BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0070

BETWEEN:

Boston Life and Annuity Company Limited

Claimant

-and-

(1) Dijon Holdings Limited

(2) International Association for Professional Benefits Inc

(3) Employers International

(4) Amber Cape Productions, LLC

(5) A.S. Sawhney

(6) Baldocchi & Sons, Inc. DBA Pacific Nurseries

(7) Barnes Yard Inc.

(8) Beamus, LP

(9) William P. Wheeler Revocable Trust

(10) Bradford Black

(11) Brian S. Grossman

(12) BRS Architects

(13) Charles Brooks

(14) Christopher P. Raggio

(15) CLIA, Inc.

(16) Craig Frank Ltd

(17) Daniel J.Olsen

(18) Daniel P. Buttafuoco

(19) Darrell W. Daugherty

(20) Douglas J. Spriggs

(32) Janelle Jones

(33) Jeffery J. Walby

(34) Kenneth Grabow

(35) Law Practice Management Consultants, LLC

(36) Lawrence L. Anderson

(37) Lewis Grayson Smyer

(38) Lyle B. Faber

(39) Marek Stawiski

(40) Marilyn A. Dahms

(41) Mark Hinman

(42) Marlin D. Collier

(43) Marvin Triplett

(44) Matthew J. Benetti

(45) Maxa Beam Searchlights, Inc.

(46) Mimbres Internal Medicine P.A.

(47) Morrow & Company CPAS

(48) North County Oncology Medical Clinic, Inc.

(49) Pyra Cap Inc.

(50) RaDCon, PC

(51) Richard W. Wilson

(21) Dr. M. Burger
(22) Dunbar Construction
(23) Earthworks Recycling, Inc.
(24) Felix O. Sogade
(25) Gerardo Aguirre
(26) Gregory Smith
(27) Herman A. Carstens
(28) Hope Medicinals
(29) Howard Merritt
(30) Infinity Stairs, Inc.
(31) JMB Materials
(52) RND, LLC
(53) Rosalind D. Triplett
(54) Stanley G. Hopp
(55) Stephen C. Klasson
(56) Stephen J. Kroll
(57) Terry L. McVey
(58) THECO, Inc.
(59) Timothy W. Teslow, MD
(60) Tony Zakhem
(61) Warren Hutchings
(62) Waterfront Funding Group
(63) WKNB Productions LLC

Defendants

Appearances:

Mr. Philip Shepherd QC of XXIV Old Buildings, London with him Mr. Michael J. Fay and Ms. Clare-Louise Whiley of Ogier for the Claimant
Dr. Joseph S. Archibald QC with him Ms. Michelle Worrell of J.S. Archibald & Co. for the Defendants save the 33rd Defendant.

2007: April 03
2007: May 14

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: On 3 April 2007, this application came before me for summary judgment pursuant to Part 15 of the Civil Procedure Rules ("CPR15") against all the Defendants save the 33rd Defendant, Jeffrey J. Walby.[1] The 1st Defendant ("Dijon") and the 2nd, 28th, 31st and 52nd Defendants do not seek to defend the application for summary judgment that was filed on 24 November 2006 and served on 27 November 2006. The remaining Defendants (conveniently called "the JSA Defendants") filed a Defence on 26

[1] The 33rd Defendant has filed a Defence and Counterclaim. Summary Judgment is not, at this time, sought against him.

July 2006. They trenchantly opposed the application for summary judgment alleging that there are a number of factual as well as legal disputes between the parties which ought to be determined at a trial.

[2] The Claimant, Boston Life and Annuity Company Limited ("Boston Life") alleged that, notwithstanding their Defence, the JSA Defendants have no real prospect of successfully defending the claim. The sole issue, therefore, that this Court has to determine is whether the JSA Defendants have any real prospect of successfully defending the claim - CPR 15.2(b).

The Summary Judgment Test

[3] CPR 15 sets out a procedure by which the Court may decide a claim or a particular issue without a trial. CPR 15.2 (b) states that the Court may give summary judgment on a claim or an issue if it considers that the defendant has no real prospect of successfully defending a claim or issue. Under CPR 15.2, the Court has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the Court to dispose summarily of both claims and defences which have no real prospect of being successful. In Swain v Hillman and another[2], Lord Woolf MR said that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success. At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to its proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials. They are simply to enable the Court to dispose of cases where there is no real prospect of success.

[4] The lucid and succinct judgment of Judge LJ in the Swain case, at page 96a-c, is also edifying. He said:

> "To give summary judgment against a litigant on paper without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion to the court to give

[2] [2001] 1 All ER 91 at page 92.

> summary judgment….If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

[5] Therefore, the Court has to be wary since it is a serious step to give summary judgment. Nonetheless, a claimant is entitled to summary judgment if the defendant does not have a good or viable defence to a claim: see the cases of Pentium (BVI) Limited and Landcleve Corporation v The Bank of Bermuda Limited[3] and Royal Bank of Canada v Helenair Caribbean Limited[4]. This is also in keeping with the overriding objective of the CPR 2000 to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

[6] To put in a nutshell, a defendant cannot be permitted to continue a case on a defence which has no real prospect of being successful. It is on these principles that I will consider the merits of the present application.

The background

[7] Boston Life is a company incorporated in the British Virgin Islands ("the BVI") pursuant to the International Business Companies Act ("IBC Act"). It holds an insurance licence issued by the Financial Services Commission ("FSC") and it acts as an insurer. Belmont Insurance Management Limited ("Belmont"), part of the KPMG Group, is the Insurance Manager to Boston Life.

[8] The 1st Defendant, Dijon Holdings Limited ("Dijon") is a company incorporated in the Bahamas. The 2nd Defendant, International Association for Professional Benefits Inc ("IAPB") is a company incorporated in the BVI pursuant to the IBC Act. The 3rd Defendant,

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[3] BVIHCV2002/0122 –per Rawlins J (as he then was) at paragraph 5 –judgment delivered on 30 April 2003 [unreported].

[4] St Lucia High Court Civil Claim No. 654 of 2001 –per Hariprashad-Charles J –judgment delivered on 23 September 2002 [unreported].

Employers International ("EI") is a professional association existing under the laws of the State of Florida in the United States of America. EI acts as a purchasing group eligible to purchase insurance for its members and in the course of so doing earns brokerage or commission. The 4th to 63rd Defendants ("the Risks") are professional persons and entities providing services in the United States of America on whose behalf Dijon had applied for insurance coverage. The insurance included supplemental Malpractice, Group Business Risk and Group Disability Policies ("the Group Insurance Cover").

The claim

[9] Boston Life filed a claim form seeking:

1. A declaration that various Policies of Insurance (as detailed in the Statement of Claim) issued to it by Dijon have been lawfully terminated;

2. Alternatively, a declaration that Boston Life was not obliged to offer coverage in respect of the Group Insurance Cover after 30 September 2005;

3. A declaration that Boston Life is not liable to repay any of the Defendants any part of the Premium.

[10] The relevant facts as alleged by Boston Life are as follows: in 2002, the Risks sought to obtain the policies of insurance through the medium of EI who in turn, agreed to obtain such policies for the benefit of the Risks. EI procured the policies from Boston Life through a scheme involving Dijon and IAPB. The Risks paid a certain sum to EI who retained 6% of that sum as brokerage and then paid the balance (the premium) to IAPB. IAPB then paid the premium to Dijon. Dijon in turn paid it to Boston Life who received the premium in consideration of agreeing to issue the policies.

[11] Boston Life duly issued the policies of insurance to Dijon with policy effective dates on 21 November 2001, 1 October 2002, 1 October 2003 and 1 October 2004 respectively. The following policies were issued effective 1 October 2004:

Policy number SR-SP000-2004-000 – a supplemental group business risk policy;
Policy number SR-EI000-2004-000 – a supplemental group business risk policy;
Policy number SR-AB000-2004-000 – a supplemental group business risk policy;
Policy number DI-AB000-2004-000 – a supplemental group business risk policy;
Policy number MM-EI-2004-000 – a supplemental group malpractice policy;

[12] Boston Life alleged that each of the policies it issued to Dijon contained a provision whereby it was entitled to cancel the Policy by providing written notice to Dijon[5]. In accordance with the terms of Clause12J, Boston Life gave notice of termination of the policy to Dijon and thereby terminated all of the policies from 30 September 2005[6] whereupon all benefits ended in accordance with Clause 12M of the Policy and/or declined to go on risk for any further year of cover.

[13] Boston Life next alleged that at the date of such termination, no Risk had been continuously covered for a minimum period of 5 years so that it was not obliged to return any premium in accordance with Clause 12F. On the contrary, all premiums had been fully earned as soon as Boston Life had gone on risk. Boston Life also alleged that it was entitled to decline to renew the policies. Accordingly, it seeks the resolution of these issues by way of a binding Declaration as to whether it is obliged to return premium or any part thereof to the JSA Defendants.

The Policy

[14] It may be worthwhile to look at the Policy ("the Policy") which was annexed to the Statement of Claim. (The JSA Defendants denied that it was the policy and asserted that it is a new previously unknown Refund Plus Insurance Policy).

[15] In the Policy, the Company refers to Boston Life. The policies define [7]:

a. the "Insured" to be Dijon.

[5] See for example Clause J of the specimen policy annexed to the Statement of Claim.
[6] See paragraph 20 of the Statement of Claim.
[7] See paragraph 2 of the specimen policy annexed to the Statement of Claim.

b. a “Risk” to be a …specific beneficiary of [*Dijon*] upon whose behalf *[Dijon*] has applied for coverage and pays the premium for each Risk which will be separately accounted for by [*Boston Life*]. In other words, all of the JSA Defendants fell within the definition of Risk.

[16] The following other clauses are important to the present application:

Clause 4: The Policy is issued as of the above specified Policy Effective Date, and it is annually renewed on the first day of October, and as to each Risk for a period of five years effective as of the date and upon acceptance by the Company of each Risk with the minimum payment required.

Clause 8: In *Consideration* of the payment of the premium, receipt of which is hereby acknowledged, and subject to the limits of liability and the other terms of this policy, the Company hereby agrees to PAY DAMAGES, in the name and on behalf of the Insured on a claim of business risk.

Clause 9: A BUSINESS RISK CLAIM SHALL BE ANY CLAIM FOR DAMAGES FILED DURING THE TERM OF THIS POLICY, AFTER THE RETROACTIVE DATE, BY THE RISK IN THE PRACTICE OF THE PROFESSION OR BUSINESS OF SUCH RISK.

Clause 12: This Policy shall be subject to the following terms and conditions:

Clause 12D: LIABILITY LIMITATIONS

Clause 12E: POLICY RETROSPECTIVE AND ASSESSMENT
This is a retrospective policy. The Company may assess premiums at any time. If in the event assessed premiums are not current the Company shall have no obligation to make payment on any claim and may treat such as a default under this Contract. The Company shall have the right to terminate the Policy or Risk at any time. (Emphasis added)

Clause 12F: PREMIUM RETURN
If after being continuously covered for a minimum period of 5 years, should the Risk covered die or in the event otherwise the Contract is terminated, the Company further agrees to a return of the portion of the premium and pro-rated earnings less claims, costs and expenses as to the portion of the Group Policy calculated to be allocable to the Risk by the Company.

Clause 12G: PRIMARY COVERAGE REQUIRED

The insurance afforded in total and per occurrence by this policy is supplemental to the required primary insurance coverage for each Risk and shall be in the event of any loss, and benefit payable shall be only excess over all other insurance including other supplemental policies in force paid or payable to or for such Risk.

Clause 12J CANCELLATION

1. The Policy may be cancelled by the Company as to the entire policy or as to only a specific Risk applied for by the Insured by providing written notice to the Insured's last known address.

2. The Company may cancel this policy for one or more of the following reasons:

    v. when cancellation is part of cancellation for all persons or organizations of a given class or type.

    vi. For reasons deemed by the Company to be appropriate or necessary.

Clause 12M: WHEN BENEFITS END

The benefits provided under this policy end automatically on the earliest of:

1. The date that the payment of the retrospective assessment is not concurrent.

2. The date of termination of the Policy by the Company [emphasis added].

3. The date the risk makes a fraudulent representation or conceals material facts from the Company.

Clause 12P: WHEN INSURANCE TERMINATES

Unless renewed prior to the termination date, or within 30 days thereafter, this policy of insurance as to a specific Risk ends automatically on such date which is five years from the Effective Date as to each Risk. In any event, the Company may Terminate the Policy on the date the Company determines that there are insufficient specific Risks to maintain the Policy [emphasis added].

Clause 12S: ALLOCATION OF AUTHORITY

The Company's authority includes, but is not limited to:

1. …
2. The right to establish and enforce rules and procedures for the administration of the Policy and any claim under it;
3. ….
4. ….
5. The right to rescind or terminate the Policy or a Risk [emphasis added].

Clause U GENERAL PROVISIONS CONTRACT

1. … No change in the Policy will be valid unless it is approved in writing by one of the Company's executive officers and given to the Insured for attachment to the Policy. No agent has authority to change the Policy or to waive any of its provisions.

[17] Boston Life relied on all of the above clauses in support of its application for summary judgment. It contended that it never issued any policies to any of the Defendants, save those issued to Dijon and as such, there is no privity of contract between Boston Life and any of the 2nd to 63rd Defendants. Boston Life further stated that it follows that the only named Insured under all the policies was Dijon to whom the policies were issued and who was the only entity in privity with Boston Life does not dispute that: (a) all the policies were lawfully terminated/or expired by effluxion of time; (b) Boston Life is entitled to a declaration that it was not obliged to offer coverage after 30 September 2005; that is, after the 1 October 2004 policies expired; and on the true construction of the policies, Boston Life is not obliged to repay any of the Defendants any part of the premium.

The Defence

[18] Learned Queen's Counsel, Dr. Joseph Archibald appearing for the JSA Defendants, helpfully summarized the defence which was filed on 26 July 2006. The Defence raised four (4) fundamental allegations namely:

1. The imposition of Dijon as the insured between the JSA Defendants and Boston Life was not a part of the arrangements between the parties;

2. The agreement between the parties was contained in a policy which was agreed in 2001 and reviewed in 2002. An important feature of this policy was the return of

unused premium after 5 years or 3 years if the Certificate Holder was 62 years or older;

3. The Policy which was reviewed did not contain any provision whereby Boston Life would unilaterally cancel insurance coverage;

4. The JSA Defendants were induced by the refund feature to enter into the contract for insurance.

No evidence

[19] Dr. Archibald QC submitted that there are several areas of dispute in relation to the facts. He alluded to the fact that Boston Life has produced affidavit evidence disputing the allegations of facts raised by the JSA Defendants in their defence and that the JSA Defendants were debarred by Order of the Court dated 26 March 2007[8] from filing the affidavit evidence in their possession in respect of Boston Life's application for summary judgment.

[20] Learned Queen's Counsel next submitted that the affidavit evidence in the possession of the JSA Defendants would substantiate their allegations of facts and would have provided the Court with a proper basis on which to determine whether the Defendants' case had sufficient merit to proceed to trial. In any event, he submitted, the Court has to have regard to the possibility that the evidence before it could be supplemented at trial.

[21] Mr. Philip Shepherd QC appearing as Leading Counsel for Boston Life, argued that the JSA Defendants had oceans of time to put in any evidence since the service of the affidavit evidence of Mr. Richard May ("Mr. May") and Ms. Andrea Douglas ("Ms. Douglas") on 12 January 2007 and Mr. Denis Kleinfeld ("Mr. Kleinfeld") on 17 January 2007. Mr. Shepherd submitted that the JSA Defendants missed the 6 March 2007 deadline ordered by the

[8] An appeal from the Order of the Court dated 26 March 2007 has since been filed on 10 April 2007 – subsequent to this hearing. When this application for summary judgment was heard, no application was made to adjourn this hearing although it was known to this Court that the time to file an appeal had not expired.

Court on 1 February 2007 as the last date for evidence in reply – a full 5 weeks to reply to Boston Life's evidence. Nothing was served even in the face of Boston Life's application to debar the JSA Defendants in the 20 days between 6 and 26 March 2007 when they were in default.

[22] Learned Queen's Counsel asserted that it was not surprising that they were debarred from putting evidence by the Order of the Court dated 26 March 2007 and it is inadmissible in such circumstances, for the JSA Defendants to refer to affidavit evidence in its possession that they now claim would have made good their defence.[9]

[23] Mr. Shepherd insisted that (i) the JSA Defendants have only themselves to blame for being debarred from adducing evidence - it was certainly no fault of Boston Life; (ii) neither the Court nor Boston Life can begin to give credence or place any weight on such an incredulous argument; (iii) if this were an admissible argument, every defendant facing summary judgment would be in a better position by failing to put in evidence and then simply asserting that it has such evidence; (iv) if such evidence were available, it is even more inexplicable that it was not deployed and served when the Application was issued as long ago as 24 November 2006 - 3 ½ months before the eventual final date for service of the JSA Defendants' evidence namely 6 March 2007 and 4 months prior to 26 March 2007 when the JSA Defendants were finally debarred and (v) it is incredible to allege that the JSA Defendants have evidence to make good the defence but for reasons that they have never explained, they have elected not to serve it although they were asked by the Learned Master to explain why they did not do so.

[24] Now, it is fundamental to this application that I recite the chronology of events. On 7 March 2006, Boston Life initiated these proceedings which were commenced by Claim Form with Statement of Claim. On 9 March 2006, an application for leave to serve out of the jurisdiction was filed and on 17 March 2006, an Order was granted for service out of the jurisdiction. On 26 July 2006, a Defence was filed by the JSA Defendants. On 27

[9] See paragraph 9 of written submission of the JSA Defendants lodged at the Registrar's Office on 27 March 2007.

November 2006, Boston Life applied for: (i) a Notice of Application for Summary Judgment and (ii) Request for Information pursuant to CPR 34. The JSA Defendants have failed to answer to the Request for Information.

[25] The present position is this: despite two Orders of the Court[10], the JSA Defendants have not put in any affidavit evidence. Consequent upon such default, the Learned Master, on 26 March 2007, barred the JSA Defendants from filing any affidavit evidence in their possession in respect of the present application for summary judgment. As a result, there is no evidence whatsoever from the JSA Defendants.

[26] CPR 15.5 deals with evidence for the purpose of summary judgment hearing and is expressed in mandatory terms. Subsection (2) states that a respondent who wishes to rely on affidavit evidence must – (a) file affidavit evidence and (b) serve copies on the applicant … at least 7 days before the summary judgment hearing.

[27] The upshot is that the JSA Defendants cannot rebut the evidential burden which has shifted to them where as here, Boston Life has adduced credible and compelling evidence. Mr. Shepherd cited the White Book 2006 24.2.5 to substantiate his argument that "*If the applicant for summary judgment adduces credible evidence in support of the application, the respondent becomes the subject to an evidential burden of proving a real prospect of success or some other reason for a trial……The respondents case must carry some degree of conviction: the court is not required to accept without question any assertion he makes.*"

[28] Mr. Shepherd quite correctly submitted that (i) in the present application, there is no evidence at all, credible or otherwise, which has been put in to discharge the evidential burden on the JSA Defendants and there is overwhelming evidence that supports Boston Life and (ii) the JSA Defendants' case simply cannot stand in the face of clear and

[10] See the Order of Master Mathurin dated 28 November 2006 and the Order of Master Cottle dated 1 February 2007.

unassailable contemporaneous documents and independently corroborated witness testimony.

[29] Mr. Shepherd also accurately explained that it has never been the law that the Court should give permission to defend where, as here, the JSA Defendants put in no evidence to rebut the evidential burden and then allege that they just will do better at trial or that the Court should speculate that they might. Dr. Archibald argued that the Court should have regard to the possibility that the evidence before it could be supplemented at trial and the Court will have to bear in mind that there is affidavit evidence which admittedly actually exists (some of which lies in the hands of Mr. Shepherd) but not permitted to be introduced and would be relied upon at trial[11].

[30] The simple answer to Dr. Archibald's submission is that the JSA Defendants have not put in any evidence whatsoever, credible or otherwise. So, as they have put in no evidence at all, there is nothing to be supplemented at a trial. If there were some evidence, then the Court would take into consideration that it may well be capable of being supplemented at trial. In any event, CPR 15.3 mandates that a respondent who wishes to rely on evidence must (emphasis added) file affidavit evidence.

[31] Mr. Shepherd referred me to the case of Lady Anne Tennant v Associated Newspapers Group[12]. Megarry VC said this:

> "A desire to investigate alleged obscurities and a hope that something will turn up on the investigation, cannot separately or together amount to sufficient reason for refusing to enter summary judgment for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism."

The Policies of Insurance

[32] The Defence of the JSA Defendants filed on 26 July 2006 alleged that:

> 2. "…in June 2001 the parties entered into an arrangement whereby it was agreed that a benefit purpose trust would be set up to facilitate the provision of group long

[11] See paragraph 9 of Dr. Archibald's written submission lodged on 27 March 2007.
[12] [1979] FSR 298.

term and group casualty insurance products to the 4th to 63rd Defendants by the Claimant …"

…….

4. The Defendants say that the agreement between the parties was contained in a policy which was shown by Dennis Kleinfeld, a principal of Boston Life to Brad Barros, President of an employment Association, the Associated Benefits Group ("ABG") in early 2001, and which was reviewed in 2002 by officials of two other employment associations, the Strategic Planning Associates ("SPA") and the third Defendant EI."

5. The Defendants further say that the said policy did not contain any provision equivalent to clause J of the policy exhibited to the Statement of Claim herein. The Defendants specifically deny that the terms of the policy agreed between the parties contained any language which would have permitted Boston Life to unilaterally cancel insurance coverage to any of the Defendants."

[33] The JSA Defendants disputed that the policy of insurance produced by Boston Life is "the" policy. They contended that the agreement between the parties was contained in a policy which was shown by Mr. Kleinfeld in early 2001 and which was reviewed in 2002. However, they have not produced any documents contemporaneous or otherwise to support this allegation, no particulars of the purported agreement are pleaded and the Request for Information of 27 November 2006 still remains unanswered.

[34] Dr. Archibald submitted that in the affidavit sworn to on 10 January 2007 by Ms. Douglas, she stated that she is a director of Belmont which acted as insurance manager to Boston Life up to 31 March 2006. She also stated that five supplemental insurance policies were issued each year from 2001 to 2004 and that Belmont has retained signed copies of the policies for October 2002, October 2003 and October 2004 but only unsigned copies for 2001.

[35] Dr. Archibald next submitted, that in the affidavit sworn to on 11 January 2007 by Mr. May, he stated that he is a director of Boston Life. In paragraph 5, he stated that he is "unable to locate the signed copies of the policies issued in 2001."

[36] According to Learned Queen's Counsel, the above plainly left a substantial void in the case for Boston Life in proving the policies of insurance, particularly where the defence

alleges that the agreement was contained in a policy shown by Mr. Kleinfeld in 2001 as a principal of Boston Life.

[37] Boston Life contended that the alleged void canvassed by the JSA Defendants no longer exists because a signed copy of the 2001 policy has now been found.

Proof of the Policies of Insurance

[38] Mr. Shepherd argued that the existence, applicability and issuance of the policies is proved beyond doubt by the affidavit of Mr. May sworn herein on 5 January 2007 who has at all times been a director of Boston Life. At paragraph 5 of his affidavit, Mr. May confirmed that the only such policies were issued naming Dijon as the insured.[13] It was submitted, further, on behalf of Boston Life that no evidence has been advanced at any time nor have any particulars been given in any pleading submitted by the JSA Defendants that disputes the evidence of Mr. May.

[39] Mr. Shepherd also submitted that it is extremely difficult to see how it could be disputed in light of the additional fact that Boston Life retained Belmont which is part of the KPMG group, and therefore, is entirely independent and of good reputation, to approve, manage and sign all the policies and that Belmont did so[14]. Mr. May's evidence was also independently corroborated by Ms. Douglas, a director of Belmont who identified each of the policies issued in each policy year commencing on 21 November 2001 and ending with the policies with a Policy Effective Date of 1 October 2004[15]. Ms. Douglas also confirmed that each policy was issued to Dijon and that no other policies were issued or signed by Belmont on behalf of Boston Life.

[40] It is to be observed that no other relevant or applicable policy has ever been produced by the JSA Defendants and no document has ever been produced that even refers to the existence of any such policy.

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[13] A signed copy of the 2001 policy has since been found.
[14] See paragraph 4 of affidavit of Richard May sworn to on 5 January 2007.
[15] See paragraph 2 of affidavit of Andrea Douglas sworn to on 16 January 2007.

[41] It seems to me that Boston Life has undoubtedly proved by evidence that was independently corroborated that the policies in question are those referred to in paragraph 11 above and that neither Boston Life nor Belmont have issued any other relevant applicable policy.

[42] At paragraph 6 of his affidavit, Mr. May elucidated that the structure of this supplementary insurance scheme was, as advised by Greenberg Traurig ("GT"), a US law firm that required the policy to be issued to a corporation owned by a trust and for the premium to be paid by the Risks to a professional association (here EI) and that this was driven by tax considerations so that the premium could be deductible in the year that it was paid. This is corroborated in the advice of GT[16].There is no evidence to the contrary effect.

[43] Mr. May also referred to the fact that Boston Life has no ownership interest in either Dijon or IAPB or EI. He also referred to the Indemnity Agreement signed by Mr. Brad Barros ("Mr. Barros") of ABG and that Mr. Barros created IAPB to serve as a non US association consultant to ABG as well as EI and Strategic Planning Association LLC who all had agreements with IAPB to this effect.

[44] The JSA Defendants have not disclosed a copy of the said Indemnity Agreement. Boston Life has found a copy of this document dated 9 April 2002 whereby Mr. Barros agreed to indemnify ATC (Trustees) BVI Limited and Company Managers Limited ("CML") – this deed, signed by Mr. Barros specifically referred on the opening page that CML has agreed to "*a. act as a director of Dijon Holdings Limited, a company incorporated under the laws of the Bahamas"*. It goes on to refer to CML providing Dijon with services under what is described as the DHL Services Agreement. Boston Life contended that this demonstrated and verified that Mr. Barros who created IAPB which played a central role in this scheme by actually paying premium to Dijon was fully cognizant of the existence of Dijon and irrefutably, not only signed the Indemnity Agreement to which Mr. May referred in his 5 January 2007 affidavit but he was also a party to the arrangements whereby CML would

[16] See Exhibit RM1 at pages 227-236.

actually act as a director of Dijon and provide services to Dijon under the DHL Services Agreement.

[45] Mr. Shepherd submitted that this showed that there is clear and uncontradicted evidence that:

(i) Mr. Barros was fully aware of the nature of these arrangements.

(ii) Mr. Barros set up IAPB.

(iii) IAPB was to pay premium to Dijon.

(iv) Mr. Barros knew full well of the existence of Dijon.

(v) Mr. Barros procured that CML should actually act as a director of Dijon and

(vi) Mr. Barros agreed to indemnify CML for so doing.

[46] Mr. May further clarified that Mr. Barros also owned Global Financial Advisors Network[17]. It follows that Mr. Barros had very intimate knowledge and took a central role in these arrangements. I agree entirely with above submission advanced by Learned Queen's Counsel, Mr. Shepherd.

Alleged misrepresentation

[47] Dr. Archibald QC submitted that the JSA Defendants intend to rely on misrepresentation. He argued that Mr. Kleinfeld made representations to the JSA Defendants as to the distinguishing feature of the Refund Plus Scheme, that is, refunds were to be given to the JSA Defendants; and Boston Life collaborated in the creation of this impression by naming the Policy "Refund Plus". He adroitly argued that there were no publications or statements made by Boston Life to counterbalance the impression that the key feature of the policy was the refund of premiums after 5 years and that there is no doubt that the persons who were to benefit from the refund of such premiums would be the JSA Defendants.

[48] There is no doubt that a key feature of the policy was the refund of premiums after 5 years. That is exactly what the policies stated so the issue of misrepresentation does not arise. In fact, Mr. Michael Fay, who also appeared for Boston Life drew the Court's attention to

[17] See paragraph 16 of Richard May's affidavit [supra].

Clause 12U – General Provisions Contract. Clause 12U (2) provides that any statement made by the Insured to obtain the Policy is a representation and warranty. Misrepresentation whether provided or made by the Insured or caused by the Risk may be used to deny a claim or to deny the validity of the Policy. All warranties and representations by the Company are in writing in this Policy [emphasis added].

[49] Looking at Clause 12F[18], it appears to me that Boston Life did not guarantee that the policies would be renewed for 5 years. In any event, there is no evidence to support the alleged misrepresentation and no particulars are provided even though they were requested.

[50] Boston Life submitted that paragraphs 22 -29 of the JSA Defendants' written submission emphasized that there is a triable issue as to whether a return of premium was a key feature - but according to Boston Life, this is of no issue at all because there was a return of premium clause in the policy[19]. This is indeed accurate.

[51] Mr. Shepherd attractively submitted that the point is that it only took effect **if** not **when** after 5 years of being continuously insured so the complaint seems to be that the only policies in existence did not guarantee that they would be kept in existence for more than 5 years. Common sense says that no liability insurer would do any such thing. Equally, there was no corresponding obligation on the Risks to keep the policy in being after each year. In short, neither party could demand that the other continued this relationship after the expiry of each contract year. I agree with Mr. Shepherd's analysis of Clause 12F.

No obligation to renew on expiry of 2004 policies

[52] Mr. Shepherd submitted that the argument put forward in the JSA Defendants' submission is fundamentally flawed because it does not fully reflect what Boston Life has alleged. Boston Life claimed that it does not rely solely on the cancellation provisions in Clause12J as seems to be assumed in paragraph 5 of the Defence and in paragraphs 30-36 of the

18 Clause 12F of the policy will be examined in more detail later on in the judgment.
19 See Clause 12F of the policy.

submission, but also, on the fact that nothing obliged it to enter into a new group of policies when the 2004 policies expired. Mr. Shepherd submitted that nevertheless, pursuant to Clause 12J, and out of an abundance of caution, Boston Life still gave notice of termination to Dijon as it was entitled to do. Furthermore, the 2004 policies had expired on 30 September 2005.

[53] At paragraph 20 of the Statement of Claim, Boston Life alleged that having given notice to Dijon as it was entitled to do, it terminated all of the policies from 30 September 2005 whereupon all benefits ended in accordance with Clause 12M, and Boston Life …"declined to go on risk for any further year of cover." Mr. Shepherd argued that the JSA Defendants have not addressed the latter part of this alternative pleading at all. As I scrutinized the submission, I agree that the JSA Defendants have not addressed the alternative pleading.

[54] To add, there is nothing in the 2004 policies that compelled Boston Life to make a new contract and to go on risk for an additional year of cover. For my part, it is implausible that any liability insurer would bind itself for a fixed period with no possibility of either cancelling the policy or declining to renew. The same is true of the Risks who were entitled to cancel the policy at any time. All they needed to do was to stop paying the premiums and the policy would automatically be cancelled.

[55] At any rate, Clause 12E gave Boston Life the right to terminate at any time[20].

Role of Dijon irrelevant to absence of obligation to renew

[56] The JSA Defendants alleged that the imposition of Dijon between the JSA Defendants and Boston Life was not part of the arrangement between the parties and that Boston Life has made no reply to this allegation. Mr. Shepherd submitted that the evidence is overwhelming and the fact that Dijon is named the "Insured" makes no difference as to whether Boston Life was or was not obliged to go on risk for a further year. I agree entirely

[20] See also Clauses 12J and 12S. For the common law position, see Clarke- The Law of Insurance Contracts at paragraphs 18 -3 A.

with Mr. Shepherd's submission for there is nothing in the 2004 policies or indeed any of the policies which obligated Boston Life to renew after the policies expired.

[57] It is plain from the evidence that Boston Life issued the policies of insurance to Dijon annually with policy effective dates on 21 November 2001, 1 October 2002, 1 October 2003 and 1 October 2004 respectively. The last policy expired on 30 September 2005 by which time Boston Life decided not to go on risk for a further year. Whether Dijon agrees or not with the stance taken by Boston Life is immaterial because Boston Life has the right to terminate the policy at any time [21].

[58] It was also vociferously argued on behalf of Boston Life that each renewal is a separate contract. Scrutinizing the policy, each of them bore a separate policy number and each of them has to be renewed annually. It seems to me that as a matter of law and construction, they must be separate and discrete contracts. The policy has an effective date for a certain term of one year. After a year, it could be renewed or terminated. The insurer has an absolute right to refuse to renew the policy, whatever his motives for refusal. If it is renewed, the same terms and conditions may continue to apply but, in my opinion, it still remains a separate, independent and unattached policy to any previous or future policies.

Clear language required to displace the common law rule

[59] Dr. Archibald relied heavily on Clause 4 of the Policy [22] which essentially states that the policy is renewed annually on the first day of October, and as to each Risk for a period of 5 years effective as to each Risk as of the date and upon acceptance by the Company [Boston Life] with the minimum payment required.

[60] He argued that the intention was to guarantee liability coverage for a continuous period of at least 5 years. Mr. Shepherd argued correctly that if that were the intention, then each of the policies would have so said in simple and plain language. Mr. Shepherd contended that it would be very atypical for liability insurance coverage to be guaranteed for any

[21] See Clauses 12 E< 12 J and 12 S of the policy of insurance annexed to the Statement of Claim.
[22] See paragraph 16 [supra] of judgment which spells out the entire clause.

period – on the contrary, all manner of events can occur that may change the nature of the risk so that the insurer will invariably retain the right to terminate at any time and certainly retains the right to decline to accept the risk under a new contract for an additional policy year.

[61] According to Learned Queen's Counsel, there is no language in the 2004 policy that gives the Insured or the Risks an option to demand renewal. Here, a new contract of insurance was made for each year - "In particular, it is a case of renewal when the insurer has a clear option not to renew for a further period of cover and a case of continuation when the insured has a clear option to renew."

[62] The law is that although a contract of insurance may refer to the possibility of a further period of cover beyond that contracted for, renewal is the formation of a new contract of insurance [23] and is governed by the normal legal rules of formation. In principle, the insurer has an absolute right to refuse to renew the policy and its motives for so doing are irrelevant[24].It follows that an insurer is not obligated to send a renewal notice. If the insurer does so, the insured has a right to accept or reject the renewal of the insurance.

[63] The common law principles go further to state that the insurer is not even obliged to give the insured notice that he does not intend to renew the cover. In Thompson v Knickerbocker Life Ins. Co., [25] Bradley J said that *"the insured knew or was bound to know, when his premiums become due….the reason why the Insurance Company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The Company is under no obligation to give such notice and assumes no responsibility by giving it."*

No Return of premium

[64] Learned Queen's Counsel, Dr. Archibald fought hard in an attempt to persuade this Court that the JSA Defendants were entitled to, at the very least, the return of unused premiums.

[23] Last v London Assurance Corp (1884) 12 QBD 389, 400 per Day J.
[24] Sun Fire Office v Hunt (1889) 4 App Cas. 98 (PC)
[25] 104 US 252 at 258.

This is fully particularized in paragraph 8 of the Defence. Dr. Archibald asserted that Boston Life knew that the essential distinguishing feature of the Refund Plus Scheme was the promised return of unused premium. He maintained that there is a live issue to be tried in relation to this aspect of the case as the JSA Defendants were induced to purchase the policies by the promised return of unused premium.

[65] It was submitted on behalf of Boston Life that there is no issue here to be determined as there is absolutely no evidence to support the allegation of return of unused premium. Not one of the JSA Defendants has come forward to provide any affidavit evidence of the alleged inducement or any such similar allegations. All that this Court has, are the submission of the JSA Defendants.

[66] In any event, Boston Life submitted that Clause 12F[26] expressly dealt with premium return. At para. 13 - 12 of Clarke on the Law of Insurance Contracts, the learned author summed up the common law principles in clear terms. In principle, the insured has no right to a return of premium unless the insurer has wrongfully repudiated the contract or induced the contract by misrepresentation or non-disclosure. In Tyrie v Fletcher, [27] Lord Mansfield had this to say:

> "If the risk of that contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risks depend on the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned."

[67] In motor insurance policies, for example, there is sometimes, a clear provision entitling the insured to cancel and ask for a proportionate return of premium. But in the present case, there is only such provision as is limited to Clause12F. It is also doubtful whether the JSA Defendants qualify under this provision for any return of premiums.

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[26] See below for fuller analysis.
[27] (1777) 2 Cowp.666,668.

[68] Be that as it may, the Risks were all given cover for a full year. So it is not as if the cover was terminated part way through a policy year. The complete year expired and what happened thereafter is that Boston Life declined to go on risk for any further year of cover.

Clause 12F

[69] Mr. Shepherd correctly contended that Clause 12F expressly states "**If** (not when) after being continuously covered for a minimum period of 5 years…" This, he said, is entirely consistent with there being no obligation to renew and with return of premium being contingent, not guaranteed as the JSA Defendants asserted.

[70] In my opinion, when the policy is read holistically, it makes absolute sense on this basis whereas, with respect, it does not make any sense if the argument asserted in the JSA Defendants' submission were accepted: See also Clause 12E- the right to terminate at any time and Clauses 12J, 12M, 12P and 12S which would all make sense if Clause 12F means exactly what it says.

[71] Besides, the Policy does not provide that there was an obligation to renew on the part of Boston Life. If it did, then there would have been very clear wording to that effect.

Clause 12J

[72] Clause 12J focuses on cancellation. Clause 12J(1) provides that the Policy may be cancelled by the Company [Boston Life] as to the entire policy or as to only a specific Risk applied for by the insured …by providing written notice to the insured.

[73] Much time was spent on this clause as Boston Life relied upon it for the basis upon which it alleged that it terminated all the policies by notice to Dijon. It is a fact that Dijon has not disputed that it received written notice.

[74] The JSA Defendants stated that the policy upon which they agreed did not contain any provision equivalent to Clause 12J. The JSA Defendants specifically deny that the terms of the policy agreed between the parties contain any language which would have permitted

Boston Life to unilaterally cancel insurance coverage to any of the JSA Defendants. Needless to say, these are bald assertions by these Defendants as they did not put in any evidence on this application for summary judgment. In addition, they could have provided evidence of the existence of another policy which they alleged, as early as when the Request for Information was sought in November 2006. Having failed to do so, it is difficult to see on what basis they could challenge the policy which was annexed to the Statement of Claim.

[75] It seems incredible that anyone of the Risks should be able to recall with precision in the absence of documentary evidence to the contrary, that a single clause was included in a document they claimed to have seen 6 years ago.

Should there be a trial?

[76] Paragraphs 34 - 36 of the JSA Defendants' submission say that the construction of the policy means that there must be a trial. With respect, this is not the law. In Investors Compensation Scheme Ltd. v West Bromwich Building Society and Investors Compensation Scheme Ltd. v Hopkin & Sons (a Firm) and Others[28], Lord Hoffman at pages 912- 913 enumerated the principles by which contractual documents are nowadays construed. They are as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of facts" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exceptions to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical

[28] [1998] 1 WLR 896.

policy and in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of the words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax:

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v Salen Rederiena A.B. [1985] A.C. 191 at 201:

> "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

[77] As can be gleaned from the above dictum, the modern approach to construction does not allow the parties to give oral evidence about what they thought the contract of insurance was supposed to mean: (i) The matrix of facts is that US based professionals wanted supplemental insurance and this is what Boston Life provided. (ii) The key features of the policy are stated in the words used. (iii) No amount of background can possibly alter the plain meaning of the 2004 policy and (iv) Business common sense is not flouted – quite the reverse because the Risks paid a premium and Boston Life provided coverage to Dijon on whose behalf Dijon applied for liability insurance.

[78] Should there be a trial? At this stage in the proceedings, a Court is not concerned to try to assess which side will probably succeed if there is a trial: the question is whether there is material which shows that there are issues which should be investigated at a trial and in my opinion, the material before the Court does not show this.

[79] I conclude with what Dr. Archibald submitted are some of the criteria which a Court should have regard to; namely the Judge should have regard to the witness statements and also to the question of whether the case is capable of being supplemented by evidence at trial. As I said before, there is no affidavit evidence adduced by the JSA Defendants and as such, there is nothing to be supplemented[29]. In The Bank of Bermuda Limited v Pentium (BVI) Limited and Landcleve Limited[30], Saunders CJ (ag.) said:

> "A Judge should not allow a matter to proceed to trial where the defendant had 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 invite speculation and does not demonstrate a real prospect of successfully defending the claim."

[80] However, in my judgment, there are no issues, either factual or legal that will necessitate a trial. All that is before this Court from the JSA Defendants are bald assertions with no contemporaneous documents to support them. The issue of construction of the policy is a legal one which does not warrant a trial as it has been dealt with summarily. The policy is clear on its wording and is unambiguous. Therefore, to proceed to trial is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.

Conclusion

[81] For the reasons above stated, I conclude that the JSA Defendants have no real prospect of successfully defending the claim. As a consequence, I will enter summary judgment for Boston Life with costs. I will hear the parties on the issue of costs at a subsequent date. The declarations sought in paragraph (9) of the Judgment are granted.

Indra Hariprashad-Charles

High Court Judge

[29] See Royal Brompton Hospital NHS Trust v Hammond (2001) BAR 297.

[30] BVI Civil Appeal No. 14 of 2003. Judgment delivered on 20 September 2004, per Saunders CJ (acting) with Alleyne JA (as he then was) and Gordon JA concurring.