BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT
(CIVIL DIVISION)

[Unreported]
Suit No: CV0361 of 2008

BETWEEN:

APSARA RESTAURANTS (BARBADOS) LIMITED **PLAINTIFF**

and

GUARDIAN GENERAL INSURANCE LIMITED **DEFENDANT**

Before:
The Honourable Madam Maureen Crane-Scott Judge of the High Court

Appearances:
Mr. Alair Shepherd Q.C. in association with Ms. Genevieve Maynard for the Plaintiff

Mr. Roger Forde Q.C. in association with Mr. C. Anthony Audain for the Defendant

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2011: October 17, 18, 19, 20, 21, 26, 27, 31;

November 1;

December 9;

2013: October 25.

DECISION

[1] **Crane-Scott, J:** On October 25, 2013 I dismissed the Plaintiff's claim and indicated that detailed reasons would be provided at a later date. The following are the reasons for my decision.

[2] The proceedings concerned a claim by Apsara Restaurants (Barbados) Limited ("the Plaintiff") for the sum of Bds$6,092,696.60 for the loss by fire of its leasehold improvements, restaurant equipment, furniture, contents and stock insured under a policy of insurance effected with the Guardian General Insurance Limited ("the Defendant") on 5th April 2007. The claim was filed following the Defendant's denial of liability under the policy on multiple grounds, including, *inter alia*, material non-disclosure and breaches of terms and conditions endorsed or otherwise expressed in the policy.

THE FACTUAL BACKGROUND:

[3] The Defendant is a limited liability company incorporated under the Republic of Trinidad and Tobago and is registered as an external company under the *Companies Act Cap 308* of the Laws of Barbados and conducts the business of insurance underwriting in Barbados.

[4] The Plaintiff is a limited liability company incorporated under the *Companies Act Cap 308* of the Laws of Barbados as Company number 24101. In and about the month of August, 2006 the Plaintiff company opened and began operating two restaurants respectively known as *"Apsara"* and *"Tamnak Thai"* in rented premises situated at "Morecambe House", Worthing, Christ Church.

[5] In and about the month of July, 2006, the Plaintiff company acting through its owner/directors, Ms. Marie Kavanagh and Mr. Sharif Mohammed, appointed Lynch

Insurance Brokers as its agent to effect insurance on the contents and lease hold improvements of the company's restaurants. After meeting with Mr. Michael Gonsalves of Lynch Insurance Brokers and examining several quotations, the Plaintiff company acting by Mr. Sharif Mohammed, gave instructions to its said brokers to place the insurance with the Defendant company.

[6] Ultimately, by Fire Commercial Policy of insurance number BB FCP 6452842 dated 5th April 2007, the Defendant, in consideration of premiums paid and to be paid, agreed to insure the Plaintiff company against loss or damage by fire at the Plaintiff's place of business situate at "Morecambe House", Worthing, Christ Church as follows:

Particulars of Insurance

Bds $2,000,000.00 on the Plant, Machinery and Equipment

Bds $4,000,000.00 on the Improvements and Betterment

Bds $500,000.00 on the Stock

[7] In the early morning hours of 27th August 2007, just over 4 months after issuance of the policy and whilst the policy was in force, a fire occurred at the restaurants of *"Apsara"* and *"Tamnak Thai"*, which destroyed the Plaintiff's leasehold improvements and betterments, furniture, effects and other equipment and stock in trade.

[8] The Plaintiff then delivered to the Defendant a claim for loss under the policy which the Defendant refused to honour. Consequent on the Defendant's refusal to honour the claim, the Plaintiff filed a Writ of Summons and Statement of Claim on 6th March 2008 claiming the sum of Bds$6,092,696.60.

THE PLEADINGS:

The Statement of Claim

[9] The Plaintiff's case against the Defendant is that in breach of the aforesaid policy of insurance with the Defendant dated 5th April 2007, the Defendant has failed to honour the Plaintiff's claim.

[10] At paragraph 5.1 of its Statement of Claim, the Plaintiff claimed the sum of Bds $6,092,696.60 being:

i. BDS $4,000,000.00 for leasehold improvements,

ii. BDS $1,973,793.00 for restaurant equipment, furniture and contents,

iii. BDS $118,903.59 for restaurant stock, and

iv. Interest at 8% thereon and costs.

The Defence

[11] The Defendant company filed a Defence on 17th April 2008, an Amended Defence on 6th May 2008 and a Further Amended Defence on 8th April 2011.

[12] While it admitted having issued the said policy of insurance, the Defendant claimed at paragraph 3 of the its Defence that the policy was subject to the terms and conditions endorsed or otherwise expressed on the policy and which were to be taken as part of the policy.

[13] At paragraph 5 of the Defence, the Defendant further alleged that the policy of insurance constituted a contract *uberrimae fidei* and as such, the Plaintiff company was under a duty to disclose to the Defendant, before the conclusion of the contract, all information which was material and which was known, or ought to have been known by the Plaintiff's directors and/or officers and/or agents which would influence the judgment of

the Defendant and/or a prudent insurer in fixing the premium or determining whether it would take the risk.

[14] The Defendant further claimed that the Plaintiff was under the same duty of disclosure as is imposed on an "assured" under section 21 of the *Marine Insurance Act Cap 292* of the Laws of Barbados.

[15] At paragraph 8(a), (b) and (c) of the Further Amended Defence, the Defendant gave particulars of the non-disclosures complained of and alleged that, in breach of the duty of disclosure, the Plaintiff failed to disclose certain material facts and circumstances, known to the company, its directors, and/or officers and/or agents. However, as the alleged non-disclosures will be discussed in detail later on, they will not be outlined at this stage.

[16] The Defendant also claimed that the said policy was subject to a condition precedent that upon the happening of any loss or damage, the Plaintiff company would forthwith give notice to the Defendant and shall within 15 days after the loss or damage or such further times as the Defendant may in writing allow in that behalf deliver to the Defendant a claim in writing as well as particulars therein. The Defendant alleged that in breach of this condition precedent, the Plaintiff had failed to notify the Defendant within the stipulated 15 days of the loss and damage.

[17] The Defendant further alleged at paragraph 10 of the Further Amended Defence that the loss and damage was occasioned by the Plaintiff's wilful act and/or with its connivance and was contrary to the conditions of the policy. Particulars of this alleged breach, taken from the Amended Defence, were as follows:

i. The pattern of the fire shows that the fire originated in two areas, namely, the ground floor and the first floor;
ii. The pattern of the burning throughout the property was uniform;

iii. The pattern of the burning was highly indicative of a fire regime having been perpetrated and influenced by large quantities of fire accelerants/enhancers;

iv. The burning patterns at both the ground floor and first floor areas of the hallways and stairways main entrances/exits reflected abnormal fire behaviour;

v. The said fire was not caused by any electrical and/or other building defect;

vi. The electrical fire alarms had been disabled prior to the commencement of the fire;

vii. Within 6 hours of the commencement of the said fire, the said Sharif Mohammed and/or an accessory of the Plaintiff company removed from the said property a statue of "Buddha";

viii. The fire was incendiary in nature, perpetuated by someone who had keys and/or access to the insured premises;

ix. Within 3 hours of the fire an employee locked the premises (which were later destroyed by fire) and delivered the keys to Mr. Sharif Mohammed;

x. At the time of the fire, Mr. Sharif Mohammed was present in an Annex which is adjacent to and less than 50 yards from the property which was destroyed by the fire;

xi. After the said fire, Mr. Sharif Mohammed and/or his agent and/or an agent of the Plaintiff tampered with electrical fittings in the property;

xii. By letter dated the 8th and 28th days of March 2007 the Defendant threatened to cancel the said Policy for non-payment of the premium in the sum of $87,264.09;

xiii. The Plaintiff company was incurring severe financial losses;

xiv. The financial statements of the Plaintiff at the 31st day of August 2007 disclose (i) that its fixed assets which represented 97.27% of the company's asset base was less than the company's total indebtedness of $8,975,895.70, (ii) that its bank accounts were all in an overdraft position, and (iii) it had no cash as at the 31st day of August 2007.

[18] At paragraph 11 of the Further Amended Defence, the Defendant further denied paragraph 5 of the amended Statement of Claim and alleged that the loss suffered by the Plaintiff did not exceed Bds $2,693,512.03. The Defendant further contended that the policy limit in respect of the Plaintiff's claim for loss of plant, machinery and equipment was limited to Bds $2,000,000.00 and alleged that the plant, machinery and equipment were under-insured.

THE JOINT PRE-TRIAL MEMORANDUM:

[19] In accordance with the Court's directions, the parties filed a Joint Pre-trial Memorandum on 1st June 2011 with the aim of identifying the legal issues which, in their view, would

arise for the Court's determination at the trial. According to the Joint Pre-Trial Memorandum, the issues to be determined were:

i. Whether having regard to the provisions of the policy of insurance number BBFCP452842 dated 5th April 2007, the Plaintiff is entitled to recover its loss as claimed in the Statement of Claim;

ii. Whether having regard to the conditions of the said policy the Defendant is liable to indemnify the Plaintiff and in particular,

   i. Whether having regard to condition 11 of the policy the Defendant is entitled to reject the Plaintiff's claim?;

   ii. Whether the alleged loss or damage arose out of a fire fully covered by the terms of the policy or was caused by the deliberate act of the Plaintiff?;

iii. Whether any non-disclosure on the part of the Plaintiff prior to the issuance of the policy legally entitled the Defendant to avoid the policy *ab initio* or whether any such non-disclosure was either irrelevant and did not go to any circumstance that increased the risk and/or was superfluous and/or if disclosed and inquired into would not have lead to any increase in the risk insured by the Defendant or known to the Defendant at the time of the said policy?

iv. Whether the Plaintiff's plant, machinery and equipment were underinsured?

v. What is the quantum of the Plaintiff's loss?

THE TRIAL:

[20] The trial commenced on 17th October 2011 and lasted for 10 days. The Plaintiff called 5 witnesses: Sharif Mohamed, Marie Kavanagh, Megan Hopkins-Rees, Franklyn Browne and Karan Ramlal. Their Witness Statements were admitted into evidence and the

witnesses were tendered for cross-examination by Counsel for the Defendant, Mr. Roger Forde, Q.C.

[21] The Defendant relied on the evidence of 7 witnesses: Nigel Adams, Patrick Zoë, Mark Sargeant, Elvis Simpson, Gregory Yeadon and Glenda Clarke. Their Witness Statements and Reports were also admitted into evidence and the witnesses were tendered for cross-examination by Counsel for the Plaintiff, Mr. Alair Shepherd, Q.C.

THE ISSUES:

[22] Notwithstanding the issues identified in the Joint Pre-Trial Memorandum mentioned earlier, the Court found it more convenient to re-frame the issues for its determination. The issues as re-framed will be also addressed in the order of their relative importance to the proceedings as hereinafter appears:

i) Is the Defendant entitled to avoid the policy ***ab initio*** by reason of the non-disclosures particularized at paragraph 8(a), (b) and (c) of the Further Amended Defence?;

ii) Was the loss or damage by fire which occurred at the Plaintiff's place of business on August 27th, 2007 occasioned by the wilful act, or the connivance of the insured as the Defendant claims so as to render all benefit under the policy forfeited in accordance with Condition 13 of the policy?;

iii) Is the Defendant entitled to reject the claim for non-compliance with the time stipulations contained in Condition 11 of the policy?

iv) Were the Plaintiff's plant, machinery and equipment underinsured?

v) What is the quantum of the Plaintiff's loss?

[23] **Issue 1- Material Non-Disclosures:** In terms of its relative importance to the case, the Court considered that the issue of material non-disclosure was one of such fundamental importance that it ought to be considered first. In the view of the Court, a defence which alleges material non-disclosure goes to the heart of the very existence of the contract between the parties and, if established, could even be completely dispositive of the proceedings.

[24] At paragraphs 8 (a), (b) and (c) of its Further Amended Defence the Defendant alleged that the Plaintiff failed to disclose a number of material facts and circumstances which the Defendant says were known, or ought to have been known by the persons at the appropriate level within the Plaintiff company at the time it sought insurance coverage from the Defendant in 2006.The Defendant further says that the Plaintiff breached its duty of disclosure and that the non-disclosure of these 'material' facts prior to issuance of the policy of insurance, allows it to avoid the contract *ab initio* and to reject the claim.

[25] The Defendant further claimed that the Plaintiff's duty of disclosure is identical to that imposed on an "assured" under section 21 of the *Marine Insurance Act, Cap. 292* which, corresponds to section 18 of the English Marine Insurance Act of 1906. The section, it says, gives statutory expression to the broader common law obligation placed on a prospective policyholder to disclose to the insurer before the contract is concluded, every material circumstance which *"would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."*

[26] The *Marine Insurance Act, Cap. 292* governs contracts of marine insurance and is obviously inapplicable to the Fire Commercial Policy number BB FCP 6452842 dated 5th April 2007 which was issued to the Plaintiff in this case. Nonetheless, it is accepted that all contracts of insurance are contracts *uberrimae fidei* or contracts of utmost good faith,

meaning that both parties to the contract must exercise good faith throughout the existence of the contract.***[Joseph v Clico International General Insurance, Barbados Court of Appeal, Civil Appeal No:2 of 2003; Decision of 4th December 2006.]***

[27] The effect of this overarching requirement for utmost good faith is that an applicant for insurance is under a duty to disclose before the contract is concluded, all 'material facts' within the applicant's knowledge which the insurer does not know and is not to misrepresent facts***. [See Joseph v Clico International*** *(above)* ***@ paragraph 12].*** The applicant must also disclose all facts which he ought to have known in the ordinary course of business.

[28] The justification for the doctrine of non-disclosure is explained in Lord Mansfield's often quoted dictum of in the case of ***Carter v Boehm (1766) 3 Burr. 1905*** extracted below:

> *"Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie mostly in the knowledge of the insured only; the underwriter trusts to his representation; and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist."*

[29] Where a natural person is involved it is simply a question of fact whether the insured had knowledge of a particular circumstance. In the case of ***PWC Syndicates v PCW Reinsurers [1996] 1 Lloyd's Rep. 241***, Staughton L.J. said that *"the knowledge of a natural person means what it says – he knows what he knows".*

[30] The situation, however, is different where a corporate body such as the Plaintiff company is involved. In ***PWC Syndicates*** Staughton L.J. explained at page 1142 that what must be disclosed are those facts known to *"a director or employee at an appropriate level."*

[31] In the instant case therefore, the Defendant may avoid the policy of insurance effected with the Plaintiff if it is established on the evidence that there was a misrepresentation or non-disclosure of a material fact by a director or employee of the Plaintiff company at an

appropriate level and further, that the non-disclosure or misrepresentation induced the making of the policy.

[32] 'Materiality' or what is ' material' has been defined by the House of Lords in ***Pan Atlantic Insurance Co. Ltd v. Pine Top Co Ltd [1994] 3 All ER 581*** as a fact that would have an effect on the mind of a prudent insurer weighing up the risk. Put another way, "*a matter is material if it would influence the mind of a rational underwriter governing himself by the principles and practices on which underwriters do in practice act.*" ***[Brotherton and Others v. Aseguradora Colseguros SA and Another [2003] 2 C.L.C. 629 @ paragraph 18.]***

[33] This definition of 'materiality' applies to both marine and non-marine insurance contracts. ***[Joseph v Clico International*** *(above)* and ***Somati Ali v Hand-in-Hand Mutual Fire & Life Insurance Co. Ltd. (2001) 65 WIR 186.]***

[34] Lord Templeman in ***Pan Atlantic Insurance Co. Ltd*** *(above)* put the matter in the following terms:

> *"Materiality must be judged by the reactions of a prudent insurer, otherwise the actual underwriter could, after the risk has matured, convince himself and the Court that he would have rejected the risk or increased the premium if full disclosure had been made in the course of the negotiations."*

[35] What is 'material' can also be determined by the presence of a so-called "basis clause". However, where there is a "basis clause", *"the materiality of the facts in themselves is irrelevant; and by contract their existence is made a condition of the contract."* ***[Codogianis v Guardian Assurance Co [1921] 2 AC 125.]***

[36] The Plaintiff in this case did not fill out a proposal form which would have contained such a clause. Defence witness Mr. Nigel Adams at paragraph 5 of his Witness Statement

which was adopted as his evidence-in-chief at the trial, stated that when insurance is obtained through a broker, a Broker Slip would suffice in the place of the insurance Proposal Form as was done in this case.

[37] During the course of the trial, Counsel for the Plaintiff, Mr. Shepherd Q.C., submitted that one should look to the questions contained in the Proposal Form to determine the materiality or non-materiality of a particular circumstance. The thrust of Mr. Shepherd's argument on this point appeared to be that if the proposal form or Broker Slip does not cover a particular circumstance, then that circumstance is not 'material'.

[38] However with all due respect to Mr. Shepherd, Q.C., the decided cases clearly establish that whether a particular circumstance is a 'material' circumstance which ought to be disclosed does not always depend on the contents of the Proposal Form or the Broker Slip; and further, the positive duty to disclose is not necessarily a contractual duty.

[39] In ***Quinby Enterprises Ltd (in liquidation) v General Accident Fire & Life Assurance Corporation plc [1994] 1 NZLR 736***, to which reference was made in ***Somati Ali*** *(above),* the New Zealand Court put the matter thus:

> *"The duty of disclosure exists independently of any that may be spelt out in the policy documents. This is a positive duty so that it is no answer to an allegation of non-disclosure in a proposal that there was no question specifically directed to that point".*

[40] In short, it appears that an insurer or a broker acting on behalf of an insurer cannot be expected to ask of a potential assured every possible question covering all possible areas of risk. Neither, would it be reasonable to expect a proposal form to address every possible scenario or circumstance which might affect an insurer's decision to undertake a particular risk.

[41] The Defendant is also required to prove that the non-disclosure of a material fact by a director or employee of the Plaintiff company induced the making of the contract. The insurer must show that had there had been full disclosure, it would have either elected not to enter into the contract at all or, if it did, would have increased the premium to reflect the risk undertaken. ***[Pan Atlantic Insurance Co. Ltd.]*** It however appears that if the insurer would have concluded the contract on the same terms, then the non-disclosure would not have induced the making of the contract.

[42] The burden accordingly rests on the Defendant in this case to prove on the balance of probabilities: (a) that it was induced by the non-disclosure of a director or employee of the Plaintiff or by the non-disclosure of its broker, to enter the contract of insurance; and (b) that the non-disclosed facts were 'material'. ***[Drake Insurance plc v. Provident Insurance plc [2004] Lloyd's Rep. IR 277; Somati Ali*** *(above)* ***@ page 193].***

[43] It also appears that the materiality of a matter or circumstance and whether knowledge of the particular matter or circumstance would have induced the insurer to enter into the contract must be judged at the time of placing the risk. ***[Brotherton and Others v Aseguradora Colseguros SA and Another [2003] 2 C.L.C. 629.]***

[44] In ***Carter v Boehm*** *(above)* Lord Mansfield explained the requirement in the following terms:

> *"The keeping back of such circumstance is fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement".*

[45] Material non-disclosure therefore, allows the insurer to treat the contract as void <u>*ab initio*</u> and this means that all premiums paid under the policy must be returned. ***[Cornhill***

Insurance Co. V Assenheim (1937) 58 Ll. L. R. 27, 31 per MacKinnon J.; Marks v First Federal Ins. Co. (1963) 6 W.I.R. 185; Manifest Shipping Co. Ltd v Uni-Polaris Co. Ltd The Star Sea [2001] 1 All E.R. (Comm) 193, 210.]

[46] At paragraph 8 of the Further Amended Defence, the Defendant company alleged that the following 'material' facts were not disclosed:

i. That Mr. Sharif Mohammed and Ms. Marie Kavanagh, the sole shareholders and directors of the Plaintiff Company were also the sole shareholders and directors of O'Meara Food Products Limited, a company registered under the Companies Act of the Republic of Trinidad and Tobago which company had effected a Fire and Special Perils Policy of Insurance Number GHF 5885 with Gulf Insurance Limited which policy was cancelled and the premium refunded;

ii. That the said O'Meara Food Products Limited had made fraudulent and/or baseless claims against its insurers, Maritime General Insurance Company Limited of Trinidad and Tobago which claims were dismissed by the Supreme Court of Trinidad and Tobago;

iii. That a judgment in the sum of TT$1,060,075.19 had been registered jointly and severally against the said O'Meara Food Products Limited and against the said Sharif Mohammed and Marie Kavanagh by the Agricultural Development Bank of Trinidad and Tobago for the failure to repay a loan which had been granted to the said company and which judgment debt remained unsatisfied.

[47] The question that must be asked at this time is whether these allegations must be proved to have been true in order for the Defendant to successfully rely on this defence. In ***Brotherton and Others v Aseguradora Colseguros SA and Another*** *(above)* the English Court of Appeal had to decide whether the materiality of allegations or the validity of the reinsurers' purported avoidance of the contract depended on whether the allegations were correct and there had been actual misconduct justifying the allegations.

[48] The Court in ***Brotherton's case*** unanimously held that all material circumstances should be disclosed, even allegations which at the time of entering into the risk could not be proved to be true. In support of its decision the Court relied on the following dictum from

Inversiones Manria SA v Sphere Drake Insurance Co. plc ("The Dora") [1989] 1 Lloyd's Rep. 69,

> *"When accepting a risk, underwriters are properly influenced not merely by facts which, with hindsight, can be shown to have actually affected the risk, but with facts that raised doubts about the risk."*

[49] In ***Brotherton's case*** the Court further held that known facts did not cease to be material because it could ultimately be demonstrated that what was alleged was untrue. Accordingly, an insurer could not be deprived of the right to avoid a contract for material non-disclosure by an insured showing that the allegations were false. As such, an insured is not entitled to litigate the truth or falsity of known, but undisclosed information in order to establish that if it could be shown to be true the insurer would be acting in bad faith in avoiding the contract.

[50] Against the background of the legal principles which have just been outlined, I turn to consider the facts identified at paragraph [45] which the Defendant says are "material" non-disclosures which induced it to enter into the insurance contract with the Plaintiff, and which now entitle the Defendant to avoid the policy *ab initio* and to reject the claim.

[51] *(i) Cancellation of the O'Meara Food Products policy:* At paragraph 8 (a) of the Further Amended Defence, the Defendant alleged that there had been no disclosure of the 'material' fact that O'Meara Food Products Ltd (a Trinidadian company of which Mr. Sharif Mohammed and Ms. Marie Kavanaugh were also shareholders and directors) had effected a fire and special perils policy with Gulf Insurance Limited which policy had been cancelled by Gulf Insurance Limited and the premiums refunded.

[52] As is evident from the pleadings, the Defendant claims to be entitled to avoid insurance policy BB FCP 6452842 issued to the Plaintiff company on 5th April 2007 because the

Plaintiff company through its directors and shareholders, Sharif Mohammed and/or Marie Kavanagh, had failed to disclose to the Defendant prior to issuance of the policy, the 'material' fact that their company, O'Meara Food Products Ltd, had had a policy of insurance cancelled by Gulf Insurance Limited and the premiums refunded.

[53] In developing its case for avoidance of the policy on the basis of material non-disclosure, the Defendant invited the Court to infer from the fact of Mr. Mohammed and Ms. Kavanagh's unique position as the controlling minds of ***both*** companies, that they (and more particularly, Mr. Mohammed) were persons *"at an appropriate level within the Plaintiff company"* to have disclosed to the Defendant facts about the insurance history of O'Meara Foods, which would have raised doubts about the risk which the Defendant was being asked to undertake in relation to the Plaintiff company which was under identical management.

[54] The Defendant further submitted that the fact of Mr. Mohammed's and Ms. Kavanagh's association with O'Meara Food Products Ltd, coupled with O'Meara Food Product Ltd's doubtful insurance history with Gulf Insurance Ltd, were facts which were 'material' to the Defendant assuming the risk in relation to the Plaintiff company and which, in good faith, ought to have been disclosed to the Defendant before the policy issued.

[55] Relying on the landmark decision in ***Pan Atlantic Insurance Co. Ltd and another v. Pine Top Insurance Co. Ltd [1994] 3 All E R 581***, the Defendant contended that the Plaintiff company breached its duty of disclosure in that it failed to disclose to the Defendant, prior to issuance of the policy, 'material' facts known to its directors, Sharif Mohammed and Marie Kavanagh about the doubtful insurance history of O'Meara Foods, another company also owned and managed by them. The Defendant further

contended that non-disclosure of these facts prevented the Defendant from properly assessing the moral and physical hazards attaching to the risk to be undertaken and that the Defendant was thereby induced to enter into the contract.

[56] In support of its case that the Gulf Insurance policy had been cancelled, the Defendant adduced documentary evidence in the form of a letter dated May 9, 2008 which had been issued by Hobsons on behalf of Gulf Insurance Limited [See p. 154 of the Agreed Bundle] which clearly confirmed that a Fire and Special Perils Policy No. GHF 5885 had in fact been issued to O'Meara Food Products Limited and that that policy had been cancelled.

[57] At the trial, Mr. Sharif Mohammed gave evidence on behalf of the Plaintiff in relation to this allegation. He stated that the Gulf Insurance policy had not been cancelled, but rather that a Credit Note [See p. 152 of the Agreed Bundle] had been given as a refund for the premiums paid as the insurance had been placed with Gulf Insurance by the brokers without O'Meara Food Products Ltd's permission.

[58] Under cross-examination, Mr. Mohammed also told the Court that the Plaintiff company had appointed a broker to seek insurance for its restaurant business in Barbados. Asked whether he had told the broker everything about himself, Mr. Mohammed stated that he had only told the broker what had been asked of him.

[59] Additionally, in answer to Defence Counsel's specific question as to whether he had told the broker about the cancellation of the O'Meara Foods policy, Mr. Mohammed insisted that O'Meara Food Products Limited had not had a cancellation and further, that the company did not have a policy with Gulf Insurance.

[60] Under further cross-examination, Mr. Mohammed was specifically referred to paragraph 4 of the Hobsons letter of May 9, 2008 addressed to Counsel for the Plaintiff, Mr. Alair P. Shepherd, Q.C. in which Hobsons, the attorneys-at-law for Gulf Insurance Limited, had advised Mr. Shepherd, *inter alia*, as follows:

> *"4. Based on its present computerized records, our client [Gulf Insurance Limited] is able to confirm only that it did in fact issue a Fire and Special Perils Policy No. GHF 5885 to O'Meara Food Products Limited and that the same was cancelled."*

[61] Confronted with the letter, Mr. Mohammed told the Court that he had seen the letter from Hobsons which very clearly stated that the policy had been issued and cancelled. He agreed that he had not advised the Barbados brokers of the cancellation of that policy. He also told the Court that he had not advised the broker in Trinidad to place insurance with Gulf Insurance Limited and had been unaware of the cancellation.

[62] While accepting under cross-examination that the Hobsons letter suggested that a policy had indeed been issued to O'Meara Foods, and while also agreeing that stamp duty is paid whenever a policy is issued, Mr. Mohammed doggedly refused to accept that a policy had been issued to O'Meara Food Products Limited by Gulf Insurance.

[63] He also continued to maintain that the insurance had not been cancelled for any adverse reason. His evidence was initially corroborated by that of Mr. Karan Ramlal who testified on behalf of the Plaintiff. However, under cross examination by Counsel for the Defendant, Mr. Ramlal, confronted also with the contents of the Hobsons letter, conceded that the Hobsons correspondence issued on behalf of Gulf Insurance had very clearly stated that the policy issued to O'Meara Food Products Ltd had been cancelled.

[64] During the course of her cross examination at the trial, Marie Kavanagh agreed that the Plaintiff is a limited liability company and not a natural person and that it acted through its directors. She further agreed that she was a director and shareholder of the Plaintiff company and was part of the company's decision making process. She however told the Court that she did not directly or personally make any disclosures to the Defendant company and that to the best of her knowledge she did not believe that her broker had confirmed what disclosures, if any, had been made to the Defendant company.

[65] After reviewing the evidence, the Court was satisfied that at the time the Plaintiff company, acting through its directors and shareholders, Sharif Mohammed and Marie Kavanagh, proposed through its broker for commercial fire insurance for their restaurant business in Barbados, Sharif Mohammed and Marie Kavanagh had also both been shareholders and directors of O'Meara Food Products Ltd, a seafood processing business which operated out of Trinidad.

[66] The Court also accepted that (as appears from their respective Witness Statements and their oral testimony at the trial) Sharif Mohammed and Marie Kavanagh were the directors and joint owners of both companies and further were also the persons *"at an appropriate level in both companies"* who made key decisions for and on behalf of both companies, including selecting the brokers in Trinidad and in Barbados who would, as their agents, assist them in effecting the insurances required in relation to both their businesses.

[67] The Court also accepted (as clearly appears from the Hobsons letter) that O'Meara Food Products Ltd (a Trinidadian company owned and operated by Mr. Mohammed and Ms.

Kavanagh) had in fact been issued a Fire and Special Perils Policy No. GHF 5885 by Gulf Insurance Ltd in Trinidad, which policy had in fact been cancelled.

[68] Based on the existence of a Credit Note issued by Gulf Insurance Limited to O'Meara Food Products, the Court was also satisfied that the evidence established that the premium had in fact been refunded to O'Meara Food Products Limited consequent on the cancellation of Policy No: GHF 5885.

[69] As a matter of law, the Court was satisfied that the Plaintiff company, acting through Sharif Mohammed and Marie Kavanagh, was under a duty, as the proposed assured, to disclose to the Defendant company all facts which were in the Plaintiff's actual or presumed knowledge and which were material to the risk to be undertaken by the Defendant. ***[See E.R. Hardy Ivamy: General Principles of Insurance Law, 6th Edition, Ch. 13, p. 139]***.

[70] The Court was also satisfied as a matter of law that as the Plaintiff is a company and not a natural person, what must be disclosed are those facts known to *"a director or employee at an appropriate level."* ***[PWC Syndicates*** *(above)* ***per Staughton L.J****.]*

[71] In the light of what they both stated in their respective Witness Statements which were admitted in evidence at the trial, the Court accepted that Marie Kavanagh and Sharif Mohammed contacted Michael Gonsalves and that ultimately, Lynch Insurance Brokers was engaged as the Plaintiff's agent: *"to effect insurance on the contents and leasehold improvements of the restaurant;"*

[72] In view of this, the Court further found, as a matter of mixed fact and law, that Lynch Insurance Brokers in fact acted as the Plaintiff's agent in relation to the placement of the commercial fire and allied perils insurance policy with the Defendant company.

[73] The Court found, as a matter of law, that having appointed Lynch Insurance Brokers as its agent to place the insurance on its behalf, the Plaintiff company thereby delegated the duty of disclosure to its agent. Following the appointment of its agent, it accordingly became the Plaintiff's duty, as the proposed assured, to place Lynch Insurance Brokers in possession of all the material facts which the Plaintiff company would have been bound to disclose had the company itself conducted the negotiations. ***[See E.R. Hardy Ivamy: General Principles of Insurance Law, 6th Edition, Ch. 51, p. 572; Also see MacGillivray on Insurance Law, 10th Edition, Ch.18, p. 460]***

[74] The law is that an omission on the part of the agent which, if judged solely from the agent's state of knowledge, would have no effect on the validity of the policy may, when the proposed assured's knowledge is imputed to the agent, amount to non-disclosure entitling the insurer to avoid the policy. It is immaterial whether the Plaintiff company neglected to communicate knowledge of a particular fact to its agent because it did not think the knowledge was material. ***[See above E.R. Hardy Ivamy: General Principles of Insurance Law, 6th Edition, Ch. 51, p. 572.]***

[75] The Court is satisfied that courts will not allow insurers to be prejudiced by the assured's employment of an agent to deal with them. Insurers are entitled to the same accuracy of statement and unstinted disclosure of material facts as they would be justified in demanding from the assured in person. ***[See above MacGillivray: para 18-10, p. 460]***

[76] Accordingly, the Court found that Mr. Mohammed's testimony at the trial that he had only told the broker what had been asked of him, coupled with Ms. Kavanagh's testimony under cross-examination that she did not directly or personally make any disclosures to the Defendant company, and that to the best of her knowledge she did not

believe that her broker had confirmed what disclosures, if any, had been made to the Defendant company, would not relieve the Plaintiff company of the legal duty imposed on it as the proposed assured to place Lynch Insurance Brokers, as its agent, in possession of all the 'material' facts which the company knew or should have known.

[77] As the cancellation of the O'Meara Foods insurance coverage and the issuance of a Credit Note by Gulf Insurance Limited were facts known to Mr. Mohammed, a director at an appropriate level within *both* companies, the Court was satisfied that his knowledge could properly be attributed to the Plaintiff company, notwithstanding that Mr. Mohammed evidently did not think the information was 'material' to the risk and appears to have believed that the cancellation by Gulf Insurance had not been done for any adverse reason.

[78] Although the evidence disclosed that the policy in this case was issued on the basis of a Brokers Slip as opposed to a Proposal Form, in assessing the 'materiality' of the fact of cancellation of the Gulf Rentals policy, the Court noted that the cancellation of an insurance policy is a fact or circumstance which is very clearly envisaged in Item 8 of the Defendant's Proposal Form [see Item 1 of the Agreed Bundle-Volume 2].

[79] The Court noted that Item 8 of the Defendant's Proposal Form seeks to elicit disclosure relating to any previous cancellation or refusal of an insurance policy in the following terms:

> *"8. Have **you**, or any of **the partners** or **directors** of your Company ever had a proposal or policy refused, declined, cancelled or special terms imposed?*
>
> *(a) Name of company:……*
>
> *(b) Type of Proposal/Policy……"*

[80] Closer examination of this particular Item of the Proposal Form, reveals that in an attempt to prompt disclosure by a proposed corporate assured of 'moral hazards' in relation to the proposed company, the Defendant as the proposed insurer expressly invites disclosure in relation to any previous refusal, declination or cancellation of insurance, not only in respect of the proposed assured, but also of its partners or directors.

[81] Extrapolating from Item 8 of the Proposal Form and conscious that the duty of disclosure exists independently of any that may be spelt out in the policy documents, the Court was satisfied and holds that the Plaintiff was under a duty to disclose to the Defendant facts and circumstances relevant to the prior insurance history not only of the Plaintiff, but of its partners and directors.

[82] In this regard, the Court has accepted the evidence of the Defendant's witness, Nigel Adams that in assessing the 'moral hazard' of the Plaintiff company, the Defendant would have considered: (i) the identity of its directors and main shareholders; (ii) the previous claims history of the company, including that of its directors and main shareholders; (iii) whether the entity, its directors or main shareholders had ever been declined for insurance by any other insurer and (iv) whether any of the directors or shareholders had a criminal record.

[83] The Court also accepted paragraphs 13 to 15 of Mr. Adams' Witness Statement and in particular, his evidence that the relevant Brokers Slip had not reflected any adverse information relative to 'moral or physical hazard' and further, that at the time the Defendant accepted this particular risk, the Defendant had not been aware of the claims history associated with the directors and principal shareholders of the Plaintiff or that they, or companies associated with them had ever been associated with suspicious claims.

[84] In assessing the materiality of the cancellation of the O'Meara Food Products policy, the Court also had regard to the fact that at the time it proposed for insurance in 2006, the Plaintiff had recently been incorporated under the *Companies Act* of Barbados with non-resident directors and shareholders and that it would have been vital for the Defendant to know the "moral hazard" of the persons who controlled the Plaintiff and in particular, whether they had any issues with previous insurers.

[85] At paragraph 15 of his Witness Statement, Mr. Adams stated that the Plaintiff nor the persons who controlled it had not drawn to the Defendant's attention any information relating to the 'moral or physical hazard' that was material to the risk proposed. He also stated that had that information been known upfront, the Defendant would have declined the risk.

[86] In its Reply filed on June 19, 2008, the Plaintiff alleged, in answer to the Defendant's allegations of material non-disclosure, that the matters of which the Defendant complained were known to a Richard Espinet, who, the Plaintiff alleged, had been initially attached to Maritime General Insurance Ltd at the time of the O'Meara Foods claims, but who, had subsequently been the Defendant's Chief Executive Officer at the time the contract of insurance was issued and that in those circumstances, the non-disclosures now complained of were, or ought to have been known to the Defendant.

[87] The Court is satisfied that the allegation as to the Defendant's state of knowledge contained in the Plaintiff's Reply was not explored during the trial. Further, apart from a brief reference in paragraph 53 of Mr. Mohammed's Witness Statement to the same effect, the Plaintiff led no other evidence to support that allegation. The matter was not even raised in the Plaintiff's Written Submissions filed following the trial and ultimately,

the Court was in no position to make any finding of fact in relation thereto. In any event, the allegation appears somewhat disingenuous since, without evidence, it can only amount to an attempt to side-step the positive duty of disclosure which rests on every 'would-be assured' who proposes for insurance cover.

[88] Returning once again to the alleged cancellation of the Gulf Insurance policy, the Court was not prepared, in the face of the Hobsons letter and the Credit Note, to accept Mr. Mohammed's evidence that a policy had neither been issued to O'Meara Foods by Gulf Insurance nor been cancelled or his further assertion that the Gulf Insurance policy had been placed by the company's brokers without his authority.

[89] In the circumstances, the Court found as a matter of fact that the Defendant had successfully established for purposes of paragraph 8(a) of the Further Amended Defence that O'Meara Food Products Ltd (a Trinidadian company of which Mr. Sharif Mohammed and Ms. Marie Kavanaugh were also shareholders and directors) had in fact effected a fire and special perils policy with Gulf Insurance Limited which policy had been cancelled and the premiums refunded and further, that this fact had not been disclosed to the Defendant company prior to issuance of the policy.

[90] The Court will shortly revisit the issue of the 'materiality' of this particular non-disclosure and consider whether the Defendant was induced by the non-disclosure to enter into a insurance contract that it would not have issued had it been placed in a position to fully appreciate the risk. In the meantime, I turn to consider the second alleged non-disclosure.

[91] *(ii) Dismissal of O'Meara Food Products claims:* At paragraph 8 (b) of its Further Amended Defence, the Defendant next alleged that O'Meara Food Products Ltd had

made fraudulent and baseless claims against its insurers, Maritime General Insurance Company Limited and that the claims were dismissed by the Supreme Court of Trinidad and Tobago.

[92] At the trial, the Defendant sought to establish that O'Meara Food Products Limited had insured two containers of spoilt shrimp which had been rejected and returned by a purchaser in Jamaica. The Defendant's allegation was that having insured the containers of shrimp, O'Meara Foods had attempted to claim against the insurance policy and the claim was refused.

[93] The Defendant also alleged that O'Meara Foods had then made a claim in the High Court of Trinidad and Tobago in relation to the insurance claim which had been refused and that the case had been dismissed by the Court on the ground that the claim was baseless.

[94] The Defendant, relied on several pieces of correspondence in support of the allegation of fraudulent insurance claims on the part of O'Meara Food Products Limited. [See items 1 to 72 of the Agreed Bundle-Correspondence]

[95] Amongst this correspondence was a June 1995 faxed letter from Grace, Kennedy & Co Ltd, which had purchased shrimp from O'Meara Food Products which letter stated that all shell-on shrimp and all fish in the shipment had been declared wholesome and fit for human consumption, but that 404 boxes of peeled shrimp had been declared off-conditioned and unfit for human consumption by the Public Health Department in Jamaica.

[96] The documents also reveal that some months later in October, 1995 O'Meara Foods had made a claim on their insurers, Maritime General Insurance Company Limited under the

peril of malicious damage, claiming loss of frozen stock and damage to equipment and building.

[97] The documents also reveal that while the O'Meara Foods claim was being investigated, several difficulties arose between Mr. Sharif Mohammed, the insurers, Maritime General Insurance Company Limited and the loss adjusters, Claims Adjusting Bureau Limited in Trinidad in relation to aspects of the claim. One difficulty appears to have been the loss adjuster's wish to establish that the consignment of off-conditioned shrimp which had been returned to O'Meara Foods from Grace, Kennedy & Co Ltd in Jamaica in August 1995, did not form part of the company's October 1995 malicious damage claim

[98] By letter dated 16th May 1996 Mr. Mohammed was informed that Maritime Insurance had declined to honour the O'Meara Foods claim due to Mr. Mohammed's failure to supply satisfactory or sufficient details or evidence to support the company's allegations relating either to: a) the quantum and value of stocks held prior to the alleged loss; or b) the loss suffered.

[99] At the trial, Mr. Shepherd Q.C. cross-examined Mr. Patrick Zoë of Claims Adjusting Bureau Limited about the O'Meara Foods claim which he had also been involved in. Mr. Zoë was questioned about whether he knew that Maritime Insurance had not claimed fraud as a defence in that action. His response was: "*That cannot be. I denied that claim on behalf of Maritime based on breaches of conditions 11 and 13 of the policy contract".*

[100] However, whilst the correspondence and pleadings in the claim that was subsequently filed in the Supreme Court of Trinidad and Tobago seem to suggest that Maritime Insurance might have had some reservations about the claim and may have thought it was

fraudulent, the Defence and Statement of the Issues filed in the case clearly do not claim fraud as a defence.

[101] Added to this, the May 16th, 1996 letter sent by Claims Adjusting Bureau Limited to O'Meara Foods and signed by Mr. Zoë, denying the claim on behalf of Maritime General Insurance, clearly states that the denial of the claim was for breach of condition 11 or for O'Meara Foods's refusal or failure to provide satisfactory or sufficient details or evidence to support its claim.

[102] At this time I also have to state that I found Mr. Mohammed's testimony, in relation to this particular allegation of non-disclosure, to be simply not credible. His evidence was inconsistent with the evidence gleaned from the correspondence between himself, acting on behalf of O'Meara Foods, and Mr. Zoë, of Claims Adjusting Bureau Ltd, acting on behalf of Maritime Insurance, the insurer at the time of the O'Meara Foods claim.

[103] At paragraphs 49 and 50 of his Witness Statement, Mr. Mohammed's evidence was that the two containers of frozen shrimp and frozen fish which O'Meara Foods had shipped to Jamaica in April 1995 had been "frost bitten". According to him, the entire shipment consisting of frozen shrimp and fish had not been spoiled but was simply "off condition" and had been returned to Trinidad and placed in public cold storage. He denied that the shipment had been unfit for human consumption. This was evidently not the case, since the June 22, 1995 Fax from Grace Kennedy & Co Ltd clearly advised Mr. Mohammed that the peeled shrimp had been deemed unfit for human consumption by the Public Health Department in Jamaica and would be dumped.

[104] At paragraph 51 of his Witness Statement, Mr. Mohammed stated that following the investigation, O'Meara Foods' malicious damage claim had been denied by Maritime

Insurance on the basis that the loss had occurred through a peril that had not been insured against (burglary). Once again, this was shown not to be true. As earlier indicated, the reason for the denial of the claim was that O'Meara Foods had breached a condition of the contract by not providing satisfactory or sufficient evidence to support its claim.

[105] While there were many obvious discrepancies between Mr. Mohammed's evidence in relation to the O'Meara Foods claim and the contents of certain documents in the Agreed Bundle which raised doubts about his credibility, the Court was satisfied that the evidence at the trial established that at on 5th April, 2007 when the policy of insurance in this case was effected between the Plaintiff and the Defendant, Mr. Mohammed (in his capacity as a director and/or officer and/or agent of the Plaintiff company) had failed to disclose to the Defendant the fact that O'Meara Food Products Ltd, a company of which he also a director, had had its claim denied by its insurer, Maritime Insurance for breach of condition.

[106] Once again, in assessing the 'materiality' of the fact of the denial of O'Meara's claim, the Court examined the Defendant's standard Proposal Form. The Court noted that the question whether the proposed assured or its partners or directors had ever suffered an insurance or other loss was a fact or circumstance which very clearly envisaged in Item 6 of the Defendant's Proposal Form [see Item 1 of the Agreed Bundle-Volume 2].

[107] Analysis of Item 6 of the Defendant's Proposal Form will reveal that it seeks to elicit disclosure from a proposed assured pertaining to any previous losses (whether insured or not) which the proposed company or its partners or its directors had suffered whether at the premises to be covered or elsewhere in the following terms:

*"6. Have **you**, <u>or</u> any of **the partners** <u>or</u> **directors** of your Company ever suffered a loss, (whether insured or not) at these premises **or elsewhere**?*

(a) Date of loss:……..

(b) Nature of Loss or Damage:……..

(c) *Amount of Loss:……"*

[108] The Court was satisfied as to the materiality of this particular non-disclosure and holds that the Plaintiff was under a duty to disclose to the Defendant facts and circumstances relating to Mr. Mohammed's prior insurance claims history with O'Meara Foods and in particular to any losses (whether insured or not) which may have been sustained not only by the Plaintiff, but also, by its partners or directors.

[109] The Court also accepted the evidence of Mr. Nigel Adams who told the Court that at the time the Defendant accepted this particular risk, the company had not been aware of the insurance claims history which Mr. Mohammed would have had in his capacity as a director and shareholder O'Meara Foods or that he had ever been associated with a suspicious insurance claim.

[110] The Court also considered the fact that at the time it proposed for insurance in 2006, neither the Plaintiff nor the persons who controlled it or the Plaintiff's brokers had drawn to the Defendant's attention any information relating to the 'moral or physical hazard' that was material to the risk proposed.

[111] The 'materiality' of this particular non-disclosure and whether it induced the Defendant to enter into the contract with the Plaintiff will also be revisited shortly. In the meantime, I turn finally to the joint and several judgment debt which the Defendant alleges was registered against O'Meara Foods and Mr. Mohammed and Ms. Kavanagh and not disclosed.

[112] *(iii) The unsatisfied ADB registered Judgment Debt:* At paragraph 8 (c) of its Further Amended Defence, the Defendant alleged that the Agricultural Development Bank of Trinidad and Tobago had registered against the said O'Meara Food Products Limited and against Mr. Sharif Mohammed and his wife Marie Kavanagh jointly and severally, a judgment in the sum of TT$1,060,075.19 consequent on their failure to repay a loan granted to the said Company and that the judgment remained unsatisfied.

[113] In his Witness Statement, Mr. Mohammed admitted that O'Meara Foods had obtained a loan for approximately TT$2,000,000.00 from the Agricultural Development Bank of Trinidad and Tobago which had not been fully paid off. He explained that he had refused to repay the balance due on the loan, due to the Bank's refusal to approve a proposal to sell the company's equipment to a buyer or to accept his proposals to settle the loan which had resulted in the equipment becoming obsolete.

[114] At the trial, Mr. Mohammed agreed that the ADB loan was still outstanding. In answer to Defence Counsel Mr. Forde's question under cross examination as to whether he had informed Mr. Gonsalves of Lynch Insurance Brokers or the Defendant as the intended insurer that he had refused to pay the ADB loan, Mr. Mohammed told the Court that the question had never been asked.

[115] With specific reference to Mr. Mohammed's answer to the question posed by Counsel for the Defendant, the Court has already adverted to the positive duty of disclosure which rests on the shoulders of anyone who proposes for insurance. Furthermore as discussed earlier, having appointed Lynch Insurance Brokers to act as its agent, it became the Plaintiff's legal duty, as the proposed assured, to place Lynch Brokers in possession of all

the material facts which the Plaintiff company would have been bound to disclose had the company itself conducted the negotiations.

[116] Once again, it is therefore clearly no answer to an allegation of material non-disclosure in a proposal for insurance that Mr. Mohammed and by extension, the Plaintiff, had only told the broker what had been asked of him or that there was no question specifically directed to that point. [See above at paragraphs [39] and [73] to [76].]

[117] Likewise under cross-examination by Mr. Forde, Q.C., Ms. Marie Kavanagh similarly told the Court that she had not directly or personally made any disclosure to the Defendant company about the judgment which had been entered against her by the Agricultural Development Bank. Ms. Kavanagh told the Court that she had only seen the policy which had been issued by the Defendant company to the Plaintiff company after the fire when she had collected it from the brokers, Lynch Insurance Brokers Limited.

[118] In the light of the evidence in relation to this particular non-disclosure, the Court was satisfied that prior to 5th April, 2007 when the policy of insurance in this case was issued, the Plaintiff company had failed to disclose to the Defendant the fact that the Agricultural Development Bank of Trinidad and Tobago had registered against Mr. Sharif Mohammed and his wife Marie Kavanagh and O'Meara Foods, jointly and severally, a judgment in the sum of TT$1,060,075.19 for the failure to repay a loan granted to the said company and further, that the judgment remained unsatisfied.

[119] Having examined the allegations and found as a fact that the disclosures identified in paragraph 8 (a), (b) and (c) of its Further Amended Defence were not notified to the Defendant either by the Plaintiff company directly, or vicariously through its agent Lynch Insurance Brokers Ltd, prior to issuance of the policy, the Court turns to consider (i) the

issue of 'materiality' and in particular, whether the said non-disclosures were matters which the Plaintiff or its broker were duty bound to disclose; and (ii) whether the non-disclosures induced the Defendant to issue the policy and deprived the Defendant from making a proper assessment of the risk and determining what terms should apply.

[120] ***Were the non-disclosures "material"?:*** As was earlier discussed, the test of materiality of a non-disclosed fact is whether the relevant circumstance would have had an effect on the mind of a prudent insurer in weighing up the risk. ***[Pan Atlantic Insurance Co. Ltd v. Pine Top Co Ltd** (above)]*

[121] It is also well established that whether a given fact is or is not 'material' is a question of fact to be determined by the Judge as the trier of fact. The decision will involve the Judge making his or her own appraisal of the relevance of the disputed facts to the subject matter of the insurance and is not something which is settled automatically by the practice or opinion of insurers. ***[See MacGillivray: para 17-39 – 17:40 pp. 426-427.]***

[122] Additionally, a fact does not become 'material' simply because the particular insurer regards it as such. However, the insurer's subjective opinion may be relevant as evidence that the insurer would not have contracted either on the same terms or at all, had the fact been disclosed by the assured, so that the non-disclosure can be shown to have induced the issuance of the contract. ***[See MacGillivray: para 18-10, p. 460; Also Pan Atlantic Insurance]***

[123] In ***Somati Ali*** the High Court of Guyana offered some guidance on how the attitude of a prudent insurer may be assessed. Bernard C.J. considered that materiality may be proved by the Court relying on its own sense of the attitude of a prudent underwriter or by the calling of expert evidence in addition to the insurer's own evidence.

[124] In some circumstances where the materiality of the circumstance is so obvious, it would be unnecessary to rely on the evidence of experts. ***[Glicksman v Lancashire and General Assurance Co. [1925] 2 K.B. 593.]***

[125] The Court in ***Somati Ali*** pointed out that *"an insurer is never the best person to determine a matter involving his own interests. His evidence will not prove materiality from the point of view of a prudent underwriter, only that he considered the particular fact to be material. Therefore, proof of materiality rests on expert evidence".*

[126] Of further assistance to this Court is the dictum of Forbes J in ***Reynolds v Phoenix Assurance Co. Ltd [1978] 2 Lloyd's Rep. 440,*** which was quoted with approval in ***Somati Ali***. In ***Reynolds***, Forbes J stated that the insurer is *"not to give evidence as to what they themselves would do [...] They are to give evidence of what, in their opinion, having regard to the general practice of underwriters, a reasonable underwriter would do".*

[127] With a view to adducing opinion evidence in relation to 'materiality', Defence Counsel, Mr. Roger Forde Q.C. made a formal application for Defence Witness, Mr. Gregory Yeadon to be deemed an expert witness based on his training, expertise and qualifications as a Chartered Loss Adjuster, a Certified Fire and Explosion Investigator and a Chartered Insurance Practitioner respectively. Details of his training, expertise and qualifications were more particularly set out in his Witness Statement.

[128] Counsel for the Plaintiff, Mr. Shepherd, Q.C. informed the Court that while he had no objection to Mr. Yeadon's being qualified as an expert witness given his expertise as a Chartered Loss Adjuster, a Certified Fire and Explosion Investigator and a Chartered

Insurance Practitioner, he was taking issue with Mr. Yeadon's expertise in the field of underwriting.

[129] In answer to specific questions from Defence Counsel, Mr. Forde, Q.C. at the trial, Mr. Yeadon told the Court that in order to obtain his professional qualification as a Chartered Insurance Practitioner he had been required to study insurance underwriting as one of the subjects. In addition, Mr. Yeadon stated that he also has expertise in underwriting since in order to perform his duties as a Chartered Loss Adjuster, he is required to make inquiries relating to material facts and non-disclosure.

[130] Based on the evidence and in accordance with section 66 of the ***Evidence Act***, *Cap. 121*, the Court deemed Mr. Gregory Yeadon, an expert in the fields of Chartered Loss Adjusting and as a Chartered Insurance Practitioner. Notwithstanding Mr. Shepherd's objection, the Court was satisfied that by reason of his training, qualifications and expertise, Gregory Yeadon had specialised knowledge as a chartered insurance loss adjuster and a chartered insurance practitioner and was a witness who was in a position to give the Court expert opinions on issues relating to insurance practice including in particular, insurance underwriting, materiality and non-disclosure.

[131] At this stage, it should be emphasized that the Court kept firmly in mind that as an expert witness, Mr. Yeadon had been called by the Defendant to assist the Court in deciding what a reasonable and prudent underwriter would or would not do. Furthermore, the evidence he gave was opinion evidence only and not factual. Put another way, Mr. Yeadon was simply giving evidence of what, in his opinion, having regard to the general practice of underwriters, a reasonable underwriter would do.

[132] In short, his role in these proceedings was merely to furnish the Court with the necessary information about insurance practice, insurance underwriting, materiality and non-disclosure to enable the Court to form its own independent judgment by the application of the information to the facts proved in evidence at the trial. ***[See Reynolds v. Phoenix Assurance Co Ltd [19978] 2 Ll. L. Rep 440.]***

[133] Mr. Yeadon's Witness Statement was duly admitted in evidence. He adopted paragraph 17 of his Witness Statement in which he had stated, *inter alia*, that a proposer for insurance has a duty to reveal all 'material' facts about the proposed risk. He defined a 'material' fact as one which would influence the mind of a prudent insurer in deciding whether to accept a risk and what terms would apply. He agreed with Defence Counsel, Mr. Forde, Q.C. that a prudent insurer in deciding whether to accept a risk and on what terms, must consider 'material' facts.

[134] At paragraph 18 of his Witness Statement, Mr. Yeadon stated that at the proposal stage a prudent insurer will seek to assess the moral and physical hazards attaching to the proposed risk as presented by the proposer before accepting the risk. At the trial, he explained that the term 'moral hazard' relates to the moral integrity of the entity or person who is proposing for insurance relative to their conduct which may have a bearing on whether the insurance company will accept the risk or not.

[135] At paragraph 19 of his Witness Statement, Mr. Yeadon stated that he had been shown a copy of a letter dated August 23, 2006 addressed to the Defendant by the Plaintiff's agent, Lynch Insurance Brokers Limited [p. 88 of the Agreed Bundle- Correspondence] which represented the Broker Slip for the insurer to consider the risk being proposed. He

was also shown the correspondence which was exchanged between the Plaintiffs' brokers and the Defendant.

[136] He told the Court that none of the moral hazard 'material' facts regarding O'Meara Food Products Limited had been disclosed to the Defendant. He also told the Court that since the proposer was not a natural person, the proposer should have provided the insurer with information on its directors and principal shareholders sufficient to allow the insurer to gain a full and proper perspective of the characteristics of the risk it was being asked to underwrite.

[137] At the trial, Mr. Yeadon also told the Court that the fact of cancellation of an insurance policy is a 'material' fact because with that knowledge, the insurance company would be able to make further inquiries into the reason for the cancellation which may have a bearing on whether the insurer will agree to run the risk of insurance.

[138] At the trial, Mr. Yeadon was also referred to Hobsons' letter dated May 9, 2008 written on behalf of Gulf Insurance Limited addressed to the Plaintiff's attorney-at-law and agreed that the letter suggested that Policy No. GHF 5885 in the name of O'Meara Food Products Limited had been cancelled.

[139] Mr. Yeadon told the Court that cancellation of a policy for any reason whatever is a 'material' fact. In this case, he said, it would have been 'material' because had the Defendant's insurance underwriter been informed of the cancellation he would have been able to make further inquiries into the reason for the cancellation which might then have influenced the insurer as to whether it would run the risk of the insurance.

[140] The Court noted that Mr. Yeadon's evidence coincided to a great extent with the evidence given by the Defendant's Operations Manager, Mr. Nigel Adams who, as earlier

discussed, told the Court that due to the fact that the Plaintiff company had recently been incorporated under the Barbados *Companies Act*, with non-resident directors and shareholders, it would have been vital for the Defendant to have been made aware of 'the moral hazard' of the persons who controlled the Plaintiff and in particular, whether they had any issues with previous insurers.

[141] The Defendant submitted that notwithstanding that the Plaintiff company is a separate legal entity from O'Meara Food Products Limited, Sharif Mohammed and his wife Marie Kavanagh, occupied the unique position as sole shareholders and directors of both companies and were in actuality, the "mind and management" or the "controlling minds" of both companies and as such were persons *"at an appropriate level"* within both companies having knowledge of the 'material' facts.

[142] The Defendant further submitted that the state of mind of Sharif Mohammed and Marie Kavanagh prior to issuance of the policy, was accordingly, the state of mind of both companies and, in particular, of the Plaintiff. Counsel for the Defendant submitted that the Plaintiff company was, accordingly, under a duty to disclose to the Defendant material facts known to its controlling minds and by extension, by the company, that would have had an effect on the mind of the Defendant company as a prudent insurer in weighing up the risk it was being asked to undertake. Counsel for the Defendants cited in support: ***Arterial Caravans Limited v. Yorkshire Insurance Company Limited [19773] 1 Lloyd's Rep. 169*** and ***March Cabaret Club and Casino Limited v. London Assurance [1975] 1 Lloyd's Rep. 169*** both of which were followed and approved in ***Brotherton v. Aseguradora Calseguras SA (No 2) [2003] 1 All E. R. (Comm) 774; Container Transport International Inc v. Oceanus Mutual Underwriting Association (Bermuda)***

Ltd(No 1) [1984] 1 Lloyd's Rep. 476 and ***Marene Knitting Mills Pty v. Greater Pacific General Insurance [1976] 2 Lloyd's Rep. 631***.

[143] For its part, the Plaintiff contended that it was under no duty to disclose the fact of cancellation by Gulf Insurance of the O'Meara Food Products Limited policy. Counsel for the Plaintiff further contended that O'Meara Food Products Limited is a separate legal entity from the Plaintiff company and therefore no duty of disclosure arose.

[144] Further, the Plaintiff submitted that as clearly appears at question 8 of the Defendant's Fire Proposal form, the Defendant had never sought to obtain information about information about the directors and beneficial ownership of companies other than the specific company which was proposing for insurance.

[145] The Plaintiff also submitted that information about the cancellation of the O'Meara Food Products Limited policy was not 'material' to the risk which the Defendant was about to undertake in relation to the Plaintiff company and in any event, would not have influenced the judgment of the Defendant in deciding whether to undertake the risk.

[146] Finally, the Plaintiff submitted that the failure to disclose the fact of the cancellation of the O'Meara Food Products policy had not induced the Defendant into issuing the policy or to giving the Plaintiff more favourable terms than it might have given had all the facts been disclosed. Counsel for the Plaintiff cited the following authorities in support of the Plaintiff's submissions: ***Somati Ali v. Hand-in-Hand Mutual Fire and Life Insurance Co. [2007] 71 WIR 227; Pan Atlantic Insurance Co. Ltd and another v. Pine Top Insurance Co. Ltd (cited above); Meisels and anor v. Norwich Union Insurance Co [2006] All E R 115; Decorum Investments Limited v. Atkins, the Elena G [2001] All***

ER 187; and S Hosein & Co v. The Goodwill Life & General Insurance Co. Ltd H.C.A. No. 6603 of 1988.

[147] It is well established in the field of moral hazard, that the duty to disclose encompasses all facts and circumstances which could raise doubts in the mind of a prudent insurer about the risk which it is about to undertake. [See ***Brotherton's case*** *(above.)*]

[148] As is also clear from ***Quinby,*** *(above)* it is no answer to an allegation of non-disclosure for Mr. Sharif Mohammed (a director and shareholder of both companies at the appropriate level) to assert, as he did at the trial, that when proposing for insurance coverage for the Plaintiff company with the Defendant insurers, he did not tell the broker about the cancellation of the O'Meara Products Limited policy with Gulf Insurance and had only told the broker what he was asked.

[149] However, I find that the evidence of Mr. Yeadon is not very useful to this Court in deciding the materiality of the undisclosed facts. His responses to the following have to be examined:

> Q. Is the cancellation of an insurance policy a material fact?
> A. Yes because with that knowledge the insurer will be able to make further inquiries into the reason for the cancellation and that may have a bearing on whether the insurer will agree to run the risk of the insurance.
> Q. Is cancellation [of a policy] for any reason whatsoever a material fact?
> A. Yes. It would be material in that the underwriter, had he been informed of the cancellation, would have been able to make further inquiries into the reason which might then influence whether to run the risk of the insurance.
> Q. Would the disclosure of a judgment against Mr. Mohamed and Ms. Kavanagh be material?
> A. Yes. The disclosure of that fact would invite the underwriter to make further inquiries in considering the moral hazard so that the insurance company could decide whether to run the risk or not.
> Q. Would the denial of claims be a material fact?

A. Yes. It would invite the underwriter to make further inquiries into the reason for the denial. The reason may have a bearing on moral hazard of the insured or proposer.

[150] As stated before, a circumstance is material if it would have an effect on the mind of prudent insurer weighing up the risk. Mr. Yeadon's responses as related to the undisclosed circumstances were, in essence, that disclosure of the facts would have put the insurer on notice to make further inquiries. He has not stated that these undisclosed facts would have had an effect on the prudent insurer but merely that these facts may have affected the decision to accept the risk depending on the result of further inquiries. An insurer simply wanting to be made aware of certain facts is not the test and was rejected by the House of Lords in ***Pan Atlantic***.

[151] As such, the Court will have to rely upon *"its own sense of the attitude of a prudent underwriter"* ***[Somati Ali].***

[152] I am guided by the dictum in ***Somati Ali*** that *"an insurer is entitled to know all facts which throw doubt on the business integrity of the assured at the time the insurance is placed".* The Guyana Court of Appeal further stated that *"the character of an insured has long been held to be material to risk".*

[153] The Court is satisfied that the law is that when the Plaintiff's directors, Ms. Kavanagh and Mr. Mohammed, acting on the Plaintiff's behalf, approached the Defendant, through Lynch Insurance Broker's to obtain commercial insurance coverage for the company's newly established restaurant business, the Plaintiff was under the general duty to disclose either directly to the Defendant or vicariously through the Plaintiff's broker, all facts which could be said to be material to an insurer's appraisal of the risk which were known

or deemed to be known by the Plaintiff, but neither known nor deemed to be known by the Defendant***.[Pan Atlantic Ins. Co Ltd v. Pine Top Ins. Co.]***

[154] It is beyond dispute and the Court has found that as its directors, Marie Kavanagh and Sharif Mohammed are natural persons 'at an appropriate level' who controlled the Plaintiff and represented its "directing mind and will". In the circumstances, the law will attribute to the Plaintiff company the knowledge possessed by them as the *"directing mind and will"* of the company. ***[MacGillivray: paragraph 17-10 @ p. 412. Also see PWC Syndicates.]***

[155] For purposes of the duty of disclosure and irrespective of whether the assured is a natural person or a company, or whether the insurance is marine or non-marine in nature, the law will also deem the assured: *"to know every circumstance which, in the ordinary course of business, ought to be known by him/it."* ***[MacGillivray: paragraph 17-13 @ p. 414.]***

[156] The rationale and justification for the disclosure rule, as well as the rule which attributes to a corporate assured the knowledge of the natural persons who are their directing mind is to enable insurers to make an informed assessment of the risks presented to them before the policy is issued. ***[Carter v Boehm*** *(above)****.]***

[157] In relation to the non-disclosure of the fact of cancellation of the O'Meara fire policy, the Court has already accepted that the cancellation of the O'Meara Foods policy and the issuance of a Credit Note representing a refund of the premium were facts which were known to Mr. Mohammed in his capacity as a director of both companies.

[158] The Court was easily persuaded by the evidence of both Nigel Adams and Gregory Yeadon that the fact of the cancellation of an insurance policy and the return of premiums is a moral hazard which will almost invariably excite the interest of a prudent insurer and

cause it make further inquiries with a view to ascertaining, prior to issuance of the policy, the reason for the cancellation and in particular, whether the cancellation had occurred for an adverse reason.

[159] As the Court has already observed, although a Brokers Slip was submitted in this case as opposed to the Proposal Form, Item 8 of the Proposal Form clearly invites disclosure by a proposed assured or its directors in relation to ***any*** previous insurance refusal, declination or cancellation, not only of the proposed assured, but also of the partners, directors or associates of the proposed assured.

[160] For these reasons, I therefore attribute to the Plaintiff company, the knowledge of Mr. Sharif Mohammed relating to the fact of the cancellation of the O'Meara Foods policy and the return of the premiums and find that the Plaintiff, of which he was a director, was consequently under a duty: (i) to either directly disclose to the Defendant prior to issuance of the policy, the material fact of the cancellation of the Gulf Insurance policy and the refund of premiums to O'Meara Foods of which Mr. Mohammed was also a director; or (ii) to place Lynch Insurance Brokers in possession of the foregoing 'material' facts which the Plaintiff company would have been bound to disclose had the company itself conducted the negotiations.

[161] For similar reasons, I hold that the fact that Maritime Insurance refused to pay out a claim to a company of which Mr. Mohammed was also a director on the ground that he breached a condition of the policy in failing to supply sufficient or satisfactory evidence was also a 'material' fact which ought to have been disclosed to the Defendant (whether by the Plaintiff or its broker) prior to the issuance of the policy.

[162] The materiality of the fact of any prior claims history or losses sustained by the proposed assured as well as by its partners and directors is, in the Court's view, underscored by the presence in the Proposal Form of Item 8 expressly inviting disclosure of such matters.

[163] Further, I find 'material' the fact that O'Meara Foods (a company of which Mr. Mohammed and Ms. Kavanagh were also directors) had a debt with the Agricultural Development Bank which that company and its directors refused to pay. Also 'material' was the fact that a claim had been made for payment of the outstanding debt and a judgment subsequently entered *jointly and severally* against the company and its directors, Mr. Mohammed and Ms. Kavanagh.

[164] I am satisfied that all these facts and circumstances speak to the character and integrity of Mr. Mohammed and Ms. Kavanagh the shareholders and directors of the Plaintiff company, as well as to the state of their financial obligations. To use the jargon of the insurance industry, such matters clearly constituted "moral hazards" and were 'material' facts which undoubtedly cast doubt on the business integrity of the Plaintiff which was a relatively new company with no known track record in Barbados.

[165] Disclosure of these facts, would have provided the Defendant company with information on the Plaintiff company's directors and principal shareholders (albeit in relation to their management of O'Meara Foods) from which the defendant would have been in a position to gain a full and proper appreciation of the risk that it was being asked to undertake in relation to the Plaintiff. I turn now to consider whether these several 'material' non-disclosures induced the defendant to enter into the contract.

[166] ***Was the Defendant induced to enter the contract?:*** As outlined earlier, to succeed in a defence of non-disclosure the Defendant must establish not only that the assured failed to

disclose a 'material' fact but also that the non-disclosure induced the making of the contract in the sense that the insurer would not have issued the policy if it had known the matters in question.***[Pan Atlantic Ins Co v Pine Top Ins. Co]***

[167] Where the materiality of the undisclosed matter is obvious, it appears that a Court may be justified in using an evidential presumption to arrive at a finding that the insurer was induced. However, such an evidential presumption may be rebutted by contradictory evidence adduced by the assured.***[MacGillivary: para 17-28 @ p. 421]***

[168] The Defendant's Operations Manager, Mr. Nigel Adams stated that had these facts been disclosed to the Defendant company, it would have declined the risk. Mr. Gregory Yeadon similarly stated that the prudent insurer would have declined the risk had these facts been disclosed. I accept this to be the case.

[169] It seems obvious to me that the non-disclosure to the Defendant company of the material facts that the directors of the Plaintiff company had (i) had been directors of another company which had had its insurance cover cancelled and premiums refunded; and (ii) made a claim in respect of another company of which they were also directors for the substantial TT $2,513,525 which had been denied on the basis of breach of a condition of the policy; and (iii) the fact that a judgment had been entered jointly and severally against the said directors and another company for the balance of a loan which they had refused to pay would have undoubtedly have induced the unsuspecting insurer in this case to enter into the contract of insurance.

[170] As such, the Court holds that the Defendant company's defence of non-disclosure succeeds. I accordingly declare that the Defendant is entitled to avoid the policy <u>*ab initio*</u> by reason of the material non-disclosures particularized at paragraph 8(a) (b) and (c) of

the Further Amended Defence. It is not an answer to this Defence for the Plaintiff or its directors to say that the questions were not asked. The Defendant entitled to avoid the policy *ab initio*.

[171] **Issue 2: Was the fire occasioned by arson, or with the connivance of the Plaintiff?**;

The Defendant company also alleged in its Defence that the fire was not fortuitous and that it was caused by the wilful act or connivance of the Plaintiff company and that it is accordingly entitled under the policy to forfeit all benefits due under the policy.

[172] Condition 13 of the policy states as follows:

FORFEITURE

> *"13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain a benefit under this Policy; or, if loss or damage be occasioned by the wilful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this Policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited."*

[173] It is a principle, well established in insurance law that an insured cannot recover against his own wilful misconduct. This principle has found contractual expression in Condition 13 of the policy of insurance number BBFCP452842 entered into between the parties and dated 5th April 2007.

[174] It is common ground that the Plaintiff's plant, machinery, and equipment together with its lease hold improvements, betterment and stock situated within leased premises known as "Morecambe House" were insured with the Defendant company against loss or damage

by fire. It is also not in dispute that on August 27th, 2007 a fire occurred at the said "Morecambe House" which resulted in substantial damage to property. The Defendant has however alleged that the fire was deliberately occasioned by the Plaintiff company or through its connivance, contrary to the conditions of the policy.

[175] The law is that where an insurer alleges fraud, the burden of proof is on the insurer to prove that the fire was not fortuitous. The standard of proof in such cases goes beyond the usual civil standard of balance of probabilities.

[176] In the case of ***Bater v Bater [1951] Probate 35*** Denning L.J. stated,

> *"A civil court when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."*

[177] This position has been echoed in the in the cases of ***John Chung v Colonial Fire and General Insurance Co. Limited Civil Appeal No. 151 of 1991*** from the Court of Appeal of Trinidad and Tobago, the English case of ***Hornal v Neuberger Products Ltd [1957] 1 QB 247, CA*** and the case ***of Solomon Ghany Oil & Engineering Ltd v N.E.M. (West Indies) Insurance Ltd HCA No. S 3114 of 1986)*** from the High Court of Trinidad and Tobago.

[178] In the case of ***The Zinovia [1984] 2 Lloyd's Rep. 264*** it was stated that the burden of proof where fraud is alleged is one *"falling not far short of the rigorous criminal standard".*

[179] The Court is, accordingly, satisfied in relation to the Defendant's allegation that the fire was not fortuitous, that the legal burden lies on the Defendant to satisfy the Court to *"a high degree of probability"* that the loss and damage to property insured under the policy

was occasioned, as alleged in the Defence, by the wilful act of the Plaintiff company or with its connivance and contrary to the conditions of the policy.

[180] The Defendant company relied on the evidence of Mr. Patrick Zoë and Mr. Mark Sargeant to support its assertions that the fire had not been fortuitous and had been occasioned by the Plaintiff's wilful act and/or with its connivance.

Evidence of Patrick Zoë

[181] Mr. Zoë is a double certified fire investigator by the New York Department of State. He has been a forensic fire cause and points of origin specialist investigator for the past 15 years. He has been a member of the International Association of Arson Investigators for the past 15 years. His witness statements and two reports were entered into evidence. Mr. Zoë was accepted by this Court as an expert in the field of fire investigations.

[182] Mr. Zoë is the Managing Director of a company known as Claims Adjusting Bureau, a company incorporated under the laws of Trinidad and Tobago. On or about the 30th August 2007, Mr. Zoë was retained by the Defendant company to investigate the circumstances surrounding the fire which occurred at "Morecambe House".

[183] Mr. Zoë was questioned under cross-examination about his investigation techniques. He stated that collecting evidence includes speaking to people, taking photographs and where necessary collecting samples and consulting with experts in other fields. He further agreed with Counsel that a fire investigation should proceed without assumptions and with "an open mind". He also agreed that it was important for a fire investigator to be unbiased.

[184] Mr. Zoë described "Morecambe House" as a two storey building with a basement and balconies on each level. It was constructed with concrete walls and wooden floorings, doors, windows, jalousies, ceiling and roof frames.

[185] There was a two storey annex to the north of Morecambe House. The annex housed on the ground floor the kitchen for the Indian restaurant, staff quarters (inclusive of a lunch room and showers) and the top floor housed the kitchen for the Thai restaurant, offices and an apartment occupied by Mr. Mohammed and Ms. Kavanagh. The entire property was enclosed by an eight foot tall concrete wall and two metals gates to the southern and eastern sides of the property. The gates were kept locked outside of business hours. The rooms of the restaurants on both floors were equipped with fire alarms and were so equipped on the day of the fire.

[186] During the course of his investigations, Mr. Zoë obtained a statement from Ms. Sharifa Abraham who was employed by the Plaintiff company and had worked at the restaurants on the night of 26th August 2007. She was responsible for locking up the restaurants and gave a statement stating that before she left that night she had locked the windows and doors and had given Mr. Mohammed the keys. She stated that the premises were equipped with fire alarms and that on the night of the fire the alarms were in working order. This fact was also confirmed by Mr. Franklyn Browne, who also testified at the trial.

[187] When Mr. Zoë visited "Morecambe House" he noted *"the wide extent of complete fire destruction of several of the wood structured floorings and ceilings throughout the restaurants at both floors, as well as of the entire roof".* He stated that the physical characteristics of the building were such that *"it would be virtually impossible for an*

accidental fire to completely destroy the several wooden flooring structures [...] in the manner as observed in this fire". He further opined that *"the patterns of complete and otherwise severe fire destruction of the wooden floorings at both floors of the building in this particular case are reflections of strong characteristics and traits of unnatural or abnormal burnings".*

[188] In his oral testimony, Mr. Zoë stated that the normal behaviour for a fire is to travel upwards from the base of combustion. However, in this case, he stated, the fire had travelled downwards, which is abnormal. He stated that fire travelling downwards is a clear indicator of the presence and use of an accelerant or fire enhancer.

[189] Mr. Zoë's evidence also was that he had found two "seats of fire", one on each floor which in his opinion *"..could be considered strategic for holistic fire-spread and total destruction".* He defined a "seat of fire" as *"an area determined to have been a point where a fire started".*

[190] He identified the two fire seats as the south-western section of the Moghul Room, located on the ground floor of the *"Aspara"* Restaurant and the south-western section of the Siam Room of the *"Thamnak Thai"* Restaurant located on the first floor. Mr. Zoë also expressed the view that the "fuel load quantities" at these points were incompatible with the extremely high temperature combustion which was evident.

[191] He further stated that the level of destruction strongly suggested that there were even more seats of fire. However, the state of complete destruction at some parts of the building made it virtually impossible to point definitively to other fire seats and origins.

[192] Mr. Zoë told the Court that in an accidental or normal fire there will be one seat of fire. He clearly testified that more than one seat of fire, burning simultaneously and unrelated to each other, is an indicator of deliberate fire setting.

[193] Mr. Zoë stated that the complete fire destruction indicated *"extreme high temperature burnings"* wholly consistent with the use of fire enhancers or accelerants. He was able to identify the fire seats by the *"degree of spalling of the walls ...coupled with the extent of burnt away floorings"*.

[194] In his oral testimony Mr. Zoë explained that 'spalling' is the *"cracking and/or breaking off of concrete walls due to high temperature heat by fire".* He further stated that "spalling" is indicative of highly abnormal fire behaviour and burning.

[195] Mr. Zoë's evidence was that the radiated heat from the fire in the Siam Room on the first floor had destroyed the wood-framed dropped ceilings, concrete walls of the verandas situated immediately outside the room and also the roof tops of three gazebo-type huts located several meters away.

[196] According to Mr. Zoë, the stairway to the upper floor had been completely consumed by the fire. The floor and ceiling in this immediate vicinity had also been completely destroyed. This evidenced *"exceedingly high temperature burnings".*

[197] He investigated all electrical outlets, wires and apparatus in the immediate and surrounding areas of the Siam Room and the Moghul Room and his investigation revealed no evidence of electrical fault of short circuit. The electrical wires in the roof, ceilings, panels and conduits at various walls throughout the building were also examined. He stated that there was absolutely no evidence of electrical fault. He noted

that the main switch in the main electrical circuit distribution panel situated in the east-west corridor at the north-western section of the first floor had been in the "off" position.

[198] He was questioned about the characteristics of an electrical fire and explained that *"electrical faults or shorts would product or cause ignition at a fire seat".* He also explained that *"electricity is not a fuel source and cannot influence burning in any manner or form".* An electrical fault, he said, would cause fire to be normal, meaning that the area would burn in accordance with its own constituents. However, where an accelerant is used the fire would be abnormal.

[199] Spontaneous combustion was defined by the witness as *"the self ignition of a product or material".* According to Mr. Zoë, no materials were found which indicated spontaneous combustions. Further, he had specifically inquired of Ms. Abraham about the materials that were in the areas surrounding the identified seats of fire and his evidence was that there were no materials there which would indicate spontaneous combustion.

[200] The witness told the Court that where there has been spontaneous combustion and where there are no accelerants, the combusted material or product would burn in accordance with its normal constituents. However, if an accelerant is used there would be a very heated, abnormal fire.

[201] Mr. Zoë stated that based on his investigations, a bronze Buddha statue located in the Buddha room upstairs had been removed immediately prior to the fire. According to him, the statue was 16 inches tall and sat atop a bronze metal stand. He referred to a statement of Ms. Sharifa Abraham who stated that the statue had been in its usual location in the Buddha Room when she closed-up the restaurants on the night of 26th August, 2007.

[202] Mr. Zoë told the Court that if the bronze statue had been in place, remnants would have been found, albeit in a deformed state. He told the Court that neither the statue nor remnants of it had been found on the premises following the fire. However, he told the Court that he had found the remnants of the stand on which the statue stood at the bottom of the Moghul room. Mr. Zoë also identified what appeared to be the remnants of the stand in his report and further explained that the Moghul Room had been located directly below the Buddha Room.

[203] Mr. Zoë was informed of the presence of a bronze Buddha by Ms. Sharifa Abraham who was employed as a hostess and supervisor at *"Apsara"* Restaurant. He also confirmed its presence by looking at photographs.

[204] According to Mr. Zoë, he had found evidence of other metallic symbols in the debris, but nothing remained of the Buddha statue other than the stand.

[205] Mr. Zoë was of the opinion that there was no evidence to support an accidental cause of the fire. Having further ruled out electrical fault and spontaneous combustion, Mr. Zoë concluded that the fire was incendiary in nature. In further support of this conclusion Mr. Zoë pointed to what he termed the *"phenomenal fire spread",* the wide extent of extensive and complete fire destruction of floorings at both floor levels, the evidence of high temperature fire and the two fire seats and the fact that the Buddha statue appeared to be missing. He further pointed out that the ceilings, which were built with fire-retardant Gypsum materials, had been completely destroyed. According to the witness this was unnatural or abnormal. Further, the rooms in the building were used for dining and contained primarily chairs, tables and tablecloths and the high temperature of the fire

was inconsistent with those materials. He explained that those materials and the wooden floors, ceilings and facades were incapable of producing such high temperatures.

[206] Mr. Zoë was cross-examined extensively about the Buddha statue. He maintained, however, that the fire was deliberately set and that this conclusion *"had nothing to do with the Buddha"* and that the 'missing' Buddha had played no part in his findings. In answer to Mr. Shepherd's suggestion that this statement was contrary to the findings in his Report, Mr. Zoë denied that his admission that the Buddha had played no part in his findings was contrary to or in conflict with the conclusions in his Report.

[207] Mr. Zoë did, however, admit under cross-examination that he had drawn conclusions about the "missing" Buddha statue without having spoken to either Mr. Mohammed or Ms. Kavanagh. He also admitted that he did not have an independent report from an electrician nor did he take any samples from the building.

[208] Mr. Zoë was referred to paragraphs 13 and 14 of Ms. Kavanagh's witness statement in which she described several electrical problems experienced by the restaurant some months prior to the fire. Under cross-examination, the witness informed the Court that he became aware of these matters after his report had been submitted. He, however, maintained that the information was not relevant to his investigation and refused to concede that the information of that nature should have been elicited by him during his investigations.

[209] Counsel for the Plaintiff, Mr. Shepherd QC suggested to Mr. Zoë in cross-examination that the Report which had been prepared by Mr. Sargeant had come to different conclusions regarding the location of the seats of fire. In response, whilst agreeing that

Mr. Sargeant's report had concluded that the Moghul room was not a seat of the fire, Mr. Zoë pointed out that he had reported that there were a minimum of two seats of fire.

[210] Whilst Mr. Zoë agreed with Mr. Sargeant's definition of 'flash-over' which occurs when all the surfaces in a room are heated up to the point of almost ignition and then they spontaneously ignite, he disagreed that one occurred in this case.

[211] Under cross-examination Mr. Zoë conceded that a fire on one storey may burn the flooring of the level above and agreed that that *"might have been involved"* in this case. However, he maintained that the evidence in this case did not suggest such.

[212] Under cross-examination, Mr. Zoë was asked whether it would have been best practice for him to take samples to confirm the use of accelerants. He explained that such samples should ideally be taken within 72 hours of the fire but that as he had not been on the site within 72 hours, it was not feasible for him to take such samples.

[213] He was further asked whether it would have been best practice to have his conclusions checked by an electrical expert. He told the Court that there was absolutely no need for such an expert as there had been no evidence of an electrical fault or short. Under re-examination, Mr. Zoë stated that it was not mandatory in a fire investigation that an electrical expert be retained. According to him, an electrical expert is needed only when there is evidence of electrical fault or short circuitry.

[214] Overall, I found Mr. Zoë to be, generally, a forthright and knowledgeable witness. Furthermore, the Court found that the integrity of his findings was not shaken or undermined during his cross-examination..

<u>Evidence of Mark Sargeant</u>

[215] Mr. Mark Sargeant is a forensic scientist and the Managing Director of Forensic Consultants Inc. He possesses a Bachelor of Science degree in Forensic Science obtained from John Jay College of Criminal Justice, New York in 1995 and a Masters of Forensic Science from the same institution obtained in 1997. Mr. Sargeant was accepted by the Court as an expert in fire investigations.

[216] A Report prepared by Mr. Sargeant was admitted into evidence at the trial without objection. Additionally, Mr. Sargeant's witness statement was admitted into evidence and stood as his evidence-in-chief.

[217] Mr. Sargeant was contacted and retained by the Defendant company on 27th August 2007 to investigate the circumstances surrounding the fire.

[218] In cross-examination, Mr. Sargeant stated that during the course of his investigations he spoke to Mr. Mohammed, Ms. Kavanagh and Ms. Sherifa Abraham. However, he did not take any written statements from these persons. His investigations also entailed inspecting the premises and taking photographs.

[219] Mr. Sargeant made observations about the exterior and the interior of the building. He observed that the upstairs veranda on the eastern side of the building had a considerably much greater level of burn than the downstairs veranda. According to him, he identified some "beading" of the wires there.

[220] In his examination-and-chief, Mr. Sargeant explained that "beading" occurs when an electrical wire shorts causing the wire to spark and heat up. When the wire cooled it caused "beads" to develop on the wire. This, he said, shows that there was an electrical discharge. However, sometimes "beading" can also be created by the heat of the fire. In

such a situation it is called “blistering”; it has a similar look. The witness told the Court that he can differentiate between “blistering” and “beading”.

[221] Mr. Sargeant observed that there was an electrical panel on the north wall of the service corridor which contained the controls for the fans on the ground floor. There was also a large electrical breaker box in the corridor. According to the witness, he had observed that none of the breakers had been in the ‘trip’ position.

[222] The upstairs service corridor, he said, sustained much more burn damage. There was in his view, a high degree of clean burn. There was a circuit panel in the corridor opposite the entrance to the Buddha Room which contained the controls for the fans and breakers that controlled the outlets and lights. The panel received a large quantity of burn. A number of breakers were found to be in the ‘trip’ position. Some were in the ‘off’ position; none were in the ‘on’ position. Inspection of the wires found no ‘arcing’. The lower set of wires had their insulation on them.

[223] An examination of the cellar revealed that the floor for the Zenana Room and the Jasimaler Room had burnt away and fallen into the cellar. The floor supports under the Zeanna Room had collapsed. An inspection of the wires found no “beading”.

[224] Mr. Sargeant observed that in the Moghul Room most of the floor boards were still intact although they had some burn on them. There was damage to the upper surface of the floor boards, but little “burn through”. In his report Mr. Sargeant further described this room as having carbonaceous deposits on the lower surfaces of the south and west walls. Most of the plaster on the walls was burnt off and there was a considerable amount of clean burn on the walls. “Beading” was observed on wiring on the north wall by the

doorway. An excavation of the area adjacent to the western wall of the Moghul Room found some brass objects.

[225] In cross-examination Mr. Zoë was asked to comment on this aspect of Mr. Sargeant's findings. Whilst Mr. Zoë agreed that there were carbonaceous deposits on the lower surfaces of the south walls and west wall and above the door on the east wall, that most of the plaster on the walls in the Moghul room was burnt off and that there was a considerable amount of clean burn on most of the walls, he did not agree with the rest of Mr. Sargeant's description of the Moghul Room.

[226] Mr. Zoë disagreed with Mr. Sargeant's description of the Moghul Room which he described as having "most of the floor boards still intact although they had some burn on them". He also disagreed with Mr. Sargeant's finding that "there was some damage to the upper surface of the floor boards but there was little burn through of the floor boards" and that there was "beading" on some of the wiring. Mr. Zoë stated that "the photographs speak for themselves".

[227] Mr. Sargeant observed that in the Zenana Room most of the floor supports were intact with some burn. The plaster was almost completely off the walls. The Jaipur Room had most of the floor boards in tact with the exception of the southwest section. The wooden trimming around the room was still in place. Most of the plaster was still on the walls. And there was no "beading" present on the wires in this room.

[228] According to Mr. Sargeant, inspection of the Jasimaler Room revealed that half the floor supports on the western side of the room were missing and the wood had fallen into the cellar. Some of the floor trimming was still in place. An examination of the electrical

wires in this area revealed no "beading". Plaster was still on the walls on all sides of the room. Remnants of an elephant statue were found in the debris.

[229] Little support was left of the stairwell; it had been destroyed by the fire. The flooring surrounding this area had also been destroyed. More than 90% of the plaster in this area was burnt off leaving a clean burn appearance. There was no "beading" of the wires in this area.

[230] According to Mr. Sargeant, he found a high degree of burn in the Buddha Room. More than 80% of the plaster was burnt off the walls and most of the floor supports had been burned away. Some of the flooring had collapsed into the Moghul Room below. Examination of the wires showed some "beading" on some of the wires.

[231] Similarly, the Siam Room had all of the floor boards missing. There were very little remnants of the boards that were in the walls which were deep inside the wall. Most of the wall plaster was gone. "Beading" was observed on the wires on the western and eastern walls.

[232] In the Gong Bearer's Room there was a lot of calcination and the floor support was burned away. Most of the plaster was burnt off the walls. Some 'beading' was observed on the wires of the western and eastern walls.

[233] Mr. Sargeant spoke to an attendant and the security guard of the Shell gas station next door to "Morecambe House" who were eye-witnesses to the fire. He also examined footage from the camera at the Shell gas station. Whilst the footage did not capture the fire he was able to observe the glow from the fire on a wall of the station.

[234] From the reports of the eye-witnesses and examination of the video, Mr. Sargeant concluded that the fire was first seen on the ground floor of the building. Neither of the

witnesses reported seeing the fire on the western side of the building at the ignition point. The upstairs level had shutters which would have made it difficult for the eye-witnesses to see whether there was fire in the upstairs level.

[235] It appeared that the fire burned more in the south-eastern section of the building, both upstairs and downstairs. However, most of the burning was to the upstairs level.

[236] Mr. Sargeant opined that the origin of the fire had been on the southeast corner of the building although he was unable to identify in which specific room. He further opined that the fire must have been burning on more than one floor simultaneously *"for the massive evolution of fire to engulf both floors simultaneously"*.

[237] Mr. Sargeant was asked in cross-examination about the eye-witnesses and how he determined the location of the fire based on their reports. He explained that he had returned to the location from which the witnesses saw the fire. From that point, one witness had seen an orange glow coming from the building. Mr. Sargeant stated that from the location where the witness had been standing, the upper point of the ground floor could be seen.

[238] Like Mr. Zoë, Mr. Sargeant concluded that the fire was incendiary in nature. His expert opinion was based primarily based on the fact that he had ruled out accidental causes, spontaneous combustion and mechanical, electrical and chemical causes.

[239] Mr. Sargeant eliminated an electrical cause for a number of reasons listed in his report. Firstly, he observed that the power had been switched off from an electrical panel on the ground floor which controlled the lights, fans, outlets and smoke alarms on that floor. As such, an electrical cause on the ground floor could be eliminated. There was some

"beading" on this level but Mr. Sargeant opined that these wires were associated with the wires that hung down to the downstairs area.

[240] Secondly, he opined that if an electrical fire had occurred within a particular area of the building, the fire would have been isolated to one area at the point of evolution or growth that was seen by the two witnesses. However, this fire traversed a floor level, as well as windows and walls, to cause a burning that eventually could be seen through the roof and the shutters.

[241] Further, he stated that if there had been an electrical cause for a fire in one room it would have been retained by the ceiling which was made of Gypsum, a material which acts as fire proofing to retard or reduce the spread of fire from one area to another.

[242] Like Mr. Zoë, Mr. Sargeant also made reference to the Buddha statue to support his contention that the fire had been deliberately set. He stated that from his information the Buddha was a brass object. According to him, excavations of the room below the Buddha room did not reveal the Buddha statue nor any remnants of it.

[243] Similarly to Mr. Zoë, Mr. Sargeant stated that in an accidental fire one would expect to find only one 'seat of fire'. More than one 'seat of fire' would suggest that the fire was incendiary. Mr. Sargeant concluded from his investigations that there were at least two 'seats of fire' in this case.

[244] In cross-examination, it was suggested to Mr. Sargeant that his evidence regarding the number of 'seats of fire' differed from his Rport. Mr. Shepherd Q.C. referred Mr. Sargeant to his Report where he had stated that it was his opinion that *"the origin of this fire was somewhere in the southeast corner of the great house".* Mr. Sargeant insisted that his testimony was not contrary to his Report. He explained that the building

consisted of two stories and so the expression "the southeast corner" referred to any of the rooms located in the southeast corner, whether upstairs or downstairs.

[245] Mr. Sargeant in examination-in-chief stated that the intensity of a fire would speak to the fire load on a building. He also stated that the intensity of a fire is also referred to as the "quick growth" of a fire. In accidental fires there is an expected growth rate of a fire. When a fire grows beyond the expected growth rate, it is suggestive that there was some "aid" to have grown it so quickly. Having spoken to the fire officers and the eye-witnesses, Mr. Sargeant concluded that the fire grew very quickly.

[246] Mr. Sargeant stated that the growth rate of an accidental fire is "fairly slow". This, he said, can be accelerated through the use of accelerants which would aid in the spread of the fire.

[247] The witness was asked whether during the course of his examination he found the remnants of a bronze Buddha. He answered in the negative.

[248] This witness, like Mr. Zoë, stated that fires burn upwards. He further confirmed that there was evidence of downward burning in this case.

[249] In cross-examination Mr. Sargeant stated that the fact that the breakers were in the 'off' position raised red flags and suggested that someone was "interfering" with the breakers.

[250] In cross-examination, Mr. Sargeant clarified that the brighter, larger glow that was seen on the wall of the Shell in the video coincided with a "flash over". There can be an accompanying sound with a "flash over" but according to him, the witnesses did not report such a noise.

[251] Mr. Sargeant stated in cross-examination that he was unaware that there were cloth hangings in the ceilings of the rooms. He conceded that had not spoken to Mr. Mohammed or Ms. Kavanagh about what was on the ceilings.

[252] In cross-examination Mr. Sargeant admitted that during the course of his investigations he had spoken to the fire officials but said he could not recall whether he asked them if they turned off the breakers.

[253] Under cross-examination Mr. Sargeant admitted that no samples had been taken by him and to his knowledge no samples were taken by anyone else. He was asked whether it would not have been helpful to take samples to rule in or out the presence of accelerants. In response Mr. Sargeant explained that "accelerants by nature are volatile. In this fire we had large quantity of heat, enough to cause the walls to "spall" that is, cause the removal of the surface area. We had a period of rain. Therefore, given those conditions and the magnitude of heat from the building, it would have been non-productive to take samples".

[254] Mr. Sargeant rejected Mr. Shepherd's suggestion that older buildings burn more quickly than newer buildings.

[255] Overall, I found Mr. Sargeant to be a confident and knowledgeable witness. Furthermore, his opinions and conclusions had not been not been fundamentally shaken under cross-examination by Counsel for the Plaintiff, Mr. Shepherd Q.C.

Evidence of Glenda Clarke

[256] At the trial Ms. Glenda Clarke was deemed an expert in the field of accounting without objection. Ms. Clarke was presented with the balance sheet, income statement, management accounts and bank statement of the Plaintiff company for the year ending

31st August 2007. From these documents she had prepared a report which was also admitted into evidence.

[257] In her Witness Statement Ms. Clarke stated that the financial performance of the Plaintiff company was poor and that the company had recorded losses of $1,391,000.00 for the year ending 31st August 2007. She further stated that the company had no cash and had been in overdraft for the entire period under review and had to rely on cash injections from its parent company in Trinidad.

[258] According to Ms. Clarke, as at August 2007 the Plaintiff's level of indebtedness was $5,957,000.00. This amount was made up of: bank overdraft of $304,000.00, $749,000.00 due to Aspara Trinidad and $4, 904,000.00 in bank loans.

[259] Whilst Mr. Mohammed in his oral testimony stated that the losses sustained by the Plaintiff company were less than those budgeted for, this conflicted with his Witness Statement where he stated that *"the loss exceeds the budgeted loss but this is not an unusual event for a start up business particularly in restaurant operations".*

[260] Discussion: A bronze Buddha statue was the subject of many questions during the course of this trial. The importance of the material of the Buddha being that if it was indeed wooden as the Plaintiff claimed, it may have been completely consumed by the fire. However, if it was bronze, it was expected that there would have been some remnants of the statue, none of which were found by either fire investigator.

[261] Mr. Mohammed maintained that the statue was a gilded wooden statue. Under cross-examination Mr. Mohammed was confronted with the claim which had been submitted to the Defendant company, *inter alia*, in respect of a *"Bronze seated Buddha 16 inches high".* In response to this suggestion, Mr. Mohammed told the Court that this was

incorrect and said that the claim should have been amended as the Buddha was gilded or bronze-looking.

[262] The evidence of Ms. Hopkyn-Rees, a witness for the Plaintiff, should be recalled at this time. Ms. Hopkyn-Rees is an interior designer and was responsible for the renovations to "Morecambe House". She stated in her witness statement that she had travelled to India and Thailand with Ms. Kavanagh to purchase the furniture and decorative elements for the restaurants.

[263] She testified that two Buddha statues had been purchased in Thailand. One statue was a large gilded wooden seated Buddha about 42 inches tall which was displayed on a carved chest in the Buddha Room. The second Buddha statue was about 16 inches tall and was bronze. This statue, she said, was also located in the Buddha Room displayed in its own cabinet. She could not recall whether it was solid bronze or whether it was hollow inside, but she confirmed that the statue was bronze.

[264] Her evidence, therefore, was that there was indeed a gilded wooden statue in the Buddha Room but there was also a bronze one. Her description of the bronze Buddha corresponded with the description given by the Plaintiff company in its claim. For this reason I am of the opinion that Mr. Mohamed's evidence in this regard was untruthful.

[265] The evidence of the fire investigators, Mr. Zoë and Mr. Sargeant, was that the fire at "Morecambe House" had deliberately been set. They both ruled out other causes such as accident, chemical and electrical.

[266] Both Mr. Sargeant and Mr. Zoë examined the wiring in the building. Whilst Mr. Zoë did find some evidence of "beading" in the south-eastern and south-western sections of veranda on the first floor, these "beadings" were the result of the insulation being burnt

off. He noted no other "beading". Mr. Sargeant also reported "beading" in these areas. In addition to the "beading"observed in the verandas, Mr. Sargeant also observed "beading" in the Buddha Room, but Mr. Zoë disagreed with this finding.

[267] The importance of "beading", as I understand it, is that it may be indicative of electrical activity such as a short. I find the evidence of Mr. Zoë useful in this regard. Mr. Zoë stated that *"electrical faults or shorts would produce or cause ignition at a fire seat. [...] electricity is not a fuel source and cannot influence burning in any manner or form."* He further stated that at the seat of an electrical fire the fuel in that area will burn in accordance with its own constituents. In another part of his evidence when speaking about spontaneous combustion, Mr. Zoë stated that the burning was inconsistent with the type of materials contained in the building. I am further guided by the fact that the roof was covered with Gypsum, a fire retardant material.

[268] I accept the evidence of Mr. Zoë that electricity is not a fuel source and that a fire with an electrical cause can only spread or grow as much as its surrounding fuel source would allow. Mr. Shepherd Q.C. suggested to Mr. Sargeant that the "flash-over" he described in his Report would explain the spread of the fire. However, Mr. Sargeant stated that a "flash-over" occurs in rooms and would not explain the spread of fire between levels. He maintained that there must have been two fires simultaneously.

[269] Mr. Anthony Walcott, an electrician, gave a statement to Mr. Rawlson Philips of Blackstone Consultants. Mr. Walcott was the electrician responsible for the electrical refurbishment of "Morecambe House". He stated that the refurbishment was done in compliance with an electrical plan which he had been provided with and that after the job

was completed, the building underwent and successfully passed three inspections by the Government Electrical Department.

[270] Mr. Walcott recalled a few instances where he was called on by Mr. Mohammed to rectify electrical problems. He stated that all the problems were minor and the type of problems that occur in electrical systems from time to time.

[271] He stated that after the fire he sent an employee of his to "Morecambe House". His employee reported that on both floors the breakers were in the 'trip' position and that the main breaker of each panel was in the "off" position. On 2nd September 2007, Mr. Walcott visited "Morecambe House". He inspected a panel and saw that it was burnt. However, in his opinion, he fire did not originate there and that the fire started elsewhere in the building.

[272] I accept the evidence of the two forensic fire investigators that there was no electrical cause to this fire. I also take into account the statement of Mr. Walcott. I am satisfied based on the evidence, that without the use of some accelerant, an electrical cause, would not explain the obviously rapid spread of the fire between floors and the ultimate near total destruction of "Morecambe House" and its contents.

[273] Both investigators opined that there must have been at least two 'seats of fire' to explain the rapid spread of the fire and near total destruction. Whilst they did not agree on the location of the seats, they both agreed that the south-eastern side of the building sustained the most damage. I further accept their evidence in this regard.

[274] I further accept that there was no accidental, chemical or mechanical cause to the fire.

[275] The circumstances surrounding the fire appear to this Court to be highly suspicious. It burned at an extremely high temperature, indicative of the use of an accelerant.

Furthermore, I accept that there was more than one 'seat of fire'. Although, the fire investigators did not agree on the location of the seats, they both agreed that there were at least two seats.

[276] Further, bearing in mind the evidence of Mr. Mohammed and Mr. Browne that the premises were secured by an employee of the Plaintiff company and they keys handed to him, and the fact that when the fire officers arrived at "Morecambe House" the gates were locked so that Mr. Mohammed had to be alerted to unlock the gate, I find that Mr. Mohammed had opportunity and was somehow involved in the deliberate fire at "Morecambe House".

[277] I also considered the fact that Mr. Mohammed lied about the bronze Buddha which, at the time of the fire, appeared to have been removed from "Morecambe House". I also found Mr. Mohammed to be an untruthful witness in relation to other matters. He stated that the premises were not equipped with fire alarms. However, his employee, Mr. Franklyn Browne stated that the property was equipped with smoke alarms. Mr. Walcott also stated in his statement that the smoke alarms were installed by his company. Mr. Mohammed stated in cross-examination that there was never a bronze Buddha statue on the premises, which is in direct contradiction to the testimony of the Plaintiff's own witness, Ms. Hopkyn-Rees whom I found to be a forthright and credible witness with no interest to serve.

[278] At this time I am reminded of the standard of proof required in cases such as this, which was discussed in paragraphs [175] to [178] above. As stated before, this standard of proof is higher than the usual civil standard of on a balance of probabilities, but falls short of the criminal standard of beyond reasonable doubt.

[279] With this in mind, I am satisfied to the requisite standard that the fire in this case was not fortuitous, but deliberately set.

[280] The Defendant company submitted that the motive for the loss was the severe losses of the Plaintiff company and relied on the evidence of Ms. Glenda Clarke to support this submission. The Plaintiff's financial statements disclosed that as at August 31st, 2007: (i) the company's fixed assets which represented 97.27% of the company's asset base was less than the company's total indebtedness of $8,975,895.70; (ii) the company's bank accounts were all in overdraft; and (iii) the company had no cash.

[281] While no samples were taken which would have confirmed or disproved the presence of accelerants at the scene of this fire, the Court found that in this case there was *"a high degree of probability"* that the loss and damage to property insured under the policy was occasioned, as alleged in the Defence, by the wilful act of the Plaintiff company or with its connivance and contrary to the conditions of the policy.

[282] The Court's finding that the fire was deliberately set is based to a great extent on the evidence presented by the forensic scientists, Messrs. Zoë and Sargeant coupled with the absence of other expert evidence which might have contradicted their findings and conclusions. In particular, the Court found the following facts were established by the evidence:

(a) The fire originated in two areas of the building, specifically, on the ground floor as well as on the First Floor. The Court was satisfied that the presence of a minimum of two seats of fire each burning simultaneously and unrelated to each other, was a strong indicator of a fire which was deliberately set;

(b) Coupled with this, the state of complete fire destruction in several areas of the building indicated *"extreme high temperature burnings"* wholly consistent with the use of fire enhancers or accelerants;

(c) Added to this, the Court was satisfied that the contents of the rooms in the building namely the chairs, tables and tablecloths and the wooden floors, ceilings and facades were incapable of producing such high temperature burning without the use of accelerants;

(d) Additionally, the downward burning patterns on the ground and first floors coupled with the *"phenomenal fire spread",* the wide extent of extensive and complete fire destruction of floorings at both floor levels, the evidence of high temperature fire and the fact that the ceilings, which were built with fire-retardant Gypsum materials, had been completely destroyed reflected unnatural or abnormal fire behaviour;

(e) At or around the time of the fire, the Plaintiff company was experiencing financial difficulties and incurring severe losses; In particular, as at August 31st, 2007: (i) the company's fixed assets which represented 97.27% of the company's asset base was less than the company's total indebtedness of $8,975,895.70; (ii) the company's bank accounts were all in overdraft; and (iii) the company had no cash;

(f) Within a period of 3 hours immediately prior to the fire, an employee of the Plaintiff company had locked up the premises and handed the keys to Mr. Sharif Mohammed;

(g) Mr. Mohammed was physically present in the nearby Annex situated on the first floor and adjacent to both restaurants where the fire occurred;

(h) Quite suspiciously, the fire alarms installed in the building were found by investigators to have been disabled prior to the fire.

[283] In reaching its decision, the Court refused to draw any inference adverse to the Plaintiff or to Mr. Mohammed from the fact that, according to Mr. Zoe, following the fire no remnants of the bronze Buddha statue were found in the debris. The Court considered that it was neither logical nor reasonable to conclude that the Buddha had been removed prior to the fire simply because the Plaintiff had made a claim for a 16 inch bronze Buddha and because no remnants of the statue had been found in the debris.

[284] Furthermore, Mr, Sargeant's Report had clearly indicated that brass objects had been observed in the debris. In the absence of evidence of closer examination of these objects by both the investigators, it was, in the view of the Court, very possible that one of those objects could have been the deformed remnants of the "missing" Buddha.

[285] Mr. Shepherd Q.C. submitted that a party is obligated to "put their case" in cross-examination to a witness to give that witness an opportunity to deny any adverse allegation. This rule was espoused in the case of ***Browne v Dunn (1893) 6 R 67.*** Counsel further submitted that in this case the allegation of fraud had not been put to the witnesses and so it would be contrary to justice for the Court to find that there was fraud.

[286] ***Phipson on Evidence 16th Edition*** at paragraph 12-35 states:

> *"As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g if the witness has deposed to a conversation, the opposing counsel should put to the witnesses any significant differences from his own case. If he asks no questions he will generally be taken to accept the witness's account and will not be permitted to attack it in his final speech; now will he be allowed in that speech*

to put forward explanations where he has failed to cross-examine relevant witnesses on the point [...] Failure to cross-examine will not, however, always amount to acceptance of the witness's testimony, for example, if the witness has had notice to the contrary beforehand [...]".

[287] In this case the pleadings of the Defendant company stated that, contrary to condition 13 of the insurance policy, the fire was deliberately set or set with the connivance of the Plaintiff. Further, the Plaintiff company would have been served with copies of the forensic reports of Mr. Zoë and Mr. Sargeant, supporting the Defendant company's allegation of fraud.

[288] As such the Plaintiff company would not have been taken by surprise by the defence. It was known from the outset that fraud was being alleged. Further, as discussed above, I find that this defence is supported and been successfully proved to the requisite level by the uncontroverted evidence of both forensic experts.

[289] In the circumstances, as the Court is satisfied that the fire was not fortuitous, and there is a high probability that it was occasioned by a wilful act of one of its shareholders and/or with its connivance and in breach of Condition 13 of the policy, the Defendant company's defence of breach of condition 13 succeeds and all benefits under the policy shall be forfeited in accordance with the policy. I turn to consider the limitation defence raised at paragraphs 6 and 9 of the Further Amended Defence.

[290] **Issue 3: Breach of the Condition 11 time bar:** At paragraph 6 of the Further Amended Defence, the Defendant alleged that the policy was subject to a condition precedent that upon the happening of any loss or damage the Plaintiff *"shall forthwith give notice to the Defendant and shall within 15 days after the loss or damage or such further times as the*

Defendant may in writing allow", deliver to the Defendant a claim in writing as well as particulars as stated therein.

[291] Condition 11 of the policy provides as follows:

> *"Occurrence of a Fire*
>
> *11. On the happening of any loss or damage the insured shall forthwith give notice thereof to the Company, and shall **within 15 days** after the loss or damage, or such further times as the Company may in writing allow in that behalf, deliver to the Company.*
>
> *(a) a claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.*
>
> *(b) particulars of all other insurance if any.*
>
> *The insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith."*

[292] At paragraph 9 of the Further Amended Defence, the Defendant further alleged that in breach of the said condition the Plaintiff had failed to give notice of the loss and damage forthwith and to make the claim within the stipulated 15 days. The Defendant contends that by reason of the breach it is entitled not to honour the claim.

[293] Mr. Shepherd Q.C. for the Plaintiff, relying on the case of ***Western Australian Bank v Royal Insurance (1908) 5 CLR 533,*** submitted that Condition 11 of the insurance policy is a "suspensive condition", meaning that it is merely a condition preventing the Claimant

from obtaining payment until the condition is satisfied, that is, the condition to submit a claim.

[294] In ***Western Australian Bank*** the insurance policy in question contained a condition in the following terms,

> *"[...] in default of compliance with terms of this condition or any of them no claim in respect of any such loss or damage shall be payable or sustainable unless and until such notice statement account proofs and explanations and evidence respectively shall have been delivered produced and given as aforesaid and such statutory declaration if required shall have been made".*

[295] That Court held, relying on the case of ***Weir v Northern Counties of England Insurance Company (1879) 4 Lloyd's Report I.R. 689***, that the effect of the word 'until' in the condition was to suspend the right of action so that failure to render the statement and account within the prescribed time was not fatal. Griffith C.J referred to the words "unless and until" as "words of futurity".

[296] In the instant case, Condition 11 does not contain the word 'until'. As such, the case of ***Western Australian Bank*** can be distinguished.

[297] MacKinnon L.J. in the case of ***Welch v Royal Exchange Assurance [1939] 1 K.B. 294*** rejected the argument that 'unless' (used in a similarly worded condition as this one) could be construed as meaning 'until'. Therefore, where the condition stated that no claim shall be payable unless the terms of the condition have been complied with, that stipulation would be a condition precedent to the right of the insured to recover.

[298] I am therefore satisfied and hold as a matter of law that Condition 11 is to be regarded as a 'condition precedent' to the Plaintiff's ability to claim under the insurance policy. In the circumstances, the Defendant would be entitled to reject the Plaintiff's claim if the

evidence establishes that the stipulations comprising the condition precedent were not met.

[299] Turning to the evidence. In his Witness Statement, Mr. Mohammed deposed that on the morning of the fire he had telephoned Mr. Michael Soochan of Lynch Brokers. According to Mr. Mohammed, Mr. Soochan had undertaken to inform the Defendant company of the fire. He further stated that on that very morning, Mr. Soochan had visited the scene of the fire accompanied by Mr. Mark Sargeant.

[300] In his evidence, Operations Manager of the Defendant company, Mr. Nigel Adams, confirmed that the Defendant company had been immediately notified of the fire. This was further evidenced by the fact that Mr. Mark Sargeant, who had been retained by the Defendant company, attended the scene on the same day of the fire.

[301] Having regard to the evidence, the Court therefore had no difficulty in finding that the Plaintiff company had discharged the obligation imposed by the first portion of Condition 11 to: *"...forthwith give notice"* to the Defendant company of the happening of loss or damage.

[302] However, it is evident that Condition 11 also imposed on the Plaintiff a further obligation to deliver to the Defendant company a claim in writing *"within 15 days"* of the fire, unless otherwise, in writing allowed by the insurer.

[303] Turning to the evidence as a whole, the Court observed that in his Witness Statement Mr. Mohammed deposed that a claim for $6.1 million had been put in to the Defendant company on 5th September 2007. Later in his Witness Statement, he stated that the claim form had been submitted to Lynch Brokers on the 6th September, 2007 along with a

covering letter for transmission to the Defendant company requesting further time to submit full particulars of claim.

[304] At paragraph 15 of her Witness Statement, Ms. Kavanagh also deposed that she had presented the claim to the Defendant on 5th September 2007.

[305] In his Witness Statement Mr. Mohammed stated that he later received written confirmation from Lynch Brokers to the effect that they had faxed the Plaintiff's claim to the Defendant company upon receipt in September 2007 and that a hard copy had been collected by the Defendant company's messenger on 7th April 2008. According to Mr. Mohammed, full particulars of the claim were submitted to the Defendant through Lynch Brokers on October 1st, 2007 and that on receipt of the completed claim, the Defendant raised no issue with the late submission and proceeded to deal with the claim. Mr. Mohammed asserted that the Plaintiff had accordingly complied with the conditions stipulated in the policy

[306] In his Witness Statement, the Defendant's Operations Manager, Mr. Nigel Adams stated that the Plaintiff company had submitted its quantified claim to the Defendant on October 4th, 2007, approximately 5 weeks following the loss. Under cross-examination at the trial he agreed that the Defendant company had received the initial claim form on 7th September 2007 and the detailed information on 12th December 2007 when it was submitted by Lynch Insurance Brokers.

[307] The evidence disclosed that the Defendant company received the initial correspondence from the Plaintiff asking to be allowed more time to submit their detailed claim. It appears that the Plaintiff' letter went unanswered and that the Defendant company continued to adjust the claim.

[308] By a fax dated 3rd December 2007 addressed to the Plaintiff, Mr. Elvis Simpson of E.A Simpson & Associates Inc, the Defendant company's loss adjuster for the claim, requested further information, specifically, balance sheet, detailed monthly management accounts, bank statements and a breakdown of the administrative expenses. The fax also referred to conversations between Mr. Mohamed and Mr. Simpson which had taken place on 29th November 2007.

[309] Referring to the several communications which had passed between the Plaintiff and the Defendant since the initial notice about the fire without denial of the claim, Counsel for the Plaintiff, Mr. Shepherd Q.C. submitted that the Plaintiff's non compliance with Condition 11 was not a bar to recovery under the policy and the Defendant company would be estopped from relying on this clause. He submitted that as the Defendant had never insisted on strict compliance with Condition 11, it would be quite wrong for the company to contend that its acts were not acts of estoppel.

[310] For its part, the Defendant submitted that the late notification of the claim by the Plaintiff constitutes a breach of Condition 11 and the Plaintiff is accordingly not entitled to recover the claimed loss.

[311] Relying on ***Somati Ali*** *(cited above)* and the Trinidadian Privy Council case of ***Super Chem Products Ltd v. American Life & General Insurance Co Ltd et al (No 2) [2004] 64 WIR 345*** Counsel for the Defendant further submitted that there was no evidence before the Court to support the Plaintiff's suggestion that waiver or estoppel had occurred.

[312] After considering the matter, the Court found guidance in the following dictum of Lord Styn in the ***Super Chem case***:

"...it is common ground that waiver and estoppels can only be established... if the insurers made a clear and unequivocal representation to the insured that they would not rely on the time bar; ***Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] AC 741 per Lord Hailsham of St Marylebone.*** *If the insured cannot establish such a clear and unequivocal representation both pleas must fail...."*

[313] The Court has found that nothing said or done by or on behalf of the Defendant in the various interactions with the Plaintiff identified by Mr. Shepherd Q.C. can be viewed as a representation that the Defendant would no longer be relying on the Condition 11 time bar.

[314] In summary, as the Plaintiff has failed to establish that the Defendant made "a clear and unequivocal representation" to the Plaintiff that the contractual time bar would not be relied on, the late submission of the Plaintiff's particularized claim well beyond the 15 day time bar stipulated in Condition 11, constitutes a breach of condition entitling the Defendant to reject the claimed loss.

[315] **Issues 4 & 5: Under-insurance/Quantum:** The Plaintiff company made a total claim on its insurance policy for the sum of $6,092,696.59 which included a claim for $1,973,793.00 for plant, machinery and equipment. At paragraph 11 of its Further Amended Defence the Defendant included an additional defence that the Plaintiff's plant, machinery and equipment were under-insured. By inclusion of this defence, the Defendant company sought to invoke the condition of average set out in the policy (Condition 17), and contended that as the fire had not destroyed the kitchen and bar areas

and as the plant, machinery and equipment had been insured for the sum of $2,000,000.00, the Plaintiff had been under-insured.

[316] In the light of the success of the Defendant's other defences already discussed above, the under-insurance and quantum of loss issues are now moot.

DISPOSAL:

[317] For the reasons earlier outlined, the Plaintiff's claim is dismissed with costs to the Defendant certified fit for two attorneys-a-law, to be assessed by the Registrar, if not agreed. In the event that costs are not agreed and are to be assessed, Counsel for the Defendant shall submit their Bill of Costs and file and serve written submissions on costs at the earliest opportunity.

[318] As the Defendant is entitled to avoid the policy ***ab initio*** by reason of material non-disclosures, it follows that all premiums paid under Guardian General policy of insurance number BB FCP 6452842 dated 5th April 2007 are to be returned to the Plaintiff.

Maureen Crane-Scott

Judge of the High Court

31-12-2014