the assured. This is no doubt of question of fact. The onus lies on the Defendants to prove the non-disclosure as they allege. The Claimant's evidence has been uncontested and accepted by this Court and in the circumstances the Defendants have failed to discharge their duty to prove that there was non-disclosure on the part of the Claimant enabling them to invalidate the health coverage of the Claimant's son.

[128]. The claimant's evidence was that in her discussions with the second and third named defendants she was advised not to bother about it and that it was not necessary for her to submit her son for medical examination even though she offered to. It is to be noted the third named Defendant did admit to knowing of the claimant's son's issues from the mother. This Court accepts his evidence in that regard. This

corroborates the claimant's contention that at all material times, he knew of her son's challenges.

[129]. It is this Court's view that the defendants' posture adapted regarding the role of their agents is purely and primarily for the purpose of their defence to the case at bar. Further, it is reasonable to wonder why, having discussed her son's challenges with the second and third defendants would the claimant then answer no to the questions raised in section four of the questionnaire.

[130]. This Court also accepts the claimant's submissions that the two pages of the claimant's application for coverage were in fact altered. Again, the court asks why the claimant would discuss her son's challenges with the second and third named Defendants then answer no on the relevant part of the form.

[131]. It is to be noted that the finding of materiality is based on that which might influence a prudent insurer in determining whether he will take the risk and if so at what premium and on what conditions. In **Container Transport International Inc and Reliance Group Inc -v- Oceanus Mutual Underwriting Association (Bermuda) Ltd.**³¹ it was stated that everything is material which might influence a prudent insurer in determining whether he will take the risk and if so at what premium and on what conditions. It was held that the test was whether the presentation of the risk to the insurer was fair. According to the learning offered in **Colinvaux's Law of Insurance**³² *"what is regarded as material by more experienced and intelligent insurers carrying on the business in question at the time is what matters and the general practice is relevant in this respect."*

[132]. In the old case as referred to in the cited Insurance text, **Re: Anderson -v- Fitzgerald**³³ it was held that the question of materiality is a pure question of fact in

³¹ [1984] 1 Lloyd's Report 476

³² Op cit at page 107 at paragraph 5-17

³³ (1853)4 HLC 484

each case and the decided cases therefore give no more than an indication of what conclusion an arbitrator would reach in a particular case.

[133]. In the case of **Economides -v- Commercial Assurance Co plc**³⁴ it was held that the duty of the applicant is one of honesty.

[134]. It is therefore necessary to consider the evidence before this Court regarding the application that was made. This Court accepts the evidence of the claimant that at all material times, she did inform the second and third Defendants of her son's health challenge. This Court believed her when she said she told them of her son's situation and even offered him up for examination and was told that it was not necessary.

[135]. It is therefore plain that this Court is of the view that there was no non-disclosure on the part of the claimant as contended by the defendants and this Court is of the view that this posture as was adopted by the Defendants is in a concerted effort to deny their liability to the claimant's claim. The issues as to the changes made to the form which were not initialed by the claimant is supportive of the claimant's contention that the forms were changed and or altered by the defendants.

[136]. The defendants have sought to suggest in their submissions that the claimant sought insurance coverage after she started planning for her son to go to Cuba to seek medical treatment. Counsel David in considering the dates that the application was made by the claimant and the dates elicited under cross examination regarding when the claimant started planning to travel to Cuba with her son, has suggested and in fact submitted to this Court that, that was the reason why the claimant made the application for coverage. This submission is not accepted by the court as there is no evidentiary base to support such a conclusion.

³⁴ [1998] 1 QB 587, [1997] 3 ALL E R 636

[136] This Court has reviewed the evidence as adduced in its entirety and it is not accepted that there was any non-disclosure on the part of the claimant. It is clear to this Court that Mrs. Currency from the very beginning informed Mr. Browne of her son's health challenges. It is a well-established principle of insurance law that the burden of proving that a fact is material lies with the insurer who must satisfy the court on a balance of probabilities. Have the defendants, the insurers in this matter done so? The answer to this question is no.

[137] There was no expert evidence adduced for and on behalf of the defendants neither was there any evidence adduced by the defendants to show that this information or lack thereof influenced whether the insurance contract would have been entered into by the Defendants.

[138] In **Somati Ali -v- Hand in Hand Mutual Fire & Life Insurance Co** ³⁵ it was held that the proof of materiality rests on expert evidence. The learned judge in that case had this to say:

"The burden of proof that a fact is material rests on the insurer who must satisfy the court on the balance of probabilities. In doing so, reference is usually made to the 'prudent or reasonable underwriter'. The court may rely on its own sense of the attitude of a prudent underwriter, or materiality may be proved by the insurer calling expert evidence in addition to the insurer's own testimony that the fact is material. Of these courses, it is always best to rely on the expert evidence as the court hearing the action may not be adequately seized of all aspects of insurance law, and an insurer is never the best person to determine a matter involving his own interests. His evidence will not prove materiality from the point of view of a prudent underwriter, only that he considered the particular fact to be material. Therefore, the proof of materiality rests on expert evidence.³⁶"

³⁵ (2001) 65 WIR 186

³⁶ Ibid per D P Bernard CJ at pages 193-194

[139] When one looks at the evidence of both Mr. Browne and Ms. Mapp, they are both personally involved with the defendants and their evidence cannot be considered as sufficiently independent for the court to place any weight on. No evidence has been led for and on behalf of the defendant to assist this Court in deciding what a reasonable and prudent insurer would or would not do in the fact of the facts adduced in this case.

[140] An examination of the evidence adduced for and on behalf of the defendants shows that there is no suggestion as to what a reasonable insurer or underwriter would consider as material and what would be done in the circumstances of the case.

[141] The medical history of the child of the insured family might have been a fact that the insurers would have wanted to be informed of. This Court finds that as a matter of fact that Mrs. Currency did inform Mr. Browne from the very inception of her discussions about her wanting medical insurance about her son's medical challenges. It is this Court's finding that upon consideration of all the evidence adduced that it was more likely than not that this information was not relayed to the underwriters and excluded from the application upon the actions of the second named Defendant by its employees.

[142] There is nothing in the evidence as adduced by the defendants to show that had the underwriters been made aware of this condition that they would not have issued the health insurance policy inclusive of coverage of the son of the family. This is even if this Court were to accept the defendants' evidence that they did not know of the child's medical challenges they have not adduced any evidence as they are required by law to do to prove that this would have influenced whether they would have accepted the risk.

[143] For the avoidance of all doubt this Court does not accept the defendants' case that there was non-disclosure on the part of the claimant. It is to be noted also, that there

is no evidence adduced to show that the defendants were induced by way of the non-disclosure to issue the policy. **Re: Pan Atlantic Insurance case**³⁷.

[144] Upon a careful reading of the evidence adduced, the submissions made, and the cases cited in addition to the cases which this Court found to be helpful and directive of the Court's mind this Court has come to the ineluctable conclusion that judgment should be entered for and on behalf of the claimant.

[145] In the case at bar the, defendants have not seen it prudent to adduce any expert evidence to address the issue of materiality. No evidence has been adduced to this Court to assist the Court in finding whether, even if the Court were to find that there was a non-disclosure on the part of the Claimant whether this non-disclosure was material would have led the Insurers to avoid entering into the contract regarding the minor child of the family.

[146] In the further submissions ordered by the Court³⁸ counsel David quite properly and correctly conceded "that in light of the law set out in the **Pan Atlantic, Apsara and Somati Ali**, cases and in light of the evidence presented by their witness Mr. Stanley Browne, the Defendants cannot, and do not contend that they have presented to the Court, evidence sufficient to establish that the health insurance coverage for the minor child can be adjudged to have been properly repudiated."³⁹

[147] In his further submissions as ordered by the Court, counsel Jomo Thomas essentially submitted that the **Pan Atlantic, Apsara and Somati Ali**, cases underscore and support the Claimant's case in this matter.

[148] It is clear to this Court that at all material times the second and third named defendants were acting as the duly registered and authorised agents for the first

³⁷ OP cit

³⁸ On 23rd September 2024 the parties were ordered to make further submissions on the issues of the applicable law regarding the rights of the insurance company to repudiate a policy of insurance an the relevant authorities.

³⁹ Re: Paragraph 6 of the defendants further submissions filed on the 30th September 2024

named defendant and therefore this Court declines to make a finding of personal responsibility on the second or third named defendant.

[149] The claimant in their pleaded case made a claim for damages but no evidence has been led by the claimant to support any damages which could be considered in addition to the sums payable under the claim for the expenses incurred for the trip to Cuba as claimed. No evidence has been led that would form the basis for an award for damages for the telemedicine services as claimed or for general damages.

[150] It is further noted that the claimant has sought to have this Court make several declarations. Upon review of the statement of case as filed the court will, based on the evidence which was accepted and the law which applies, this Court will make the following declarations in favour of the Claimant:

IT IS HEREBY DECREE AND DECLARED THAT:

- i. There was at all material times⁴⁰ a health insurance policy in favour of the claimant which is binding on the defendants herein.
- ii. At all material times the claimant disclosed to the defendants all the necessary and relevant information for a health insurance policy.
- iii. That Health Insurance Policy Numbered H057400516 ⁴¹(The health insurance policy) between the claimant and the first named company covering the Claimant, her husband and two children is valid and legal binding from the **5th day of July 2019** to the date that the claimant ceased to pay premiums on the health insurance policy.
- iv. The circumstances of the case the defendants are estopped from denying a claim filed regarding her minor child of the family and

⁴⁰ The court says "at all material times" as the relationship between the parties herein has broken down to the extent that the Health insurance policy at the time of the trial and writing of the judgment was no longer in existence as the claimant has ceased making payments of the agreed premium.

⁴¹ The Health Insurance Policy was duly attached and exhibited to the Statement of Claim

cancelling coverage for her minor child during the life and existence of the Health Insurance Policy as aforesaid.

- v. SAGICOR shall honour the Claimant's request for tele-medicine services and pay damages in the nominal sum of \$5000.00.
- vi. Sagicor shall pay to the Claimant the sum of \$27,000 (Twenty seven thousand EC Dollars) being the expenses incurred for the care and treatment of the minor child in Cuba.

[151] Judgment is awarded in the sum of \$27,000.00 being the expenses incurred for the taking the minor child IB to Cuba for care and treatment.

The Additional submissions

[152] A copy of the draft judgment was handed to each lawyer for them to read over to ensure that there were no grammatical, typographical or factual errors in the draft judgment. With the understanding that the Court, with the consent of defence counsel would give further consideration to the question of general damages which were pleaded, but no evidence adduced in support thereof and to recheck the costs incurred for the trip to Cuba.

[153] In the case at bar after the Court handed down its finding in favour of the claimant, which judgment has not yet been finalised or the order after judgment perfected. It was indicated to counsel on both sides that the Court found some challenge in awarding damages for the breach of damages as claimed, as no evidence in terms of the claim for general damages were adduced at trial. Counsel insisted that there was a plethora of authority for the Court to do make such an award and undertook to provide the Court with same.

[154] With the agreement of counsel for the defendant Ms. Paula David, counsel for the claimant was granted the opportunity to present the Court with these authorities to

support his contention that evidence need not have been adduced by the Claimant to support an award of damages in her favour.

[155] Counsel Mr. Thomas also sought to clarify the damages claimed in the statement of claim for the costs incurred by the Claimant for her minor son's trip to Cuba which ought to have been covered by the insurance policy which this Court claimed was wrongfully terminated by the Defendants. This Court was of the view that based on the claim before it the amount was \$27,000.00. Counsel informed the Court that he thought it was more than that. A review of the Claimant's evidence was that she was claiming \$27,000. So the Court will award damages to the Claimant in that amount.

The draft judgment

[156] When a lawyer receives a draft judgment to review, the purpose of such, an exercise is not an invitation to embark on a second round of submissions. Reference is made to **Gosvenor London Ltd v Aygun Aluminium UK Ltd**⁴² where the presiding Judge Mr. Justice Fraser made it clear that draft judgments were not to be taken as an invitation to the parties to embark on a second round of submissions. This Court takes guidance from the statement made by the Learned Judge.

[157] Therefore, the only submissions that would be considered in the further submissions made for and on behalf of the Claimant are as it regards the possible award on the claim for general damages and a correction to the damages claimed for the trip to Cuba. This Court noted that counsel Mr. Thomas sought to make what this Court considered to be additional submissions in his matter which has been read but not taken into consideration in this judgment.

⁴² [2018] EWHC 227 (TCC)

[158] *Ex abundante cautula* what was expected from counsel for the Claimant was the citation of a few of the plethora of cases he stated in court to support the fact that where there is a pleaded claim for damages but no evidence as to the actual damages suffered or any submission in that regard that the Court should make an award of nominal damages. It is noted counsel Ms. David agreed with the Court that if such cases were presented in support by counsel Thomas' she would be willing to concede the point and quite correctly so.

[159] Counsel Mr. Thomas in his invited further submissions which he made after the judgment sought to launch an attack on the draft judgment which this Court wishes to note will not be entirely considered at this stage. Should counsel have great disagreements with the judgment, he knows what his options are.

Claim for general damages

[160] On the issue of damages for the failure to access the telemedicine services as pleaded and stated in the evidence before the Court counsel submitted four options to be considered by the Court to make the award for damages for which no evidence as to quantum was led at trial. I will deal with each of these options.

[161] The Court understands that where loss is established the Court is to use available evidence to determine the quantum of loss. Originally, this Court was not inclined to make an award on the claimant's claim for general damages on the ground that the claimant failed to adduce any evidence in this regard that would assist or direct the Court as to the quantum.

[162] Noting the judgment of the United Kingdom Supreme Court whose judgment though not binding on this Court is extremely persuasive to this Court, in the case of **Re L and B**⁴³ where it was held *inter alia* that where there is a plain mistake by the

⁴³ [2013] UKSC 8

Court that the Court has the discretion to review its decision. In this regard, this Court wishes to apply the principle of law adumbrated in this case and to exercise its discretion in the interest of justice and in pursuit of the Overriding Objective of the CPR to deal with cases justly. The Court will therefore apply the principle of law which states that where there is evidence of monetary damages having being suffered; the Court ought to make an award of damages.

The Actuarial Study

[163] In the case at bar the claimant's evidence is because of the actions of the Defendants she was unable to access telemedicine services for her son her evidence was wholly supported by her husband's evidence. Now regarding the quantum of damages to be awarded to the Claimant, counsel Thomas' submission is that the Court ought to take into consideration the actuarial study which has been appended to his legal submissions.

[164] It would appear to this Court that counsel expected the Court to consider this study and make a finding and an award for damages. Respectfully, this Court disagrees with counsel on this issue for a number of reasons. The information as contained in the actuarial study would in this Court's mind amount to expert evidence in that, it would contain information that this Court has no expertise in and further that the defendants through their counsel would not have had to opportunity to test the conclusions contained in said study.

[165] According to the LexisNexis Glossary an actuarial report is one which is prepared and signed by a scheme actuary, on developments affecting the scheme's technical provisions. In the preparation of an actuarial report, an actuary is required to comply with standards set by the various Actuarial Standards Boards and is required to take appropriate steps to ensure that the form and content of each actuarial communication

are appropriate to the circumstances considering the intended users. An Actuarial report all in all is considered an expert report.

[166] Counsel Thomas' submission as to the quantum of general damages to be awarded is in one instance predicated on the actuarial report appended to his submissions. This to the Court's mind means that the calculation of damages claimed to be suffered by the claimant would be postulated on the contents of the actuarial study.

[167] The ultimate question is the overall fairness of the trial. It is trite law that in civil proceedings it is the Claimant who bears the burden of proof in establishing his or her damage. It is also trite law that the role of the expert is to assist the Court in relation to matters of a scientific, technical or otherwise specialised knowledge which are outside of the judge's knowledge and expertise by giving evidence of fact or opinion.

[168] The actuarial report that counsel Thomas seeks to urge the Court to consider is in this Court's respectful view an expert opinion which should have been adduced in compliance with part 32 of CPR. Part 32 makes provision for expert evidence to assist the court. Counsel cannot just annex such a report to his submissions and require or expect the court to take judicial notice of its contents and extract information in concluding what award of damages is to be made.

[169] Further, counsel for the defendants has not been able to address the contents of the report or test the conclusions contained therein. Counsel for the defendants would have been given no opportunity to review, to agree, or disagree or question the contents of the report which undermines the fairness of the trial.

[170] Based on counsel's failure to comply with part 32 as it regards the actuarial report, this Court will pay no regard to the contents of said report as a guide to determining and making an award of general damages herein.

Bifurcating the Trial

[171] Counsel submitted that if the Court concluded that there was no sufficient evidence that the Court it should have ordered that there be a bifurcated the trial and allowed for an assessment of damages outside of the trial so as to establish the defendants' liability, which would have allowed the claimant to opportunity to prove both special and general damages. Counsel cited and relied on **Myett's Enterprises Ltd -v- Kimberly Cooke Leight et al**⁴⁴

[172] Bifurcation of trials operates to separate the issues of liability and the quantum of damages to be awarded, allowing these issues to be decided separately. It is accepted that the Court has the power to bifurcate trials, however this is done at the case management stage and when the circumstances of the case make it necessary.

[173] Counsel's reference to the **Myette** appeal emanating out of the Territory of the Virgin Islands is somewhat misguided as in that case the question of possible bifurcation arose out of an appeal coming from the Master's court. The Master's primary role is to case manage cases coming before him or her and further the issue at hand in that case was whether or not the master should bifurcate the case in circumstances of where there was summary trial which is not at all relevant to the case at bar. Bifurcation as submitted is not an option and such an order will not be made.

Amendment of Statement of Claim

[174] Counsel Thomas further submitted that maybe, the claimant can be allowed to amend her statement of claim to include her claim for damages suffered as a result of

⁴⁴ BVIHCVAP2020/0005

her not being able to access telemedicine. Apart from being a submission which will not be entertained at this stage for reasons stated above, it is also incumbent on this Court to say that in any event to allow an amendment of a statement of claim after the full trial of the matter would visit prejudice on the defendants who have already defended the matter based on the statements of case as pleaded and evidence adduced in the matter. To entertain such an application and to allow it, would fly in the face of the Overriding Objective and indeed to take us back to pre CPR practice where there was the possibility of a party amending their pleading right up to judgment.

[175] Further, the authority cited and relied on by counsel addressing amendments to statement of claim or a statement of case by a party whilst the matter was still before the court was one which was still before the Master and in the circumstances clearly at a case management stage where such an application could possibly be entertained. This in this Court's view is absolutely not an option at this stage; this Court will go further and say that to allow such an application would be like to allow the Claimant a second bite of the cherry which will not be allowed as this would allow the Claimant to remedy the gaping deficiencies in the evidence on damages.

The award of Nominal damages

[176] There is a presumption in the case at bar that damages have been sustained by the claimant as a result of the actions of the defendants. However, the burden of proof is on the claimant to prove on the balance of probabilities on the damages that she claims to have suffered. An award for damages should be fair to both parties. In **Scott -v- Attorney General**⁴⁵ Lord Kerr in delivering the Board's opinion said the following at paragraphs 17 & 18 of the opinion.

“[17] General damages must be compensatory. They must be fair in the sense of being fair for the Claimant to receive, and fair for the Defendant to be required to pay—*Armsworth v South Eastern Railway Co* (1847) 11 Jur 758 at 760. But an award of general damages should not aspire to be 'perfect compensation' (however that might be conceived)—*Rowley v London and North Western Rail Co* (1873) LR 8 Exch 221. It has been suggested that full, as opposed to perfect, compensation should be awarded—*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 per Lord Blackburn ...

[18.] As Dickson J, in the Supreme Court of Canada, observed in *Andrews v Grand & Toy Alberta Ltd* (1977) 83 DLR (3d) 452, 475-476, applying this principle in practice may not be easy:

“The monetary evaluation of non-pecuniary losses is philosophical, and policy exercises more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.”

[177] Counsel Thomas submitted that the Court should consider making an award of nominal damages. It was further submitted by counsel that there was a plethora of authorities which would justify this Court in making an award for nominal damages based on the evidence adduced and accepted by the Court. Counsel further submitted that the claimant's inability to access telemedicine services for her son over the last four years was as a result of the breach of the insurance contract on the part of the defendants

⁴⁵ [2017] 3 LRC 704 (PC)

and is a quantifiable loss. It is noted that there is no evidence before the court as to the quantity of the loss.

[178] It was counsel's contention where the Court concluded that sufficient evidence was not adduced to definitively prove damages that the Court should have considered making an award of at least nominal damages. That failure to do so was clearly an error on the part of this Court which can be corrected. This Court accepts that and makes reference to the finding of Lady Hale in **Re: L and B**⁴⁶ The issue in this case is whether and in what circumstances a Judge who has announced her decision is entitled to change her mind. It was held that the issue can arise in the context of civil proceedings as is the case at bar. The law was restated thus "It has long been the law that a Judge is entitled to reverse his decision at any time before his order is drawn up and perfected."⁴⁷

[179] Lady Hale traced the history of the law and said

"... that this law was established by the Court of Appeal no later than the case of *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717, where the Judge had revised his award of damages before his order was drawn up and the Court held that he was entitled to do so."⁴⁸

[180] The jurisdiction exists where the order has not been drawn up or perfected. This is the case in the case at bar. The Court's discretion can be exercised where a plain mistake by the Court on a point of law is made which is the issue here.

[181] The assessment of damage by a Judge is a matter of the exercise of the Court's discretion. It is well established law that there is no precise mathematical formula or precise method of assessing or quantifying the assessment of general damages. Nominal damages are important because they prove that the claimant has successfully proved their case.

[182] Generally, where a claimant does not request or seek nominal damages, a Judge can however decide to award such damages based on the facts at hand. It is to be noted that in breach of contract cases, usually

⁴⁶ [2013] UKSC 8

⁴⁷ Ibid at paragraph 16

⁴⁸ Ibid at paragraph 18

there is an economic monetary loss suffered by the claimant. It is also to be remembered that a claimant has a legal obligation to prove the scope of his or her damages. In the case at bar, the claimant to this Court's mind failed to adduce evidence to prove her losses for breach of the contract particularly with reference to her failure to be able to access telemedicine. In these circumstances the court ought to award her nominal damages to commemorate that the defendant has breached its contract with her.

[183] Counsel on behalf of the claimant cited and relied on the case of **Greer -v- Alston's Engineering Sales and Services Ltd**⁴⁹. At the Court of Appeal level in Trinidad and Tobago Justice of Appeal Jones made an award of \$5,000.00 where special damages were not proven. The facts in that case involved the question of the loss of use of a backhoe by the Claimant. The loss of use was identified by the Court of Appeal as special damages. The learned Justice of Appeal said that the onus was on the claimant to strictly prove not only his loss but also the quantum of his loss.

[184] In the case at bar, there was no evidence adduced by the claimant proving any quantum of loss for her inability to access telemedicine services for her minor son. In the **Greer** case the learned Justice of Appeal went on to quote from **McGregor on Damages**⁵⁰ where it stated that

"Nominal damages may also be awarded where the fact of loss is shown but the necessary evidence as to the amount is not given. This is only a subsidiary situation but it is important to distinguish it from the usual case of nominal damages awarded, where there is technical liability but no loss"

[185] In the case at bar this is a similar situation, that is, the challenge is one of the absence of evidence of the amount of loss. This Court gratefully adopts the learning gleaned from McGregor as stated.

[186] In the Greer Case the Justice of Appeal went on to say "*Although*" the loss under the head was unquantified the duty of the Court was to recognise it by any award that was not out of scale.⁵¹ This Court pauses to recognise this is where I erred on a point of law in my draft judgment as circulated to counsel thus justifying my revisiting the judgment in compliance with the principle as adumbrated in **Re: L and B**.⁵²

⁴⁹ 63 WIR 388. [2003] UKPC 46

⁵⁰ 13th Edition at paragraph 295

⁵¹ Greer at para 9

⁵² Op cit

[187] When considering the proof of damages, it is proper to place before the Court all facts and circumstances having any tendency to show damages or their probable amount so as to enable the Court to make the most intelligible and probable estimate. According to the learning in the Halsbury's Laws of England⁵³ the function of damages for breach of contract is to be compensatory aiming to compensate the true loss suffered by the innocent party and to place her in the same position so far as money can do it as if the contract had been performed.

[188] A breach of contract is said to be actionable per se which follows that where there is proof of the breach of contract if he proves no recoverable loss at all. The Claimant is entitled at least to a nominal award. **Re: Mappouras -v- Waldrons Solicitors**⁵⁴ in that case it was decided that it was technically wrong to dismiss contractual professional negligence proceedings where there was no loss.

[189] Halsbury's further states that

"The extent to which a Claimant recovers damages in respect of losses related to a breach of contract is limited by the following:

- *the principles of causation and remoteness*
- *the extent to which the Claimant has sought to mitigate their loss "*

[190] The assessment and the award of damages is an exercise in the discretion of the trial Judge. There is no mathematical formula for the award of general damages. The damage which has incurred is assessed as at the date of the breach of the contract. In the case at bar, it would be the date the insurance company attempted to terminate the insurance coverage for the minor child of the family.

[191] The Court is satisfied that an award of nominal damages should be awarded to the Claimant since there was a finding of a breach of contract on the part of the Defendants.

[192] Counsel cited and relied on the case of **Christopher Joachim -v- Damien Luke**⁵⁵ and **St Kitts Development Corp -v- Golf View Development Ltd**⁵⁶ where the Court ruled that an aggrieved party should

⁵³ Volume 25 at paragraph 499 5th Edition

⁵⁴ [2002] EWCA 500 CA

⁵⁵ DOMHCV20150139 at paragraph 6

be put in the position that it would have been in had the Defendants discharged their obligations under the contract. Counsel also cited and relied on **Andre Winter -v- Charles Richardson**⁵⁷ in this case our Court of Appeal held that even though damages had not been proved, the trial Judge could have gone on to consider an award of nominal damages for the unproven special damages (*in that case*) *representing loss of net earnings from the sale of sand and the net loss of tools destroyed*. Counsel also cited and relied on the case of **Greer -v- Alston's Engineering Sales and Services Ltd** where the Trinidad and Tobago Court of Appeal under the hand of Jones JA awarded nominal damages in the sum of \$5,000.00 where special damages had not been proven.

[193] Counsel Thomas went on to cite and rely on the Privy Council decision in **The Owners of the Steamship “Mediana” vs The Owners Master and Crew of the Lightship “Comet**⁵⁸” where it was opined that nominal damages does not mean small damages.

[194] This Court judgment interest this being a case where there is a contract Interest at the rate of 6% per annum is to be paid on the judgment sum herein from the date of judgment that is the 11th October 2024 to the date of payment.

[195] Costs in favour of the claimant to be \$7,000.00

[196] I wish to further thank counsel for the assistance lent to the court and for their patience in awaiting this decision.

M E Birnie Stephenson
High Court Judge

⁵⁶ SKBHCv200123 at paragraph 26

⁵⁷ (2008) ECSCJ no 48

⁵⁸ [1900] AC 113

By the Court

Registrar