THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0977 OF 2018

PALIN CORPORATION LIMITED ……..…… PLAINTIFF

VERSUS

UAP OLD MUTUAL INSURANCE (U) LIMITED ….…… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The Plaintiff's claim against the defendant is for indemnity arising out of two contracts of insurance entered into between the parties. Through Sunbridge International Insurance Brokers Ltd, the Plaintiff secured the two motor vehicle insurance policies from the Defendant, namely; policy No.010/070/1/013438/2016 for a Toyota Noah Reg. No. UAX 944 at a premium of shs. 1,277,980/= running from 16th August, 2016 to 15th August, 2017 and policy No. 010/070/1/013473/2016 for a Land Rover Reg. No. UAT 943 Q at a premium of shs. 6,445,940/= running from 26th August, 2016 to 25th August, 2017.

Later, the Toyota Noah Reg. No. UAX 944 was stolen on 5th January, 2017 while the Land rover Reg. No. UAT 943 Q was on 2nd June 2017 involved in an accident that left it severely damaged. The plaintiff then submitted its claim for indemnity with the defendant under both policies. The defendant rejected both claims on grounds that the respective policies had been cancelled and notice of that cancellation had been given to Sunbridge Brokers international who were the Insurance brokers who procured the insurance. The plaintiff was dissatisfied with the defendant's conduct and filed this suit claiming the defendant was in breach of contract, seeking orders from court to enable it to be compensated for the losses they suffered as a result of the defendant's

actions and in the alternative a refund of the monies they paid to the defendant as premiums under the policies.

b. The defence to the claim;

In their written statement of defence, the defendant did not deny entering into both contracts of insurance with the plaintiff. It however contends that the Insurance contracts had been cancelled by a notice issued to Sunbridge and that Sunbridge Brokers were agents of the plaintiff. They contended further that the obligation was placed on Sunbridge to communicate the cancellation to the plaintiff and not the defendants. Their defence is that that the mode adopted for communication of the cancellation is in accordance with established industry practice and policies where an insurance policy insurance is procured through a broker. They prayed that the suit be dismissed with costs.

c. The issues to be decided;

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. The court may amend issues or frame additional issues at any time, including during judgment (see *Oriental Insurance Brokers Ltd v. Transocean (U) Ltd S.C. Civil Appeal No. 55 of 1995; Odd Jobs v. Mubia [1970] E.A. 476* and *Norman v. Overseas Motor Transport (Tanganyika) Ltd [1959] E.A. 131*). The following therefore are the issues to be decided by court.

1. Whether Sunbridge International Insurance Brokers Ltd was an agent of the plaintiff or that of the defendant in the execution of the insurance contracts.
2. Whether the defendant breached the insurance policies when it issued a notice of cancellation to Sunbridge International Insurance Brokers Ltd and not the plaintiff.
3. What remedies are available to the parties?

d. The submissions of counsel for the plaintiff;

Counsel for the plaintiff, M/s Amber Solicitors & Advocates, submitted that it was Sunbridge International Insurance Brokers Ltd that approached the plaintiff company for and on behalf of the defendant company to sell insurance policies that were being offered by the defendant. The defendant admitted having paid a commission to said insurance brokerage firm. In its written statement of defence, the defendant admitted that Sunbridge International Insurance Brokers Ltd collected premiums from the plaintiff on its behalf. The insurance brokerage firm therefore was an agent of the defendant. The two insurance contracts laid down express and clear provisions on how the said contracts would be cancelled. It follows that any termination that did not comply with the express terms of the contracts constituted an act in breach of the two motor vehicle insurance policies and cannot be deemed to be cancellation under the law. Since the defendant did not comply with the condition set out in clause 9 of the two policies by giving the requisite notice, the cancellation was ineffective. The defendant cannot rely on trade practice and custom to deny the existence of the relationship od agency between it and Sunbridge International Insurance Brokers Ltd, or to argue that notice of cancellation served on that brokerage firm was effective service upon the plaintiff.

e. The submissions of counsel for the defendant;

Counsel for the defendant, M/s S. & L. Advocates, submitted that at common law and by virtue of section 2 of *The Insurance Act, 6 of 2017*, an insurance broker is an agent of the insured. The brokers had apparent authority to act on the plaintiff's behalf. The plaintiff is now estopped from denying that agency relationship. That the brokers received a commission from the defendant did not constitute them agents of the defendant. By the notice of cancellation dated 14th October, 2016 and received by the brokers on 18th October, 2016 the defendant received the 30 day notice required. Industrial practice required the defendant to act through the broker in its communication with the plaintiff. Notice given to an agent is effective notice to the principal. The plaintiff is not entitle to the reliefs sought since by the time he made his claim both policies had been cancelled. The plaintiff did not provide proof of the claimed special damages. Although the award of general damages and interest is at the discretion of court, the plaintiff is not entitled to any. The plaintiff

is only entitled to a *pro rata* refund of premium which the defendant has been willing and ready to pay since 22nd November, 2016. For failure to mitigate damages and for the rest of the reasons stated above, the plaintiff's claim should be dismissed.

f. The decision;

1st issue; Whether Sunbridge International Insurance Brokers Ltd was an agent of the plaintiff or that of the defendant in the execution of the insurance contracts.

Agents and brokers act as intermediaries between the insurance buyer and the insurers. These can be either "insurance agents" or "insurance brokers" Section 2 of *The Insurance Act, 6 of 2017* defines an "insurance agent" as a person appointed and authorised by an insurer to solicit for applications for insurance or negotiate insurance coverage on behalf of the insurer or to perform other functions of an insurance nature that may be assigned to him or her by the insurer, and who in consideration for his or her services receives commission or other remuneration from the insurer.

The main difference between an insurance broker and an insurance agent is that an agent represents one or more insurance companies, acting as an extension of the insurer. Insurance agents have contractual agreements (known as appointments) with insurers that set up the guidelines for the policies they can offer and the terms of their remuneration. An insurance agency sells policies on behalf of insurers that have granted it an appointment. Agents can complete insurance sales (bind coverage), while brokers cannot.

On the other hand insurance brokers represent the insurance buyer (see *Arthur v. London Guar. & Acc. Co., 78 Cal. App. 2d 198, 202 [177 P.2d 625]* and *Detroit T. Co. v. Transcontinental Ins. Co., 105 Cal. App. 395, 398 [287 P. 535*). Section 2 of *The Insurance Act, 6 of 2017* defines an "insurance broker" as a person, not being an insurance agent, who acting as an independent contractor for a commission or remuneration; (a) negotiates or arranges insurance contracts on behalf of an insurer or prospective insured, other than himself or herself; or (b) advises an insured or prospective insured on his or her insurance needs and requirements. Insurance brokers therefore may help the insured to do any or all of the following: (a) solicitation of a policy; (b) engage in

negotiations preliminary to execution; (c) execution of a contract of insurance; (d) transaction of matters subsequent to execution of the contract and arising out of it.

Insurance brokers thus are not appointed by insurers and do not have the authority to bind coverage. They solicit insurance quotes and / or policies from insurers by submitting completed applications on behalf of insurance buyers. They prepare applications to insurers on behalf of the brokers' clients, the insurance buyers. They guide the insurance buyer through selection of the most suited insurance company to underwrite their risk in terms of underwriting capacity, selection of the most ideal Insurance policy / package, guide the insurance buyer through insurance claims requirements and procedures to ensure prompt payment of indemnities, and so on.

However, statutes defining "broker" are not determinative of the actual relationship in a particular case. The actual relationship is determined by what the parties do and say, not by the name they are called. A dual agency can consequently exist as such where a broker represents both the insured and the insurer, e.g. an insurance broker acts as an agent for the insured in procuring insurance for the insured, but the broker may also be the agent of the insurer in respect to the policy (see *Fraser-Yamor Agency, Inc. v. Del Norte County (1977) 68 Cal. App. 3d 201, 213 [137 Cal. Rptr. 118*). For example when the broker accepts the policy from the insurer and the premium from the assured, he is deemed to have elected to act for the insurer to deliver the policy and to collect the premium. When the broker is entrusted with and accepts the policy from the insurer for delivery to the assured, and accepts the premium from the assured for delivery to the insurer, such facts create an actual dual agency (see *Maloney v. Rhode Island Ins. Co., 115 Cal. App. 2d 238, 244 [251 P.2d 1027]*).

There are several English authorities which have uniformly held that an agency relation exists between an insurer and a broker as to collection of the premium (see *Shee v. Clarkson, (1810), 104 Eng. Rep. 199; Goldschmidt v. Lyon, (1812), 128 Eng. Rep. 438* and *Houston v. Robertson (1816), 128 Eng. Rep. 1109*.). Thus in *Minett v. Forrester (1811), 128 Eng. Rep. 441 at 443,* it is stated:

> The broker is agent for the assured, and also for the underwriter [insurer]; he is agent for the insured, first, in effecting the policy, and in everything that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for

nothing else; and he is supposed to receive the premium from the insured for the benefit of the underwriter.

The evidence in this case does not show that the Sunbridge International Insurance Brokers Ltd received the premium on behalf of the defendant. To the contrary, the plaintiff paid the premium directly to the defendant (see exhibits P. Ex.1 and P. Ex.2). Since the broker never acted in that regard, I find that for all intents and purposes Sunbridge International Insurance Brokers Ltd acted as the plaintiff's agent in the transaction.

2nd issue; Whether the defendant breached the insurance policies when it issued a notice of cancellation to Sunbridge International Insurance Brokers Ltd and not the plaintiff.

A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes circumstances where an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform in a manner that meets the standards of the industry. The facts of breach relied upon by the plaintiffs are twofold; failure to give effective notice of cancellation of the policies and refusal to indemnify the loss.

Once an insurance policy is issued, an insurance company cannot cancel the policy except for reasons specifically stated in the policy. Ordinarily an insurer may cancel a liability insurance policy at any time during the term of the policy for: (a) fraud in obtaining coverage; (b) failure to pay premiums when due; (c) an increase in hazard within the control of the insured that would produce a rate increase; or (d) loss of the insurer's reinsurance covering all or part of the risk covered by the policy. A cancellation clause explains who may cancel the contract, the conditions for cancellation, and the procedures they must follow.

Prior notice of cancellation of an insurance policy is intended to afford the insured time to obtain other insurance. The policy contract will usually specify the reasons for which the insurer can cancel the policy and the time frame and method in which it can do it. In the instant case, clause 9 common to both contracts provided as follows;

> The company may cancel this policy by sending seven days' notice by the registered letter to the insured at his last known address and in such an event will return to the insured the premium paid less the *pro-rata* portion thereof for the time during the current period of the insurance policy has been in force…

Notice provisions in contracts and other commercial agreements exist for a purpose; to give the parties certainty over how they may communicate with each other, and when a communication will be effective for contractual purposes. The provision of this method of service of notice is intended to avoid subsidiary disputes between the parties to the contract as to whether the notice was given or received. Compliance with its provisions eliminates to a very large extent such disputes, as it provides for a mode of service and receipt of the required notice which can be corroborated from an independent and official source. Further, the receipt of a registered notice imports a certain solemnity or importance to the giving of the notice which a more informal method of service may not convey (see *Eriksson v. Whalley [1971] 1 NSWLR 397 at 400-401*).

For an effective notice of cancellation, the defendant as insurer certainly had to prove it met the notice requirement in full. The mailing method is highly relevant to that burden. Mailing of notice by registered mail is effected by depositing it in a sealed envelope, directed to the addressee at his or her last address as known to the insurer or as shown by the insurer's records, with proper prepaid postage affixed, in a letter depository of the Uganda post office. The language of the contract at no point refers to receipt of the notice by the insured or to acquisition of "actual knowledge" by the insured. While service by registered mail raises a presumption of actual notice, such notice may be found where the certified mailing is properly directed to the intended recipient, even though not actually received by them.

By way of analogy, section 35 of *The Interpretation Act* provides that where any Act authorises or requires any document to be served by post, the service is deemed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post. This presumption is rebuttable and the burden of proof lies on the addressee. It is open to the addressee to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities

never tendered the registered letter to him or her (see *R v. Appeal Committee of County of London Quarter Sessions, Ex parte Rossi [1956] 1 All ER 670*). The burden to rebut the presumption lies on the party challenging the factum of service. Hence, in the absence of evidence in rebuttal, the fact is proved and no other evidence is necessary to prove it. Mere denial of the addressee that he or she did receive the notice or that the notice was not tendered to him or her is not sufficient to rebut the presumption.

It was defence counsel's argument that the plaintiff followed established industrial practice in delivering notice to Sunbridge International Insurance Brokers Ltd, instead of the contractual mode of "registered letter to the insured at his last known address" as required by clause 9 common to the two contracts. This in a way serves to introduce a term into the written contract, based on custom and usage, yet it is well-established that express terms trump implied terms.

It is trite that terms may be implied by the custom, usage or practice of a particular trade, market or area in which the contract is made. Terms may also be implied from the parties' previous course of dealing with each other. However, this is only done where what is expressly stated in a contract is not sufficient to cover a particular scenario, in situations where it is objectively necessary to give "business efficacy" to the contract, i.e. to allow the parties to properly conduct the business that they had contracted for; or if a third-party (i.e. the "officious bystander") asked the parties if they intended to include that term into their contract, both of them would reply with "Oh, of course!"

To be inferred in those circumstances, the custom or usage must be usual and generally known about in the industry or place of contract for these terms to be implied into the contract. The usage has to be: notorious, certain, reasonable and not contrary to law more than a mere trade practice. For a term to be implied by custom, it has to be: (i) well-known and of universal practice by people in that trade, such that even if an outsider to the trade hadn't been aware of the custom, he or she would be able to find out about it if he were to make reasonable inquiries on them; (ii) recognised to be legally binding on the parties; (iii) certain, i.e. identifiable and largely consistent; and (iv) consistent with the contract's express terms. It is well-established that express terms trump implied terms.

It is therefore possible to imply terms only for purposes of filling in “gaps” not covered by express terms in a contract where such a term is; reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; or where it is so obvious that "it goes without saying"; it is capable of clear expression; and does not contradict any express term of the contract (see *B.P. Refinery (Westernport) Pty Ltd v. Shire of Hastings (1977) 180 CLR 266*). Conduct, custom or usage can fill in gaps in the contract but cannot generally override contract terms. Generally speaking, in the event of a conflict between an express term and an implied term, the express term will prevail (see *Irish Bank Resolution Corp Ltd (In Special Liquidation) v. Camden Market Holdings Corp & 7 others [2017] EWCA Civ 7*). However, it is possible (albeit rare) for custom and usage to override written terms if, for example, it has been customary for many years to ignore a written term such that the parties have come reasonably to expect it to be ignored.

The most fundamental tenet regulating the interpretation of contracts is the determination of the common intent of the parties. The cardinal rule of contract interpretation is to ascertain and give effect to the expressed intentions of the parties. The construction of a contract has to determine the common intention of the parties or, if no such intention can be determined, the meaning that reasonable parties of the same kind as the parties would give to it in the same circumstances, taking into account, in particular, the nature and purpose of the contract, the conduct of the parties and the meaning commonly given to contract terms and expressions in the trade concerned. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. The threshold inquiry is whether the contract's terms are ambiguous or explicit. If the provision is unambiguous, then the court should look only to the text of the contract to determine the parties’ intent. If the language of the contract provisions are found to be explicit and unambiguous, no additional evidence can be considered. Court will interpret clear and unambiguous contract terms according to their ordinary meaning.

One exception is where despite the existence of such an express contractual term, the parties choose to engage in a particular course of conduct when serving notices. The parties may then be prevented from later contending that this particular method of serving the notice was legally ineffective, even if the method is not explicitly included in the contract (see *Charles Rickards ltd*

v. Oppenheim [1950] 1 KB 623 and *Jawaby Property Investment Ltd v. The Interiors Group [2016] EWHC 557*). Clear and express words would be needed in the contract to make impermissible service by alternative yet practically effective means. However in the instant case, there is no evidence to show that the parties mutually chose to engage in any particular mode of serving notices that is inconsistent with clause 9 common to both contracts. This exception therefore in inapplicable.

That notwithstanding, this court is alive to persuasive jurisprudence emphasising the importance of adopting a flexible construction of the language in the contract in order to give effect to the commercial purpose of the notice provisions. When such approach is used, a construction should be given to the clause, consistent with its commercial purpose and context. Unless a particular form of notice or method of delivery is explicitly excluded in the contract or otherwise not permitted by law, it is possible to serve a valid notice by a contractually unspecified means as long as it fulfils its purpose and it is clear to the receiving party that it is given as a contractual notice.

The rationale for this approach is that in the absence of explicit wording in the contract or similar evidence of the parties' intention, it would be unreasonable to construe a provision for service by registered mail as excluding the giving of notice by equally other expeditious means which do in fact result in the actual receipt of the notice by the other party (see for example *Torbey Investments Corporated Pty Ltd v. Ferrara [2017] NSWCA 9; Kennedy v. Collings Construction Co Pty Ltd (1991) 7 BCL 25* and *Spectra Pty Ltd v. Pindari Pty Ltd [1974] 2 NSWLR 617*). This however applies to notices which though lacking in from or mode are compliant in substance and intention, in circumstances where it is established that the relevant information was in fact received. In such cases the purpose of the mandatory language would have been achieved, such that any formal non-compliance should not be seen as rendering the notice ineffective under the contract.

Those cases illustrate that valid service of a notice can still be achieved despite the use of a method or form not contractually specified. What is necessary, however, is that any alternative service takes place by a method that is (a) effective in terms of actual communication of a contractual matter; and (b) evidently acceptable to the party to whom the notice is sent. In the instant case, when the notice of cancellation of over twenty seven (27) policies, including the two taken out by

the plaintiff, was on 14th October, 2016 sent to Sunbridge International Insurance Brokers Ltd where it was received on 18th October, 2016 (exhibit D. Ex.4), they undertook to transmit the notice to each of the affected policy holders, which they never did. As a result, the plaintiff never received actual notice of the cancellation until 22nd June, 2017 as indicated by its official rubber stamp impressions affixed to a copy of the defendant's notification to dated 14th October, 2016 (see exhibit P. Ex.3). This was more than five months after the Toyota Noah Reg. No. UAX 944 had been stolen on 5th January, 2017 and three weeks after Land rover Reg. No. UAT 943 Q was involved in a collision on 2nd June 2017. Therefore, service of the notice on Sunbridge International Insurance Brokers Ltd was neither effective in terms of actual communication nor was it evidently acceptable to the plaintiff. The purposive approach to interpretation of the contract therefore too is inapplicable.

It was contended by counsel for the defendant that an insurance broker acts for the insured at all stages of the contract from its inception, claim stage, renewal until expiry. Indeed insurance brokers may help the insured to do any or all of the following: (a) solicitation of a policy; (b) engage in negotiations preliminary to execution; (c) execution of a contract of insurance; (d) transaction of matters subsequent to execution of the contract and arising out of it. Subject to any contractual arrangement between the broker and the insured, a broker has duties (among others) to take reasonable care to: (i) arrange effective cover within a reasonable time on behalf of the parties; (ii) ensure that the insured complies with his or her duties in relation to making disclosure and avoiding misrepresentation; (iii) arrange cover which is appropriate to the insured's needs and which is in accordance with the insured's instructions; (iv) protect the insures in respect of matters on which the broker has not received instructions. i.e. the broker must make an assessment of the insured's needs and advise the insured of any gaps in the cover; (v) arrange cover with a reputable and solvent insurer; (vi) advise the insured of the insured's rights and obligations under the contract of insurance; (vii) ensure that the cover remains effective; (viii) if it has authority to handle a claim, the broker must do so with reasonable care.

Brokers therefore have an active role not only in the negotiation of the insurance policy but also when a loss occurs, as they usually channel the communications between the insured and the insurer. It does not follow though that their mandate necessarily includes receiving notices of

termination. It is not necessarily implied that an insurance broker acting for one of those purposes, acts for all. An insurance broker that solicits and negotiates a contract does not necessarily undertake transaction of matters subsequent to execution. The extent of the powers granted to the broker can be expressly defined by the insured or inferred from the conduct of the insured.

On the other hand, in the event that the power granted to a broker to enter into insurance contracts is construed as necessarily authorising the broker to negotiate, amend or extend insurance contracts, as well as receive notifications and draw up declarations of rescission, unless its powers have been expressly limited by the insurer, then the express provisions of the policy may exclude the power to receive notice.

Whereas an authorised broker is, presumably, the party most interested in maintaining a business relationship with the insured, and would, therefore, advise the insured as quickly as possible of any notice of cancellation, however, while an insurance broker may have acted on the insured's behalf in securing the policy, that does not make it the insured's' agent for all purposes, or for the specific purpose that is relevant here: receipt of a notice of cancellation (see for example *Sierra v. 4401 Sunset Park, LLC, 2014 NY Slip Op. 08216; 101 AD3d 983*). Effective notice must be given to the insured and where necessary on account of prudence, to the authorised agent who can assist the insured in obtaining replacement coverage, but not to the latter exclusively.

Moreover, according to section 93 of *The Insurance Act, 6 of 2017* the appointment of an insurance agent by a person does not preclude that person or a beneficiary under the policy from having direct communication with the insurer or vice versa. A broker's duties only relate to the procurement of insurance and not the termination (see *Kotlar v. Hartford Fire Ins. Co. (2000) 83 Cal.App.4th 1116, at 1123*). The duty of a broker is to use reasonable care, diligence and judgment in procuring requested insurance. In any event, an authorised agent or broker is one that the insured designates to receive information on its behalf. In light of section 93 of *The Insurance Act, 6 of 2017,* authority to receive notice of cancellation may not be inferred from instruction given to the broker to conduct procure a policy because it is not incidental to such authority, it does not usually accompany it, nor is it a reasonably necessary means for accomplishing it.

Section 161 of *The Contracts Act, 2010* provides that any notice given to or information obtained by an agent in the course of the business transacted by the agent for the principal, shall, as between the principal and a third party, have the same legal consequences as if it had been given or obtained by the principal. For this provision to apply, the agent must have been acting "in the course of the business transacted by the agent for the principal." There is no evidence to show in the instant case that as by 18th October, 2016 Sunbridge International Insurance Brokers Ltd. was transacting any business with the defendant on behalf of the plaintiff. Its role for all intents and purposes on the facts of this case ended with the plaintiff's execution of the two policies.

To the contrary, the evidence shows that immediately the plaintiff executed policies with the defendant, it established direct contact with the defendant and its communications henceforth were directly with the defendant, and not through Sunbridge International Insurance Brokers Ltd. This is manifested by the claim contained in the letter and email dated 10th February, 2017 (exhibits P. Ex.5 and P. Ex.5 respectively), the defendant's response thereto in an email and letter both dated 21st June, 2017 (exhibit P. Ex.4 and P. Ex.5). Therefore, in absence of evidence to show that by the insured's own actions the insurance broker was held out to be its agent for the purpose of giving notice and in light of the explicit provision in clause 9 common to both contract, a timely notice to a broker did not constitute the notice contemplated by the insurance policy. Reasonable belief that notice to the broker is sufficient notice to the insured is not a basis for amending the policies.

Since none of the exceptions apply to this case, what is left then is resort to the cardinal rules that guide the interpretation of contracts. When interpreting a written contract, the Court seeks to give effect to the intention of the parties as expressed in the unequivocal language they have employed. The best evidence of intent is the contract itself since it stipulates the intention which the parties expressed, not the subjective intentions which they may have had, but did not express. Contract language is not ambiguous merely because the parties dispute what it means. To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning. Courts must give unambiguous provisions of an insurance contract their plain and ordinary meaning (see *Essex Ins. Co. v. Laruccia Constr., Inc., 71 A.D.3d 818, 819 (2d Dep't 2010*). Therefore, in focusing on the words, I apply the well-settled principles of contract interpretation that require this court to enforce the plain and unambiguous terms of a contract as the binding expression of the

parties' intent. Where the language of the contract is unambiguous on its face, it must be enforced according to the plain meaning of its terms.

In the instant case, I find that the language in clause 9 common to both contracts is not reasonably susceptible to more than one meaning. Being unequivocal, a notice of cancellation will not be effective unless mailed or delivered in accordance thereto. To discharge the burden of proof of notice of cancellation in accordance with the terms of the insurance policy, the insurer is required to provide evidence that establishes the notice was properly mailed and, if mailing is established, the notice will be deemed to have been effected at the time of posting, or at most, at the time which the letter would be delivered in the ordinary course of the post. This is based on the presumption that that regular office mailing procedures took place in order to get the document into the possession of the addressee.

By his one admission, D.W1 stated that the mode adopted by the defendant in the instant case was delivery of a letter to the insurance broker. This was not the mode expressly agreed upon in the two policies of insurance. It thus constituted a breach of each of the two policies. This issue therefore is answered in the affirmative. The defendant breached each of the two policies of insurance when it issued a notice of cancellation to Sunbridge International Insurance Brokers Ltd and not the plaintiff.

3rd issue; <u>what remedies are available to the parties</u>.

The insurer is fully liable towards the insured, if a valid insurance contract is executed, without any regard to the intervention of brokers. The extent of liability is determined by the contract and the circumstances of each particular case. Since written notice does not take effect until it is communicated (see *Newcastle Upon Tyne Hospitals NHS Foundation Trust v. Haywood [2018] UKSC 22*), it follows that if a notice of cancellation is defective by reason of non-communication, the policy remains in effect. As corollary to this, a party is liable to perform agreed-to contract duties until or unless it is discharged or the contract is effectively cancelled.

In the instant case, the defendant purported to terminate the two policies by notice intended to take effect on 11th November, 2016. However, since the notice was not communicated to the plaintiff until 22nd June, 2017, the implication is that the two policies remained valid until then. Hence, they were still valid and binding on the defendant by the 5th January, 2017 when Toyota Noah Reg. No. UAX 944 was stolen and 2nd June 2017 when Land Rover Reg. No. UAT 943 Q was involved in a collision.

Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. The two policies covered accidental loss of or damage to each of the two vehicles. Toyota Noah Reg. No. UAX 944 was insured up to shs. 25,000,000/= while Land Rover Reg. No. UAT 943 Q was insured up to the sum of shs. 120,000,000/= With accidental damage, when the insurer decides that it is not economical to repair the vehicle, its compensation will be: (a) the reasonable market value of the vehicle at the time of the loss or damage; or (b) the insured amount for the vehicle. The plaintiff's claim for special damages for loss of one vehicle and damage to the other therefore is covered by the risk insured. An order of specific performance would suffice compelling the defendant to indemnify the plaintiff in accordance with the terms of the two policies.

As regards the claim for general damages, the primary remedy for breach of contract is damages. Damages for breach are assessed according to the principle that the innocent party is, as far as possible, put in the position in which it would have been if the contract had been properly performed, subject to the usual rules on causation, foreseeability and mitigation (see *British Westinghouse Electric Co. Ltd v. Underground Electric Railways [1912] AC 673*). A party cannot recover damages for any part of a loss which could reasonably have been avoided. The duty to mitigate requires a party to act reasonably, which will depend on the individual circumstances of each situation. However, the claimant need only take steps which are in the ordinary course of business and is not required to engage in commercially risky conduct. Expenses, costs or further loss incurred in taking steps to mitigate the loss can be recovered. In the circumstances of this case, nominal damages of shs. 5,000,000/= would suffice and it is accordingly awarded.

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In conclusion, judgment is entered for the plaintiff against the defendant in the following terms, namely;

a) An order of specific performance of the two policies of insurance.
b) Shs. 5,000,000/= as general damages
c) Interest on (b) above at the rate of 8% per annum until payment in full.
d) The costs of the suit.

Dated at Kampala this 25th day of March, 2021

……...
Stephen Mubiru
Judge,
25th March, 2021.