IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY OF MALAYSIA

WRIT NO: WA-22NCC-5-01/2020

BETWEEN

1. NG EE NEE
(NRIC NO: 780313-02-6114)
2. NG EE NEE
(NRIC NO: 780313-02-6114)
[SUING IN HER CAPACITY AS GUARDIAN AND PARENT OF ASHLEY CAI RYUI ENN
NRIC: 1209-09-02-1142] **... PLAINTIFFS**

AND

PRUDENTIAL ASSURANCE MALAYSIA BERHAD
(COMPANY NO.107655-U) **... DEFENDANT**

JUDGMENT

Introduction

[1] This judgment concerns a dispute between an insured party and an insurance company over the repudiation of insurance claims under two policies. The key issues in contention are whether there was material non-disclosure by the insured that justified the insurer's repudiation of the

policies, and whether there was any fraud or forgery committed by the insurer's agents in the process of obtaining the policies. The insured seeks declaratory and monetary relief, while the insurer maintains its repudiation was lawful and valid.

Background facts

[2] The 1st Plaintiff, Madam Ng Ee Nee ("***Madam Ng***") had subscribed to various insurance plans from the Defendant, Prudential Assurance Malaysia Berhad ("***the Defendant***") through her insurance agent, Madam Lok Ai Tee ("***Lok***") prior to the policies in dispute in this case. On 1.3.2010, Madam Ng subscribed to a PRUlink Assurance Plan with Policy No. 34034127 ("***Policy 4127***") for medical insurance and an Insurance Plan for critical illness known as Crisis Shield Benefit with Certificate No. 95266419 through Lok.

[3] Madam Ng became pregnant with her daughter, the 2nd Plaintiff, Ashley Cai Ryui Enn ("***Ashley***"), whom she gave birth to on 9.9.2012 at Kedah Medical Centre, Alor Setar. On or about 1.12.2012, Madam Ng subscribed to an insurance plan known as 'PRUmy child' with policy number 34522881 ("***Policy 2881***") through Lok for the benefit of Ashley.

[4] On or about 1.2.2013, based on Lok's recommendation, Madam Ng agreed to increase the insurable limit for her critical illness coverage to RM1,000,000.00 under a policy

known as ‘Crisis Shield Benefit’ with policy number 34564499 (“***Policy 4499***”).

[5] Madam Ng was diagnosed with a brain tumour on 24.4.2013. She underwent successful surgery to remove the tumour at Hua Shan Hospital in China and then returned to Malaysia.

[6] On or about 28.6.2013, Madam Ng made insurance claims against her policies with the Defendant. The Defendant approved her medical insurance claim for RM100,000.00 on 25.3.2014 and her critical illness insurance claim for RM150,000.00 on 20.3.2014.

[7] However, the Defendant rejected Madam Ng’s claim under Policy 4499 for the extended RM1,000,000.00 critical illness coverage, even while continuing to charge premiums for a few months after. The Defendant also rejected Ashley’s entitlement for the “PRUmy child” benefit under Policy 2881.

[8] In letters dated 25.4.2014 and 15.5.2014, the Defendant stated the reasons for the repudiation of the claims. For Policy 4499, the Defendant stated that there was suppression of material information by Madam Ng in the proposal form dated 7.1.2013 and during a medical examination conducted by the Defendant’s panel doctor recorded in a Statement to the Medical Examiner dated 13.1.2013 (“***SME***”). For Policy 2881, the Defendant stated

that there was non-disclosure in the proposal form dated 16.11.2012 signed by Madam Ng on behalf of Ashley.

[9] The Plaintiffs commenced this suit against the Defendant on 31.12.2019. In the original Writ and Statement of Claim, the Plaintiffs sought declarations that the Defendant wrongfully repudiated the claims under Policy 4499 and Policy 2881, an order for the Defendant to pay Madam Ng the RM1,000,000.00 under Policy 4499 with interest, an order for Ashley to continue receiving coverage under the "PRUmy child" benefit, special damages, general damages, exemplary damages, costs and other relief.

[10] On 28.1.2020, the Plaintiffs' solicitors sent a letter requesting from the Defendant's solicitors the copies of the relevant proposal forms signed by Madam Ng. On 28.2.2020, the Defendant's solicitors sent over copies of several proposal forms, including the Proposal Form No. 101040171 dated 7.1.2013 ("***Proposal Form 171***") related to Policy 4499.

[11] On 12.6.2020, when the Plaintiffs filed their Reply to the Defendant's Defence, the Plaintiffs raised a new allegation that Madam Ng's signature on the Proposal Form 171 for Policy 4499 was forged.

[12] The Plaintiffs subsequently amended their original Statement of Claim and the Amended Statement of Claim was filed by the Plaintiffs on 18.12.2020. In this Amended Statement of Claim dated 18.12.2020, the Plaintiffs added a new claim based on the allegations of fraud, forgery and conspiracy to defraud related to Proposal Form 171.

The Plaintiffs' case

[13] Madam Ng had purchased several insurance policies from the Defendant over the years through the Defendant's agent, Lok.

[14] The two main policies in dispute are:

a) Policy 2881 - A child policy for Ashley with "PRUParent Payor" benefit waiving premiums if Madam Ng is diagnosed with critical illness.

b) Policy 4499 - A critical illness policy providing Madam Ng with RM1 million coverage.

[15] In April 2013, Madam Ng was diagnosed with a brain tumor, which is a critical illness covered under Policy 4499.

[16] Madam Ng filed claims under both policies in 2013. However, in 2014 the Defendant repudiated her claims, citing non-disclosure of material facts by Madam Ng in the following:

a) Proposal forms when applying for the policies; and

b) The SME dated 13.1.2013.

[17] The crux of the Plaintiffs' original case in December 2019 was that the Defendant's repudiation of the claims was wrongful, unwarranted and a breach of contract.

[18] However, after receiving copies of signed proposal forms from the Defendant in early 2020, Madam Ng alleged that her signature on the crucial Proposal Form 171 for Policy 4499 was forged.

[19] In their Amended Statement of Claim in December 2020, the Plaintiffs added new claims of fraud, forgery and conspiracy against the Defendant and/or its agents related to the purportedly forged proposal form signature.

[20] The Plaintiffs are seeking the RM1 million critical illness benefit, other damages, and declaratory reliefs that the Defendant's repudiation was wrong and/or that the Defendant conspired to commit forgery/fraud against them.

The Defendant's case

[21] The Defendant admits that Madam Ng subscribed to Policy 4127 and Policy 2881. However, the Defendant claims that the benefits under Policy 2881 (PRUParent payor benefit) have been rendered void from inception.

[22] The Defendant asserts that Policy 4499 was issued based on Madam Ng's proposal form dated 7.1.2013 and her SME dated 13.1.2013. The Defendant also claims Policy 4499 has been rendered void from inception.

[23] The Defendant discovered that Madam Ng had several medical consultations, diagnoses and treatments in 2011 to 2012 which were not disclosed in the proposal forms for Policy 2881 and Policy 4499, as well as in the SME.

[24] The Defendant alleges these non-disclosures constitute misrepresentations that entitled the Defendant to repudiate liability and render the policies void, as the undisclosed conditions would have led to the postponement or non-issuance of the policies if the Defendant had known about them.

[25] Regarding the allegations of fraud and forgery, the Defendant contends:

a) These allegations, raised over 7 years after Proposal Form 171 and 6 years after the repudiation, are an afterthought by the Plaintiffs.

b) The Plaintiffs are estopped from raising these allegations.

c) Even if there was a forgery, it would mean no insurance contract was formed for Policy 4499, and the Plaintiffs have no cause of action to claim under that policy.

d) The allegations of fraud/forgery are baseless, as Madam Ng had signed other proposal forms before and the timing of raising forgery is illogical.

e) There are no reasons for the agent Lok or her assistant to forge Madam Ng's signature.

f) Madam Ng had ratified the alleged forgery by authorising premium payments for Policy 4499.

[26] The Defendant denies the Plaintiffs have suffered any losses, and contends the damages claimed are unsubstantiated, remote or not caused by the alleged fraud/forgery.

[27] In essence, the Defendant maintains its repudiation of the claims was lawful and justified based on Madam Ng's non-disclosures, while disputing the allegations of fraud and forgery. The Defendant seeks for the Plaintiffs' claim to be dismissed with costs.

Witnesses

[28] Two witnesses appeared for the Plaintiffs whose witness statements are marked “WS-PW1” and “WS-PW2” as follows:

a) PW1 is Mr Lim Yok Chaw, a Forensic Document Examiner. His evidence is on a signature analysis and verification report he conducted comparing the disputed signature of Madam Ng on Proposal Form 171 against specimen signatures to determine if the disputed signature was forged or not. His witness statement is marked “WS-PW1”.

b) PW2 is the 1st Plaintiff, Madam Ng, a businesswoman. Her evidence is on the factual background of the case, including her purchase of various insurance policies from the Defendant, her medical diagnosis of a brain tumor, her insurance claims made to the Defendant, the Defendant’s repudiation of claims under Policy 2881 and 4499, and allegations that her signature on a proposal form was forged. Her witness statement is marked “WS-PW1”.

[29] The Defendant called seven witnesses whose witness statements are marked “WS-DW1” to “WS-DW7” as follows:

a) DW1 is Dr Suresh a/l Ramasamy (“***Dr Suresh***”), a Consultant Orthopaedic, Spine and Arthroplasty

Surgeon practicing at Putra Medical Centre, Alor Setar. His evidence is on the medical consultations, diagnosis, and treatment he provided to Madam Ng regarding her wrist pain and swelling complaints in 2011. His witness statement is marked "WS-DW1".

b) DW2 is Dr Chan Jit Wooi ("***Dr Chan***"), a Consultant Physician and Cardiologist practicing at Putra Medical Centre, Alor Star, Kedah. His evidence is on the medical examination he conducted on Madam Ng on 13.1.2013 to facilitate her insurance policy application with the Defendant, and the statements recorded from Madam Ng during that medical examination. His witness statement is marked "WS-DW2".

c) DW3 is Dr Sathindren A/L T. Santhirathelagan ("***Dr Sathindren***"), a Consultant Neurologist & Physician currently practicing at Gleneagles Hospital Pulau Pinang. His evidence is on the medical consultation, diagnosis, test results and advice he provided to Madam Ng when she consulted him on 26.7.2012 for complaints of numbness on her tongue and lips. His witness statement is marked "WS-DW3".

d) DW4 is Madam Lok Ai Tee, a Senior Agency Manager for the Defendant. Her evidence is on her role as the insurance agent who sold various insurance policies including the disputed policies to

Madam Ng, the process she followed in getting Madam Ng to complete the proposal forms, witnessing Madam Ng signing the forms, and her denials of the allegations that she forged Madam Ng's signature or that Madam Ng disclosed all medical information to her. Her witness statement is marked "WS-DW4".

e) DW5 is Puan Intan Sofina Binti Johari ("***Intan Sofina***"), who was previously a clerk/personal assistant to Lok. Her evidence is on her witnessing Madam Ng's signatures on several insurance proposal forms submitted to the Defendant. Her witness statement is marked "WS-DW5".

f) DW6 is Ms Tong Mei Ying ("***Tong***"), the Senior Manager of the Claims Department of the Defendant. Her evidence is on the Defendant's review, assessment and decision to repudiate the Plaintiffs' insurance claims under two policies due to non-disclosures in the proposal forms and medical examination statement, as well as addressing the Plaintiffs' allegations of fraud/forgery related to one of the proposal forms. Her witness statement is marked "WS-DW6".

g) DW7 is Dr Ashish Kanakia ("***Dr Ashish***"), the Head of Claims and Technical Services of the Defendant. His evidence is on why Madam Ng's previous

ovarian cyst condition was not considered a negative factor when underwriting the new insurance policy, and clarifying that Madam Ng's consultations with Dr Sathindren regarding numbness, neuropathy, etc. were material information that should have been disclosed for underwriting purposes. His witness statement is marked "WS-DW7".

Issues

[30] After considering the facts of the case and the defences relied on by the Defendant, the court frames the following issues for deliberation which this court considers pivotal to the resolution of this case:

a) Whether Madam Ng's signature on Proposal Form 171 for Policy 4499 was forged, which would invalidate the insurance company's ground for repudiating the policy based on incorrect information provided in that proposal form.

b) Whether Madam Ng disclosed all relevant medical information to Lok, the insurance agent, during the proposal stage for Policy 22881.

c) Whether there was material non-disclosure by Madam Ng to the insurance company's medical examiner, Dr Chan, regarding her previous medical consultations and symptoms, which would constitute

a breach of the duty of utmost good faith and provide valid grounds for the insurance company to repudiate the claim.

d) Whether the Defendant and its agent, Lok, committed fraud, forgery or conspiracy to defraud against Madam Ng by forging her signature on Proposal Form 171, thereby causing injury or loss to Madam Ng.

e) Whether if Proposal Form 171 is forged, Policy 4499 would not have come into existence and no valid insurance contract was formed.

[31] In the ensuing part of this judgment, this court will structure its deliberations around the issues above.

Analysis and findings of the court

Whether Madam Ng's signature on Proposal Form 171 for Policy 4499 was forged, which would invalidate the insurance company's ground for repudiating the policy based on incorrect information provided in that proposal form.

[32] The Plaintiffs submit that the Defendant's ground for repudiation, alleging incorrect information in Madam Ng's Proposal Form 171 relating to Policy 4499 is invalid as she never signed Proposal Form 171 and her signature on the

form 171 was. In this regard the Plaintiffs contend and submit as follows:

a) Madam Ng cannot be held responsible for incorrect information on Proposal Form 171 for Policy 4499 as she never signed the proposal form.

b) The Expert Handwriting Report by Lim Yok Chaw (PW1) concludes that the signature on the disputed form for Policy 4499 does not match known signature of Madam Ng. Notably, the Defendant has neither refuted this report nor produced its own expert evidence to counter it. It is submitted that the unchallenged expert report should be accepted as definitive, following *JLA Motorsports Sdn Bhd lwn. Ahmad Suhaimi Abdullah & Yang Lain* [2020] 1 LNS 689 (HC) which states that an unchallenged expert opinion stands and must usually be accepted by the court.

c) The testimony of Lok (DW4), the agent, lacks credibility. She initially testified that she explained the policy benefits to Madam Ng through a “Sales Illustration” and witnessed Madam Ng signing Proposal Form 171. However, during cross-examination, it was revealed that the “Sales Illustration” referred to had a date that was years later than the alleged event, disproving her claim.

Lok also admitted to inaccuracies in Proposal Form 171 related to Madam Ng's medical history.

d) The testimony of Intan Sofina (DW5), who was supposed to have witnessed Madam Ng's signature on Proposal Form 171, also lacks credibility. She admitted that her name was used on most proposal forms signed in the office, whether or not she actually witnessed the signing. She agreed that there were discrepancies in her signature across various forms and failed to recall specific details about the accuracy of the proposal form's answers.

e) The signature on Proposal Form 171 itself, when compared to Madam Ng's other signatures, including those on other proposal forms and her own witness statement, differs significantly. The Plaintiffs cites the case of *Masyitah Md Hassan v Sakinah Sulong* [2020] 1 LNS 2108 (HC) for the proposition that the court has the discretion to take judicial notice of this variance and conclude that the signature on the said proposal form was likely forged.

f) The timing of the dispatch of Policy 4499 (which contains Proposal Form 171) casts further doubt on the authenticity of Madam Ng's alleged signature on the proposal form. Proposal Form 171 was sent to Madam Ng only sometime in 2019 through the Defendant's letters dated 27.6.2019. These letters

enclosed a duplicate Policy Document and were sent to the Plaintiffs' solicitors. There is no evidence presented before the court to suggest that Policy 4499 was sent to the Plaintiffs before this date.

g) The Defendant has acknowledged the possibility that Madam Ng's signature on Proposal Form 171 may have been forged which is evident in Paragraph 14B of the Defendant's Amended Defence. While the Defendant argues that such forgery would make Policy 4499 void from the beginning, the very acknowledgment indicates that the Defendant is not entirely confident about the authenticity of the signature and is open to the possibility that forgery and fraud may have occurred.

[33] The Plaintiffs submit that if Madam Ng's signature on Proposal Form 171 is proven to be a forgery, then it is evident that fraud and forgery have been committed against her. Furthermore, if Proposal Form 171 did not actually come from Madam Ng due to this forgery/fraud, then the Defendant's ground for rejecting the policy based on incorrect information in the proposal form is invalidated both factually and legally.

[34] The Defendant counters that the evidence, viewed holistically, does not support a finding of forgery. The Defendant questions the reliability of the expert report, noting that even the expert admitted significant variations in

Madam Ng's signatures and the non-compliance with guidelines on using original specimens. The Defendant argues that objective facts and contemporaneous documents should be given more weight than the expert opinion, citing *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57 (CA). The Defendant also clarifies seeming inconsistencies in Lok's and Intan Sofina's testimonies. Further, the Defendant highlights Madam Ng's past experience with insurance applications and her status as an educated, successful businesswoman, arguing it is improbable she would be unaware of the need to sign the form. The Defendant also emphasises the timing of the forgery allegation, noting Madam Ng's possession of the policy documents since 2013, her receipt of the repudiation letter in 2014, her signing of a related document in 2013, and the lack of any forgery claim until mid-2020, suggesting it is an afterthought. Finally, the Defendant argues Lok had no motive to forge the signature given Madam Ng's status as a regular customer.

[35] Having carefully considered the evidence and the parties' submissions, I find in favour of the Defendant on the issue of whether Madam Ng's signature on Proposal Form 171 was forged.

[36] While the Plaintiffs have raised several important issues, they are not sufficient to overturn the coherent and logical case presented by the Defendant. Each of their points is met and surpassed by the Defendant's arguments,

particularly in the areas of objective evidence, credibility, and logical coherence. This is explained as follows.

[37] In support of their contention that Madam Ng's signature on Proposal Form 171 was forged, the Plaintiffs rely heavily on the expert handwriting report prepared by Lim Yok Chaw (PW1). While the court recognises the potential value of expert testimony in cases involving disputed signatures, it is essential to carefully scrutinise the reliability and limitations of such evidence, particularly when viewed in the context of other available evidence.

[38] Upon examination of PW1's expert report and testimony, the court notes two significant concerns that impact the weight that can be given to this evidence. Firstly, during cross-examination, PW1 himself acknowledged that Madam Ng's signatures exhibit substantial variations across different documents. As recorded in the Notes of Proceedings:

> *"ENG (Defendant's counsel): So now Mr Lim I have shown you, only shown you about ten of signatures. All these 10 signatures are visually different isn't it? By different I mean some got loop, some no loop, some of the diacritic become a circle and some cut across and some don't. do you agree?*
>
> *LIM (PW1): Are you saying different?*
>
> *ENG: Yes, I say visually different because my reason is some got loop, some no loop, some the diacritic, the shape changes differently and some part across the left. So do you agree they look differently?*

LIM: Visually yes I agree they look different but in handwriting identification,"

[39] The existence of significant variations in Madam Ng's signatures raises doubts about the reliability of using these signatures as a basis for comparison. If the genuine signatures themselves lack consistency, it becomes more challenging to make a definitive determination of forgery based on handwriting analysis alone.

[40] Secondly, it was revealed during the trial that PW1's expert report did not fully comply with the guidelines set by the Malaysian Chemist Department. Specifically, the report relied on photocopies of signatures rather than original specimens for analysis. This deviation from the recommended best practices casts further doubt on the reliability of the expert's conclusions.

[41] While the court acknowledges that expert testimony can be a valuable evidential tool in appropriate circumstances, it is crucial to consider such evidence in the context of the totality of the evidence presented. In this case, there is a significant body of other evidence, including objective facts and contemporaneous documents, that must be weighed alongside the expert opinion.

[42] The court finds guidance in the decision of the Court of Appeal in *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [supra], where the court cautioned against

overreliance on expert handwriting evidence and emphasised the importance of considering the probabilities of the case. The case concerned a dispute over the ownership of shares in a family company, where the plaintiff alleged that his signature on a share transfer form was forged. An issue that arose was whether the judge erred in relying on non-expert handwriting evidence and circumstantial evidence to conclude that the plaintiff's signature was forged. The court held that the judge failed to properly evaluate the expert handwriting evidence, and drew inferences from circumstantial evidence without fully appreciating all the evidence, leading to an erroneous finding that the plaintiff proved the forgery on a balance of probabilities. The relevant excerpt from the judgment states:

> *"Further, it is said that evidence by handwriting expert can never be conclusive because it is only opinion evidence (PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64 at p 66). Minus the evidence of PW3, what other evidence was relied on by the plaintiff to show that D4 was forged?*
>
> *….*
>
> *The other telling evidence which should have triggered the learned judge's mind would be why it took the plaintiff a few months after the death of his father to lodge a police report alleging forgery. It would show more probable than not that having failed to obtain the monies to settle his debts which he acknowledged, he decided to put pressure on his half brothers by lodging the police report alleging forgery."*

[43] Applying the principles set out in *Lim Tai Ming*, the court finds that the expert handwriting evidence in the present

case, while persuasive to some extent, must be considered in light of its limitations and the other available evidence. The variations in Madam Ng's signatures and the non-compliance with the Malaysian Chemist Department guidelines diminish the weight that can be given to PW1's opinion.

[44] Moreover, as will be discussed in greater detail in the subsequent paragraphs of this judgment, there is a substantial body of objective facts and contemporaneous documentary evidence that points towards the improbability of forgery in this case. When viewed holistically, this other evidence carries greater probative value than the expert opinion on handwriting.

[45] Therefore, while not disregarding PW1's expert report entirely, the court is cautious about placing undue reliance on it in the face of the other compelling evidence presented. The court finds that the objective facts and contemporaneous documents, which will be examined in the following paragraphs, provide a more reliable foundation for determining the authenticity of Madam Ng's signature on Proposal Form 171.

[46] Concerning the testimony of Lok, the court notes that her credibility was initially called into question. However, upon re-examination, several of these issues were clarified.

[47] During cross-examination, the credibility of Lok was challenged based on an apparent discrepancy between the date of the sales illustration she claimed to have used when explaining the policy to Madam Ng and the date on Proposal Form 171. The sales illustration bore the date 17.6.2019, while Proposal Form 171 was dated 7.1.2013. This seeming inconsistency was used to suggest that Lok's account of the events surrounding the signing of Proposal Form 171 was untrue.

[48] However, this discrepancy was adequately explained during the re-examination of Tong, a senior manager from the Defendant's claims department. Tong clarified that the sales illustration dated 17.6.2019 was actually a reprint made in response to a request from the Plaintiffs' solicitors. This request was made via a letter dated 4.6.2019.

[49] Tong further explained that when the reprint was generated, the Defendant's internal system automatically populated the current date, i.e., 17.6.2019, on the reprinted sales illustration. She confirmed that the original sales illustration used by Lok bore the date 7.1.2013, which matched the date on Proposal Form 171.

[50] Lok, during re-examination, also maintained her position that she had prepared a sales illustration for Madam Ng, as recorded in the Notes of Proceedings:

> *"WONG (Defendant's counsel): All right. Now, clearly the sales illustration which you have referred to in the witness statement, the date there which is 17.6.2019 postdates proposal form. Can you explain why?*
>
> *LOK: I cannot explain.*
>
> *WONG: All right. But do you stand by your statement that you prepared a sales illustration for Madam Ng?*
>
> *LOK: Yes."*

[51] Taken together, the evidence provided by Tong and Lok offers a coherent and logical explanation for the discrepancy in dates. The 17.6.2019 date on the sales illustration was the result of an automatic system process when reprinting the document at a later date, and not an indication that Lok's testimony was untruthful. The original sales illustration, which was contemporaneous with Proposal Form 171, bore the date 7.1.2013, consistently with Lok's account.

[52] In light of this explanation, I find that the Plaintiffs' attempt to discredit Lok based on the differing dates is not persuasive. The evidence demonstrates that the dates are not, in fact, irreconcilably different, and Lok's credibility on this point remains intact.

[53] The Plaintiffs' counsel attempted to undermine Lok's credibility by pointing out an apparent inconsistency in her testimony regarding the answers provided in Proposal Form 171. Specifically, the answer to question 4.4b, which asked

whether Madam Ng had ever been advised to have any angiogram, echocardiogram, electrocardiogram, x-ray, blood or urine test, ultrasound, CT scan, MRI, biopsy or other diagnostic test, was marked as "NO".

[54] During cross-examination, Lok appeared to agree with the Plaintiffs' counsel's suggestion that this answer could not have been provided by Madam Ng, given that Lok knew Madam Ng had given birth to two children and would have undergone ultrasounds as part of her prenatal care. This exchange is recorded as follows in the Notes of Proceedings:

> *"OOI (Plaintiff's counsel): Agree that besides 4.4b, sorry besides mean beside the question 4.4b there are no notations taken down by you of any kind whatsoever?*
>
> *LOK: Because,*
>
> *OOI: Yes or no there are no notations? It's a factual question Madam.*
>
> *LOK: Yes.*
>
> *OOI: Now Madam look, at the point in time this policy was taken the 4th proposal form 4th policy was taken you already knew Madam Ng had 2 children. You had just testified that this is a wrong answer, the answer should have been yes, correct?*
>
> *LOK: Yes.*
>
> *OOI: Madam clearly based on the facts that I'm putting to you now clearly these answers were not given by Madam Ng, agree?*
>
> *LOK: Yes."*

[55] However, during re-examination, Lok clarified her previous testimony, asserting that she had not agreed with the Plaintiffs' counsel's suggestion. She maintained that the answers in the proposal form were provided by Madam Ng and that, as a non-medical professional, she would not have modified or interpreted Madam Ng's responses differently. This clarification is found as follows in the Notes of Proceedings:

> *"WONG: He said to you at that point you already knew that Madam Ng had 2 children and he said clearly based on the facts clearly this answer was not given by Madam Ng and you agreed. Did you agree or not, can you clarify?*
>
> *LOK: I'm not agree. Whatever answer tick is given by Madam Ng. I'm not a medical doctor.*
>
> *WONG: No, listen Madam Lok. Because you have given evidence which a bit strange to me. Because when he said to you clearly these answers were not given by Madam Ng, you from my notes you agreed. So, can you clarify are you agreeing or not agree?*
>
> *LOK: I disagree."*

[56] I find Lok's clarification during re-examination to be reasonable and consistent with her role as an insurance agent. As a non-medical professional, Lok would not have been in a position to interpret or modify Madam Ng's answers based on her own knowledge of Madam Ng's medical history. Her primary responsibility was to accurately record the answers provided by Madam Ng.

[57] The fact that Lok knew Madam Ng had children does not necessarily mean that she would have questioned Madam Ng's "NO" response to question 4.4b. Madam Ng may have understood the question differently or may not have considered routine prenatal ultrasounds as falling within the scope of the question.

[58] Given Lok's clear and unequivocal testimony during re-examination that she recorded the answers as provided by Madam Ng and did not modify them based on her own knowledge, I find that the apparent inconsistency raised by the Plaintiffs' counsel does not significantly undermine Lok's credibility. Her explanation that she accurately recorded Madam Ng's answers without interpretation is reasonable and consistent with her role as an insurance agent.

[59] In assessing the credibility of Madam Ng's claim that she did not sign Proposal Form 171 for Policy 4499, it is essential to consider her past conduct and personal circumstances. The evidence before the court reveals significant inconsistencies between Madam Ng's assertion and her prior experiences with insurance applications, as well as her educational background and business acumen.

[60] Firstly, it is an undisputed fact that Madam Ng had signed at least three proposal forms for insurance policies before applying for Policy 4499. This is evident from the proposal forms for Policy 4127 (signed on 11.2.2010), Policy No. 100604111 (signed on 4.8.2011), and Policy 2881 (signed

on 16.11.2012). These documents demonstrate that Madam Ng was familiar with the process of applying for insurance policies and the requirement to sign proposal forms.

[61] Secondly, the evidence presented to the court establishes that Madam Ng is a highly educated and successful businesswoman. During cross-examination Madam Ng confirmed that she holds a degree in Physics and Mathematics from the University of Malaysia Sabah.

[62] Furthermore, Madam Ng's business acumen is evident from the fact that her company had a turnover of more than RM5 million in the last financial year.

[63] Given Madam Ng's prior experience with signing insurance proposal forms and her educational and professional background, it is difficult to accept her claim that she was unaware of the need to sign Proposal Form 171 for Policy 4499. As an educated and successful businesswoman who had previously signed multiple proposal forms, it seems highly improbable that Madam Ng would have been oblivious to this standard requirement.

[64] Madam Ng's claim that she was unaware of the need to sign Proposal Form 171 appears inconsistent with the undisputed facts of her prior experience with insurance applications and her educational and professional background. The inherent improbability of her claim, when

viewed in the context of these factors, casts significant doubt on its credibility.

[65] In light of the above, I find that the inconsistencies between Madam Ng's assertion and her past conduct, coupled with her educational qualifications and business success, severely undermine the credibility of her claim that she did not sign Proposal Form 171 for Policy 4499.

[66] The timing and circumstances surrounding the Plaintiffs' allegation of forgery in relation to Proposal Form 171 for Policy 4499 raise significant doubts about the credibility of Madam Ng's claim. The evidence before the court demonstrates that Madam Ng had ample opportunity to raise the issue of forgery much earlier, yet she failed to do so until it appeared to be a convenient response to the Defendant's allegations of misrepresentation.

[67] Firstly, it is undisputed that Madam Ng had the original Policy 4499 documents, which included the allegedly forged Proposal Form 171, in her possession since 2013. During cross-examination, Madam Ng confirmed that she received the policy documents after purchasing the policy:

> *"WONG: Dan kamu telah memberitahu Yang Arif bahawa ketiga-tiga polisi tersebut selepas kamu membeli polisi tersebut telah dihantar kepada kamu? Ingat tak?*
>
> *NG: Yes.*
>
> *...*

WONG: Baik, So polisi ini dalam posisi kamu?

NG: No, it given back to the insurance company.

WONG: Bukan. Pada masa itu?

NG: Yes, at that time yes.

...

WONG: Tetapi sekali lagi saya tanya bila kamu beli polisi ini, polisi ini diberi kepada kamu dan dalam posisi kamu?

NG: Yes Yang Arif."

[68] Despite having the allegedly forged proposal form in her possession since 2013, Madam Ng waited over seven years to raise any allegations of forgery.

[69] Secondly, Madam Ng received a repudiation letter from the Defendant dated 25.4.2014, which specifically referenced the proposal form relating to Policy 4499. The relevant excerpt from the repudiation letter states:

*"In view of above non-disclosures, we have sufficient reasons to believe that the information furnished in the **proposal forms** and the declaration statement signed for the medical examination were incorrect which misled insurance company to issue policies.*

*We therefore regret to inform you that there is a clear breach of "Section 149 (4) of the Insurance Act 1996 and declaration statements" of the **proposal forms**. In view of these facts, we hereby null and void policy no 34564499 and void the PRUParent Payor Basic for policy no 34522881*

> *from inception. Hence, we are unable to admit liability on the claim for Crisis Shield benefit and PRUParent Payor Basic benefit."*

(Emphasis added)

[70] Also, in the repudiation letter from the Defendant dated 15.5.2014, the proposal form relating to Policy 4499 was also referred to. The relevant excerpt from the repudiation letter states:

> *"Having carefully evaluated all facts and evidences, we regret to inform that we have decided to repudiate all liabilities from policy no. 34564499 for Crisis Shield benefit and policy no. 34522881 for PRUParent Payor benefit on the grounds of suppression of material information.*
>
> *We would like to highlight that **the proposal form for the policy no. 34564499** was signed on 7th January, 2013 by Ms. Ng Ee Nee (hereinafter referred to as Life Assured) for her own Crisis Shield benefit coverage. While issuing the above policy, the Company relied on responses to specific questions in the **proposal form** as below…"*

(Emphasis added)

[71] Despite this clear reference to the proposal form relating to Policy 4499, Madam Ng took no action to challenge the authenticity of the form for more than six years after receiving the repudiation letter.

[72] Thirdly, Madam Ng signed the SME on 13.1.2013, which specifically mentioned the proposal form number 101040171. By signing the SME, Madam Ng acknowledged

the existence of Proposal Form 171. However, she did not raise any concerns about the authenticity of the proposal form at that time.

[73] Finally, even when filing the initial action against the Defendant in January 2020, the Plaintiffs did not allege forgery, despite their solicitors having received the relevant policy documents, including Proposal Form 171, in 2019 (as evidenced by Exhibits D5 and D6). It was only after the Defendant raised allegations of misrepresentation in its Defence that the Plaintiffs amended their claim to include allegations of forgery.

[74] The belated timing of the forgery allegation, particularly in light of Madam Ng's possession of the relevant documents and her failure to challenge the authenticity of Proposal Form 171 despite multiple opportunities to do so, strongly suggests that the claim of forgery was an opportunistic afterthought aimed at countering the Defendant's allegations of misrepresentation, rather than being a genuine issue that was diligently pursued by the Plaintiffs.

[75] In view of the above, I find that the timing and circumstances of the forgery allegation significantly undermine the credibility of Madam Ng's claim and support the conclusion that the allegation was an opportunistic afterthought.

[76] In assessing the credibility of the Plaintiffs' allegation that Lok forged Madam Ng's signature on Proposal Form 171, it is crucial also to consider the motivations and incentives that would have driven such an action. The evidence before the court strongly suggests that Lok had no reasonable motive to forge Madam Ng's signature, given the nature of their business relationship and the circumstances surrounding the purchase of Policy 4499.

[77] Firstly, it is undisputed that Madam Ng was a regular customer who had previously purchased three insurance policies through Lok. This long-standing business relationship is evidenced by the proposal forms and policy documents for Policy 4127, Policy No. 34280702, and Policy 2881, which were all sold to Madam Ng by Lok prior to the application for Policy 4499.

[78] Secondly, the evidence indicates that Madam Ng herself approached Lok for additional critical illness coverage. Lok had already testified that there was no justifiable reason for her to forge Madam Ng's signature, as Madam Ng had already agreed to subscribe to Policy 4499. Furthermore, Lok testified that Madam Ng had even visited her agency office on 7.1.2013, the date when Proposal Form 171 was signed.

[79] Given these circumstances, it is difficult to conceive of any logical reason why Lok would have forged Madam Ng's signature on Proposal Form 171. As a regular customer

who had voluntarily approached Lok for additional coverage and had agreed to subscribe to Policy 4499, Madam Ng's business was already secured. Forging her signature would have been an unnecessary and irrational act on Lok's part.

[80] Moreover, the potential consequences of forging a client's signature would have been severe for Lok, both in terms of her professional reputation and her earnings. As an insurance agent, Lok's success depended on maintaining the trust and confidence of her clients. Engaging in forgery would have jeopardised her career and her ability to attract and retain customers in the future.

[81] In assessing the credibility of Lok's testimony, I considered the inherent probabilities of the case. This is by assessing the evidence with reference to its consistency with the undisputed facts and the overall probabilities of the case. The allegation that Lok forged Madam Ng's signature appears highly improbable when viewed in the context of their long-standing business relationship, Madam Ng's voluntary approach for additional coverage, and the potential consequences of forgery for Lok's career.

[82] In light of the above, I find that the absence of any reasonable motive for Lok to forge Madam Ng's signature, coupled with the inherent improbability of such an action given the circumstances, significantly undermines the credibility of the Plaintiffs' forgery allegation. The logic and evidence presented by the Defendant on this point are more

persuasive and consistent with the overall probabilities of the case.

[83] For these reasons, this court finds in favour of the Defendant on the issue of whether the Defendant's ground for repudiation on the basis of incorrect information in Madam Ng's Proposal Form 171 and finds that the Defendant's repudiation of the policy on this ground is valid.

Whether Madam Ng disclosed all relevant medical information to Lok, the insurance agent, during the proposal stage for Policy 22881.

[84] The Plaintiffs submit that Madam Ng had provided all necessary information to the insurance agent, Lok, when signing the proposal form for Policy 2881. They argue that Madam Ng was only presented with a signing page by Lok and did not fill out Proposal Form No. 101335201 herself. Therefore, if the form contains inaccuracies, it is the fault of the agent who prepared it, not Madam Ng. The Plaintiffs contend that under these circumstances, Madam Ng discharged her duty of disclosure to the best of her ability.

[85] The Defendant refutes this, arguing that there were material non-disclosures in the proposal form which justify the repudiation of the Pru-Parent Payor Benefit under Policy 2881. The Defendant asserts that Madam Ng is bound by her signature on the form regardless of who filled in the other details.

[86] Having considered the parties' submissions and the evidence adduced, I find that the Plaintiffs' position is unsustainable. The Plaintiffs rely on Section 151 of the Insurance Act 1996 to argue that any knowledge acquired by Lok during the proposal stage should be imputed to the Defendant. Section 151 states:

> *"(1) A person who is authorised by a licensed insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation of the contract of insurance, to be the agent of the licensed insurer and the knowledge of that insurance agent shall be deemed to be the knowledge of the licensed insurer.*
>
> *(2) A statement made, or an act done, by the insurance agent shall be deemed, for the purpose of the formation of the contract of insurance, to be a statement made, or act done, by the licensed insurer notwithstanding the insurance agent's contravention of subsection 150(4) or any other provision of this Act."*

[87] On its face, this provision appears to support the Plaintiffs' case. However, a closer examination reveals that Section 151 is inapplicable for a fundamental reason - it is neither pleaded nor proven that Madam Ng specifically informed Lok about her consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar during the proposal stage for Policy 2881.

[88] The Plaintiffs' Amended Statement of Claim dated 18.12.2020 is bereft of any allegation that Madam Ng had disclosed the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar to Lok during the proposal stage for

Policy 2881. The only medical consultation mentioned is in paragraph 13, which states Madam Ng was diagnosed with a brain tumor by Dr Sim Bee Fung on 24.4.2013.

[89] Even in the Plaintiffs' Amended Reply to the Amended Defence dated 19.2.2021, the specific consultations are not mentioned. Paragraph 8(b) merely avers that the Plaintiffs had responded to all the questions asked by the Defendant and/or Defendant's agent, Lok in respect to Policy 2881 and Policy 4499 accurately and truthfully by notifying them of the status of her health and any relevant facts / events. Again, there are no particulars on the disclosure of the specific consultations.

[90] In the present case, the Plaintiffs have not properly pleaded the very fact they seek to rely on, i.e. that the consultations were disclosed to Lok. This failure undermines their case as it deprives the Defendant of fair notice on this issue.

[91] Furthermore, even if this court were to examine the evidence beyond the pleadings, there is nothing to support the contention that Madam Ng had informed Lok about the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. Madam Ng herself did not testify to this effect.

[92] During cross-examination, Madam Ng was questioned about the consultations with each doctor. The relevant Notes of Proceedings show that while she admitted to

seeing the doctors, there was no mention of informing Lok about the same:

[93] The evidence relating to the consultation with Dr Sathindren:

> *"WONG: Okay I will take that answer. Tetapi consultation dengan Dr Sathindren pada 26 Julai 2012, betul tak?*
>
> *NG: It's stated so on this document but I cannot remember the exact date.*
>
> *WONG: Okay fair enough. Tetapi ini adalah 5 bulan sebelum child policy dikeluarkan, betul tak?*
>
> *NG: Yes."*

[94] The evidence relating to the consultation with Dr Suresh:

> *"WONG: Dalam borang cadangan tersebut juga tidak ada apa maklumat tentang lawatan kamu kepada seorang orthopaedic surgeon bernama Dr Suresh, betul tak?*
>
> *NG: Yes, it's not stated."*

[95] The evidence relating to the consultation with Dr Kamal Kumar:

> *"WONG: Mengikut rekod Dr Kamal Kumar kamu telah berjumpa dengan Dr Kamal Kumar pada 13.9.2012, itu di muka surat 12 atas.*
>
> *NG: Yes Yang Arif.*
>
> *WONG: Dan juga pada 17.12.2012, sila lihat no.4.*
>
> *NG: Yes Yang Arif."*

[96] Clearly, there is nothing in Madam Ng's testimony to suggest that Lok was informed about the consultations. The failure to specifically plead and prove this critical fact renders Section 151 of the Insurance Act 1996 inapplicable. Consequently, any knowledge acquired by Lok cannot be imputed to the Defendant.

[97] For these reasons, I find that the Plaintiffs are unable to rely on Section 151 of the Insurance Act 1996 to fix the Defendant with constructive knowledge of the consultations. The Plaintiffs' submission on this point is unsustainable and must be rejected.

[98] When the Defendant requested further and better particulars on the issue of whether Madam Ng had disclosed her consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar to Lok, the Plaintiffs provided a reply dated 21.8.2020. The relevant excerpt from the reply states:

> *"With regards to Paragraph 2(b), 2(c) and 2(d) of the said letter, our Client has stated that vide telephone calls between Lok Ai Tee and our Client, our Client remembers to the best of her recollection that sometime in January 2013 she had informed Lok Ai Tee via telephone call of her trips to the gynaecologist and / or other doctors with regards to her pregnancy and / or pregnancy related issues."*

[99] At first blush, this appears to support the Plaintiffs' contention that Madam Ng had indeed informed Lok about her medical consultations. However, upon closer scrutiny, I

find that the alleged disclosures stated in the reply are wholly irrelevant to Policy 2881 for two clear reasons.

[100] Firstly, the timing of the alleged phone call is inconsistent with the inception date of Policy 2881. The reply specifically states that Madam Ng informed Lok about her doctor visits "sometime in January 2013". However, it is undisputed that Proposal Form No. 101335201 for Policy 2881 was signed by Madam Ng on 16.11.2012, nearly two months before the alleged phone call took place. This means that even if the phone call did occur in January 2013, it would have been after Policy 2881 was already issued. Any disclosures made in January 2013 cannot retrospectively cure the non-disclosures in the proposal form signed in November 2012. The alleged phone call is therefore irrelevant to Policy 2881.

[101] Secondly, and more crucially, the information allegedly conveyed by Madam Ng to Lok during the phone call related solely to Madam Ng's pregnancy and her visits to the gynaecologist. There was absolutely no mention of the material consultations with Dr Sathindren (neurologist), Dr Suresh (orthopaedic surgeon) and Dr Kamal Kumar (general practitioner).

[102] It is critical to note that these three doctors whom Madam Ng consulted were not gynaecologists and the consultations were not for pregnancy-related matters. The medical records clearly show that Madam Ng saw:

a) Dr Sathindren on 26.7.2012 for symptoms of numbness on tongue and lips;

b) Dr Suresh on 24.7.2011 and 7.8.2011 for bilateral wrist pain and swelling; and

c) Dr Kamal Kumar on 13.9.2012 and 17.12.2012 for upper respiratory tract infection and urticaria.

[103] These consultations were plainly unrelated to Madam Ng's pregnancy. They pertain to distinct medical issues involving separate medical specialties.

[104] Furthermore, two of the consultations with Dr Suresh took place in 2011, over a year before Policy 2881 was even proposed. It would strain credulity to suggest that these consultations fell within the ambit of "trips to the gynaecologist and / or other doctors with regards to her pregnancy and / or pregnancy related issues" allegedly disclosed to Lok in January 2013.

[105] Therefore, even if the court accepts the reply dated 21.8.2020 at face value, the inescapable conclusion is that Madam Ng did not inform Lok about the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. Based on the Plaintiffs' own reply, the only information allegedly conveyed to Lok was in respect of Madam Ng's pregnancy and her visits to the gynaecologist. The disclosures which

the Plaintiffs themselves have particularised are completely irrelevant to the consultations at the heart of this dispute.

[106] In light of the above, I find that the Plaintiffs' reply dated 21.8.2020 does not advance their case at all. The reply in fact reaffirms my finding that the Plaintiffs have failed to plead or prove that Madam Ng had informed Lok about her consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar during the proposal stage for Policy 2881. Accordingly, the Plaintiffs cannot rely on the alleged phone call to avoid the consequences of the non-disclosures in the proposal form.

[107] Crucially, even Madam Ng's own testimony does not support the argument that Lok was informed of the material consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. During examination-in-chief through WS-PW2, Madam Ng had every opportunity to clearly state that she had disclosed these specific consultations to Lok. However, she failed to do so.

[108] Neither did she mention anything about this in re-examination. The relevant extract from the Notes of Proceedings dated 7.1.2022 reads as follows:

> *"OOI: Very well Ms. Ng, I will just move on now to pages 507 My Lord to page 519 of Bundle B3. Ms. Ng, pages 507 to 519 is the proposal form with regards to Ashley Cai's policy. And if you can remember Ms. Ng, it was suggested to you, you were taken through the terms at the back, the terms*

> *at pages 518 to 519. Can you remember that you were taken through the terms? And it was suggested to you that look you signed the proposal form, so you are responsible for it. You disagreed. Can you just explain why in your mind you are disagreeing?*
>
> *NG: The reason that I disagreed is because the form was not filled up by me and my agent have only showed me the signing page when she asked me to sign. Throughout all those years I have been subscribing insurance policy from her nearly each and every year for instance 2011 I subscribed for my new born son which is Ashton. For this policy was subscribed to my new born daughter Ashley. She should know that I have just delivered a baby. Yes, I have disclosed all of the information during my pregnancy which I know within my knowledge to her."*

[109] A plain reading of Madam Ng's testimony reveals that the only information she allegedly disclosed to Lok related to her pregnancy. Madam Ng expressly stated "Yes, I have disclosed all of the information during my pregnancy which I know within my knowledge to her". The words "during my pregnancy" are significant. They qualify and limit the scope of the information allegedly disclosed to matters concerning Madam Ng's pregnancy.

[110] At no point did Madam Ng testify that she specifically informed Lok about her consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. If indeed such crucial information had been conveyed to Lok, surely Madam Ng would have mentioned it. The glaring absence of any reference to these consultations speaks volumes.

[111] It bears emphasis that the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar were not for pregnancy-related matters. As highlighted earlier, Dr Sathindren treated Madam Ng for numbness of the tongue and lips, Dr Suresh treated her for wrist pain and swelling, while Dr Kamal Kumar treated her for upper respiratory tract infection and urticaria. None of these conditions fall within the ordinary meaning of pregnancy-related issues.

[112] Therefore, Madam Ng's own testimony that she disclosed information related to her pregnancy does not, in any way, advance the argument that Lok was informed about the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. The court cannot stretch the meaning of "pregnancy-related issues" to include these separate and distinct medical conditions. To do so would be to rewrite Madam Ng's testimony.

[113] Tellingly, despite being given the perfect opportunity to clarify these issues during re-examination, Madam Ng did not claim that Lok had been told about the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. The re-examination was the Plaintiffs' final chance to address this evidential gap. The failure to do so only reinforces my conclusion that there is simply no basis to find that Lok was informed of these consultations.

[114] Parties are bound by their pleadings and evidence. The court can only decide on the case as presented by the parties, not on a case which might have been but was not made out.

[115] In the present case, the Plaintiffs have not pleaded or adduced evidence to show that Madam Ng had informed Lok about the consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar. Madam Ng's own testimony during examination-in-chief falls woefully short in this regard. Accordingly, this court is constrained to find that Lok was not informed of these material consultations.

[116] In light of the above, I find that there is no basis to conclude that Lok was aware of Madam Ng's consultations with Dr Sathindren, Dr Suresh and Dr Kamal Kumar during the proposal stage for Policy 2881. The Plaintiffs' submission on this point is mere conjecture unsupported by evidence or pleadings.

[117] Accordingly, Madam Ng must bear the consequences of the incorrect information provided in the proposal form which she admittedly signed. The inaccuracies therein, particularly the non-disclosure of the consultations with Dr Sathindren, constitute a breach of the insured's pre-contractual duty of utmost good faith. This entitles the Defendant to repudiate the policy.

Whether there was material non-disclosure by Madam Ng to the insurance company's medical examiner, Dr Chan, regarding her previous medical consultations and symptoms, which would constitute a breach of the duty of utmost good faith and provide valid grounds for the insurance company to repudiate the claim.

[118] The Plaintiffs submit that there was no non-disclosure by Madam Ng to the Defendant's medical examiner, Dr Chan (DW2). They argue that both Madam Ng and Dr Chan testified that all relevant information was volunteered and truthfully answered during the medical examination. Dr Chan described Madam Ng as "forthright" and "direct". The Plaintiffs also point out that Dr Chan confirmed he determined what information was relevant to record, and he would not write down anything he felt uncomfortable including or deemed irrelevant. When cross-examined on specific checkboxes marked "NO" in the SME form, Dr Chan affirmed that he would still have marked them "NO" even if presented with additional symptoms, except concerning numbness of the tongue. But he later conceded that even for that, the answer would logically have been "NO" absent specific tests. The Plaintiffs further argue that Dr Chan's additional notations outside the formal statement, which were not available in court, should lead to an adverse presumption against the Defendant under Section 114(g) of the Evidence Act 1950.

[119] The Defendant contends that there was material non-disclosure by Madam Ng to Dr Chan. They rely on Dr Chan's testimony that had he been made aware of Madam Ng's previous medical consultations and symptoms, particularly the "numbness of the tongue and lips" in the consultations with Dr Sathindren, he would have filled out questions 2 and 4 in the SME form differently. The Defendant submits this points to the materiality of the undisclosed information, affecting not just the premium but also the very decision to underwrite the policy. They argue the non-disclosure is even more significant given Dr Sathindren's consultations involved symptoms Dr Chan described as "sinister". Such symptoms may indicate underlying conditions substantial in assessing the insurance risk. The Defendant argues that failure to disclose this information breaches the duty of utmost good faith and validly allows repudiation of the claim. As for the argument on Dr Chan's additional notes, the Defendant points out Dr Chan was willing to read these notes in court but the Plaintiffs' counsel objected to their inclusion.

[120] Having carefully considered the evidence and submissions of both parties, I find that there was indeed material non-disclosure by Madam Ng to the Defendant's medical examiner, Dr Chan.

[121] The law on an insured's pre-contractual duty of disclosure is well-established. In *Teh Kheng Ping (Suing As Legitimate Son Of Lim Ah Sim (Deceased)) v Prudential Assurance (M)*

Bhd [2014] 7 MLJ 877 (HC) dealt with this point. The case concerned a claim by the plaintiff against an insurance company for payment under a life insurance policy taken out by his deceased mother, where the insurer denied liability on grounds of non-disclosure of material facts. An issue that arose was whether the deceased had failed to disclose the existence of a breast tumor when applying for the policy, as advised by a doctor she had consulted prior to the application. The court held that the deceased knew about her breast tumor but did not disclose this material fact in the insurance proposal form and medical examination, which amounted to a breach of her duty of disclosure under Section 150(1) of the Insurance Act 1996, allowing the insurer to avoid the policy. It was held that:

> *"The defendant only had to prove material non-disclosure and not fraudulent misrepresentation. Section 147(4) of the Insurance Act 1996 required fraudulent misrepresentation if the policy sought to be invalidated was after the expiry of two years from the date on which it was effected. Here, the policy sought to be invalidated was within the two years period from when it was effected."*

[122] The insured is duty bound to reveal material facts even if no questions are asked. This was made clear in by the Court of Appeal in *Leong Kum Whay v QBE Insurance (M) Sdn Bhd* [2006] 1 CLJ 1. The case concerned an insurance dispute where the insured failed to disclose material facts about other insurance policies when renewing a personal accident policy. An issue that arose was whether the insured had a duty to disclose material facts even if the insurer did not ask

specific questions. The court held that the insured has a pre-contractual duty to make full disclosure of all material facts, regardless of whether the insurer asks any questions, as insurance contracts are based on utmost good faith (uberrimae fides). The court made it clear that "It does not matter whether the insurer asks any questions of the insured. The duty is on the insured to make full disclosure of material facts within his knowledge."

[123] A fact is material if it would influence the judgment of a prudent insurer in determining whether to accept the risk and if so, at what premium and on what conditions. This is codified in Section 150(1) of the Insurance Act 1996 which states:

> *"Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that –*
>
> *(a) he knows to be relevant to the decision of the licensed insurer on whether to accept the risk or not and the rates and terms to be applied; or*
>
> *(b) a reasonable person in the circumstances could be expected to know to be relevant."*

[124] What is "relevant" or "material" must be assessed from the perspective of a prudent insurer, not the insured. The insured cannot pick and choose what facts to disclose based on his own opinion of their significance.

[125] In the present case, the pre-contractual duty of disclosure must be assessed in the context of the medical examination

conducted by Dr Chan as part of Madam Ng's insurance application process. The purpose of such examinations is to enable the insurer to obtain material facts about the insured's health to assess the risk and set an appropriate premium.

[126] Against this legal backdrop, I will now consider whether Madam Ng breached the duty of disclosure during her medical examination with Dr Chan.

[127] In the present case, the medical examination conducted by Dr Chan on 13.1.2013 was a crucial part of Madam Ng's insurance application process for Policy 4499. The purpose of this examination was for the Defendant insurer to ascertain material facts about Madam Ng's health to decide whether to accept the risk of insuring her and if so, on what terms.

[128] Dr Chan's evidence, which I accept, was that if Madam Ng had disclosed her previous consultation with Dr Sathindren on 26.7.2012 where she presented with numbness of the tongue and lips, he would have filled out the SME form differently for questions 2(a) and 4(a) concerning her medical history and diagnostic tests.

[129] Question 2(a) of the SME form asks:

> *"Have you EVER had or been told you had or been treated for:*

Epilepsy, fainting spells seizure, nervous or mental condition, neuritis, paralysis or any disease or abnormality of the brain or nervous system?"

[130] Dr Chan testified under re-examination that numbness of the tongue and lips falls under this question as it may indicate neuritis or some abnormality of the brain or nervous system. I reproduce the relevant excerpt from the Notes of Proceedings dated 12.10.2022:

"WONG: If I can take you back to page 855, if you look at 2(a) remember my learned friend asked you where would it have fallen under and you mention 2(a). Do you remember that?

CHAN: I do.

WONG: And you get a justification for that. You recall that?

CHAN: Yes I do.

...

CHAN: Neuritis would possibly. You see this is very generalise question. Because this is any disease what abnormality of brain or nervous system. So to be fair it would be pertinent that if there was numbness of the face or numbness of the lips or something like that. That would certainly alert us to something else but apart from that it doesn't sound anything else that was. That is the sound sinister. That's fair."

[131] Similarly, for question 4(a) of the SME form which asks:

"In the PAST 5 YEARS, have you had any:
Diagnostic tests such as X-Ray, mammography, electrocardiogram, CT scanning, echo or ultrasonogram, blood or urine studies?"

[132] Dr Chan stated in his re-examination that he would have answered "Yes" to this question in light of the nerve conduction test done by Dr Sathindren to investigate Madam Ng's numbness of the tongue and lips. The relevant testimony found in the Notes of Proceedings is as follows:

> *"WONG: I can put it in another way. Dr Chan if you look at the question 4, what would you comment be in so far as question 4 is concerned in relation to page 837 and the test conducted there?*
>
> *CHAN: If diagnostic test such as so it would have to include that, yes. It's what you call nerve conduction that you have."*
>
> *Dr Chan further elaborated that the nerve conduction test results which showed "Slight reduced CMAP in the lower Facial nerve which may reflect a mild neuropathy (in the Facial arc) or a technical variation" (per page 270 of CBOD Volume 4) ought to have been disclosed under question 4(b) as well:*
>
> *"WONG: Just for clarity, how about 4(b)? just for our knowledge. How would you view 4(b) in light of that test?*
>
> *...*
>
> *CHAN: If a nerve conduction tests the neurology was seen then yes it would have to be yes."*

[133] The evidence above clearly establishes that Dr Chan as the Defendant's medical examiner viewed the undisclosed symptoms of numbness and the nerve conduction test as material information falling within the ambit of questions 2(a), 4(a) and 4(b) of the SME form. Had these facts been made known to him, he would have recorded them and answered the questions differently. This in turn would have

influenced the Defendant's assessment of the risk and underwriting decision for Policy 4499. By failing to disclose these material facts, Madam Ng breached her duty of utmost good faith.

[134] I find Dr Chan to be an independent and credible witness. He is an experienced medical professional and candidly stated in cross-examination that his role is to uncover the truth and he has no reason to be biased towards any party. Dr Chan was also a forthright witness, readily making concessions where appropriate. For instance, he agreed that if told about Madam Ng's consultations with Dr Suresh and Dr Kamal Kumar, it may not have changed his answer for questions 2(g) and 2(k) of the SME form. This shows his objectivity.

[135] Given Dr Chan's independence and the cogency of his testimony, I accord significant weight to his evidence. His testimony establishes the materiality of Madam Ng's undisclosed symptoms and consultations, particularly those involving Dr Sathindren. These were not minor complaints but serious neurological symptoms. Numbness of the tongue and lips was significant enough to warrant a nerve conduction test which showed "Slight reduced CMAP in the lower Facial nerve which may reflect a mild neuropathy (in the Facial arc) or a technical variation" (per Dr Sathindren's medical report).

[136] Dr Chan did not mince his words in describing the numbness as a "sinister" symptom that would have alerted him to a potential underlying problem. I reproduce his testimony from the Notes of Proceedings:

> *"OOI: Strictly 2(a), I'm not looking at anywhere. I'm just strictly at 2(a). 2(a) talks about epilepsy. It talks about fainting spells, it talks about seizure, it talks about nervous or mental condition, it talks about neuritis, paralysis or any disease of or abnormality of the brain or the nervous system. Would you agree with me there is no condition here specifically speaking about the numbness of tongue and lip?*
>
> *CHAN: Neuritis would possibly. You see this is very generalise question. Because this is any disease what abnormality of brain or nervous system. So to be fair it would be pertinent that if there was numbness of the face or numbness of the lips or something like that. That would certainly alert us to something else but apart from that it doesn't sound anything else that was. That is the sound sinister. That's fair."*

[137] The materiality of the undisclosed information is further evidenced by the fact that the Defendant had called its senior underwriter, Dr Ashish Kanakia, to testify on this very issue. Dr Ashish stated in no uncertain terms that Madam Ng's consultation with Dr Sathindren on 26.7.2012 involving numbness of the tongue and lips and mild neuropathy would have elevated the Defendant's risk and led to the application being declined pending further investigation. I refer to Q&A 7 of Dr Ashish's Witness Statement (Enclosure 94) where he said:

> *"In such circumstances, PAMB would not have issued Policy 4499 until and unless the 'underlying*

cause' of the mild neuropathy suffered by the 1st plaintiff was identified."

[138] I am satisfied that information about Madam Ng's neurological symptoms and related consultation with Dr Sathindren would have influenced the judgment of a prudent insurer in determining whether to accept the risk of insuring her and if so, on what terms.

[139] In any event, the SME is a crucial part of the insurance proposal for Policy 4499, and any non-disclosures of material facts in the SME would mean Madam Ng breached her duty of utmost good faith (uberrimae fidei). In signing the SME, she declared that:

"I the undersigned, hereby confirm that the above answers, given by me, are full, complete and true and agree that they form part of any policy, where these answers are or may be, relied upon by the company."

[140] The Court of Appeal case of *Aetna Universal Insurance Sdn Bhd v Fanny Foo May Wan* [2001] 1 CLJ 476 supports the proposition that any non-disclosure in the SME would entitle the insurer to avoid/repudiate the insurance contract. The case concerned an insurance claim made by the beneficiary of a life insurance policy against the insurer. An issue that arose was whether the insurer could avoid the insurance contract due to inaccurate or incomplete statements made by the deceased insured in the "Statement to Medical Examiner" form, which formed part of the insurance application. The court held that the "Statement to Medical

Examiner" was subject to a "basis clause" which made the answers provided therein the basis of the contract. As a result, the insurer could avoid the contract ab initio simply by showing there was an inaccurate statement, without needing to prove the statement was material to the risk insured. The court found the deceased had made an inaccurate statement by failing to disclose prior diagnostic tests, triggering the "basis clause" and allowing the insurer to void the policy from the outset. The court held:

> *"The legal effect of a basis clause in a proposal form is that it entitles the insurer to avoid the contract simply by showing that the statement was inaccurate or incorrect.*
>
> *The general principle that an insurance contract is uberrimae fidei contract which imposes a duty on the proposed insured to exercise the utmost good faith and to make a full disclosure of all facts material to the contract remains applicable. The difference between proposals containing a basis clause and ones without, is that in the latter category an insurer is obliged to show that the misstatement was of a material fact...."*

[141] It is clear from the above authorities that failure by an insured to disclose material facts breaches the duty of utmost good faith and entitles the insurer to avoid the policy. On the facts and evidence before me, I find that Madam Ng failed to disclose to Dr Chan material information about her consultation with Dr Sathindren on 26.7.2012 where she presented with numbness of the tongue and lips and was diagnosed with mild neuropathy following a nerve conduction test. The non-disclosure of these material facts

breached the duty of utmost good faith and justified the Defendant in repudiating the claims under Policy 4499.

[142] I am unable to accept the Plaintiffs' argument that Dr Chan is solely responsible for determining what information to record and that the lack of details in the SME form cannot be attributed to non-disclosure by Madam Ng.

[143] It is well-established that the insured's duty to disclose material facts is a personal, non-delegable duty. It exists independently of the particular questions asked or not asked by the insurer or its medical examiner. In *Teh Kheng Ping (Suing As Legitimate Son Of Lim Ah Sim (Deceased)) v Prudential Assurance (M) Bhd* [supra], the deceased knew about her breast tumor, which was a material fact, and had an obligation to disclose this to the insurer regardless of whether specific questions were asked about it. The court held that if the deceased had disclosed the tumor and advice to see a specialist during the proposal stage, the insurer would have declined to issue the life insurance policy. The insured therefore has a duty to disclose all material facts proactively, independent of the questions posed by the insurer.

[144] The insured's duty to disclose is neither dependent on nor constrained by the insurer's precise questions. They are two distinct duties. Madam Ng cannot rely on the fact that Dr Chan did not specifically ask her about consultations with Dr

Sathindren to absolve herself of the duty to disclose the same.

[145] In any event, I find that the nondisclosed symptoms and consultations with Dr Sathindren fall squarely under questions 2(a) and 4(a) of the SME form, as evident from Dr Chan's re-examination testimony. As explained in my earlier findings, Dr Chan stated that numbness of the tongue and lips is a neurological symptom that is relevant to question 2(a) concerning "any disease or abnormality of the brain or nervous system". He described this symptom as "sinister" and said it would have alerted him to a potential underlying problem.

[146] Similarly, for question 4(a) on diagnostic tests, Dr Chan confirmed that he would have answered this question differently in light of the nerve conduction test done by Dr Sathindren to investigate Madam Ng's numbness. I refer to the same passages from the Notes of Proceedings which I cited in my earlier findings.

[147] Dr Chan's evidence on these points was clear, consistent and unequivocal under cross-examination and re-examination. I therefore find that even if the precise questions in the SME form are taken into account, Madam Ng's undisclosed consultations and diagnostic tests with Dr Sathindren were material facts which ought to have been revealed under questions 2(a) and 4(a). Her failure to do so cannot be excused or attributed to any lack of specific

questioning by Dr Chan. At the end of the day, it is the insured who bears the legal burden to make full and frank disclosure of all material facts within her knowledge, whether asked or not.

[148] In the circumstances, I reject the Plaintiffs' attempt to shift the responsibility for the non-disclosure to Dr Chan. The duty to disclose material facts rests squarely on Madam Ng's shoulders and she failed to discharge that duty in respect of her consultation with Dr Sathindren on 26.7.2012.

[149] I also reject the Plaintiffs' submission for an adverse inference to be drawn against the Defendant for not producing Dr Chan's additional notes in court.

[150] Section 114(g) of the Evidence Act 1950 provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. However, this provision must be construed strictly. It only applies where there is intentional withholding or suppression of material evidence by a party.

[151] This was made clear by the Supreme Court in *Munusamy Vengadasalam v PP* [1987] 1 MLJ 492 where Mohamed Azmi SCJ held:

> *"Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a*

party in his possession, or for non-production of not just any witness but an important and material witness to the case."

[152] The key elements that must be established are:

a) the evidence withheld must be material;

b) there must be intentional withholding or suppression of such evidence; and

c) the withheld evidence must be in the possession of the party against whom the inference is sought.

[153] Applying these principles, I find that the elements for drawing an adverse inference are plainly absent in the present case.

[154] First, there is nothing to suggest that Dr Chan's additional notes contained any material evidence. When questioned by Plaintiffs' counsel on the contents of these notes, Dr Chan clarified that he did not record any of Madam Ng's answers there. The notes merely contained his general impression that Madam Ng was a forthright person (see PDF pages 233 to 234 of the Notes of Proceedings). As such, the notes do not appear to be material to the question of what was disclosed or not disclosed by Madam Ng during the medical examination.

[155] Second and more importantly, the unchallenged evidence is that Dr Chan was in fact willing to read out his additional notes in court. However, the Plaintiffs' counsel objected to the same. I reproduce the relevant exchange from the Notes of Proceedings dated 12.10.2022:

> *"WONG: Dr Chan you have referred to some notes, could you just for the sake of, I mean you taken the oath, take it very seriously to tell not only the truth but the whole truth. Could you just read what you just show to the Court and so that we be very clear about what it is?*
>
> *OOI: My Lord how is that not leading? I have never cross.*
>
> *HAKIM: No, I think that's fair because you ask the question on his extraneous notes. It was put up on camera. I think we all have an interest in knowing what was written. I think Mr. Wong is just saying, its not leading. He is just saying what is right.*
>
> *OOI: Very well My Lord. Let's see where it goes on this. I'm obliged My Lord.*
>
> *...*
>
> *OOI: Sorry doctor you just have to, again I object to this My Lord because this is being raised in re-examination. Then the contents of the notes were never brought up during cross and if it is now introduced in re-examination I have no right to cross on this. I will have to object to this. It is not fair. Now I only ask whether doctors notation were taken outside of pages 855 onwards. And I suppose Mr. Wong has led enough evidence for us to submit on that. If the contents of what is now being raised is brought up in re-examination it will be prejudicial to us because we have never had the opportunity to cross examine the contents of a handwritten notes in a document which is not even before this Honorable Court. I leave it to My Lord.*
>
> *HAKIM: All right.*
>
> *...*

HAKIM: All right, I accept Mr. Ooi, I think it will have some prejudicial effects. So can we move on Mr. Wong?"

[156] It is evident from the above that it was the Plaintiffs' counsel who objected to Dr Chan referring to his notes, despite the court initially being of the view that it was fair for the notes to be read since counsel had asked questions on the same. The court eventually sustained the Plaintiffs' objection on the basis that it may be prejudicial for the contents of the notes to be introduced in re-examination.

[157] In these circumstances, the Defendant cannot be faulted for the non-production of Dr Chan's additional notes in court. There was clearly no intentional withholding or suppression of evidence by the Defendant. On the contrary, the Defendant's counsel had in fact attempted to have the notes read out by the witness but this was blocked by the Plaintiffs.

[158] Therefore, the twin requirements of materiality and intentional suppression by the Defendant have not been met. It would be wholly unjust for this court to draw an adverse inference against a party for not producing evidence which that party had wanted to adduce but could not because of the other side's objection.

[159] The Federal Court case of *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465 illustrates the principle that there must be withholding or suppression of material evidence to invoke section 114(g). The case concerned a dispute over ownership of lands arising from a family breakup and power struggle between factions in a family company. An issue that arose was whether the purchaser could invoke the rule in Turquand's case to claim it was a bona fide purchaser without notice of the internal irregularities in the company's management. The court held that it is difficult to see the justification for invoking the presumption under illustration (g) of Section 114 of the Evidence Act 1950 against the purchaser for having failed to call the brokers as witnesses, as the brokers' testimony was an omission, not a withholding or suppression of testimony. The court held:

> *"It is difficult to see the justification for invoking the presumption under illustration (g) of s 114 of the Evidence Act 1950 against the Purchaser/Intervener for having failed to called the brokers; the brokers's testimony was an omission, not a withholding of testimony. On the contrary, the Purchaser/Intervener was entitled to rely on the contemporary documents, to wit, the sale and purchase agreement and the memoranda of transfers of the disputed properties to invoke the presumption contained in illustration (f) of S 114 of the Evidence Act 1950 for the purpose of establishing the true price paid for the disputed properties."*

[160] For all the above reasons, I find no basis to invoke the presumption under Section 114(g) against the Defendant in

respect of Dr Chan's additional notes. The submission by the Plaintiffs' counsel on this issue is therefore rejected.

[161] In conclusion, I find that Madam Ng failed to disclose to Dr Chan during the pre-contractual medical examination her previous consultations with Dr Sathindren where she presented with numbness of the tongue and lips and underwent a nerve conduction test. These were material facts which ought to have been disclosed. The non-disclosure breached the duty of utmost good faith and justifies the Defendant's repudiation of Madam Ng's insurance claim.

Whether the Defendant and its agent, Lok, committed fraud, forgery or conspiracy to defraud against Madam Ng by forging her signature on Proposal Form 171, thereby causing injury or loss to Madam Ng.

[162] The Plaintiffs contend that the Defendant, through its agent Lok, committed fraud and/or forgery in relation to the insurance proposal form (Proposal Form 171) for Policy 4499. They argue that the signature on the form is not that of Madam Ng despite testimonies from Lok (DW4) and Intan Sofina (DW5), claiming they saw Madam Ng sign it.

[163] The Plaintiffs suggest that Lok had a financial motive to forge the signature, as she stood to gain commission from the insurance policy. They raise an adverse presumption under Section 114(g) of the Evidence Act 1950 regarding

Lok's failure to provide evidence that her commission was returned to the Defendant. The Plaintiffs assert that the Defendant is liable for the acts of its agents under Schedule 9, Paragraph 12 of the Financial Services Act 2013, unless there is evidence of collusion or other exclusions. They cite the case of *Ammetlife Insurance Bhd v Nandakumar Appu & Anor* [2016] 5 CLJ 569 to emphasise that an insurance agent's knowledge and actions are deemed to be that of the insurer they represent.

[164] The Plaintiffs further argue that the Defendant and its agent conspired to commit fraud and/or forgery to injure the Plaintiffs, particularly Madam Ng. They contend that the Defendant knew or should have known that Madam Ng's signature on Proposal Form 171 was forged, as they had received other proposal forms signed by her previously. The Plaintiffs highlight that the Defendant's own witnesses confirmed no thorough investigation into the forgery allegations was conducted, with the only action being to speak with Lok, the alleged fraudster. Despite all witnesses acknowledging the seriousness of the allegations, none lodged a police report.

[165] Based on the legal requirements for establishing conspiracy, the Plaintiffs argue there was an agreement to avoid investigating or verifying Madam Ng's claim, thereby injuring her. This intentional lack of action allegedly resulted in damages to Madam Ng without lawful justification,

substantiating claims of both fraud and conspiracy to commit fraud.

[166] The Defendant denies the Plaintiffs' allegations of fraud, forgery and conspiracy to defraud. It maintains that Proposal Form 171 was not forged and that Madam Ng did sign the form as witnessed by Lok and Intan Sofina.

[167] The Defendant submits that even if the court finds that Proposal Form 171 was forged (which it denied), the Plaintiffs' claims on fraud and conspiracy still cannot succeed. This is because there were material non-disclosures by Madam Ng in the SME dated 13.1.2013 which justified the Defendant's repudiation of the insurance benefits. If the critical illness benefit is not payable from the onset due to the non-disclosures in the SME, then there is no loss suffered by the Plaintiffs as a result of the alleged fraudulent scheme relating to Proposal Form 171.

[168] The Defendant argues that loss is an essential element of fraud and conspiracy claims and without proof of loss, the Plaintiffs' allegations lose their foundation.

[169] The Defendant further submits that for an agreement to defraud to exist, such agreement must have been formed before the alleged unlawful acts or losses occurred. It argues the Plaintiffs' allegation of conspiracy is illogical and unsupported by evidence. The Defendant contends it had no reason to lodge a police report about the alleged forgery

as it was the Plaintiffs' responsibility to prove the allegation. Interviewing Lok about the allegations was sufficient action taken by the Defendant.

[170] The court has found that there was no forgery of Proposal Form 171. Therefore, the Plaintiffs' case on fraud and conspiracy to defraud which is founded on the forgery of Proposal Form 171 falls.

[171] In any event, given the court's finding above on the material non-disclosure by Madam Ng to the medical Examiner, the Plaintiffs' allegations of fraud, forgery, and conspiracy to defraud are redundant and should be dismissed in their entirety. Any non-disclosures in the SME would legally justify the Defendant's repudiation of the insurance benefits, thereby negating the Plaintiffs' claims. The basis for this is that if the Critical Illness Benefit is not payable from the onset due to non-disclosures, then there is no loss suffered by the Plaintiffs as a result of the alleged fraudulent scheme.

[172] Loss is an indispensable element in establishing a claim for fraud or conspiracy to defraud. This principle is well-established in the authorities cited by the Defendant. In *Letchumanan Chettiar Alaggapan v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, the Federal Court elucidated the wide scope of fraud in civil justice at paragraph 18:

> *"Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another ... Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to."*

[173] This passage underscores that an injury to the victim is central to the conception of fraud. Similarly, Paul McGrath QC in his treatise Commercial Fraud in Civil Practice (2nd edition) explains at paragraph 1.08 that in common law, "fraud carries with it the connotation of deception or deceit leading to causation of loss."

[174] The requirement of damage is even more explicit in the tort of conspiracy. The Court of Appeal in *Renault SA v Inokom Corp Sdn Bhd* [2010] 5 MLJ 394 clearly pronounced at paragraph 32 that "damage is an essential element" to satisfy at the interlocutory stage for the tort of conspiracy.

[175] In the present case, the court has found, based on the unequivocal evidence of Dr Chan (DW2), that there were material non-disclosures by the Madam Ng in the SME dated 13.1.2013. Dr Chan testified that if he had been informed of Madam Ng's consultation with Dr Sathindren on 26.7.2012 where she presented with symptoms of numbness of tongue and lips and was diagnosed with mild neuropathy, he would have answered "yes" to questions 2(a), 4(a) and 4(b) in the SME (NOP dated 12.10.2022,

pages 232, 240-241). These non-disclosures entitled the Defendant to repudiate the policy and the critical illness benefit of RM1 million claimed by the Plaintiffs is therefore not payable irrespective of the alleged forgery of Proposal Form 171.

[176] Consequently, the Plaintiffs have not proven any loss arising from the alleged fraudulent scheme of forging the proposal form, which is the crux of their claim. If the Critical Illness Benefit is not payable from the onset due to non-disclosures, then there is no loss suffered as per the 'fraud' or 'conspiracy' as alleged by the Plaintiffs. Without establishing this essential element of loss, the Plaintiffs' claims of fraud and conspiracy to defraud collapse and must be dismissed in their entirety. As such, the Plaintiffs' failure to prove any loss is fatal to their case.

[177] The Plaintiffs' allegation that the Defendant conspired with its agent, Lok, to defraud the Plaintiffs by forging the signature on Proposal Form 171 is fundamentally flawed. This is because for an "agreement to defraud" to be established, the Plaintiffs must prove that such an agreement was formed prior to the occurrence of any alleged unlawful acts or losses. The Court of Appeal lucidly explained this requirement in *Renault SA v Inokom Corp Sdn Bhd* [supra] at paragraph 34:

> *"It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts*

are done in execution or pursuant to the agreement."

[178] In the present case, the alleged unlawful act is the forgery of Madam Ng's signature on Proposal Form 171 and the alleged loss is the Defendant's rejection of the Plaintiffs' claim for the RM1 million critical illness benefit under Policy 499. However, the Plaintiffs' contention of a conspiracy is premised on the Defendant's failure to investigate the forgery allegations and lodge a police report after the forgery and rejection of the insurance claim had allegedly occurred. This is clearly incongruous with the requirement that the agreement must precede the unlawful acts and losses.

[179] The Plaintiffs argue that the Defendant's lack of action in investigating the alleged forgery amounts to an "agreement" to defraud the Plaintiffs. With respect, this argument is untenable and incompatible with the legal conception of an agreement to conspire. An agreement to conspire cannot be inferred from an omission to act after the fact. The agreement must have been pre-formed to execute the unlawful acts which then lead to the damage. The chronology is critical. When the Plaintiffs complained of the forgery, the alleged unlawful acts and loss i.e., the signing of Proposal Form 171 and rejection of the critical illness claim had already occurred.

[180] Furthermore, the Defendant's conduct in interviewing Lok about the forgery allegations, as confirmed by the Defendant's witnesses, runs contrary to the existence of any agreement to conspire. There is simply no credible evidence of a pre-formed agreement between the Defendant and Lok to forge Proposal Form 171 and defraud the Plaintiffs. In fact, the Defendant has expressly denied the allegations of conspiracy and maintained that Proposal Form 171 was not forged.

[181] Accordingly, the Plaintiffs' attempt to establish a conspiracy to defraud against the Defendant is devoid of merit and must fail as the essential element of a pre-existing agreement to conspire has not been proven. The Plaintiffs cannot retrospectively infer a conspiracy from the Defendant's alleged inaction after the purportedly unlawful acts had occurred, as this is plainly inconsistent with the requirement laid down in *Renault SA v Inokom Corp*.

[182] Further, the court finds the Plaintiffs' allegation that the Defendant conspired with its agent, Lok, to defraud the Plaintiffs by forging Madam Ng's signature on Proposal Form 171 to be wholly unsubstantiated and illogical.

[183] Firstly, there is absolutely no credible evidence to suggest that the Defendant was complicit in or even aware of the alleged forgery by Lok. The Defendant has consistently maintained that Proposal Form 171 was not forged and that Madam Ng did in fact sign the form, as attested to by the

witnesses present, Lok (DW4) and Intan Sofina (DW5). The Plaintiffs have not adduced any concrete proof to refute this or to show the Defendant's involvement in the alleged forgery.

[184] Secondly, the Plaintiffs' contention that the Defendant should have lodged a police report when the forgery allegations surfaced is plainly misconceived. There is no logical reason or legal compulsion for the Defendant to lodge a police report in respect of an allegation which it denies and which the Plaintiffs themselves have not reported to the authorities. The evidential burden is squarely on the Plaintiffs to prove the serious allegation of forgery and it is certainly not the Defendant's obligation to make a police report to facilitate the Plaintiffs in discharging this burden. This is a fundamental principle in civil litigation. As submitted by the Defendant, "Why would the defendant lodge a police report just because the plaintiff said her signature was forged? If at all, the plaintiff herself should lodge a police report and not the defendant."

[185] Moreover, the uncontroverted evidence shows that the Defendant did take reasonable steps to look into the forgery complaint upon being notified by interviewing Lok, who maintained her denial of the forgery allegations. In the circumstances, this was sufficient and the Defendant was not obliged to play detective and conduct a full-scale investigation into an allegation it believes to be unmeritorious. The Defendant's Senior Manager, Tong

(DW6), and its underwriter, Dr Ashish (DW7), confirmed in cross-examination that other than questioning Lok, there were no further investigations. This is entirely reasonable as the forgery complaint was unsubstantiated and the Defendant is entitled to rely on its agent's account unless proven otherwise.

[186] Hence, the Plaintiffs' postulation of a conspiracy between the Defendant and Lok appears to be nothing more than bare conjecture. There is simply no objective evidence to support the existence of any agreement between the Defendant and Lok to conspire to injure the Plaintiffs through the alleged forgery. Viewed holistically, the evidence does not come close to meeting the threshold for establishing a conspiracy to defraud against the Defendant. The Plaintiffs' claim in this regard is therefore devoid of merit and must fail.

Whether if Proposal Form 171 is forged, Policy 4499 would not have come into existence and no valid insurance contract was formed.

[187] The Defendant argued that if the court finds the proposal form was indeed forged, the legal consequence is that Policy 4499 never came into existence in the first place. The Defendant submitted that a proposal form is the genesis of any policy - it is the 'offer' from the proposer to the insurer to issue the policy. It underpins the whole contractual relationship between the parties. When the Plaintiffs plead

forgery of the proposal form, the inescapable legal consequences are that there was no 'offer' from the Plaintiffs and the parties were never ad idem.

[188] On the other hand, the Plaintiffs submitted that even though Proposal Form 171 of Policy 4499 was forged, the Defendant had still issued Policy 4499 and 'offered' it to the Plaintiffs with all the terms of the insurance contract. The Plaintiffs contended that they had accepted this offer via payment of the premiums. Therefore, a contract still existed between the parties and the Defendant's repudiation of liability for Policy 4499 was wrong in law.

[189] Having already made a finding that Proposal Form 171 was not forged, this issue is now academic. Nonetheless, if I am mistaken on the non-forgery finding and for the sake of completeness, I will proceed to make a determination on this issue.

[190] Having considered the submissions of both parties, I find that the Defendant's contention on this issue holds water and should be accepted. A proposal form is undoubtedly the cornerstone of any insurance contract. It constitutes the 'offer' made by the proposer to the insurer, without which no policy can come into existence. The importance of the proposal form was expounded by the English court in *Glicksman v Lancashire and General Assurance Company*

[1925] 2 KB 593, where it was held that the proposal form is the basis of the insurance policy.

[191] The legal effect of a forged document was explained by our Court of Appeal in *Siaw Kim Seong v Siew Swee Yin* [2009] 1 MLJ 349 - a forged instrument is null and void and of no effect. Applying this principle to the present case, if Proposal Form 171 was indeed a forgery as alleged by the Plaintiffs, it would mean there was no valid 'offer' made by the Plaintiffs to the Defendant for the issuance of Policy 4499. Absent a valid offer, there can be no consensus ad idem and consequently, no binding insurance contract could have been formed between the parties.

[192] I find the Australian High Court decision in *Phoenix Assurance Co Ltd v Berechree* [1906] 3 CLR 946 to be highly instructive and persuasive. The facts of that case mirror the present dispute. The insured there instituted an action on a fire policy against the insurer. The insurer pleaded that the policy was made pursuant to a proposal form signed by the insured, but there was material non-disclosure in the proposal regarding ownership of the insured property. The insured alleged the ownership answer was altered by the insurer's agent. In finding there was in fact no contract between the parties, the Australian High Court held:

> *"Let us suppose the simple case of a letter written by A to B containing an offer to enter into a contract subject to certain terms. Before the letter reaches B*

> *it is altered by the insertion of additional terms more onerous to A. B accepts the offer contained in the letter as received by him. In this case, if no more happens, it is clear that B cannot hold A bound by the contract expressed in the documents in their existing state. In order that A may be bound it must be shown that the alteration was made by his authority, which may be proved, certainly by evidence of antecedent authority given by him to the person by whom the alteration was made, and, possibly, by evidence of ratification.*
>
> *It is clear also that B would not be bound by the offer as written by A, unless he were estopped from denying the alteration. And, since a contract must be mutual, it would seem that, as B could not sue A upon the contract contained in the altered document, so also A could not sue B upon that contract. If this is the correct view, there could not in such a case be any binding contract at all."*

[193] The legal reasoning in *Phoenix Assurance* is compelling and ought to be applied to the present case. If Proposal Form 171 was indeed forged as alleged, the Plaintiffs cannot on one hand disown the proposal form but yet seek to enforce the benefits under Policy 4499 which came into existence only by virtue of that very proposal form. There either was a proposal form or there was not. The Plaintiffs cannot have their cake and eat it too.

[194] Without a valid proposal form, there was simply no 'offer' made by the Plaintiffs to the Defendant for the formation of an insurance contract. The Plaintiffs' attempt to argue that an 'offer' was made by the Defendant when it issued the policy is misconceived, as it puts the cart before the horse. An insurer cannot make an offer to itself to issue an

insurance policy. The offer must originate from the proposer, without which there can be no acceptance by the insurer to complete the formation of a binding contract.

[195] The Plaintiffs' submission that a contract still existed despite the forgery of Proposal Form 171 because the Defendant had issued Policy 4499, offering it with all the insurance terms which the Plaintiffs accepted by paying premiums, is fundamentally flawed and cannot be accepted.

[196] It is trite law that a contract of insurance, like any other contract, can only be formed by the acceptance of an offer. The offer must be made by the party seeking insurance cover, i.e. the proposer, to the insurer. This is done via a proposal form setting out the material facts based upon which the insurer decides whether to accept the risk and if so, on what terms. The proposal form constitutes the offer which must be accepted by the insurer for a contract to arise.

[197] The Plaintiffs' contention that the Defendant had made an offer to them by issuing Policy 4499 is misconceived and and inverts the logical order. An insurer cannot make an offer to itself to provide insurance. The offer must originate from the party seeking cover. Only upon receipt of a valid proposal can the insurer decide whether to accept the risk and issue a policy on terms it deems fit. Issuance of the policy is the acceptance of the offer, not the offer itself.

[198] If, as the Plaintiffs allege, Proposal Form 171 was a forgery, there was no offer made by the Plaintiffs to the Defendant for the insurance coverage under Policy 4499. It is an oxymoron for the Plaintiffs to argue that a contract existed by virtue of a forged document. Forgery, by its very definition, means there is a lack of genuineness. A forged proposal form has no legal effect and cannot constitute a valid offer. This is consistent with section 24 of the Contracts Act 1950 which provides that a contract based on bilateral mistake is void.

[199] The Plaintiffs' act of paying premiums also does not change the legal analysis. At its highest, payment of premium is an act which constitutes acceptance of an offer. In the absence of a valid offer preceding it, acceptance cannot bring into existence a contract. It takes two hands to clap. There can be no acceptance without an offer, just as there can be no contract without the acceptance of an offer. The Plaintiffs' submission that a contract existed because premiums were paid begs the crucial question - acceptance and payment of premium for what? In the absence of a valid proposal, the short answer is nothing.

[200] The Defendant did not "offer" insurance coverage to the Plaintiffs by issuing Policy 4499. If the Plaintiff's position of foregery is correct, the Defendant had issued the policy on the mistaken belief that Proposal Form 171 was genuine and all material facts had been truthfully declared. If indeed

the proposal form was forged, the Defendant's acceptance of the risk was vitiated and no consensus ad idem arose.

[201] Support for this conclusion can be found in the *Phoenix Assurance* case. The court in *Phoenix Assurance* held that where an offer is altered without authority before it reaches the offeree, the purported acceptance of the altered offer cannot result in a binding contract, as there would be no consensus ad idem.

[202] *Phoenix Assurance* demonstrates the legal fallacy of the Plaintiffs' argument. One cannot have a contract based on a forged document, as forgery means there is no genuine offer capable of being accepted. Where an offer is altered without authority, the purported acceptance of the altered terms cannot result in a binding contract.

[203] The Plaintiffs' submission, taken to its logical conclusion, would lead to an absurd result. It would mean that a person who forges a document can rely on that forgery to enforce contractual rights. This surely cannot be right, as it violates the legal maxim of ex turpi causa non oritur actio (no action can arise from an illegal act). Forgery is a criminal offence. A forger cannot be allowed to reap legal benefit from his crime.

[204] For these reasons, I agree with the Defendant's submission that if Proposal Form 171 was indeed forged, the inescapable conclusion is that Policy 4499 never came into

legal existence. The Plaintiffs' claim for the policy benefits under a non-existent contract is therefore unsustainable and ought to be dismissed.

Conclusion

[205] Based on the foregoing analysis, this court finds that the Plaintiffs have failed to establish their case against the Defendant on all the issues raised. Firstly, the Plaintiffs have not proven on a balance of probabilities that Madam Ng's signature on Proposal Form 171 for Policy 4499 was forged. Secondly, there is insufficient evidence to show that Madam Ng had disclosed all relevant medical information to the Defendant's agent, Lok, during the proposal stage for Policy 2881. Thirdly, the court finds that there was material non-disclosure by Madam Ng to the Defendant's medical examiner, Dr Chan, regarding her previous medical consultations and symptoms, which constituted a breach of the duty of utmost good faith and provided valid grounds for the Defendant to repudiate the claims under both Policy 2881 and Policy 4499. Fourthly, in light of the finding that Proposal Form 171 was not forged, the Plaintiffs' allegations that the Defendant and its agent committed fraud, forgery or conspiracy to defraud against Madam Ng must necessarily fail. Fifthly, even assuming Proposal Form 171 was forged, Policy 4499 would not have come into legal existence and there would be no valid insurance contract to enforce.

[206] For these reasons, the Plaintiffs' claims against the Defendant are hereby dismissed in their entirety with costs of RM40,000 to be paid by the Plaintiffs to the Defendant.

25 April 2024

ATAN MUSTAFFA YUSSOF AHMAD

Judge

Kuala Lumpur High Court

(Commercial Division)

Counsel:

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