

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law & Equity Division**

**2021/CLE/gen/01473**

**BETWEEN**

**GEORGE OVEREND**

**Claimant**

**AND**

**NUA INSURANCE AGENTS & BROKERS LTD**

**First Defendant**

**AND**

**BAHAMAS FIRST GENERAL INSURANCE COMPANY LTD**

**Second Defendant**

**Before: Her Ladyship The Honourable Madam Senior Justice Deborah Fraser**

**Appearances: Gail Lockhart Charles, KC and Mrs. Syann Thompson-Wells for the Claimants**

**Raynard Rigby, KC and Ms. Asha Lewis for the First and Second Defendant**

**Trial Dates: 4 July, 2023; 5 July 2023 and 27 July 2023**

**Civil Procedure – Breach of Contract – Insurance Policy – Common Assumption – Estoppel by Convention - Waiver**

**JUDGMENT**

**FRASER, SNR. J:**

[1.] This is a trial for breach of contract regarding a claim for indemnification of the insured value of two yachts destroyed by Hurricane Dorian. The Claimant, Mr. George Overend, has brought this action against the First Defendant, NUA Insurance Agents & Brokers Ltd. (“NUA”), and the Second Defendant, Bahamas First General Insurance Company Ltd (“BFGI”) (collectively “the Defendants”).

**BACKGROUND FACTS**

[2.] The Claimant was a twenty-five (25) year client with the Defendant Company for all his insurance needs in The Bahamas.

[3.] The Claimant is the owner of two yachts, a 22 Ft Grady White and a 28 ft. Intrepid.

[4.] The case of the Claimant is that his policies were on a rolling basis with a running account with the Defendant Company and paid when requests were made and that there was no strict approach to policy renewal.

[5.] On 27 February 2019, the Claimant received a Statement of Account detailing insurance premium payments for the period 2018-2019. This statement include four policies:

**1. Policy FYP0027837 (Homeowner Policy) Renewal Date of 17th July, Total: \$19,823.37;**

**2. Policy MYP0000224 (Marine Hull & Liability Policy) Renewal Date of 21<sup>st</sup> April, Total: \$415.22;**

**3. Policy MYP0000225 (Marine Hull & Liability Policy), 22FT, Sum Insured \$40,000, Renewal Date 12th April, Total: \$1245.66;**

**4. Policy MYP0000226 (Marine Hull & Liability Policy), 22 FT, Sum Insured \$80,000, Renewal Date 12<sup>th</sup> April, Total: \$1,937.69.**

[6.] According to the Statement of Account dated 27 February 2019, the following payments were made for the period 2018-2019:

**(i.) Ref. 9999 14-April-18 (Transfer Credit), total \$1,480.62**

**(ii) Ref. 1128 06-Sept-18, total \$19,823.37.**

The Statement of Account recorded an outstanding balance of **\$2,117.95.**

[7.] On 29 May 2019 the Claimant received a gentle reminder for payment from NUA.

[8.] In September 2019, Dorian struck and destroyed two yachts. On 27 September 2019, the Claimant requested claim forms from the Defendant.

[9.] On 10 October 2019 NUA advised the Claimant that his policies had not been renewed. NUA refused to pay.

[10.] The court will decide whether the Defendant had an obligation to arrange coverage in light of mutual assumption and the course of dealings between the parties over the 25-year relationship.

### **ISSUES:**

[11.] In my opinion, the issues that arise for determination are:

- i. **Whether the course of conduct between the parties gives rise to a mutual assumption, if so whether special arrangements between the parties have been established based on the evidence of the Claimant's two witnesses and the Defendant's three witnesses.**
- ii. **Whether the Defendants have an obligation to insure the Claimant's boats for the 2019-2020 period of insurance?**

### **EVIDENCE**

#### **Claimant's Evidence**

##### *Mr. Overend's Evidence*

[12.] On 10 February 2023, the Witness Statement of George Overend ("Overend WS") was filed, which stood as his evidence in chief at trial. According to Overend WS, he relied on the NUA, for insurance services in The Bahamas for 25 years. He owned two yachts, both destroyed by Hurricane Dorian on September 2, 2019. His Marine Insurance policies were arranged by NUA with the Second Defendant, and covered the period April 12, 2019, to April 11, 2020. He contends that policy renewals operated on a 'rolling basis', with payments made through a running account rather than strict deadlines.

[13.] In paragraph [5] of Overend WS, he states that on February 27, 2019, NUA sent him a Statement of Account showing an outstanding balance of \$2,117.95, which he settled by cheque number 1305 on March 5, 2019. He stated that on 5 March 2019 he emailed Ms Newbold the following:

**"good morning...not sure why there is an unpaid balance, but will get a check in the mail to you right away. Thanks!"**

[14.] Ms. Newbold replied later that day as follows:

**"Acknowledged with thanks."**

[15.] Overend WS states that on 29 May 2019 he received a reminder email from Margarita Newbold stating:

**"Good afternoon Mr. Overend,**

**I trust all is well with you today, just a friendly reminder with regards to the attached Statement of Accounts.**

**We look forward to receiving your payment soon and wish to thank you for your continued patronage of our business.**

**Should you have any questions or concerns please feel free to contact us.”**

He states that he took no further action, believing NUA was behind in processing their cheques.

[16.] Overend WS provides that on 2 September 2019 Hurricane Dorian struck the Northern Bahamas, causing catastrophic damage and destroying his two yachts. He states that on 27 September 2019, he emailed NUA requesting copies of his policies and claim forms. On 10 October 2019, NUA responded acknowledging receipt of his payment on 13 September 2019 and advising him that his policies had not been renewed due to non-payment.

[17.] According to Overend WS, BGF I refused to indemnify him for the insured value of the yachts. Further, he was never warned that unless payment was made before April 12, 2019, the insurance coverage for his yachts would lapse. He notes that Cheque 1305 was deposited on September 13, 2019, without explanation. Based on past practices and the absence of explicit notice, he maintains that he reasonably believed his coverage remained in force. He contends that the Second Defendant’s refusal to indemnify him for the insured value of the yachts is unwarranted.

*Kenrick J Belsak*

[18.] On 6 February 2023, the Claimant filed the Witness Statement of Kenrick J Belsak (“Belsak WS”), which stood as his evidence in chief at trial. According to Belsak WS on 27 February 2019, Mr. Overend provided him with a Statement of Account from NUA with approval to pay. On 5 March 2019 he issued and posted Cheque No. 1305 for \$2117.96. Mr. Belsak confirmed recording the cheque information in his outgoing mail log.

### **Defendant’s Evidence**

*Renee Gibson*

[19.] On 21 February 2023, the Defendant filed the Witness Statement of Renee Gibson which stood as her evidence in chief at trial. According to her Witness Statement she is employed at BFGI in the capacity as Special Placements Officer. She stated that her duties are coordinating the underwriting of the Special Placements with reinsurers and agents for special indemnity. She stated that no queries were brought to her attention concerning the Claimant’s policy, and she only became aware of the matter when a claim was filed.

[20.] Ms. Gibson stated that she first learned about the Claimant’s policy after Hurricane Dorian, when she was informed that the Underwriting Department was handling a hurricane related claim

and that his premium had not been paid. She further confirmed that NUA served as the Claimant's agent, while BGFI was his insurer.

*Margarita Newbold*

[21.] On 2 March 2023, the Defendants filed the Witness Statement of Margarita Newbold, which stood as her evidence in chief at trial.

*Rochelle Roberts*

[22.] On 7 March 2023, the Defendant filed the Witness Statement of Rochelle Roberts which stood as her evidence in chief during trial. According to her witness statement, she is was the technical manager for NUA and her responsibilities include monitoring the state of policyholder's accounts and addressing underwriting matters. On 10 October 2019 Ms. Roberts emailed Mr. Overend confirming that his "Homeowners Policy was renewed for the period 17 July 2019 to 17 July 2020 based on expiring terms and conditions. The policies related to his boats were not renewed for 2019/2020 period of insurance because the premiums for 2018/2020 were outstanding."

### **Findings of Fact**

[23.] I shall now examine the testimony of each witness and make my findings of facts based on the same, coupled with their respective evidence in chief. The Defendants have filed a Supplemental Bundle containing the yacht policy.

*George Overend*

[24.] During his cross-examination, Mr. Overend acknowledged receiving a renewal notice but was uncertain whether he received it or if it was handled by someone managing his books. However, he confirmed that renewal notices had been consistently received and paid for 25 years.

[25.] Mr. Overend stated that he was unaware of any previous late payments, as he always paid promptly. He explained that he made payments when instructed by NUA, rather than always paying before the renewal period. He described this arrangement as a "comfortable relationship" and clarified that he did not pay premiums in advance but instead relied on NUA to inform him when payment was due.

[26.] When questioned about his payment practices, Mr. Overend was asked whether he consistently paid premiums before the policy expired or only after being notified by NUA. He indicated that their arrangement was informal rather than a strict requirement to pay before expiration. While he agreed with the literal wording of the renewal notice, he argued that it did not reflect their 25-year operational practice. He confirmed that the renewal notices were generally consistent and that he typically reviewed the amount due before making a payment.

*Kenrick J Belsak*

[27.] During his cross examination, Mr. Belsak's testimony was limited to cheque processing. He stated that his sole responsibility was to prepare and issue Cheque #1305. On 5 March 2019, he mailed the cheque from Atlanta, Georgia, using his own postage meter and sent it via regular mail, despite being aware of expedited mailing services.

[28.] Mr. Belsak acknowledged that Mr. Overend had emphasized the need for prompt payment. He interpreted this as requiring payment within a few days but did not confirm this understanding with NUA. Although he mails items three to four times a year, he claimed to have no knowledge of the typical delivery times to Nassau.

[29.] Mr. Belsak testified that a month later, he issued another cheque for \$432.60 but was not instructed to pay for the 2019/2020 policy period or use an alternative method. He recorded the cheque details for internal records but did not recall Mr. Overend asking him in May 2019 to verify if cheque #1305 had been processed, despite the significant delay. Overall, I found Mr. Belsak to be a forthright and credible witness.

*Margarita Newbold*

[30.] Ms. Newbold testified that cheque #1305, dated March 5, 2019, for \$2,117.95, was for the Mr. Overend's outstanding yacht insurance balance for the policy period April 13, 2018 – April 13, 2019. She confirmed that on February 27, 2019, she sent him a payment notice for this balance and stated there were no issues in notifying him of his 2018/2019 payment obligations. She explained that a partial payment had already been made in 2018, and the notice was for the remaining balance. She disputed claims that NUA was lenient on policy lapse dates, stating that the Claimant had a \$1,400 credit from a previous overpayment, which was applied to his 2018/2019 balance. Since the 2018/2019 balance remained unpaid, she did not issue a statement for 2019/2020, as that policy was not yet up for renewal.

[31.] She testified that her role in Accounts Receivable was to send statements to customers with outstanding balances and to allocate payments to the highest outstanding amount (Court Transcript, page 68, lines 7-19, 4 July 2019). She stated that NUA customarily accepted late payment but emphasized that accepting a payment did not guarantee policy renewal—it only acknowledged receipt while informing the Claimant that his balance remained due. Regarding coverage, she stated that if the Claimant paid before 12 April, 2019, he would have had coverage, but determining coverage itself was outside her role.

[32.] Ms. Newbold confirmed that she personally received and recorded cheque number 1305 when it arrived at the front desk. She explained that the email sent on 29 May 2019, was a friendly reminder that his balance remained unpaid and that NUA expected payment. She stated that because the Claimant's payments were typically sent via U.S mail, she noted that NUA customarily allowed up to six weeks for cheque delivery. She reiterated that she did not issue statements for the 2019/2020 policy period, as her responsibility was solely to manage outstanding balances. I found Ms. Newbold to be a credible witness whose evidence is based on the knowledge available to her at the time.

*Rochelle Roberts*

[33.] During cross-examination, Counsel for the Claimant directed Ms. Roberts to paragraph [7] of her witness statement, in which she stated “The Plaintiff never communicated to me that he wished to renew. When he did not renew I naturally assumed that he insured the yachts with another insurer.” She was then asked whether she had a history of direct communication with the Claimant, to which she responded ‘no.’ When further questioned about whether a request had been made to Mr. Overend regarding his intent to renew for the 2019-2020 period, Ms Roberts reiterated that the Claimant never communicated to her his wishes to renew his policy. Additionally, she also confirmed that she was unaware of Mr. Overend's communication with NUA.

[34.] Ms. Roberts was then directed to an email exchange from 18 January 2019 between Mr. Overend and Dolnisha Wymss. The email from Ms. Wymss stated:

**“Good afternoon Mr. Baker.**

**I trust this email finds you well.**

**Further to our recent conversation please find attached the notice for the Marine Liability. Can you kindly confirm that the policy should be renewed and that there have been no losses from April 21<sup>st</sup>, 2018 to present?**

**Once I have your confirmation I can have the policy reinstated.**

**Many thanks in advance for your assistance.”**

[35.] In response, Mr. Overend’s wrote:

**“Hello, I’m not “Mr. Baker,” but I can confirm that the Marine Policy for George Overend should be renewed and confirm that there have been no losses from April 21, 2018 to present.**

**thank you!”**

[36.] Ms. Roberts clarified that when she referenced there was no response from Mr. Overend, she was referring specifically to the 29 May 2019, email from Ms. Newbold, which reminded him of his outstanding balance for the 2018-2019 insurance period. She acknowledged the amount outstanding was \$2117.00, which was received in September 2019. She further confirmed that this payment was in reference to the Statement of Account presented to Mr. Overend in February 2019. Additionally, she acknowledged that there was no record of NUA informing Mr. Overend that if payment is not received by a specific date he would be uninsured.

[37.] Ms. Roberts testified that Mr. Overend was never told that he could not renew his policy until the previous balance was paid, as his policies were typically settled before the end of the previous insurance period. She confirmed that the Statement of Account referred to four premiums for the 2018-2019 insurance period. When asked specifically about the homeowner's policy, she confirmed that the premium was for the period 17 July 2018 to 17 July 2019 and that the premium was renewed on 17 July 2018. She acknowledged that this renewal occurred before payment was received.

[38.] Regarding NUA's renewal practices, Ms. Roberts was questioned as follows:

**“Q: yes, NUA’s practice was not that the policy would lapse if the payment was not made before the due date?”**

**A: If the previous period of insurance had been paid in full because it usually took about six to eight weeks to receive payment.**

**Q: Let me repeat the question. NUA’s practice was not that the policy would lapse if the premium was not paid before the due date?**

**A: Yes ma’am.”**

[39.] When asked whether NUA notified Mr. Overend that failure to make payment by the end of the policy period would result in non-renewal, Ms. Roberts responded on page 25 line 3 of 5 July 2023 Court Transcript:

**“A: No, we never sent anything like that.”**

[40.] Ms. Roberts was further questioned about her assumption that Mr. Overend insured his yacht with another broker. She explained that after Margarita Newbold followed up with him and received no response, she assumed he did not wish to renew. She also confirmed the payment from Mr. Overend after Hurricane Dorian. When pressed on why the funds were not returned, she stated that the payment was applied to the 2018-2019 period of insurance and was unrelated to the 2019-2020 period. She further clarified that the payment covered a period already insured and not related to the disputed renewal period.

[41.] Ms. Roberts acknowledged that there is no record from NUA instructing Mr. Overend not to send cheque payments via mail.

[42.] During re-examination, Ms. Roberts confirmed that Denise Willoughby worked along with Mr. Overend as his broker in the US and that she liaised with her renewal for Mr. Overend's home and boat insurance policies. She further stated that the Statement of Account attached to the 27 February 2019, email referred to the 2018- 2019 insurance period. Ms. Robert explained that she would communicate with Ms. Willoghby regarding premiums, and payments were typically sent via mail or sometimes through FedEx.

[43.] When questioned by the Court, Ms. Roberts confirmed that no warning letter or termination notice was sent out to Mr. Overend. She also stated that his policy was not cancelled because NUA was waiting on payment, which Mr. Overend had indicated he would send but was never received. When asked if a termination notice was issued, she stated that she could not comment on that matter.

*Renee Gibson*



[44.] Ms. Gibson's evidence was limited in scope and primarily procedural, as she had no prior involvement with the Claimant's policy before Hurricane Dorian. Her testimony established that she only became aware of the issue when a claim was made into NUA's handling of the Claimant's renewal process or any communications regarding his payment obligations.

#### *Claimants Submissions*

[45.] Counsel for the Claimant, Mrs. Lockhart-Charles KC submit that the Claimant has satisfied the requirement of Estoppel by Convention. She argued that, throughout their 25 year relationship, a common assumption existed between the parties. This assumption was that the Statement of Account detailing the amounts due for the continuation of the Claimant's portfolio of policies would be issued, and payments would be made by cheque. She further contended that NUA reinforced this assumption through its correspondence with the Claimant.

[46.] Mrs. Lockhart-Charles submits that, applying **Waterman v Gerling**, the insurers and their agents conducted themselves in a manner where punctual premium payment was not required, and if either party departed from this common assumption, notice would be required.

[47.] Counsel contends that having regard to the common assumption shared between the parties over the course of 25 year relationship, the Court should find that all the elements required to give rise to an estoppel of convention are met and the Defendant are estopped from refusing to renew the Claimants insurance coverage and honour his claim for the loss of the yachts.

#### *Defendant Submissions*

[48.] Mr. Rigby KC, Counsel of the Defendant, submits that the Claimant failed to renew his insurance policy for the 2019-2020 period due to non-payment of premiums before the renewal deadline. Counsel asserts that the policy was a non-continuous, non-exclusive contract that required active renewal through timely premium payments. Mr. Rigby KC argues that, based on the legal principles established in **NCB Insurance Company Limited v Claudett Gordon-McFarlane [2014] JMCA Civ. 51** and **Campbell v Alexiou and others [2006] 1 BHS J. No. 7**, insurance contract must be strictly interpreted. As such, coverage does not automatically extend beyond the specified period unless renewal is expressly confirmed through payment.

[49.] Mr. Rigby KC further contends that the cheque received from the Claimant on September 13, 2019, was for the 2018-2019 period, not the renewal term and therefore did not secure coverage for 2019-2020. Counsel emphasizes that, under the contractual principles set forth in **Belitza Marling Sagaray Silva v Replay Destinations SCCivApp. No. 52 of 2022**, the Court must consider the objective meaning of the contract's language, which clearly states that coverage ends unless renewal payments are made before expiration.

[50.] Additionally, Mr. Rigby KC submits that the Claimant's failure to pay for the 2019-2020 period resulted in a lapse of coverage, and there was no valid contract of insurance for that term. Relying on **Dorsey McPhee v Colina SCCivApp No. 295 of 2016**, Counsel asserts that failure to

pay the premiums on time constitutes a repudiatory breach, justifying termination of the coverage. Furthermore, under the principles established in **Deutsche Genossenschaftsbank v Burnhope [1995] 4 All ER 717 and Lombard North Central PLC v Butterworth [1984] L. No. 1361**, contractual obligations in financial agreements, including insurance, are strictly enforced, and late payments do not automatically extend contractual obligations.

[51.] Accordingly, Mr. Rigby KC avers that the Court should dismiss Claimants' claim and grant an award of costs in the Defendants' favor, asserting that the Claimant's failure to renew precluded any claim for coverage beyond 12 April, 2019 and that the Defendant were under no obligation to continue coverage without payment.

## LAW

[52.] The general rule in civil proceedings is that the party who asserts must prove. According to sections 82 to 84 of the Evidence Act Chapter 65:

**“82. (1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts, must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact the burden of proof shall lie on that person.**

**83. The burden of proof in any proceeding at the commencement thereof lies on that person who would fail if no evidence at all were given on either side, regard being had to the pleadings and other documents filed therein; but at any tme in the course of any proceeding the burden of proof may be shifted to the person who fail, if no further evidence were given on either side.**

**84. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”**

[53.] The Bahamian Courts have reaffirmed this principle that, in civil cases, the legal burden rests on the Claimant, but the evidential burden may shift to the Defendant at any stage. The Defendant's reliance on authorities such as **Gardiner v Emerald Bay Resort Limited [2009] 1 BHS J No. 25 and Lockhart and Munroe v Mitsui Sumitomo Insurance [London Management Limited and others [2010] 3 BHS J. No. 38 and Colco Electric Co. v Gold Circle Co. [2003] BHS J, No. 53** was particularly instructive in reinforcing this legal doctrine.

[54.] Estoppel by Convention arises when parties to a transaction act on an assumed fact or legal principle, either by mutual agreement or when one party makes an assumption that is acquiesced to by the other. According to **Chitty on Contracts (33<sup>rd</sup> ed., para. 4-108)**, this type of estoppel prevents a party from denying a shared assumption if it would be unconscionable to do so. The learned authors in **Chitty** referenced the summary by Lord in **Republic of India v Steamship Co Ltd (No 2) [1998] AC 878 at page 913 E-G:**

**“It is settled that an estoppel may rise where the parties to a transaction act on an assumed fact or law, the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in the other party.”**

[55.] The principles of Estoppel by Convention, were outlined in a case cited by the Claimant, **George on High Ltd and another Company v Allan Boswell Insurance Brokers Ltd and another Company [2023] EWHC 1963 (Comm)**, where the Court discussed Lord Steyn’s principle summarized at paragraphs [100] – [101] the following requirements:

**“... the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings...are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”**

**[Emphasis Added]**

[56.] Another point of consideration is whether estoppel can act as a sword or a shield as observed by Brandon J in the *locus classicus* case of **Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84** when he said:

“...while a party cannot in terms ground a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case.”

[57.] For waiver or estoppel to arise, requires a clear and unambiguous or unequivocal representation by the insurer that he will not insist on his legal right against the insured, and such reliance by the insured will render it inequitable for the insured to go back upon his representation.

This principle was affirmed by Lyons J in **Moree et Al v Imperial Life Assurance Company of Canada [2007] SC 17**.

[58.] To emphasize this key principle, the authority cited by the Claimant provides valuable guidance on the application of election or waiver in insurance contracts. In **Waterman v Gerling Australia Company Pty Ltd & Anor [2005] NSWSC 1066** Brereton J at paragraphs [71] – [73] established that the doctrine of election or waiver applies to insurance contracts in the same manner as it does other contractual arrangements. Brereton J explained at paragraph [71]:

**“71 I turn first to the waiver issue. General principles relating to election or waiver apply equally to insurance contracts as to other types of contract. Election, or waiver, is a principle under which one party, by electing to pursue a right which arises from breach or non-compliance by the other, may deprive itself of another right inconsistent with that election”**

[59.] In the insurance context, this principle is particularly relevant when non-compliance with a policy requirement would otherwise absolve the insurer from liability. Paragraph [72] states:

**Thus the principle is capable of application in the present situation, where non-payment of premium absolves the Insurers from liability to pay the sum insured, notwithstanding that it does not give rise to a right to rescind or cancel.”**

[60.] Further, insurers may, through their conduct, revive a lapsed policy or extend coverage despite formal non-compliance. Paragraph [72]:

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

[61.] However, Brereton J clarified that a waiver can only occur after a breach or equivalent event has triggered a right of election:

**“However, a waiver can only occur after a breach or equivalent has given rise to a right of election between inconsistent courses...”**

[62.] In the Bahamian case **Colina Insurance v Enos BS 2019 CA 80**, the Court of Appeal in discussing the principle of estoppel by convention held that the respondent was estopped from denying an assumption existed as it would be “unconscionable and unjust and contrary to the principle of estoppel by convention.”

## **DISCUSSION AND ANALYSIS**

[63.] In order for the Claimant to seek indemnity under an insurance policy he must prove: (i) that a valid policy was in place at the relevant time, and (ii) that the Defendant is estopped from denying coverage due to a shared assumption regarding the acceptance of late premium payment and rolling based accounting. I will rely significantly on the authorities presented in the Claimant’s

closing submissions, while also referring to other cases to distinguish the Court's approach to this issue.

*Estoppel by Convention*

[64.] Estoppel by convention arises when both parties act on a shared assumption, making it unjust for one to later deny that assumption. The legal principles governing estoppel by convention are well established, and not in dispute. To ground a plea of estoppel by convention, there must be an assumed state of facts or law or mixed fact and law on which both parties have relied.

[65.] In **ABN AMRO Bank NV v Royal & Sun Alliance Insurance plc and others [2021] EWCA Civ 1789** the Court of Appeal held that estoppel by convention arises in insurance contract when:

**“... (i) there is a relevant assumption of fact or law, either shared by both parties, or made by party B and acquiesced in party A, and (ii) it would be unjust to allow party A to go back on that assumption”**

[66.] In the Eastern Caribbean Supreme Court case of **Barrington Pond v Netherland Antilles General Insurance Corporation [2020] ECSC J 1020-1**, the Court found that late premium payment, made four months after the policy had expired, did not revive the policy or establish estoppel, as no valid or subsisting policy existed at the time of the loss. The Court at paragraph [37] discussed:

**“An insurance policy may lapse for a number of reasons, but the most usual ones are the assured's failure to pay the consideration due from him in the form of premium on the due date or within the period of grace allowed, or his failure to renew the policy. However, there may be a revival of a policy which has so lapsed, either by agreement between the parties or conduct of the insurers such as to estop them from denying that there is a subsisting policy.”**

[67.] In a recent Bahamian decision of **Deborah M. Volodzko v Royal Palm Condominium Phase III Condominium Association BS 2024 SC 40** the Court held that silence and inaction, without an unequivocal representation, do not constitute a shared assumption for estoppel. Braithwaite J at paragraph 28 cited the case of **Argo Systems Fze v Liberty Insurance (Pte) and another [2012] 2 All ER (Comm) 126** which emphasized the following:

**“The judge had erred in concluding that the first defendant had made an unequivocal representation to the claimant that it no longer intended to rely on its legal rights as a result of the claimant's breach of the no hold harmless warranty. In the absence of special circumstances, silence and inaction were, when objectively considered, equivocal and could not, of themselves, constitute an unequivocal representation as to whether a person would or would not rely on a particular legal right in the future. In the instant case, there were no special circumstances that were capable of turning the silence and inaction of the first defendant over a period of almost seven years into an unequivocal representation to the claimant that it did not intend to enforce its strict legal rights based on a breach of the no hold harmless warranty. Moreover, the letter from the first defendant had made no such**

**representation, let alone an unequivocal one. The fact that there was nothing about the breach of the no hold harmless warranty in the United States proceedings did not add anything to that; if there was any representation at all in those proceedings it was equivocal rather than unequivocal. Even taken together, the letter, the United States proceedings and the seven-year silence/inaction remained equivocal. Accordingly, the first defendant was able to plead and rely upon the claimant’s breach of the no hold harmless warranty in the instant proceedings and the appeal would be allowed.”**

[68.] In contrast, in **Waterman v Gerling**, where the insured consistently paid premiums late, and the insurer routinely accepted these payments without consequence. The Court held that a shared assumption had been established that punctual payment was not essential to maintain coverage. The insurer was estopped from later insisting on strict adherence to payment deadlines.

[69.] In **George on High Ltd v Allan Boswell Insurance Brokers Ltd [2023] EWHC 1963** the Court reaffirmed the elements of estoppel by convention: (i) common assumption must be expressly shared between the parties; (ii) the party alleging estoppel must have relied on that assumption; (iii) that reliance must have occurred during ongoing interactions and (iv) detriment must have been suffered by the party relying on the assumption, or the other party must have received an unfair benefit.

[70.] The Defendant cited the case of **Harding v Bahamas First General Insurance No. 1194 of 1995**, to support the argument that mere receipt of a renewal notice, without the corresponding payment, does not waive the insurer’s right to cancel the policy. Strachan J stated:

**“I conclude that for a non-continuous policy, unbroken coverage may be secured when premium is paid later than at or before the renewal date if the parties so agree. However, a policy of insurance is, by its very nature coverage for risk not certainty, if there is as here no risk because, the property had, at the time the policy is issued, already been destroyed (by fire), then I see no escape for the insured.”** [Emphasis added]

[71.] Applying the reasoning in **Harding** and **Waterman**, the Defendant’s position that the 2019/2020 policy was not renewed due to outstanding premium is contradicted by evidence, including emails and statements of account showing a pattern of accepting late payments without enforcing strict compliance with renewal deadlines.

[72.] The Claimant relied on the February 27 Statement of account, the 5 March and the, 29 May emails, and the correspondence from Dolnesha Wymss. The Defendants relied on the general policy terms provisions of the insurance contract requiring payment as a condition of indemnity but failed to demonstrate consistent enforcement of those terms.

[73.] The Claimant reasonably believed his policy remained in force, having made prior late payments without issue. This belief was supported by the continued interaction with the agents of the Defendant and the absence of any express cancellation or non-renewal notice.

[74.] In applying **Deborah Zelovko**, the Defendant failed to provide evidence that it took steps to enforce policy lapses or that it explicitly warned the Claimant that non-payment would result in a lapse of coverage. The testimony of Rochelle Roberts and Margarita Newbold confirms that the Claimant was never informed that his policy would be considered lapsed due to non-payment.

[75.] Despite the Defendant's argument that the 2019/2020 period was not renewed due to unpaid 2018/2019 premiums, evidence shows policies were previously renewed despite similar outstanding balances.

[76.] Rochelle Robert's October 10, 2019 email confirms that the Homeowners Policy was renewed for the 2019/2020 period despite an unpaid balance, contradicting the Defendant's claim that non-payment prevented renewal. This aligns with the February 27, 2019 Statement of Account reflecting acceptance of a late payment for the 2018/2019 period.

[77.] Further evidence supporting the Claimant's reasonable belief includes: i. The February 27, 2019, Statement of Account showing late payments without termination; ii. The March 5, 2019, email acknowledging a payment without warning of lapse; iii. The May 29<sup>th</sup> email, a friendly reminder, without no cancellation language; iv. The January 18 email from Dolnesha Wemyss maintaining policy-related discussion; v. the Defendant's acceptance of a payment on September 13, 2019.

[78.] When examining the course of dealings as a whole, it is evident that Defendant did not strictly enforce its contractual provisions regarding policy lapses due to non-payment. Instead, the Claimant and Defendant had an established practice, where late payments were accepted while coverage continued.

[79.] The evidence demonstrates an established practice between the parties in which the Defendants did not insist on strict compliance with payment deadlines. Given the Defendant's inconsistent enforcement of payment terms, the Claimant had justified and reasonable belief based on the shared assumption that his policy remained active at the time of Hurricane Dorian.

[80.] I find that there existed a practice and consistent course of dealing where the Defendant routinely accepted late payments without issuing termination notices, reinforcing the Claimant's reasonable belief that late payment would not result in a lapse of coverage. The Defendant's failure to issue a cancellation notice or enforce policy lapse supports the Claimant's case of estoppel by convention.

#### *Waiver*

[81.] The principle of waiver arises when a party, through conduct, knowingly relinquishes a contractual right. In the present matter, the Defendant's repeated acceptance of late payments, and failure to issue termination notices amount to a waiver of strict payment terms.

[82.] While the Defendant argues that no renewal confirmation was sent, it likewise failed to issue a non-renewal or cancellation notice. Given the history of accepting late payments, a reasonable insured would assume continuity of coverage absent clear contrary communication.

[83.] The Defendant's acceptance of a late payment without refund or clarification further supports the Claimant's assumption that coverage remained in effect. If the policy had lapsed, the payment should have been rejected or refunded.

[84.] The Defendant's inconsistent enforcement and failure to notify of cancellation created a reasonable expectation that the policy was still valid when the loss occurred. This amounts to both estoppel and waiver.

[85.] The Court finds that an established practice existed in this case in which the Defendant routinely accepted late payments without issuing termination notices. This reinforces the Claimant's reasonable belief that coverage remained in effect and supports the conclusion that the Defendant is estopped from denying indemnity or has waived its right to insist on punctual payment.

## **CONCLUSION**

[86.] I find that the elements of estoppel by convention and waiver are fully satisfied, barring the Defendant from denying coverage based on late payment.

[87.] I therefore make the following Orders:

1. The relief sought by the Claimant in his Statement of Claim filed on 14 December 2021 is granted.
2. Cost to the Claimants to be assessed if not agreed.

**Senior Justice Deborah Fraser**

**Dated this        day of March 2025**