

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2015/0476

BETWEEN:

ABI INSURANCE LTD

Claimant

and

CHERYL GORE T/A EDEN'S PLACE APARTMENTS

Defendant

Appearances:

Mr. Dane Hamilton instructed by James Dublin & Associates for the Claimant.
Mr. George Lobby IV for the Defendant

2018: February 5th
2019: March 18th

ORAL JUDGEMENT

[1] **WILKINSON J.:** On 8th May 2015, the Claimant filed its claim form and statement of claim. By its statement of claim the Claimant pleaded:

“1. The Claimant is an insurance company

2. At all material times the Defendant was a customer of the Claimant.

3. On or about the 15th April, 2013, at the request of and for the benefit of the Defendant, the Claimant agreed to and facilitated the Defendant with insurance coverage, namely property insurance over the Defendant's property known as Eden's Place Apartment situated at All Saints Road, St. John's, Antigua. The agreed premium was \$32,000.00. The insurance policy was assigned with the number PFC/13/00078.
4. At the request of the Defendant, the Claimant extended a credit facility which allowed for the payment of the agreed premium via monthly installments.
5. The said Policy was renewed on the 15th April, 2014. The Claimant, at the request of the Defendant, once again extended a credit facility allowing the Defendant to pay the premium in monthly installments.
6. In performance of the agreement, the Claimant provided coverage to the Defendant for the period April 15, 2014 to April 15, 2015. The Claimant also informed the Defendant's financial institution with an interest in the property of the renewal of the insurance policy and that insurance coverage was provided over the said property for the period 15th April, 2014 to 15th April, 2015 (and) in place over the said property.
7. For the period 15th April, 2014 to 15th April, 2015 the Defendant has benefited from the coverage provided by the Claimant and utilised the same to her benefit.
8. The Defendant has defaulted in the payment of the premium as agreed under the credit arrangement with the Claimant. Via correspondence dated 29th October, 2014 and 23rd December, 2014 the Claimant demanded payment of the outstanding sums. Copies of the said correspondence are attached herewith and collectively exhibited as "RA1".
9. Despite numerous requests the Defendant has failed and / or refused to satisfactorily address its indebtedness to the Claimant. As at 23rd December, 2014 the sum of \$32,000.00 was due and owing to the Claimant. A copy of the Customer Statement in relation to the Defendant's account with the Claimant is attached herewith and exhibited as "RA2".
10. The Claimant is entitled to and claims the outstanding premium in the amount of \$32,000.00.
11. The Claimant has been deprived of the use of the money due to it and the Claimant claims interest on the sum of \$32,000.00 pursuant to sec. 27 of the Eastern Caribbean Supreme Court Act Cap 143 from the date of filing of the claim form and continuing at the same rate until judgment or sooner payment.
12. The Claimant claims interest at the rate of 5% after judgement pursuant to section 7 of the Judgments Act Cap. 227.
13. An order that the Defendant shall pay the Claimant's costs of this action.

14. By reason of the matters aforesaid the Claimant has suffered loss.

AND THE CLAIMANT CLAIMS:

1. The sum of \$32,000.00 being the premium balance due and owing on insurance policy Number PFC/13/00078 granted to the Defendant
2. Interest thereon at such rate and for such period as the Court may think fit pursuant to section 27 of the Eastern Caribbean Supreme Court Act, Cap. 143;
3. Interest at the rate of 5% pursuant to Sec 7 of Judgment Act Cap. 227
4. Costs
5. Such further or other relief as this Honourable Court deems just.”

[2] Exhibited to the statement of claim were (a) Renewed Property Insurance Policy Schedule dated 16th April 2014 for policy PFC 13/00078 and which reflected - insured: Eden Place Apartments; period 15th April 2014 to 15th April 2015; premium \$32,000.00; building value \$2,850,000.00; cover for fire and full perils, mortgagee: Antigua Commercial Bank main branch; class: commercial policy; (b) demand letter issued by the Claimant to the Defendant dated 29th October 2014, calling for payment of “Outstanding Balance – Property Insurance Policy No. PFC/13/00078 with amount demanded \$32,000.00 plus \$2336.36 from the previous year; the letter also stated:

“Our records indicate that the above policy was renewed on April 15, 2014. At that time ABI Insurance Co. Ltd allowed an extended credit arrangement to you. To date, this agreed time period has lapsed and a balance of \$32,000.00 remains outstanding, in addition to a balance of \$2,336.36 outstanding from the previous year.

Should you require a new arrangement as regards to the payment of the outstanding premium we invite you to contact us as soon as possible. Please note that failure to address the outstanding balance by November 14, 2014 will result in our moving to cancel the above mentioned policy.”

(c) customer statement dated 29th October 2014, (d) a further demand letter dated 23rd April 2014, and (e) a customer statement dated 19th December 2014.

[3] On 24th June 2015, the Defendant filed her defence. Therein she pleaded:

“1. Paragraphs 1- 4 of the Claimant’s statement of claim are admitted save that the Defendant avers that she was a customer of the Claimant over the period 15th April, 2013 to 14th April, 2014 circa. In support of paragraph 3 of the statement of claim, attached hereto and marked “**CG 1**” is a copy of the signed credit agreement between the Claimant and the Defendant in respect of said policy of insurance for 2013 to 2014.

2. Paragraph 5 of the statement of claim is vehemently denied. At no time did the Defendant request of the Claimant a renewal of the said insurance policy and at no time did the Defendant agree to the renewal of said policy or made any request for or agreed to

any credit facility in respect of same. The Claimant is put to strict proof of any agreement between itself and the Defendant for the renewal of the policy and credit facility regarding same.

3. By letter dated the 24th day of March, 2014, the Claimant sent an invitation to renew policy letter to the Defendant inviting her to renew her policy No. PFC/13/00078. A copy of the said letter is exhibited hereto and marked “**CG 2**”. At no time, as alleged by the Claimant, did the Defendant request a renewal of policy. The Defendant did not respond to this letter, nor did she sign any credit agreement with the Claimant for insurance coverage over the period 2014 to 2015. A copy of a Credit Agreement, signed by the Claimant’s agent, but unsigned by the Defendant, is exhibited hereto and marked “**CG 3**”.

4. In respect of paragraph 6 of the statement of claim, the Defendant avers that having not requested a renewal of the policy she did not expect any insurance coverage over the period 2014 to 2015 from the Claimant. Further, the Defendant was only recently made aware by the financial institution with interest in the property that the Claimant notified them of the alleged renewal of the policy. The purported Renewed Property Insurance Policy Schedule which the Claimant sent to the Defendant’s bank is dated the 11th day of February, 2015 – two (2) months before the expiration of the alleged renewed policy. The Defendant maintains that she did not request and/or authorise the renewal of the insurance policy and that had the Claimant considered there was a valid policy of insurance in existence with the Defendant, confirmation of same would have been provided to the bank prior to two months before the expiration of the alleged policy. A copy of the purported Claimant’s Renewed Property Insurance Policy Schedule is exhibited hereto and marked “**CG 4**”.

5. In regards to paragraph 7 of the statement of claim, the Defendant denies that, in view of her not renewing the policy of insurance with the Claimant, she was covered under a policy of insurance and therefore benefitted therefrom.

6. In regards to paragraph 8 of the statement of claim, the Defendant denies that there was ever any credit agreement between herself and the Defendant which she was capable of defaulting on. The Claimant only provided the Defendant with a draft credit agreement under cover letter dated March 11, 2015 which provided in the Schedule that payments were to commence on March 31, 2015 and end on August 31, 2015. The Defendant contends therefore that when the Claimant sent the letter dated October 29, 2014 that it could not have been demanding payment in accordance with any credit agreement with the Defendant. Further, that having advised the Defendant in said letter that should payment of the \$32,000.00 for the renewal for 2014 to 2015 not be made by November 14, 2014, the “policy” would be cancelled, the Defendant avers that the said policy, which renewal in any event is denied, should have automatically been cancelled after November

14, 2014. This is so especially when the Defendant on November 17, 2014 only paid the balance of \$ 2,336.36 owing under the prior policy.

7. Paragraphs 9, 10 and 11 of the statement of claim are denied. The Defendant is not indebted to the Claimant as claimed or at all.

8. In the premises, the Defendant avers that the Claimant is not entitled to any of the relief sought in its Statement of Claim or at all.

[4] On 11th December 2015, the Claimant filed a reply to the defence. Therein the Claimant pleaded in reply:

“1. As to Paragraphs 2 and 3 of the defence, the Claimant contends that at all material times the Defendant was aware of and consented to the renewal of the Policy of Insurance. The Claimant will say that the Defendant expressly requested that coverage be provided for the additional year.

2. The Claimant vehemently denies Paragraphs 4 and 5 of the defence. The Claimant will say that not only was the Defendant aware that coverage was in place, but was at all material times aware that coverage of the property by the Claimant had been confirmed to her financial institution with interest in the property. The Claimant contends that at all material times the Defendant’s property was covered under a policy of insurance and benefitted from the same.

3. The Claimant stands by its assertions contained in its statement of claim and joins issue with the Defendant in each and every aspect of her Defence.”

[5] The Parties attended mediation and at 4th May 2016, Mediator, Mr. Kelvin John reported that mediation was unsuccessful – no settlement.

[6] The Claimant filed its list of documents on 20th January 2017, thereto disclosed and as available for inspection were: (i) Renewed Property Insurance Policy Schedule for policy PFC13/00078 for the period 15th April 2014, to 15th April 2015 dated 16th April 2014 and unsigned, (ii) receipts numbers ANB34443, ANB34348, ANB33677, ANB33378, ANB37783 (iii) customer statement date 24th March 2014, (iv) property renewal notice dated 24th March 2014, (v) correspondence to Mrs. Gore dated 29th October 2014, (vi) correspondence to Mrs. Gore dated 23rd December 2014, (vii) renewal advice dated 13th March 2015, (viii) customer statements dated 24th March 2014, 29th October 2014, 19th December 2015, and 11th March 2015, (ix) email correspondence between the Defendant and the Claimant’s agent, Roger Abbott, (x) credit agreement dated 18th April 2013 for the period April 2013 to April 2014 (1st policy), (xi) undated credit agreement for coverage provided for 15 April 2014 to 14 April 2015 signed by the Claimant only.

[7] The Defendant filed her list of documents on 27th October 2016, and thereto disclosed and as available for inspection were: (i) the first credit agreement between the Claimant and the Defendant

dated 18th April 2013 (signed by both Parties), (ii) letter of invitation to renew the policy dated 24th March 2014, for the period 15th April 2014 to 15th April 2015, (iii) second credit agreement which was undated and executed solely by the Claimant, (iv) letter dated 29th October 2014, from the Claimant to the Defendant, (v) receipt of payment dated 17th November 2014 (final payment for the 2013-2014 policy), (vi) letter dated 23rd December 2014, from the Claimant to the Defendant, (vii) Renewed Property Insurance Policy Schedule dated 11th February 2015 (i.e approximately 10 months after it is alleged the policy was renewed and 21/2 months before the suit was filed), (viii) email from the Claimant to the Defendant dated 10th March 2015, (ix) copy of letter dated 11th day of March 2015 from the Defendant to the Claimant, (x) letter dated the 8th June 2016, from the Antigua Commercial Bank to the Defendant.

[8] The Claimant's deputy manager Mr. Roger Abbott filed a witness statement on 20th January 2017. It read:

1. "My name is Roger Abbott. I live at Radio Range in the Parish of St. John, in Antigua.
2. I make this witness statement in relation to the above mentioned suit. The matters set out below are within my own personal knowledge, except where I indicate to the contrary.
3. I am employed with ABI Insurance as the Deputy Manager in the Company. I have worked in this capacity for two (2) years.
4. As a part of my duties I am required to address all outstanding receivables and the general operations of the accounting department.
5. I am well acquainted with and have access to the Defendant's case file held in the offices of ABI Insurance Company Limited.
6. On or about the 15th day of April, 2013, the Defendant visited the premises of ABI Insurance Company Limited and requested insurance coverage over her commercial premises situated at All Saints Road, St. John's, Antigua. After the requisite site visitation and assessment of the property, the Claimant offered the Defendant the coverage in the sum of \$3,200,000.00 at an annual premium of \$32,000.00.
7. The Defendant accepted the said premium and made a deposit of \$5,335.85 towards the payment of the same. At the Defendant's request the Claimant, entered into a Credit Agreement with the Defendant to allow for the balance on the premium via six monthly installments. It was agreed that the remaining premium would be paid in monthly installments of \$4,446.52. A copy of the said agreement is attached herewith and marked "RA1". Based on the agreement the entire premium was scheduled to be paid by 15th October, 2013.
8. The Claimant confirmed to the Antigua Commercial Bank, the Defendant's financial institution with interest in the said property, that insurance coverage was provided over the same in the sum of \$3,130,000.00.
9. Regretfully, the Defendant, due to financial constraints, did not complete the payments as expected. However, based on the business relationship established with the

Claimant, the facilitated a further extension of time for the payment of the agreed premium. The Defendant completed payment of the said premium on the 17th November, 2014.

10. On or about 24th March, 2014, via Property Renewal Notice, Mrs. Gore was advised of the renewal date and premium for her insurance coverage. At Mrs. Gore's request, credit facility was once again extended for the payment of the premium.
11. Based on these discussions with Mrs. Gore, the Claimant subsequently confirmed to Antigua Commercial Bank, that coverage was provided for the period 15th April, 2014 to 15th April, 2015. A renewed property insurance policy scheduled was also dispatched to Mrs. Gore as confirmation as to her coverage. A file copy of the said Policy Schedule is attached herewith and marked "RA2"
12. The Claimant also prepared and executed a second Credit Agreement with reference to the payment of premiums for the period 15th April 2014 to 15th April 2015. The said Credit Agreement was placed on the Defendant's file held with the Claimant for her signature.
13. Since the renewal of the policy, several requests, both verbal and written were made to Mrs. Gore with respect to the payment of the premium for the period April 2014 to April, 2015. Despite these constant reminders she did not visit the offices to facilitate payment or to execute the Credit Agreement as she promised to do.
14. In correspondence dated 29th October, 2014 and 23rd December, 2014, demand was made for the payment of the outstanding premium. Attached to each correspondence was a copy of the Customer Statement providing a breakdown of the sums owed. Both correspondences were personally delivered to Mrs. Gore. In response Mrs. Gore promised to visit the offices to address the outstanding issues. To date she has failed and or refused to do so.
15. In or about 10th March, 2015 I had a discussion with Mrs. Gore with respect to renewal of her policy to provide coverage for April 2015 to April 2016. During the conversation, I informed Mrs. Gore that based on the fact that there was a substantial outstanding balance on the current policy (2014 / 2015 Policy), ABI Insurance would not be able to extend a credit facility to provide coverage for the upcoming period. I further made a suggestion to Mrs. Gore with respect to seeking financial assistance from her bankers for the payment of the upcoming premium. At the same time I once again reminded Mrs. Gore of her need to sign off the Credit Agreement already prepared based on her verbal agreement.
16. It was at this point that the relationship with Mrs. Gore broke down. Mrs. Gore subsequently reneged on her verbal agreement with reference to the payment of the 2014/2015 premiums. Mrs. Gore further indicated that she had neither requested nor agreed to the renewal of the policy.
17. I am advised and verily believe that as a part of her mortgage arrangement Mrs. Gore was required to have property insurance coverage over her premises situated at All Saints Road. As a result of Mrs. Gore's request for insurance coverage for the period 2014 / 2015 under the terms of a credit facility, similar to the credit facility extended for

the coverage provided for the period 2013 / 2014; and her agreement to pay the agreed premium, confirmation of coverage for the period 2014 / 2015 was sent to Antigua Commercial Bank. This confirmation assisted Mrs. Gore in complying with the terms of her mortgage facility in that the Defendant's property must at all relevant times be covered with a policy of insurance.

18. Mrs. Gore has benefited from the benefit and use of coverage provided for the period 2014 / 2015 and is therefore indebted to ABI Insurance for the insurance coverage provided."

[9] A further witness statement made on behalf of the Claimant was by Mr. Compton Walcott.

He said:

1. "My name is Compton Walcott. I live at Branch Avenue, Michael's Village in the Parish of St. John, in Antigua.
2. I make this witness statement in relation to the above-mentioned suit. The matters set out below are within my own personal knowledge, except where I indicate to the contrary.
3. I am employed with ABI Insurance as a Field Officer. I have worked in this capacity for over fourteen (14) years.
4. As a part of my duties I am required to inspect and solicit business.
5. I am well acquainted with and have access to the Defendant's case file held in the offices of ABI Insurance Company Limited.
6. I am aware that on or about the 15th day of April, 2013, the Defendant purchased property insurance coverage over her Apartment Complex buildings situated at All Saints Road, St. John's, Antigua. I am also aware that coverage was provided in the sum of \$3,200,000.00 with an annual premium of \$32,000.00.
7. I am further aware that the Defendant made arrangements to pay the agreed premium in installments. It was agreed that Mrs. Gore would pay the said premium in 6 installments of \$4,446.52. Mrs. Gore fell into arrears with this arrangement and as a part of my duties I was required to follow up with her with respect to the payments.
8. In speaking with Mrs. Gore, I was informed that due to financial difficulties she had been unable to make the payments as agreed. I would follow up with her on a regular basis. Most times whenever I called, Mrs. Gore would tell me that she would call me whenever she was ready for me. Whenever I was told by Mrs. Gore that she had a payment, due to the good relationship which I had established with Mrs. Gore, most times, I would travel to her business place to collect the funds. This was done to ease the strain of her having to travel into town and to the offices.
9. In or about March, 2014 I had discussions with Mrs. Gore with respect to the renewal of her premium for the period April 2014 to April 2015. I also indicated to her that the renewal date was approaching and she still had a balance for April 2013 to April 2014.

Mrs. Gore informed me that she was expecting a box hand and would use it to make a full payment to clear the outstanding amount.

10. When the renewal date for the period April 2014 to April 2015 came, I had a conversation with Mr. Kevin Gilead, our then Manager. Based on our conversation, I once again reminded Mrs. Gore that her policy was up for renewal. I also reminded her of her outstanding balance. Mrs. Gore asked me to renew the coverage and promised that once she completed the April 2013 – April 2014 payments, she would make arrangements for the payment of the April 2014 to April 2015 period. After having a second conversation with Mr. Gilead, Mrs. Gore's request was granted and the policy was renewed. At the time of the renewal Mrs. Gore had a balance of \$4,559.62.
11. Unfortunately, Mrs. Gore took longer than anticipated to complete the April 2013 to April 2014 payments. In addition to my follow up calls she was also contacted by Mr. Jason Colbourne, our then Business Services Officers/Receivables.
12. I am very surprised to learn that Mrs. Gore has now indicated that she did not request a renewal for the period April 2014 to April 2015. The request for renewal was made directly to me and granted after obtaining approval from the Manager. At all material times it was understood and accepted by Mrs. Gore, that the renewal was granted on credit and that payment of the renewal premium would commence upon the completion of the premium for April 2013 to April, 2014."

[10] The Defendant filed her witness statement on 22nd December 2016. Therein she stated:

"**I, CHERYL GORE**, the Defendant, of Jonas Road, St. John's, Antigua, make oath and say as follows:

1. I am a businesswoman and the owner of Eden's Place Apartments situated on All Saints Road, St. John's, Antigua.
2. The property which comprises Eden's Place Apartments was insured with the Claimant Company for the period 15th April, 2013 to 14th April, 2014 and assigned insurance policy No. PFC/13/00078.
3. The Claimant Company sent me a letter dated the 24th day of March, 2014, inviting me to renew the said insurance policy for the period 15th April, 2014 to 15th April, 2015.
4. At no point before or after the date of the said letter of invitation did I request a renewal of the said insurance policy or agree to same or made any request for or agreed to any credit facility in respect of same.
5. I have not responded to the said letter of invitation.
6. I reasonably concluded, in the absence of a response or a signed credit agreement by me, that the said insurance policy was not renewed.
7. Two (2) months before the expiration of the alleged renewed insurance policy, the Claimant Company sent a purported Renewed Property Insurance Policy Schedule dated the 11th day of February, 2015 to my bank.

8. The Claimant Company provided me with a draft Credit Agreement which provided in the Schedule that payments were to commence on March 31, 2015 and end on August 31, 2015. I did not sign same.
9. At no time did I consider that the said insurance policy was renewed, and at no time did I benefit from the purported coverage.
10. In the circumstances, i.e. a lack of my request for or agreement to a renewal of the said policy, I am not indebted to the Claimant Company nor is it entitled to any relief it has sought in this claim or at all.”

[11] Mr. Dalmer McCoy on 22nd December 2016, also filed a witness statement for the Defendant. Therein he stated:

“**I, DALMAR McCOY** of #5 Cassada Gardens, St. John’s, Antigua, make oath and say as follows:

1. I am a Consultant at The Risk Management Broking Consultancy, an Insurance Broking and Risk Management Consulting firm situated on Temple Street, St. John’s, Antigua.
2. I have been practicing in the Insurance sector for over 20 years.
3. In my years of experience, I have not known of a situation where an insurer would provide renewed coverage to an insured prior to receiving written or verbal authorization from the insured, except in the claim where the Claimant avers that it provided renewed coverage to the Defendant.
4. In my opinion, provision of renewed coverage without first receiving written or verbal authorization from the insured is inconsistent with insurance principles and practice.”

[12] On 10th February 2017, the Claimant filed its pre-trial memorandum and therein identified the issues as:

- i. “Did the Claimant, at the Defendant’s request, provide continue coverage for the Defendant’s premises situate at All Saints Road for the period 15th April 2014 to 15th April 2015;
- ii. Did the Claimant credit the Defendant with insurance coverage for the period 15th April 2014 to 15th April 2015;
- iii. Is the Claimant entitled to the payment of the premium due and owing?

[13] On 2nd February 2017, the Defendant filed her pre-trial memorandum and therein she identified the issues as:

- i. Whether the Defendant requested and/or agreed to insurance coverage for the said period April 15th 2014 – April 15th 2015;
- ii. If so, whether the Defendant requested and/or agreed to a credit facility in respect of the renewed policy;

iii. If so, what quantum of damages is the Claimant entitled to?

[14] On 23rd March 2017, the Court made the following order:

1. The Claimant is to disclose to the Court within 14 days a copy of the original contract between the Parties and any other documents signed by the Defendant in relation to this matter.

ii. The pre-trial review is adjourned to June 1st 2017.

iii. The Claimant is to draw, file and serve this order.

[15] On 11th April 2017, the Defendant filed an application seeking the following:

- 1) Summary judgment be granted to the Defendant/Applicant;
- 2) Costs in the application be awarded to the Defendant/Applicant;
- 3) Costs in the cause be awarded to the Defendant/Applicant;
- 4) Such further and other relief as the Court sees fit.

The grounds of the application were:-

1. Pursuant to Rule 15.2 (a) the Court may grant summary judgment where the Claimant has no real prospect of succeeding on the claim.
2. The Claimant/Respondent filed a claim against the Defendant/Applicant averring that the Defendant/Applicant is indebted to it for the provision of insurance coverage over her property, known as Eden's Place Apartments, for the period April 15, 2014 – April 15, 2015.
3. The Claimant/Respondent has not adequately made out its case against the Defendant/Applicant in its statement of case as it has not pleaded, exhibited or pointed to the existence of an agreement between itself and the Defendant/Applicant for the provision of said insurance coverage.

[16] The Defendant's affidavit in support deposed:

"1. The Claimant/Respondent and I entered into an agreement for the provision by the Claimant/Respondent to me of insurance coverage over my property described as Eden's Place Apartments situated on All Saints Road, St. John's, Antigua, for the period April 2013 – April 2014.

2. The agreement did not stipulate that the insurance coverage would automatically be renewed.

3. By way of letter dated the 24th day of March, 2014, the Claimant/Respondent invited me to renew the said insurance coverage.

4. I did not at any point during or after the abovementioned period of coverage or after receiving the said letter of invitation request or agree to a renewal of the said insurance coverage.

5. Notwithstanding this, the Claimant/Respondent avers that the coverage was renewed and sent a purported Renewed Property Insurance Policy Schedule dated the 11th day of February, 2015, some two (2) months before the expiration of the alleged renewed insurance coverage, to my bank.

6. The Claimant/Respondent provided me with a draft Credit Agreement which provided in the Schedule that payments were to commence on March 31, 2015 and end on August 31, 2015. I did not sign same.

7. At no time did I consider that the said insurance policy was renewed, and at no time did I benefit from the purported coverage.

8. The Claimant/Respondent has not produced any evidence which supports its averment that I am indebted to it for the alleged insurance coverage by virtue of agreement, and therefore has no real prospect of succeeding on the claim.

9. I make this Affidavit in support of my application for summary judgment.”

[17] On 7th June 2017, the Claimant filed an affidavit deposed by Mr. Roger Abbott in opposition to the application for summary judgment. Mr. Abbott deposed:

“1. I am employed by the Claimant, ABI Insurance Ltd. as Deputy Manager. I am duly authorised to swear the contents of this Affidavit on behalf of the Claimant.

2. I am advised and verily believe that the Defendant on the 11th day of April, 2017 filed an application seeking summary judgment against the Claimant. I am further advised by the Claimant's Attorney-at-Law that the said application was served on the offices of James Dublin & Associates on or about the 12th day of May, 2017. I am again advised and verily believe that the affidavit in support sworn to by the Defendant was served on the said Chambers on the 2nd day of June, 2017

3. I make this affidavit in opposition to the said application.

4. I am advised and verily believe that pursuant to Part 15.1 of the Civil Procedure Rules 2000, that the Court may give Summary Judgment where it considers that the Claimant has no real prospect of succeeding on the claim. Based on my understanding of the said provisions, as explained to me, I very believe that the Claimant has a real prospect of succeeding on the claim herein.

5. The Defendant contends, as its grounds for summary judgment, that the Claimant has not exhibited to the Court any documented evidence of the agreement for renewal of the insurance policy. It is my understanding that based on the principles of contractual law, an

agreement can be in writing or oral. The Claimant, based on its pleadings contends that the agreement for renewal was an oral agreement between the parties. It is therefore a matter for the Court, upon the examination of the evidence at trial, to determine if the prerequisites for the formation of a contract have been satisfied thus creating a valid and legally binding contract between the parties.

6. The Defendant in its defence has admitted that her financial institution confirmed that coverage was provided for the period in question. As such the Defendant benefited from the said coverage.

7. The Court must therefore also determine whether or not this confirmation of insurance coverage, as given by the Claimant to the Defendant's financial institution, formed a part of and was a result of the oral agreement for renewal.

8. The Claimant's evidence contained in the Witness Statement of Mr. Compton Wallcott is that of an oral agreement between the parties upon which certain actions were taken by the Claimant. The Defendant denies the existence of such. Therefore the parties ought to be afforded the opportunity to cross examine the evidence before the court.

9. The matter is not one for which summary judgment can be properly entered as there are disputed issues which ought to be properly ventilated at trial.

10. In the circumstances, I pray that the Application for Summary Judgment be denied."

[18] The Defendant's application came on for hearing on 11th May 2017, and was adjourned for hearing on 8th June 2017. On the said 8th June 2017, the Court made the following order: -

ORDER

UPON THE matter coming on for hearing of the Defendant's summary judgment.

AND UPON Counsel for the Claimant informing the Court that the Claimant does not have the original policy in its possession and that enquires were made including to the Defendant's Bank and was denied and that the Bank will only assist on a court order.

IT IS HEREBY ORDERED

1. The Antigua Commercial Bank is ordered to provide Counsel for the Claimant within 21 days with copies of all connected documents including policies applications and applications for renewal of insurance coverage provided by ABI Insurance Limited for the Defendant and her business Eden's Place Apartments.
2. The hearing of the applications filed April 11th 2017 and June 7th 2017 is adjourned to October 12th 2017.
3. The Claimant is to draw, file and serve this Order."

- [19] On 3rd October 2017, the Claimant filed a supplemental list of documents and thereto disclosed and as available for inspection was an ABI Insurance Company Ltd. Policy of Insurance issued by ABI Insurance Company Ltd. in relation to Eden Place Apartments, attached to the policy were (i) document described as “New Property Insurance Policy Schedule” and (ii) “Renewed Property Insurance Policy Schedule.
- [20] A copy of the 2013 policy was attached to the supplemental list of documents. The Court makes the following observations on the disclosed document:
- i. it was dated 15th April 2013;
 - ii. under CONDITIONS OF INSURANCE there is provided:
 - 2) No payment in respect of any premiums shall be deemed to be payment to the Company unless a printed form of receipt for the same signed by an Official or duly appointed Agent of the Company shall have been given to the insured. Of any insurance
 - 3. The insured shall give notice to the Company of any insurance or insurances already effected or which may subsequently be effected, covering any of the property hereby insured, and unless such notice be given and the particulars of such insurance or insurances be stated in or endorsed on this Policy by or on behalf of the Company before the occurrences of any loss or damage, all benefits under this Policy shall be forfeited.
 - iii. nothing in the policy provided for automatic renewal;
 - iv. the attached Policy Schedule provided for policy number, name of insured, address of insured, account holder (Eden’s Place Apartments), period of insurance – 15th April 2013 to 15 April 2014, the mortgagee/loss payee was the Antigua Commercial Bank – main branch;
 - v. the “Renewal Property Insurance Policy Schedule provided (a) date of issue was stated to be 11th February 2015 (this is literally 3 months before this suit was filed); (b) effective to be date at 15th April 2014, it bears no expiration date and is stated to have been issued.
- [21] Also disclosed to the Court was the Defendant’s 2013 application for insurance, it was dated 12th April 2013, it described the insured property as Eden Place Apartments, the amount to be insured for, description of the building. Nothing in the application provided for renewal or even more so, automatic renewal.
- [22] The Customer Statement bearing the name of Eden Place Apartment disclosed and dated 19th December 2014, showed at 15th April 2013, an opening balance of \$32,000.00, on said date stamp tax of \$15,000.00 was added. On said 15th April 2013, the first payment recorded was \$5,335.85. Thereafter, payments were made in the sum of \$1,111.63 between 13th May 2013 and 17th November 2014. At 15th April 2014, a debit of \$32,000.00 was processed against the account and this brought the account’s balance to \$32,000.00.

- [23] The credit agreement dated 18th April 2013, and disclosed stated therein that it covered the period 15th April 2013 to 15th April 2014.
- [24] At 11th March 2015, the Claimant issued a Customer Statement and therein is shown a due date at 15th April 2014, type of transaction being 'Renewal', same policy number, transaction date of 16th April 2014, for amount of debit of \$32,000.00 and balance \$32,000.00.
- [25] An undated Credit Agreement was disclosed, it was signed solely by an agent of the Claimant. It referred to the policy, showed the covered period as 15th April 2014 to 15th April 2015 and amount due as \$32,000.00.

The Law

- [26] The **Civil Procedure Rules 2000** Part 15 provide:

“15.2 The court may give summary judgment on the claim or on a particular issue if it considers that the –

(a) claimant has no **real prospect of succeeding** on the claim or the issue; or

(d) defendant has no real prospect of successfully defending the claim or the issue.

....

15.5 (1) The applicant must –

(a) file affidavit evidence in support with the application, and

(b) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought; not less than 14 days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must –

(a) file affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the application; at least 7 days before the summary judgment hearing.

15.6 (1) The court may give summary judgment on any issue of fact or law whether or not the judgment will bring proceedings to an end.

(2) If the proceedings are not brought to an end the court must also treat the hearing as a case management conference. (My emphasis)

[27] In **The Caribbean Civil Court Practice 2011 Note. 12.3 “REAL PROSPECT”** the authors state:

“The Court should interpret ‘real’ as the opposite of fanciful and should not conduct a mini-trial in order to establish whether a summary disposal was appropriate: **Swain v. Hillman**.

The test under Part 15 (ENG CPR 24) is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful: when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at the trial - or the lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to trial (namely, the balance of probabilities). See **Royal Brompton Hospital NHS Trust v. Hammond (No.5) [2001] EWCA Civ.50,[2001] BLR 297**.

The rule ‘... is designed to deal with cases which are not fit for trial at all’; the test of ‘no real prospect of succeeding’ requires the judge to undertake an exercise of judgment, he must decide whether to exercise the power to decide the case without a trial and give summary judgment, it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, ‘the criterion which the judge has to apply under CPR Pt.24 is not one of probability; it is the absence of reality.’ **Three Rivers District Council v. Bank of England (No.3) [2001] UKHL 16, [2001] 2 All ER 513 (Lord Hope at paras. 65 and 158)**

Where there is no admissible evidence to support pleaded case then this is a most significant factor for the judge to take into account. In **Smikle v. Nunes (CL 1999/ S 243) (judgment 9 March 2007)**: Sykes J considered the speech of Lord Hobhouse in **Three Rivers District Council v. Bank of England (No.2)** (see above) and stated that:

‘First, his Lordship stated that merely pleading a legally sufficient case is not the end of the analysis. Second, pleading is based on admissible evidence. This second point cannot be over emphasized because some attorneys are resisting inquiries by the case management judge of the evidence they intend to call to support the case. They think that when the judge makes these enquiries they are giving away too much. However, as Lord Hobhouse is saying, a pleaded case assumes that the evidence is indeed available to make good the allegation and that can only be done if the proposed evidence is legally admissible. The pronouncement by Lord Hobhouse, logically, cannot be restricted to cases of fraud or dishonesty since all civil cases are required to be established by legally admissible evidence. Third, even if the evidence is admissible, a judge in clear and obvious cases may and should make a decision on the prospects of success. Fourth, when the judge is

making this assessment the judge must consider whether the case can be strengthened by requests for information. Fifth, if after taking into account the pleaded case and the possibility of gaining further information if the judge concludes that there is no real prospect of success then the judge should act accordingly and give summary judgment for the other party. Summary judgment is not a device to avoid trial but one of the powerful tools of case management which is designed to eliminate hopeless cases

Similarly, in **Bank of Bermuda Ltd. v. Pentium (BVI Civil Appeal No. 14 of 2003)** (judgment 20 September 2004) Saunders CJ (Ag) stated that:

'[15] A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invited speculation and does not demonstrate a real prospect of successfully defending the claim.'

On the other hand when, on the evidence before the court at the time of the application, there are issues which remain unresolved and oral evidence may affect the judge's assessment of the facts then the matter should proceed to trial: **Kathleen Hosang v. Kendal Bhaggy (TT CV 2009-02286)** (23 November 2010) (Madam Justice Pemberton).

In **Western United Credit Union Co-operative Society Ltd. v. Corrine Ammon** (TT Civ App 103/2006) Kangaloo JA (at para. 79 onwards) considered the English learning on summary judgment and approved and applied the English approach in the then recent case of **Toppin Fashion Ltd. v. Nik Nak Clothing** [2009] EWHC 1333 and its reliance of **Federal Republic of Nigeria v. Santolina Investment Corp** [2007] 437 CH where it was stated that:

'(iii) In reaching its conclusions the court must not conduct a "mini trial"...

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

(v) However, in reaching its conclusion the court must take into account not only the evidence actually before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial ...'

[28] Insurance contracts are of a peculiar species of contract and a specialty in contract law. In **Chitty On Contracts** 32nd ed. Vol. II SPECIFIC CONTRACTS it is stated:

“42-001 Definition. A contract of insurance is one whereby one party (the insurer) undertakes for a consideration to pay money or provide a corresponding benefit to or for the benefit of the other party (the assured) upon the happening of an event which is uncertain, either as to whether it has or will occur at all, or as to the time of its occurrence, where the object of the assured is to provide against loss or to compensate for prejudice cause by the event, or to make provision for some identified contingency, such as for the assured's old age (where the event is the reaching of a certain age by the assured. It is these objectives which distinguish insurance from gaming or wagering. When embodied in a document the contract is usually called a policy, but save in the case of marine and possibly life insurance, an oral contract of insurance, though rare, is perfectly valid and may indeed also be described as a policy.”

[29] In **MacGillivray on Insurance Law** 9th ed. it is stated:

“2-1 All material terms. In order that a binding contract of insurance shall be concluded, there must be an offer put forward by one party to the contract and an acceptance of it by the other. An offer is usually made by the proposer who completes a proposal form and sends it to the insurers for their consideration. Counter-proposals may, however, be made by the insurers so that negotiations may end with the insurers making a final offer of insurance cover to the applicant which it is up to him to accept by, for instance, tendering the premium due.

2-2 An acceptance will be of no effect in law unless the parties have agreed upon every material term of the contract they wish to make. The material terms of a contract of insurance are: the definition of the risk to be covered, the duration of the insurance cover, the amount and mode of payment of the premium and the amount of the insurance payable in the event of a loss. As to all these there must be a *consensus ad idem*, that is to say, there must either be an express agreement or the circumstance must be such as to admit of a reasonable inference that the parties were tacitly agreed. Without such agreement, it would be impossible for the courts to give effect to the parties' contact except by virtually writing the contract for them, which it is not the function of the courts to do.

2-15 General rules as to acceptance. The general rule is that a contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether final acceptance is that of the assured or insurers depends simply on the way in which the negotiations for an insurance have progressed. In many cases, both offer and acceptance are made and given respectively through the parties' authorised agents. It is particularly important that the person accepting for the insurers should be someone empowered to make contracts on their behalf...

2-16 Silence does not denote consent and therefore no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance of it. Mere delay in giving an answer cannot be construed as an acceptance, as prima facie, acceptance must be communicated to the offeror. This is not always so; for instance, a motorist who is sent an insurance cover note by insurers may probably accept this offer of insurance cover by taking his car out on the road in reliance on it. It seems that a person whose acceptance is expressed by conduct of this sort, and not by words, is not 'silent' for the purposes of the rule that silence does not denote consent....

2-17 Communication may be dispensed with through an acceptance being made in a manner expressly prescribed by the terms of the offer, or by the general course of business. For example, an offer to insure holders of newspaper coupons may be made in such manner as to conclude a contract between the company and purchasers of the newspaper who sign the coupon, or are regular subscribers to the paper, or their personal representatives....

2-34 **"No insurance to be effective until premium paid."** Insurers frequently stipulate that they will not come under a liability to indemnify the assured until the first premium is paid. Thus the applicant may find in the proposal which he signs a provision that no contract is to come into being, or no insurance is to be effective, until a premium is paid. Alternatively, that provision may be found in a letter sent acknowledging receipt of the proposal and saying that the risk proposed is agreeable to the insurers. The policy itself may also contain a condition providing that the risk shall not commence to run until a premium is received.

2-35 When insurers purport to "accept" the applicant's proposal subject to such a stipulation, it is misleading to speak in general terms of their "acceptance" of his offer, and to say that a "preliminary contract" has come into being, since on legal analysis there is probably no binding contract at all at that time. The legal position of the parties will depend upon the negotiations which have taken place and the exact wording of the clause in question, from which the court will endeavor to deduce whether it was the parties' intention to enter into a legally binding agreement at that moment. There are certainly three alternative interpretations of acceptance.

7-2 Premium defined. The premium is the consideration required of the assured in return for which the insurer undertakes his obligations under the contract of insurance. It will generally be a money payment but need not necessarily be so. Thus, in the case of a mutual insurance society it may consist of the liability of the member to contribute to a fund to indemnify other members of the society for their losses. The amount or adequacy of the premium in relation to the risks run is a matter for the insurer rather than a court, but it has been said that the amount of the premium charged might be of assistance in determining

what risks the insurer intended to run if the premium was assessed on a fixed scale commensurate with the scope of the risk.

7-3 Theory and practice. Prima facie premiums are payable in cash to the insurers at their principal place of business, that is to say, in the case of a company, at the head office of the company. In practice, the place and manner of payment are regulated by the terms of the policy or by the customary method of transacting the business of insurance.

7-18 Allowance of credit. An insurance company may, by its course of business, in allowing credit to the assured for the amount of the premium on a periodical account to be settled at some unspecified future time, impliedly agree that the policy shall be treated as renewed on the renewal date, although the premium be not then paid. The validity of the policy for the renewal period is not affected by the subsequent failure of the assured to pay the balance due by him on his account.

7-40 Punctual payment essential. In all classes of insurance the punctual payment of the renewal premium according to the terms of the policy is a condition precedent to the continuance of the risk. In the Canadian case of **Frank v. Sun Life** the premium on a life policy was payable by quarterly instalments on specified days. It was held that default in the payment of any one quarterly instalment even for a day would release the company from further liability, notwithstanding the absence of any express forfeiture clause. Burton J. said:

“Promptness in payment is of the very essence of the business of life insurance, and if, therefore, any one of the quarterly instalments remains unpaid the forfeiture is absolute, unless there is something in the contract itself to dispense with it. When no such stipulation exists it is the well-established understanding that time is material, or, as it is sometimes expressed, is of the essence of the contract.”

7-41 Payable by instalments. A premium expressed to be an annual premium is sometimes, for the convenience of the assured, made payable in quarterly or other periodical instalments; but in order that the insurers may not lose thereby it is provided that if the assured die in any one year before the whole instalments for that year have been paid, the balance may be deducted from the sum insured. Such a proviso does not render the punctual payment of the instalments any less a condition precedent to the continuance of the risk.

7-45 Reason for days of grace. If the continuance of the risk under a policy were conditional on the payment of a premium on a certain specified date in each year or quarter, and no provision were made for the payment of overdue premiums, the policy would immediately lapse if a premium was even one day in arrear, and in consequence the assured would be placed in the position of having to apply for a new contract of insurance.

7-52 Extension of time for payment. Notwithstanding the provisions in the policy, the insurers may extend the time for payment of the premium or waive any of the conditions precedent to the continuance of the risk, and even after the policy has lapsed the insurers may be held to have revived the insurance upon the same terms by any word or act which leads the assured to believe that the insurers have reassumed the risk.

Findings and Analysis

- [30] The Court being guided by the authorities cited on how to apply **Part 15** must recall that it cannot at this juncture conduct a mini trial but nonetheless it must in this instance examine the pleadings, documents disclosed and witness statements before it to ascertain the evidence in the case and perhaps further evidence that might or could be adduced.
- [31] The Court is also to bear in mind the specialty nature of contracts for insurance.
- [32] The Claimant does not claim to have based its position on an automatic renewal clause in its first policy of 2013-2014 with the Defendant and there was no such clause. Rather the Claimant says that based on an oral agreement for renewal, it renewed the policy. There were no particulars such as date and time stated on when the oral agreement was made. It is understood that the terms were to be the same.
- [33] It is a fact that the Claimant did send a letter of invitation to renew the policy to the Defendant but there was no evidence that the Defendant ever responded to the letter. The Claimant's position is that there was an oral agreement.
- [34] Even if the Court accepts that there was an oral agreement, it is a fact that while the Claimant did send the Defendant a credit agreement signed by the Claimant's officer and for execution by her for the renewal period 2014 – 2015, the Defendant never signed it.
- [35] It is a fact that while the Claimant alleged that it had renewed the policy for 2014 – 2015, it was never disclosed same with its pleadings or witness statement. It was never produced not even on the Court's order. Under further order to the Antigua Commercial Bank (the Bank) a copy of a "General Household Insurance Policy" was disclosed under a supplemental list of documents filed 7th June 2017.
- [36] As pointed out before, the Renewed Property Insurance Policy Schedule disclosed by the Defendant had an date issue of 11th February 2015 – i.e. A date 2 months before its expiration at 15th April 2015, and 2 ½ months before the suit was filed. The Claimant's copy of the identical document as disclosed was unsigned and undated.
- [37] Such late date of issue is contrary to the Claimant's case that based on an oral conversation with the Defendant that it renewed the policy and informed the Bank of same. How could the policy

have been renewed and there was no policy certificate of renewal issued for 10 months? Of note the Bank was not called as a witness to say that it placed any reliance on the “word” of the Claimant that there was insurance coverage in the absence of a policy certificate evidencing renewal, since it could not be its policy certificate relied upon as same had not been issued for 10 months of the renewal period.

- [38] If once again the Court gives the Claimant the benefit of the doubt that there was an oral agreement for renewal for the period 2014 -2015, the Court finds it most unusual that the Claimant would continue to hold a policy in the face of a Defendant who was not prepared to sign its credit agreement or make a single payment and indeed made the last payment on her 2013-2014 policy some 7 months after that policy expired. Added to this, by letter dated 29th October 2014, the Defendant was told that if she required a new credit agreement to make contact as soon as possible and that it she failed to address the outstanding balance by 14th November 2014, then the policy would be cancelled.
- [39] The Court’s bears in mind that the Claimant was in the driver’s seat in this transaction as there was no credit agreement signed, no payments made and no policy certificate issued for 10 months, so why was the alleged policy not cancelled despite the threat to do so by letter of 29th October 2014. No explanation is set out in the pleadings, disclosures and witness statements as to which the policy was not cancelled.
- [40] A contract of insurance works both ways and so the Court wonders if there had been a claim made under these same set of circumstances by the Defendant whether the Claimant would have been eager to pay the claim. Most likely the Defendant would not have succeeded because of the insurance contract principles highlight above. And chief amongst which was that with no premium paid, there could be no coverage for a claim.
- [41] With the policy certificate bearing a 11th February 2015, date, the Court finds it difficult to accept that there was coverage based on an oral agreement for the period 15th April 2014 to 15th April 2015.
- [42] What is the evidence that the Court can expect to receive at trial? Any particulars of an oral contract should have been pleaded, such being for example the date the oral contract was made. As the Court understands, all other terms and conditions of the 2013 -2014 policy were to be in the renewal and so that is not in issue.
- [43] The Court believes that the Defendant has made out a case for summary judgment. The Court makes this finding grounded on (a) not a single document can be produced as executed by the Defendant to support an oral agreement, (b) it was some 10 months on after the alleged renewal was to have occurred that a policy renewal dated 11th February 2015, was issued, and this was some 2 ½ months before the suit was filed, (c) there is no witness statement from the Bank stating that it relied on the “word” of the Claimant that the Defendant’s property was covered since 15th April 2014, (d) the

authorities suggest that even where parties may have arrived at an oral agreement for coverage, it ought to be reduced to writing.

[44] The Claimant's claim is struck out with costs to the Defendant.

[45] Court's order:

- i. The claim is struck out.
- ii. The Claimant is to pay the Defendant costs in the sum of \$1,000.00 within 21 days of judgment.

Rosalyn E. Wilkinson
High Court Judge