IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

Claim No. 2016/CLE/gen/01649

B E T W E E N

ISLAND OSTOMY AND WOUND TREATMENT CENTRE

First Claimant

AND

DAWN ALBURY GAITOR

Second Claimant

AND

TELCENE ALBURY

First Defendant

AND

SONJA ALBURY

Second Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Ms Darrell Taylor for the Claimants
Mrs Sharlyn Smith and Ms Akeira Martin for the Defendants

Hearing Dates: 2th May 2023; 2nd February 2024; 14th March 2024
Submissions Received: 14th May 2024

Civil Procedure – Contract Law – Breach of Contract – Oral Contracts – Consideration – Defence of Mistake – Unpleaded Defence

RULING

DARVILLE GOMEZ, J

[1.] This matter concerned a claim for damages brought by the Claimants against the Defendants, arising from an alleged breach of an oral agreement said to have been made in early 2016. The

Claimants asserted that the Second Defendant, Sonja Albury had agreed to authorize insurance payments and discharge co-payment obligations for wound-care treatment provided to her mother, the First Defendant, Telcene Albury. While the insurance payments had been made, the Claimants alleged that the co-payment obligation remained unpaid. The Second Defendant denied liability, maintaining that no binding agreement had been formed and that she had understood co-payments to have been waived.

[2.] The Claimants commenced these proceedings by Writ of Summons filed 15th December 2016, together with their Statement of Claim filed on even date. The Claimants' sought:

(i) The sum of $11,101.53;
(ii) Damages for breach of contract together with interest;
(iii) Interest on the said sum of ($11,101.53) at the rate of 10 per centum from the 19th May 2016 to the date of payment;
(iv) Costs; and
(v) Further or other relief as this Honourable Court deems just.

[3.] Telcene Albury, the First Defendant died in 2023, after the proceedings had been commenced. There was no allegation that she was a party to the Agreement, therefore, no Defence was filed on her behalf. Sonja Albury, her daughter, the Second Defendant, was subsequently appointed her Personal Representative by virtue of an Order dated 13th June, 2023.

[4.] For the reasons hereinafter set out, I have found that there was a contract between the parties for the provision of wound care treatment to the Second Defendant's mother and awarded the Claimants the sum of $4,612.11. I will hear the parties on costs unless they are able to agree them.

Background

[5.] The First Claimant, Island Ostomy and Wound Treatment Centre is a licensed medical facility owned by the Second Claimant, Dawn Albury-Gaitor (sometimes referred to as "Dawn Albury-Gaitor") providing specialized wound-care treatment in The Bahamas. Dawn Albury-Gaitor is a certified wound-ostomy nurse and a representative of the First Claimant.

[6.] Between January and May 2016, Telcene Albury, then an 82-year-old bedridden woman suffering from dementia, received wound-care treatment from Dawn Albury-Gaitor. Following her death, the Second Defendant, her daughter, was appointed Personal Representative of her Estate.

[7.] The Claimants asserted that Telcene Albury had been accepted as a patient only after they obtained what they understood to be the Second Defendant's agreement to authorize insurance payments and pay any required co-payments. The Second Defendant denied any such agreement, maintaining that she had been told the cost would be "a little over $400 per visit," that it would be fully covered by Bahama Health, and that co-payments had been waived.

[8.] The Claimants acknowledged receipt of $40,979.75 in insurance payments but maintained that a co-payment balance of $11,101.53 remained unpaid for more than seven (7) years.

Claimants' case

[9.] The Claimants called two witnesses, Mrs Dawn Albury-Gaitor and Ms Latisha Forbes whose respective witness statements stood as their evidence-in-chief.

Dawn Albury-Gaitor

[10.] In her evidence-in-chief Mrs Gaitor testified that she is a certified trained Wound Ostomy Nurse and that she had been employed in such capacity since 2009.

4. Sometime on the 19th January, 2016 I was invited by Dr. Beverton Moxey, a relative of the First Defendant to have a consult with the patient and her two children, Errol Albury and Sonia Albury.
5. At the time of the consult the First Defendant was an 80 year old bedridden patient.
6. My examination of the patient was confined to the wound care treatment assessment.
7. When I examined the First Defendant I noticed that she had two major wounds, namely a gaping wound in the buttocks and a gaping wound at the bottom of her right foot.
8. The Wound in her buttocks was the more severe one, measuring 5 inches in diameter and consisting of puss and other fluids draining from it. The wound was so wide that my closed fist could easily fit through it. In my experience a wound of this depth was a clear indication of a patient that had bedsores with little or no treatment to the infected area.
9. The second wound was also severe, but not as severe as the first wound. It was 2 inches in diameter and was severely infected.
10. I explained to the Second Defendant and her brother the process of the treatment that would be required to heal the infected wounds and that it would take many sessions before a wound of that severity was completely infected.
11. In addition to explaining to them the process of treatment, I inquired whether the First Defendant had health Insurance which would cover the larger portion of the bills for treatment. The Second Defendant confirmed that she did have health insurance. I also explained that in addition to the General payment they would have to make the co-payment for the services, as is usual in health Insurance.

[11.] Despite her evidence-in-chief that she obtained the consent of the Second Defendant prior to commencing the treatment, this was not sustained under cross-examination.

[12.] During cross examination the Second Claimant admitted that she had *"never met the Second Defendant"* prior to the commencement of treatment. She explained that when she went to the hospital to meet the patient (viz., the First Defendant), the patient's son was there. According to her evidence, the patient had been referred to her by Dr. Moxey and after examining the patient she explained to the son what the treatment would entail and inquired into who would be responsible for *"taking care of the financial part of it."* She stated that the son *"said that his sister would be responsible. And that was all the information that [she] got."*

[13.] I refer to the exchange during cross examination between the Second Claimant and the Defendant's Counsel about when she spoke with the patient's daughter, viz., the Second Defendant:

Q. *And so, how would you have gotten to talk to the sister?*

A. *Well, I --- that is not my role. So, I got that information from the patients and I pass it over to my office manager along with the phone contact. So I pass it over to my office manager, Latisha Forbes and that is her portfolio.*

Q. *So you're saying that you never had the conversation with the second defendant?*

A. *Not at that time, no.*

Q. *And so, how did the treatments begin? Who did you speak to allow these treatments to begin?*

A. *The son.*

Q. *Okay. So you spoke to the son who is the second defendant of the brother, who agreed ---- sorry, second –yes, who's the brother of the second defendant who agreed for you to commence the treatments?*

A. *Right.*

Q. *On the First defendant?*

A. *uh-huh.*

Q. *But you never spoke to the second defendant about---*

A. *No, I didn't. Not at that time, no.*

[14.] Further, when asked about whether she had provided the cost of the treatment to the Second Defendant's brother, she had this to say in cross examination:

Q. *Okay Well while we are there, I know you said that you spoke to the son who's not a party. But did you ever give him an amount that the treatment would be; like per visit?*

A. *I couldn't, I don't handle that. So I never spoke to him about the costing. So, I would have to defer to my office manager.*

Latisha Forbes

[15.] In her evidence-in-chief Ms Forbes had this to say about the financial arrangements with the Second Defendant:

6. I first became familiar with the First Defendant when the Second Claimant informed about the patient and provided me with the information needed to open a new patient file. The information I received was that the First Defendant was the patient and the Second Defendant is the daughter of the First Defendant.

7. I became aware of the Second Defendant when she came into the Office to sign the authorization for payment on Medical Insurance form on behalf of the First Defendant.

8. A necessary part of my duties is to meet with the parties and their Guardian and or sponsor to ensure that they are aware of the payment process.

9. I met the First Defendant on many occasions when she came into the office to sign Health Insurance Forms for payment of services to Office Manager of the First Claimant.

10. At her first visit at the office to sign for the Medical Proceed, I informed the Second Defendant about her agreement to make the co-payments, she indicated that she was aware of it and she would make good on those payments.

11. I am aware that the First Defendant was treated a total of 118 days, commencing on 19th January, 2016 thru 19 May 2016.

12. The first eleven (11) treatment sessions from 19-23 and 25-30 of January 2016, were done while the First Defendant was an in-patient at the Princess Margaret Hospital.

13. The remaining 107 treatment sessions were done at the home of the First Defendant.

14. I am aware of the day and dates of the treatment, as I am the person responsible for inputting the information for the purposes of the insurance claim to the Insurer and to keep a record of the co-payment for the office accounts.

15. As treatments were completed, the Second Claimant provided me with the day, date and a written record of the treatment given. I then prepared the necessary medical insurance forms and contacted the Second Defendant to come in and sign the form to give authorization for payment. On each occasion that the Second Defendant came into the office to authorize payment I reminded her about the co-payment which were in arrears, however no payments were made on the co-payments.

16. Included in each bill that the Second Defendant agreed to pay was the sum of the co-payment so the Second Defendant was well aware of the sums of monies due and owing for the co-payment.

[16.] Further, in her evidence-in-chief Mrs Gaitor testified that the First Defendant received 118 wound-care treatment visits, which was corroborated by the evidence of her office manager, Ms Forbes, though only certain documentation was produced to support this assertion at trial. Of those visits, both Mrs Gaitor and Ms Forbes alleged that 11 of them occurred while the First Defendant was inpatient at PMH, and 107 visits occurred at her home thereafter.

[17.] As to cost, the Second Claimant testified that prices were *"set according to the CPT guidelines"*, a position corroborated again by the evidence of Ms Forbes. Nonetheless, she accepted, that she could not say whether any agreement on price was reached with the Second Defendant. However, she confirmed that in any event, she did not speak directly to the Second Defendant about payment until 29th March 2016, just over two (2) months after treatment had commenced.

[18.] The Second Claimant also accepted that she could not explain the discrepancy between the amount claimed ($11,101.53) and the co-payment balance provided by Bahama Health ($4,612.11). She

deferred explaining the discrepancy to Ms Forbes, who, despite testifying that she was responsible for billing and reconciliation for the First Claimants' patients' accounts, was unable to account for it either. Ms Forbes did confirm, however, that the Second Claimant reviewed and approved all bills and insurance forms before submission to the relevant insurer, however, no contemporaneous bills substantiating the claimed sum were produced.

[19.] Notwithstanding these inconsistencies, the Claimants allege in their Statement of Claim that the Second Defendant breached the Agreement by refusing to settle the outstanding co-payment balance despite repeated demands to do so even after as asserted by Mrs Gaitor, the Second Defendant reviewed and signed the First Defendant's medical bills which *"included ...the sum of the co-payment"* due.

[20.] Ms Forbes' in her evidence-in-chief said that the Second Defendant *"indicated that she was aware of [the co-payment obligation]"* and promised to *"make good"* on it. Under cross-examination, however, this assertion was contradicted because Ms Forbes accepted that she never met the Second Defendant in person, that no bills were signed by her, and that treatment had commenced *"before any conversation about payment"* with the Second Defendant had occurred.

[21.] Further, Ms Forbes stated, that she later telephoned the Second Defendant on or about 1st February 2016, advising her of projected weekly treatment costs of between *"$1,500.00 to [...] $4,000.00"* and projected co-payment amounts between $450.00 to $600.00, consistent with Bahama Health's confirmed 80% coverage of all sums due. According to Ms Forbes, the Second Defendant responded *"okay"* and subsequently also signed the general insurance payment authorization form left at the First Defendant's home for her execution. Nevertheless, in her evidence-in-chief, Mrs Gaitor testified that the Second Defendant has made no effort to pay the outstanding co-payment bill, and when she and her office by way of Ms Forbes made verbal demands for it to be paid, the Second Defendant repeatedly referred them to the First Defendant's brother.

[22.] It is therefore the position of Mrs Gaitor as asserted in her Witness Statement that the Second Defendant's *"non-payment of the co-payment"* has caused her to suffer loss of a good chunk of income she is entitled to for the treatment she provided as the nurse that attended to the First Defendant.

Closing Submissions

[23.] In Closing Submissions, Counsel acknowledged that certain evidential inconsistencies arose in the Parties' pleadings during the course of trial. Nonetheless, Counsel emphasized that the crux of the matter remains the Second Defendant's deliberate failure to pay the co-payments which constituted a material breach of the Agreement.

[24.] Counsel submitted that the Second Defendant was *"always"* aware of the co-payment requirement under the alleged Agreement, reiterating the Second Claimant's oral evidence that, following each

treatment, the First Defendant's bills which included the outstanding co-payment, were sent to the Second Defendant for review and signature.

[25.] Counsel further relied on the testimony of Ms Forbes, who stated that she informed the Second Defendant of the expected co-payment range and payment structure, made repeated demands for payment, and in any event, the Second Defendant *"acknowledged her indebtedness"* and *"agreed to pay"*.

[26.] Counsel argued that, in light of this evidence, the Second Defendant's professed "surprise" at the co-payment balance was inconsistent with her admitted prior awareness that the First Defendant's medical treatment ordinarily attracted a co-payment, as well as her failure to raise any objection when Ms Forbes explained the projected co-payment range.

[27.] Counsel invited the Court to reject the Second Defendant's assertion that the First Defendant had informed her that the co-payments were waived, noting that the First Defendant was not a party to the Agreement, is now deceased, and had suffered from dementia.

[28.] Accordingly, Counsel maintained that co-payments were always a material term of the Agreement of which the Second Defendant was at all times aware.

Breach and Quantum

[29.] Counsel submitted that the Second Defendant's failure to pay the co-payments, without any lawful justification, constituted a material breach, as it deprived the Claimants of the benefit they would otherwise have derived **(National Power Plc v United Gas Co Ltd (1998) All ER (D) 321)**.

[30.] Relying on an asserted 118 treatment visits at $482.12 per visit, Counsel calculated a total treatment cost of $56,897.24 and argued that the Claimants' claimed loss was therefore justified. In support, Counsel emphasized that it was the Second Defendant's own oral evidence that she was aware treatment would cost between $1,500.00 and $3,500.00 per week, with co-payments ranging between $460.00 to $600.00.

[31.] Applying an 80/20 insurance split, Counsel asserted that Bahama Health was responsible for approximately $45,517.79 (being 80% of $56,897.24) with the First Defendant responsible for the remaining 20% balance.

[32.] Thus, after a $3,000.00 adjustment for uncovered amounts, Counsel submitted that the insurer paid $42,517.79, resulting in a co-payment balance of $11,379.44, comprised of a base outstanding co-payment of $10,823.20, a $500 deductible, $56.24 in out-of-pocket fees and reflecting the inherent variation in weekly co-payment amounts due to the First Defendant's fluctuating medication needs.

[33.] Addressing the discrepancy between the $11,101.53 claimed and the lower Bahama Health estimate of $4,612.00, Counsel submitted that on the evidence of Ms Forbes, this was attributable to document processing issues on the part of the insurer. However, Counsel submitted, that once

corrected, the revised amount aligned with the usual range for comparable wound-care treatments, and in the absence of contrary evidence, the Claimants' figure should prevail.

[34.] Counsel rejected the Second Defendant's assertion that, according to her records, only 54 wound care treatment visits occurred at a quoted cost of $400.00 per visit. Counsel relied on the Second Defendant's own admission that the initial cost quoted was "a little over $400.00" per visit, and maintained that insurer documentation requirements made the higher number of visits (118) more probable.

Causation, Mitigation & Remedies

[35.] On causation, Counsel submitted that the Second Defendant's non-payment was the effective and dominant cause of the Claimants' *"direct loss of income"* and established the *"nexus and direct causal link between the Defendant's breach and the Claimants' loss"* **(Chitty on Contracts (32nd edition); Robinson v Harman (1848) 1 Ex 8501).** Counsel further argued that the Claimants reasonably mitigated their loss by, inter alia, making repeated demands for payment and seeking clarification from the insurer, who ultimately confirmed that the co-payments were the Second Defendant's responsibility **(British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673).**

[36.] Accordingly, Counsel submitted that damages should be awarded on the basis that the loss sustained was *"foreseeable as liable to result from the breach"* and not too remote. Counsel emphasized that the Second Defendant was *"quite aware and had relevant information that co-payments were part of the consideration payable to the Claimants under the agreement, and for which she was responsible"* and that any *"reasonable person in her position would have realized that the loss to the Claimants was sufficiently likely to result by her non-payment of the outstanding co-payment debt"* **(Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949 2 KB 528; Hadley v Baxendale [1843-60] All ER Rep 461; Koufus v Czarnikow Ltd [1969] 1 AC 350).** Counsel further submitted that interest should follow for the period during which the Claimants were *"kept out of money which ought to have been paid to them"*, running from the date of judgment or entry of judgment until payment, together with costs and all other consequential relief this Honourable Court deems just **(Jefford v Gee [1970] 1 All ER 1202; Slater v Hughes [1971] 3 All ER 1287).**

Defence of Mistake and Equitable Relief

[37.] Counsel objected to the Second Defendant's reliance on the defence of "mistake", noting that it was *"never articulated or advanced in [the Second Defendant's] pleaded Defence"*.

[38.] Relying **on V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another [2015] 5 SLR 1422,** Counsel argued that pleadings define the boundaries of the case and may not be expanded at trial save in limited circumstances. Counsel submitted that the introduction of a new defence post-trial was impermissible and prejudicial, as the Second Defendant should have *"at the very least disclosed the material facts*

which would support such a defence, so as to give the Claimants fair notice of the substance of her case" **(Article 20(8) of the Constitution).**

[39.] As to the Court's equitable jurisdiction, Counsel submitted that it should not be exercised, as without *"a shred of evidence"* to support her position, the Second Defendant, unilaterally decided *"not to pay [the] outstanding co-pay amount as she believed that the insurance payments satisfied and exceeded the money owed in exchange for the First Defendant's treatment"*. On that basis, Counsel invoked the maxims *'he who comes to equity must come with clean hands'*, and *'he who seeks equity must do equity"*, submitting that these principles serve to protect the Court's integrity by denying relief for misconduct such as that of the Second Defendant *"which ought to be discouraged as a matter of public policy"* **(Overton v Banister (1844) 67 E.R. 479)**, and by denying equitable remedies unless the party *"without clean hands"* is prepared to fulfill his legal obligations and act fairly towards the aggrieved party.

[40.] By reference to the evidence presented and the circumstances "in the round", Counsel urged the Court to consider the Second Defendant's non-payment in the context of standard industry practice, her failure to present any valid defence to the claim, and her admitted breach of the Agreement by deliberate non-payment of the outstanding co-payment sum. Counsel submitted that, on a balance of probabilities, her non-payment constituted a material breach that caused the Claimants to suffer the financial loss they did

Second Defendant's Case

[41.] The Second Defendant was the sole witness in her defence.

[42.] In her Defence she admitted that the First Defendant was referred to the Second Claimant for wound-care treatment, and that such treatment was provided from January 2016 to May 2016. However, in her evidence-in-chief she asserted that the Second Claimant's final visit to the First Defendant occurred on 13th June 2016, at which time her wounds were approximately *"95% healed"*.

[43.] She denied agreeing to assume co-payment obligations on 19th January 2016 or at all, stating that, based on an alleged telephone call from the Second Claimant, she understood the cost of treatment to be *"a little over $400"* per visit, and that during that call *"no co-pay was [ever] mentioned"*. Under cross-examination, however, her evidence presented difficulties, as she stated that her first substantive discussion with the Second Claimant regarding her mother's treatment occurred *"at the back of the Straw Market"*, and it was during that interaction that they agreed that the treatment cost per visit would be $400 inclusive of supplies.

[44.] She testified that she was *"flabbergasted"* when later advised by Ms Forbes of the then outstanding $7,400.18 co-payment, and of the actual billed cost per visit, which was said to have been $469.18, inclusive of supplies. She maintained that this was the first occasion on which she learned of any co-payment obligation, and it occurred only after treatment had concluded *"sometime in June"*.

While she accepted familiarity with co-payments generally, she denied being told any applied in this case. She also expressed concern that the insurer's statement reflected charges exceeding the initial estimate and included charges for *"medical supplies, surgeries and care"*.

[45.] The Second Defendant alleged that the Second Claimant made only 54 visits to her mother, Telcene Albury during the course of her treatment, *"which should [only] have cost somewhere around $21,600.00"*. She observed that the Bahama Health Benefits Summary produced in evidence reflects that the First Claimant received $40,979.75, and on that basis she asserted that *"all money due and owing has been paid"* in accordance with her understanding of the Agreement made.

[46.] She therefore denied the Claimants' allegations of loss, denied that repeated demands for payment were made, denied referring the Claimants or their agents to her uncle for payment, and made no admission to the Claimants' assertion that her uncle identified her as the party responsible for the co-payment obligation.

Skeleton Argument and Closing Submissions

[47.] In the Second Defendant's Skeleton Arguments and Closing Submissions, Counsel submitted that the Claimants have failed to prove, on a balance of probabilities, any agreement whereby the Second Defendant undertook to pay the First Defendant's wound-care treatment co-payments. Rather, Counsel argued that the only agreement established was for treatment to be provided to the First Defendant by the Second Claimant at a cost of *"a little over 400"* per visit, inclusive of supplies.

[48.] Counsel relied on the evidence of the Second Claimant, who accepted under cross-examination that discussions regarding payment responsibility prior to the commencement of treatment originated with the First Defendant's son viz., the Second Defendant's brother and not the Second Defendant. Counsel emphasized that the Second Claimant did not speak directly with the Second Defendant about the First Defendant's *"treatment or payment"* until several treatment sessions had already occurred.

Consideration, Intention to Create Legal Relations and Mistake

[49.] Counsel further submitted that, on the evidence, no clear agreement as to consideration or intention to create legal relations has been proven. While the Second Defendant's brother purported to accept the Claimants' offer for wound-care treatment services, Counsel highlighted that, on the Second Claimant's own oral evidence, no consideration was discussed with him prior to treatment commencing in or about January 2016.

[50.] Counsel also submitted that although the Second Defendant acknowledged signing a Bahama Health general insurance payment authorization form on 29th March 2016 in favour of the First Claimant on the First Defendant's behalf, she did so under the belief that each session, inclusive of supplies, would cost *"a little over four hundred dollars"* and would be fully covered by Bahama Health. Counsel argues that, in any event, as the complete authorization form was never produced

to this Honourable Court, the only certain agreement regarding consideration was the authorization for general insurance payments to be made to the First Claimant.

[51.] With respect to the amount claimed, Counsel emphasized that even the Second Claimant, as owner of the First Claimant and the treatment provider, was unable under cross-examination to explain how the claimed sum was calculated. While Ms Forbes initially testified that bills were provided evidencing the co-payment amount owed, her later oral evidence was that the Second Defendant never attended the First Claimant's office to make payments on the alleged bills, nor did she sign any of them to indicate acceptance. Rather, Counsel submitted that, on the Second Defendant's testimony, she had no knowledge of any co-payment obligation and to her *"surprise"* she was only first contacted about it after the First Defendant's treatment ended in June 2016.

[52.] Counsel further submitted that substantial discrepancies between the amount claimed and the insurer's figure rendered the claim unreliable, particularly because:

(i) The Claimants produced only a single statement referencing multiple invoices but did not produce the invoices themselves or any breakdown;

(ii) The Second Claimant, as the owner and treatment provider, could not speak to the amounts billed; and

(iii) At the time the action commenced, the Claimants had not yet received full payment or a final bill from Bahama Health.

[53.] Counsel therefore submitted that the accuracy of the co-payment amount remains in doubt as it could *"not have been finalized and shared with the Second Defendant if the Claimants themselves did not in fact know what would be covered."*

[54.] Then, as regards intention to create legal relations, Counsel submitted that none was proven.

[55.] Relying on established authority, including **Edwards v Skyways Ltd [1964] 1 All ER 494** and **Heilbut, Symons Co v Buckleton [1913] AC 30,** Counsel argued that no clear terms were ever communicated to the Second Defendant that could give rise to contractual liability.

[56.] In the alternative, Counsel submitted that if any agreement existed, it was entered into under unilateral mistake, as the Second Defendant was never financially able to pay such sums.

[57.] For these reasons, Counsel submitted that the Court should find that the Second Defendant acted on the mistaken belief that the co-payments were waived, and dismiss the claim, or alternatively limit any award to $4,612.11.

Issues

[58.] The issues the Court must decide are:

i. Whether the Defendants breached an oral agreement by failing to pay the co-payments;

ii. Whether the Claimants have proven entitlement to $11,101.53 or any amount; and

iii. Whether the Defendants may rely on the defence of Mistake.

The Law

Oral Contract Formation and Nature

[59.] It is settled law that an oral agreement may constitute a legally binding contract provided the essential elements of offer, acceptance, consideration, and intention to create legal relations are established.

[60.] Where a contract is constituted orally, the Court must examine all relevant oral and documentary evidence in determining its terms.

[61.] As Smith LJ observed in **Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058 at [26],** determining the terms of an oral contract is a question of fact, and post-agreement conduct may assist in assessing the accuracy of the parties' recollections.

Burden and Standard of Proof

[62.] The Defendants relied on **Larry Ferguson v RBC Royal Bank (Bahamas) Limited SCCivApp No 79 of 2023,** in which Charles JA reaffirmed that it is trite law that the burden of proof rests upon the party asserting the claim. Similarly, Teare J in **Grizzly Business Ltd v Stena Drilling Ltd [2014] EWHC 1920 (Comm) at [8]** reaffirmed that a party alleging breach of an oral contract bears the burden of proving, on the balance of probabilities, both the contractual terms and the alleged breach.

[63.] In **Claudia Edwards Bethel v The Attorney General of the Bahamas et al (2015/CLE/gen/00245),** Charles J (as she then was) referring to **Re H (Minors) [1996] AC 563 at 586 at [108],** explained that the Claimant must discharge the burden on the balance of probabilities or in other words, satisfy the Court, on the evidence, that an event "more likely than not" occurred. She also cited Denning J in **Miller v Minister of Pensions [1947] 2 All ER 372 at [109],** who explained that if probabilities are equal the claim fails, but if the Claimant's version is even marginally more likely, (by as little as 51%), the burden of proof is discharged.

Breach of Contract

[64.] In **National Power Plc v United Gas Co Ltd (1998) All ER (D) 321**, the Court held that a material breach is one that has a serious effect on the benefit the innocent party would otherwise have derived from the contract. This principle guides the Court's assessment of whether the conduct in issue amounts to a breach of such significance as to affect contractual expectations.

Damages and Remoteness

[65.] In addition to the authority of **National Power Plc** (supra), the Claimants relied on a number of authorities and practitioner texts addressing damages and remoteness, including **Chitty on Contracts (32nd edition), Robinson v Harman (1848) 1 Ex 850, Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, Koufus v Czarnikow Ltd [1969] 1 AC 350,** and **Halsbury's Laws of England, Volume 29 (2014).**

[66.] The foundational principle of damages was set out in **Robinson v Harman,** viz., that the innocent party is to be placed, so far as money can do so, in the position they would have been in had the contract been performed.

[67.] At para 26-058, **Chitty on Contracts** emphasizes that causation must be established before questions of remoteness arise and that damages may only be recovered where *"the breach of contract was the 'effective' or 'dominant' cause of [a] loss."*

[68.] In **Victoria Laundry,** the Court confirmed that recoverable losses are limited to those *"reasonably foreseeable"* at the time of contracting, having regard to the knowledge available to the parties. **Halsbury's Laws of England,** paragraph 534, similarly explains that the rule in *Hadley v Baxendale* is best viewed as a single composite rule, that the innocent party may only recover such losses as were within the reasonable contemplation of both parties given the *"general and specific facts .... known"* to them.

[69.] Consistent with these principles, the House of Lords in **Koufus v Czarnikow Ltd [1969] 1 AC 350** held at pp. 385-386 that the critical question is "whether, on the information available to the defendant when the contract was made, he should reasonably have realized that such loss was sufficiently likely to result from the breach of contract."

Mistake and Related Principles

[70.] **Chitty on Contracts, Volume 1, General Principles,** at para 5-063 notes that specific performance is a discretionary remedy and may be refused where enforcement would impose an uncontemplated burden resulting from an honest mistake, or where enforcement would grant an unconscionable advantage. Relief, however, is generally unavailable where the mistake is "entirely the product of a party's own carelessness unless the case is one of significant hardship".

[71.] Finally, in **Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] 2 LRC 28,** the Court examined the principles of "consensus ad idem" and unilateral mistake. The Court emphasized that contractual agreement is judged objectively from the parties' words and conduct, and that "mistakes that are not fundamental, or which do not relate to an essential term, do not vitiate consent". The Court recognized, however, that in "unusual circumstances where a unilateral mistake exists, the law can find on a contract on terms intended by the mistaken party."

Analysis and Disposition

[72.] I will consider each of the three issues in turn.

(i) Whether the Defendants breached an oral agreement by failing to pay the co-payments?

[73.] A party alleging breach of an oral contract must establish, on the balance of probabilities, the existence of a contract and the essential terms upon which it was formed **(Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058).** In my view, the Claimants must therefore demonstrate not only that an agreement existed, but that it contained the obligation they now seek to enforce.

[74.] In the instant action, the burden of proof rests squarely upon the Claimants **(Larry Ferguson v RBC Royal Bank (Bahamas) Limited SCCivApp No 79 of 2023).** I accept the principle that if the probabilities are equal the Claimants' claim will fail; but if their version of events is even "marginally" more likely, they succeed **(Re H (Minors) [1996] AC 563; Miller v Minister of Pensions [1947] 2 All ER 372).** With those principles in mind, I consider the elements of contract formation.

Offer and Acceptance

[75.] I begin with the requirement that offer and acceptance must coincide. The Claimants must prove that, before treatment began, they made an offer to the Second Defendant and she accepted it. Whether this occurred is a question of fact requiring careful scrutiny of the evidence **(Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058; Grizzly Business Ltd v Stena Drilling Ltd [2014] EWHC 1920 (Comm)).**

[76.] The determinative factual issue is whether the Second Defendant agreed to assume liability for co-payments, and if so, whether such an agreement was made at a time when the minds of the parties could reasonably be said to have met. This issue is critical because the evidence showed, and the Claimants ultimately accepted, that wound-care treatment commenced before any communication occurred between them and the Second Defendant.

[77.] In my judgment, the commencement of treatment prior to any communication with the alleged guarantor makes it inherently difficult for the Claimants to establish a contemporaneous meeting of offer and acceptance. While I accept that post-agreement conduct may sometimes support an inference of assent, such conduct must be consistent with credible testimony and supported by

contemporaneous documentation **(Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058; Grizzly Business Ltd v Stena Drilling Ltd [2014] EWHC 1920 (Comm)).**

[78.] Here, the Claimants rely chiefly on two matters, viz.:

(i) That the Second Defendant executed an insurance payment authorization form on behalf of the first Defendant; and

(ii) The Second Defendant reviewed and signed certain associated bills.

[79.] While the form was never produced in full it was clear that the form authorized the insurers to settle the payments to the First Claimant. This was signed by the Second Defendant two months after the treatment had commenced. While the Second Defendant had complained about not having seen the entire document, she signed it and her evidence was that she consented to the treatment being given to her mother, however, she thought that it would be fully covered by insurance or that the co-payments were waived.

[80.] The Claimants own witnesses accepted that they neither met the Second Defendant prior to treatment nor obtained any signed bills from her.

[81.] Taking the evidence as a whole, I conclude that while the Claimants cannot establish a contemporaneous meeting of offer and acceptance at the outset of treatment, the ongoing nature of the wound-care services meant that their offer remained capable of acceptance. The Second Defendant's subsequent execution of the insurance authorization form and her engagement with billing matters, though occurring two months later, demonstrate assent to the continuing offer. Accordingly, I find that the Claimants have proved that an agreement was ultimately formed, even if the acceptance was delayed rather than contemporaneous.

Consideration

[82.] The issue of consideration arises. In ***Tweddle v Atkinson*** **(1861),** it was established that consideration must move from the promisee, and only a party who has provided consideration may enforce a contract. In ***Carlill v Carbolic Smoke Ball Co*** **(1893),** the principle was affirmed that consideration may consist of an act performed in reliance on a promise.

[83.] The Second Defendant did not initially promise to pay for the treatments. The evidence is clear that it was her brother who undertook that his sister would pay. However, the Second Defendant, corroborated by Mrs Forbes, later agreed to pay for her mother's treatment. Ms Albury's evidence was that she believed the treatment was covered by insurance, estimated at approximately $400 per visit inclusive of supplies. She stated that no co-payment was mentioned, though she understood co-payments and had previously covered them when her mother was hospitalized.

[84.] Despite inconsistencies in Mrs Forbes' statement, I accept her account that the co-payment was explained. In cross-examination, Ms Albury confirmed that she had authorized medical treatment for her mother in the past and that she herself would normally pay the co-pay.

[85.] The treatments were ongoing due to the severity of the wounds. The Second Defendant signed the authorization form two months after treatment commenced. Given her prior experience, she would have understood that insurance might not cover the full cost and that she would be liable for any balance.

[86.] Although past consideration is generally not valid (***Eastwood v Kenyon* 113 ER 482**), this case falls within the exception recognized in ***Pao On v Lau Yiu Long* [1980] AC 614**, where an act forms part of a continuing relationship.

[87.] Accordingly, I find that consideration was present.

(ii) Whether the Claimants have proven entitlement to $11,101.53 or any amount;

[88] It follows that a contract existed and was breached.

[89.] The Claimants failed to produce invoices or contemporaneous documentation to substantiate the sum claimed. Their reconstructed schedules, prepared retrospectively, do not meet the evidential standard required (***National Power Plc v United Gas Co Ltd* (1998) All ER (D) 321**).

[90.] This was an issue raised by Counsel for the Second Defendant in the Second Defendant's Closing submissions. Counsel emphasized that:

> "32.The Claimants have only produced one Statement in support of their claim despite their now debunked claim that they produced a bill after each treatment.
>
> 33. The Statement includes the invoice numbers and amounts of other invoices which were allegedly issued to the Defendants. However, the Court has not been provided with a breakdown of these invoices which would show how much the Claimants billed the First Defendant, through Bahama Health for each treatment. By extension, there is not and cannot be an accurate reflection of any co-payments."

[91.] However, the insurers, Bahama Health Summary of Explanation of Benefits for the period December 2015 – April 2016 sets out the sums billed of $52,232.09, the amount paid to the provider of $40,979.75 and the member's responsibility or the co-payment of $4,612.11.

[92.] Although the Second Defendant's Counsel submitted in Closing Submissions that the co-payment was waived by the Claimants, Counsel also submitted that:

> "44. Without waiving [its] foregoing position, if the Court does not accede to the Second Defendant's submissions and finds that there was an oral contract the Second Defendant submits that:
>
> 44.1. the co-payment was $4,612.11 as stated in the Explanation of Benefits.

[93.] In light of the evidential deficiencies in the Claimants' case, the court is unable to accept the reconstructed schedules as proof of the sums claimed. The Claimants sought $11,101.53, but the only reliable evidence before the court is the insurer's Summary of Explanation of Benefits, which records a member's responsibility of $4,612.11. It is on this basis, and in keeping with the principle that only substantiated sums may be awarded, that the court fixes the Claimants' recovery at $4,612.11.

[94.] In addition to the sum of $11,101.53, the Claimants sought damages for breach of contract together with interest. However, damages for breach of contract are not a separate or freestanding entitlement; they are simply the measure of compensation for the loss actually suffered as a result of the breach. The law does not permit an award of damages merely because a breach has occurred, absent proof of actual loss or a recognized category of recoverable damage.

[95.] In this case, the Claimants' recovery is fixed at $4,612.11, being the substantiated sum shown by the insurer's Summary of Explanation of Benefits. No further basis for damages has been established, and accordingly no additional award is made under this head. For these reasons, I award the Claimants the sum of $4,612.11 for breach of contract, and I note that no further documentation or support has been provided to justify any additional damages.

(iii) Whether the Defendants may rely on the defence of Mistake.

[96.] The Second Defendant's reliance on mistake was not properly pleaded and therefore cannot be considered (***V Nithia v Buthmanaban* [2015] 5 SLR 1422**). Parties are bound by their pleadings **Philipps v. Philips** (1878) 4 Q.B.D. 127.

Conclusion

[97.] Therefore, having found that there was a contract between the parties for the provision of wound care treatment to the First Defendant, I have awarded the sum of $4,612.11 as the quantum of the loss suffered. Interest will apply at the rate of 5% from the date of filing of the Writ to the date of judgment and thereafter at the statutory rate pursuant to the Civil Procedure (Award of Interest) Act (Ch. 80) until payment.

[98.] The Claimants are the successful party and are entitled to recover their costs. In determining the appropriate order, the court notes that the Claimants sought the sum of $11,101.53 but were awarded $4,612.11. The recovery is therefore substantially less than the sum claimed (less than half) and proportionality arises as a relevant consideration (**Lownds v Home Office (2002) EWCA Civ 365**). In these circumstances, the court will hear the parties on the issue of costs unless they are able to agree them. The parties are advised that, in the absence of agreement, the court may consider a percentage reduction to reflect the extent of the Claimant's success and the reasonableness of the costs incurred.

[99.] It is ordered that:

(i) Judgment is entered for the Claimants in the sum of $4,612.11 plus interest at a rate of 5% from the date of the filing of the Writ of Summons to the date of judgment and thereafter at the statutory rate until payment.

(ii) No further order is made for damages for breach of contract.

(iii) I will hear the parties on costs unless they are able to agree them.

Dated this 30th day of January, 2026

Camille Darville Gomez
Justice