[2014] JMCC Comm 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00140

BETWEEN	WILSON'S ELECTRONICS LIMITED	CLAIMANT
AND	SPECTRUM INSURANCE BROKERS LIMITED	DEFENDANT

Mr. Michael Howell and Mr. Aon Stewart instructed by Knight Junor Samuels for the Claimant.

Mr. John Graham and Ms. Peta-Gaye Manderson instructed by John G. Graham & Co. for the Defendant.

HEARD: 30th April, 1st May, 1st June, July 2nd and November 7, 2014

INSURANCE-AGENCY-INSURANCE SECURED THROUGH A BROKER-BROKER AN AGENT FOR THE INSURED-INSURED REQUIRING COVERAGE FOR ACTIVE CABLE TRANSMISSION LINES-EXCLUSION CLAUSE IN POLICY EXCLUDING SUCH RISK-NO SUCH COVERAGE AVAILABLE IN THE TRADE-BROKER FAILING TO INFORM INSURED OF EXCLUSION CLAUSE-NO DISCLOSURE TO THE INSURER THAT EQUIPMENT WAS ACTIVE TRANSMISSION LINES-NO INDEMNITY BY INSURER-WHETHER THE BROKER IN BREACH OF AGENCY CONTRACT- WHETHER BROKER LIABLE TO INDEMNIFY THE INSURED-WHETHER BROKER UNDER A DUTY TO DISCLOSE THE EXCLUSION CLAUSE OR INFORM THE INSURED THAT NO SUCH COVERAGE AVAILABLE FOR THAT RISK.

MISREPRESENTATION-WHETHER BROKER LIABLE TO THE INSURED FOR MISREPRESENTING TO THE INSURER THE NATURE OF THE PROPERTY TO BE INSURED-WHETHER BROKER MISREPRESENTED THAT COVERAGE HAD BEEN SECURED OVER THE ACTIVE TRANSMISSION LINES-MEASURE OF DAMAGES.

Edwards J.

BACKGROUND

[1] This case involves a company, Wilson's Electronics Limited (the Claimant) which operated a cable distribution service in the parish of Manchester, with its office located at Lot 21 Nashville Sub-Division, Mandeville, in the parish of Manchester. Since 2004 the Company was insured with a reputable insurance company through Spectrum Insurance Brokers Limited (the Defendant). The Claimant really needed insurance both to cover its

staff and its equipment. Its active transmission and distribution lines had been damaged by not one but two hurricanes; firstly, by hurricane Ivan in 2004 and then hurricane Dean in 2007. In 2005 it secured, through the Defendant, what it thought was adequate insurance cover on its stock and equipment at its offices and over its transmission and distribution network mounted on Jamaica Public Service Company's (JPS) poles in its Manchester region. It was a standard Fire and Allied Perils policy with an exclusion clause excluding cover for active transmission and distribution lines. This action arose out of the refusal by the insurance company (the Insurers) to indemnify the Claimant for the damage done to its active transmission and distribution lines by the passage of hurricane Dean over the Island of Jamaica in 2007. The insurers relied on this exclusion clause to avoid the policy.

[2] The material facts forming the background to this claim are largely undisputed and can be briefly summarized. The Defendant is and was at all material time an insurance brokerage firm providing insurance services to both individual and commercial clients and was the Claimant's broker since 2003. The Claimant's business was insured, through the Defendant's brokerage firm, with the insurers. Prior to 2004, the Claimant's risk was covered under what was called a Synergy Policy offered by the Insurer. It was a packaged policy offered to clients with small offices. In September of 2004, like many other businesses, the Claimant Company suffered significant losses from the passage of Hurricane Ivan. Having sustained heavy losses to its distribution net work of cables which supplied cable services to its clients, the Claimant sought to recover on the insurance policy it had, up to that point, renewed annually. The insurance company however, paid only that part of the Claimant's claim which involved damage done to its property located at its offices. The Insurer failed to pay the entire claim on the basis that the only risk covered were located at the company's office and no property located away from the office at Lot 21 Nashville Sub-Division was covered by the policy.

[3] In this Synergy Policy there was no property identified as being away from the main office or off-site. Therefore, despite the damage sustained to its active transmission and distribution lines after hurricane Ivan in 2004, the Claimant did not recover from the insurers any sums with respect to such items. The Insurer by letter sent to the Defendant in May 2005 advised that they could not renew the Synergy Policy over the Claimant's risk but recommended a different policy for the Claimant's class of business. The standard Fire and Allied Peril Insurance was suggested as suitable for the Claimant's class of business.

[4] Following on this experience with losses resulting from the earlier hurricane, the Claimant, wanting to now definitively secure coverage for its active transmission and distribution lines which were located away from its offices, sought to have that risk covered by insurance. It subsequently entered into discussions with the Defendant as to how it could secure adequate coverage for the business and especially to prevent a repeat of the earlier experience where it was unable to recover under its policy of insurance for damage to its active transmission and distribution lines. A new contract of insurance for the standard Fire and Allied Peril Insurance was sought on its behalf by the Defendant in 2005 and thereafter entered into between the Claimant and the insurers.

[5] There was some misunderstanding between the Claimant and the Defendant as to the reason for the change in the type of policy required for the Claimant's class of business. On the one hand the Claimant seemed to have thought the change was necessary as the Synergy Policy could not cover the transmission lines. However, the Defendant maintained that the change was necessary as the Synergy Policy was for small offices and not commercial enterprises of the nature of the Claimant's business. Though the nature of the discussions surrounding how the new policy came to be secured was in dispute, the result was that the Claimant thereafter, entered into an insurance contract requiring a significant increase in the premiums paid.

[6] In order to ensure that its entire business was covered under the policy of insurance, the Claimant, at the request of the Defendant provided a list of its equipment which was to be covered under the policy. The list which was prepared by the Claimant included items which were described as "off-site". Importantly, this description was contained in the document titled "Fire and Allied Perils Schedule Forming part of and attaching to Policy No. F000000323, in the name of Wilson's Electronics Limited Elaine Wilson, and dated 03/09/05". This list was provided to the Insurance Company yearly as part of the renewal process. The policy was effected based on the list of property provided and was renewed annually from 2005 to 2007.

[7] In 2007, the Claimant again suffered significant losses to its equipment from the passage of a hurricane; this time Hurricane Dean. Included in that loss was damage done to property which it had listed as "off-site" and which were the active transmission and

distribution lines used in its cable business. The Claimant again made a claim on its policy and was again met with a rejection of part of this claim. This time the insurer cited the exclusion clause in the policy which excluded liability for damage to active transmission and distribution lines located 500 feet from the insured's main building.

[8] The upshot of all this was that the Claimant thought it had secured insurance coverage for its active transmission and distribution lines which were "off-site", that is away from its main buildings and attached to JPS poles but this was not so. As it turned out, because of the risk involved with that type of property, not only was the company not insured for that risk, there was an exclusion clause in the policy of insurance it secured through the Defendant, excluding such risk. Importantly too, based on the evidence given, it would have been impossible to secure any such coverage from any other insurance company in the island of Jamaica at the time. The claim was denied by the insurer because the items were active lines and attached equipment, which were excluded under the policy. There was no dispute that based on this exclusion clause the insurer was entitled to deny liability.

[9] It is as a result of the foregoing that the matter is before this court. The Claimant sought to recover from the Defendant the costs of replacing the damaged items. The Claimant had sued both the Defendant and the insurers but subsequently the action against the insurers was discontinued. The Defendant has denied that it is liable to indemnify the Claimant for its loss.

The Pleadings

[10] The Claimant's 2nd Amended Claim Form presented a claim for breach of contract and misrepresentation of contract as to property to be insured under an insurance contract. Consequentially, the remedies sought by the Claimant was a declaration that it was entitled to be indemnified under the terms of the contract in respect of costs incurred by it in remedying the damage to the property and/or in respect of the replacement value of the property. In effect, the Claimant claimed for the sums lost amounting to $11,462,064.50, an indemnity under the contract in respect of the loss or alternatively damages to the said amount, damages for loss of business opportunity and interest at the commercial rate of 16.47% and costs. The penultimate claim for loss of business was

never argued nor was any attempt made to prove such a claim so it was treated as having been abandoned.

[11] In the 2nd Amended Particulars of Claim the Claimant averred that the Defendant, in acting as its broker in the process of applying for insurance coverage, was, as its agent, under a duty to secure insurance coverage appropriate to cover the property to be insured, and to disclose to the prospective insurer all material facts communicated to it by the Claimant. It also averred that the Defendant, as its broker, knew or ought to have known that there was an exclusion clause and in breach of its duty to the Claimant it failed and/or neglected to advise the Claimant of it. The Claimant also averred that the Defendant failed to disclose to the insurer all material facts relative to the property to be insured including the nature of the same. Specifically, it averred that the Defendant failed to disclose that the off-site property to be insured included transmission and cables and other equipment installed and used in transmission and distribution process more than 500 feet away from the Claimant's building. The Claimant claimed that in view of the Defendant's breach of duty in respect to non-disclosure of all material facts to the insurer, it was entitled to be indemnified by the Defendant with respect to its losses. The claim particularizes the manner in which the Claimant avers that the Defendant negligently failed to carry out its duties under the contract and the way in which it claimed the Defendant breached the contract.

[12] There was also an alternate claim, that the Claimant was induced by the Defendant to enter into the contract with a third party by the misrepresentation of the Defendant as to the property that was the subject matter of the schedule to the contract. The claim is therefore formulated in contract for breach of the Defendant's contractual obligations and negligent misrepresentation.

[13] The Defendant raised, as a preliminary point, the Claimant's pleadings in its current form. It claimed that although the claim form showed a cause of action in contract for breach of contract and misrepresentation the claim had not proceeded in that way, in the sense that there was no pleading or evidence to support a claim of misrepresentation. Counsel took the point that the claim is and must be to the effect that had the Defendant secured for the Claimant the type of coverage contemplated then the remedy to which the claimant was entitled would be a sum equal to the indemnity which it would have received

under such a policy. The cause of action, he argued, would not matter as much as the amount of compensation to be awarded.

[14] There was no doubt that a contract to provide insurance was entered into between the Claimant and the insurer. It was also not disputed that the Defendant obtained insurance for the Claimant with the insurer and at the time of doing so they were in fact and law acting as the Claimant's agent. The Claimant in its pleadings, in effect, alleged that the Defendant acted in the capacity of an agent whereby the Claimant depended and relied on its expertise and judgment to enter into an appropriate contract of insurance with the insurer. It was the Claimant's contention that not only did the Defendant fail to do so in breach of their contract but it also misrepresented the terms of the contract of insurance entered into on its behalf.

[15] What became apparent on an examination of the pleadings and after considering the evidence given was that the aspect of the Claimant's pleadings indicating misrepresentation of contract may perhaps have been somewhat inelegantly put. However, the court is empowered and so minded to look at the pleadings as a whole, as well as the evidence adduced before this court, to ascertain the essence of the claim against the Defendant. Upon such an assessment, it is apparent that the Claimant sought to establish a breach of duty under the agency relationship which was a contract between themselves and the Defendant and damages arising from the misrepresentation by the Defendant of the nature of the items for which it intended to secure insurance coverage on the Claimant's behalf. An agent's liability for breach of his duty of care towards his principal arises both in contract and in tort.

The Claimant's Case

[16] I believe that in light of the narrow disputed facts it may be helpful to summarize the case presented by each. The Claimant's case can be summarized briefly as follows;

1. That the Defendant was fully aware that some of the Claimant's property to be insured was located at its business premises and that others were not so located but were "off-site", as listed in the Schedule. That at all times it was clear to the Defendant the nature of the off-site property to be insured. The Defendant was well aware that it was not stock but active transmission lines as the phrase "off-site" was coined from discussions between the Claimant

and the Defendant's representative in order to differentiate the active transmission lines attached to JPS poles from the property located at the Claimant's office.

2. That the Defendant advised the Claimant that the Insurer would be willing to insure the said property located "off-site". That as a result a schedule was provided listing the equipment to be insured and which were listed as off-site equipment and not off-site stock.

3. That the Defendant failed and/or neglected to disclose to the insurer all material facts relative to the property to be insured including the nature of the property to be insured.

4. That the Defendant, acting as the broker for the Claimant, knew or ought to have known of the exclusion clause and was in breach of its duty to the Claimant and failed and/or neglected to advise the Claimant of the exclusion clause.

5. That the Defendant failed to exercise the necessary skill and care that a reasonably prudent broker engaged in the insurance business would exercise under similar circumstances.

6. That the Defendant negligently failed to obtain the insurance coverage that was specifically requested by the Claimant as a result of which the Claimant suffered loss and damage.

The Defendant's Case

[17] The Defendant's case in short was that;

1. At all material times the Defendant sought and did obtain insurance for the Claimant's property described as "off-site stock".

2. That based on the initial description of "off-site stock", the Defendant assumed that these were spares being kept at an off-site location as there was no expressed or implied suggestion by the Claimant that the items referred to were active transmission and distribution lines.

3. That the term "off-site" was inappropriately used by the Claimant in the context to describe cable lines transmitting data over a 7-mile radius for which there was no insurance coverage available in Jamaica at that time.

4. That the Claimant was ambiguous in declaring the nature of the items to be insured as they were incorrectly described as "off-site stock".

5. That the Defendants exercised reasonable skill and care as an insurance broker in obtaining the required insurance coverage and that it disclosed all material facts to the insurance company to enable it to assess the risk involved and to provide the appropriate insurance coverage.

The Issues

[18] It is clear therefore, that the issues for determination are as follows;

1. What Duty did the Defendant, As the Claimant's Agent, Owe to the Claimant;
2. Was there a Breach of Duty by the Defendant;
3. Was the Claimant induced to enter into the Insurance Contract by the Defendant's Misrepresentation of the Nature of the Property that was to be covered by the Insurance Policy.
4. Was the Defendant Liable for the Loss suffered by the Claimant and, if so; what is the Measure of Damages.

The Arguments

[19] It is undisputed that the insurance policy which the Claimant had at the time of the loss contained an exclusion clause. In fact, this clause clearly and unambiguously excluded the coverage of such transmission lines as were lost by the Claimant during hurricane Dean. Since it was unanimously agreed that the equipment listed as off-site fell within the exclusion clause and was outside of what was covered under the policy it was, therefore, not necessary for this court to determine whether the equipment lost by the Claimant fell within the meaning of the terms of the policy and indeed the case was not so argued.

[20] The Claimant argued that the Defendant acted as its agent in effecting all insurance coverage from the insurer on its behalf and that it was made to believe that all its business was securely covered by insurance. It was pointed out that the Defendant had

been acting as the Claimant's agent since 2003 and was familiar with the nature of its business. It was further argued that since that period, the Claimant had continuously relied on the Defendant's experience and advice in the area of insurance.

[21] It was also argued that the Defendant was aware of the equipment used in the course of the Claimant's business both off-site and otherwise and that the Defendant had provided an assurance that the insurers would be willing and did in fact provide insurance to cover the off-site equipment. In fact, the Claimant averred that it was because of the losses it incurred due to the passage of hurricane Ivan in 2004, for which it had not been indemnified under the previous synergy policy, why the Defendant advised that the transmission lines and other off-site items had to be specifically insured. The Claimant also averred that the Defendant advised that the premium paid for insurance would thereafter be increased and as a result they completed a list of the off-site items to be covered under the new policy. The increased premiums were paid and the list was incorporated into a Schedule forming part of the policy, which was renewed twice.

[22] The Claimant argued that it was made to understand that it was adequately covered based on the representations made to it by the Defendant. In essence, the Claimant argued that it relied on the representations made by the Defendant to its detriment. The Claimant also made factual assertions, which could not be met by the Defendant, that it was never given a copy of the substantive policy document until after the claim was denied. This, the Claimant argued, was significant as it had placed great reliance on the Defendant's professional skill, as its agent, to secure appropriate insurance coverage for its needs.

[23] The Claimant also averred that having suffered significant losses to its equipment and in particular its off-site equipment due to the passage of hurricane Dean, which caused extensive damage and believing that the equipment was insured based on the prior assurance of the Defendant, it replaced the damaged equipment with the view that the insurers would settle their claim on the insurance policy. The Claimant pointed out that from the outset of the submission of the claim for the losses sustained in 2007, the Defendant agreed and admitted that it had a claim. The Claimant asked the court to consider the correspondence between the Defendant and the insurers which indicated that this was the Defendant's position.

[24] The Claimant asserted that it was because of its reliance on the Defendant's expertise in the insurance industry and the Defendant's subsequent failure to obtain the appropriate insurance coverage as instructed that it suffered the losses sustained and pleaded. The Claimant noted that the claim is mounted on the premise that the Defendant was under a duty to secure appropriate insurance coverage as instructed and had breached this duty resulting in the losses pleaded. Additionally and or alternatively, the Claimant asserted that the Defendant's misrepresentations in relation to the risks to be covered led it to pay increased premiums through it to the insurer.

[25] The Defendant strongly refuted the claims made by the Claimant. The Defendant argued that though it acted on behalf of the Claimant in effecting insurance, it secured the best available policy based on the instructions of the Claimant and also based on what was available in the market at the time. It supported its case by its interpretation of the word stock, which was the manner in which the Claimant's equipment was described in the binder/invoice prepared by the Defendant and sent to the Claimant and by the fact of the Claimant's own failure to read the policy of insurance. It was argued that the Claimant's use of the word "off-site" was, in any event, inappropriate to describe its active transmission lines.

[26] The Defendant did not deny being an agent of the Claimant. In fact, it alleged that as agent, it honoured the Claimant's instructions and exercised reasonable care in effecting the best available insurance coverage. In essence, the Defendant alleged that it acted within the scope of its actual authority and to the letter of its instructions. In making these submissions, the Defendant further urged this court to accept that appropriateness must be measured based on the available insurance at the particular time. The Defendant denied that it had attempted or agreed to secure any such coverage for the Claimant's active transmission and distribution lines and claimed that at all times it had sought and secured coverage for the Claimant's off-site-stock.

[27] Indeed, the Defendant alleged that the items lost in the passage of hurricane Dean were not covered under the policy as they fell within the exclusion clause. The Defendant further alleged that the description in the binder/invoice as stock off-site had the meaning that they were spares being stored at an off-site location and not active transmission lines.

This they alleged became even clearer upon reading the terms and definition embedded in the policy document. The Defendant further argued that the Claimant had a duty to disclose all material facts for assessing the risk and that it had the opportunity to do so in the proposal form, which it failed to do.

[28] Further, the Defendant called on the expert evidence of Mr. Earl Codling, a seasoned insurance practitioner with over forty (40) years experience in the insurance industry. Counsel for the Defendant asked the court to accept the evidence of Mr. Codling that at the material time and generally since 1988, no local insurer provided coverage for active transmission lines due to the high risks involved. Mr. Codling had indicated to the court that not even the JPS Company Limited was able to acquire coverage for its transmission lines because of the very high risks associated with that type of equipment. It was also argued that only one expert gave evidence to the court on the Defendant's case and none having been provided by the Claimant in contradiction, the expert evidence was unchallenged and ought to be accepted by the court. In support of this contention an extract from the treatise on **Expert Evidence Law and Practice** page 319 para. 10-006, dealing with expert evidence on valuation and a case from Malaysia **The Supt. of Land & Survey & 2 ors v Amit Bin Salleh & ors** [2000] (BTU) 22-21 at para 300, a decision at first instance on the same principle, was cited by counsel for the court's consideration.

[29] In essence, the Defendant maintained that it had employed all reasonable skill and care in obtaining insurance for the Claimant's business and that the representations made by it to the insurers, were in keeping with the facts disclosed to it by the Claimant. Counsel for the Defendant pointed to the proposal form filled out by the Claimant where in answer to the question as to whether there was any other material fact to be known for estimating the risk, the Claimant answered no. Counsel argued that this indicated a material non-disclosure by the Claimant and proved not only that the Claimant failed to indicate to the Defendant that part of the risk involved active lines but it also failed to disclose this to the insurer. The Defendant submitted that there was no negligent breach of duty nor was there any breach of contract to effect appropriate insurance.

[30] With respect to the losses alleged to have been incurred by the Claimant, the Defendant argued that those have not been proven. It was counsel for the Defendant's submission that the Claimant had failed to adduce evidence to the required standard and

by the usual method; this, as there was no assessor or loss adjuster called to give evidence of the alleged losses incurred. The Defendant however asserted that should the court find liability in the Claimant's favour, the measure of damages should only be to the extent of the premiums paid.

The Applicable Law

[31] The principles of law applicable to this claim are well settled. I have also placed much reliance on the discussion of the law in this area found in MacGillivray on Insurance Law 10th Edition pp 457 to 460 and pp 1048 to 1060. I have decided to give a full exposition on the principles of law in this area, as I believe the situation the parties have found themselves in has never occurred in this jurisdiction before or if it has, it did not result in litigation. No cases were cited to me on the question from this jurisdiction and my own diligent researches found none. It may well be that the Defendant's representatives may read this judgment for themselves and it is hoped that it will serve as a guide for future conduct.

[32] The agreement between an agent and his principal is usually a contract, whether expressed or implied. It is a contract of agency which gives rise to legal consequences between the agent and his principal, the principal and third parties and the agent and third parties. Because of these legal consequences, very often questions may arise as to who is the agent and who is the principal. Generally, insurance brokers are agents of the insured person: see **Anglo-African Merchants v Bayley** [1970] 1 Q.B. 311. In fact, it is settled law that where a broker secures a contract of insurance between the assured and the insurance company, the broker acts as the agent of the assured: see also **Rozanes v. Bowen** [1928] 32 Ll.L.R. 98 and **Searle v. Hales & Co** [1996] L.R.L.R. 68.

[33] An agent's authority is usually established by express appointment. However, at common law, there are no formalities required to do so and usually an oral appointment will be sufficient to establish an agency, even where the agent is appointed to make a contract which has to be in writing, or evidenced in writing: see **Heard v Pilley** [1869] L.R. 4 Ch 548. Consequently, it is left up to the parties, where there is dispute, to adduce evidence to show what were the terms of the agency.

[34] It must be noted, that an agency relationship creates an obligation between the principal and the agent, where each party holds, in relation to each other, rights and liabilities. The specific obligations of the agent to his principal will depend on the unique

circumstances of each contract but the underlying principle is that an agent owes to his principal a duty to exercise reasonable skill and care in performing his duties undertaken on the principal's behalf, according to his instructions. An agent appointed to carry out certain instructions is obliged to do so and will be held liable for failing to carry them out as instructed. This takes on added importance in the context of insurance as the primary purpose of effecting insurance coverage is to indemnify the insured where loss covered actually occurs.

[35] The agent owes to his principal a duty to exercise reasonable care and skill in carrying out his principal's instructions. This is a duty he owes not only in contract, as there is an implied term in the contract of agency that the agent will act with due care and skill, but also in tort, as the principal would have relied on his professional skill and judgment. Therefore, an aggrieved principal may have concurrent right of action against his agent for breach of duty in contract as well as in tort. An agent must therefore use reasonable skill and care to obtain the insurance coverage that the principal has requested either expressly or by necessary implication or he will be answerable for the loss caused by his failure to exercise that reasonable standard of skill and care in transacting his principal's business: see the **"Superhulls Cover"** case *(No. 2)* [1990] 2 Lloyd's Rep. 431 at p. 445.

[36] The agent also has a duty to obtain satisfactory cover for the principal by taking all reasonable steps so to do. These reasonable steps include checking to ensure that none of the insurer's categories of unacceptable risks apply to the principal and informing the principal if it does: see the case of **Mcnealy v Pennine Insurance Co.** [1978] 2 Lloyds Rep.18 and **Anthony John Sharpe and Roares Investment Ltd. V Sphere Drake Insurance PLC & ors.** (the **Moonacre**) [1992] 2 Lloyds Rep. 501. In the latter case a broker was held to be negligent in failing to advise his client that the cover excluded the use of the vessel as a houseboat.

[37] Importantly, where the broker is aware of the scope of coverage required, he must bring to the attention of the principal any exclusion clause or limitation contained in the insurance coverage and seek instructions upon these. See **Harvest Trucking Co. Ltd. v. P.B. Davis T/A P.B. Davis Insurance Services** [1991] 2 Lloyds Rep. 638. As a general rule, it is no defence that the client could have discovered the fact himself from the

document. The client is entitled to assume that the broker has employed skill and care in obtaining the insurance and is not under a general duty to vet the documents.

[38] Whether an insurance broker has exercised reasonable care and skill in all the circumstances is a question of fact. Usually expert evidence is required by the court of the professional standards generally expected of ordinary persons of average capabilities and ordinary skills in such professional practise unless the breach is so totally egregious as to be obvious. What is required to be exercised by the Defendant is that degree of care which a reasonably competent insurance broker would bring to bear in the performance of his duty. The court in **Chapman v Walton** (1833) 3 Moo & S 389, put it this way:

> *"The point to be determined is, not whether the [broker] arrived at a correct conclusion ... but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz, whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant."*

[39] Atkins J. in **Dickson & Co. v Devitt** [1916] 86 LJKB 315, took the point even further when he held that:

> *"When a broker is engaged to effect an insurance, especially when the broker employed is a broker of repute and experience, the client is entitled to rely upon the broker to carry out his instructions, and is not bound to examine the documents drawn up in performance of those instructions and see whether his instructions have in fact, been carried out by the broker... Business could not be carried on if, when a person has been employed to use skill and care with regard to a matter, the employer is bound to use his own care and skill to see whether the person employed had done what he was employed to do."*

[40] In the case of **Provincial Insurance Assurance Pty Limited v. Consolidated Wood Products Pty Limited & Anor** [1991] 25 NSWLR 541, from the Commonwealth of Australia, a company sought insurance coverage against various risks through a broker. The broker accepted the request and found coverage with an insurer. However, within the policies secured, there were certain exclusion clauses. The insured was successful in its suit against the insurers at first instance but the decision was appealed. Upon appeal, the insured cross appealed against the broker claiming that if the insurer's liability was denied,

the broker would therefore be negligent in effecting coverage. In holding the broker negligent the court held that the broker had a duty of care to the insured to exercise proper care and skill in carrying out the insured's instructions and that such a duty was held both in contract and in tort. Importantly also, the court held that it is crucial that a broker brings to the attention of the insured any list of exceptions in the policy secured and point out any legal pitfalls.

[41] In **Harvest Trucking Co. v. Davis**, a broker had engaged insurers to effect insurance for the principal's haulage business. The broker failed to inform the principal of a clause in the insurance policy which excluded liability should the principal's truck be left unattended at the time of the loss. The principal's warehouse was struck by thieves whilst the truck was unattended and the principal suffered loss. The insurers however failed to honour the subsequent claim, citing the exclusion clause in the policy. The principal therefore sued the broker for negligently failing to obtain satisfactory coverage and for failing to notify the company of the clause which the insurers relied on to deny liability. The principal further argued that the broker failed to perform his duties with the requisite skill and care and that they were entitled to recover from the brokers the loss incurred as damages for breach of their duty.

[42] In finding that the broker was the agent of the principal and that it owed a duty to exercise reasonable care in obtaining appropriate insurance, Diamond J had this to say:

> *"It is normally not an ordinary part of the broker's or intermediary's duty to construe or interpret the policy to his client, but this again is not of course a universal rule*
>
> *"If a broker or intermediary is asked to explain the terms of a policy to his client and he does so, then he must exercise due care in giving an accurate explanation. Again if the only insurance which the intermediary is able to obtain contains unusual, limiting or exempting provisions, which if they are not brought to the notice of the assured, may result in the policy not conforming to the client's reasonable and known requirements, the duty falling on the agent, namely, to exercise reasonable care in the duties which he has undertaken, may in those circumstances entail that* ***the intermediary should bring the existence of the limiting or exempting provisions to the express notice of the client, discuss the nature of the problem with him and take reasonable steps either to obtain alternative insurance, if any is available, or alternatively to advise the client as to the best***

> ***way of acting so that his business procedures conform to any requirements laid down by the policy [Emphasis Added].***"

[43] The case of **Manor Park Homebuilders Limited v AIG Europe (Ireland) Limited** [2008] IECR 174, involved the insurer and the insured but the principles involved in that case is nevertheless applicable to the relationship of insured and broker. There Justice McMahon commenting on the principle of utmost good faith (*uberrimae fidei*) in the law of insurance said:-

> *"The principle of uberrimae fidei, which applies to all insurance contracts, imposes a heavy onus of disclosure on the insured. . . . . This does not, however mean that the insurer can cover its eyes or abstain from making normal inquiries or investigations, in the expectation that, in the event of the risk materializing, it can point to the insured's omission and repudiate the contract. The insured's duty is balanced by a reciprocal duty on the insurer to make its own reasonable inquiries, to carry out all prudent investigations and to act at all times in a professional manner. In fact the onus to do this, because of its experience and expertise, lies primarily on the insurer."*

These words, in my view, are equally applicable to an insurance broker as it is to the insurance company and the insured.

[44] The broker's duty also includes the disclosure of material facts as well as the duty not to misrepresent material facts: see **Aneco Reinsurance Underwriting Ltd v. Johnson & Higgins Ltd** [1998] 1 Lloyd's Rep. I.R. 565. An individual may claim damages for losses resulting from his inducement to enter into a contract by the misleading statements of another. Misrepresentation has been held to occur where one party makes to another party, a false representation or statement by way of affirmation, denial, description or otherwise to a matter of fact. The statement may be oral or in writing and may arise by implication from words or conduct; see 31 Halsbury's Laws of England Fourth Edition, paras. 1005-1006, 1019-1026.

[45] It has been established that even in circumstances where a relationship exists between the parties, and there is non-disclosure or inaction, this may amount to a misrepresentation. Indeed, a duty arises on one party where he has made representations, which, without making further representations or saying more, will lead to a

misapprehension of the negotiations, to say more. Where the representor fails to say more or to make further representation, this may amount to a misrepresentation. Similarly, where one party omits to qualify a statement or representation or omits to give supplementary facts, to the extent that the representation given may amount to a travesty or an inaccurate summary, this is enough to establish a misrepresentation: see 31 Halsbury's Laws of England Fourth Edition, paras. 1050-1052.

[46] In the case of **Peek v Gurney** [1873] LR 6 HL 377, the court made it clear that a mere non-disclosure of facts, unless such a non-disclosure had the effect of making the disclosed facts absolutely false, would not be sufficient to sustain an action for misrepresentation. There must be an active misstatement of fact or some partial or fragmentary statement of fact so that what has been withheld makes what was stated false. A misrepresentation may be fraudulent, innocent or negligent. It is negligent if it is made carelessly and in breach of a duty owed by the representor to the representee to take care. Such a duty may arise in a contractual relationship or any other special relationship between the parties. Since this was a contractual relationship I will forbear to go into the special conditions that need to exist in those special relationships for the court to find that a duty of care exists. If the representation was made innocently damages cannot be recovered but the representee may be indemnified under equitable principles.

[47] The question of the correct measure of damages to be applied where an agent is in breach of duty has also been the subject of discussions in the cases. In **Caparo Industries plc v. Dickman** [1990] 2 AC 605, the House of Lords held that a Claimant must show that the particular losses alleged fell within the scope of the duty owed by the Defendant and it was insufficient to only show that the Defendant breached a duty of care. Indeed, Lord Bridge had this to say at page 627:

> *"It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harm."*

[48] It is also an implied term in a contract of agency that the agent will indemnify the principal against any liability to a third party incurred as a result of the agent's actions: see the case of **Aneco Reinsurance Underwriting Limited v Johnson & Higgins Limited** [2001] UKHL 51. In that case, the House of Lords reaffirmed the duty of a broker to act in

the best interest of a principal in securing the best available insurance and or to advise the principal where there are limitations in so effecting the instructions. Importantly however, the court highlighted that where a broker advised that there was insurance coverage available and this advice was wrong, the advice was negligently given and the Claimant was entitled to damages in the amount of his total losses resulting there-from.

ANALYSIS

Issue 1-What Duty Did the Defendant, as the Claimant's Agent, Owe to the Claimant.

[49] As there is no dispute that a relationship of agent and principal existed between the parties, there is then no difficulty in holding that the Defendant acted as the Claimant's agent in seeking and effecting insurance for the Claimant's business. The Claimant requested of it and the Defendant promised to secure insurance for the Claimant according to its stated requirements. As the Claimant's agent, the Defendant was the middleman, the go between the insurer and the insured. It was contracted by the Claimant to secure the relevant insurance coverage from the proposed insurer. I also have no difficulty in holding that in acting as the Claimant's agent it was an implied term of the contract that the Defendant would exercise reasonable care and skill in obtaining quotes for and selecting the best insurance available to cover the Claimant's needs. It had a duty to find available and appropriate coverage for the business according to the Claimant's requirements and instructions. It had a duty to disclose any material fact concerning the transaction which would affect the Claimant's and the insurer's decision or which may affect its ability to accurately or adequately carry out its duty. In other words, there being established a contract of agency the Defendant was thereby obliged to exercise due diligence and skill to secure insurance for the Claimant according to instructions, if it was at all possible.

[50] In acting with the reasonable, ordinary care and skill expected, the Defendant was required to make the necessary disclosures both to the prospective insurer and the assured regarding the risk. There is however, some dispute as to the instructions given to the Defendant. The Defendant claimed that there were no instructions regarding coverage for active distribution and transmission lines. It pointed to the binder/invoice sent to the Claimant which referred to stock in building and stock off-site. The Defendant relied on this document as well as the revised renewal premium notice sent to the Claimant to show that it was its understanding that it was to secure coverage for stock in building and stock off-

site. It was the Defendant's contention that the Claimant had at least five occasions between binder/invoices and renewal notices to correct the misunderstanding as to whether what was to be insured off-site was stock or active lines and it did not. This claim, the Defendant contends, is an attempt by the Claimant to pass off its own duty to act with prudence onto the Defendant. The Claimant's duty, the Defendant averred, began at the proposal stage where it had a duty to disclose all matters material to the risk and it did not.

[51] This approach taken by the Defendant begs the question whether the Claimant's duty of disclosure to the insurer absolves the Defendant of its own duty whist acting on behalf of the Claimant. The Defendant acted as broker for the Claimant over a number of years and was aware of the type of business and risks inherent in its cable operations. It had submitted at least one other failed claim on behalf of the Claimant for damage to its distribution network. The proposal form done by the Claimant spoke to off-site equipment and the binder/invoice prepared by the Defendant spoke to stock in building and stock off-site. It was the Defendant not the Claimant who described the off-site equipment as stock. One could therefore draw two different inferences from this change made by the Defendant. The first was that the Defendant's interpretation of off-site equipment was that the active transmission equipment could be insured as stock. The second was that the Defendant thought the off-site equipment referred to stock. If the first interpretation was correct the Defendant would be at most negligent and at least mistaken. In the second interpretation of the Defendant's action, the Defendant would again at best be mistaken and at worst be negligent. Either way it had a duty to make the necessary enquiries to clarify the position, which it failed to do. The enquiry on the first interpretation would be to the insurance company and on the second would be to the Claimant.

[52] In the previous policy secured by the Defendant on the Claimant's behalf there was no stock off-site which was covered by insurance. In the previous claim submitted by them to the insurer on the Claimant's behalf there was no claim for damage to stock-off site, the claim was for damaged active lines which was rejected by the insurer. The Defendant, in those circumstances, had an additional duty to make the necessary enquiries and seek the relevant clarification. The proposal form although written up by the Claimant, was submitted through the Defendant. The Defendant cannot complain that the proposal form did not disclose material information when it had a duty to assist the Claimant in the completion of the proposal, using all reasonable care and skill: see **"The Moonacre".** The

Defendant's duty in this case, extended to explaining to the client the importance of material disclosure to the insurers. The Defendant knew the insurance it had secured excluded active lines yet it failed to communicate this fact which it had a duty to do. It also did not seek to ensure that the off-site equipment listed in the proposal form and in the schedule did not include active lines which were excluded which it also had a duty to do.

[53] The location for the insured's property was Lot 21 Nashville Sub-division. This meant that, if we were to accept the Defendant's line of reasoning, stock in building would refer to stock kept at that address. What address then did the Defendant have for this stock kept off-site? Why wouldn't the Defendant and or the insurance company not wish to know where these off-site stock were located and under what conditions? Common sense would dictate, it seems to me, that the conditions of storage would affect the risk and therefore the sum insured or at least the premiums to be paid.

[54] This seems to be the position taken by the broker in 2007 when it became clear that the insurer would not honour the claim for damage to the off-site equipment. In a letter to the insurer the president of the Defendant wrote on October 29, 2007 that;

> *"I refer to your letter of October 11, 2007 and ask that you consider the following points relative to the reasons given for your conclusion that the loss is not covered by the policy.*
>
> *The property damaged does fall within the description of property excluded by an exclusion clause in the standard printed policy. However the fact that the said type of property is specifically described in the schedule of property covered which is incorporated in the policy, has to be interpreted as superceding that standard exclusion.*
>
> *On the proposal form for the policy, the business of the insured was described as "Cable Company", which read in conjunction with the schedule describing distribution related equipment off site, ought to have made your underwriter aware that such equipment was being insured as part of the insured's distribution network. Please note that on the proposal form the property was insured under the heading of "off-site" equipment", and not as stock, and that also should have further alerted your underwriter that the insured was not insuring property stored as stock at another premises away from the insured premises.*
>
> *It is reasonable to assume that your underwriter would have wanted to know the address of the location, if it were assumed that $26, 4 million of property was being insured off site at a specific location.*

Since this information was not requested, insurer's knowledge of the insured's intended meaning of "off-site" has to be reasonably concluded".

[55] However, the questions raised by the Defendant's President to the insurer are the same questions the Defendant had a duty to ask of itself. The Defendant once again was passing its own duty as the Claimant's agent off onto the insurer. If the Defendant, as the agent sitting in the shoe of its principal, did not know or ask what off-site equipment meant, then how could it then blame the insurance underwriters for not knowing or for not asking the relevant questions that it also failed to ask. Indeed the insurer represented by its Deputy General Manager asked some of those very same questions in its reply to the Defendant dated November 12, 2007. I n that letter it was stated:

"Your letter dated October 29, 2007 refers.
Contrary to your assertions, the property is not accurately described in the schedule.

The Schedule refers to a number of equipment 'off-site", implying storage at another location. It is the duty of the insured/Broker to reveal all material facts to the Underwriter in order to have the risk appropriately assessed. It is therefore unfortunate that at this stage the Broker is now saying that they were aware that the cables and all other "off-site" materials are used in the process of transmission. If this is the case, why did spectrum knowingly accept a fire policy that excludes "transmission and distribution lines"?

We agree that the risk is described as a cable company. However, it is not logical to assert that just by stating the insured's occupation, a reasonable conclusion is the insured is insuring the cable while being used for transmission purposes. We are sure that you are aware that an object name does not always address the nature of the object, hence in insurance; we have explanations to avoid ambiguity. We insure other cable companies who are under no illusion that the cables used for transmission are covered.

Your position is unfortunate, as clearly it is the job of the Broker to understand the nature of the insured's business and to select accurately from the menu of policies available….."

[56] Let me hasten to say that I agree with Counsel for the Defendant that correspondence after the loss cannot be used to determine the intentions of the parties to the contract at the time it was made or to interpret a contract. But it is not here being used for that purpose. Its purpose here is to show the state of mind of the Defendant gleaned

from its conduct. I would like to borrow the sentiments expressed by Lord Justice Scrutton in his judgment in **Rozanes v Bowen** at page 102 when he declared that:

> *"It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything".*

In this case, the Claimant, as the assured, had no dealings directly with the underwriters but relied on the Defendant as its agent, who did. The Defendant was therefore, contractually bound to disclose to the insurer all the information material to the insurance it sought to secure on behalf of the Claimant.

[57] From the evidence given by the insurance expert and from the authorities, I accept that the function of the broker is to take and act on the instruction of his principal on the risk involved, the coverage required and the level of premium he is prepared to pay to cover the risk. The broker is also expected to communicate all material facts affecting the insurance required to his principal and to obtain the required insurance according to his instructions and on the best terms available. If the coverage required is not available this is to be communicated to his principal. An insurance broker is duty bound to exercise reasonable care and skill in performance of his duty towards is principal. He does not have to exercise an extraordinary degree of skill but on such a reasonable and ordinary degree of skill expected of a person of ordinary capacity and ordinary ability in his profession might be expected to have. The outer limits of this duty however, will depend on all the circumstances of the relationship and the precise instructions which had been given to the agent by the principal. Generally the duty will involve advising the principal on the type of insurance available for his requirements and securing such insurance best suited to those requirements as instructed. I believe that I am not placing too high a standard of care on the Defendant in holding that there was such a duty owed on its part.

[58] The general proposition, therefore, is that the Defendant, as the Claimant's agent owed a duty of care to ascertain the Claimant's needs by instructions or otherwise and use all reasonable care and skill to obtain the cover which was expressly or impliedly requested. If it could not obtain what was required it should have reported its failure and

reasons there-for and obtain alternative instructions, if any. The policy of insurance secured over the Claimant's business had an exclusion clause which clearly excluded coverage for active transmission and distribution lines other than those within 150 metres from the insured structure. The Claimant's claim was denied by the Insurers on the basis that the "off-site" equipment that was damaged was located further than 150 meters (500 feet) from the insured structure and this was expressly excluded from coverage under the policy. Under general exclusions several risk were listed as excluded perils including that at clause V headed Transmission and Distribution Lines Exclusion. That clause in the policy read:

> *"This policy excludes all above ground transmission and distribution lines, including wire, cables, poles, pylons, standard towers, other supporting structures and any equipment of any type which may be attendant to such installations of any description, for the purpose of transmission or distribution of electrical power, telephone, or telegraph signals and all communication signals whether audio or visual.*
>
> *The exclusion clause applies to all equipment other than those on or within 150 meters (500 feet) of an insured structure"*
>
> *This exclusion applies both to physical loss or damage to the equipment and all business interruption, consequential loss, and/or other contingent losses related to transmission and distribution lines, other than contingent property damage, business interruption losses(including expenses), arising from loss and/or damage to lines of third parties".*

On a strict reading of this clause, the equipment alleged to have been lost would not be covered under the policy. The Defendant had a positive duty to disclose this clause.

[59] Interestingly, the schedule to the policy which contained all the insured's information carried not only the insured's property address and its trade or business stated as a cable company but it also listed items by description, value and sum insured with a listed property address as 21 Nashville sub-division, Manchester. Yet several of the items are listed as off-site. Now if this state of affairs was not enough to put someone on enquiry I do not know what would. In fact the items listed off-site were listed by their description as power inserters, line extenders, mini trunks, cables, transformers, connectors, amplifiers amongst other things. All were clearly cable distribution equipment. Someone ought to have been placed on enquiry as to whether these were in active use or stock held

elsewhere, since the only address given was the company's address and nowhere else. So where were these items housed off-site? These items were proposed as off-site equipment and insurance was sought on the full value of the listed items and a hefty premium was paid. The insurer always has the option to avoid a policy for material non-disclosure, in any event, exclusion clause aside and a prudent broker ought to know this and alert its principal. This is especially so since the principal would have no direct contact with the insurer. The broker also had a duty to act prudently and ensure the proposed insurer was informed as to what exactly the off-site equipment proposed for coverage was. If the broker himself did not know, it had a duty to find out, especially in light of the conflict with its description as stock and the clients description as equipment.

Issue 2- Was There A Breach of Duty by the Defendant?

[60] It is important to determine whether the Defendant, at the time the contract was made, knew or ought reasonably to have known that the instructions given to acquire insurance for the Claimant's "off-site" equipment, was in reference to equipment located further than 150 meters (500) feet from the insured structure and were active transmission equipment.

[61] The evidence given by Mr. Maurice McMahon on behalf of the Claimant was that he had dialogue with representatives of the Defendant where the main area of discussion was about the denial of parts of the insurance claim for hurricane damage in 2004. He claimed that it was during these discussions that the term "off-site" was coined out of a need to differentiate those items located in building from the active distribution lines located away from the building and attached to JPS poles. He claimed that during those conversations the Claimant was advised by the Defendant to specifically insure the outdoor plant; which was the transmission lines, amplifiers, splitters and hard wires amongst other things which were attached to JPS poles, which had not been done in the previous policy. He further claimed that negotiations were commenced specifically aimed at securing coverage for the Claimant "off-site" equipment.

[62] Mr. McMahon told the court that it was following on those negotiations that the Defendant requested a list of all the items that were off-site and this list was compiled and submitted to them. This list was eventually used by the Insurers to prepare the Schedule to the contract. He said that it was based on the list of items described as "off-site" that the Defendant advised them that there would be significant increases in the premium over the

previous coverage. This increased premium was agreed on and paid by the Claimant. In actual fact the Claimant paid premium of $396,375.00 in the first year for insurance coverage over items listed in the schedule as off-site for a sum insured for those items of $26, 425,000.00.

[63] Mr. McMahon's evidence was that after the disaster, during the claim preparation process and from the day the claim was submitted the Defendant had indicated that it was a valid claim. This evidence of the conduct of the Defendant after the disaster was corroborated by its subsequent correspondence to the Insurers already noted above. The Claimant asked the court to accept that the evidence showed that the Defendant knew the Claimant wished to have its active transmission lines insured and that it caused the Claimant to believe that the off-site equipment was fully insured based on the following:

(a) The fact that the Defendant was aware of the Claimant's uninsured loss resulting from Hurricane Ivan in 2004;

(b) That following on the Claimant's substantial loss in 2004, negotiations were commenced between the Claimant and the Defendant specifically aimed at giving coverage for the Claimant's "off-site" equipment;

(c) The fact that following on its losses in Hurricane Ivan in 2004, the Claimant was requested to give to the Defendant a list of all its off-site equipment in addition to its equipment located in building and that list was supplied to the Defendant;

(d) The fact that the increase in premium as a result of the added risk of the Claimant's outside equipment was as much as 54% over the previous coverage.

[64] Mr. Clive Myers, the present Managing Director of the Defendant, gave evidence on its behalf. He had no personal knowledge of the facts in the case but gave evidence from facts gleaned from his perusal of the files. His evidence was that after 2004 the original coverage was changed by the Insurers from a package policy designed for small offices/retail shops to one more suited for the commercial nature of the Claimant's business. He said that in the previous policy, the same exclusion clause of coverage for transmission and distribution lines applied.

[65] He gave further evidence that the initial description of items as stock was assumed by the Defendant to be spares being kept at an off-site location as there was nothing to indicate that the items referred to active transmissions and distribution lines. He indicated that the insurance premium that was paid by the Claimant, while it did include coverage for the affected items on the basis that they were "off-site stock", this was based on an

increase in the items to be insured and their value and not as a result of any increased risk. He indicated that the premium would have been even more significantly increased, if coverage had been available for equipment while in active use as transmission and distribution cables, given the increased loss exposure involved. His evidence was that if such cover had been contemplated, such a high risk would have had to be specially underwritten by the application of a high excess, a possible cap on the value and rated accordingly. Interestingly however, none of this information was ever communicated to the Claimant.

[66] The Defendant's contention therefore, was that it secured coverage based on the information provided to it by the Claimant and based on what was available in the market and it disclosed all material facts to the Insurers to enable it to assess the risk involved and to provide coverage. Although Mr. Myers claimed that from his knowledge, insurance coverage for active transmission and distribution cables was not and has not been available locally or regionally for some time after hurricane Gilbert in 1988, what was very clear is that the Defendant did not disclose to the insurer that the off-site equipment in the proposal and on the schedule was active transmission lines since it claimed not to have known this fact itself.

[67] The Defendant's expert witness Mr. Earl Codlin gave evidence that an increase in premium across the board based on an across the board increase in value items would not trigger an enquiry or investigation. In that respect, his evidence supports the contention of the Defendant that the increase in premium resulted from an increase in the number of items and the value of the items scheduled for insurance and was not as a result of a greater exposure to risk from active transmission lines. However, the expert opined that it would, in his view, be very important to know where the items to be insured are located. He said a policy may have several addresses and it would be necessary to know to which address the increase would be applicable. He said that that would be a practical question posed by any professional in order to know what off-site meant and where the items were located.

[68] He also indicated that the nature of the business to be insured was also very important as different businesses carry different risks. He claimed that pertinent questions would be asked either by the insurers or the broker. He admitted to being familiar with the

work of cable companies and indicated that an insurance company would want the cable company to disclose values and description of items to be insured. He stated that as a professional he would want to know what off-site meant, if there were branches, size of the company, number of employees and any loss experience. These, he said, are standard questions to be posed either by the insurer or the broker. In the case of off-site equipment he would want to know what type of equipment and where it was being kept. He also agreed that insurance coverage for active transmission lines was not available locally, although large companies such as JPS may be able to access it from the international market. A small business such as the Claimant's, he said, would not attract the international market.

[69] It is clear that the Defendant, as the Claimant's agent for the purpose of applying for insurance coverage, was in breach of its duty to secure insurance coverage appropriate to cover the property to be insured, and to disclose to the prospective insurer all material facts communicated to it by the Claimant. It was also in breach of its duty to disclose to the Claimant pertinent information regarding its inability to secure the coverage required and the exclusion clause in the coverage it did secure.

[70] In this case, it appears from the evidence, on a balance of probabilities, that the Defendant was aware that reference to "off-site" equipment was in reference to equipment located further than 150 meters (500) feet from the insured structure and that it was not stock in trade or spare parts but active transmission equipment. This conclusion is strongly supported by the long relationship between the parties, the fact that a previous claim had been made by the Claimant for similar equipment damage, to the full knowledge of the Defendant and the specific adaptation of the phrase "off-site". If this were not so and it was indeed stock which was being insured, there would be no need for this phrase 'off-site" as stock would be stock wherever located. There would otherwise also be no necessity to designate some as stock in building and some as stock off-site; it would only perhaps be described as stock at one identified location and stock at another identified location. Mr. Myers assumptions from viewing the files cannot be countenanced in light of the clear evidence.

[71] The broker did not seem to be in the least concerned with the location of this so called off-site stock, no more than the insurer was concerned about the location of the "off-

site" equipment. There is no explanation as to how the Claimant's description of off-site equipment came to be described in the binder/invoice as stock off-site. Without more the broker would be guilty of a breach for amending his instructions without discourse to his principal. Off-site equipment as described by a cable company with no definitive location for these items should also have place a reasonable prudent broker, securing insurance with an exclusion clause which affects the nature of its principal's business, on alert. The Defendant's letter to the insurer all but admits that, although it places the onus for prudency on the insurer. Portions of the letter are worth repeating here and states:

> *"On the proposal form of the policy, the business of the insured was described as 'Cable Company', which read in conjunction with the schedule describing distribution related equipment off site, ought to have made your underwriter aware that such equipment was being insured as part of the insured's distribution network. Please note that on the proposal form the property was insured under the heading of 'off-site equipment', and not as stock, and that also should have further alerted your underwriter that the insured was not insuring property stored as stock at another premises away from the insured premises."*

[72] Although Mr. Myers, in his evidence, stated that from his knowledge insurance coverage for transmission cables is and has not been available locally of regionally for some time after hurricane Gilbert in 1988, it is clear that this information was never communicated to the Claimant. It is however, unclear as to why the Defendant would have sent a letter to the Insurers stating that they ought to have been aware "that such equipment was being insured as part of the insured's distribution network" when the Defendant had knowledge that this type of coverage was not available and was specifically excluded from the policy. It sought the policy on behalf of the Claimant and if the insurer ought to have been aware, then even more so the Defendant and it would be in clear breach to seek to insure what it knew was uninsurable.

[73] As previously noted, it is the Claimant's case that after the losses in 2004 and the claim made to the insurers was rejected discussions were held with the Defendant surrounding the fact that the policy in place at that time did not cover all the equipment and specifically the transmission lines and that such coverage was required by the Claimant. They were advised by the Defendant that the new policy would cover these items previously excluded. It would indeed be curious, that during any discussion relating to obtaining a new policy of insurance, that the issues relating to obtaining coverage for the

transmission equipment did not arise, considering that the claim after Ivan was not honoured in its entirety to the certain knowledge of the Defendant. Mr. Myers was not in a position to dispute that this was not the subject of discussions between Mr. McMahon and the Defendant's representative at the time, Ms. Reynolds. In fact, what Mr. Myers has said is that they could not have represented to the Claimant that the active transmission lines would be covered under the new policy, since to their certain knowledge no such coverage existed at the time for any business.

[74] However, Mr. Myers, once again was unable to positively state whether the Claimant had been told that the transmission and distribution lines could not be insured. The Defendant claimed to have known of this fact as well as the existence of the exclusion clause in the policy of insurance it secured on behalf of the Claimant. The Defendant clearly had a duty to disclose this known fact to the Claimant to enable it to form a prudent competent judgment on how to proceed but had equally clearly breached that duty.

[75] In concluding on this aspect of the case I wish to reiterate that in circumstances where the Defendant knew that the Claimant had suffered damage to its active transmission and distribution lines as a result of hurricane Ivan and had made a claim through them to the insurance company which was not honoured; and where they also knew that the Claimant clearly wished to have that property covered by insurance, the Defendants had a duty to indicate to the Claimant that the transmission equipment would be excluded from the new policy of insurance. It is not difficult to accept that the issue would have formed part of the discussion between the agent and its principal. The evidence that the term 'off-site" did not form part of the terminology in the previous policies suggests that there were efforts to ensure that the property away from Lot 21 Sub-division was covered under the policy. The only property away from the Nashville Sub-division offices of the Claimant were its distribution lines and attached equipment mounted on JPS poles. The Defendant is taken to have known this fact and failed to advise the Claimant appropriately.

[76] As to the Defendant's claim that it thought "off-site" referred to stock held at a different location by the Claimant and its reliance on the binder/ invoice sent to the Claimant which referred separately to stock in building and to stock off-site, I reject that argument. It is unfathomable to think an insurance broker would not be aware of its repeat

client's various offices, if it had more than one, and where they are located. Its own expert Mr. Codlin gave evidence that this is one of the things it would expect a broker to know. In any event, this contention is inconsistent with the approach taken by the Defendant in its correspondence with the insurer.

[77] On the evidence adduced by the Claimant, which I accept as true, it has been clearly determined that the Defendant knew or ought reasonably to have known that reference to "off-site" equipment or "off-site" stock meant active transmission and distribution equipment located further than 150 meters (500) feet from the insured structure. In those circumstances I find that the Defendant had a duty and that it failed in that duty to exercise that degree of care which a reasonably competent insurance broker would bring to bear in the performance of his duty.

[78] Based on the authorities cited, it is clear that it was also the broker's responsibility to understand the nature of the insured's business and obtain appropriate insurance based on the instructions received. Importantly also, the case of **Harvest Trucking v Davis** also establishes that the broker must bring to the attention of the insured, any exclusion clauses which may affect the insured and take instructions in respect of this.

[79] There was no evidence from the Defendant that the exclusion clause was brought to the attention of the Claimant. Indeed Mr. Myers is unable to say one way or the other as he was not with the company at the time. Mr. McMahon who was with the Claimant and responsible for securing the insurance gave evidence that it was not. I accept that it was not for the simple reason that since 2004, the Claimant had been seeking insurance coverage for its transmission lines and having their claim in regard to those items disallowed; it therefore, defies logic to think that they would have been told the insurance they procured excluded the said lines, yet they went ahead and paid astronomical premiums for something they were told would not be covered. Mr. Myers also could not say that the policy was ever sent to the Claimant or that the exclusion clause in it was specifically drawn to their attention. I accept the Claimant's evidence that they never received the policy document so they had no opportunity of seeing the exclusion clause for them-self.

[80] In those circumstances therefore, I find that the Defendant breached the duties imposed upon it as the reasonable skill and care expected and required of it was not employed in securing appropriate insurance or at the very least bringing the fact that there might not be any available appropriate insurance to cover the property in question. It is not sufficient for the broker to say there was an exclusion clause and therefore the Claimant ought to have known, neither is it sufficient to say, no such coverage was available locally, so the Claimant ought not to have expected to be covered. Firstly, the Claimant had no discussion with the insurers, so that the knowledge of the insurer cannot be attributed to it. Secondly, the policy of insurance was not ready and handed over to the Claimant on a timely basis, and in any event it is common knowledge that the policy of insurance document often lags behind the coverage so that a disaster could have occurred before the document was circulated. The evidence, which I accept, is that the Claimant never received the policy even though it was renewed twice and saw it only after the disaster occurred and the claim was denied.

[81] This is an appropriate juncture to indicate that I accept the evidence of the expert and I accept in the face of no evidence to the contrary, that there was no local company which provided the type of insurance to cover the active distribution and transmission lines used by the Claimant. However, I must respectfully state that this fact is not in dispute and does not assist the case of the Defendant. This is so, as whether this type of insurance was available or not, is a fact that should have been brought to the attention of the Claimant by the broker who was its agent and who owed this duty. Indeed this was the principle enunciated in **Harvest Trucking Co. Ltd v. Davis**

[82] A broker will be held to be in breach of duty where he failed to display a reasonable standard of skill and diligence in carrying out his principal's instructions. The expert gave evidence of what would be reasonably expected of a professional in the brokerage business. The Defendant fell short of this standard and was therefore in breach of its contract entered into with the Claimant.

Issue 3-Was the Claimant Induced to Enter into the Contract of Insurance by the Defendant's Misrepresentation of the Nature of the Property that was to be Covered by the Insurance Policy.

[83] In light of my finding that the Defendant was in breach of its duty towards the Claimant it may not be necessary to consider the issue of misrepresentation of contract

raised by the Claimant. However, since it was pleaded I will consider it briefly. It seems to me that the Claimant has pleaded that the Defendant misrepresented to the insurer the nature of the property which was to be the subject of the insurance and this somehow induced the Claimant to enter into the insurance contract with the insurer. I do not see how such a claim could stand. To follow the logic of the Claimants case on this point it would go something like this. The Defendant would misrepresent to the insurer that the active lines were actually stock in trade to secure the cover, thereafter inform the Claimant its transmission lines could be covered and on that representation the Claimant was induced to enter into the contract. It seems to me there is an obvious disconnect between the two things. I do not see how the misrepresentation to the insurance company by the Defendant, if there was one, could induce the Claimant to enter into a contract of insurance for its active lines when the Claimant knew it was insuring active lines and not stock.

[84] Such a claim would be grounded in tort. The representation would have to have been made to the Claimant to induce it to enter into the contract with the insurer. This would be a separate claim from the Claimant's claim in contract where it averred that the Defendant misrepresented to it that the items were covered under the policy. The two averments present two separate claims. In the first it would involve pre-contract negotiations where false and misleading statements are made which induce one party to enter into a contract with the other or a third party. In the second case, a Claimant would have to show that there was a false representation made by the other contracting party, whether in writing, by words or conduct which the Claimant relied on to his detriment. In the instant case the court would have to look to see if there were any written or oral words, action, conduct or omission which could have represented to the Claimant that the items were covered under the policy of insurance entered into with the insurers.

[85] In the second scenario the court would be guided by the statement of principle in the **Halsbury's Laws of England** Fourth Edition, that where a relationship exists between the parties, and there is non-disclosure or inaction, this may amount to a misrepresentation. Importantly, a duty arises on one party, where he has made representations, to say more, where failing to do so would lead to a misapprehension of the negotiations. Whereas the Claimant would succeed in its averment that the Defendant misrepresented to it that its off-site equipment was covered, which would be a breach of its

contract, the Claimant would fail to make out a case in its alternative claim of Misrepresentation in tort. Of course if there was proof that the Defendant misrepresented to the insurer what the subject matter of the cover was, then it would be in breach of its contract to the Claimant and the insurer would have cause to avoid the policy. The broker would then be liable for any foreseeable loss resulting directly there-from.

[86] However, in light of the rest of the pleadings and the evidence given in support by the Claimant, I have also considered whether the Defendant misrepresented to the Claimant that the active lines were in fact covered as averred by the Claimant. Mere non-disclosure of facts unless it had the effect of making the disclosed facts absolutely false is not sufficient to sustain an action for misrepresentation. There must be a failure to disclose the existence of the exclusion clause and an active misrepresentation that the active lines were covered. Assuming that merely withholding the information about the exclusion clause would not amount to a misrepresentation, in this case the Claimant must succeed in convincing the court on the evidence, that the Defendant did represent to it that the transmission lines were covered and it was this misrepresentation supported by the withholding of the information about the exclusion clause which led the Claimant to pay the additional premiums for the insurance cover it thought it had secured.

[87] Intentional or negligent concealment of a material fact that if made known to the Claimant would have caused it not to pay for such insurance makes the Defendant liable for the loss which resulted. The broker misrepresented the nature, extent and scope of coverage secured in a situation where a specific request had been made to it for a particular extent of coverage. In failing to disclose that it was not available and was in fact excluded from the policy secured, the Defendant in fact by its conduct agreed or warranted that it was available. Considering all the circumstances, it appears that on a balance of probabilities that the Defendant did negligently misrepresent that the off-site equipment was covered under the insurance policy. The Claimant was misled by the Defendant's misrepresentation and suppression of facts. The Defendant was not only morally bound to disclose facts to the Claimant but it was legally bound under its contract with the Claimant to do so and by failing to disclose it, by its conduct, actively represented that the off-site equipment was covered. This is made even more plainby the fact that it assisted the Claimant in submitting and did submit a claim to the insurers for damage it well knew was

excluded from cover. To make it plain however, it cannot be overstated that this is a result arising from the claim in breach of contract and not in the alternative claim in tort.

Issue 4-Was the Defendant Liable for the Loss Suffered by the Claimant; and, if so, what is the Measure of Damages.

[88] Counsel for the Defendant submitted that the claim fell short, that no evidence had been adduced that could satisfy a tribunal that the claim for damages had been pleaded with particularity and had been strictly proved. I do not agree with him. The insurance agent is not liable for failing to secure the insurance coverage required by his principal unless the failure was a result of his breach. The agent will however, be held liable to his principal, if the principal suffers loss directly as a result of his failure to inform his principal that he cannot secure cover on the terms he requires. The principal would then be entitled to the loss of his bargain: see the **Moonacre,** the **"Superhulls Cover"** case and **Harvest Trucking v Davis**. The obligation of notification arises from the relationship of the parties and is necessary because even if there is no other choice of insurer available, the information puts the principal in a position to amend his requirements and make any informed decision he thinks advisable in the circumstances.

[89] Considering the losses due to Ivan and the subsequent change of policy before Dean, it cannot be doubted that the Claimant sought to protect itself from the risk of possible financial losses caused by hurricane damage to its transmission equipment. Having accepted the Claimant's evidence regarding the pre-contract discussions with the Defendant and bearing in mind the inclusion of the transmission equipment in the schedule, as well as the correspondence from the Defendant to the insurer, all point to one probable conclusion; that being, the Defendant not only held the view but also represented to the Claimant that the items would have been covered under the insurance policy. The logical conclusion to be derived from this representation was that consequent upon suffering any losses due to any of the perils covered under the policy of insurance, the insurers would indemnify the Claimant for these losses. It was to this end that the claim was made to the insurers after the passage of hurricane Dean. It was also to this end that the Claimant called upon its supplier to advance the replacement equipment, with the expectation that the claim would have been settled. However, due to the Defendant's breach, the contract secured did not cover the loss.

[90] I find that the losses which were sustained were the same losses which the Claimant had employed the Defendant to seek coverage against. There was no challenge to the legitimacy of the costs pleaded to have been incurred but instead the manner in which it was pleaded. I accept that the usual manner in which such losses would be pleaded would be perhaps by way of a report from a loss adjuster or assessor. However, the Claimant has submitted several invoices for cable equipment purchased in 2007 which they allege was to replace those damaged by the hurricane. The court should not disregard the fact that the Claimant had submitted these same bills to the insurers, through the Defendant broker in a bid to claim on the insurance policy. It is reasonable to assert that they must have had some input in the submission of these bills. I, therefore, find that the Defendant had in consequence accepted the costs pleaded in the bills and which were submitted to the insurers on the Claimant's behalf.

[91] However, the evidence accepted is that there was no such coverage available anywhere in Jamaica and may have been available at great financial cost on the international market. This means that it was more probable than not, that in any event, the Claimant would not have been able to secure coverage anywhere else to recover for the damages to its property. There was in fact no evidence from the Claimant that it could have secured insurance coverage elsewhere, contrary to the evidence of the Defendant and the unchallenged expert assertion that no such coverage was available. The Claimant failed even to show how it would have amended its requirements or that it could have somehow self insured and at what cost if it had been forewarned.

[92] An insurance agent does not guarantee that he will be able to procure the insurance coverage required. His duty is to exercise due care and skill in trying to get it if possible and to inform if he is unable to do so. Where the Defendant is liable in the circumstances outlined the measure of damages must be assessed according to the loss or the amount necessary to place the Claimant in a position as if the Defendant had properly performed his duties. Usually this is the amount the Claimant would have been entitled to be indemnified by the insurer for its loss.

[93] Counsel for the Defendant argued that if the court accepts that there was no insurance available for that risk, the Claimant should not be allowed to recover the sums pleaded and may only be entitled to have damages assessed with reference to the

premiums paid. There is merit in Counsels argument; for to hold the Defendant liable to replace the damaged costs would be in my view, to make the Defendant the Claimant's insurer. To grant the Claimant full indemnity in circumstances where the insurance the brokers should have obtained was not available, and the loss the Claimant suffered it would have suffered in any event, might appear to be putting the Claimant in a better position than he would have been if the Defendant was not in breach.

[94] It appears to me that the question of what damages the Claimant would be entitled to depends on which line of cases the court finds applicable in this particular case. According to MacGillivray on Insurance Law at page 1061 paragraph 36, if the policy that the client instructed the agent to secure would not have covered the loss in any event, damages must be nominal; citing **Waterkeyn v Eagle Star & British Dominions Ins. Co.** [1920] 4 Ll.L.R. 178 and **Fomin v Oswell** [1813] 3 Camp. 357. In **Waterkeyn** the policies secured by the broker did not cover the risk in question. The Claimant contended that the brokers were liable because they had instructed them to cover those risk and they had failed to follow instructions. They sued the brokers for negligence and breach of duty having paid sixteen thousand pounds in premiums and received nothing. The broker's defence was that even if the Claimant had received all he said he wanted, it still would not have covered the risk. The measure of damages sought was for the return of the premiums in the first year and damages for breach of duty for the extended period.

[95] In **Fomin v Oswell** the court decided the Claimant was not entitled to recover on the policy in any event, so that the brokers breach did not place the Claimant in a worse position than he would have been in. Put another way he would not have been in a better position if the broker had not been in breach, therefore, he suffered no injury from the broker's breach. So although he suffered loss it was not as a result of the Broker's breach.

[96] In **Alfred James Dunbar v A&B Painters Ltd and another** [1986] 2 Lloyds Report 38, the insurers repudiated the contract due to the direct breach by the broker. It was held that the Claimant could recover from the broker the sum that would put them back in the same position they would have been in had the insurance been valid. The brokers argued that the insurers would have repudiated in any event so that the insured suffered no loss and therefore they were not liable. The broker's contention failed. But more importantly, it appears that the court would have been prepared to follow the principle that in considering

the brokers liability to indemnify the assured the court may consider whether there was a chance that the insurer would repudiate the contract in any event, so that the insured would have suffered no loss: see **Fraser v Furman** [1967] 2 Lloyds Report 1. Lord Justice May in giving judgment in the Court of Appeal in **Alfred James Dunbar,** stated that the breach of contract having been admitted the Claimants were entitled to be put in the same position so far as money can do so, as if the contract had been performed by the brokers. He went on to state that the damage they suffered did not depend on whether the insurer would have repudiated as a matter of law but whether as a matter of business there is a chance that they would have likely done so. Damages are to then be tailored accordingly.

[97] In **Harvest Trucking v Davis,** the Claimant was able to recover his losses because there was evidence that but for the Defendant's breach he would have been able to secure insurance cover elsewhere or at least be able to negotiate on different terms. The court held that the Claimant was entitled to succeed on the basis that if the Defendant had performed his duty, the Claimant would have recovered the amount of the loss they in fact suffered but because of the breach they were unable to recover for the loss. In **Provincial Insurance Australia Pty Ltd.** the court readily inferred that insurance could have been obtained without an exclusion clause and that the Defendant's breach having caused the Claimant's loss, it was entitled to recover damages to be assessed. The case also implied that in order to recover the Claimant must provide proof that had the Defendant exercised skill and care a policy could have been obtained which covered the risk.

[98] In the line of cases heard at the House of Lords on the complicated scheme of reinsurance, a different line of reasoning seem to have been followed but with the same result. In hearing the Appeal in **Aneco** the House of Lords declared that a broker cannot be held liable for losses which fall outside the scope of his duty of care. In that case the House of Lords found that brokers had undertaken a duty not merely to obtain reinsurance cover but also had assumed a duty to advise on the availability of reinsurance cover in the market, without which the transaction would not have gone ahead. It turned out that, contrary to the advice no such reinsurance was available in the market for the risk and the brokers did not advise the client of that fact. In order to properly advise the client the broker would have had to undertake a proper investigation as to the market's assessment of the risk involved and in failing to do that investigation and advise that the reinsurance

was not available for that risk, the brokers were in breach. The issue for the House was what damages were available to the client.

[99] In concluding that the client was entitled to all the foreseeable loss resulting from the brokers breach and not just limited to the loss which would have flowed from the failure to obtain the reinsurance, the House of Lords had to reconcile a previous decision of the House in **Banque Bruxelles S.A. v Eagle Star Insurance Co. plc.** [1997] 1 A.C. 191 **(SAAMCO)**, with its present decision in **Aneco**. Lord Hoffman delivering the decision of the House of Lords in **SAAMCO** (at 214D) stated the law in the following terms:

> *"A duty of care which imposes upon the informant responsibility for losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortuous duty arising from the relationship between them".*

The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore, be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and if he is negligent, he will be responsible for all the foreseeable consequences of the information being wrong.

[100] The House in **Aneco**, in assessing this statement made by Lord Hoffman, held that there was a difference between information which turned out to be incorrect and advice given in breach of duty on which a Claimant placed reliance and which resulted in loss. The House held that in the latter case the Defendant was liable for the Claimant's total loss resulting there-from even though the evidence showed that reinsurance was not available on the market. In fact, where it involved the giving of advice, the fact that the advice was wrong and reinsurance was not available was determinative of the measure of damages the Claimant was entitled to which was the whole loss resulting from the Claimant acting on that bad advice.

[101] In distinguishing the decision in **SAAMCO** case the House affirmed the decision in the "**Superhull Cover**" case as a correct exposition of the law. In that case the broker was held liable both in contract and tort for failing to inform that the reinsurance it secured was not original but contained a cut off clause. If the insurer had known this it would not have entered into the reinsurance contract and would have written reduced lines on the original insurance. They were held to be entitled to recover the difference between the amount for which the insurers became liable on the original insurance and the amount for which they would have been liable if they had written reduced lines. The Lords noted that the "**Superhull Cover**" case represented the ordinary rule, whereby brokers and others were to be held liable in contract for the foreseeable consequences of their negligence, including the adverse consequences of entering into a third party contract provided those consequences were within the scope of the broker's duty of care.

[102] The Lords also affirmed the principle that a Defendant was not liable for any loss falling outside the scope of his duty. This was an old principle applicable in contract as well as in tort. The rule it said morphed into a principle that those who undertake to give information are not generally liable for all foreseeable consequences of their negligence, but only for the consequences of being wrong. The House confined **SAAMCO** to an example of special cases where the scope of duty is confined to the giving of specific information. In **Aneco,** if the duty of the broker had been confined to the obtaining of the excess of loss protection and informing them that they had done so, damages would be limited to the value of the reinsurance which they failed to obtain which was eleven million dollars. The House held that the brokers owed a duty to inform **Aneco** that reinsurance was not available and the House having accepted that it was in fact not available, the brokers were held liable for negligently advising that it was and liability was for the whole loss of thirty-five million dollars. The case turned on, what I call, the "but for test"; that is, but for the brokers negligent advice that reinsurance was available, the Claimant would not have entered into the Bullen Treaty on which it loss the thirty-five million dollars. The loss was therefore a direct result of a breach of duty by the Defendant.

[103] How does all this affect the Claimant in the instant case? The Defendant had a duty to obtain the insurance required and inform that it had done so or had failed to do so as the case may be. Failing to inform that the insurance it secured had an exclusion clause directly affecting the Claimant's business and that no other insurance could be secured to

its requirements was a breach which confined the Defendant's liability to the loss resulting from that breach, which on the face of it appears to be the eleven million dollars pleaded. However, the earlier cases cited and Lord Hoffman's principle in **SAAMCO** suggests that where there is no proof that the Claimant could have secured the insurance required or some variant of it, if the Defendant had done its duty properly, the loss from the hurricane cannot be attributed to the Defendant's wrong. It was not a consequence of the Defendant being wrong but would have occurred in any event. There was in fact no consequence from the Defendant's wrong and the loss was not a direct result of the breach. The Claimant has to pass the but for test, that is, but for the failure to disclose the exclusion clause and to inform that the type of insurance cover required was not available or the Defendant's misrepresentation that there was coverage, the Claimant would have somehow been able to still protect against the loss from the passage of the hurricane.

[104] I have been unable to place the Claimant in the same position as that in **Aneco** because for one, there is no proof that the Defendant negligently assumed the duty to advise the Claimant to take that particular insurance policy and secondly; unlike the Claimant in the instant case, in **Aneco** the Claimant would not have lost thirty-five million dollars, even if there was no breach. Its loss was a direct consequence of the Defendant's breach. The difference between the Claimant's case and that of the Claimants in the "**Superhull Cover**" case and **Aneco** is that in the former the Claimant had an alternative which he was deprived of pursuing by the Defendant's breach of duty and was therefore entitled to damages to the value of his loss; and in the latter even though reinsurance was not available contrary to the advice of the Defendant, but for that bad advice the Claimant would not have entered into any contract, nor would it have suffered any loss. That's not the case in respect of this Claimant now before this court.

[105] So, in following the reasoning in the decision of the court in **Waterkeyn**; **Fomin v Oswell, Alfred James Dunbar, Fraser v Furman** and Lord Hoffman in **SAAMCO** and applying them to the current situation, it does not follow that this Claimant would recover nothing. In some cases the Claimant could recover the value of the total premium paid as nominal damages, where the policy sought by the principal would not cover the loss suffered or would not have been available in any event.

[106] The Defendant insists that there was no loss because there was no insurance available at the time to cover the risk, so that even if the Defendant had informed the Claimant as part of his duty, it would not have been able to secure any such insurance and would not have been indemnified. I am forced to agree that in that regard the Defendant is correct. However, in such circumstances the Claimant may recover nominal damages assessed at a sum equal to the equivalent sum of the total premiums paid. In my view, the Claimant, in these circumstances, is entitled to recover from the Defendant the total premiums paid for coverage over the active distribution network for the period of the insurance contract, as damages. The premium paid for the off-site equipment only, calculated at $396,375.00 per year over the three year period plus General Consumption Tax of $65,401.88 amounts to $1,385,330.64. At first blush this may appear to be a minimal sum compared to the total claim. But considering the evidence that the items were excluded from coverage under the policy secured on behalf of the Claimant and the fact that no such coverage could have been secured elsewhere and bearing in mind the Claimant has not presented any evidence in contradiction of this accepted fact; then the Claimant is in no worse off position than he would have been in had the premiums not been paid.

Conclusion

[108] This court finds that the Defendant was in breach of its contract of agency with the Claimant in that it failed to act as a reasonable prudent broker in securing insurance coverage for the Claimant according to the Claimant's instructions. In particular the Defendant:

(a) Failed to inform the Claimant that the insurance it required was not available;

(b) Failed to declare to the Claimant that the insurance it secured had an exclusion clause which excluded the very coverage the Claimant required;

(c) Misrepresented to the Claimant that it had in fact secured the said courage.

[109] However, because the Claimant has failed to provide proof that it would have been able to secure coverage but for the Defendant's breach or that the coverage it required was otherwise available, the loss from the damage done by Hurricane Dean is not directly attributable to the Defendant's breach. The Defendant is only liable for the direct

consequences of his wrong and the damage is not a direct consequence of the Defendant's wrong.

[110] However, this does not mean the Claimant is unable to recover as the court has the discretion to grant nominal damages. In this case, the Claimant would not have paid the additional premiums for coverage over the active distribution lines but for the Defendant's breach. Therefore, damages are assessed at the sum of the total premiums paid for such coverage over the three (3) year period plus interest.

Disposition

[111] The court having found that the Defendant was in breach of its contract with the Claimant, the following orders are made:

1. Judgment is entered for the Claimant.
2. Damages awarded in the sum of $1,385,330.64 plus interest at the commercial rate of 12% per annum from October 11, 2007 to November 7, 2014.
3. The court will hear the parties on the issue of cost.