BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

Civil Suit No. 1006 of 2002

AUBRYN BRIDGEMAN **PLAINTIFF**

AND

CLICO INTERNATIONAL GENERAL INSURANCE LIMITED **DEFENDANT**

Before The Hon. Mr. Justice William Chandler, Judge of the High Court

Appearances:

Mr. Bryan Weekes in association with Mr. Philip McWatt for the Plaintiff
Mr. Larry A.C. Smith in association with Mr. Ajamu Boardi for the Defendant

---

2005: September 29th
2006: February 24th and 27th
May 3rd, 4th, 5th, 8th, 9th and 17th
October 30th
November 1st and 2nd
2007: January 31st
February1st
2010: July 15th
2015: February 19th

DECISION

Introduction

[1] **Chandler J:** The Plaintiff was, at all material times, the owner and operator of a 2000 Isuzu 15-seater vehicle bearing registration number ZM-257 ("the vehicle").

[2] The Defendant is a limited liability company incorporated and registered under the **Companies Act, Chapter 308** of the Laws of Barbados having its registered office situate at White Park Road, St. Michael in this Island and, at all material times, carried on the business of providing insurance coverage to clients. The Defendant had insured the Plaintiff's bus under a contract of insurance which covered loss by fire.

[3] On the evening of 4th December 2000 the vehicle was completely destroyed by fire whilst the Plaintiff was driving along Graeme Hall Road, Christ Church. The Plaintiff subsequently made a claim under the policy of insurance. This contract is more particularly described at paragraph [7] of this decision. The Defendant refused to settle the claim on the grounds, *inter alia*, that the fire was not fortuitous.

Background

[4] The Plaintiff purchased the vehicle on or about 11th October 2000 from St. Hill's Funeral Home for $98,000.00. The purchase price was obtained by a mortgage loan secured over real property in which the Plaintiff had an interest. It was the Plaintiff's intention to use the vehicle, and it was so used, in his business of providing public transportation.

[5] For the purposes of having the vehicle insured by the Defendant, the Plaintiff completed, signed and delivered to the offices of the Defendant a document entitled 'Proposal for Commercial Motor Vehicle Insurance' ("the proposal form"). In the proposal form, the Plaintiff described the vehicle as having a seating capacity of ten. As will be seen, there is some dispute as to whether the true capacity of the vehicle was ten or fifteen.

[6] The proposal form contained a declaration under which the Plaintiff declared the statements contained therein to be true to the best of his knowledge and belief and that the proposal form should be the basis of the contract between the parties (the basis clause). Mr. Bridgeman signed the declaration on 11th October 2000.

[7] The Defendant approved the application for insurance and issued insurance policy number CG/MMT/000930 (the policy of insurance) which insured the vehicle against fire, amongst other perils. The Plaintiff paid a premium of $9,728.81 as consideration for the insurance coverage. The sum insured was $98,000.00. The policy of insurance was never admitted into evidence by either party.

[8] The Defendant refused to settle any part of the claim for loss of the bus on the ground that the fire was not fortuitous and informed the Plaintiff of its refusal by letter dated 15th May 2001. In consequence the Plaintiff commenced the present action.

The Pleadings

The Claim

[9] In his Writ of Summons and Statement of Claim filed 17th May 2002, the Plaintiff alleged that the Defendant, under the policy, agreed to indemnify him against loss of or damage to the vehicle, and its accessories and spare parts thereon, caused by fire to such an extent that it became a total loss.

[10] In paragraph 5 of the Statement of Claim it was pleaded that the vehicle was used by the Plaintiff to operate the business of a public transport service with a view to making a profit from such business and that, at all material times, the Defendant, through its agents, knew this to be the case.

[11] It was further pleaded that on 4th December 2000, during the currency of the policy, the Plaintiff's vehicle was damaged by fire to such an extent that it became a total loss.

[12] Paragraph 8 pleaded that the sum insured was $98,000 whilst in paragraph 9 the Plaintiff pleaded that on 5th December 2000 he delivered to the Defendant a claim in writing in respect of his loss but, in breach of the policy, the Defendant failed to settle any part of the Plaintiff's loss.

[13] The Plaintiff pleaded that, as a result of the foregoing, he suffered loss and damage. Under Particulars of Special Damage he claimed loss of profits in the sum of $50,000.00 for the period January 2000 to the date of filing of the Writ. In the general prayer for relief, he claimed:

(1) The sum of $98,000.00;
(2) Damages;
(3) Interest;
(4) Costs; and
(5) Any further or other relief which the Court may deem appropriate.

The Defence

[14] The Defendant filed a Re-Amended Defence on 18th December 2003 in which it admitted knowledge of the fire on 4th December 2000 and receipt of the Plaintiff's claim under the policy. The most salient parts of the Defence are reproduced as follows:

> 5. *In or about the month of October 2000 the Plaintiff was desirous to effect a policy of insurance with the Defendant and signed and delivered to them a CLICO International General Insurance Limited Proposal for Commercial Motor Vehicle Insurance Form in writing dated the 11th day of October, 2000, in which he declared that the to the best of his knowledge and belief the statements made by him or on his behalf given in the said Form were true and complete. He also agreed with the Defendant that the said Proposal Form and Declaration shall be the basis of the*

contract between him and the Defendant and agree [sic] *to accept a policy in the Company's usual form for this class of insurance. On the basis of the statements contained in the said Proposal Form and upon payment of a premium the Defendant issued him the said policy sued* [sic] *on No. CG/MMT/009930. Whereby the said 2000 King Isuzu Maxivan was insured comprehensively against fire and other perils for a period of one year from the 11th day of October, 2000.*

6. *It was a term and/or condition of the said policy that the said Proposal and Declaration were deemed to be incorporated in the said Commercial Insurance Vehicle Policy.*
7. *It was also a term and/or condition of the said policy of insurance that the observance and fulfilment of the terms of the policy in so far as they relate to anything to be done and not to be done by the insured or any person claiming to be indemnified and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under the policy.*
8. *In breach of the term and/or condition as stated on the preceding paragraph the Plaintiff stated on the said Proposal Form that the said 2000 King Isuzu Maxivan had a capacity of seating 10 passengers including the driver when the seating capacity was more than 10.*
9. *Further or in the alternative, the Plaintiff in signing the proposal form should form the basis of the contract of insurance between himself and the Defendant as stated in paragraph 5 hereof thereby warranting as to the truth or accuracy contained in the said proposal form.*
10. *In breach of the said warranty as aforementioned, the Plaintiff stated in the proposal form that the seating capacity including the driver, of the said 2000 King Maxivan was 10 when it was more than 10.*
11. *On or about the 11th day of October 2000 the Plaintiff purchased the said 2000 King Isuzu Maxivan from St. Hill's Funeral Home for the sum of $98,000.00. From the time of the purchase the said vehicle experienced inter alia, various electrical and/or mechanical problems which the Plaintiff sought to have resolved.*
12. *During the period of time that the Plaintiff's said vehicle experienced the said electrical and/or mechanical problems the*

Plaintiff continued use the said Maxivan in the operation of his business.

13. *It was a term and condition of the policy that the Plaintiff take all reasonable steps to safeguard the motor vehicle registration number ZM-257 from loss and damage and maintain the said motor vehicle in efficient condition.*
14. *In breach of the said term and condition the Plaintiff drove the said motor vehicle on the 4th day of December, 2000 when he knew or ought to have known that the engine was not working efficiently or at all and by doing so was breach* [sic] *of the said term and condition to the said policy as stated in the preceding paragraph.*
15. *Further or in the alternative the Plaintiff wrongfully attempted to defraud the Defendant by claiming against the said policy for loss and damage arising out the fire on the 4th day of December, 2000 when he knew or ought to have known that the said fire was not an accident but was in fact staged and/or set by himself and/or others unknown to the Defendant.*

[15] The pleaded particulars of the alleged fraud were that:

(1) the Plaintiff wilfully and/or recklessly set the motor vehicle on fire for the purpose of causing and/or allowing the destruction of the motor vehicle; and

(2) failing and/or refusing and/or neglecting to take all reasonable steps to safeguard the motor vehicle from loss of [or] damage and allowing and/or causing the said motor vehicle to be set on fire.

[16] At paragraph 16 the Defendant pleaded that:

16. *Further or in the alternative the Plaintiff fraudulently claimed for the loss for the said motor vehicle under the policy of insurance with the Defendant by knowingly and/or recklessly and/or negligently giving a statement to the Defendant on or about the 5th December, 2000 and/or knowingly and/or recklessly and/or negligently giving a subsequent statement to D. C. Craig & Associates Ltd, Loss Adjusters appointed by the Defendant on or about 7th December, 2000 the contents of which were untrue and/or inaccurate and/or misleading and/or intended and/or designed to deceive the Defendant as to the circumstances which occurred prior to and/or during and/or subsequent to the said fire and/or the manner in which the said fire started and/or burned.*

The Plaintiff's Reply to Amended Defence

[17] The Plaintiff filed a Reply to the Defendant's Re-Amended Defence on 3rd May 2004 in which he admitted that, in the proposal form, he pleaded that the capacity of the vehicle was ten but contended that this response was not incorrect as the vehicle was licensed to carry ten passengers at that time.

[18] The Plaintiff pleaded, in the alternative, that the error in the description did not amount to a breach of the warranty as to the truth and completeness of his answers in the proposal form in the absence of fraud or recklessness. The Plaintiff further pleaded, in the alternative, that if the error was a misrepresentation then it was not so material as to absolve the Defendant from liability.

[19] The Plaintiff also pleaded that, even if the misrepresentation was found to be material, the breach was waived by the Defendant's delay in making a decision as to whether to avoid the policy and that this delay resulted in prejudice to the Plaintiff.

The Evidence

[20] The Plaintiff gave evidence and called Mr. Gregory Yeadon as his sole witness.

[21] The following persons gave evidence on behalf of the Defendant:

(1) Mr. Russell Norville;
(2) Mr. Lionel Kinch;
(3) Mr. Martin Goddard;
(4) Mr. Mark Sargeant;
(5) Ms. Juanita Greaves;
(6) Mr. Ricardo Smith; and
(7) Mr. Elvis Simpson.

[22] The evidence of the Plaintiff, his witness and the several witnesses for the Defendant will be analysed in this decision as the various issues are discussed.

The Issues

[23] The major issue for determination by this Court is whether the Plaintiff is to be indemnified under the policy of insurance and, if so, what is the measure of damages? The resolution of this issue involves the determination of the following subsidiary issues:

i. Sub-issue 1 – Was there a material misrepresentation which formed part of the contract by virtue of the basis clause enabling the Defendant to avoid the contract of insurance;
ii. Sub-issue 2 – Was there an estoppel disentitling the Defendant from avoiding the contract of insurance;

iii. Sub-issue 3 – Was the Plaintiff guilty of fraud, in that (a) he himself burned the bus or procured a third party to burn the bus, or (b) he made fraudulent statements to the Defendant and/or its agents which entitled the Defendant to avoid the contract; and

iv. Sub-issue 4 – Did the Plaintiff fail to take all reasonable steps to safeguard the vehicle which would allow the Defendant to avoid the contract.

The Legal Submissions

The Plaintiff's Submissions

[24] Counsel for the Plaintiff, Mr. Bryan Weekes, submitted that, in making a claim for loss under the policy of insurance, the Plaintiff must prove that the loss suffered was caused by an insured peril. Once this threshold is met, the burden of proving an excuse for non-payment of the claim rested on the insurers (**Slattery v Mance [1962] 1 Q.B. 676**).

[25] He further submitted that a claim under an insurance contract is a claim for damages for breach of contract and that an insurer's wrongful refusal to pay rendered the insurer liable in damages which are assessed on the normal principles of remoteness (**Edmonds v Lloyd Italico [1986] 2 All ER 249**).

[26] He argued that, where a policy is valued, the valuation placed on the subject matter conclusively established the sum required for the purpose of a full indemnity. Where there is a total loss, counsel further submitted, the assured was entitled, on proving the fact of his loss, to recover the full amount insured on the subject matter of the insurance. In this regard, Mr. Weekes submitted that the Plaintiff did not have to substantiate his claim for loss with extremely detailed supporting documentation if he did not have it. Provided that the figures put forward were reasonable they could be considered by the Court in its assessment of the Plaintiff's true loss.

Allegation of Fraud

[27] Mr. Weekes submitted that an insurer who alleged fraud on the part of an assured must meet a high standard of proof. The greater the fraud alleged, the higher the degree of probability by which it must be established (**Watkins & Davies Ltd v Legal and General Assurance Company Ltd [1981] Lloyd's Rep 674; S & M Carpets (London) Ltd v Cornhill Insurance Company Ltd [1981] 1 Lloyd's Rep 667**). That standard does not fall far short of the rigorous criminal standard (**'The Zinova' [1984] 2 Lloyd's Rep 264**).

Material Non-Disclosure

[28] Counsel submitted that the questions as to whether or not there was a misrepresentation by the insured and whether that misrepresentation was material were questions of construction of the contract of insurance to which the ordinary principles of contractual interpretation applied.

[29] Mr. Weekes submitted that the Court would normally look to the natural or ordinary meaning of the words used by the parties to an agreement. He further submitted that, where a word or phrase used in a contract is ambiguous, the *contra proferentem* rule would apply so that the word(s) would be construed against the party that inserted them into the contract.

[30] Counsel also submitted that the Court was entitled to look at the evidence of the surrounding circumstances (circumstantial evidence) in concluding what the contracting parties "would have meant when using a particular word or term in the contract" (**L Schuler AG v Wickman Machine Tool Sales Ltd [1974] A.C. 235 at 268 (Schuler Ag**).

[31] In this regard, he said, the contractual term to be interpreted was "seating capacity". Counsel argued that the Plaintiff's response of "10" rather than "15" showed that the Plaintiff interpreted the question to mean "licensed seating capacity" as opposed to physical seating capacity and that the term should be construed in accordance with the interpretation ascribed by the Plaintiff (**Hales v Reliance Fire and Accident Insurance Corporation Ltd [1960] Lloyd's Rep 391**).

[32] He also submitted that "seating capacity" meant how many persons could be lawfully carried in the vehicle. In this case, that number was ten. Further, he argued, it was irrelevant what the physical capacity of the vehicle was since insurance coverage could only be granted to cover ten passengers.

Basis Clause

[33] Mr. Weekes submitted that in non-marine insurance contracts, warranties are created when the proposed assured agrees that the proposal form is to form the basis of the contract between the insurer and himself. He further submitted that there are three different classifications of warranty in insurance contracts. He relied on **Insurance Law Doctrines and Principles** by **John Lowry** and **Philip Rawlings** where the authors opine that:

> "Insurance warranties can be classified into three types depending upon whether the insured's promise or undertaking relates to: (i) some past or existing state of affairs; (ii) some future state of affairs; (iii) a warranty of opinion by the insured as to the truth of a fact."

[34] He further relied on the proposition in **Huddleston v R.A.C.C. Insurance Pty Ltd [1975] V.R. 683** quoted in **Modern Insurance Law by John Birds** that:

> "Warranties of opinion are less severe than warranties of facts because if the insured merely warrants that facts are true to the best of his knowledge and belief, there will be a breach of warranty only if he dishonestly or recklessly supplies an incorrect answer. The insured must exercise due care when making his warranty, but that is sufficient."

[35] Counsel also relied on **The Law of Insurance Contracts, page 20-6B1, Vol. 2, 2nd Ed. 2004 by Malcolm Clarke** where the author opined that the current trend "is to construe contracts as warranties of opinion rather than as warranties of fact. Thus if the insured states that he "believes" something to be true, or is "not aware" of some matter, the truth of these warranties is judged by the insured's state of mind."

[36] He further relied on the Privy Council case **Baron Uno Carl Samuel Akerhiem v Roif de Marexx [1959] A.C. 789, 805** where Lord Jenkins stated that:

> "The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made."

[37] Counsel therefore submitted that, when an insured has made an error in reply to the questions posed in a proposal for insurance and the error in and of itself does not render the contract void, the insurer may only escape liability under the policy if the error is considered to be (a) the non-disclosure of a material fact or (b) amounts to a material misrepresentation of fact.

[38] Counsel contended that what is material is any circumstance that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

[39] He referred to the headnote of **Somati Ali v Hand-in-Hand Mutual Fire & Life Insurance Co. Ltd. (2001) 65 W.I.R. 186** which states:

> "If, after accepting the risk, the insurer seeks to repudiate liability under the policy on the ground of material non-disclosure (in this case, the insured's bankruptcy in another jurisdiction and his subsequent discharge) the insurer must satisfy the court on the balance

of probabilities that the undisclosed circumstances would have had an effect on the mind of a prudent insurer in weighing up the risk. Proof of materiality rests upon expert evidence to establish what (in the opinion of the expert witness) is the general practice of underwriters, what a reasonable underwriter would do..."

Waiver and/or Estoppel

[40] Mr. Weekes argued that, in order to be found an estoppel, a representation must be clear and unequivocal, be made by words or conduct and must be relied upon by the Plaintiff. Therefore, in order to uphold a plea of estoppel an insurer must have given a clear representation, whether communicated to the insured or by virtue of its conduct that it will not rely on the breach of warranty against the insured. He referred to **para 20-7D** of **The Law of Insurance Contracts by Malcolm Clarke (2004 Edn)** where the learned author said:

> "71.1.1 Instead of treating the Insurance as having been terminated for breach of warranty, the insurer gave the insured 30 days notice of cancellation under a cancellation clause; and
>
> 71.2.2 The insurer resisted the claim by the insurer not as he might have done, on the breach of warranty, but on a different ground altogether.
>
> 71.3.3 As regards point 1 in **Mint Security v Blair [1982] 1 Lloyd's Rep.188** Staughton J held that:
>
> *"...if the only right available to the first defendant was to avoid the policy, he did not exercise it but on the contract affirmed the policy. To give 30 days notice of cancellation, under a clause providing for cancellation in the policy, is, in my judgment, totally inconsistent with the avoidance of the policy for breach of warranty.*" "

[41] Therefore, he said, the Defendant's conduct in resisting the claim not on the basis of breach of warranty, but on fraud, amounts to an unequivocal and clear representation that it was not relying on any breach of warranty on the part of the Plaintiff. He referred to **Vitol SA v Esso Australia (Re "The Wise") [1989] 2 Lloyd's Rep 451** at **460**:

> "As to the representation, I agree that absence of protest about a breach or impending breach of contract, taken completely in isolation, will not normally convey a representation that the breach will never be relied upon: see, for example, per Robert Goff J. in The Post Chaser (1981) 2 Lloyd's Rep. 695, at p. 700 . But there was more than silence here. By 10th March Esso were in possession of copy documents which made the shortfall obvious. Two weeks later, they advanced three propositions, none of them founded on the shortfall. More than two weeks later still, they were ready to sign an agreement which defined the dispute in terms of those three points, and prescribed the consequences which would follow if they prevailed. To my mind this was a clear intimation that these, and no others, were the arguments on which they were going to rely."

Defendant's Submissions

[42] The Defendant failed to file written submissions, despite the order of this Court on 15th July 2010 to file closing submissions on or before 1st November 2010 and in spite of written reminders to remedy its default. The Court, therefore, in making its decision took into account the Defendant's position as outlined in its Defence and Re-Amended Defence as set out at paragraphs [14] to [16] above.

Applicable Legal Principles

[43] There is no doubt that the Plaintiff's vehicle was destroyed by fire. The Plaintiff's evidence to this effect has not been denied by the Defendant. Both parties agreed that the Plaintiff's vehicle was insured by the Defendant against loss by fire, *inter alia*, under the contract of insurance. The difference between the parties is in terms of whether the occurrence of the fire was fortuitous or whether it was caused by the Plaintiff himself or some third party with the privity of the Plaintiff.

[44] The Court will now consider those issues which are material to resolving the primary issue.

The proposal form and basis clause

[45] It is trite law that contracts of insurance are contracts *uberrimae fidei* or of the utmost good faith. Good faith must be observed by both parties. In this regard, an applicant for insurance is under a duty to disclose all material facts within his knowledge and must not misrepresent facts.

[46] 'Materiality' was defined by the House of Lords in **Pan Atlantic Insurance Co. Ltd v Pine Top Co Ltd [1994] 3 All ER 581 ("Pan Atlantic")**. In **Joseph v Clico International General Insurance Company Limited Civ.**

Appeal No. 2 of 2003 ("Joseph"), **Simmons CJ** approved the definition in **Pan Atlantic**. He said at paragraph [13]:

> "The test of materiality was settled by the House of Lords in Pan Atlantic Insurance Co Ltd v. Pine Top Insurance Co Ltd [1994] 3 All ER 581 on a 3:2 majority. Lords Mustill, Goff and Slynn, approving in part Container Transport International Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 1 Lloyd's Rep. 476, held that, for the purposes of marine and non-marine insurance, a circumstance is material if it would have had an effect on the mind of a prudent insurer in weighing up the risk. This test accorded with the duty of an insured to disclose all matters which would be taken into account by an insurer when assessing the risk. The House also held that, for an insurer to be entitled to avoid a policy for misrepresentation or non-disclosure, the alleged misrepresentation or non-disclosure must be material and must have induced the making of the policy - see, for example, Lord Mustill at p. 617. Recently, the English Court of Appeal held that inducement must be proved by the insurer - Drake Insurance v. Provident Insurance [2004] Lloyd's Reports IR 277."

[47] The insurer is able to avoid a policy if there is misrepresentation or non-disclosure of a material fact and that non-disclosure or misrepresentation induced the making of the policy.

[48] The Court in **Joseph** examined the legal status and effect of an application for insurance and the kind of conduct or statements which would entitle an insurer to resist and avoid a claim for payment under an insurance policy covering risk of fire.

[49] **Simmons CJ** noted that it is common practice in the insurance industry in Barbados, and on a global scale, to require an applicant to fill out an insurance proposal form. He stated that the purpose of this document is to help "the insurer to make an informed decision as to whether he will indeed insure the proposer's risk" (**Joseph** at para [14]). These insurance proposal forms often contain a 'basis clause'.

[50] A 'basis clause' operates to warrant the truth of the answers contained in the insurance proposal form and "makes the truth of the statements a condition precedent to the liability of the insurer" and a "proposer by signing it signifies his agreement to it" (**Joseph** at para [15]).

[51] The position with respect to materiality changes where the contract contains a basis clause. By virtue of a basis clause, the proposer warrants the truth of

the answers contained in the application form and makes those answers the basis of the insurance contract. The answers become conditions precedent to the liability of the insurers (**Dawsons Ltd v Bonnin [1922] 2 AC 413 (Dawsons)**; **Newsholme Brothers v Road Transport and General Insurance Co [1929] 2 K.B. 356**).

[52] Where there is a basis clause in a contract "the materiality of the facts in themselves is irrelevant; by contract their existence is made a condition of the contract" (**Condogianis v Guardian Assurance Co [1921] 2 AC 125**), (**Condogianis**). The answers become warranties of the insurance contract so that misrepresentation or non-disclosure, where there is a basis clause, is a breach of warranty, making materiality of the misrepresentation or non-disclosure irrelevant (**Condogianis**). At paragraph 10-033 of **MacGillivaray on Insurance Law 11th Edition** (**MacGillivaray**) the learned authors commented on the status and effect of a basis clause thus:

> "In more recent cases it has been held that the all-important element in such a declaration is the phrase which makes the declaration the "basis of the contract". These words alone show that the proposer is warranting the truth of his statements, so that in the event of a breach of this warranty, the insurer can repudiate liability on the policy irrespective of issues of materiality."

[53] Further, it is irrelevant whether the misrepresentation or non-disclosure arose inadvertently and without any kind of fraud (**Condogianis** at page 129). It is also irrelevant that the misrepresentation does not affect the risk (**Dawsons**). Neither is it relevant that the loss is unconnected to the breach (see paragraph 10-040 of **MacGillivaray**).

[54] A warranty, in insurance law, is "a term of the contract of insurance in the nature of a condition precedent to the liability of the insurers (see paragraph 10-002 of **MacGillivaray**).

[55] In **Joseph** the Plaintiff received insurance for his home and contents from Clico International General Insurance. On the insurance proposal form the Plaintiff stated that the property was not covered by any other insurance policy, nor was it mortgaged. In fact, the house was insured by British-American Insurance Co. (Barbados) ("British American") and the property was mortgaged to the Mutual Bank of the Caribbean Inc. (Mutual Bank). The form contained a basis clause in similar terms to the instant case. It read:

> "I hereby solemnly declare that the statements made by me in this proposal form are true to the best of my knowledge and belief,

> and I hereby agree that this declaration shall form the basis of the contract between me and the …"

[56] The Court of Appeal held that, since the contract of insurance remained one of the utmost good faith, the insured was obliged to exercise good faith when making the claim on the policy. The Court opined that an insurance company must be able to trust an insured person to present a claim in good faith and that any fraud in making the claim struck at the root of the insurance contract and entitled the insurer to be discharged from it.

[57] Mr. Joseph's answers to the two questions on the proposal form were false as not only had he failed to disclose the insurance contract with British American but, at the time of the submission of his claim to Clico International General Insurance Limited, he had also claimed indemnification from British American. The Court concluded that these were false representations on material matters and were breaches of an express condition of the insurance policy. Furthermore, they constituted a breach of Joseph's continuing duty of good faith.

[58] Addressing the construction of such a basis clause, **Viscount Finlay** said in **Dawsons** at page 429 that "it is not necessary that the word 'warranty' should be used, as any form of words expressing the existence of a particular state of facts as a condition of the contract is enough to constitute a warranty". **Viscount Finlay** went on to say that "if there is such a warranty the materiality of the facts in themselves is irrelevant".

Construction of the Contract

[59] I will now consider the Plaintiff's submissions in relation to the answers given to the questions on the proposal form and their relationship to the issue of the construction of the contractual terms.

[60] In construing a contract, words are to be given their ordinary and natural meaning. The ordinary meaning of words is the meaning when read, not in isolation, but in context (**Lake v Simmons [1927] AC 487**).

[61] Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 W.L.R. 896, HL at 912 (Investors Compensation Scheme)** stated five legal principles applicable to the interpretation of contracts, namely:

(1) Interpretation is the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract;

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in **The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 1985 1 A.C. 191**, **201**: ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

[62] The case of **Investors Compensation Scheme Ltd** clearly established that it is open to this Court to look at all the circumstances (the background) to

determine the meaning of an ambiguous term within a contract. Furthermore, the Court may examine extrinsic evidence where there is a latent ambiguity, that is, an ambiguity which does not appear on the face of the document but which is disclosed only by evidence of the circumstances prevailing when the contract was made (**Schuler AG** at **page 268**).

[63] Any ambiguities in the contract must be construed against the insurers as it is they who created the document. If an insured has interpreted a statement in a way which is not deemed unreasonable, the insurer cannot contend for a reading that is more favourable to its position (see **MacGillivaray** paragraph 10-055).

Fraudulent Claim and Burden of Proof

[64] Insurance contracts protect against fortuitous loss and not wilful misconduct by the insured (**The Alexion Hope [1988] 1 Lloyd's Rep. 311**). Therefore, in a situation where an insured, either by himself or through a third party, brings about an event insured against, he will not be entitled to recover under the insurance policy.

[65] The Defendant, at paragraphs 15 and 16 of its Re-Amended Defence, claimed that the Plaintiff wrongfully attempted to defraud the Defendant by claiming against the policy of insurance for loss and damage arising out of the fire of 4th December 2000 when he knew, or ought to have known, that the fire was not an accident but was in fact staged and/or set by himself or by others unknown to the Defendant.

[66] There are two aspects to this pleading, namely:

(1) An allegation that the Plaintiff (a) wilfully and/or recklessly set the motor vehicle on fire for the purpose of causing and/or allowing the destruction of the motor car, and (b) failing and/or refusing and/or neglecting to take all reasonable steps to safeguard the said motor vehicle from loss or damage and allowing and/or causing the said vehicle to be set on fire; and

(2) An alternative pleading that the Plaintiff fraudulently claimed for the loss of the vehicle under the policy of insurance by knowingly and/or recklessly and/or negligently giving a statement to the Defendant on or about the 5th December 2000 and/or knowingly and/or recklessly and/or negligently giving a subsequent statement to D.C. Craig & Associates, the Defendant's loss adjustors, on or about the 7th December 2000 the contents of which were untrue and/or inaccurate and/or misleading and/or intended and/or designed to deceive the Defendant as to the circumstances which occurred prior to and/or during and/or subsequent to the said fire and/or the manner in which the said fire started and/or burned.

[67] Thereafter follow the particulars of the statements prayed in aid to support the defence of fraud.

[68] This Court observes that at paragraph 15 of the Re-Amended Defence the Defendant alleges that the cause of the fire was not fortuitous but was caused by the Plaintiff's own wilful conduct. Under the particulars at paragraph (b) there is some ambiguity since a proper interpretation of that pleading shows that the Defendant is alleging (1) negligence in failing to safeguard the vehicle from loss or damage and (2) misconduct in causing the vehicle to be set on fire. I will deal with these two issues later in this decision, but the point must be made that there is a qualitative difference between negligence in law and fraud. In **Joseph**, **Simmons CJ** referred to **Derry v Peek (1889) L.R. 14 App. Cas. 357** where the court defined 'fraudulent' as false statements made recklessly, not caring whether the statements were true or false.

[69] An analysis of this pleading, which was not exactly clear, leads me to the conclusion that Counsel for the Defendant is alleging misconduct in two material particulars, namely:

(1) That the Plaintiff or persons unknown to the Defendant set fire to the bus; and

(2) That the Plaintiff made fraudulent statements to the Defendant and/or its agents, D.C. Craig & Associates, with respect to the circumstances prior to, during and/or subsequent to the fire as to how the fire occurred.

Burden of Proof

[70] The Plaintiff has the burden of establishing that an insured peril which entitles him to indemnification under the insurance policy has occurred (see **MacGillivray** at paragraph 19-006). Where an insurer pleads that the loss was not fortuitous, the burden of proof shifts to the insurer to establish that the peril occurred by the wilful act of the insured (see **MacGillivray** at paragraph 19-008; see also **Solomon Ghany Oil & Engineering Ltd v N.E.M. (West Indies) Insurance Ltd HCA No. S 3114 of 1986) (Trinidad and Tobago, date of decision 19 May 2000)** (**Solomon Ghany Oil**).

[71] The Plaintiff has established that an insured peril occurred within the terms of the policy. This is not disputed.

[72] The Defendant has pleaded that the Plaintiff's loss was not fortuitous and has, therefore, assumed the burden of proof of that allegation.

Standard of Proof

[73] In a civil trial the standard of proof is on a balance of probabilities. The case law suggests that the standard of proof in cases of alleged fraud remains the ordinary civil standard, albeit to a higher degree. In **Bater v Bater [1951] Probate 35 Denning LJ** stated:

> "So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it 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".

[74] This position has been echoed in the cases of **John Chung v Colonial Fire and General Insurance Co. Limited Civil Appeal No. 151 of 1991 (Trinidad and Tobago, date of decision 13 December 2000)**, **Solomon Ghany Oil** and **Hornal v Neuberger Products Ltd [1957] 1 QB 247, CA**.

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

All reasonable steps to safeguard vehicle

[76] As previously mentioned, the Defendant pleaded that the Plaintiff failed to take all reasonable steps to safeguard the vehicle. In relation to the particulars outlined in paragraph 16 of the Re-Amended Defence, I have already noted that the law distinguishes between negligence and fraud. The negligent occurrence of an insured peril is one of the contingencies normally covered under a contract of insurance.

[77] Fire insurance covers fires caused negligently "otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, negligence or inattention" (**Waters v Merchants' Louisville Insurance Company 11 Peters 213**). This principle was accepted by the English courts in the case of **Harris v Poland [1941] 1 KB 462**. The learned authors of **MacGillivray** at paragraph 26-023 note "if the proximate cause of the loss is fire, it is immaterial in the absence of relevant warranties

that the fire has been caused by the negligence of the assured or his agents…even gross negligence will not debar the assured from recovering under the policy unless his conduct was so reckless and careless of consequences that it amounts in law to a wilful act".

Discussion

[78] The Plaintiff gave evidence that he bought the vehicle from Mr. St. Hill of St. Hill's Funeral Home. The vehicle developed electrical problems and, as a result, was returned to Mr. St. Hill to be fixed. The Plaintiff also took the car to his mechanic, Mr. Ricardo Smith.

[79] At around 8 o'clock on the evening of 4th December 2008 the Plaintiff was driving the said vehicle along Graeme Hall Road, travelling in the direction of the Top Rock roundabout, when he smelt and saw smoke coming from the vehicle. The vehicle "cut out" (stalled) and coasted downhill about 250 metres from the Top Rock roundabout.

[80] He lifted the engine cover and saw what appeared to be a wire glowing red. He tried calling Mr. Smith, his mechanic, but did not get through. However, Mr. Smith drove past shortly afterwards and stopped to render assistance. Mr. Smith tried to get the leads off the battery but was unable to do so. The vehicle became engulfed in flames shortly thereafter. The Barbados Fire Service arrived at the scene and extinguished the fire.

[81] Mr. Smith gave the Plaintiff a lift from the scene of the fire. The next day, the Plaintiff reported the fire to the Defendant and was interviewed by a Mr. Goddard who took a statement from him which he signed.

[82] The Plaintiff further gave evidence that the Defendant refused to indemnify him under the policy of insurance and, as a result, he lost income, among other things. Sometime later he was able to purchase another bus which was inferior to the bus which is the subject matter of this application.

[83] It is common ground between the parties that the Defendant issued a policy of insurance covering the Plaintiff's bus for the period during which the fire occurred. It is also common ground between the parties that fire was a peril covered by the policy of insurance. Thus, in the absence of the vitiating factors pleaded by the Defendant, the Plaintiff would be entitled to succeed.

[84] As stated above, the burden of proof is on the Plaintiff to establish that an insured peril has occurred and that he is entitled to be indemnified under the terms of the insurance policy (see **MacGillivray** at paragraph 19-006). The standard of proof is the usual civil standard of a balance of probabilities.

[85] This case, therefore, turns on the question whether the insurance contract can be avoided on the grounds contained in the Re-Amended Defence.

[86] The issues for discussion have been previously set out under separate headings in this decision. However, there are all interdependent upon each

other. For example, the issues relating to fraud and misrepresentation affect the decision in relation to the basis clause in the contract. Likewise, the question of the construction of the contract affects the issue of material non-disclosure. Where possible, the Court will consider these issues together.

Issue 1- The proposal form, basis clause and material non-disclosure

[87] The Defendant pleaded that the basis clause was incorporated into the contract and that the Plaintiff had given an incorrect answer in relation to the seating capacity of the vehicle. It is instructive to set out the evidence of the Plaintiff on this issue.

[88] The proposal form was entered into evidence as **Exhibit AB6**. All parties, however, seem to have agreed that the proposal form and the answers to the questions contained therein formed the basis upon which the insurance policy was issued. The burden of proof of material non-disclosure is on the Defendant and the standard of proof is the usual civil standard of a balance of probabilities.

[89] The insurance proposal form contained the following statement at clause 5:

> "If a PASSENGER VEHICLE please state:-
> Seating capacity (including driver)".

[90] The Plaintiff inserted "10" in response.

[91] Clause 13 of the proposal form stated:

> "Please tick if the vehicles is [sic] to be used as follows".

[92] The Plaintiff ticked the following response:

> (d) Carriage of passengers for hire or reward (Enter number of passengers below)

and inserted the following: "10 seater maxi taxi".

[93] The Plaintiff contended that his answer was correct and the actual seating capacity of 15 was irrelevant in the circumstances as the upmost number of passengers he could legally carry was ten.

[94] The proposal form also contained the following clauses to which the Plaintiff affixed his signature:

> "(1) I declare that to the best of my knowledge and belief the above statements made by me or on my behalf are true and complete.
>
> (2) I agree that this proposal and declaration, shall be the basis of the contract between me and the company and I agree to accept a policy in the Company's usual form for this class of insurance."

[95] There is no doubt therefore that this latter clause formed the basis upon which the insurance contract was made. In order to determine whether or not the answer to the question posed at clause 5 of the proposal form was a misrepresentation one has to determine the meaning to be ascribed to that clause.

[96] The issue as to whether or not the Plaintiff misrepresented the seating capacity of the vehicle is inextricably bound up in the evidence of the Plaintiff, the witness for the insurers including the evidence of the Chief Licensing Officer. It is within the context of the knowledge possessed by each of these parties that this issue is to be resolved. This must be determined bearing in mind the "matrix of fact" of this contractual arrangement. (**Investors Compensation Scheme Ltd**).

[97] The Plaintiff argued that the question about seating capacity is an ambiguous one. The contract ought to be construed strictly against the insurer who sought to rely on it applying the *contra proferentem* rule.

[98] In addition to the Plaintiff's argument that the answer of "10" was not incorrect, the Plaintiff also relied on the following arguments:

(1) That the misrepresentation was not material;
(2) That the misrepresentation was made innocently; and
(3) That the Defendant is estopped from relying on this defence.

[99] The Defendant's position is that the question is posed relative to the carrying capacity or seating capacity of the vehicle in accordance with the manufacturer's specifications. Since the vehicle was manufactured to carry 15 passengers, its seating capacity was 15 and not 10. The answer of 10 given in response was, therefore, erroneous and amounted to a misrepresentation.

The Evidence of Mr. Kinch

[100] Mr. Kinch gave evidence that he was the acting Chief Licensing Officer and, in that capacity, he had control of the records of the Barbados Licensing Authority. He said that the vehicle was registered to the Plaintiff. He also gave evidence that maxi taxis were limited, by the term of their licences, to carry ten passengers and that, if a vehicle had a capacity for more than ten passengers, the owner would be required to remove the excess seats.

[101] This evidence is extremely important as it raises a reasonable inference that any removal of excess seats would have to take place prior to licensing.

[102] In the Reply to the Re-Amended Defence the Plaintiff admitted that the seating capacity was 15. However, he maintained that the initial answer of 10 was not incorrect given that he was licensed to carry ten persons only.

[103] The Defendant, as an experienced insurer, must have known or must be taken to have known what the legal seating capacity of a maxi taxi was at the time of the proposal for insurance. This Court is of the opinion that, in the factual matrix outlined above, the term "seating capacity" as used in question 5 meant and could reasonably be understood to mean "legal or authorised or licensed seating capacity" as distinct from "manufacturer's seating capacity".

[104] I am fortified in this view by the fact that vehicles are not simply manufactured for use in Barbados only and that purchasers are sometimes required to make adaptations to comply with local law. This may be gleaned from Mr. Kinch's evidence.

[105] As noted above at paragraphs [91] and [92], the Plaintiff also responded "ten" to the question posed at paragraph 13(d). That paragraph, if properly construed, does not refer to seating capacity but "carrying capacity" – that is, of the number of passengers which the vehicle could lawfully carry. The certificate of insurance number 40174 **(Exhibit AB 7)** was issued by the Defendant to the Plaintiff in respect of the vehicle on 25th October 2000.

[106] At paragraph 6 of the said certificate, under the heading "limitations as to use", the words "Use for the carriage of 10 passengers in connection with Policy holders Business" are found. This paragraph gives credence to my view that the purpose of paragraph 13 of the proposal form was to ascertain from the proposed insured the passenger carrying capacity of the vehicle as distinct from the seating capacity or the manufacturer's carrying capacity.

[107] The Plaintiff gave evidence as to his interpretation of these statements.

[108] His interpretation was not in my opinion, an unreasonable one.

Evidence of Mr. Davis Browne

[109] Mr. Browne gave evidence on behalf of the Defendant. He did not speak to the issue as to whether those clauses were ambiguous or unambiguous from the insurer's point of view. Mr. Brown gave evidence about the seating capacity of a public service vehicle as a determining factor in calculating the rate of premium to be paid for the coverage. He also said that the seating capacity of a public service vehicle, such as a maxi taxi, is used as one of the measures to determine the type of cover and the premium.

[110] He said the seating capacity for passengers above 10 persons for a public service vehicle would require another class of permit and different underwriting terms. Every passenger above the number of 10 would require an additional premium per passenger. This additional premium is usually a flat rate figure.

[111] He opined that the seating capacity would, therefore, be material for the Defendant to assess the risk.

[112] The witness also said that he was aware that the Plaintiff's licence permitted him to carry 10 passengers. He said also that when there are more seats than the vehicle is insured to carry and this is known to the insurance company, instructions are normally given to remove the additional seats for the

purpose of the insurance company seeking to provide cover according to the seating capacity proposed.

[113] The Plaintiff gave evidence that the back (rear) seats had been removed to make room for luggage.

[114] When asked whether it made any difference to materiality what number the vehicle is actually licensed to carry? Mr. Browne replied that there are two aspects to the underwriting process:

(1) Usually the insurance is obtained before the permit is issued for a new vehicle.

(2) That the number of seats stated in the license documents may not necessarily be used by the insurance company particularly if (a) the manufacturer specifies otherwise and (b) if any of the seats were removed.

[115] I find some difficulty with reconciling this evidence with the assertion that the Plaintiff had been untruthful in his answer to the question and that the question related to seating as distinct from lawful carrying capacity. As an experienced underwriter, Mr. Browne would be well aware that the Defendant could not issue a policy of insurance which breached the permit issued by the Licensing Authority.

[116] Hence the importance of his evidence at (1) and (2) above. It follows, therefore, that a reasonable interpretation of the clause in the proposal form would be that it related to licensed carrying or seating capacity so that the insurer would be aware of the class of insurance which was applicable. If the insurance is obtained before the permit is issued and there are more seats than the vehicle is insured to carry, instructions are given for the removal of the additional seats. The manufacturer's specifications in relation to seating determines the class of insurance if the permit relates to the same number of seats as the manufacturer specifies. It is trite that a vehicle can only be lawfully insured for what it is lawfully licenced to carry.

[117] In my opinion the questions on the proposal form were ambiguous given the surrounding circumstances. As previously stated above, applying the *contra proferentem* rule, any ambiguity in the contract must be construed against the insurer.

Analysis

[118] As stated above where a proposal form contains a basis clause and there is a misrepresentation contained in one of the answers contained therein, the insured is able to avoid the contract even if that misrepresentation is not

material (see paragraph [47]). The answers provided by the proposer become warranties of the insurance contract. As such, it is irrelevant whether the misrepresentation was made innocently. In the circumstances, the pleaded defence and the counterclaim are relevant to the issue.

[119] I, therefore, accept that the answer given by the Plaintiff was not a material misrepresentation. It is important to note that the defendant's argument in relation to seating capacity is confined to the issue of material non-disclosure. It has never been alleged that the Plaintiff carried excess passengers in breach of the contract of insurance.

[120] I reject the Defendant's submissions on this point, accordingly, the defence, therefore, fails on this issue.

Issue 2 – Waiver and/or Estoppel

[121] Mr. Weekes submitted that the Defendant had the benefit of a forensic report dated January 02 2001 which included photographs which showed the seating capacity of the bus. The defendant had all the information it needed to have the policy avoided on the basis of misrepresentation. Instead it allowed the Plaintiff to pursue the matter as if the policy was subsisting but that the Plaintiff was guilty of arson. The Defendant acted at all times in a manner which confirmed the existence and continuance of the policy until it was terminated on 27 February 2001.

[122] He further submitted that nowhere in the further amended defence was it pleaded that the defendant had lawfully rescinded the contract of insurance and, while the breach is pleaded, the Defendant was silent on whether it elected to rescind the contract or sue for damages. There is no counterclaim for declarations as to the lawful rescission of the contract or for damages.

Discussion

[123] Mr. Browne gave evidence in relation to the cancellation of the policy by notice dated 27 February 2001 effective 4 December 2000. I do not consider the period between 02 January 2001 and 27 February 2001 to be excessive in the context of an insurance company receiving and reviewing a forensic report and possibly obtaining legal advice in relation to its legal position. I do not find anything in the conduct of the Defendant to suggest that it was waiving its rights to rescission or that it would forbear to insist on its full legal rights under the contract or by law. The notice of cancellation must have brought this to the attention of the Plaintiff. The Plaintiff has failed to prove detrimental reliance upon any promise by the Defendant not to insist on its full legal rights.

[124] In relation to the Defendant's failure to plead or counterclaim for rescission of the contract, this is not fatal since the main issues are whether there was fraud, misrepresentation or material non-disclosure all of which, if proven,

would vitiate the policy. The failure to counterclaim does not prevent the court from considering the issue. See **Grace Sealy v First Caribbean International Bank (Barbados) Civil Appeal No. 10 of 2008, Unreported date of decision 18th September, 2009**. The Plaintiff's submission on this matter is, accordingly, rejected.

Issue 3 (1): Fraud

[125] The Defendant is alleging arson by the Plaintiff, in that the Plaintiff (a) wilfully and/or recklessly set the motor vehicle on fire for the purpose of causing and/or allowing the destruction of the motor car, and (b) failing and/or refusing and/or neglecting to take all reasonable steps to safeguard the said motor vehicle from loss or damage and allowing and/or causing the said vehicle to be set on fire. As stated before, this is a serious allegation which must be proved to a high standard (**Watkins & Davies Ltd v Legal and General Assurance Company Ltd [1981] Lloyd's Rep 674**; **S & M Carpets (London) Ltd v Cornhill Insurance Company Ltd** [**1981] 1 Lloyd's Rep 667**; **The Zinova [1984] 2 Lloyd's Rep 264**).

[126] The two critical witnesses in respect of this issue are Mr. Norville and Mr. Sargeant.

The Evidence of Mr. Russell Norville

[127] Mr. Norville is an automotive surveyor and consultant who holds a diploma in motor vehicle engineering. Having regard to his qualifications and experience, he was accepted by the Court as an expert witness in fuel systems and properties, electrical systems and fault diagnosis.

[128] He was retained by the Defendant to inspect the vehicle after the fire. On 24th February 2006 Mr. Norville gave oral evidence and submitted a report dated 20th December 2000 which was accepted into evidence.

[129] The witness said that, when he examined the vehicle, there were no signs of intense burning in the engine bay area. He also noted that there was no evidence or sign of fusing, bonding or arcing on the wires which is what one would expect to find if the fire had been a result of the wiring system in the vehicle. There were no signs that the battery poles had been exposed to high heat. Battery poles, he further said, usually melted under high heat. He noted that the most extreme heat was away from the engine.

[130] In his report, he noted that the fire damage to the vehicle was very extensive and had almost damaged the vehicle in its entirety. Mr. Norville found no faults in the engine of the motor vehicle and recommended to the Defendant that a forensic analysis be commissioned.

[131] Under cross-examination Mr. Norville admitted that, in circumstances where diesel in a vehicle is under pressure, it would not take a large fault in the line to cause diesel to be forced out. He further admitted that it was possible that

there was a "tiny imperfection" in the fuel line. He added that, if that were the case, the vehicle would have been acting erratically. He further admitted that he did not obtain a maintenance record of the vehicle from the Plaintiff.

[132] He admitted that, if there was a break in the lines containing brake fluid, the fluid could be emitted and could come into contact with the exhaust manifold and, in such a case, it was possible that the fluid could ignite.

[133] This evidence, in my opinion, falls far short of the standard required to establish fraud in relation to an allegation of arson pursuant to a contract of insurance. Mr. Norville, on his own admission, was unable to rule out the fortuitous occurrence or a break in the brake fluid line which could cause ignition.

The Evidence of Mr. Mark Sargeant

[134] Witness Mark Sargeant possesses a Bachelor of Science degree in the area of Forensic Science which he obtained in 1995 from John Jay College of Criminal Justice in New York. He obtained a Masters of Forensic Science from that same institution in 1997. From 1998 to the time of trial he worked as a forensic consultant investigating, *inter alia*, vehicular arson, domestic and commercial building arson and traffic accidents. He had much experience and training in the area of forensic science and specifically arson. In his career he investigated in excess of 50 motor vehicle fires in Barbados and throughout the Caribbean. As such, this Court accepted Mr. Sargeant as an expert witness in forensic science especially the area of fire investigations and arson.

Preliminary Point with respect to Mr. Sargeant's Evidence

Hearsay

[135] The Forensic Scientist, Mr. Mark Sargeant, did not personally carry out the analysis of the samples collected from the vehicle and, therefore, did not personally conduct tests in relation to whether or not there were certain chemicals and/or accelerants which contributed to the fire. The samples were sent, via DHL, to the Cayman Islands where they were analysed and tested by a Dr. Schubel.

[136] Mr. Sargeant made certain observations and came to conclusions based upon the test results of the examinations conducted by Dr. Schubel.

[137] Mr. Weekes initially applied to strike out Mr. Sargeant's evidence from the record but subsequently abandoned the application. He conceded that it was for the Court to determine what weight or value it would place on this evidence.

[138] Mr. Sargeant's report dated 2nd January 2001 was accepted into evidence and marked **Exhibit CIG 15**. His evidence was quite extensive and covered several days of cross-examination.

[139] He was retained by the Defendant to investigate the circumstances of the fire that destroyed the vehicle. He examined the vehicle at Crane and Equipment Limited in Strathclyde, St. Michael on two occasions. At those times he made observations, took photographs and collected samples.

[140] In describing his method of collecting samples he stated that he observed the degree of burn as well as the burn patterns and selected areas to be sampled based on those criteria. The samples were collected in unlined sterile paint cans, sealed and marked with a reference number which corresponded with the specific areas of the vehicle which were sampled. Crime scene markers were used to mark areas in the bus. The other methods of choosing a sample area included the use of a 'hydrocarbon sniffer', an electronic device which detects volatile hydrocarbons. The collected samples were placed in a box, sealed and shipped via DHL Barbados Limited to Cayman Islands Forensic Lab.

[141] He described a fire pattern as a "markation made by smoke, heat or open fire or naked flames" and stated that such patterns were a result of a specific activity during a fire. The witness opined that the fire pattern in this case did not support a theory that the fire came up the side of the bus.

[142] When asked what he would have expected to happen if the wires in the engine were on fire and someone lifted the engine cover?, he responded that he would have expected the fire to flare up since it would have had more oxygen and space. He stated that, if someone had said that they had seen flames in the engine while driving and then lifted the engine cover, but that there was no increase in the intensity of the fire, such a situation would "defy the laws of what should naturally happen".

[143] He further stated that if an engine wire was perceived as glowing red, it would glow brighter and may flare the surface if the engine cover was raised. A situation where the wire did not glow brighter would "defy the natural way in which things happen".

[144] In relation to his investigation of the engine, the witness said that the upper parts of the engine (the top half) as well as the interior of the bus were damaged. Most of the damage was to the upper half of the engine whilst the bottom half of the engine was relatively clean, unburned and not damaged in any way.

[145] This witness was then asked what he would have expected to find if the fire started in the engine, which was covered. He stated that the level of damage in the engine compartment would have been much deeper, if it (the fire) did

not consume the whole engine, because there were combustible materials in the engine, namely rubber and plastic. He stated that these combustible materials would drop as they burned leaving burn marks on the engine below and that some of these materials would attach to the bottom of the engine.

[146] The witness opined that the fire was localised to the interior of the bus and its lowest point was at the floor level. He stated that the fire would have released a lot of heat based on the level of rusting and the material which the upholstery was made of. The fire would have been of a high intensity. He noted that the engine did not have the same level of damage as the interior of the bus.

[147] Mr. Sargeant stated that he inspected the bus for abnormalities in the wiring system. Due to a lack of "beading" in the wires, he ruled out electrical shorting or grounding as a cause of the fire. These conclusions were supported by the fact that there was no "insulation burn back" on any of the wires leading to or from the battery.

[148] The witness further stated that he did not find anything to indicate that the engine was the source or origin of the fire. He ruled out the possibility that the fire started in the engine and progressed to the cabin. He further said that, if the fire had started in the engine compartment, there would have had to have been an explosive event to propel the fire into the cabin and, if there had been such an event, the engine would have been severely damaged. There was no severe damage to the engine and therefore he was of the opinion that such an event could not have occurred in the engine.

[149] Alternatively, for the fire to spread from the engine to the interior of the bus, the use of an accelerant would have been required. Mr. Sargeant stated that, when a fire burns at a high temperature there is a total, or almost total, consumption of the accelerant. However, the instrument used for detection of the accelerant might not be able to detect extremely small quantities.

[150] The witness did not notice any cracks or leakage in the lower section of the engine. He did, however, observe cracks in the upper surface of the rubber hosing.

[151] He was asked what he would have expected to happen if there was a fire in the engine and the flammable liquids in the vehicle's engine were running through the engine but there was no leakage of the liquids. He responded that, if the engine was running and the line was then compromised by fire at a point of the line that was not under pressure, the fire would spread to the fuel and, depending on the magnitude of the compromise, and the amount of fuel escaping, the fire would remain in that area or the fire might follow the

gravity of the spillage of the liquid and continue to burn at lower points or underneath the vehicle.

[152] A visual inspection did not reveal any leaks nor did he garner from his inspection of the burn patterns that was there was a fuel leak. The witness stated that he saw damage to the tubing on the upper surface of the engine, but not to the lower surface. He again stated that the fire was of a high intensity and that, if such a fire had been in the engine, he would have expected all or more of the tubing to be consumed.

[153] Mr. Sargeant in his report opined that, "the fire was accelerated by the use of an accelerant to cause consumption of most of the Isuzu bus." In his oral testimony, he stated that this conclusion was reached through a scientific process of elimination. He eliminated an electrical cause, a mechanical cause and an accidental cause, leaving the hypothesis of an accelerant being used. Using the statement provided to the Defendant, the witness looked for evidence that would have supported the Plaintiff's version of events. He eliminated the hypothesis that the fire could have travelled underneath the vehicle or underside and up the back of the said vehicle. There was also no evidence to support an accidental cause of fire.

[154] He admitted under cross-examination that he did not interview anyone during the course of his investigations nor did he investigate the scene of the fire. He also admitted that he did not take any samples from the scene as, in his opinion, there was no need to do so. He did not use any magnification in his examination of the vehicle. He did not examine the engine compartment of a comparable vehicle nor did he request a set of schematics on this vehicle.

[155] He admitted, as well, that it was possible for the temperature of an exhaust manifold to reach a sufficiently high temperature that, if a liquid such as hydraulic fluid, was to come into contact with it in a gaseous state, a fire could result.

[156] The witness stated that, where possible, a fire investigator looked for the source of ignition. He was unable to find a source in this case. Mr. Sargeant admitted that, if water had been used to extinguish the fire, there would have been some removal of deposits, but that, in most instances, fire pattern and some of the melted debris would remain. He did not speak to anyone from the Barbados Fire Service to determine how the fire was extinguished.

[157] Ms. Sargeant was shown a picture of an area that appeared to contain scorched material. He admitted that he did not test this area and admitted that, had the area been tested, it was possible that it would have tested positive for an accelerant, had one been used. He further stated that, if

tested, the areas of scorched ground would have revealed what substances had burned there. Mr. Sargeant did not take samples from the engine area.

[158] The witness stated that the vehicle tested positive for notable amounts of 2-Ethylhaxanol, a very flammable industrial liquid, which may be used as an accelerant. This substance, however, is also used in the manufacture of vinyl floor covering and could possibly be emitted through a breakdown of the covering. He stated that this chemical was "a liquid used in the manufacturing of various items. **It is not something you would sell off the shelf for domestic purposes".** (emphasis mine)

[159] He did not conduct the tests on the samples collected but sent them to another expert in the Cayman Islands and the results were returned to him. His opinions were based on the results of these tests.

[160] Mr. Sargeant stated that in ruling out an electrical fire, he would look to "certain activities in relation to the operation of the vehicle, prior to the fire. And you would also look for evidence to support this activity. Electrical system faults can vary significantly but some of the more common symptoms one would expect to find are problems with the lighting system, significant problems with the ignition system, and other associated vehicle functions".

[161] It is important to note that Mr. Sargeant did not procure a history of the bus and, therefore, was not in a position to know the condition of the vehicle before the fire. He would not have known that the vehicle had been repaired several times for a number of problems including electrical faults. In analysing Mr. Sargeant's evidence, it is important to look at the evidence which is now reproduced in this decision.

Evidence of Juanita Greaves

[162] Ms. Juanita Greaves was a leading fire officer who responded to the scene of the fire. She gave oral testimony on 3rd May 2006. She said that when she asked the Plaintiff how the fire started he responded that he saw smoke coming from the dashboard. She stated that the Plaintiff did not indicate whether he saw fire coming from anywhere. She was not cross-examined.

Analysis

[163] Mr. Sargeant's expertise as a forensic scientist is beyond doubt. However, in these circumstances, his expertise was severely limited by the fact that:

(1) no samples were collected from the scene of the accident or from the engine compartment;

(2) he did not personally conduct the forensic analysis on the samples collected at Strathclyde, but relied upon results communicated to him by Dr. Schubel;

(3) his failure to liaise with the Barbados Fire Service or any other relevant person to determine how the fire had been extinguished. The Plaintiff, in his statement to D.C. Craig & Associates Ltd dated 8th December, 2000, said that a tender arrived from the Barbados Fire service and the flames were extinguished using on-board water;

(4) he failed to test the area under the bus and/or the engine compartment. In the opinion of the Court, this was a major failing in the forensic analysis as the analysis of the materials at the site of the accident was an important factor in ruling out or confirming the Plaintiff's claim of how the fire occurred. In this regard, the witness' evidence reproduced at paragraph [151] is crucial. His answer illustrates the importance of testing the burnt materials which were found at the source of the accident so that a scientific opinion could be rendered as to whether or not a line was compromised. Both Mr. Sargeant and Mr. Norville observed cracks in the upper surface of the rubber hosing. However, no microscopic or other scientific testing of the fuel or brake fluid lines was conducted by either of these experts so as to give a definitive answer as to whether or not the lines were compromised in a manner not visible to the naked eye.

[164] Mr. Sargeant said that forensic science is an exclusionary science based on scientific principle and a systematic approach. His observations included what he observed on the bus, material received by way of the laboratory report and the Plaintiff's statement. He made a number of hypotheses based upon the forensic analysis and his observations, and drew his conclusions by process of elimination.

[165] It appears to the Court that the forensic investigation concentrated upon a hypothesis that the fire started in the engine compartment and spread throughout the bus. The forensic expert opined that an explosive event would have been required to propel the fire from the engine compartment to the cabin of the bus. However, the evidence of Mr. Sargeant illustrates that he failed to conduct an investigation into the Plaintiff's statement that he heard explosions which seemed to be connected to the the air conditioning unit at the rear of the vehicle. In his statement to Mr. D.C. Craig, the Plaintiff stated:

> "Flames soon started to engulf the front area under the fuse box and also beneath the rear passenger seats where a number of electrical wires were. After the initial outbreak of fire, the flames spread quickly throughout the passenger compartment assisted by the heavily padded

seats which are high. There were also about three or four loud explosions which seemed to be connected to the air conditioning unit at the rear of the vehicle in the roof. The explosions appeared to be centred around the said air conditioning unit."

[166] Worryingly absent is any forensic analysis of the vehicle's air conditioning system and whether or not that system could have contributed to the fire or its propulsion into the cabin.

[167] I refer to Mr. Sargeant's statements regarding the possible use of an accelerant, the existence of the chemical 2-Ethylhaxanol in the interior of the cabin and that that chemical is not readily obtainable for domestic purposes (see paragraph [158] above). It may reasonably be inferred from this evidence that the Plaintiff would not have been able to easily procure this accelerant. The Defendant has not suggested that he did.

The Pleadings

[168] In its re-amended defence, the Defendant alleged at paragraph 15 that the Plaintiff knew or ought to have known that the said fire was not an accident but was in fact staged and/or set by himself and/or others unknown to the Defendant. It is worthwhile to repeat the pleaded particulars namely that:

(1) the Plaintiff wilfully and/or recklessly set the motor vehicle on fire for the purpose of causing and/or allowing the destruction of the motor vehicle; and

(2) failing and/or refusing and/or neglecting to take all reasonable steps to safeguard the motor vehicle from loss or damage and allowing and/or causing the said motor vehicle to be set on fire.

[169] Mr Weekes, in cross-examination, asked Mr Sargeant "Is it your opinion that the fire was purposely set?" Mr Sargeant responded "I say that the fire occurred other than stated in the statements.

"Question: To say that a fire started in a manner inconsistent with a statement is not the same thing as saying it was accidently or purposely set?

Answer: purposely set is a function of mens rea.

Question: Is your opinion that this fire is (a) accident (b) suspicious or incendiary?

Answer: As a scientist and fire examiner, my job is to determine cause and origin of fire and sometimes why. We look at physical evidence examine it, take into account statements, photographs and other relevant evidence. We then determine whether the fire started

> similar to the statement. I said the fire did not occur from chemical [cause]. I am saying that the fire did not start the way it is alleged in the statements."

[170] In my opinion, the evidence before the Court does not reach the standard required to prove fraud. The expert testimony of Mr. Sargeant suggests that the fire did not have an electrical cause, did not start in the engine but was accelerated by the use of an accelerant. This opinion must be seen in the light of the other opinions of the possible causes of the fire as above outlined in the evidence of the Plaintiff.

[171] The burden of proof is on the Defendant who alleges fraud, the standard of proof has already been set out in this decision. The two witnesses on whom the Defendant relies to establish fraud are Mr Sargeant and Mr Norville. I have already analysed Mr Norville's evidence which is inconclusive. In the written report dated 20th December 2000 from Precision Motor Engineering, he recommended that forensic specialists be employed.

[172] It is clear that Mr Sargeant is unable to say that this fire was set by the Defendant or anyone for whom he is responsible. It is also clear from an analysis of his answers to Mr Weekes, that he is unable to say that the fire which consumed the bus was deliberately or purposely set. The only worthwhile conclusion he made is that the fire was started otherwise than stated by Mr Bridgeman. This certainly falls far short of the standard of proof required and accordingly, the defence fails on this limb.

[173] In light of the foregoing, I am of the opinion that the Defendant has failed to establish that the cause of the accident was non-fortuitous or was the result of arson by the Plaintiff or some third party for whom he was responsible.

Issue 3(2): Allegation that Plaintiff made false statement

[174] The Defendant, at paragraph 16 of the Re-Amended Defence, pleaded in the alternative, that the Plaintiff fraudulently claimed for the loss of the vehicle under the policy of insurance by knowingly and/or recklessly and/or negligently giving a statement to the Defendant on or about 4th December 2000 and/or knowingly and/or recklessly and/or negligently giving a subsequent statement to D.C. Craig & Associates, the Defendant's loss adjustors, on or about 7th December 2000 the contents of which were untrue and/or inaccurate and/or misleading and/or intended and/or designed to deceive the Defendant as to the circumstances which occurred prior to and/or during and/or subsequent to the said fire and/or the manner in which the said fire started and/or burned.

[175] The pleaded particulars are as follows:

"**CLICO General Insurance Motor Accident Report Form dated the 5th of December, 2000**

Give details of the accident or loss as it occurred

> *"When I passed the Ministry of Agriculture I smelled smoke so I slowed down and pulled up the engine cover situated beside the driver's seat and realised that there was a fire coming from a wire in the engine. I then pulled over to the side of the road and stopped. I tried to get the battery connections off but was unable to. The back seat then started to catch afire so I moved away because the glass was beginning to fly."*

Statement given to D.C. Craig & Associates Ltd., Loss Adjusters on the 7th day of December, 2000

> *"...As I travelled down the slight hill and had just passed the entrance to the Ministry of Agriculture (on the opposite side of the road) I smelt something like plastic or rubber burning. I did not see any smoke at that stage. I slowed down and lifted the engine cover which was to the left beside me. As I lifted the engine cover I saw a gush of smoke. I saw a thick wire leading to the kill switch on fire. The whole wire was burning and the metal within the wire was red hot. The power to the vehicle then cut out. I coasted down the hill for a short distance and pulled over to the verge before stopping. By this time there was a lot of smoke in the vehicle and there was a reflection of light under the bus which confirmed that there was a fire. I jumped out of the bus as soon as I stopped and opened the front door. I tried to shake off the two battery leads but they would not disconnect....Flames soon started to engulf the front area by under the fuse box and also beneath the rear passenger seats where a number of electrical wires were...After the initial outbreak of the fire the flames spread quickly throughout the passenger compartment assisted by the heavily padded seats which are high. There were also about three or four loud explosions which seemed to be connected with the airconditioning unit at the rear of the*

vehicle in the roof. The explosions appeared to be centred around the said airconditioning unit."

[176] The Defendant's case, in the absence of any written submissions, appears to be that these statements were untrue and/or misleading and/or intended to deceive the Defendant. This pleading is inextricably bound up in the allegation that the loss was not fortuitous. The claim therefore, is alleged to be based on a misrepresentation of the circumstances surrounding the fire as pleaded by the Defendant.

[177] The defendant relies upon the evidence of Mr. Martin Goddard and Mr. Ricardo Smith to establish its case.

Evidence of Mr. Martin Goddard

[178] Mr. Martin Goddard gave oral testimony on 27th February 2006. He was employed as a loss adjustor with the firm of D.C. Craig & Associates Ltd. ("D.C. Craig & Associates") which was employed by the Defendant to investigate the loss. He was accepted as an expert loss adjuster.

[179] The witness gave evidence that he was hired by the Defendant to investigate a loss in relation to the vehicle. The investigations involved visiting the scene, recording a statement from the Plaintiff at the scene, inspecting the vehicle, appointing Mr. Russell Norville to act on behalf of the Defendant and interviewing other persons such as officers from the Barbados Fire Service and Mr. Ricardo Smith. The investigations were performed by his employer D.C. Craig & Associates. He conducted the interviews personally.

[180] The witness stated that he took photographs of the scene and of the burnt bus. He also did a comparative check with a similar bus which he inspected at St. Hill & Sons.

[181] Mr. Goddard stated that he came to the conclusions contained in the report of D.C. Craig & Associates because of discrepancies between the statements of Mr. Smith and the Plaintiff and what they said to the police officer and Mr. Norville. He identified the discrepancies as surrounding: (1) the Plaintiff's statement that he called Mr. Smith to the scene and later got a lift home with him and; (2) Mr. Smith's contrary statement in which he said that he happened to be passing the scene and that he was not sure how the Plaintiff got home.

[182] Under cross-examination, the witness agreed that, nowhere in Mr. Smith's statement, did he say that he did not receive a phone call. He admitted that, whilst interviewing Mr. Smith, he did not ask him whether he received a

phone call from the Plaintiff. The witness also admitted that the statements of the Plaintiff and Mr. Smith are similar in "a lot of material respects".

[183] Mr. Goddard agreed that most cases of non-fortuitous vehicle fires occur in very desolate, non-populated areas.

Evidence of Mr. Ricardo Smith

[184] Mr. Ricardo Smith, a mechanic, gave oral testimony on 4th May 2006. To that date he had been the Plaintiff's mechanic for a period of seven or eight years. He testified that he gave a statement to Mr. Goddard which was true and correct at the time it was given (**Exhibit CIG 1**).

[185] This statement was prepared on 15th December 2000. Mr. Smith said that on 4th December 2000 he left RS Auto around 8 p.m. He deposed that:

> "As I travelled towards Graeme Hall Roundabout...on the opposite side of the road in the layaway. The bus was stationary and there were flames coming from beneath it mostly the left side front. There were also sparks dropping from beneath the back. I stopped my car when I got close...to help. Neville came with me when I got close to the bus I saw Bridgeman exiting the driver's seat. I know Mr. Bridgeman as I had done work on the said bus personally. I went straight to the battery to try to get the leads off but was unable to do so. The battery leads were hot and I thought the battery might blow so we moved away from the bus. The fire was in the engine area inside and the flames were high. I went to my car and got my cellular phone which I used to call the Fire Service. Other people had stopped by this time and were watching the fire. A guy in a truck marked something like MF540 was there and I believe he also called the Fire Service. The truck was a white Daihatsu Delta flatbed which marked [sic] "..." The Fire Service arrived in about fifteen to twenty minutes. I stayed for a little while then took Neville home. I passed the area where the fire ... later that night. Aubyrn was still there when I passed. I am not sure how he got home."

[186] Under cross-examination he stated that, over a period of time, the vehicle presented to him with problems relating to the: (a) brakes, (b) starting motor, (c) alternator, (d) lights, (e) handbrakes, and (f) battery. Mr. Smith indicated that he attempted to "put these issues right".

[187] Where there are any discrepancies in the evidence of witnesses, the Court must decide whether the witnesses were deliberately lying or were confused or mistaken. I saw and heard Mr. Goddard, he was unsure about several aspects of his evidence. I did not view him as deliberately lying but unsure

in his recall of events. The following extract from his evidence in chief bears this out:

> "Question: In the Preliminary Report are some photographs, you took these?
>
> Answer: Yes
>
> ...
>
> Question: In taking your photos did you enter the bus and take photos?
>
> Answer: Yes
>
> Question: Did you come across a wheelchair lift?
>
> Answer: It was a long time ago, but No, I assume this wheelchair lift would have been to the entrance of the vehicle. But I can't recall, I have several photos.
>
> Question: You did a comparative check with a similar bus?
>
> Answer: Yes
>
> Question: The information provided to you about the second bus was provided by who?
>
> Answer: I am not sure if anyone gave me information, but I inspected the bus at St. Hill's & Sons.
>
> Question: Regarding the photographs on page 10 of the final report – St. Hill's bus. Do you see a wheelchair lift in that photograph?
>
> Answer: No."

[188] I also saw and heard the Plaintiff give his evidence in chief and under cross-examination. He was clear in his evidence and was unshaken under cross-examination. I found him to be a witness of truth.

[189] Having heard and seen these witnesses, I am of the view that any discrepancies in their testimony are attributable to faulty recollection and not any deliberate attempt to deceive. The issue is whether the Plaintiff gave a

false account of the accident to the loss adjusters? Having found him to be a witness of truth the answer is "No". Having also found that the Defendant has failed to prove its case that the accident was caused by a non-fortuitous event to the standard required by law, it therefore follows that there is no evidence to justify this pleading of fraud or deceit by the Defendant. The Court repeats its observations that fraud, recklessness and negligence are different species of conduct requiring different degrees of proof (see **Derry v Peek (1889) 14 App. Cass. 337**).

Issue 4: All reasonable steps to safeguard the vehicle

[190] The Defendant pleaded that the Plaintiff was negligent in that he drove the vehicle when he knew, or ought to have known, that the engine was not working efficiently or at all. The burden of proof is on the Defendant to prove this allegation on a balance of probabilities.

[191] The Plaintiff's evidence is that he had the vehicle repaired several times by his mechanic, Mr. Ricardo Smith. He also gave evidence that repairs had been effected by St. Hill & Sons, from whom he bought the vehicle. This evidence was not contradicted.

[192] Mr. Smith's evidence has already been outlined at paragraphs [184] to [186] above. Mr. Norville's evidence was reproduced at [127] to [133]. He did not give any evidence in relation to the repair or service history of the vehicle, nor was any other person called to give such evidence. In examination-in-chief Mr. Norville was asked whether he found any faults in the engine of the motor vehicle. He responded that he had not. The service and repair history of the vehicle was never entered into evidence. Indeed Mr. Sargeant said he had not seen it.

[193] There is no evidence to contradict the Plaintiff's evidence and that of his mechanic that he sought to remedy the faults in the vehicle.

[194] In the circumstances, the Defendant has not discharged the burden of establishing that the Plaintiff had failed to take all reasonable steps to safeguard the vehicle from loss and damage and maintain it in an efficient condition as pleaded in paragraphs 13 and 14 of the Re-Amended Defence.

Quantum

[195] Two persons gave evidence on quantum in this case: Mr. Gregory Yeadon for the Plaintiff and Mr. Elvis Simpson for the Defendant.

Evidence of Mr. Gregory Yeadon

[196] Mr. Yeadon gave oral testimony on 29th September 2005 and submitted a report dated 12th November 2003 which was admitted into evidence and marked **Exhibit GY1**.

[197] He gave evidence that the Plaintiff was retained by Foster & Ince Cruise Services to transport guests for the winter season in the year 2000. In

addition the Plaintiff was also doing business with Ryan Tours and Transport, Johnson Stables, St. James Travel and Gillian Shuttle and Tours.

[198] He stated that, as a result of the Defendant's refusal to honour the Plaintiff's claim, the Plaintiff lost the business with Foster & Ince which Mr. Yeadon described as "the cornerstone of his [the Plaintiff's] business plan". The Plaintiff fell into arrears with his bank loan as he did not have a replacement vehicle to secure his income. As a result of his inability to service the loan, he incurred late payment fees at the bank and additional interest charges.

[199] The witness further gave evidence that the Plaintiff was eventually able to secure a loan from Consolidated Finance which he used to purchase a temporary vehicle to continue his business, thereby mitigating his losses. However, the Plaintiff was unable to afford a vehicle similar to that destroyed by the fire. The replacement vehicle was several years old and smaller than the original vehicle. The Plaintiff, therefore, lost the "lucrative type of clientele" he had enjoyed before and returned to basic taxi services. This temporary vehicle was operated up until the date of the report.

[200] Under cross-examination Mr. Yeadon stated that he based his calculations on information relayed to him by the Plaintiff regarding his business expansion intentions and what the Plaintiff was paid. The calculation of the Plaintiff's earnings was made from entries made in the Plaintiff's diary between October and December 2000. This figure was then adjusted for trends.

[201] When counsel for the Defendant suggested to the witness that the net losses were grossly overstated, his response was that he relied on the Plaintiff.

[202] Further, Mr. Yeadon stated that, due to limited available historical accounting information for the Plaintiff's business, he had to make some assumptions to arrive at a trend to predict the future revenue that could be earned by a new vehicle. He admitted that the absence of this information would have hampered his ability to make a more accurate analysis of the Plaintiff's actual losses.

[203] He explained the methodology by which he calculated consequential loss. He looked at what the Plaintiff earned in the period before the incident and then made adjustments for trend. He stated that he would have been in a better position to arrive at a trend where there are detailed accounts with records of turnover which go back several years. However, in this case, he admitted that he did not have a substantial amount of background accounting information available to him.

[204] He therefore had to consider the fact that the destroyed vehicle was superior and more attractive in relation to other types of vehicles used by other taxi operators. He stated that the Plaintiff's vehicle had a wheelchair lift and

large interior and was therefore able to attract a major client in Foster & Ince. This statement was based on his experience travelling on minivans. He did not carry out any further studies into the type of vehicles used by taxi operators.

[205] Mr. Yeadon admitted that he had never travelled in or saw the vehicle before it was destroyed. He saw the interior of the vehicle from pictures contained in Mr. Sargeant's report and a brochure obtained from the Plaintiff. He assessed the Plaintiff's loss at $353,920.34 being $196,597.76 for net loss of revenue, $29,480.00 being net cost of a temporary vehicle and $127,842.58 being net loss of revenue from business expansion. These losses were calculated by an examination of the records kept by the Plaintiff. His calculations are now reproduced verbatim in this decision:

Subsequent Period with Inferior Bus	
(Dec 29, 2001 to November 20, 2003)	
628 Working Days x 151.20 =	
Sub total $130,019.85	
Less Operating Expenses on Above Revenue:	
Internal Period Without Bus	
(Dec 4, 2000 to Dec 28, 2001)	
333 Working Days x 390.45 =	
	$ 94,953.60
	$224,973.45
Add Foster & Ince Revenue	$ 42,016.24
(From 2000 to 2003)	$266,989.69
4 Winter Seasons x 10,504.06 =	
Fuel 8.4 x $266,989.69	$22,427.13
Servicing $1,350 x 2.6 years	$ 3,510.00
Tyres $1,170 x 2.6 years	$ 3,042.00
Insurance Premium $9,728 x 2.6 years	$25,292.80
Road Tax $1,050 x 2.6 years	$2,730.00
Misc. Expenses $5,150 x 2.6 years	$13,390.00
	$ 70,391.93
	$196,597.76
	$196,597.76

Loss of Net Revenue (Net of Expenses)

Add Cost of Temporary Vehicle		
(HP Agreement with Consolidated Fincance):		
Deposit Paid to Consolidated	$ 8,000.00	
Finance	$54,480.00	
HP Payments	$62,480.00	
Total Cost of Temporary Vehicle	$33,000.00	$29,480.00
Less Residual Value of Temporary Vehicle	$226,077.76	
Loss of Net Revenue (Including Loan Payments Brought Fwd	$226,077.76	
Add for Planned Business Expansion		
Second Bus		
(Jan 1 2002 to November 20, 2003)		
625 days x $390.45 Daily Revenue	$244,031.25	
Less Operating Expenses:		
Fuel 8.4 x $244,031.24	$20,498.62	
Servicing $1,350 x 1.88 years	$ 2,538.00	
Tyres $1,1709 x 1.88 years	$ 2,199.60	
Insurance Premium $9,728 x 1.88 years	$18,288.64	
Road Tax $1,050 x 1.88 years	$ 1,974.00	
Drivers Salary (25 of Vehicle Revenue)	$61,007.81	
Misc. Expenses $5,150 x 1.88 years	$ 9,682.00	
		$116,188.67
Loss of Revenue Net of Expenses (Second Bus)	$127,842.58	$127,842.58

TOTAL CLAIM FOR LOSS OF BUSINESS

SUMMARY OF CLAIM

The above claim can be summarised as follows:	
Net Loss of Revenue from King Bus	$196,597.76
Net Cost of Temporary Vehicle	$ 29,480.00
Net Loss of Revenue Business Expansion	$127,842.58
TOTAL CLAIM	$353,920.34

[206] The initial period without the bus is 04 December 2000 to 28 December 2001. A temporary vehicle was obtained on hire purchase on 28 December 2001, the period 28 December 2001 to 12 November 2003 (the date of preparation of the report) is referred to as the subsequent period with the inferior bus.

Evidence of Mr. Elvis Simpson

[207] Mr. Simpson gave evidence on 1st February 2007. He had been active in the insurance industry since December 1982 having worked both in the underwriting and claims department of an insurance company and as a loss adjustor in his current firm. He had worked in this position since 1992. He is a Chartered Insurer. Mr. Simpson was accepted by the Court as an expert loss adjustor with expertise in assessing loss of income claim from profit earning chattels.

[208] Part of his duties as a loss adjustor involved assessing business interruption claims. He described this as the assessment of loss of profit following damage which affected business. In making such an assessment, he said, he would look at the historical financial information of the business. He would examine the business' accounting books in conjunction with audited statements in order to assess the profit of the business prior to and after the loss.

[209] Mr. Simpson stated that, in the absence of audited financial reports, it was difficult to arrive at a true and independent assessment of a company's financial position. In such circumstances, one would have to make a number of assumptions. However, due to those assumptions, the assessments could be described as speculative since the figures could be verified.

[210] Mr. Simpson referred to Mr. Yeadon's use of data from the Plaintiff's diary and stated that the difficulty with using this data was that there was no way of knowing whether the diary was in fact a genuine record of his account. He further stated that, in assessing a claim such as this, where small business owners may not have audited accounts, he would ask to be provided with banking records as there may have been some correlation between the bank deposits and the figures provided by the client.

[211] He stated that, as an independent assessor, in the absence of banking information he would have difficulty in coming to any conclusion.

[212] He was asked to define "trend" as the term relates to loss adjusting. He said that a trend was "basically a projection as to how the business would have performed based on historical information and on the environment in which

the business is operating" and stated that normally one would look at a 12-month period but could even go as far back as three years.

[213] He opined that the information available for the 11month period in this case was insufficient to project growth. The reason for that is that some peculiar event might have occurred during that period which might have contributed to the growth for that year, in which case it would have been difficult to use that information as an indication of a trend. He further opined that, in the absence of information for a period longer than 12 months, it was impossible to assume a trend of any sort.

Discussion

[214] Mr. Simpson stated that, in assessing loss of income, allowances were made for tax deductions. He opined that the figures provided by the Plaintiff were not accurate as there was no allowance for tax deductions.

[215] The Plaintiff is a self-employed person. He is responsible for paying his own income taxes and national insurance contributions from his gross earnings. He will have to do so from any sum awarded to him. Mr. Simpson's criticism is more relevant to a situation where compensation is being awarded to an employee as distinct from a self-employed person. It is therefore, irrelevant to this matter. **See Pryce v Elwood (1964) 108 S. J. 583 and Morahan v Archer and Belfast Corporation [1957] N.I. 61**

[216] The major criticism of the evidence relative to compensation coming out of the cross-examination was that there were insufficient records for at least one to three years which would allow for a projection based on "trend". In short, there was a lack of historical accounting records upon which a proper projection could be based.

[217] Whilst this may be so, it does not obviate the responsibility of the Court to assess the Plaintiff's damages notwithstanding the difficulty in so doing. The reality is that this bus only operated for eleven months. The Court must use the data which is available to it. There was no real attack upon the legitimacy of the figures save for the inherent uncertainty which projections engender.

[218] Bearing that in mind, I will discount the figures by 5% to take into account the vicissitudes inherent in the business environment and the uncertainty occasioned by the paucity of historical data.

[219] With respect to the claim concerning the prospective acquisition of a second bus for business expansion, no evidence was adduced to the Court that the Plaintiff made the Defendant aware of this proposed expansion before or at the time of entering into the contract of insurance.

[220] The principles relative to the measure of damages for breach of contract were set out in **Hadley and Another v Baxendale and Others (1854) 9 Ex. 341** where Alderson LJ said at 355:

> "Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

[221] In relation to this issue, the case of **Victoria Laundry (Windsor) LD v Newman Industries LD [1949] 2 K.B. 528** is instructive. In that case the claimant purchased a large boiler for use in their dying and laundry business. The defendants were aware that the claimant wished to utilise the boiler immediately and knew the nature of the claimant's business. Due to a mishap, the boiler could not be delivered to the claimant by the contracted delivery date. The plaintiffs commenced an action for breach of contract and included in their damages, a request for loss of business profits.

[222] Asquith LJ laid down the following guiding principles:

> "(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money

can do so, as if his rights had been observed: (Sally Wertheim v. Chicoutimi Pulp Company). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of A/B Karlshamns Oljefabriker v. Monarch Steamship Company Limited)

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.”””

[223] In applying the above principles I am of the view, and hold, that the sum of $127,842.58 net revenue claimed for business expansion cannot be recovered by the Plaintiff as the purposes surrounding the circumstances of the acquisition of the second bus were not within the contemplation of the parties at the time the contract of insurance was entered into and the loss is, therefore, too remote.

[224] The costs associated with the temporary vehicle are not recoverable in view of the fact that the Plaintiff will recover the pre-accident value of the lost vehicle.

[225] The Plaintiff has claimed the sum of $98,000.00 for the loss of the vehicle. Mr Weekes submitted that the policy is a valued policy and therefore the sum payable under the policy is the sum assured or $98 000.00. He also submitted that the measure of damages is to be measured by the normal principles of Contract Law. These two submissions are contradictory. The policy was not put in evidence and, therefore, I am unable to find that the policy was a valued policy. I must therefore apply the normal principles applicable to the loss of a vehicle under the Law of Insurance: namely the pre-accident value of the vehicle.

[226] The only evidence of its pre-accident value was contained in the report of Mr. Russell Norville of Precision Motor Engineering dated 20 December 2000 in which he opined that the pre-accident value was $75,000.00. There has been no challenge to this. I, therefore, accept his opinion and find that the pre-accident value is $75,000.00. He also found, and I accept, that the salvage value of the vehicle was nil.

[227] It is convenient, at this juncture, to deal with the Defendant's pleading at the second paragraph 17 of the re-amended defence (there are two paragraphs numbered 17) namely that, if held liable, the defendant will exercise its option under Section 1 of the said policy to repair, reinstate or replace the said motor vehicle or any part thereof or its accessories or spare parts. The evidence of Mr. Norville showed that this vehicle was a total loss. That is also evident from the photographs put in evidence. The question of repair of the bus or replacement of spare parts is untenable. The Plaintiff has mitigated his loss by acquiring another, though inferior, bus. I consider that it would make no sense to replace the bus given all that has transpired between the fortuitous event and now.

[228] In the circumstances, I hold that damages are an adequate remedy. The total sum to be awarded is as follows:

Pre accident value of the vehicle	$75,000.00
Less salvage	Nil
Net loss of revenue	$196,597.76

Discounted by 5%	$9829.88	$186,767.88
Net total to be awarded		$261,767.88

Disposal

[229] In the circumstances the Plaintiff's claim is upheld and judgement is entered for the Plaintiff against the Defendant in the sum of $286,023.88 with interest thereon at the rate of 8% per annum from the date of judgment until payment. The Plaintiff will have his costs certified fit for one counsel to be taxed if not agreed.

William J. Chandler
Judge of the High Court