IN THE MATTER OF AN ARBITRATION PURSUANT TO THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993

BETWEEN:

EMPLOYERS' INNOVATIVE NETWORK, INC

JEFF MULLINS

Claimants

V

BRIDGEPORT BENEFITS, INC

VOLUNTARY BENEFIT SPECIALISTS, LLC

CASEY BLASMAN

WAYNE BLASMAN

STEPHEN SALINAS

First Respondents

-and-

CAPITAL SECURITY, LTD

UNIVERSAL RISK INTERMEDIARIES, INC

JEANA NORDSTROM

Second Respondents

FINAL AWARD

CLAIMANTS' COUNSEL:	**Nicholas S. Preservati and W. Randolph McGraw**
FIRST RESPONDENTS' COUNSEL:	**Kurt Entsminger and Phillip Estep**
SECOND RESPONDENTS' COUNSEL:	**Sam Stevens and Oliver Wade**

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A. INTRODUCTION

1. This arbitration concerns the issuance of a policy of insurance. The critical question for determination which permeates all aspects of the dispute is whether Employers Innovative Network entered into a contract for a fully insured policy or a self-insured policy.

2. The Claimants contend the First and Second Respondents supplied a self-insured policy disguised as a fully insured policy. The First and Second Respondents reject this contention. They firmly assert the Claimants sought a fully insured policy and the Claimants got exactly what they bargained for.

3. This dispute arises pursuant to claims referred to arbitration by the United States District Court for the Southern District of West Virginia. By agreement of the parties, the arbitration is conducted in accordance with the Uncitral Arbitration Rules presently in force and the various Procedural and Interlocutory Orders and Awards made by this tribunal since the inception of the arbitration on 9 April 2020.

4. I have previously decided the proper law of the Claimants claims in Interim Order 2 dated 2 February 2021. I adopt the findings in Interim Order 2 in this Award.

B. THE PARTIES

5. **Claimants**

Employers' Innovative Network Inc ("EIN") is a Professional Employer Organization ("PEO") operating as a limited liability company with its principal place of business in West Virginia. EIN serves as an outsourced human resources department by handling other businesses' employer benefits, regulatory compliance, and payroll outsourcing. Jeff Mullins is the President of EIN and is a resident of West Virginia.

6. **First Respondents**

Bridgeport Benefits Inc ("Bridgeport") is a California company that specialises in setting up employee benefit plans, including health insurance plans. Wayne Blasman is the President of Bridgeport. Bridgeport employed Steve Salinas from July 1, 2004, through December 31, 2018. Voluntary Benefit Specialists, LLC ("VBS") provided supplemental insurance benefits to EIN. Wayne Blasman is the manager of VBS, Casey Blasman is Wayne Blasman's son and an administrator at VBS.

7. **Second Respondents**

Capital Security, Ltd. ("CSL") is a Bermuda insurance company, and Steve Nordstrom was the President of CSL. Universal Risk Intermediaries, Inc. ("URI") is a Florida corporation operated by Jeana Nordstrom. Jeana Nordstrom became the President of CSL and URI in 2017 after the death of her husband, Steve Nordstrom.

C. THE FACTS

8. A summary of the relevant facts is conveniently set out in paragraphs 22 to 41 of the Written Submissions of the Second Respondent, which with amendments are reproduced below.

9. CSL is a Class 3 Bermuda insurer under section 4 of the Bermuda Insurance Act 1978 (as amended) and a segregated accounts company under the Segregated Accounts Companies Act 2000 (as amended). CSL was incorporated in 2007. CSL's founder and the principal was the late Steven Nordstrom.

10. URI is a marketing and consultancy company incorporated in Florida, which is associated with CSL and is a corporate vehicle through which CSL and Steven Nordstrom marketed alternative risk transfer structures, including segregated cell accounts.

11. Jeana Nordstrom is the wife of the late Mr Nordstrom. Mrs Nordstrom held positions within both CSL and URI during Mr Nordstrom's lifetime but was only engaged in administrative roles and had no involvement with either the Claimant or the EIN SCCP until after Mr Nordstrom's death on April 5, 2017.

12. From at least 2014 onwards, Mr Mullins developed an interest in captive insurance arrangements and the commercial benefits of such arrangements. Mr Mullins is also a former West Virginia state senator. During his tenure in the state senate, Mr Mullins was a member of both the senate's Finance and Banking and Insurance Committees. Mr Mullins also served as the Chair of the Banking and Insurance Committee. Mr Mullins was involved in lobbying for and drafting amendments to the laws of West Virginia as they pertained to PEOs and captive insurance. Mr Mullins sought alternative ways of providing EIN's clients with a group healthcare plan and actively pursued a captive arrangement through Mr Nordstrom.

13. The Claimants first became involved with Mr Nordstrom in approximately 2014. Mr Mullins began communicating with Mr Nordstrom with respect to EIN's insurance needs in or about March 19, 2014, as Mr Mullins signed a request for assistance with

URI with respect to EIN's workers' compensation plan. Mr Nordstrom also attended a meeting with others at EIN's offices. On May 28, 2014, an article on the Bermuda Segregated Accounts Companies Act 2000 (SACA) was forwarded to Mr Mullins and EIN Chief Financial Officer Gary Bowling.

14. At some point, before January 1, 2015, EIN was marketing a segregated account rent-a-captive solution to its clients. Mr Mullins and Mr Nordstrom began discussing potential plans to develop a captive program for EIN again in late 2015 and early 2016.

15. CSL engaged Bridgeport and its representatives Steve Salinas and Wayne Blasman, who, were expert brokers experienced in the arrangement of health benefits plans.

16. Having spoken to Mr Mullins and Ms Brooks, Mr Nordstrom provided promotional materials on behalf of CSL and URI, which explained the potential benefits of maximising investment returns and tax advantages through a Bermuda segregated account program, and also that CSL worked with R & Q Quest, a licenced insurance manager in Bermuda. On December 31, 2015, Mr Mullins sent an email to Mr Nordstrom in which he said he wished to speak about "*a health captive*" and asked, *"[h]ow quick we can do it*?".

17. On February 6, 2016, Ms Brooks asked Mr Nordstrom if he could speak to her and Mr Mullins about captives, and those individuals' held discussions on February 8, 2016, and February 10, 2016.

18. Mr Nordstrom had also contacted Bridgeport Benefits in January 2016 and advised that CSL was in discussion with the Claimants about the prospect of developing a Bermuda segregated account for EIN's healthcare benefit plan.

19. While Mr Mullins remained appointed to the state senate in West Virginia, a draft bill had been introduced into the senate: West Virginia Senate Bill 465. Mr Mullins was involved with the drafting of this bill. The bill's primary purpose was to limit the prohibition on West Virginia PEOs insuring risks through captive insurance structures. Mr Mullins discussed the bill before and after it was passed with, amongst others, Mr Nordstrom and Mr Mullins' attorneys at Spilman Thomas & Bale. On February 10,

2016, Mr Mullins sent: (i) a detailed email discussion on the draft West Virginia Senate Bill 465; and (ii) a detailed report from AON Consulting entitled "*Employee Benefits Captives - Their Role in Managing Enterprise Risk*" to Ms Brooks and Mr Nordstrom. The bill was passed unanimously by the West Virginia Senate on March 12, 2016.

20. In August 2016, further discussions were held between Mr Nordstrom and Mr Mullins, along with EIN's attorneys, Spilman Thomas & Bale, concerning the captive structure sought by Mr Mullins for the Plan in the 2017 year. By September 2016, the Claimants were reviewing, discussing and amending the contractual terms of the EIN SCCP.

21. In addition to the Client Service Agreement ("CSA"), the EIN SCCP's contracts included the Contractual Liability Reimbursement Policy (' the Policy or CLRP") and the Excess Loss Insurance Policy ("Stop Loss Policy"). The Policy was drafted by R&Q Quest Insurance Limited, which company was to provide Mr Mullins with another segregated cell account that would reinsure the liabilities of Mr Mullins' segregated cell account within CSL. The Policy would insure EIN, as the policyholder, regarding the risks of its Plan for 2017. CSL would issue the Policy to EIN for and on behalf of the EIN Segregated Account. The CSA would incorporate the terms of the Policy, and thus those documents would be read together and form part of the same contractual arrangement.

22. The Stop Loss Policy was procured on behalf of CSL by Bridgeport, URI and Mike Tate. Mr Nordstrom sought the assistance of Bridgeport as they had experience in employee healthcare plans and the procurement of excess loss insurance policies. Bridgeport, in turn, approached Mr Tate to assist with procuring the Stop Loss Policy. Mr Tate subsequently introduced Bridgeport to Capitol Administrators and Capitol Administrator's then-parent company Lucent Health. Capitol Administrators would later be appointed to provide third party administration services to CSL so that, in effect, responsibility for the administration of the EIN SCCP (including the payment of claims under the Plan) was passed to Capitol Administrators.

23. A final version of the CSA, which referenced both the incorporation of the Policy and the parties' respective liabilities, was signed by Mr Mullins on November 17, 2016. However, this version was subsequently amended between the parties to reflect the

fact that Mr Mullins would own the EIN segregated cell, as opposed to EIN. The Policy was signed by Mr Nordstrom and sent to Mr Mullins on December 18, 2016, and December 22, 2016, and Mr Mullins signed it after that with the date December 18 2016. The amended version of the CSA was sent to Mr Mullins on January 7, 2017, and was signed by Mr Nordstrom, Mr Mullins and Oceana Yates of R & Q Quest Limited in January 2017.

24. On November 22, 2016, Mr Nordstrom provided a letter to Mr Mullins stating that a fully insured policy "with the limits thereof" had been placed for EIN. When this was sent to Mr Mullins, Mr Nordstrom asked in the email to which the letter was attached if the letter would "*serve [Mr Mullins'] need*". Mr Mullins replied, "*Perfect*".

25. The EIN SCCP was incepted on January 1, 2017. At that time, Mrs Nordstrom had no involvement with the EIN SCCP. CSL subsequently entered into an Administration Agreement with Capitol Administrators for the outsourced administration of the EIN SCCP.

26. There were two versions of this agreement signed between the contracting parties. The first was signed by CSL and Capitol Administrators by January 24, 2017. It was sent to Mr Mullins and Ms Brooks by Mr Nordstrom on February 22, 2017. The version of the agreement attached to this email stated in the recitals that "*The Insurer offers a fully insured, properly registered and licenced with the EIN Segregate [sic] Account, in Bermuda, which is the sponsor of the fully insured Contractual Liability healthcare plan* ..." which language was inserted by Mr Nordstrom. Mr Nordstrom then participated in a call with Mr Mullins and, Ms Brooks, on March 2, 2017. After that phone call, the Administration Agreement was revised and re-signed.

27. The revised version of the Administration Agreement included EIN as a party to agree to specific provisions in the contract and included amended recitals which stated that "*The Insurer offers a fully insured, properly registered and licensed under the laws of West Virginia, group health insurance to Employers' Innovative Network, LLC ... which is the sponsor of a fully insured employee healthcare plan.*" By this time, Mr Nordstrom had been diagnosed with advanced throat cancer and died in hospital on April 5, 2017.

28. After this time, Mrs Nordstrom first became involved and received direct contact from Mr Mullins and Ms Brooks concerning the operation and administration of the EIN SCCP. Mr Mullins had been investigating the possibility of appointing a replacement third party administrator for the EIN SCCP. Mrs Nordstrom was asked to participate in these amendments to the EIN SCCP, but by May 7, 2017, Mr Mullins had decided to terminate the EIN SCCP Contractual structure of the EIN SCCP.

D. THE CONTRACTUAL ARRANGEMENTS BETWEEN THE PARTIES

29. A critical feature of the dispute between the Parties is the contrary interpretations each Party places on the structure of their contractual arrangements. The Claimants essentially assert they entered into agreements to purchase a group health insurance policy with the 1st and 2nd Respondents. In paragraph 4. b of their Defence, the 2nd Respondents contend the Claimants agreed to enter into an alternative risk financing mechanism known as a Segregated Cell Captive Program ("SCCP") using two separate companies in Bermuda registered (i) as Class 3 insurers under the Insurance Act 1978 (as amended); and (ii) as segregated accounts companies under the Segregated Accounts Companies Act 2000 (as amended) (the "SACA").

30. In the Interim Order NO.2, dated February 2, 2021, I set out the contractual arrangements between the parties, reproduced below for ease of reference.

(I) The Client Service Agreement

31. The Client Service Agreement dated January 1, 2017 (the "CSA") was entered into by Jeff Mullins acting in respect of its segregated account designated as "EIN Segregated Account") and R&Q Quest Insurance Limited (Quest) (acting in respect of its segregated account designated as "EIN Segregated Account"). The CSA contains the arbitration agreement under which the United States District Court for the Southern District of Virginia referred this matter to arbitration in Bermuda.

32. The CSA refers to two segregated accounts in Bermuda, one created by and linked to CSL (the "CSL EIN Segregated Account") and one created by and linked to Quest (the "Quest EIN Segregated Account"), both of which were managed for and on behalf of

Mr Mullins, who was the "account owner" (as such term is defined by the SACA) of both.

33. The first two recitals on page 1 of the CSA set out the contractual arrangement between the Parties:

> *"WHEREAS the COMPANY (No distinction is drawn between CSL and Quest in the definition of "Company" in the CSA) is registered as segregated accounts COMPANY and has created a segregated account designated as "EIN SEGREGATED ACCOUNT" (the "SEGREGATED ACCOUNT") as a segregated account pursuant to SACA and J. MULLIN is the account owner of the SEGREGATED ACCOUNT; and*
>
> *WHEREAS J. MULLIN has requested CAPITAL SECURITY LTD on behalf of the SEGREGATED ACCOUNT, to issue a Contractual Liability Reimbursement Policy (hereinafter called the "Policy" which is attached hereto and made a part hereof) to Employers' Innovative Network, LLC, for the purposes of insuring certain risks of Employers' Innovative Network, LLC and then reinsure the policy with the R&Q Quest Insurance Limited Segregated Account for the purposes of participating in the underwriting results and investment earnings generated on premium funds invested...".*

34. The CSA contains the following defined terms and clauses:

> *Policy*
>
> *"The Contractual Liability Policy issued by the COMPANY, on behalf of the SEGREGATED ACCOUNT to Employers' Innovative Network LLC and any amendment thereto or replacement policy."*
>
> *"2. SEGREGATION OF RIGHTS AND LIABILITIES*
>
> *a. The AGREEMENT shall be deemed the governing instrument (as defined under the SACA) in respect of the SEGREGATED ACCOUNT and binding on*

the COMPANY and J. MULLIN as the sole account owner ... To the extent that there is any conflict between the AGREEMENT and any other agreements or documents affecting the rights, obligations and interests of the parties hereto, the AGREEMENT shall prevail.

(II) The Contractual Liability Reimbursement Policy

35. The Contractual Liability Reimbursement Policy (the "CLRP") was attached to and formed part of the CSA. The insured under the CLRP was the Claimant Employers' Innovative Network, LLC ("EIN") and the insurer was "Capital Security Ltd" for and on behalf of the EIN Segregated Account" (defined in the CLRP as the "Company"). The type of Protection was defined in the CLRP as "Contractual Liability Reimbursement Policy to insure Losses incurred under the [EIN] Employee Benefit Plan." The "Benefit Period" under the Policy was from January 1, 2017 "until cancelled."

(III) The Excess Loss Insurance Policy

36. The Excess Loss Insurance Policy (the "Stop-Loss Policy") effective January 1, 2017, sat on top of the CLRP in the Employers Innovative Network Segregated Cell Captive Program, (EIN SCCP"). The Stop-Loss Policy was between CSL for and on behalf of the EIN Segregated Account as the policyholder, and the United States Fire Insurance Company (the "Stop Loss Insurer").

(IV) The Reinsurance Agreement

37. As stated in the second recital of the CSA, the CLRP was reinsured by Quest (acting in respect of the Quest EIN Segregated Account). Mr Mullins was also the "account owner" of the Quest EIN Segregated Account. The Reinsurance Agreement is dated January 23, 2016 (the "Reinsurance Agreement") and is between "R&Q Quest Insurance Limited for and on behalf of the EIN Segregated Account" (the "Reinsurer") and "CSL for and on behalf of the EIN Segregated Account".

(V) Administration Agreement

38. CSL exercised its discretion under the CLRP (and with Quest's approval under the terms of the Reinsurance Agreement) to appoint a Third-Party Administrator ("TPA") to provide administration services to the EIN SCCP on a day-to-day basis for and on behalf of the CSL EIN Segregated Account. The Third-Party Administration Agreement (the "TPAA") is dated January 1, 2017, and is between CSL, Capitol Administrators, Inc and EIN.

E. THE PLEADED CLAIMS

39. The following claims have been referred to this arbitration for resolution by the United States District Court for the Southern District of West Virginia in the Claimants' Statement of Claim.

1. Violation of the Unauthorised Insurers Act: W.Va. Code §33-44-1, et seq on the basis that the First and Second Respondents are "unauthorised insurers" pursuant to W.Va. Code § 33-44-3(q) because they engaged in the transaction of insurance in West Virginia without a license, or because they assisted another entity in the transaction of insurance in West Virginia without a license. As "unauthorised insurers," the First and Second Respondents engaged in the unlawful transaction of insurance in Violation of W.Va. Code § 33-44-4. The Claimants' Statement of Claim allege the Claimants are entitled to civil relief which includes, but is not limited to:

   A. Contract damages (W.Va. Code § 33-44-8(c)(1);
   B. Simple interest at a rate of prime plus one percent on the total amount awarded as restitution, accruing from the date payment was due (W.Va. Code § 33-44-(c)(2);
   C. The payment of reasonable attorney's fees because the Respondents' failure to make payments was without reasonable cause (W.Va. Code § 33-44-8(c)(3);
   and

D. The payment of punitive damages because the Respondents' failure to make payments was willful, wanton and malicious (W.Va. Code § 33-44-8(c)(4).

2. Negligence: Bridgeport Benefits, URI, Capital Security, Mr Salinas, and Mr Wayne Blasman owed the Plaintiffs a duty of care related to the underwriting of the Policy, the design of the overall insurance plan that was contemplated to fully insure the EIN Employee Benefit Plan, the procurement of the Policy and the Stop-Loss Policy, and the administration of claims submitted pursuant to the EIN Employee Benefit Plan. The Respondents breached the aforementioned duties to Claimants as a result of their grossly negligent, willful and wanton conduct.

3. Breach of Contract: EIN and CSL entered in a contract for the provision of insurance in which CSL was to fully insure EIN's Employee Benefit Plan. Capital Security breached the terms of the contract and failed to fully insure the EIN Employee Benefit Plan.

4. Fraud in the Inducement: Bridgeport Benefits, Capital Security, URI, Mr Salinas, Mr Nordstrom and Mr Wayne Blasman falsely and fraudulently represented to the Claimants that they were placing a fully insured policy to cover all of the claims submitted under the EIN Employee Benefit Plan and that EIN's only liability would be the payment of monthly premiums. Claimants justifiably relied upon these false and fraudulent representations that were material to EIN's decision to enter into the Policy.

5. Civil Conspiracy: All Respondents, through concerted actions, devised a plan to obtain financial gain to the detriment of EIN by engaging in fraud, the unauthorised transactions of insurance, and other unlawful acts. In furtherance of the conspiracy, the Respondents did engage in overt acts of fraud, the unauthorised transactions of insurance, and other tortious and unlawful acts.

6. Declaratory Judgment: Claimants seek a declaratory judgment on the following issues:

A. CSL provided EIN a fully insured insurance policy to cover the claims submitted pursuant to the EIN Employee Benefit Plan;

B. CSL is responsible for funding all claims submitted to Capitol Administrators for payment pursuant to the EIN Employee Benefit Plan;

C. EIN is not responsible for funding the claims submitted to Capitol Administrators for payment pursuant to the EIN Employee Benefit Plan other than its obligation to pay the monthly premiums, which it has done;

D. CSL is obligated to reimburse Claimants all amounts they have provided Capitol Administrators for payment of claims other than the monthly premiums remitted by EIN.

7. Damages in the sum of $53,764,720.40 from the Respondents jointly and severally, in addition to the currently undetermined attorneys' fees and cost, pre-judgment interest and post-judgment interest.

F. EVIDENCE ADDUCED AT THE HEARING

40. The final hearing took place on the 8 March through to the 12 March 2021 and the 29 and 30 April 2021. The parties relied upon documentary evidence filed in support of their respective cases. The tribunal also heard fact evidence from Mr Mullins and Kristina Brooks on behalf of the Claimants, Mr Salinas on behalf of the First Respondents and Mrs Nordstrom on behalf of the Second Respondents, all of whom were cross examined.

41. The Claimants relied upon the witness statements of the following additional witnesses, Gary Bowling, Hope Connard, Ramona Adams and Andrea Mullins. I have taken note of their evidence. However, these witnesses were not tendered for cross-examination. Accordingly, although I have considered their evidence, I have not given the evidence of witnesses not tendered for cross-examination the same weight as those subjected to cross-examination.

42. I have referred to relevant portions of the documentary evidence, witness statements, and the live evidence of witnesses who appeared before the tribunal when considering each of the Claimant's claims, the First and Second Respondents replies to each claim and my findings.

43. The Claimants and the Second Respondents each produced expert reports. The Claimants relied upon the expert report of William J. Kropkof, President, Erisa Advisory Group. The Second Respondents relied upon the expert report of Andrew McComb. At the final hearing, Mr Kropkof and Mr McComb were both certified as experts qualified to assist the tribunal with expert evidence on specific questions agreed between the parties.

44. Significantly, following a period of mutual consultation, on 12 February 2021, both experts signed a Joint Expert Witness Report, the entire content of which is reproduced below.

JOINT EXPERT WITNESS REPORT OF
WILLIAM J KROPKOF AND ANDREW MCCOMB

We, the undersigned, are the experts appointed by the Claimants and the Second Respondents in the above-titled arbitration, in accordance with paragraph 3 of the procedural order dated 10 December 2020.

This is a statement provided by us in accordance with paragraph 4 of the procedural order dated 10 December 2020

We had a Zoom video call discussion on 11 February 2021, during which we consulted on the contents of our respective expert reports, both dated 5 February 2021.

We are agreed on the following facts and issues, as set out in our reports:

1.	*Under a fully-insured group health plan, the employer pays a premium to an insurer (or insurance carrier)*
2.	*Under a fully-insured group health plan, the premium rates are normally fixed for a year, based on the number of employees enrolled in the plan each month.*
3.	*Under a fully-insured group health plan, the insurer collects the premium and assumes the responsibility for paying claims falling within the insured coverage benefits detailed in the insurance policy.*

4.	*Under a fully-insured group health plan, the employer policyholder has no requirement to make further payments to the insurer should its claims exceed the premiums paid.*
5.	*Under a self-insured group health plan, an employer assumes the financial risk for providing health care benefits to its employees.*
6.	*Under a self-insured group health plan, a self-insured employer will often set up a trust to hold company and employee contributions to pay claims. The employer pays all claims as they arise from the trust or corporation assets irrespective of the quantum of claims.*
7.	*Under a self-insured group health plan most self-insured employers will usually purchase some form of stop loss coverage to limit their exposure to catastrophic claims.*
8.	*Capital Security Ltd. Is a segregated accounts company that "rents" segregated cells to its clients.*
9.	*The provisions in the Contractual Liability Reimbursement Policy support a view that there was a fully-insured plan.*
10.	*A segregated accounts company's cell (or its creditors) is not able to make claims against the assets of other cells, or the general assets of the segregated accounts company, for the purposes of satisfying the cell's obligations under an insurance policy.*
11.	*Capital Security Ltd. entered into contracts such as the Contractual Liability Reimbursement Policy for an on behalf of the EIN segregated cell.*
12.	*EIN purchased a guaranteed cost insurance policy, where it paid a fixed premium to cover all claims up to USD 250,000 per claimant. EIN itself had no further liability beyond the premium it was obliged to pay under the EIN Policy and EIN was therefore fully insured.*

Signed:

William J Kropkof *Andrew McComb*

Date 12 February, 2021 *Date 12 February, 2021*

45. Mr Kropkof and Mr McComb both gave evidence and were cross examined at the final hearing. On the 30 April 2021, the final day of the evidential hearing, Mr Kropkof resiled

from the position he took in the Joint Expert Witness Report. Mr Kropkof no longer accepted that (i) the terms of the Policy support the view that there was a fully insured plan in place and (ii) EIN was fully insured. Unfortunately, Mr McComb was given no notice that Mr. Kropkof intended to change the opinion he expressed on the 12 February 2021 before the 30 April 2021.

46. I have considered the evidence of the experts. I prefer the evidence of Mr McComb, particularly on the crucial questions, namely whether the terms of the Policy support the argument that there was a fully insured plan in place and whether EIN was fully insured. Mr McComb had a wealth of experience in the Bermuda captive insurance market managing and operating segregated accounts companies and was more familiar than Mr Kropkof with the structure and meaning of the contractual arrangements between the parties. Further, I was not convinced by Mr Kropkof's explanation for the abrupt change of his expert opinion.

G. BREACH OF WEST VIRGINIA CODE SECTION 33-44 (UNAUTHORISED INSURERS ACT)

(I) The Claimant's Submissions

47. In paragraphs 133-244 of the undated Submission of Law and Fact, the Claimants identify instances in which the Respondents committed unauthorised acts of insurance.

48. The Claimants allege the Respondents transacted insurance business by: (a) making the insurance contract, (b) receiving or collecting any premium, commission dues or other consideration, (c) solicitation, negotiation, procurement or effectuation of insurance, (d) adjustment of claims, (e) offering insurance and (f) assisting a person or insurer in the transaction of insurance in any other manner.

49. They further allege the Respondents were unauthorised insurers, and CSL issued an unlawful insurance contract to EIN with the assistance of the other Respondents.

50. The Claimants' supplement the above allegations with facts from the arbitration proceedings. Notably, the Claimants' alleged in paragraph 302 of the undated Submission of Law and Fact that CSL's counsel admitted CSL was an unauthorised insurer under the West Virginia Unauthorised Insurance Act.

51. In paragraph 309 of the undated Submission of Law and Fact, the Claimants' assert CSL admitted it was an unauthorised insurer; therefore, the remaining Respondents are also liable under the West Virginia legislation because they assisted an Unauthorised insurer. Further, Mrs Nordstrom assisted CSL by overseeing the EIN Benefit Plan on behalf of CSL while acting in her individual capacity and without being appointed as President by the CSL Board. Accordingly, she together, with all Respondents, are liable to EIN as unauthorised insurers under the Act.

52. And in paragraphs 318 and 319 of the undated Submission of Law and Fact the Claimants' assert:

> *"318. According to W.Va. §33-31-2, any such captive company insuring a PEO's health benefit plan "must maintain its principal place of business in West Virginia" or limit its insurance of risks to those risks of its parent, affiliated or controlled businesses.*
> *319. This is important because Capital Security cannot meet the requirements of W.Va. §33-31-2. It does not have its principal place of business in West Virginia. As such, if it is going to insure the health benefit plan of a PEO located in West Virginia, that PEO must be its parent company or one of its affiliated or controlled companies. EIN is none of those. Therefore, as a captive company, Capital Security is not permitted to insure EIN's Health Benefit Plan under West Virginia law unless it does so as an approved insurer and in a fully-insured capacity."*

(II) First Respondents' Submissions

53. The First Respondents reply to the Claimant's case regarding breaches of the West Virginia Insurance Code is set out in paragraphs 42 to 46 of the First Respondents Closing Submissions:

" 42.In paragraph 60 (a) of their Article 20 Statement of Claims, Claimants erroneously assert that "all claimants" are "unauthorised insurers" under West Virginia Code §33-44-3(q).

43. Contrary to Claimant's initial allegations, Voluntary Benefits Specialists, LLC (VBS) was properly licensed to transact insurance business in West Virginia and lawfully issued to EIN a supplemental benefits policy against which no claims have been asserted in this case. Although Claimants had refused to stipulate that VBS was duly licensed in West Virginia in advance of the hearing, this fact was effectively stipulated by Claimant's counsel during Mr Mullins testimony. TR pp. 442-443. Therefore, VBS cannot be properly accused of violating West Virginia Code §33-44-1 et seq., which prohibits the unauthorised practice of insurance in West Virginia.

44. Bridgeport Benefits, Wayne Blasman, and Steve Salinas concede they were not licensed to transact insurance business in West Virginia. However, Bridgeport Benefits, Wayne Blasman and Steve Salinas did not violate West Virginia Code § 33-44-1 et seq. because these First Respondents did not issue any insurance policies to Claimants, nor did they otherwise transact insurance in West Virginia.

45. The only transaction of insurance undertaken by First Respondents in connection with the EIN SCCP was to procure the Stop Loss Policy dated January 1, 2017. Bundle 10, pp. 003215-3232. That policy was procured for Capital Security, for an on behalf of the EIN Segregated Account, and reflects on its face that it was delivered in Bermuda. Mr Mullins conceded that no claim was being asserted by Claimants that First Respondents violated West Virginia law in connection with procuring that policy. TR. p. 445.

46. The other reason the cited West Virginia statute has no application to First Respondents is because there is no allegation by Claimants that First Respondents failed to make any payments to them under a contract. The civil remedies provided under West Virginia Code §33-44-8 apply only in the

specific instances in which "the unauthorised insurer has failed to make a payment in accordance with the terms of the contract."

(III) Second Respondents' Submissions

54. The Second Respondents' submissions in response to the allegation that they breached the West Virginia Insurance Code are contained in paragraphs 146-149 of their Written Submissions.

"146. The first point to make is that CSL did not owe any contractual duties to Mr Mullins under the Policy (as Mr Mullins was not a party to that contract). So even if it could be said that CSL was an unauthorised insurer under the UIA and failed to make payments to EIN in accordance with the terms of the Policy, Mr Mullins would not have a personal right in those circumstances to recover civil damages under Section ss-44-8(c). As a result, Mr Mullins' claim pursuant to the UIA should be dismissed.

147. As to EIN's claim against CSL under the UIA:

147.1 It is conceded that, pursuant to the broad provisions of the UIA, by issuing the Policy to EIN for and on behalf of the EIN Segregated Account CSL did enter into a transaction of insurance (as defined) in West Virginia without the requisite licence, and was therefore an "unauthorised insurer" for the purposes of the UIA.

147.2 There is of course no evidence that the Claimants themselves, their West Virginia legal representatives or EIN's West Virginia insurance broker raised CSL's unlicensed status as an issue during the discussions and negotiations leading up to the inception of the insurance cover. In fact there is evidence that Mr Nordstrom was explicitly clear with Mr Mullins that CSL was licensed by the Bermuda Monetary Authority.

147.3 However, the Claimants' pleading at paragraph 60a. of the Statement of Claim is wrong to suggest civil liability attaches to CSL simply because it was

an unauthorised insurer under the UIA. For that to happen, pursuant to Section 33-44-8(c) EIN has to prove that CSL failed to pay claims in accordance with the terms of the Policy. CSL met all of its obligations to EIN under the Policy because (inter alia) CSL's liability to pay any claims submitted under the Plan was strictly limited to the assets held in or linked to the EIN Segregated Account owned by Mr Mullins. To the extent there was a higher value of claims submitted than there were assets held in or linked to the EIN Segregated Account, under the terms of the Policy CSL had no obligation to pay those excess claims. EIN is not therefore entitled to recover any civil damages under Section 33-44-8(c) from CSL.

147.4 In the alternative, if contrary to CSL's primary position the Tribunal finds that CSL is liable to pay EIN damages pursuant to Section 33-44-8(c) then CSL relies for reimbursement of those damages on the contractual indemnity provided by Mr Mullins at clause 7 a. of the CSA, in which Mr Mullins agreed to "indemnify and hold harmless [CSL] against all liability, loss and expense incurred by [CSL] arising out of [the CSA] and [the Policy] other than those losses due to the gross negligence of [CSL]."

148. As to EIN's claim against URI under the UIA:

148.1 It is denied that URI is an unauthorised insurer under the UIA because it did not enter into a transaction of insurance in West Virginia and neither did it assist in the unauthorised transaction of insurance in West Virginia by introducing Mr Mullins to CSL, or by assisting Bridgeport to obtain the Stop Loss Policy. In relation to the Stop Loss Policy, it should be noted that the named Policyholder is "Capital Security Ltd For and on behalf of the EIN Segregated Account", not the West Virginia insured EIN, and the "State of Delivery" of the Stop Loss Policy is stated to be Bermuda.

148.2 In the alternative, in the event the Tribunal finds that URI was an unauthorised insurer and did assist with the unauthorised transaction of insurance in West Virginia then URI is not liable to EIN for civil damages under the UIA because URI has not "failed to make payment in accordance with the

terms of the contract". This is because URI is not a party to the Policy (and therefore owed no obligations to EIN under that contract). Consistent with this, it is submitted that the self-evident purpose of the civil relief available under Section 33-44-8(c) (which is identical to the civil relief available to an insured under West Virginia law for breach of a lawfully issued policy- Hayseeds, Inc. v State Farm Fire & Casualty, 177 W. Va. 323, 352 S.E.2d 73 (1986)) is to require the unauthorised insurer that is a party to the relevant policy to pay its insured what it is required to pay under the terms of the policy (plus simple interest), and to further sanction that unauthorised insurer if it is shown that it breached its obligations under the Policy "without reasonable cause" or in a manner that was "wilful, wanton and malicious".

148.3 In the alternative, if the Tribunal does not accept this proposition and holds that URI can be held liable to EIN under Section 33-44-8(c) of the UIA notwithstanding that URI is not a party to any contract of insurance, then URI is not liable because CSL fulfilled its obligations to EIN under the Policy.

149. As to EIN's claim against Mrs. Nordstrom under the UIA:

149.1 It is denied that Mrs. Nordstrom entered into an unauthorised transaction of insurance in West Virginia or assisted in the unauthorised transaction of insurance in West Virginia. It is common ground that Mrs. Nordstrom was not involved in any capacity with the negotiation and design of the EIN SCCP. Consistent with this, Mrs. Nordstrom did not send or receive, and nor was she copied into, any correspondence concerning the EIN SCCP prior to its inception on January 1, 2017, and neither did she attend any meetings with representatives from EIN, Bridgeport or Capitol Administrators at which the EIN SCCP was discussed. While she was forced by the circumstances of her husband's declining health and eventual death between February and April 2017 to start familiarising and involving herself in the day-to-day business affairs of CSL and URI, none of her activities and interactions with Mr Mullins in early 2017 and thereafter amounted to assisting with the unauthorised transaction of insurance in West Virginia.

149.2 In the alternative, in the event the Tribunal finds that Mrs. Nordstrom was an unauthorised insurer under the UIA and did assist with the unauthorised transaction of insurance in West Virginia then Mrs. Nordstrom is not liable to EIN for civil damages under Section 33-44-8(c) for the same reasons URI is not liable under that section (as explained at paragraph 148.2 above.

149.3 In the alternative, if the Tribunal does not accept this proposition and holds that Mrs. Nordstrom can be held liable to EIN under Section 33-44-8(c) of the UIA notwithstanding that Mrs. Nordstrom is not a party to any contract of insurance, then Mrs. Nordstrom is not liable because CSL fulfilled its obligations to EIN under the Policy.

(IV) The Law

55. Section 33-44-4 (a)-(c) of the UIA states as follows:

"(a) It is unlawful for any person to engage in any act which constitutes the transaction of insurance under the provisions of this article unless authorised by a license in force pursuant to the laws of this state, or unless exempted by the insurance laws of this state. Any person or insurer engaged in any act which constitutes the unauthorised transaction of insurance shall be subject to the provisions contained in chapter thirty-three of the code and the provisions and penalties set forth in this article.

(b) It is unlawful for any person to, directly or indirectly, represent, aid, counsel, opine, administer, assist in any manner or capacity or otherwise act as an agent for or on behalf of an unauthorised insurer in the unauthorised transaction of insurance. Any person who represents, aids or assists, in any manner or capacity, an unauthorised insurer in violation of this article shall be subject to the provisions and penalties set forth in this article.

(c) An unauthorised insurer shall be bound by the terms of the insurance contract, certificate or agreement as if the contract, certificate or agreement were legally procured under the insurance laws of this state."

"Insurer" means" any person engaged in the transaction of insurance" (Section 33-44-3(h).

"Insurance" means "a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies."

"Person" means "any natural person or entity, including, but not limited to, individuals, partnerships, associations, bona fide associations, trusts, trustees, companies, insurers, unauthorised insurers, organisations, societies, reciprocals, syndicates, administrators, third-party administrators, agents, producers, advertisers, customer service representatives, promoters, officers, directors, lawyers, incorporators or any other legal entity." (Section 33-44-3(j)

"Transaction of insurance" means "any of the following acts in this state effected by mail or otherwise is considered to constitute the transaction of an insurance business in or from this state:

(1) The making of or proposing to make an insurance contract;
(2) The making of or proposing to make, as guarantor or surety, any contract of guaranty or suretyship as a vocation and not merely incidental to any other legitimate business or activity of the guarantor or surety;
(3) The taking or receiving of an application for insurance;
(4) The receiving or collection of any premium, commission, membership fees, assessments, dues or other consideration required for obtaining or renewing insurance;
(5) The issuance or delivery in this state of certificates or contacts of insurance to residents of this state or to persons authorised to do business in this state;
(6) The solicitation, negotiation, procurement or effectuation of insurance or renewals thereof;
(7) The dissemination of information as to coverage or rates, or forwarding of applications, or delivery of policies or contracts, or inspection of risks,

the fixing of rates or investigation or adjustment of claims or losses or the transaction of matters subsequent to effectuation of the contract and arising out of it, or any other manner of representing or assisting a person or insurer in the transaction of insurance with respect to any risk or exposure located or to be performed in this state;

(8) The transaction of any kind of insurance business specifically recognised as transacting an insurance business within the meaning of the statutes relating to insurance;

(9) The offering of insurance or the transacting of insurance business; or

(10) Offering an agreement or contract which purports to alter, amend or void coverage of an insurance contract."

"Unauthorised Insurer" means "a person or insurer engaged in the transaction of insurance without a license in force pursuant to the laws of this state unless exempted by the insurance laws of this state, or any person assisting an unauthorised insurer."

56. Under the UIA an unauthorised insurer which has entered into a transaction of insurance in West Virginia is, notwithstanding the fact that it was not authorised to transact insurance in the state, still obliged to fulfil its contractual obligations to its insured pursuant to Section 33-44 8(a) of the Unauthorised Insurance Act.

57. In the event of a breach of the UIA, an unauthorised insurer can be subject to civil liability, but only if it is proved that the unauthorised insurer failed to indemnify the insured in accordance with the terms of the relevant insurance contract. Section 33-44-8 (c) of the Unauthorised Insurance Act.

(V) Findings in Respect of the Claims Under the West Virginia Unauthorised Act

58. I do not accept the Claimants' claim that the First Respondents breached various provisions of the West Virginia Code by committing unauthorised acts of insurance. The written evidence disclosed by the parties and, equally importantly, the live evidence adduced at the final hearing discloses that VBS was properly licenced to

transact insurance business in West Virginia and lawfully issued EIN a supplemental benefits policy. Mr Mullins admitted this fact during his testimony.

59. The Claimants did not adduce evidence supporting the contention that Bridgeport, Steve Salinas and Wayne Blasman issued any insurance policies to the Claimants or transacted insurance business in West Virginia. The First Respondent did procure the Stop Loss Policy for and on behalf of the EIN Segregated Account, which stipulates delivery in Bermuda. Mr Mullins agreed with the statement that the First Respondent's participation in arranging the Stop Loss Policy did not violate West Virginia law.

60. For the above reasons, I reject the Claimants' claims against the First Respondent under the West Virginia Code sections 33-44 Unauthorised Insurers Act.

61. Turning to the Second Respondent, the first point to consider is the structure of the contractual arrangements between the parties. CSL did not owe Mr Mullins any contractual duties under the Policy because Mr Mullins was not a party to that contract. For this reason, I find that Mr Mullins cannot maintain an action to recover civil damages under sections 44-48 (c) of the West Virginia Unauthorised Insurers Act.

62. In paragraph 60. a of the Statement of Claim, the Claimants assert that civil liability attaches to CSL because, as conceded by CSL, by issuing the CLRP to EIN for and on behalf of the Segregated Accounts, CSL did enter into a transaction of insurance without a licence contrary to the provisions of the West Virginia Unauthorised Insurers Act. However, this assertion fails to take into account two factors. First, the Claimants must establish that CSL breached the provisions of section 33-44- 8 (c) of the West Virginia Unauthorised Insurers Act by failing to pay claims under the terms of the CLRP. Second, consistent with the contractual arrangements between the parties, CSL met its obligation to pay claims submitted under the Plan.

63. Under the contractual arrangements between CSL and EIN, CSL was liable to pay any claims submitted up to the limit of the assets held in or linked to the ERIN Segregated Account. If and to the extent claims exceed the assets held in or linked to the EIN Segregated Account, then under clause 7 a. of the CSA, Mr Mullins is contractually obliged to indemnify and hold harmless CSL against all liability, loss and expense

incurred by CSL arising out of the CSA and the Policy. I, therefore, reject the Claimants claim that CSL failed to pay claims submitted for payment in breach of the provisions of the West Virginia Unauthorised Insurers Act.

64. As to EIN's claim against URI, I find there is no evidence that URI entered into a transaction of insurance in West Virginia, nor was there oral or documentary evidence URI assisted in the unauthorised transaction of insurance in West Virginia. I also accept the Second Respondent's alternative submission that URI has not failed to make payment under the terms of the contract because URI is not a party to the Policy and therefore owed no obligations to EIN under that contract.

65. Regarding the claim that Mrs Nordstrom committed unauthorised acts of insurance or assisted in the unauthorised transaction of insurance in West Virginia in breach of the provisions of the West Virginia Unauthorised Insurers Act, the evidence is that Mrs Nordstrom was not involved with the negotiation and design of the EIN SCCP. Due to the unfortunate passing of Mr Nordstrom in February of 2017, Mrs Nordstrom did become involved in the day-to-day business affairs of CSL and URI. I have considered the activities Mrs Nordstrom engaged in once she became involved in the operation of the affairs of CSL and URI against the definition of "Transaction of Insurance" under section 33-44-4 (a)-(c) of the Unauthorised Insurance Act. On balance, it does not appear that Mrs Nordstrom engaged in the "transaction of Insurance" nor assisted in the "transaction of Insurance". If, however, I am wrong on this point, I find that Mrs Nordstrom is not liable to EIN for civil damages because Mrs Nordstrom did not fail to make payment of a claim in breach of the terms of the Policy to which she was not personally a party and therefore owed no obligations to EIN under that contract.

H. THE NEGLIGENCE CLAIM

(I) The Claimants' Submissions

66. The Claimants allege that Bridgeport, URI, CSL, Steve Salinas and Wayne Blasman were negligent in the underwriting of the Policy, the overall design of the Plan that was supposed to be fully insured, procurement of the Policy and Stop-Loss Policy.

67. More specifically, the claim is that CSL negligently drafted the CLRP to include a coverage gap for which no entity was liable for paying claims, by failing to disclose numerous changes to the CLRP, the CSA, and the Administration Agreement that were made by CSL without the knowledge or consent of EIN, by failing to advise Jeff Mullins of the consequences and significant liabilities associated with him being designated the owner of the EIN Segregated Account instead of EIN, by ignoring EIN and Mr Mullins demand for a fully-insured policy and instead providing a self-insured policy, and by fraudulently editing the CLRP, the CSA and the Administration Agreement to protect CSL and to place additional liability upon Claimants.

68. The Claimants further allege that Bridgeport, Mr Blasman and Mr Salinas breached their duties to EIN as their client and as EIN's broker by failing to provide any underwriting for the CLRP and simply relying upon Mike Tate to set the premium rates, by procuring a stop-loss policy that did not provide any coverage to EIN or its employees, by assisting in the drafting of the CLRP with significant coverage gaps, by failing to advise EIN of the critical elements of the CLRP, the Stop-Loss Policy and the Administration Agreement, by misrepresenting the commissions received by the Respondents, and by putting the needs of the stop-loss carrier above that of EIN. It is also alleged that Mr Salinas admitted to several of these breaches when he testified in the final hearing:

(II) The First Respondents' Submissions

69. The First Respondents contend that when pressed on cross-examination, Mr Mullins conceded that there was no specific agreement by Bridgeport to serve as brokers for EIN. Instead, Mr Mullins admitted that, as of January 2016, he really did not know what role Bridgeport would serve in this anticipated effort to put together a captive plan.

70. The First Respondents also contend that there was no brokerage agreement entered into by and between Bridgeport and EIN confirmed in the witness statements of Mr. Mullins and Kristina Brooks. There is no written contract or other documentation evidencing an agreement by First Respondents to serve as EIN's broker. There was no discussion of fees or other details that would be expected to be associated with entering into a brokerage agreement.

71. The First Respondent's case is that overwhelming evidence demonstrates that IIS and Kristina Brooks are the parties that served as EIN's brokers in the relevant transactions. Mr Mullins admitted that his statement and Claimant's other submissions contain references to the broker fees that were paid to Kristina Brooks. Mr Mullins also admitted that the Administration Agreement he signed provided for the payment of broker fees to Kristina Brooks. Finally, Mr Mullins admitted that the monthly statements prepared by Capital Administrators repeatedly reported that broker's fees were being paid to Kristina Brooks.

72. Kristina Brooks admitted that she completed the portion of the New Client Application that was completed by EIN and submitted to Lucent Health which called upon EIN to identify its broker in this transaction. This form unmistakably identifies Innovative Insurance Solutions (IIS) as EIN's broker. Mr Mullins also admitted that this New Client Application completed by EIN specifically identified IIS as EIN's broker. By contrast, this form filled out by EIN makes no mention whatsoever of First Respondents serving as EIN's brokers.

73. The First Respondents also rely upon the records produced by Capital Administrators, which provide compelling proof that Kristina Brooks and IIS served as EIN's brokers. These records repeatedly report that Kristina Brooks was paid a monthly "broker fee" during 2017 while the EIN Plan was being administered. These fees totaled approximately $280,000. Mr Mullins testified that he was "pretty certain" that these broker fees were ultimately deposited into IIS's general account.

(III) The Second Respondents' Submissions

74. The Second Respondents contend the relationship between CSL and EIN was one of insurer and insured pursuant to the terms of the Policy. Consistent with the position in England, Bermuda law does not impose a duty of care on an insurer in relation to the procurement or underwriting of its insured's Policy of insurance or the design of its insured's insurance plan. Neither is there any authority for the proposition that the law of tort imposes a Hedley Byrne v Heller duty of care on an insurer to avoid causing its

insured pure economic loss named after the groundbreaking legal authority Hedley Byrne v Heller 1964 AC 465.

75. To the extent that there are any duties owed to an insured in relation to the underwriting/design/procurement of an insurance policy or program, the law recognises that those duties would be owed to an insured by an insured's insurance broker:

76. The Second Respondents submit that to the extent that EIN has any claim in negligence for the procurement, design or underwriting of the Policy, then that claim can only be against its insurance broker IIS, which broker arranged the EIN SCCP on EIN's behalf (and was paid brokerage fees for doing so). In addition, CSL did not assume any duty of care to EIN in relation to the procurement of the Stop Loss Policy because CSL was not responsible for the procurement of the Stop Loss Policy – that task having been undertaken by Bridgeport, in conjunction with URI and Mr Tate.

77. In the alternative, and in the event the Tribunal does find that CSL owed EIN a duty of care, then that duty of care was not breached. This is because what EIN wanted was a fully insured program of insurance, and this is what it obtained when it entered into the Policy with CSL. There can be no question of a breach of the duty of care alleged in circumstances where EIN obtained precisely what it bargained for.

78. In the alternative, CSL's breach of any duty of care owed to EIN did not cause EIN loss.

(i) Duty of Care/Breach – CSL and Mr Mullins

79. The Second Respondents contend that Mr Mullins' claim is for pure economic loss arising from CSL's alleged negligence in the procurement, design and underwriting of the Policy and the procurement of the Stop Loss Policy. As such, Mr Mullins is required pursuant to the principle in Hedley Byrne v Heller to demonstrate that a special relationship existed as between CSL and Mr Mullins to prove that CSL owed Mr Mullins a duty of care.

80. CSL and Mr Mullins are both parties to the CSA. The Second Respondents assert that pursuant to the terms of the CSA, CSL agreed to issue the Policy to EIN for and on behalf of a segregated account to be established by CSL on Mr Mullins' behalf as the account owner. The stated purpose of this contractual bargain as between CSL and Mr Mullins was to allow Mr Mullins to "participate in the underwriting results and investment earnings" generated. Pursuant to the terms of the CSA, this was to be achieved by Mr Mullins receiving distributions from the EIN Segregated Account in the event of positive underwriting returns, together with returns from any premium income that was invested. Conversely, in the event of a Program Loss (as defined) Mr Mullins was contractually obliged to provide funds to the EIN Segregated Account in a timely manner.

81. The Second Respondents principal argument with respect to the allegation CSL breached a duty of care owed to Mr Mullins is that the terms of the CSA clearly defined and segregated the rights, obligations and liabilities as between CSL and Mr Mullins. In particular, the CSA made clear that Mr Mullins' rights against CSL were "confined to" the assets linked to the EIN Segregated Account and that Mr Mullins could only have recourse to those assets "*notwithstanding any other [contractual] provisions expressed or implied*" by CSL to Mr Mullins.

82. The Second Respondents further contend while it is accepted as a matter of principle that concurrent duties can be owed by one party to another in contract and tort, in light of the specific contractual rights, obligations and liabilities that existed as between CSL and Mr Mullins in the CSA, CSL cannot be taken to have assumed any duty of care in tort to Mr Mullins in relation to the procurement, design or underwriting of the Policy or the procurement of the Stop Loss Policy. Any duty of care in relation to those activities could only conceivably have arisen between the insured under the Policy, EIN, and the company that was responsible for ensuring that EIN obtained insurance cover that met its needs. That responsibility lay with EIN's broker IIS, not CSL.

83. Finally, In the alternative, even if the Tribunal finds that CSL did owe a duty of care to Mr Mullins in relation to the procurement, design and underwriting of the Policy, and the procurement of the Stop Loss Policy (or otherwise) then that duty of care was not in fact breached. This is because what Mr Mullins wanted was a fully insured Policy

for EIN and this is what was obtained when EIN entered into the Policy with CSL for and on behalf of the EIN Segregated Account. There can be no question of a breach of the duty of care alleged in circumstances where Mr Mullins obtained precisely what he wanted for EIN.

(ii) Duty of Care – URI and EIN

In paragraphs 111 and 113-116 of their written submissions the Second Respondents reply to the assertion URI owed EIN a duty of Care.

> *111. EIN's pleaded claim is for pure economic loss arising from URI's alleged negligence in the procurement, design and underwriting of the Policy, and the procurement of the Stop Loss Policy. As such EIN is required, pursuant to the principle in Hedley Byrne, to demonstrate that a special relationship existed as between URI and EIN so as to prove that URI owed EIN a duty of care.*
>
> *EIN's claim against URI for negligence as it relates to the procurement, design and underwriting of the Policy must fail because URI itself had no involvement with those activities that could give rise to a duty of care. URI's primary commercial function was in this case (and has always been) to act as the producer of business in the United States for CSL's Bermuda segregated cell captive programs by introducing potential US-based clients to CSL's services. URI does not procure, design or underwrite the insurance policies issued by CSL for and on behalf of the segregated accounts CSL establishes for its clients. That role was played by CSL's insurance manager in Bermuda R&Q Quest. In light of this EIN cannot establish a sufficiently proximate relationship between URI and itself in relation to the negligent acts alleged so as to demonstrate that URI owed a duty of care.*
>
> *113. In the alternative, in the event the Tribunal does find that URI owed EIN a duty of care in relation to the procurement, design and underwriting of the Policy, then the duty was not breached because EIN received precisely the type insurance cover it wanted and bargained for.*

114. In the alternative, in the event the Tribunal does find that URI owed EIN a duty of care in relation to the procurement, design and underwriting of the Policy and that the duty was in fact breached, then the breach of the duty of care did not cause EIN loss.

115. The position in relation to the procurement of the Stop Loss Policy is slightly different because URI assisted Bridgeport in locating a suitable stop loss carrier and procuring the Stop Loss Policy for the ultimate benefit of the Plan.In those circumstances URI concedes that it did assume a duty of care to EIN in relation to the procurement of the Stop Loss Policy. However, it is not clear on what basis EIN can argue that this duty of care was breached given that the Stop Loss Policy provided a functioning and available excess layer of insurance over and above the limits of liability in the Policy such that any one Plan claim over $250,000 was covered. As it transpired, no claims submitted under the Plan in 2017 exceeded the $250,000 limit of liability in the Policy, so the excess layer of insurance provided by the Stop Loss Policy was never required.

116. It is submitted that URI did not owe a duty of care to Mr Mullins personally in relation to the procurement, design or underwriting of the Policy or the procurement of the Stop Loss Policy (or otherwise). In the alternative the duty was not breached because Mr Mullins obtained exactly what he sought for EIN. In the further alternative URI's breach of duty has not caused Mr Mullins loss.

(IV) The Law

84. The common law tort of negligence is founded upon the principle that a person should take reasonable care to avoid causing foreseeable injury to others. This is known as a "duty of care". To succeed in an action for negligence in Bermuda, a claimant must establish the following:

1 The existence in law of a duty of care (i.e. one in which the law attaches liability to carelessness). There has to be a recognition in law that the careless infliction of

the kind of damage in question on the class of person to which the Claimant belongs by the class of person to which the defendant belongs is actionable.

2 A breach of the duty of care by the defendant (i.e. that there was a failure by the defendant to measure up to the standard of care set by the law)

3 A causal connection between the defendant's careless conduct and the damage suffered;

4 That the particular kind of damage to the particular Claimant is not so unforeseeable as to be too remote. Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) [1961] AC 388.

"The existence of a duty of care

72. A duty must be owed by a defendant to a claimant for that Claimant to be entitled to advance a claim in negligence. As Lord Wright said in Grant v Australian Knitting Mills Ltd:[1936] A.C. 85

" It is essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right: if the act involves a lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists."

85. Pure economic loss is distinguished in law from physical loss, and there is no presumed general duty in tort to avoid causing economic loss to another person. As Hobhouse LJ observed in Perrett v Collins [1998] 2 Lloyd's Rep. 255:

"in a competitive economic society, the conduct of one person is always liable to have economic consequences for another and, in principle, economic activity does not have to have regard to the interests of others and is justifiable by the actor having regard to his own interests alone".

86. A special relationship between the parties is required to justify a duty in cases involving pure economic loss. The starting point for a special relationship is the decision of the English House of Lords in Hedley Byrne & Co Ltd v Heller & Partners Ltd. The case established the principle that a defendant who made a negligent statement to a claimant could owe a duty of care to a person who suffered financial loss by relying on the statement provided a "special relationship" existed between the claimant and defendant. The principle has since been extended to all situations where financial loss has been caused through reliance or dependence on another's negligent conduct.

87. The imposition of a duty on a defendant not only requires reliance by the defendant, but also an assumption of responsibility by the claimant: Henderson v Merrett Syndicates Ltd. [1995] 2 A.C. 145. A duty of exercising reasonable skill and care exists where a person undertakes to perform professional or quasi-professional services for another. And the undertaking of such duties, together with a reliance on them, is sufficient to give rise to a duty of care in tort (unless this is precluded by contractual agreement between the parties).

88. The English courts have developed a "three-stage" test to determine if a duty of care is owed. The three parts are: (1) the foreseeability of harm to the claimant; (2) the proximity of relationship between claimant and defendant; and (3) whether imposing a duty would be fair, just and reasonable. Lord Bridge's summary of these requirements in Caparo Industries Plc v. Dickman [1990] 2 A.C. was as follows:

> *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other".*

89. The contractual context between Claimant and defendant may also be relevant. While the case of Henderson v Merrett Syndicates Ltd established that the existence of a contract does not prevent a duty arising between the parties to that contract (and thus

concurrent duties can exist in contract and tort), the tortious duty cannot be inconsistent with the contract. As Lord Goff opined:

> *"...I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded..."*

90. Further, in Pacific Associates Inc v Baxter [1990] 1 Q.B.993, the English Court of Appeal held that it would not be reasonable to impose a Hedley Byrne duty in circumstances where the parties had a contract which contained clauses dealing with the parties' rights and liabilities and for the arbitration of disputes between the parties, because it would "*cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered*".

91. The Bermuda courts have also recognised that whilst concurrent duties can be owed in contract and tort, a tortious duty cannot be inconsistent with the contractual liability of the defendant. Kawaley CJ, in Patton and Cook-v- The Bank of Bermuda Limited [2011] Bda. L.R.34 noted as follows:

> *".... In fact the true legal position is, as Mr Hargun contended, that concurrent duties may be owed in contract and tort in the sense that (a) a plaintiff may choose whether to sue in contract or tort, but (b) the extent of tortious liability will be qualified by the extent of the contractual liability."*

92. This statement was also recognised and applied by Kawaley CJ in Medeiros v Island Construction Services Company Ltd and Ors. [2016] Bda LR 130.

> *"The English law position was clearly articulated by 'Clerk & Lindsell on Torts', 21st edition (2014) at paragraph 10-06:*
>
> *... since Henderson, it has been accepted that any professional is prima facie liable to his client in both contract and tort. However, a converse point should*

be noted: even if there is a contractual duty to the client, the duty in tort will not extend further than the contractual one, save in very exceptional circumstances."79 [emphasis added]

93. In the context of an insurer/insured relationship, in a pre-contractual context the only duty of an insurer to an insured that is recognised under English and Bermuda law is a duty of utmost good faith, which requires an insurer to disclose to its prospective insured "all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer." Banque Keyser Ullman SA v. Skandia (UK) Insurance Co Ltd. [1990]1 QB 665 at [772]. It has been held that an insurer's duty of disclosure does not extend to giving the insured the benefit of the insurer's market experience, and in that context an insurer is not required to perform the role of the insured's broker. MacGillivray on Insurance Law (14th Edition) at 17-094 and the Court of Appeal judgment in Banque Keyser at [772]. If an insured is able to establish that its insurer breached its duty of disclosure, its sole remedy is to rescind the contract and there is no entitlement to damages HIH Casualty & General Insurance Co Ltd v Chase Manhattan Bank [2001] C.L.C.1853.

Breach

94. A defendant will be regarded as in breach of a duty of care if his conduct falls below the standard required by the law. The standard normally set is that of a reasonable and prudent man Blyth v Birmingham Waterworks (1856) 156 E.R. 1047 (1856) Ex. 781 at 784:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do."*

The specific level of care required is what conduct would be reasonable in the particular circumstances.

95. The test is an objective one and does not take into account the individual defendant. Courts will be influenced by the evidence of common practice of those engaged in the activity in question but this must sometimes be balanced against what are conceived to be the reasonable expectations of those who may be affected by the activity.

Causation

96. The claimant must establish that a defendant's negligence has caused the claimant to sustain loss as a matter of fact on the balance of probabilities. That is, the claimant must prove that it is more likely than not that "but for" the defendant's wrongdoing, the relevant damage would not have occurred.

97. The claimant's claim will fail if either:

(a) The claimant would have suffered the same loss even in the absence of the defendant's negligence.
(b) The true cause of the claimant's loss was something other than the defendant's carelessness.

98. A break in the chain of causation will be established where there was a new and independent cause of the loss, in the sense that the defendant's negligence merely created the opportunity for the loss and was not an effective cause of that loss. Weld-Blundell v Stephens [1920] AC 956.

Remoteness

99. In a negligence claim, the loss must have been reasonably foreseeable to be recoverable. Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound) [1961] AC 388.

100. Where a claimant pursues concurrent claims in contract and in tort, the contractual remoteness test will apply to the recoverability of damage for economic loss – that is, damage is only recoverable if it is the kind of damage that the defendant could

reasonably contemplate as a consequence of his breach. Wellesley Partners LLp v Withers [2016] Ch 529 at [80]

(V) Findings On the Claim for Negligence

101. I find that there was no written contract or other documentation evidencing an agreement by the First Respondents to serve as EIN's broker.

102. The documentary evidence adduced at the final hearing combined with the oral testimony of the Claimant's witnesses under cross-examination demonstrates that IIS and Kristina Brooks both served as EIN's brokers in the contractual agreements entered into by EIN. In support of this finding, I rely upon the following evidence:

(a) Mr Mullins admitted that his own statement contains references to broker fees paid to Kristina Brooks.
(b) Mr Mullins admitted that the Administrative Agreement he signed provided for payment of broker fees to Kristina Brooks.
(c) Monthly statements prepared by capital Administrators reported broker fees were being paid top Kristina Brooks.
(d) Mr Mullins admitted that his New Client Application completed by EIN identified IIS as EIN's broker.
(e) The records produced by Capital Administrators report that Kristina Brooks was paid a monthly broker fee during 2017 while the EIN Plan was being administered.
(f) Mr Mullins testified that broker fees of approximately $280,000n were deposited into IIS's general account.

103. To the extent the Claimants allege the First Respondents owe Mr Mullins a duty of care as a broker I find there is no evidence to support this contention, and there was certainly no agreement the First Respondents would act as brokers for and therefore owe a duty of care to Mr Mullins.

104. The First Respondents were involved in the procurement of the Stop Loss Policy and the Claimants do complain that Policy was drafted to exclude coverage of any excess

claims that EIN might have made. However, no such excess claims were presented in 2017. Therefore, I am not tasked to make any findings concerning the First Respondent's conduct in connection with payments under the Stop Loss Policy.

105. Based upon the above findings, I reject the Claimants' claim as pleaded in paragraph 60 d. of the Statement of Claim that the First Respondents owed the Claimants a duty of care related to the underwriting of the Policy, the design of the overall insurance plan, the procurement of the Policy and the Stop Loss Policy and the administration of claims submitted pursuant to the EIN Employee Benefit Plan. There is force in the First Respondent's submission that the Claimants' allegation of negligence is difficult to sustain in the face of evidence that the Claimants received a fully insured plan.

106. With respect to the Second Respondent, I accept the submission made on behalf of CSL that the law does not impose a duty of care on an insurer in relation to the procurement or underwriting of its insured's Policy of insurance or the design of its insured's insurance plan. English Court of Appeal decision in Banque Keyser Ullman SA v. Skandia (UK) Insurance Co Ltd. [1990] 1 QB 665 at [772], which statement was upheld by Lord Bridge in the House of Lords: Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd. [1991] 2 A.C. 249 at [268]. I also accept the legal proposition that the law of tort does not impose a Hedley Byrne v Heller duty of care upon an insurer to avoid causing its insured pure economic loss.

107. Following from my findings concerning the First Respondent, in respect of the Second Respondent CSL, any claim in negligence for the procurement, design or underwriting of the Policy would be a claim against EIN's insurance broker IIS, which was paid a brokerage fee for arranging the EIN SCCP on EIN's behalf.

108. Mr Mullins claim of negligence against CSL is for pure economic loss; however, based upon the authorities Henderson v Merret and Caparo Industries PLC v Dickman I find that Mr Mullins has failed to adduce evidence or engage with the legal propositions to demonstrate a special relationship existed with CSL to form the basis for establishing that CSL owed Mr Mullins a duty of care. Further, the terms of the CSA made clear Mr Mullins rights against CSL were confined to the assets linked to the EIN Segregated Account, and Mr Mullins could only have recourse to those assets, notwithstanding

any other contractual provisions. I also find that based upon the authorities, and in light of the contractual arrangements entered into between EIN, Mr Mullins and CSL, CSL cannot be taken to have assumed any duty of care in tort to Mr Mullins in relation to the procurement design or underwriting of the Stop Loss Policy.

109. EIN's claim for negligence against URI is for pure economic loss arising out of URI's alleged procurement, design and underwriting of the Policy and procurement of the Stop Loss Policy. EIN is required to establish that a special relationship existed with URI in accordance with the principle in Hedley Byrne V Heller. URI had no contractual or other roles in relation to the Policy's procurement, design, or underwriting. Therefore, I find that the Claimants have not established a special relationship between the Claimant and URI, and the Claimant has not satisfied the burden of establishing URI owed the Claimants a duty of care. I refer to the legal authorities previously referred to Henderson v Merret and Caparo Industries PLC v Dickman.

110. URI was involved in the procurement of the Stop Loss Policy therefore; URI does have a duty of care in connection with its conduct in that regard. However, no claims were made against the Stop Loss Policy, which were rejected in breach of the terms of the Stop Loss Policy. It is, therefore, difficult to see how a claim can be made that URI was negligent in the procurement of the Stop Loss Policy. I find the Claimants have not proven URI was negligent in the procurement of the Stop Loss Policy.

I. BREACH OF CONTRACT CLAIM

(I) The Claimants Submissions

111. CSL issued the CLRP to EIN. EIN was the "Insured" under the Policy, and Capital Security was the "Insurer" under the Policy. As the Insurer under the EIN Policy, CSL was responsible for paying all claims up to $250,000 for each Claimant.

112. CSL breached the CLRP by refusing to pay claims under $50,000 despite there being over $1,400,000 available for payment of those claims.

113. In January of 2018, EIN became aware that there were $5,966,499.98 in unpaid claims under the CLRP. EIN requested that Capital Security pay the $5,966,499.98 in unpaid claims due and owing under the EIN policy pursuant to a formal demand from EIN to Jeana Nordstrom dated February 2, 2018. Jeana Nordstrom and Capital Security refused to pay the $5,966,499.98 in outstanding claims on the basis that the EIN Policy was "self-insured" instead of "fully-insured." As a result of Capital Security's refusal to pay the claims, Claimants paid an additional $5,599,671 over and above EIN's monthly premiums to satisfy the claims submitted under the EIN policy.

(II) The First Respondents' Submissions

114. The First Respondents' case is that the Claimants' breach of contract claim concerning the funding of the EIN Plan is found in paragraph 60(e) of the Article 20 Statement of Claim. This claim is asserted solely against CSL. The obvious reason that no such claim has been asserted against First Respondents is because First Respondents were not parties to any of the respective policies and agreements. The First Respondent also submits that Mr Mullins expressly confirmed that Claimants are not asserting any breach of contract claims against First Respondents in this case.

(III) The Second Respondents' Submissions

115. The Second Respondents maintain their submissions regarding the structure of the contractual arrangements. They assert the Policy was entered into by EIN and "the Company", which is defined as "Capital Security Ltd for and on behalf of the EIN Segregated Account". The Policy was signed for and on behalf of EIN by Mr Mullins. Pursuant to the terms of the Policy, CSL was not itself agreeing to insure EIN or, to put it another way, CSL was not by contract agreeing to place its General Account "on risk" under the Policy. It is doubtful whether this fact could have been made any clearer on the face of the Policy:

> *"Segregated Account – Capital Security Ltd is registered as a Segregated Accounts company and has established a separate and distinct Segregated Account which has been designated as the EIN Segregated Account (the*

"Subject Segregated Account") pursuant to the Segregated Account Companies Act of 2000 (the "Act").

Accordingly the liability of the Company in relation to this Policy is limited to the assets held in such Segregated Account and is not otherwise a liability of Capital Security Ltd or of any other segregated account managed by Capital Security Ltd. In the event the assets of the Subject Segregated Account are not sufficient to satisfy any of the Company's obligations under this Policy, the insured agrees that it shall make no claim against the assets of Capital Security Ltd outside of the Subject Segregated Account or the assets maintained in Capital Security Ltd's general account, or against any assets in any other Segregated Account, except those assets of the Subject Segregated Account. For the avoidance of doubt, there is no obligation whatsoever for Capital Security Ltd to use any of its property or assets, other than assets linked to the Subject Segregated Account to fulfil its obligations under this Policy." [emphasis added]

116. The above extract is to be read in conjunction with clause 2 of the CSA ("Segregation of Rights and Liabilities"), as the two documents were designed to be read together (the terms of the Policy were incorporated into the CSA by reference). Clause 2 of the CSA made clear that CSL entered into the CSA "and all transactions related thereto" (the primary transaction of course being the Policy) for and on behalf of the EIN Segregated Account it agreed to manage on Mr Mullins' behalf and that the Claimants could have no recourse against assets held in CSL's General Account, or any assets held in the other segregated cells that CSL managed.

117. Mr McComb explains the position as follows:

"In my opinion neither CSL's General Account nor any of its segregated accounts, with the exception of the EIN Segregated Account, were responsible for funding any claims amounts under the EIN Policy, or otherwise in the EIN SCCP. I arrive at this view based on my experience of how segregated accounts programs are structured and operated, together with the express

terms of the EIN Policy, and the agreement of the account owner (Mr Mullins) in the governing instrument the CSA."

118. Accordingly, the Second Respondents contend the Policy did not contain any term, either express or implied, that CSL would itself fully insure EIN, and in the absence of any such express or implied term EIN's breach of contract claim must fail. In any event EIN was fully insured under the Policy by CSL for and on behalf of the EIN Segregated Account, which was managed by CSL on behalf of Mr Mullins, the account owner. And has been repeatedly stated, it was Mr Mullins' contractual obligation to ensure the EIN Segregated Account was sufficiently funded over and above the premiums collected so as to ensure EIN was fully insured.

(IV) Findings on the Breach of Contract Claim

119. Claimants conceded in evidence that they were not pursuing a breach of contract claim against the First Respondents. Nothing further need be said in that respect.

120. Concerning the Second Respondents, I find that EIN's insurance Plan was fully insured consistent with the views of both experts expressed as at 12 February 2021:

"EIN purchased a guaranteed cost insurance policy, where it paid a fixed premium to cover all claims up to USD 250,000 per Claimant. EIN itself had no further liability beyond the premium it was obliged to pay under the EIN Policy and EIN was therefore fully insured."

121. The Policy formed part of the CSA, and both contracts made it clear that CSL's liability under the policy was limited to the assets held in or linked to the EIN Segregated Account. Mr McComb's evidence is that the applicable wording that was used in the Policy is "very typical" in policies issued by Bermuda segregated accounts companies for and on behalf of their segregated accounts, but unlike some policies he has seen, the language in the Policy was "prominently" set out rather than being relegated to a separate endorsement.

122. Consistent with the argument made by the Second Respondent, I find that while EIN was fully insured under the Policy, there were clear limits to CSL's liability. CSL did not agree to expose its General Account to insurance risk. Mr Mullins' obligations mitigated the risk to EIN under the Policy under clause 7 b. of the CSA.

123. In light of the above findings, I reject EIN's breach of contract claim.

J. THE FRAUD CLAIM

(I) The Claimants' Submissions

124. In response to Mr Mullins' request, on November 22, 2016, Mr Nordstrom sent EIN a letter acknowledging the placement of a fully insured policy insured by CSL. This was just eight (8) days before EIN received the November 30, 3016 draft CLRP that was represented as the final version of the CLRP. The Claimants contend It is now apparent that Mr Nordstrom's November 22, 2016, letter confirming the placement of a fully-insured policy by CSL was fraudulent and simply a means for it to avoid the West Virginia prohibition against PEO's being self-insured. They allege this is true for two reasons. First, the representation could not be true because CSL did not offer fully insured policies, and it refused to assume any risk on behalf of its clients. As such, any policy issued by CSL had to be, by its very nature a self-insured policy.

125. The second reason this is true is because Mr Salinas admitted it was true. Mr Salinas admitted that the EIN Plan was always going to be self-insured and that Mr Nordstrom only referred to the Plan as "fully-insured" in order to get around the West Virginia prohibition against self-insured PEO's. Mr Salinas' testimony was as follows: "*We always understood fully insured to be to get around the West Virginia prohibition. Segregated cell arrangement from day one going to Steve's email, I believe, January of '16 or December of '15 was client assumes the risk. Always worked off that premise. How that happens, that really wasn't our worry. That was not something that we got involved. That was not. That was -- to our knowledge that never changed.*"

126. The Respondents offer two defenses to this claim. First, they admit that Mr Nordstrom made the representation because it is true. They argue that EIN did get a fully insured

CLRP that was insured by the EIN Segregated Account and Mr Mullins individually. What Respondents fail to recognize, is that in his letter, Mr Nordstrom not only represented that the Policy was fully insured, he represented that it was fully-insured with CSL as the "insurer."

(II) The First Respondents' Submissions

127. The Claimants allege the First Respondents Bridgeport Mr Salinas, and Mr Wayne Blasman falsely and fraudulently represented to the Claimants that they were placing a fully insured policy to cover all of the claims submitted under the EIN Benefit Plan, and EIN's only liability would be for the payment of the monthly premiums.

128. The First Respondents say the most obvious reason the Claimants' fraud claim fails as against First Respondents is because the evidence adduced at the hearing conclusively establishes that a fully insured policy was placed for EIN and that EIN's only liability was for payment of premiums. Mr Mullins admitted to this fact. The experts jointly opined this was the case. Therefore, no fraudulent representation can be shown if the alleged statement made was fully true. As a result, the first required element of a fraud claim is wholly missing in this case.

129. Equally fatal to this fraud claim is the lack of any credible evidence that First Respondents made any specific representations to the Claimants (false or otherwise) about the risk allocations to be assumed under the proposed captive arrangement.

130. The First Respondents contend that they did not hold themselves out to be experts as to captive arrangements and possessed no such expertise. The First Respondents had no substantial involvement in developing the agreements that defined the respective rights and obligations under the captive arrangement. At the same time, the Claimants and their lawyers had a full and independent opportunity to review the relevant policies and documents before Claimants signed them. Under these circumstances, the assertion that Claimants relied to their detriment upon anything that the First Respondents may have told them about the legal structure of the Bermuda Captive arrangement is rejected.

131. When pressed on cross examination, Mr Mullins admitted that there was no claim being made that EIN had entered into the Contractual Reimbursement Liability Policy based upon any representations made by Steve Salinas, Wayne Blasman or anyone at Bridgeport. Mr Mullins also admitted that there was no claim being made that the CSA was entered into based upon any representations made by Steve Salinas, Wayne Blasman or anyone at Bridgeport. The First Respondents argue this testimony effectively negates any fraud claim against First Respondents since detrimental reliance is an essential element of such a claim, and Mr Mullins is admitting on behalf of the Claimants that there was no such reliance.

(III) The Second Respondents' Submissions

132. The Second Respondents reply to the allegation of fraud identifies five allegations of fraud made by the Claimants. Each of the five allegations are considered in detail in paragraphs 51 to 53 and 55 to 65 of the Second Respondents written submissions. To fairly represent the submissions paragraphs 51 to 53 and 55 to 65 are reproduced below.

> *51. The Claimants claim that the following representations were made to them by both CSL and URI, which representations are said to be false, made knowingly, and with the intention of inducing the Claimants to enter into the EIN SCCP.*
>
> > *51.1 Representations by each of CSL and URI that the Policy to be underwritten would be a "fully insured" policy and/or that the Policy was "fully insured". It appears to be alleged that these representations were made in (i) a letter from Mr Nordstrom to Mr Mullins dated 22 November 2016; and (ii) on the face of the Administration Agreement between CSL and Capitol Administrators.54 (The First Representation)*
> > *51.2 A representation by each of CSL and URI that CSL would be responsible for paying the claims that could not be paid by EIN's premiums. This representation is alleged to have been made in an email sent by Mr Nordstrom to Mr Salinas of Bridgeport Benefits. (The Second Representation)*

51.3 A representation by CSL that the Plan would be "funded in its entirety by EIN's payment of its monthly premium." 56 The Claimants have failed to particularise when, where and how this representation was made by CSL. (The Third Representation).

51.4 A representation by each of CSL and URI that CSL needed to obtain a stop-loss policy to protect CSL in the event a higher number of claims were submitted under the Plan than projected.57 The Claimants have failed to provide any particulars as to when, where and how this representation was made. (The Fourth Representation).

51.5 A representation by each of CSL and URI that EIN's only liability under the Policy would be the payment of monthly premiums. The Claimants have failed to provide any particulars as to when, where and how this representation was made. (The Fifth Representation).

52. As to the First Representation, it is common ground that Mr Nordstrom, who was at the time the principal of both CSL and URI, stated in a letter to Mr Mullins dated 22 November 2016 that the Policy being issued to EIN was fully insured "with the limits thereof", the later statement clearly being a reference, it is submitted, to the fact that the Policy covered any one claim submitted under the Plan up to a limit of $250,000.

53. As such there is no dispute that the First Representation was made by Mr Nordstrom in his capacity as principal of CSL and URI. But in addition to proving that the First Representation was made, to establish a viable claim in misrepresentation the Claimants must also show that the First Representation was a false statement of fact. And on this basis the Claimants' claim must fail because the First Representation was clearly true. Further, there is no evidence before the Tribunal to suggest that Mr Nordstrom did not honestly believe that the First Representation was true.

55. As explained by Mr McComb, the Policy (and therefore EIN) was fully insured because what EIN was issued was a "guaranteed cost policy". This meant that in return for paying a fixed premium EIN was insured up to the limits of liability set out in the Policy. Importantly, EIN had no liability to pay additional

amounts over and above the fixed premium. By taking out the Policy, EIN was not "self-insuring", in the sense that EIN was not agreeing to assume any responsibility itself to fund the claims submitted under its Plan.

56. Further, there is clear and unimpeachable authority under English law (which the Tribunal is invited to consider as being the position under Bermuda common law) for the proposition that a statement honestly believed to be true is not capable of amounting to fraud. In the absence of any evidence that Mr Nordstrom did not honestly believe in the truth of the First Representation a claim in deceit cannot be made out.

57. From the other pleaded representations it appears as if the Claimants may seek to argue that the meaning of the First Representation was ambiguous, and that they understood it to mean something else (for example, that as a result of the Policy being fully insured CSL would be responsible for paying the claims that could not be paid by EIN's premiums).

58. The Second Respondents deny that the meaning the First Representation was ambiguous. But even if it was, in order to make out their claim in deceit the Claimants' must prove that they understood the statement in a false sense and that Mr Nordstrom intended the statement to have that effect.

60. As to the Second Representation, it is firstly denied that CSL or URI ever made such a representation to the Claimants, and therefore this claim falls at the very first hurdle. The Claimants have not produced any evidence that this representation was made to them, either expressly or impliedly.

61. In the 25 October 2016 email exchange relied on by the Claimants between Mr Nordstrom and Mr Salinas (which copied, among others, EIN's broker Ms Brooks of IIS), Mr Nordstrom stated to Mr Salinas that CSL was to take "first dollar responsibility" under the Policy. "First dollar" coverage is a well-known term of art in the insurance industry, and means insurance coverage that provides for the payment of all claims once an insurable event occurs, up to any specified limits of an insurer's liability, without any use of deductibles/an excess.

It is submitted that all Mr Nordstrom was doing in this brief email exchange was confirming that there would be no deductible in the Policy issued by CSL (i.e. as the insured, EIN would not be responsible for paying any part of any claims itself). While Mr Nordstrom's email does not clarify the fact that CSL was not issuing the Policy for and on behalf of itself (but rather for and on behalf of the EIN Segregated Account) that was a technical detail which was not necessary for Mr Nordstrom to elaborate on in the context of the precise question he was asked by Mr Salinas.

63. As to the Third Representation the same points apply as for the Second Representation. Neither CSL nor URI made the Third Representation to the Claimants, and even if the Third Representation had been made the Claimants knew the truth of the matter when they signed the CSA and the Policy: namely, that in the event funds held in the EIN Segregated Account were insufficient to pay Plan claims then additional funds would have to be injected into the EIN SCCP by Mr Mullins. The very fact that the CSA included the concept of a "Program Loss" and provided for what would need to happen in such an event, demonstrates that (i) the parties to the CSA recognised the potential for claims values exceeding the value of premiums collected; (ii) the parties arranged their contractual obligations accordingly.

64. As to the Fourth Representation the same points apply as for the Second and Third Representation. Neither CSL nor URI made the Fourth Representation to the Claimants, and even if the Fourth Representation had been made the Claimants knew the truth of the matter in any event. The Stop Loss Policy says on its face that the Policyholder was "Capital Security Ltd For and on behalf of EIN Segregated Account".65 This is consistent with the language in the Policy, which states that the insurer is "Capital Security Ltd For and on behalf of EIN Segregated Account." The reality, which was clear on the face of the contracts the Claimants signed, was that the purpose of the Stop Loss Policy was not to protect CSL (whose liability under the Policy was strictly limited to the assets held in or linked to the EIN Segregated Account) but rather to protect EIN and its Plan by ensuring any Plan participant with a claim exceeding $250,000 would be covered. This was because the limit of liability

under the Policy issued by CSL for and on behalf of the EIN Segregated Account was $250,000 any one claim, so an excess of layer of insurance cover and above the Policy was deemed necessary.

65. As to the Fifth Representation, neither CSL nor URI made this representation expressly to the Claimants (and the Claimants have provided no evidence of the same). While it is accepted that such a representation theoretically could have been impliedly made by Mr Nordstrom given (i) the nature of the EIN SCCP; and (ii) the wording of the Policy, the representation is incapable of grounding a viable claim in deceit because it is a true statement of fact. EIN's payment obligations under the Policy were limited to payment of the prescribed premiums. As stated in paragraph 55 above, by taking out the Policy, EIN was not agreeing to take on any liability to pay the claims of Plan participants. In the event there was insufficient premiums collected to pay claims under the terms of the CSA it was Mr Mullins' obligation – not EIN's obligation – to supply the funds to pay claims. While the Claimants frequently attempt to blur the distinction between Mr Mullins and EIN, the Tribunal cannot ignore this distinction as a matter of legal analysis.

(IV) The Law

133. Under Bermuda (and English) law a claim for fraudulent misrepresentation is founded in the tort of deceit, and the ingredients of that tort are as follows:

(a) The defendant makes a false representation to the claimant.

(b) The defendant knows that the representation is false, alternatively he is reckless (in the sense that he does not care either way) whether the representation is true or false.

(c) The defendant intends that the claimant should act in reliance on the false representation.

(d) The claimant does in fact rely on the false representation and, in consequence, suffers loss. See Fubler and Fubler v Thomas [2009] Bda L.R. 50; Pitt & Co Ltd and BGA Ltd v White and White [2014] Bda; Capital Security Ltd v Woodruff [2018] Bda LR 46.

(V) Findings on the Claim of Fraud

134. The claim for fraud or deceit against the First Respondent fails for three reasons.

First, because the evidence adduced at the hearing from both experts and admitted by Mr Mullins is that EIN received a fully insured Policy. EIN's liability was for the payment of premiums. A claim for fraud cannot be sustained if the allegedly fraudulent statement is true.

Second, the Claimants were unable to identify any documentary communications made by the First Respondents in support of the assertions made in evidence by Mr Mullins and Ms Brooks that specific representations were made by the First Respondents concerning the risk allocations to be assumed under the captive arrangement.

Third, under cross-examination, Mr Mullins admitted the Claimants did not claim EIN entered into the CSA or CLRP based upon any representation made by the First Respondents. The Claimants cannot sustain a claim for fraud or deceit if they fail to establish detrimental reliance, a necessary ingredient of the claim.

135. Turning to the Second Respondents, the Claimants identify five representations that they contend are fraudulent.

136. The first representation is that the Policy to be underwritten was not, in fact, a "fully insured Policy". The Second Respondent does not dispute that Mr Nordstrom made this statement. However, the statement in the Policy that EIN was "fully insured " was qualified by words in the Policy "within the limits thereof" which is a reference to the cap on any one claim of $250,000. The statement made by Mr Nordstrom was not false, based upon the evidence of Mr McComb, the statement was true. I also accept

the submission made by the Second Respondent that there is no evidence before the Tribunal that Mr Nordstrom did not honestly believe the policy was fully insured.

137. The second representation made by URI and CSL is that CSL would be responsible for paying claims not paid by EIN's premiums. The third representation made by CSL is that the Plan would be funded in its entirety by EIN's payment of its monthly premium. I consider the second and third representations together. There is no documentary evidence in support of these representations. The documentary evidence entered into by EIN and Mr Mullins in the form of the CSA and the Policy suggests that Mr Mullins knew that in the event funds held in the Segregated Account were insufficient to pay Plan claims, Mr Mullins would have to inject funds into the EIN SCCP; alternatively, if any claim exceeded $250,000, the Stop Loss Policy would cover the excess.

138. The fourth representation is that CSL and URI each said to the Claimants CSL needed to obtain a stop-loss policy to protect CSL in the event a higher number of claims were submitted than the plan projected. The Stop Loss Policy explicitly states that the policyholder is CSL for and on behalf of the EIN Segregated Account. The contractual structure of the suite of documents signed by the Claimants indicates that the purpose of Stop Loss Policy was not to protect CSL (whose liability under the Policy was strictly limited to the assets held in or linked to the EIN Segregated Account) but rather to protect EIN and its Plan by ensuring any Plan participant with a claim exceeding $250,000 would be covered. This was because the limit of liability under the Policy issued by CSL for and on behalf of the EIN Segregated Account was $250,000 any one claim, so an excess of layer of insurance cover and above the Policy was deemed necessary.

139. The fifth representation by each of CSL and URI is that EIN's only liability under the Policy would be the payment of monthly premiums. Again, based upon the contractual structure of the suite of documents signed by the Claimants, this representation is true. In the event funds held in the EIN segregated account were insufficient to pay Plan claims, then additional funds would have to be injected into the EIN SCCP by Mr Mullins.

140. For the reasons I have stated, in respect of each of the five representations, I reject the Claimants claim for fraud against the Second Respondents as pleaded in the statement of claim.

K. THE CIVIL CONSPIRACY CLAIM

(I) The Claimants' Submissions

141. The Claimants submit this is a case of unlawful means conspiracy, which requires the use of unlawful means and an intention to cause injury to the target. There are four elements, which include: 1) an agreement or combination of parties; 2) an intention to cause injury; 3) concerted action; and 4) damages. Lonrho plc v Fayed [1992] 1 AC 448, Lisa SA v Leamington Reinsurance Company Ltd. and Avicola Villalobos SA, [2008] Bda LR 51.

142. In paragraphs 370-374 of their Submissions of Law and Fact the Claimants set out their case in support of the unlawful means conspiracy.

> *370. All four elements are met in this case. First, there was a combination of parties as well as an agreement between the parties. All Respondents were acutely aware that EIN wanted a fully-insured policy. Respondents were also aware that Capital Security could not provide a fully insured policy and Capitol Administrators could not administer a fully-insured policy. Therefore, they agreed to reference the CLRP as fully-insured despite knowing all-along that it was going to be self-insured. (T-1037).*
> *371. Mr. Salinas also admitted that Mr. Tate's inability to write a fully-insured contract was creating a problem because the EIN Plan "can't be technically self-insured because of PEO regulations." (A-2504). As a result, Mr, Salinas advised Mr. Tate that "the group" wanted to run all of the claims through the captive from the beginning for the implied purpose of getting around the West Virginia regulations. (A-2504). Mr. Salinas admitted that such an arrangement would not be "an insured contract" (i.e. would be "self-insured") but insinuated that the arrangement would not violate the West Virginia prohibition against*

self-funding because "the captive would be responsible for all claims" instead of EIN. (A-2504).

372.The Respondents collectively engaged in varying aspects of the fraudulent conduct, including altering the CSA, the CLRP, and the Administration Agreement without EIN's consent, misrepresenting the number and amounts of commissions and fees deducted from the EIN premiums, collectively administering claims as if they were self-insured and hiding $6,000,000 worth of unpaid claims from EIN. The Respondents did this to hide the fact that they had sold EIN a self-insured plan disguised as a fully-insured plan. The Respondents did this knowing that EIN could not self-insure as a PEO. They did so because the Policy had to be self-insured in order for the Respondents to get paid.

373. In this instance, Once Mr. Salinas acknowledged that the EIN Plan had to be self-insured in order for Bridgeport to get its five (5) commissions, he could no longer deny that the Respondents' fraudulently represented to EIN that the Plan was fully-insured. He was specifically asked:

Q: Right. So this had to be dressed up as a fully insured policy to get Jeff Mullins to sign all of the documents because he told you that he didn't want a self-insured plan. So everybody dressed it up, passed it off as fully insured so they could get their commissions, which Bridgeport Benefits got five commissions on this; correct? (T-1039-40).

The pointed nature of this question should not be lost on the Tribunal. Mr. Salinas was directly accused of fraud by representing to EIN that its Plan was fully-insured when it was not just so it could collect its five (5) commissions. This Tribunal should also carefully consider Mr Salinas' answer to this pointed question, which was as dismissive and arrogant as it was revealing. Instead of deny the allegation of fraud, Mr. Salinas simply referred to IIS's Pathway to Care fee and then said:

A: So, I mean, what -- it's insurance. Everyone gets paid in insurance, so." (T-1039-40).

95

374. The evidence is clear, the Respondents collectively engaged in fraudulent and unlawful conduct in order to steal from EIN and Mr. Mullins and they were successful

(II) The First Respondents' Submissions

143. Commencing at paragraph 48 in various paragraphs through to paragraph 72 of the First Respondents closing submissions succinctly set out their response to the allegation that they engaged in a civil conspiracy to write a self-insured policy.

> *48. ..... Mr. Mullins confirmed that this alleged civil conspiracy is predicated upon the allegation that Respondents secretly agreed to saddle EIN with a self-insured policy while tricking Claimants into believing EIN was getting a fully insured policy.*
>
> *49. There was no trickery or deception undertaken by First Respondents or anyone else against EIN or Mr. Mullins. EIN received a fully insured policy just as it had expected. Mr. Mullins voluntarily entered into agreements in which he assumed the legal obligation to pay claims that exceeded the amount of premiums. The notion that First Respondents could have successfully deceived Claimants about the structure of this captive arrangement defies common sense. First Respondents were not parties to these agreements and had no involvement in drafting the Client Services Agreement or the Reinsurance Agreement that defined the captive obligations.*
>
> *55. As to any alleged unlawful means conspiracy, Claimants have provided no credible evidence to demonstrate that any of the Respondents entered into an express or tacit agreement (either between themselves or others) the object of which was to cause damage to the Claimants.*
>
> *56. As to any alleged lawful means conspiracy, Claimants have offered No credible evidence to prove that First Respondents engaged in any form of concerted activity with the predominant intention of inflicting harm on Claimants.*
>
> *57. Claimants' allegations of a secret conspiracy to defraud the Claimants are based upon isolated conversations among Respondents that are taken out of context or grossly misconstrued.*
>
> *62. Claimants' civil conspiracy allegations are tied in part to unfounded allegations that First Respondents engaged in criminal conduct in connection with their efforts in this matter. uance to allow Mr. Salinas and Mrs. Nordstrom to seek out such advice as needed so that an informed decision could be made*

for each as to whether they should proceed to testify. TR p. 808. After obtaining such consultation, First Respondents concluded it was perfectly proper for Mr. Salinas to proceed with testifying in this matter.

64. There is no proper basis for Claimants to assert that Stephen Salinas or any First Respondents committed criminal acts in violation of West Virginia Code §33-44-4. This statute provides no meaningful clarification about what specific intent is required to invoke criminal liability and no meaningful clarification about what activities rise to the level of aiding in the unauthorized transaction of insurance. There are also no West Virginia cases that provide any direct guidance on these issues.

71. First Respondents therefore respectfully assert that Claimants have not sustained their burden to prove that Stephen Salinas or First Respondents criminally violated West Virginia Code §33-44-1 et. seq. in connection with their conduct in this case. First Respondents also ask that this Tribunal take judicial notice that nearly five (5) years have passed since these alleged wrongful acts occurred, and no criminal charges have been filed against any First Respondents. Under these circumstances, there is an inadequate legal and factual basis to make any findings that First Respondents engaged in criminal misconduct that would form the basis of a civil conspiracy.

(III) The Second Respondents' Submissions

144. The Second Respondents respond to the conspiracy claim in paragraph 5.4 of their closing submissions set out below.

(b) Until they filed their written opening submissions, the evidence relied on by the Claimants to support their pleaded case appeared to hang in significant part on a string of emails exchanged between Mr. Tate, Mr. Salinas, Mr. Blasman and Mr. Nordstrom in November and December 2016. In particular, the Claimants identified:

(i) an email from Mr. Salinas dated 14 November 2016 urging the group to "once and for all let us get on the same page"; and

(ii) a subsequent email from Mr. Tate dated 22 November 2016 in which Mr. Tate wrote of having "shifted gears" towards assuming the EIN SCCP would be a self-insured insurance program.

(c) The Claimants say this is evidence of the formulation of a conspiracy, involving Mr. Nordstrom on behalf of CSL and URI, to "convert" the Policy from fully insured to self-insured without the Claimants' knowledge.

(d) There are three principal reasons why the Claimants' position on these emails cannot withstand scrutiny.

(i) Firstly, there is no indication whatsoever from the surrounding context that Mr. Salinas' "let us all get on the same page" comment was referring to a need to combine in the commission of a fraud. The Claimants' position that this email represents clear evidence of the Respondents' nefarious intent is an extreme and incredible interpretation of its contents (and, bluntly, is the flimsiest of hooks on which to hang a claim in conspiracy).

(ii) The more logical (and entirely innocent) explanation is that Mr. Salinas was simply urging the main players involved in the arrangement of the EIN SCCP to communicate more efficiently to ensure no misunderstandings. When the question was put to him in cross examination Mr. Mullins agreed that there was nothing in Mr. Salinas' email (or the surrounding chain) to suggest that Mr. Salinas was referring to an agreement to mislead and defraud EIN. Nevertheless, he then suggested (without evidence) that the fraudulent scheme was "probably" a topic Mr. Tate, Mr. Salinas, Mr. Blasman and Mr. Nordstrom discussed on the call that was being arranged for the following day.

(iii) It is submitted that Mr. Mullins' entirely speculative evidence is a further reflection of the weakness of the Claimants' case on this email.

(e) Secondly, and as argued at paragraph 135.3 of the SR's Opening Submissions, the evidence shows that what was ultimately contracted for by EIN was a fully insured program of insurance. Logically therefore there could have

been no "conversion" of the Policy from fully insured to self-insured by the alleged conspirators.

(f) Third, it is submitted that the reference in Mr. Tate's email of 22 November 2016 to the program being self-insured by EIN was likely because he had just reviewed a draft of the Policy that contained a specific excess deductible of $50,000 – meaning EIN would be responsible for paying the first $50,000 of any claim submitted by a Plan participant. There is evidence in the record in this arbitration that shows that there was indeed an evolving draft of the Policy in circulation in late 2016 that contained this deductible. Mr. Tate stated as follows in his email:

"As it stands, the Capital Security Ltd policy takes all risk on claims over $50,000 on an individual. We will provide excess over the captive over $250,000 per individual to unlimited."

(g) If the final Policy had in fact contained such a deductible it would be correct to say that EIN was at least partly self-insuring its Plan. However, as Mr. Salinas made clear in his reply to Mr. Tate's email the next day, the Policy was to contain no deductible and the insurer under the Policy (CSL for and on behalf of the EIN Segregated Account) would be on risk from "dollar one to $250,000". Under the final version of the Policy EIN's obligation was only to pay premium and it assumed no liability to pay claims – which consistent with Mr. McComb's expert view, meant that EIN was fully insured by the Policy.

(h) When taken to Mr. Tate's email in cross examination, Mr. Mullins accepted that it was clear based on its contents that Mr. Tate had just reviewed (and was commenting on) a draft of the Policy that contained a $50,000 deductible. He also conceded, as he had to, that the final version of the Policy which he signed contained no deductible and that (i) the insurer under the final Policy therefore had first-dollar responsibility up to the specified limit of liability; and (ii) EIN had no liability under the Policy other than to pay the specified premiums to the insurer.

(IV) The Law

145. The classic definition of a conspiracy at common law is as follows:

> *"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." Mulcahy v R (1868) L.R. 3 H.L. 306 at [317].*
> *The tort of conspiracy takes two forms: conspiracy to use unlawful means, and lawful means conspiracy, with the later also referred to as "conspiracy to injure":*
>
> *An unlawful means conspiracy (or "conspiracy to use unlawful means") requires two or more persons to combine and take action which is unlawful in itself with the intention of causing damage to a third party (although this does not necessarily need to be the pre-dominant purpose) which third party does incur the intended damage.*
>
> *118.2 Lawful means conspiracy (or "conspiracy to injure") does not require any unlawful acts to be carried out by the parties to the agreement. Indeed, the acts themselves carried out pursuant to the agreement may be lawful. However, this form of conspiracy does require the parties' sole or predominant purpose to have been to deliberately cause injury to the claimant, rather than to legitimately benefit the interests of the alleged conspirators.*
>
> *This statement of principle has been accepted by the Bermuda courts as an accurate reflection of the position under Bermuda law: Walsh and Taal v. Horizon Bank International [2008] S.C. (Bda) 2L.R. 16*

146. The cause of action in both types of actionable conspiracy is an intention to injure the claimant. The distinction is that to have an actionable unlawful means conspiracy a claimant must prove that unlawful actions were taken by the alleged conspirators. If a claimant cannot do that, it must instead prove that a defendant who has joined with others to commit acts that are otherwise lawful has done so with the predominant purpose not of advancing his own interests, but of injuring the claimant.

"... the tort may take two broad forms: (a) unlawful means conspiracy, in which case an intention to injure the plaintiff must be proved, and (b) conspiracy to injure, in which case the predominant purpose of the agreement or combination must be to injure the plaintiff. In the present case, the Plaintiffs have assumed the burden of proving the existence of a conspiracy coupled with an intention to defraud them. Whether this must be shown to have been an intention or the predominant intention depends on whether the Court finds the relevant conspiracy to have been a category (a) or (b) conspiracy." Walsh and Taal v. Horizon Bank International at [38]

The other requisite elements for either type of actionable conspiracy are:
1 a combination, of two or more persons.
2 concerted action pursuant to the combination; Lonrho Ltd v Shell Petroleum Co Ltd (No.2) [1982] A.C. 173
3 loss caused to the claimant. JSC BTA Bank v Ablyazov (No.14) [2018] UKSC 19.

Conspiracy is recognised as one of the "economic torts", which torts are helpfully described in the English Supreme Court judgment of JSC BTA Bank v Ablyazov (No.14) [2018] UKSC 19:

"...the economic torts are a major exception to the general rule that there is no duty in tort to avoid causing a purely economic loss unless it is parasitic upon some injury to person or property. The reason for the general rule is that, contract apart, common law duties to avoid causing pure economic loss tend to cut across the ordinary incidents of competitive business, one of which is that one man's gain may be another man's loss. The successful pursuit of commercial self-interest necessarily entails the risk of damaging the commercial interests of others. Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy. The elements of the four established economic torts are carefully defined so as to avoid trespassing on legitimate business activities or imposing any wider liability than can be justified in principle."

Combination

The first element for any tortious conspiracy is a combination between two or more persons to injure another. A tacit agreement or understanding will be sufficient. Belmont Finance Corporation v Williams Furniture Ltd and others (No 2) [1980] 1 All ER 393. The conspirators need not all join in at the same time, so long as each individual conspirator knows the central facts and entertains the same object. Huntley v Thornton [1957] 1 WLR 321 at 343; cited with approval in Kuwait Oil Tanker Co v Al Bader [2000 EWCA Civ 160]. The question is how far the relevant defendant was aware of the plan and then joined in the execution of it.

Concerted action

A claimant must show that concerted action has been taken pursuant to that agreement Per Lord Diplock in Lonrho Ltd v Shell Petroleum Co Ltd (No.2) [1982] A.C. 173:

:

"The gist of the cause of action is damage to the plaintiff; so long as it remains unexecuted the agreement, which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So, the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement."

Concerted action can be active or passive, but it must be more than mere facilitation. CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] A.C. 1013.

Unlawful means

Once the elements of combination and concerted action have been proven, in order to make out a claim for unlawful means conspiracy, a claimant must demonstrate a conspiracy to inflict harm by means of the commission of a tort, or torts, against the claimant, or by means of acts that are criminal.

In determining whether a defendant participated in a conspiracy, a claimant must prove that such participation took place with the requisite knowledge of the unlawfulness of the conspiracy. Walsh and Taal v. Horizon Bank International [2008] Bda L.R. 16; Lisa S.A. v. Leamington Reinsurance Company Ltd. and Avicola Villalobos S.A. [2008] SC (Bda) 47 Com.

Intention

When conspirators use unlawful means to injure a claimant, it is no defence for them to show that their primary purpose was to further or protect their own interests; an intention to injure the claimant, rather than a predominant purpose to injure, is enough. Lonrho Plc v Fayed [1992] 1 A.C. 448

However, if a claimant cannot prove unlawful acts then its claim for conspiracy is only capable of succeeding if the intention is to cause deliberate damage to the claimant. This is distinct from a situation in which a claimant's interests are harmed in consequence of a combination with a legitimate purpose of furthering the interests of the combiners. This principle was established by the English House of Lords in Crother Hand Woven Harris Tweed Co v Veitch[1942] A.C. 435.

"The true contrast is, I think, between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any such just cause."

This has been more recently formulated in the judgment of Lords Sumption and Lloyd-Jones in JSC BTA Bank v Ablyazov (No.14):

"A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of

the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse for the combination". [2018] UKSC 19 [2020] A.C. 727 at [744]

Damage

Finally, unless the concerted act of the defendants, with the intention of causing damage to the claimant, has actually caused loss or damage to the claimant, there can be no claim for conspiracy. Walsh and Taal v. Horizon Bank International [2008] S.C. (Bda) 2L.R. 16.

A claimant must detail the amount of damage it claims to have suffered. Lonhro Plc And others v Fayed and Others (no.5) 1993 1WLR 1489.

In the case of unlawful means conspiracy, the only damage which is relevant is that which follows from the unlawful means itself, and it is not therefore the case that the conspirators using unlawful means will be liable for any damage caused by any act carried out pursuant to the conspiracy, even if that act is not in itself unlawful. Adams & Others v Atlas International Property Services Ltd & Others 2016 EWHC 3120 QB at 219.

(V) Findings on Conspiracy Claims

147. The Claimants contend that all four elements to establish unlawful means conspiracy are present in this case against both the First and Second Respondents.

148. The Claimant's evidence against the First Respondents must establish the First Respondents conspired with others to inflict harm upon the Claimants by means of the commission of a tort or torts or by means of acts that are criminal. The Claimants rely upon a number of email exchanges and facts, including but not limited to the following:

- The admission by Mr Salinas that he wanted to "run all the claims through the captive from the beginning."
- The altering of the CSA and the CLRP and the Administration Agreement
- The administration of the claims as if they were self-insured while purporting the arrangement was fully insured and
- Mr Salinas admission that the arrangement would not be "an insurance contract" and would not violate West Virginia prohibition against self-funding because "the captive would be responsible for all claims" instead of EIN.

149. I do not find the evidence relied upon by the Claimants establishes the First Respondent committed a tort or engaged in tortious acts. The creation of an arrangement through what Mr McComb described as a fully insured program utilising a captive vehicle is not a tortious act. The Claimants rejoinder maybe then why are their claims unpaid. The answer to that question again defaults to the arrangement the parties entered into by which Mr Mullins would finance any shortfall if there were unpaid claims not covered by the Stop-Loss Policy. I find it hard to characterise the contractual arrangements between the parties as tortious. As far as committing criminal acts, the Claimants have not addressed me on the essential ingredients of establishing criminal conduct, nor have I been addressed how the behaviour of the First Respondent satisfies the requisite criminal standards of proof.

150. Consequent upon my finding that the First Defendants did not commit tortious or criminal acts, the Claimants must establish the First Respondents intended to cause deliberate damage to the Claimants. I refer to the test to establish intention in civil conspiracy cases explained by Lords Sumption and Lloyd-Jones in JSC BTA Bank v Ablyazov. The First Respondents can advance their own interests by lawful means even if the foreseeable consequence is to damage the interests of others; however, the First Respondents do not have this right if they seek to advance their own interests by unlawful means. Nor is the First Respondent entitled to use lawful means with the predominant intention of causing injury to the Claimants.

151. In this case, I have found the First Respondents did not commit unlawful acts by setting up a fully insured Policy which is what the Claimants sought. Therefore, a fully insured

policy could not damage the interests of the Claimants. Consequently, I also find the First Respondents did not use lawful means to set up a fully insured policy with the predominant purpose of causing injury to the Claimants.

152. Finally, and consequent upon my findings, the Claimants have failed to establish they suffered damage flowing from unlawful conduct carried out by the First Respondents.

153. Turning to the Second Respondents, the Claimant's evidence must also establish the Second Respondents conspired with others to inflict harm upon the Claimants by means of the commission of a tort or torts or by means of acts that are criminal. The Claimants rely upon a number of email exchanges and facts, including but not limited to the following:

- The email from Mr. Salinas dated 14 November 2016 urging the group to get on the same page and the subsequent email from Mr Tate suggesting shifting gears towards assuming the EIN SCCP would be a self-insured insurance program.

154. I rely upon the same reasoning in respect of the First Respondents. I do not believe the evidence relied upon by the Claimants establishes the Second Respondents committed a tort or engaged in tortious acts. The creation of an arrangement through what Mr McComb described as a fully insured program utilising a captive vehicle is not a tortious act.

155. To the extent it is alleged the Second Respondents committed criminal acts, the Claimants have not addressed me on the essential ingredients of establishing criminal conduct. Nor have I been addressed how the behaviour of the Second Respondents satisfies the requisite criminal standards of proof.

156. I also find the Second Respondents did not commit unlawful acts by setting up a fully insured Policy which is what the Claimants sought. Therefore, a fully insured Policy could not damage the interests of the Claimants. Consequently, I also find the Second Respondents did not use lawful means to set up a fully insured policy with the predominant purpose of causing injury to the Claimants.

157. Finally, and consequent upon my findings, the Claimants have failed to establish they suffered damage flowing from unlawful conduct carried out by the Second Respondents.

L. THE FRESH ALLEGATIONS RAISED AT THE HEARING

158. In the latter stages of this arbitration the Claimants made the following additional unpleaded allegations:

(a) firstly that the Respondents misled Mr. Mullins into signing contracts that contained important amendments that were made at the last minute and were deliberately not brought to Mr. Mullins' attention and/or not properly explained to him before he signed the contracts (the Contract Drafting Claims); and

(b) secondly that the premiums due from EIN were deliberately never paid into the Bermuda bank account of the EIN Segregated Account managed by CSL such that allegedly CSL never assumed any liability to EIN under the Policy (the Flow of Funds Claim).

(i) The Contract Drafting Claims

159. My first observation is that Mr. Mullins is an experienced and successful businessman. I find it highly unlikely that he would sign contracts likely to affect dozens of EIN's clients (and in turn thousands of their employees' critical healthcare benefits) without thoroughly reviewing and understanding what he was signing. Further, Mr Mullins had the benefit of experienced attorneys.

(ii) The Drafting of the Policy

160. The Claimants' case on the "hidden" changes made to the Policy in late 2016 is set out in paragraphs 306 to 316 of their written opening submissions. However, this version of events completely ignores an intervening email, which was sent by Mr. Nordstrom to Mr. Mullins (copying individuals from R&Q Quest) on 18 December 2016.

161. The 18 December 2016 email was stated by Mr Nordstrom to attach "the finalised insurance policy". The version of the Policy attached to this email is signed by Mr. Nordstrom and dated 18 December 2016. This was the same date of the version of the Policy which was attached to Mr. Nordstrom's email to Mr. Mullins of 22 December 2016; and the date of the final Policy that was signed by Mr. Mullins.

162. When one compares the version of the Policy that was attached to Mr. Nordstrom's email of 18 December to the version of the Policy that was attached to Mr. Nordstrom's email four days later of 22 December, they contain identical terms. I find the Claimants did not sign a version of the Policy with hidden changes of which they were unaware.

(iii) The Drafting of the CSA

163. The Claimants assert a version of the CSA was signed and dated on 12 December 2016 which named EIN and not Mr. Mullins as the owner of the EIN Segregated Account. They then note that Mr. Nordstrom subsequently contacted Mr. Mullins on 7 January 2017 to explain that a revised version of the CSA had to be executed, which reflected that Mr. Mullins was the owner of the EIN Segregated Account.

164. The Claimants make two points. Firstly, they say that amending the CSA to make Mr. Mullins the owner of the EIN Segregated Account while "purposely" electing to keep the name of the segregated account the same was a critical part of the co-conspirators' alleged scheme to convert the EIN SCCP from a fully insured to a self-insured program of insurance without the Claimants realising.

165. Secondly, the Claimants contend that in changing the account owner's name from EIN to Mr. Mullins, Mr. Mullins was never advised by CSL/Mr. Nordstrom that he would be personally liable to provide capital in the event of a Program Loss.

166. What I find particularly challenging with the Claimant's argument is that on the second day of the hearing, Mr. Mullins admitted during his cross-examination that he knew well before January 2017 that he was to be the owner of the EIN Segregated Account. Therefore, I find Mr. Mullins did know what his obligations as the account owner would be before he signed the final version of the CSA naming him as the owner of the EIN Segregated Account and consequently was not misled by the First and Second

Respondents. It is also important to note that there is no legal link between the name given to a segregated account and its ownership.

(iv) The Administration Agreement

167. The Claimants contend that the recital at the top of the first page of the agreement stated that the Policy was "properly registered and licensed under the law of West Virginia." The Claimants argue the recital is a false statement and is evidence of a deliberate attempt to mislead them. At the final hearing, the Claimants also contend that the "Employer" signature block (the "Employer" being EIN) on the penultimate page of the Administration Agreement contains Mr. Mullins' signature. The Claimants now argue that the language of the signature block had the contractual effect of making EIN jointly and severally liable with CSL for all claims covered by the Policy.

168. At the final hearing, the Claimants placed no reliance on the argument that they were deceived by the recital reference to the Policy being registered and licensed under the law of West Virginia. I find that reading the entire suite of contractual documents, namely the CSA, the CLRP, the Stop Loss Policy, the Reinsurance Agreement together with the Administration agreement, it is unlikely the Claimants concluded that the Policy was "properly registered and licensed under the law of West Virginia."

169. I find that the language used in the Employer signature block made it expressly clear that the purpose of the clause was to secure CSL's obligations under the Administration Agreement, not under any other contract. Mr. McComb expressly confirmed in his evidence that it was his firm view that the wording of the Employer signature block did not alter the fact that EIN was fully insured. I accept Mr McComb's evidence.

170. In my view, the Administration Agreement was a contract of agency, not of insurance, and was entered into purely to administer the operation of EIN SCCP, particularly the processing and payment of claims. I reject the Claimants claim that CSL deliberately inserted the language of the signature block to deceive the Claimants into signing on to what was therefore rendered a self-insured insurance program.

(v) The Flow of Funds Claim

171. The Claimants assert that because no premium monies were held in the Bermuda bank account of the EIN Segregated Account maintained by CSL, CSL had no liability from the inception of the contractual arrangements becoming enforceable.

172. The Second Respondents made two primary submissions in reply to the flow of funds argument.

"(i) Firstly, premium monies paid to and held by Capitol Administrators (a Californian company) as the TPA were held by Capitol Administrators for and on behalf of CSL as CSL's agent. The Administration Agreement envisaged that, acting as CSL's agent, EIN would pay premiums directly to Capitol Administrators rather than CSL, and Capitol Administrators would open a bank account for the purposes of paying the claims of Plan participants pursuant to CSL's obligations under the Policy. It is common ground that this is what happened in practice: EIN paid its premiums to Capitol Administrators, and Capitol Administrators held a portion of those premium monies in a bank account in the US in order to pay any claims under the Plan up to a value of $50,000. The monies held in the US bank account managed by Capitol Administrators were, it is submitted, assets of the "Subject Segregated Account" (i.e. the EIN Segregated Account managed for Mr. Mullins by CSA) as defined in the Policy. The fact that they were held in an overseas bank account managed by CSL's agent does not undermine that analysis.

(ii) Secondly, CSL's obligations for and on behalf of the EIN Segregated Account were 100% reinsured by the EIN Segregated Account (which was also owned by Mr Mullins) managed by R&Q Quest Insurance Limited (Reinsurer)."

173. Mr McComb explained in his evidence that the assets in a segregated cell are not limited to the cash at the bank. Mr McComb stated:

"the assets belonging or linked to a segregated cell can take several different forms, including the right to receive reinsurance recoveries and a right of indemnity from the owner of the segregated cell owner (both of which assets

the EIN Segregated Account managed by CSL had throughout the life of the EIN SCCP). "

174. For the above reasons, I reject the Claimants claim that because no premium monies were held in the Bermuda bank account of the EIN Segregated Account maintained by CSL, CSL had no liability.

M. THE CLAIM FOR DAMAGES

175. In addition to the declaratory judgments, the Claimants seek punitive damages, attorneys' fees and costs, pre-judgment and post-judgment interest, and a finding that Respondents are responsible for all arbitration costs, including legal fees and travel expenses.

176. The Claimants' claim is itemised as follows:

Compensatory Damages Amount:	
Reimbursement for claims payments	$ 4,160,162.60
Lost Revenue	$ 2,239,353.00
Reimbursement for Overpayment	$ 1,471,868.98
Misrepresentation of Claims Data	$ 3,300,000.00
Slander, et al.,	$ 2,000,000.00
Total	$13,441,180.10
Punitive Damages Amount:	
Three times Compensatory Damages	$40,323,540.30
Total Compensatory & Punitive Damages	$53,764,720.40

177. The First and Second Respondents both submit the Claimants have laid no proper evidentiary foundation to support the claim for damages. I have rejected each of the claims made by the Claimants. Therefore, based on my findings, it is unnecessary to assess the Claimant's claim for damages.

N. THE AWARD

178. I have read, considered and taken note of the pleadings filed by the parties, the legal arguments and submissions, the bundle of documents submitted to the tribunal for the final hearing, the witness statements, oral evidence, written and oral submissions made by counsel for the parties.

179. **I AWARD AND DIRECT THAT,** in full and final settlement of all claims in this arbitration the Claimants' claims against the First Respondents and Second Respondents set out in the Statement of Claim are dismissed. More particularly, the Claimants' claims in paragraphs 60 through 67 of the Statement of Claim are dismissed seeking relief for:

Breach of the West Virginia Unauthorised Insurers Act;
Negligence;
Breach of Contract;
Fraud;
Civil Conspiracy;
The Fresh Allegations raised at the Hearing; and
Damages.

O. RESERVED MATTERS

180. I reserve to my further final award determination, if not agreed, of the amount of recoverable costs for which purpose I shall give my further directions upon the application of the parties.

Dated: 20 January 2022

DELROY B DUNCAN QC
Arbitrator