

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 4 of 2015

BETWEEN:

CLICO INTERNATIONAL GENERAL INSURANCE LIMITED Appellants

AND

AUBRYN BRIDGEMAN

Respondent

Before: The Hon. Andrew D. Burgess, The Hon. Kaye C. Goodridge, Justices of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)

2017: December 4

2018: February 13, March 1

December 28

Mr. Larry Smith, Ms. Shanna Goddard and Mr. Fabian Walthrus for the Appellants

Mr. Bryan Weekes and Mr. Philip McWatt for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

- [1] This appeal concerns a claim by the respondent against the appellants for an indemnity under a policy of insurance covering, *inter alia*, loss by fire. In his claim, the respondent alleged that his maxi taxi van which was insured with the appellants caught fire fortuitously and was totally destroyed by the fire. The appellants resisted the respondent's claim on three broad bases. The first was that the respondent made untrue statements in the proposal form and was thereby precluded from claiming under the policy of insurance. The second was that the fire did not occur fortuitously, but was either deliberately set or recklessly caused by the respondent and that he had made a fraudulent claim to the appellants. The third was that the respondent had not proved some of the loss for which he claimed the indemnity.
- [2] The matter came on for hearing before **Chandler J** on 29 September 2005; 24 and 27 February 2006; 3, 4, 5, 8, 9 and 17 May 2006; 30 October 2006; 1 and 2 November 2006; 31 January 2007; 1 February 2007; and 15 July 2010. The written decision of **Chandler J** was delivered on 19 February 2015.
- [3] In his decision, **Chandler J** upheld the respondent's claim and rejected the defences raised by the appellants. The judge entered judgment for the respondent in the sum of \$286,023.88 with interest thereon at the rate of 8% per annum from the date of judgment until payment. Costs certified fit for one counsel to be taxed if not agreed were also awarded to the respondent.

[4] This appeal challenges that decision of **Chandler J.**

FACTUAL BACKGROUND

[5] The appellants are a limited liability company incorporated and registered under the **Companies Act, Cap. 308** and an insurer registered under the **Insurance Act, Cap. 310**. At all material times, the appellants carried on the business of providing insurance coverage to clients from its registered office situate at Whitepark Road, Bridgetown, St. Michael.

[6] The respondent is a businessman whose business is providing public transportation. At all material times, he was the owner of a 2000 Isuzu maxi taxi van bearing the registration number ZM-257 which he operated for hire and/or reward in his business.

[7] The maxi taxi van was a second hand vehicle which the respondent had purchased on 11 October 2000 from St. Hill's Funeral Home for \$98,000.00. The purchase price was obtained by way of a mortgage loan secured by real property in which the respondent had an interest.

[8] On the same 11 October 2000, the respondent attended the offices of the appellants to insure the maxi taxi van. There, the respondent completed all the "questions" in a document entitled "PROPOSAL FOR COMMERCIAL MOTOR VEHICLE INSURANCE" (the proposal form). Questions 5 and 13 and

the “DECLARATION” in the proposal form are of particular relevance in this case.

- [9] Question 5 headed “Particulars of vehicle(s) to be insured” contained a section asking: “If a PASSENGER VEHICLE, please state:- Seating capacity (including driver)”. The respondent entered “10” in the column opposite this question.
- [10] Question 13 read, in so far as relevant: “Please tick if the vehicle is to be used as follows: (d) Carriage of passengers for hire or reward (Enter number of passengers below).” The respondent ticked this box and entered “10 Seater Maxi Taxi” in the box immediately below Question 13.
- [11] A declaration at the bottom of the questions in the proposal form, in so far as relevant, read as follows:
- “DECLARATION:
- (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.”
- [12] The respondent dated and signed the completed proposal form immediately below that declaration.
- [13] On 25 October 2000, the appellants approved the respondent’s application for insurance and issued to the respondent insurance policy number

CG/MMT/009930 (the policy of insurance), which insured the maxi taxi van against, amongst other perils, fire. The respondent paid a premium of \$9,728.81 as consideration for the insurance coverage. The sum insured was \$98,000.00.

[14] On the evening of 4 December 2000, whilst the respondent was driving along Graeme Hall Road, Christ Church, the maxi taxi van was completely destroyed by fire.

[15] On 5 December 2000, the respondent went to the office of the appellants and informed them that the van had been destroyed by fire on the previous day and that he was making a claim for his loss pursuant to the terms of the policy of insurance. The respondent's statement to the appellants as to the "details of the accident or loss as it occurred" was as follows.

"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 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 I was unable to. The back seats then started to catch afire so I moved away because the glass was beginning to fly."

[16] On 7 December 2000, the respondent gave the following statement to D.C. Craig & Associates Ltd, the loss adjusters appointed by the appellants:

"...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 left 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 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 vehicle in the roof. The explosions appeared to be centred around the said air conditioning unit.”

[17] The appellants refused to settle any part of the claim for the loss of the maxi taxi van on the ground that the fire was not fortuitous and so informed the respondent by letter dated 15 May 2001. In consequence, the respondent commenced an action in the High Court against the appellants for the appellants’ refusal to indemnify his loss.

ACTION IN THE HIGH COURT

Respondent’s Claim

[18] The action by the respondent, then plaintiff, against the appellants, then defendants, was commenced by the filing of a writ of summons and statement of

claim on 17 May 2002. In it, the respondent alleged that, under the policy of insurance, the appellants agreed to indemnify him against loss of, or damage to, the maxi taxi van and its accessories and spare parts thereon, caused by fire to such an extent that it became a total loss. He pleaded that, on 4 December 2000, during the currency of the policy of insurance, the maxi taxi van was damaged by fire to such an extent that it became a total loss. He further pleaded the sum insured was \$98,000.00 and that on 5 December 2000, he delivered to the respondent a claim in writing in respect of the loss, but that, in breach of the policy of insurance, the appellants failed to settle any part of that loss and that, as a result he suffered loss and damage.

[19] Under the particulars of special damage, the respondent claimed loss of profits in the sum of \$50,000.00 for the period January 2001 to the date of the 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.
5. Any further or other relief which the Court might deem appropriate.”

Appellants’ Defence

[20] The appellants filed a defence which was subsequently amended and re-amended. In the re-amended defence filed on 18 December 2003, the appellants

admitted knowledge of the fire and receipt of the respondent's claim under the policy of insurance. However, they denied liability to indemnify the respondent's loss on three grounds.

[21] First, the appellants pleaded that the respondent had in the proposal form declared that "to the best of his knowledge and belief the statements made by him ...in the said Form were true and complete". This declaration, as well as the remainder of the proposal form, were by the respondent's agreement made the basis of the contract between the respondent and the appellants. Further, they maintained that the truth of the statements and answers in the proposal was not only thereby rendered a warranty given by the respondent, but that by the policy of insurance, was also made a condition precedent to any liability on them to make any payment under that policy of insurance.

[22] The appellants alleged that the respondent was in breach of the warranty and the condition precedent in that he had stated on the proposal form that the maxi taxi van had a seating capacity of 10 passengers including the driver when the seating capacity was more than 10. The respondent was therefore not entitled to any indemnity under the insurance contract.

[23] Second, the appellants pointed to the stipulation that "the observance and fulfillment 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”. By that stipulation, alleged the appellants, it was “term and condition” of the policy of insurance that the respondent take all reasonable steps to safeguard the maxi taxi van from loss and damage and maintain that vehicle in efficient condition.

[24] The appellants maintained that the respondent was in breach of this term and condition in that he, the respondent, continued to operate the maxi taxi van whilst it was experiencing electrical and mechanical problems. For this reason also, argued the appellants, the respondent could not maintain a claim for an indemnity under the policy of insurance.

[25] Third, the appellants alleged that the respondent’s claim is a wrongful attempt to defraud the appellants. The particulars of the fraud alleged by the appellants are that the respondent: (a) wilfully and/or recklessly set the maxi taxi van on fire for the purpose of causing and/or allowed the destruction of the vehicle; (b) failed and/or refused and/or neglected to take all reasonable steps to safeguard the vehicle from loss or damage and allowed and/or caused the vehicle to be set on fire; and (c) knowingly and/or recklessly and/or negligently gave a statement to the appellants and/or knowingly and/or recklessly and/or negligently gave a subsequent statement to loss adjusters appointed by the appellants the contents of which were untrue and/or misleading and/or intended and/or designed to deceive the appellants as to the circumstances which occurred prior to and/or

during and/or subsequent to the fire and/or the manner in which the fire started and/or burned.

Respondent's Reply to Appellants' Defence

[26] On 3 May 2004, the respondent filed a reply to the appellants' re-amended defence. In it, the respondent admitted that he had stated in the proposal form that the capacity of the vehicle was 10. He contended, however, that this response was not incorrect as the vehicle was licensed to carry ten passengers at that time.

[27] In the alternative, the respondent pleaded that the error in his response did not amount to a breach of warranty as to the truth and completeness of his answers in the proposal form in the absence of fraud or recklessness. He pleaded, in the further alternative, that, if the error was a misrepresentation, then it was not so material as to absolve the appellants from liability.

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

Decision of Chandler J

[29] In his decision, **Chandler J** dismissed the alternative pleas raised by the respondent in his reply to the appellants' re-amended defence. He held that the inclusion of the basis clause in the proposal form which was signed by the

respondent rendered the materiality of the respondent's misrepresentation irrelevant as well as the question of whether that misrepresentation was made fraudulently or recklessly. **Chandler J** also dismissed the respondent's plea that the appellants had waived any breach of contract by him.

[30] The respondent did not cross-appeal these holdings of **Chandler J**. Accordingly, we deem it unnecessary to consider this aspect of **Chandler J**'s decision.

[31] **Chandler J**, however, upheld the respondent's claim that, in breach of the policy of insurance, the appellants had failed to settle any part of his claim for loss and that as a result, he had suffered loss and damage. The judge entered judgment for the respondent against the appellants 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 judge also awarded costs to the respondent to be certified fit for one counsel to be taxed if not agreed.

[32] It is the appellants' challenge to this judgment of **Chandler J** with which we are now concerned.

THE APPEAL

Issues in the Appeal

[33] In pursuance of its appeal, the appellants filed a notice of appeal on 18 March 2015. This notice contained nine grounds of appeal. In our judgment, those grounds, the agreed issues identified in the "Statement of Agreed Facts and

Issues”, and, the written and oral submissions of both counsel make it abundantly clear that the disposition of this appeal involves three major issues. These issues may for convenience be classified as:

- (i) whether the appellants can avoid liability on the basis of the respondent’s breach of warranty and condition precedent;
- (ii) whether the appellants can avoid liability on the basis that the respondent’s claim is fraudulent; and
- (iii) whether **Chandler J** erred in the assessment of the damages awarded to the respondent in the circumstances of the case.

The appeal against **Chandler J**’s costs order was pursued before us as being contingent upon the outcome of the appeal on the major issues.

[34] Before confronting these issues, however, we pause here to observe that the appellants’ grounds of appeal at paragraph 3 (a),(c), (d), (e), (g) and (h) challenge the judgment of **Chandler J** as being in error on matters of mixed fact and law and at (b), (f) and (i) as being in error on matters of law. In our judgment, these grounds and the written and oral submissions of Mr. Smith on these grounds invite this Court to review the findings of **Chandler J** on issues of fact which arose on the evidence before him as well as on issues of law.

[35] In light of this invitation, before considering the major issues in this appeal, it behoves us to advert, as a preliminary matter, to the principles which govern this Court's power to interfere with the decision of **Chandler J** in the court below.

This Court's Power to Interfere in this Case

[36] It is very well settled law that **section 52 (1)** of the **Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)** confers on this Court power to interfere with the judgment of the court below, even in respect of findings of fact and to give any judgment and make any orders which this Court considers ought to have been made by the court below. It is equally well settled that, in exercising its statutory power of interference, the fundamental rule which guides this Court is that its appellate function is not to retry cases decided by the trial judge; nor is it to substitute its views for the views of the trial judge according to what it thinks the evidence establishes. This Court operates on the presumption that the decision of the lower court was right and that it is for the appellants to displace that presumption. If this Court is in any doubt, it will not disturb the decision of the lower court. This rule describes what is called in procedural justice theory the principle of appellate courts' deference to trial courts and is well entrenched in our law.

[37] Accepting the principle of appellate court deference, Mr. Smith contends that the real question in this appeal is whether the matters particularised at paragraph 3

of the notice of appeal satisfy the applicable standard to warrant this Court's interference with the decision of **Chandler J.** In addressing that question, we consider it profitable to remind ourselves of some basics of an appeal from a trial court to an appeal court which we retraced at length in **E. Pihl & Sons A/S (Denmark) v Brøndum A/S (Denmark), Civil Appeal No. 24 of 2012 (E. Pihl).**

[38] In **E. Pihl**, this Court explained that, for purposes of determining the appellate court's function on an appeal from a trial court, the issues that may arise in a trial court fall into three broad categories. These are questions of law, questions of fact, and questions of mixed law and fact. In a nutshell, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[39] On an appeal on a question of law, there can be no doubt that, in exercising its primary function, an appellate court is free to review a trial judge's findings and to replace the opinion of the trial judge with its own to correct errors of law. The standard which determines appellate interference on questions of law is one of correctness; and an appellate court is thus free to replace the opinion of the trial judge with its own where there is an error of law.

[40] Where the appeal is on questions of fact, the settled law in our jurisdiction is that a distinction is to be drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts. The process of finding primary facts involves assessing the credibility of witnesses. Inferences are concerned with the evaluation of those primary facts.

[41] In **Eudese Ramsay v St. James Hotels Services Ltd (Magisterial Appeal No. 4 of 1999)**, **Sir David Simmons CJ**, in delivering the judgment of this Court, stated the law to be that this Court will only interfere with findings of fact where there was no evidence at all or only a scintilla of evidence to support the finding. **Sir David** explained at **para 11** of that case that: “The reason for the reluctance of an appellate court to interfere with findings of fact by a court below is that the judge was in a better position to assess the credibility of the witnesses and the value of their evidence”.

[42] With respect to inferences from primary facts, **section 61(e)** of **Cap. 117A** expressly empowers this Court to draw inferences of any fact that might have been drawn by the trial judge. However, that Act does not anywhere indicate the applicable standard on which this Court can interfere with factual inferences of the trial judge. On the standard of interference with factual inferences, this Court opined in **Gypsy International v Canadian Imperial Bank Civil Appeal No. 27 of 2012 (Gypsy)** as follows:

“This Court’s decisions in *Ward v Walsh*, Civil Appeal No. 20 of 2005 (date of decision 28 November 2012) and *E. Pihl* suggest that for this Court to interfere, not only must there be error by the trial judge in coming to a factual conclusion based on accepted facts, but that error must also be clear and convincing. Such a standard is not only consistent with principles of appellate court deference but is also consistent with the basic purpose of appellate jurisdiction which is to correct lower court error, not to retry cases.”

- [43] Finally, questions of mixed fact and law involve applying a legal standard to a set of facts. It is to be contrasted with factual findings or inferences which, as just seen, require making a conclusion of fact based on a set of facts. But, both mixed fact and law and factual findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. It follows therefore that on an appeal on a question of mixed law and fact, this Court is free to draw legal or factual inferences. It may therefore interfere with the findings of the trial judge on the standard of clear and convincing error applicable to factual inferences. It may also interfere if it is clear that the trial judge made some extricable error in principle with respect to the characterisation of the standard or its application. In such a case, the error would amount to an error of law, and therefore, subject to interference in order to correct the error of law.
- [44] Against the foregoing backdrop, we now turn to considering the three major issues in this appeal identified at **para [33]** above.

Court's Consideration of the Issues

(i) Whether the appellants can avoid liability on the basis that the respondent is in breach of contract

[45] Here, we begin by noting that it is not in dispute that the respondent declared in the proposal form that “to the best of his knowledge and belief the statement made by him ...in the said Form were true and complete”. In this declaration, the respondent agreed that the proposal form and the declaration were to be the basis of the contract between the respondent and the appellants. It is elementary learning that, in consequence of this basis clause, the truth of the statements and answers in the proposal form was thereby made a warranty given by the respondent. Further, it is well settled that observance of this warranty was also made a condition precedent to any liability by the appellants to make any payment under that policy of insurance.

[46] The appellants' case before us is that the respondent was in breach of his contractual obligation not to make untrue statements in the proposal form in that he misrepresented in Question 5 of the proposal form that the maxi taxi van had a seating capacity of 10 passengers including the driver and was a “10 seater Maxi Taxi” in Question 13, when in fact, the vehicle was manufactured to carry 15 passengers. The seating capacity was therefore more than 10. Consequently, argued the appellants, the respondent was in breach of his contractual obligation

to make truthful statements in the proposal form, and so was not entitled to any indemnity under the insurance contract.

[47] In our judgment, the appellants' case on this point stands or falls on the correct interpretation of Question 5 and Question 13 (d) of the proposal form. In this regard, **Chandler J** held that Question 5 was ambiguous and, applying the *contra proferentem* rule, held that there was no misrepresentation on the part of the respondent in answering Question 5. The question for us therefore is whether this interpretation of Question 5 by **Chandler J** was correct.

[48] In approaching the interpretation of Question 5, **Chandler J** invoked the principles enunciated by Lord Hoffmann in the well-known English House of Lords case of **Investors Compensation Scheme Ltd v. West Bromwich Building Society** [1998] 1 WLR 896 at 912–913 (**Investors Compensation Scheme**). We are in entire agreement with **Chandler J**'s reliance on those principles. Indeed, we say that the judge was bound by principles of *stare decisis* so to do.

[49] In **E. Pihl**, this Court decided that the **Investors Compensation Scheme** principles are the fundamental principles that should guide courts in Barbados in an inquiry into the meaning of contractual language. In **E. Pihl**, this Court felt bound by the **Investors Compensation Scheme** guiding principles since they were accepted and applied by the Caribbean Court of Justice in the

Barbadian case of **Sea Haven Inc v. Dyrud (2011) 79 WIR at 146 para [30]** and were again cited with approval by that Court in **Campbell v. A-G of Barbados (2009) 76 WIR 63 at 66 para [43]**. In **E. Pihl** also, this Court felt compelling persuasion in the fact that the **Investors Compensation Scheme** principles were accepted and applied by the Privy Council in the Belizean case of **Attorney General of Belize & Ors v. Belize Telecom Ltd & Anor [2009] 1 WLR 1988** and in the Bermudan case of **Consolidated Contractors Co SAL v. Masri (2011) 78 WIR 141 at 152 para [17]**.

[50] Given the burden of authority supporting **E. Pihl**, then, there can be little doubt that the **Investors Compensation Scheme** principles are the basic principles which should guide our courts in the interpretation of contracts. It is for this reason that **Chandler J** was correct in invoking those principles in approaching the interpretation of Question 5.

[51] The **Investors Compensation Scheme** principles are succinctly captured by Lord Steyn in the later English House of Lords decision of **Sirius International Insurance Co (Publ) v. FM General Insurance Ltd [2005] 1 All ER 191 at 200 (Sirius International Insurance)**, where he said:

“The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person circumstanced as the actual parties were, would have understood the parties to have meant by the use

of the specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.”

[52] Of some importance in this case also, given the arguments of Mr. Smith on the relevance of the respondent’s understanding of Questions 5 and 13 (d), is what was said by this Court in **E. Pihl** on the **Investors Compensation Scheme** principles. There, this Court stated at **para [53]**:

“The bedrock of the Investors Compensation Scheme contextual approach to commercial contract interpretation is the objective theory of contractual interpretation. According to this theory, the purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. Rather, the aim is to determine the meaning of the contract against its objective contextual scene. Lord Hoffmann explained this theory in *Chartbrook* at p 1120 para [39] as follows:

“English law...mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be.”

[53] So what would a reasonable person circumstanced as the respondent and the appellants were in this case have understood Question 5 to mean?

[54] Following **Sirius International Insurance**, in answering that question it is necessary to identify the persons or class of persons to whom Question 5 was addressed as a first step. In this regard, the evidence before **Chandler J**

disclosed that the person or class of persons to whom Question 5 was addressed was a class of persons with knowledge of the seating capacity of the maxi taxi van as manufactured, as well as knowledge of the legal limitations and number of passengers permitted to be carried in a maxi taxi van. In particular, such persons would have knowledge that, by the terms of their licences, maxi taxi vans were limited to carrying 10 passengers and that if a vehicle was manufactured with a capacity for more than 10 passengers, the owner would be required by the Licensing Authority to remove the excess seats. Such person would also have knowledge that the appellants were experienced insurers who, in drafting Question 5, must have known that there was a difference between the legal seating capacity of a maxi taxi van as determined by the Licensing Authority and the seating capacity of vehicles as manufactured. Put simply, the person or class of persons to whom Question 5 was addressed was a class of persons with background knowledge that there were at least two possible meanings of seating capacity.

[55] In our judgment, the meaning which Question 5 would have conveyed to a reasonable person with the foregoing legal, regulatory and factual background knowledge is that “seating capacity” might have referred equally to “legal” or “authorised” or “licensed” seating capacity or to “manufacturer’s” seating capacity. The question as raised in Question 5 did not indicate to the reasonable

man circumstanced as the respondent which of these possibilities the appellants intended “seating capacity” to have. If, therefore, the appellants intended Question 5 to mean “manufacturer’s seating capacity”, the question was at best ambiguous.

[56] In our further judgment, if Question 5 is taken in the context of the text in the proposal form, the same conclusion is inevitable. Question 5 is found in a box containing eleven questions. That box is headed “Particulars of vehicle(s) to be insured”. The question immediately above the question at issue in this case reads “If a GOODS VEHICLE, please state:- (a) Maximum carrying capacity”. It will be remembered that the question at issue reads “If a PASSENGER VEHICLE, please state:- Seating capacity (including driver)”. The express indication of “maximum” carrying capacity in the case of a goods vehicle and the absence of any indication whatsoever in respect of “seating capacity” in the case of a passenger vehicle would have left the reasonable man in significant doubt as to what “seating capacity” meant.

[57] The reasonable man would have been left in further doubt as to what “seating capacity” meant in Question 5 in light of Question 13 (d). As noted above, Question 13 (d) reads: “Please tick if the vehicle(s) is to be used as follows: (d) Carriage of passengers for hire or reward (Enter number of passengers below)”. In our view, the reasonable man circumstanced as the respondent in this case

would be left in considerable doubt as to what these two questions meant. In fact, we would observe that the respondent in response to Question 13 (d) entered in the space provided “10 Seater Maxi Taxi”.

[58] In fine, we agree with **Chandler J** that the questions in Question 5 and Question 13 (d) which were answered by the respondent were ambiguous. Accordingly, the judge was correct in applying the *contra proferentem* rule and in concluding that the respondent was not in breach of the warranty as to the truth of the statements and answers in the proposal form. The respondent’s statements of “10” in answer to Question 5 and “10 Seater Maxi Taxi” in answer to Question 13 (d) were not misrepresentations.

[59] The appellants’ other claim of breach of contract is that the respondent continued to operate the maxi taxi van whilst it was experiencing electrical and mechanical problems. This, the appellants argued, was in breach of the term and condition in the insurance contract that the respondent take all reasonable steps to safeguard the maxi taxi van from loss and damage and maintain that vehicle in efficient condition. We agree with the finding of **Chandler J** that the appellants did not adduce any evidence to substantiate this claim. Accordingly, the appeal on this point also fails.

(ii) *Whether the appellants can avoid liability on the basis of the respondent’s fraud*

[60] The appellants' grounds of appeal at paragraphs 3(c), (d), (e) and (g) challenge the judgment of **Chandler J** as being in error on matters of mixed fact and law in relation to the fraud claim and at (f) as being in error on a matter of law in relation to the same claim. Accordingly, these grounds and Mr. Smith's written and oral submissions on these grounds invite this Court to review the findings of **Chandler J** on issues of fact which arose on the evidence before him as well on issues of law.

[61] We find it advantageous to deal with these challenges separately under the heads of "errors of fact" and "errors of law".

Errors of Fact

[62] The appellants' four errors of fact identified in the grounds of appeal on the fraud issue and the appellants' submissions on these errors must be examined against the backdrop of the principles outlined at **paras [36] to [43]** above. There it was emphasised that this Court will not interfere with a finding of primary fact by a trial judge and will interfere with a factual inference of a trial judge only where it is shown that the error was clear and convincing.

[63] The first error of fact is **Chandler J's** "holding that having observed the demeanour of the Respondent he found him to be a witness of truth without testing his observations against the whole of the evidence of the Respondent". The second is his "discounting the evidence of the expert witnesses Mr. Paul

Norville and Mr. Mark Sargeant as to how the fire could have occurred *vis-à-vis* the evidence of the Respondent as to how the fire occurred and failed to give a coherent reasoned rebuttal of his reason for so doing”. The third is the judge’s misdirecting himself “in his analysis and treatment of the evidence of the expert witnesses Mr. Russell Norville and Mr. Mark Sargeant”. The fourth error of fact by **Chandler J** is “in relation to the allegation that the Respondent made a fraudulent claim by virtue of being reckless as to the statements made by the (sic) him to the Appellant and to its appointed Loss Adjustors (sic) in support of the claim”.

[64] In our judgment, all of these grounds are unmistakeably challenges of findings of primary fact by the judge and not factual inferences. This being so, based on settled authority, we can interfere only if it were shown that there was no evidence at all or only a scintilla of evidence to support the judge’s findings. This was not so shown. Accordingly, these grounds must fail.

Errors of Law

[65] There are two facets to the appellants’ challenges of errors of law. The first relates to the appellants’ pleadings that the fire was not an accident but was in fact wilfully and/or recklessly caused by the respondent, what we call the arson defence, and the second relates to the appellants’ allegation that the respondent made a fraudulent claim to them, the fraudulent claim defence.

[66] For convenience, we will deal with each aspect of the challenge separately under the headings (i) the arson defence, and (ii) the fraudulent claim defence.

(i) The arson defence

[67] Here, the gravamen of Mr. Smith's argument is that **Chandler J** erred in law in failing to give sufficient consideration and/or weight to the evidence of the expert witnesses Mr. Russell Norville and Mr. Mark Sargeant. According to Mr. Smith in his written submissions, **Chandler J** "failed to assess the scientific bases which underpin the evidence of the experts, which evidence effectively countered the version of events in the evidence of the Respondent and that given on his behalf". In those submissions, Mr. Smith argued further, that the judge reached his finding that the appellants had not discharged their burden of proof "by placing disproportionate weight on the evidence of the Respondent and by failing to consider the totality of the evidence including the inconsistencies and discrepancies".

[68] In our view, the pith and purport of Mr. Smith's challenge of **Chandler J**'s judgment compels us to consider how a trial judge should measure the standard of proof where, in the absence of direct evidence from eye witnesses as to how a fire was started, an insurer has raised an arson defence. In this regard, we confess to finding the decision of the English Court of Appeal in **National**

Justice Compania SA v Prudential Assurance Co Ltd (The Ikarian Reefer)
(1995) 1 Lloyd's Rep 455 (The Ikarian Reefer) of invaluable assistance.

[69] The facts of **The Ikarian Reefer** were that the plaintiff company were the owners of *Ikarian Reefer* which was insured with the defendants. The vessel was insured against *inter alia* perils of the sea, fire and barratry. On 12 April 1985 at about 23 00 hours *Ikarian Reefer* ran aground on the Shoals off Sherbro Island, Sierra Leone in the course of a voyage from Kiel to Abidjan in ballast. At about 01 00 hours on 13 April a fire broke out in the engine room and spread to the accommodation.

[70] The plaintiffs claimed under the policy contending that *Ikarian Reefer* became an actual or constructive total loss in consequence of a peril insured against, namely, fire (and or perils of the sea). The defendants argued that the vessel was wilfully cast away in that it was deliberately run aground and deliberately set on fire by or with the connivance of those beneficially interested in the plaintiffs. The defendants contended that it was to be inferred that the master, officers and crew would only have cast the vessel away on the instructions or with the connivance of her beneficial owners.

[71] The question for decision was whether the defendants had proved to the relevant standard that *Ikarian Reefer* was deliberately set on fire with the connivance of the owners. The trial judge held that, on the evidence, the defendants had not

proved to the relevant standard that the vessel was deliberately set on fire. The Court of Appeal, in reversing the decision of the trial judge, emphasised that the trial judge should stand back and look at the case in the round and ask himself whether the defendants had eliminated other possible causes so that the only realistic explanation was that of arson. In this respect, a distinction must be drawn between remote or fanciful possibilities, unsupported by evidence, and substantial or substantiated possibilities which, if shown to exist on the evidence, had the effect of precluding a successful discharge of the burden of proof.

[72] In our view, the explication of Stuart-Smith LJ on the burden of proof and the standard of proof in these cases in delivering the judgment of the court, bears reciting here. In this regard, he said at **p 459**:

“On this issue, the burden of proof rests unequivocally on the insurers, and the degree or standard of proof which the law requires makes the burden heavier than that which rests upon the shipowners. Although the same “balance of probabilities” test applies, the standard of proof required is commensurate with the gravity of the allegation made; and no more serious allegation can be made against the master of a ship, a trained and experienced professional who was responsible for its safety and for the lives and welfare of its crew. The Court therefore must take account of the likelihood or otherwise of the master of this vessel intending deliberately to run the vessel aground (per Lord Justice Mustill in *The Filiatra Legacy* [1992] 2 Lloyd’s Rep 337 at pp 365-366

We do not find it necessary to pursue the question, which may be no more than semantic, whether the burden of proof so described

by reference to the balance of probabilities is different in practice from the criminal standard of “beyond reasonable doubt” and if so by how much. The burden is not discharged, in our judgment, if the evidence fails to exclude a substantial, as opposed to a fanciful or remote possibility that the loss was accidental. But we bear in mind that, on the authorities, the burden which rests upon the insurers is derived from the civil, not the criminal standard, and that its nature is as described above.”

[73] Very importantly, Stuart-Smith LJ continued at p 483 to set out what he considered should be the proper approach of the court as follows:

“(i) The Court is not assisted by considerations of evidential burdens of proof which may arise in the course of the trial. The sole question at the end of the trial is whether the underwriters have discharged the burden of proving that the fire was deliberately started with a view to causing a constructive total loss of the vessel and that this was done with the connivance of the owners. The burden of proof is the balance of probabilities but “commensurate with the gravity of the charge”. (See *The Filiatra Legacy* [1991] 2 Lloyd’s Rep 337). The burden is a heavy one; but the mere existence of the possibility that the fire was accidental does not mean that it has not been discharged. There must be a real or plausible explanation which is supported by the evidence, or at least is not inconsistent with it.

(ii) In considering whether the burden of proof has been discharged, the Court must consider all the evidence in the case, including that relating to motive and particularly that in relation to the grounding. If the judge had made up his mind that the grounding was accidental before he considered the fire evidence he was in error. The two parts of the case are inextricably linked. If the grounding was deliberate, it is difficult to think of any purpose in doing so, save as a preliminary step to the destruction of the vessel; indeed, none has been suggested. It is still

conceivable that an accidental fire supervened before the conspirators destroyed the ship, but it is in the highest degree unlikely. It is conceivable but very improbable, that the owners had given some general instruction: if you find yourself on a sandbank it would be more convenient for us if you set fire to it". We regard the suggestion that a member of the crew might have deliberately set fire to the ship on his own initiative, so that it would have to be abandoned, as fanciful...

Where, as in this case, there is clear evidence upon which a charge of arson can properly be advanced by the underwriters, the judge should be careful to keep an open mind as to the honesty to those impugned. It imposes too high a burden on the underwriters to say that such witnesses must be telling the truth unless the underwriters prove that their accounts are impossible. Their evidence has to be tested in the light of the probabilities and the evidence as a whole."

[74] We have firmly in mind **The Ikarian Reefer** principles as we approach the powerful arguments of Mr. Smith in furtherance of his contention that **Chandler J** erred in deciding that the requisite burden of proof had not been discharged by the appellants in the circumstances of this case. In particular, we remind ourselves that, in **The Ikarian Reefer**, as in this case, there were a number of theoretical causes for the fire which destroyed the vessel. In that case, the Court of Appeal reversed the trial judge on the basis that he had not applied his mind to the realistic likelihood of such possibilities having in fact occurred.

[75] That did not happen in the case before us. Between **paras [127]** and **[173]** of his judgment, **Chandler J** painstakingly considered the expert evidence of

Mr. Norville and Mr. Sargeant and the theoretical possibilities advanced by them.

[76] **Chandler J** noted that Mr. Norville was an automotive surveyor and consultant who held a diploma in motor vehicle engineering. The judge noted that the evidence of Mr. Norville was that there were no signs of intense burning in the engine bay area; that there was no evidence or sign of fusing, bonding or arcing as would be expected to be found if the fire had been a result of the wiring system in the vehicle; that there were no signs that the battery poles had been exposed to high battery heat; and that the most extreme heat was away from the engine. The judge also noted that, in his report, Mr. Norville stated that he had found no faults in the engine of the motor vehicle and recommended to the appellants that a forensic analysis be commissioned.

[77] The judge further noted that, 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 the diesel to be forced out; that it was possible that there was a “tiny imperfection” in the fuel line; that he did not obtain a maintenance record of the vehicle from the respondent; and that if there was a break in the lines containing brake fuel, the fuel could be emitted and could come into contact with the exhaust manifold and that, in such a case, it was possible that the fuel could ignite.

[78] As regards Mr. Sargeant, **Chandler J** noted that Mr. Sargeant was a forensic consultant since 1998 and that he possessed a B.Sc. Degree and M.Sc. in the area of Forensic Science from John Jay College of Criminal Justice in New York. Mr. Sargeant was retained by the appellants to provide the forensic analysis recommended by Mr. Norville. His evidence was that the fire pattern in this case did not support that the fire came up the side of the vehicle; that he did not find anything to indicate that the fire originated in the engine; that 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; that the fire was not caused by electrical shorting or grounding; that a visual inspection did not reveal any fuel leak; that, by a scientific process of elimination, he was of the opinion that “the fire was accelerated by the use of an accelerant to cause consumption of most of the Isuzu bus”; and that there was no evidence to support an accidental cause of fire.

[79] At **para [165]** of his judgment, **Chandler J** made the following observation of Mr. Sargeant’s evidence:

“[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 air conditioning unit at the rear of the vehicle...

[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."

[80] At **paras [171] to [173], Chandler J** concluded that the evidence of the experts did not eliminate the realistic possibility that the fire was caused fortuitously and not as a result of arson. There, he stated:

"[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 (sic) 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."

- [81] **Chandler J** did not expressly invoke the **Ikarian Reefer** principles. Be that as it may, we are satisfied that **Chandler J** adopted the correct approach in this case. It is abundantly evident that the judge stood back and looked at the case in the round and addressed his mind to whether the appellants had discharged their burden of proof by eliminating other possible causes so that the only realistic explanation for the fire that destroyed the maxi taxi van was that of arson.
- [82] In our judgment, **Chandler J** was correct in holding that the burden of proof on the appellants was not discharged. The evidence before him failed to exclude as a substantial, as opposed to a fanciful or remote, possibility that the loss was caused by the air conditioning unit in the vehicle or that the fire occurred fortuitously.
- [83] It is noteworthy that **Chandler J** did not advert to absence of evidence as to the respondent's motive for deliberately setting the vehicle on fire. In **The Ikarian Reefer**, however, the Court of Appeal treated as important the fact that there was clear evidence of motive and a good reason to dispose of *Ikarian Reefer* by scuttling. The owners in January/March, 1985 were committed to disposing of *Ikarian Reefer* and were under considerable pressure from the market situation if not from the bank to do so sooner rather than later during the year. Similarly, in **Grave v G A Bonus Plc [1999] 2 Lloyd's Rep 716**, a case cited to us by Mr. Smith, clear evidence of motive and a good reason to set fire to the insured

property was considered to be crucial in holding that the insurers had discharged their burden of proof. The evidence of motive was that the insured's hotel business was failing, that she was under intense pressure to procure an injection of capital for the business, and that on the available evidence an appropriate source was not available.

[84] In our view, evidence of a motive can never be dispositive in cases like that in this appeal. On the other hand, evidence of a motive for setting the property in question on fire will in most cases be relevant in tying the insured to the setting of the fire. In that vein, we find that the absence of evidence of a motive on the part of the respondent to set the maxi taxi van on fire lends some support to the conclusion by **Chandler J** that the appellants had not discharged their burden of proof that the fire was deliberately caused by the respondent.

The fraudulent claim defence

[85] The appellants' claim here was by way of a challenge to **Chandler J's** finding of fact that the respondent did not fraudulently claim for the loss of the maxi taxi van under the policy of insurance by knowingly and/or recklessly and/or negligently giving a statement to the appellants and/or knowingly and/or recklessly and/or negligently giving a statement to the appellants on 4 December 2000 and subsequently giving a statement to the loss adjusters appointed by the appellants the contents of which were untrue and/or misleading and/or intended

and/or designed to deceive the appellants as to the circumstances which occurred prior to and/or during and/or subsequent to the fire and/or the manner in which the fire started and/or burned. Mr. Smith argued that, on the evidence before him, **Chandler J** should have found as a matter of fact, that the respondent made a fraudulent claim as pleaded in breach of his duty of utmost faith in making a claim under the policy.

[86] **Chandler J** considered the claim as pleaded and the evidence adduced in support of it between **paras [174]** and **[189]** of his judgment. Of Mr. Goddard, a witness called by the appellants to give evidence in support of this claim, **Chandler J** stated at **para [187]** of his judgment:

“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.”

By contrast, at **para [188]**, **Chandler J** said of the respondent’s evidence:

“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.”

At **para [189]**, **Chandler J** concluded on this issue:

“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”.”

[87] In the case before us, **Chandler J** saw and heard the witnesses. On the question of whether the respondent made a fraudulent claim, the credibility of the

witnesses was in issue. **Chandler J** preferred the evidence of the respondent to that of the witnesses of the appellants. Nothing has been presented to this Court that persuades it that it should interfere with **Chandler J**'s findings of fact based, as they are, on the credibility of the witnesses. Consequently, consistent with the principles expounded above in this judgment, this Court has accepted the factual findings of **Chandler J** in this case.

*(iii) Whether **Chandler J** erred in the assessment of the damages awarded to the respondent in the circumstances of the case*

[88] Broadly speaking, the appellants challenged **Chandler J**'s assessment of damages on two bases. The first is that the judge erred as a matter of mixed fact and law in finding that the respondent's claim for loss of revenue was adequately made out. The second is that the judge erred as a matter of law in not deducting a sum on account of income taxes and national insurance contributions from the respondent's award of damages for loss of revenue.

[89] As to the first challenge, the essential legal difficulty highlighted by Mr. Smith is as to the certainty of damages. On this, Mr. Smith insists that the settled law is that a claimant is required to prove damages with reasonable certainty and the respondent did not provide such proof. In his written submissions, Mr. Smith contended "that outside of the letters submitted in evidence from the business houses to whom the Respondent provided his services, that (sic) the use of the

Respondent's diary as proof of loss of revenue, was a grossly insufficient means of determining his loss of revenue. The period for which the diary spanned being less than one year was also grossly insufficient."

[90] At **paras [216]** and **[217]** of his judgment, **Chandler J** confronted this argument as follows:

"[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 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."

[91] In our view, **Chandler J** applied the correct law. The accepted approach where specific records are absent and precise evidence unavailable is that the court must do the best it can to estimate loss and damages. Thus, in **Gypsy** where the records were incomplete, this Court said at **para [104]**:

"We conclude on the authorities, then, that the difficulty in this case in assessing loss due to incompleteness of records is not to be regarded by us as a bar to assessing damages, but as nothing more than a challenge to do the best we can in the circumstances of this case."

The same approach was adumbrated by Devlin J. in the English case of *Biggin v. Permanite* [1951] 1 K. B. 422 at 438, where commenting on the certainty of damages principle, he stated: “It is only that where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can.

[92] Given the foregoing, this first challenge by the appellants to **Chandler J’s** decision on the assessment of damages in this case must fail.

[93] The second challenge to **Chandler J’s** assessment of damages, namely, that he did not deduct income taxes and national insurance contributions from the damages he awarded, also fails for the reason given by the judge at **para [215]** of his judgment. It is our judgment that the judge was correct in holding that any sum awarded as damages for loss of revenue would be taxable in the hands of the respondent and as such the tax element is to be ignored in assessing his damages. A similar principle applies to national insurance contributions because it is the respondent, as a self-employed person, who is responsible for the payment of national insurance contributions.

CONCLUSION

[94] The appeal must fail on each of the grounds raised by the appellants. The first ground relating to the appellants’ right to avoid liability on the basis of the respondent’s breach of contract was unsupported on a proper interpretation of Questions 5 and 13 (d) of the proposal form. Likewise, we find no basis on which to disturb the judge’s finding that the appellants failed to discharge the burden

of proving that the respondent's claim was fraudulent and that he, the respondent, deliberately set, or recklessly caused the fire. And finally, as we stated earlier, the law upon which **Chandler J** proceeded in respect of his assessment of damages was unimpeachable.

DISPOSAL

[95] For all of the foregoing reasons, the appellants' appeal is dismissed with costs to the respondent to be assessed if not agreed.

Justice of Appeal

Justice of Appeal

Justice of Appeal (Acting)