**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2014-01099**

BETWEEN

**THE VILLAGE AUTOMOTIVE & HARDWARE SUPERSTORES LTD**

Claimant

AND

**ANCHORAGE GENERAL INSURANCE LTD also known as "FURNESS ANCHORAGE GENERAL INSURANCE LTD**

Defendant

**Before The Honourable Mr. Justice Robin N. Mohammed**

**Appearances:**

Mr. Rodney Lamsee for the Claimant

Mr. Keston McQuilkin instructed by Mr. Ramnarine Mungroo for the Defendant

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**JUDGMENT**

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**INTRODUCTION AND PROCEDURAL HISTORY**

1. Before this Court is the Defendant's Notice of Application filed on the 28th October, 2014 to strike out the Claimant's Claim Form and Statement of Case pursuant to **Part 26.2(1)(c)** and/or **Part 26.2(1)(b)** of the **Civil Proceedings Rules 1998 (as amended) ("the CPR")** on the basis that it discloses no grounds for initiating a claim against the Defendant and/or is an abuse of the processes of the Court. The Defendant also seeks the costs of this Application and of the substantive matter.

2. The Claimant is an automotive and hardware company and the Defendant is an insurance company with whom the Claimant holds an insurance policy. On or around the 27th April, 2010 certain premises of the Claimant were destroyed by fire and the Claimant accordingly sought indemnity from the Defendant. However, the Defendant has refused to do so. The Claimant contends that the Defendant has wrongfully refused/neglected or failed to indemnify the Claimant under the contract of insurance and that, as a result, the sum of 4.2 million dollars is now due and owing to the Claimant from the Defendant.

3. Accordingly, the Claimant alleges a breach of contract by the Defendant and seeks the sum of 4.2 million dollars, interest, costs and such further and/or other relief as the Court deems fit. The Claim Form and Statement of Case were filed on the 28th March, 2014 with the Amended Claim Form and Statement of Case having been filed on the 29th September, 2014.

4. The Defence was filed on the 18th July, 2014. Therein, the Defendant averred that the Claimant's Statement of Case should be struck out as it discloses no reasonable cause of action and without prejudice thereto, the Defendant denied the Claimant's case, alleging that there has been no breach of contract.

## THE APPLICATION TO STRIKE OUT

### The Defendant's Notice of Application

5. The Defendant's Notice of Application to strike out under **Part 26.2(1)(c)** and/or **Part 26.2(1)(b)** of the **CPR,** filed on the 28th October, 2014, is supported by an affidavit of even date deposed to by Prakash Nandlal, the Claims Manager for the Defendant. According to the Defendant, the grounds of the application are as follows:

   (a) The claim which was issued on the 28th March, 2014 and then amended on the 29th September, 2014 concerns a 4.2 million dollar recovery against the Defendant (the Claimant's insurers) after one of the Claimant's buildings located at Chanka Trace, El Socorro Extension was destroyed by fire.

   (b) In response, the Defence of the 18th July, 2014 filed, avers *inter alia*, that there are no grounds for the initiation of a claim. That for the purpose of this application, the Defendant will refer to only one of the reasons set out in the aforementioned Defence, which is as follows:

      a. Section 19 of the Conditions of the Policy of Insurance executed between the Claimant and the Defendant provides:

*"In no case whatsoever shall the Insurers be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of a pending action or arbitration."*

b. On April 28, 2010 the Claimant informed its servant and/or agent, Comprehensive Insurance Brokers Limited, that its warehouse had been destroyed by fire and that they were in the process of quantifying their claim. Pursuant thereto, Comprehensive Insurance Brokers Limited informed the Defendant of the loss and requested that they appoint an adjuster to investigate.

c. In or about May, 2010 during the course of the investigation the Claimant submitted documents to their servant and/or agent, Comprehensive Insurance Brokers Limited.

d. The Defendant, after their enquiries indicated to Comprehensive Insurance Brokers Limited that the loss location did not form part of either of the aforementioned broker's slips and therefore the loss location was not covered by the Policy of Insurance.

e. Further, in December 2010, the Defendant through the appointed adjuster, Axis (Eastern Caribbean) Limited, indicated again to Comprehensive Insurance Brokers Limited that after final consideration, the loss location was not declared prior to the fire in that, the loss location was not set out in the broker's slip and/or the Policy of Insurance and therefore the Policy of Insurance did not cover the losses sustained by the Claimant and the loss location.

f. Thereafter no arbitration proceedings were initiated by the Claimant. Instead, the Claimant filed the present proceedings more than three years after the Defendant denied the claim and indicated same to the Claimant's servant and/or agent.

g. That pursuant to Section 19 of the Conditions of the Policy of Insurance, the present claim is initiated after the 12 month period set out therein. Therefore, by effluxion and/or lapse of time the present proceedings are initiated out of time and the Defendant and/or their co-insurers are not liable to compensate the Claimant for their alleged losses.

**The Claimant's Response**

6. The Claimant contends that when all the allegations in the proceedings are considered the Claim has every chance of success. According to the Claimant, the Statement of Case with particulars served thereunder discloses a course of action fit to be decided by the Court both as to the questions of law or of fact or of mixed law and fact.

7. According to the Claimant, the Claim requires prolonged and serious argument and the Court ought only to exercise its powers of striking out in clear and obvious cases and this Claim is not such a case. The Court must be satisfied that there is no reasonable cause of action. The Claimant further contends that there is no abuse of process on the face of the Claim Form or Statement of Case.

8. The Claimant submits that striking out ought to be very sparingly exercised and only in exceptional circumstances, not as in this case where there is a bona fide claim with substance and foundation and seriously arguable points of fact and law where the Court would be required to conduct a protracted examination of documents. The Claimant reiterates that such jurisdiction should be exercised with great care and only in cases where the Court is absolutely satisfied that no good can come of the action. The Claimant further submits that the Court ought to be wary of setting aside an otherwise non-fraudulent valid and enforceable contract of insurance.

9. With respect to Clause 19 of the Conditions of the Policy of Insurance, the Claimant says that liability must have been admitted or established before such a disclaimer clause becomes operative. Time begins to run from the date of repudiation and not (as Clause 19 suggests) from the date of the occurrence of the fire. The Claimant further contends that by its own admission, the Defendant denied the Claim in December, 2010- some eight months after the occurrence of the fire. The Claimant also contends that such delay is significant and has legal consequences.

10. The Claimant goes on to submit that, be that as it may, the Defendant disclaimed liability; it did not repudiate the contract of insurance. It would appear that the Defendant was intending to keep the door open and was promising that it would continue to look at and consider the Claim. According to the Claimant, the phrase "on the happening on (sic) any loss or damage" in Clause 19 suggests that arbitration or legal action is all that remains to be done to the Claim. The Claimant contends that the Clause presupposes a valid Claim against the Defendant has been made but until the Defendant accepts the Claim as valid or denies liability there will be nothing to arbitrate or litigate. The Claimant submits that the Defendant finally purported to deny liability on the 5th November, 2012 some 2 ½ years after the date of the Claimant's loss on the 27th April, 2010.

11. According to the Claimant, by the Defendant's own admissions the Defendant also purported to deny liability through their agent Axis on the 21st December, 2010. The Claimant says that the Defendant disregarded same and substituted their own repudiation on the 5th November, 2012 approximately one month after Comprehensive Insurance Brokers Limited (CIBL) (the Broker/Agent of the Defendant) sought the appointment of an Arbitrator in accordance with Clause 19 on (sic) the Condition of the Policy well within the limitation period of 12 months stipulated by the said clause.

12. The Claimant further says that a letter of advice dated 21st January, 2011 from CIBL as agents for the Defendant to the Defendant's affidavit in response was left unanswered for 18 months while the Defendants carried out investigations and review of the Claim. The Claimant submits that such a lapse of time or delay constitutes conduct inconsistent with the continued validity of the policy even though the Defendant did not intend it to have that result. The Claimant further submits that delay for such length of time is evidence that the Defendant in truth decided to accept liability and that the Claimant was relieved from the other condition (sic) of the policy inclusive of Clause 19.

13. It is the Claimant's contention that the conduct and declaration of the Defendant are of a character as to justify the belief that waiver was intended which the Defendant acted upon and that the principle of equitable estoppel is applicable. The Claimant further contends that it would be inequitable and unconscionable for the Defendant to plead the time bar after raising the expectation in the mind of the Claimant that the time bar would not be relied upon. The Claimant says that it was urged verbally by the Defendant's representatives and co-insurers not to issue proceedings against the Defendant and submits that such encouragement creates an express, or, in the alternative, an implied agreement between the parties that the Defendant would not seek to rely on Clause 19 whilst further requests were being made by the Defendant, the Broker, or agents for further information.

14. In relation to the non-disclosure allegation, the Claimant refers to paragraphs (d) and (e) of the grounds of the application which allege non-disclosure. The Claimant submits that the onus of proving non-disclosure is on the Defendant and the Claimant puts the Defendant to strict proof thereof. Further, the Claimant submits that if there is non-disclosure (which is not admitted) same does not entitle the insurer to avoid the policy. The Claimant submits that the duty of disclosure comes to an end when the contract is made. The loss location has been in existence as a bonded warehouse for ten years. The Claimant further contends that the broker/agent of the Defendant, that is, CIBL, did obtain the subscription of the three participating insurers, inclusive of the Defendant company, to write their lines or "endorse the slip" signifying their consent to the contract of insurance on the 25th March, 2010, 17th March, 2010 and 18th March, 2010 . Thus, the

contract was made on the "21/1010" (sic). The Claimant says that it was completed or finalized approximately one month from the occurrence of the fire.

15. Accordingly, it is the Claimant's contention that the action was not time barred by Clause 19 of the Conditions of the Policy and there is nothing in the Claim that can be construed as an abuse of process of the Court. In the circumstances, the Claimant contends that the Application ought to be dismissed.

**ISSUES**

16. From the evidence, the issues which arise are fairly straightforward. The Court must determine the following:
    - **(i) Whether Clause 19 of the Conditions of the Policy of Insurance applies?**
    - **(ii) Whether the Claimant's Claim Form and Statement of Case disclose no grounds for bringing a claim and/or whether the Claimant's Claim Form and Statement of Case are an abuse of the process of the Court and therefore whether they ought to be struck out?**

**(i) Whether Clause 19 of the Conditions of the Policy of Insurance applies?**

17. It is not in dispute between the parties that a contract of insurance was entered into between them. However, they dispute the applicability of Clause 19 of the Conditions of the Insurance Policy which provides as follows:

*"In no case whatsoever shall the Insurers be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."*

**LAW AND ANALYSIS**

**When time begins to run**

18. In its Response, with respect to when time begins to run under clause 19, the Claimant submitted that such could only occur once liability has been established and in its written submissions the Claimant states that the case law seems to suggest that disclaimers that employ the phrase "twelve calendar months from the date of such disclaimer" and not as in the case "twelve calendar months from the happening of the loss or damage" would more likely be upheld by the Court. Reliance was placed on the case of **Yorkshire Ins. Company Limited v. Craine [1922] AC 451** where Lord Atkinson (at page 546) stated as follows:

*"on the happening of any loss or damage the company may so long as the claim is not adjusted...these words suggest that adjustment is all that remain to be done to the claim. They presuppose that a valid claim against the company has been made and that all that remains to be done is to adjust the amount of it. If no claim had been made or a claim is so defective that it gives no right to obtain money under the policy, it would be ridiculous to refer to the adjustment of it, until the company accept the claim as valid they may insist they owe nothing under the policy and a cipher cannot be adjusted..."*

19. I am of the view that the dicta of Lord Atkinson relied upon by the Claimant must be appreciated in its context. The quoted statement was made with reference to condition 12 of the Policy of Insurance therein and turns on the specific wording contained therein. His Lordship's dicta speak to the proper construction of that particular condition, which is not the same as the wording of Clause 19 in the instant matter. Rather, condition 12 therein expressly refers to circumstances where liability may not be incurred provided the claim is not adjusted. This is not the same as the Clause 19 provision which contains no such wording. Accordingly, I am of the view that the **Yorkshire** case does not assist this Claimant as it does not apply here. Moreover, I am strengthened in my view when I consider the cases of **Super Chem Products Limited v. American Life and General Insurance Company Ltd & Others Cv. No. 158 of 1997 and [2004] UKPC 2** and **Tysa Company Limited v. Guardian General Insurance Company Limited CV2009-04349**, both of which considered provisions in the respective insurance policies that were worded in much the same way as Clause 19 of the instant matter.

20. In the case of **Super Chem Products Limited v. American Life and General Insurance Company Ltd & Others** the Court of Appeal of Trinidad and Tobago and thereafter the Privy Council[1] considered a limitation condition, Condition 19, which provided that *"In no case whatsoever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."*As in the case at bar, the insurers in **Super Chem** contended that the action by the Appellant was out of time. In **Tysa Company Limited** the Court considered whether, as the action was filed more than 12 months after the fire, the Defendant was entitled to deny liability under Condition 15 of the Policy which provided that *"In no case whatever shall the Insurers be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration"*.

21. Accordingly, it is the approaches of the Courts in the aforementioned two cases which are applicable as a guide as to when time begins to run under Clause 19 and not the **Yorkshire** case relied upon by the Claimant. In both **Super Chem** and **Tysa** the Courts

[1] CV No. 158 of 1997 and [2004] UKPC 2.

considered the relevant time period as beginning to run from the date on which the loss or damage occurred- ***"the happening of the loss or damage."*** In **Super Chem,** this was the approach accepted by the trial judge[2] as to when time began to run and such was not the subject of the appeals. Similarly, in **Tysa** Rajkumar J. stated that-

> *"A claimant can run afoul of the equivalent of Condition 15, (**a twelve month time limit from (the) date of incident giving rise to the claim"**.* [Emphasis mine]

Rajkumar J. determined that 12 months from the date of the fire in that case would be the 24th September, 2009, the fire having occurred on the 24th September, 2008.

22. Accordingly, it is clear that with respect to Clause 19 in the instant matter, time begins to run from the date of the incident giving rise to the claim- the date of the fire at the Claimant's warehouse. In the Amended Claim Form, the Claimant stated that the fire occurred on the 27th April, 2010. The Claim Form and Statement of Case were filed on the 28th March, 2014, more than 12 months after the date of the fire.

23. In **Super Chem**, a fire occurred on the 3rd April, 1990 at the premises. On the 19th September 1991 the insured commenced proceedings against the insurers under the stock policy. Thus, more than a year had elapsed from the date of the incident giving rise to that claim and the claim was held to be time-barred under Condition 19 of the stock policy (which is the equivalent of Clause 19 of the Conditions of the Insurance Policy in the case at bar) unless Super Chem Products Limited was able to establish waiver or estoppel.

24. In the instant case, having sought by letter to institute arbitration proceedings outside of the twelve-month limitation period[3] and having also filed its Claim Form and Statement of Case beyond the said twelve-month period, the Claimant's Claim would be time-barred unless waiver and/or estoppel could be successfully established.

**Waiver and/or Estoppel**

25. In response to the Defendant's reliance on the limitation provision contained in Clause 19 of the Conditions of the Insurance Policy, the Claimant seeks to rely on the defence of

[2] See Super Chem Products Limited v. American Life and General Insurance Company Limited & Others H.C.A. 3141 of 1991 and H.C.A. 845 of 1992 at page 11 where Sealey J. stated "It is not in doubt that the plantiff commenced proceedings more than twelve months from the happening of the event, the fire."

[3] See PN 4- letter dated 31st October, 2012 from Comprehensive Insurance Brokers Limited to Furness Anchorage General Insurance Limited.

waiver and/or estoppel. The question thus is whether the Claimant has established the necessary ingredients for a successful plea of waiver or estoppel to defeat the limitation defence under the Clause 19 of the Conditions of the Policy of Insurance[4].

26. In **Super Chem,** when considering the legal doctrines of waiver and estoppel, Lord Steyn stated as follows:

> *"The concepts of waiver and estoppel have often been explained. Generally, waiver is of a unilateral character: it involves giving up something. Estoppel by representation is bilateral in character and focuses on the impact on the representee. This is, of course, an extremely general statement. But it is sufficient for present purposes since* ***it is common ground that waiver and estoppel can only be established, in the circumstances of the present case, if the insurers made a clear and unequivocal representation to the insured that they would not rely on the time bar****: Woodhouse AC Israel Cocoa Ltd. v. SA Nigerian Produce Marketing Co. Ltd. [1972] AC 741, at 753, per Lord Hailsham of St. Marylebone, LC.* ***If the insured cannot establish such a clear and unequivocal representation both pleas must fail****."*[5][Emphasis mine]

27. Applying the aforementioned, the evidence must establish that the Defendant [insurers] made a clear and unequivocal representation to the Claimant [insured] that they would not rely on the time bar stipulated in Clause 19 aforesaid.

28. In seeking to establish that waiver or estoppel applies, the Claimant raised the following points in its Response filed on the 11th November, 2014. The Claimant contends that by its own admission, the Defendant denied the Claim in December, 2010, some eight months after the occurrence of the fire. The Claimant contends that such delay is significant and has legal consequences. The Claimant further contends that the Defendant did not repudiate the contract of insurance, even if they disclaimed liability and further suggests that the Defendant was intending to keep the door open by promising that it would continue to look at the Claim. The Claimant says that a letter of advice dated the 21st January, 2011 from Comprehensive Insurance Brokers Limited (CIBL) as agents for the Defendant was left unanswered for 18 months while the Defendant carried out investigations and review of the Claim. The Claimant alleges that such a lapse of time constitutes conduct inconsistent with the validity of the policy even though the Defendant

[4] See paragraph 8 of Super Chem Products Limited v. American Life and General Insurance Company Limited [2004] UKPC 2.

[5] Para 21 of the Judgment of Lord Steyn in Super Chem Products Limited v. American Life and General Insurance Company Limited [2004] UKPC 2.

did not intend it to have that result. The Claimant further claims that delay for such length of time is evidence that the Defendant in truth decided to accept liability and the Claimant was relieved from the other condition of the policy inclusive of Clause 19.

29. According to the Claimant, the Defendant, by its own admission, finally purported to deny liability on the 5th November, 2012, some 2½ years after the date of the Claimant's loss on the 27th April, 2010. The Claimant goes on to say that the Defendant by its own admission, purported to deny liability through their agent Axis on the 21st December, 2010 and the Defendant disregarded same and substituted their own repudiation on the 5th November, 2012, approximately one month after CIBL, the broker/agent of the Defendant, sought the appointment of an Arbitrator in accordance with Clause 19 of the Conditions of the Policy, well within the limitation period of 12 months stipulated by the said Clause. Moreover, the Claimant contends that it was urged verbally by the Defendant's representatives and co-insurers not to issue proceedings against the Defendant and that such encouragement creates an express, or in the alternative, an implied agreement that the Defendant would not seek to rely on Clause 19 whilst further requests were being made by the Defendant.

30. Having considered the aforementioned points raised by the Claimant in light of the evidence adduced, I am of the view that the Claimant has not be able to establish that there was any clear and unequivocal representation on the part of the Defendant that they would not rely on the time bar.

31. Before referring in detail to the evidence before me, I wish to make clear that the Claimant appears to have fallen into error in its repeated reference to CIBL being the broker/agent of the *Defendant*. Rather, the documents exhibited by the Claimant indicate that CIBL was in fact the broker /agent of the *Claimant*[6]. The Claimant annexed a copy of the Broker's slip to its Statement of Case filed on the 28th March, 2014. The said slip, annexed and marked "C", is signed by Comprehensive Insurance Brokers Limited and addressed to the Defendant. It begins "*In confirmation of the **insured's** instructions we are pleased to advise that we have the following..."* Further, by letter dated the 25th January, 2011 CIBL wrote to Axis (Eastern Caribbean) Limited seeking to review the Claim in light of the issue pertaining to the loss location. Thus it appears from the evidence, that CIBL was acting as agent of the Claimant, in obtaining the policy of insurance and attempting to negotiate a settlement after the occurrence of the fire. I note

[6] I have noted letter of the 31st October, 2013 attached as "D" to the affidavit of Mr. Sawh filed on the 11th November 2014. This letter was written to the Claimant by CIBL which refers to action potentially being taken by the Claimant against the Defendant and CIBL? However, save for this letter all correspondence exhibited suggests CIBL was acting for the Claimant.

that the affidavit of Brain Sawh, managing director of the Claimant, filed on the 11th November, 2014, at paragraph 3 refers to CIBL as the agent of the Defendant but again this appears to be unsupported on the evidence. For example, at paragraph 7 of his affidavit, Mr. Sawh says that *"I was not in the country in December, 2010 and on my return was shown a letter of 21/12/2010 from the Defendant agents Axis which purports to deny liability... by letter of the 25/1/11 CIBL wrote challenging their (sic) the Defendant their principals pointing them to Memorandum 21 Errors Clause....calling upon them to settle the claim."* It is trite law that an agent acts on behalf of its principal and so, by Mr. Sawh's own statements, CIBL's challenging of the Defendant's denial of liability under the errors clause and calling on them to settle is manifestly inconsistent with any agency relationship with the Defendant and instead supports the view that CIBL was in fact acting on behalf of the Claimant.

32. Annexed to the affidavit of Prakash Nandlal are a series of letters, the authenticity of which has not been disputed by the Claimant. The first exhibit "PN1" is a letter from Mark Nazum of Axis (Eastern Caribbean) Limited ("Axis") to Troy Gosine of Comprehensive Insurance Brokers Limited dated the 12th May, 2010. The letter begins *"We refer to our site meetings of the 29th April at Chanka Trace and 5th May at the Insured's Diego Martin branch and confirm we act under instructions from Furness Anchorage Limited and co-insurers."* During submissions, Attorney for the Claimant attempted to raise, for the first time as an issue, whether Axis was in fact acting as the agent of the Defendant. I note that in the letter that followed, CIBL continued to attempt to negotiate with Mr. Nazum, without raising any issues as to the agency relationship between his company and the Defendant, and further, no mention was made of this issue in the Claimant's Response submissions (filed on the 11th November, 2014) to the Notice of Application and affidavit in support, made after the Claimant would no doubt have had sight of the annexed exhibits referred to above. Yet further, no mention was made of same in the Claimant's written submissions filed on the 25th November, 2014. The Defendant has not claimed that Axis was not its agent and the Claimant has raised no evidence in support of its last minute assertion questioning such agency in oral submissions. Accordingly, I attach no weight to that argument.

33. Returning to a consideration of the correspondence, the letter dated the 12th May, 2010 from Axis to CIBL stated that-

> *"in view of the foregoing, there are concerns that the Chanka Trace location had not been declared prior to the fire and as such* ***Insurers are exercising a full reservation of rights*** *that requires our continuing enquiries on a* ***without prejudice basis****. With this in mind we request the following information and records... Finally* ***without prejudice****, please note*

*that on review of the foregoing documents additional information may be requested."*

34. In seeking to establish waiver and/or estoppel the Claimant alleges that the delay which occurred while the Defendant carried out investigations and review of the Claim amounted to evidence that they decided to accept liability and that the Claimant was relieved from Clause 19 of the Policy. This assertion is flawed both in fact and law. From the letter of Axis dated the 21st December, 2010, it is clear to CIBL that the Defendant denied liability from as early as that date, though the Claimant referred to same as a "purported" denial of liability despite the clear wording of the letter which states that ***"Having concluded that the Chanka Trace location had not been declared prior to the loss, Insurers advise that they are unable to assist your client on this occasion and they deny liability."***[7] [Emphasis added]

35. Insofar as the Claimant wishes to rely on the information and records requested in the letter of the 12th May, 2010 and the investigation of the claim which flowed therefrom, Axis clearly indicated that such was being done on a without prejudice basis, with the Insurer fully reserving its rights, one of which would no doubt be the right to rely on the limitation clause under the policy of insurance. The Claimant alleges that the Defendant was intending to keep the door open and was promising that it would continue to look at and consider the Claim. The mere fact that the insurer continues to investigate the claim by no means in and of itself constitutes waiver/or estoppel.

36. In **Super Chem** Lord Steyn stated as follows:

*"...insurers are entitled to investigate liability and quantum at the same time and to negotiate about both at the same time, and often prudence will require them to do so. Moreover, the mere fact that a party has continued to negotiate with the other party about the claim after the limitation period had expired, without anything being agreed about what happens if negotiations break down, cannot give rise to a waiver or estoppel: Hillingdon London Borough Council v. ARC Ltd (No. 2)[2000]3 EGLR 97 at 104, per Arden LJ; Seechurn v. ACE Insurance SA [2002] 2 Lloyd's LR 390."*

37. Lord Steyn went on to find that nothing in the exchanges in that case was therefore capable of creating a representation that the time bar would not be relied on. I note that in this case, through its agent, Axis, the Defendant conducted investigations and moreover, had made it patently clear that they were doing so on a without prejudice basis.

[7] See exhibit "PN 2" attached to the affidavit of Prakash Nandlal filed on the 28th October, 2014.

They were express in their contention that they fully reserved their rights, which as I said before, would have included the right to rely on the limitation condition contained in Clause 19. I accordingly find that there is nothing in the exchanges between the representatives of the Claimant and the Defendant that amounts to a representation, far less a clear and unequivocal representation, that the Defendant did not intend to rely on the time bar in Clause 19 of the Conditions of the Policy.

38. The Claimant also claimed that it was urged verbally by the Defendant's representatives and co-insurers not to issue proceedings against the Defendant. The Claimant has adduced no evidence to support this contention. The Claimant did not provide any details such as the names of the persons who allegedly had such discussion or the date on which such discussions were had. The importance of such an allegation in seeking to establish waiver or estoppel with respect to reliance on the time bar clause surely could not have been lost on the Claimant, yet all that was provided to this Court was a bald assertion. In the circumstances, I am unable to attach any weight to this contention.

39. In its written submissions, the Claimant contends that at no stage whatsoever did the Defendant, either themselves, or through their agents, state that any reliance was to be made on Section 19. The Claimant raises this point in seeking to establish that the Defendant, by its conduct, waived its ability to rely on the Clause 19 time bar. Reference is made to the case of **Fortisbank SA v. Trenwick Int. Ltd [2005] Lloyds Ref 465** and the West Indian case of **Parey v. Colonial Fire and General Insurance Co. Ltd. (1972) 22 WIR 480**. Reference was made to the dicta of Malone J. at page 485 where it was stated that-

> *"There was no intimation that it was the intention of the Defendant, if sued, to rely upon condition 19...for it cannot be right....that an insurance company which for its own purposes obtained the forbearance of the insured and thereby delayed payment...should by the assertion of a right it had waived and had not clearly intimated it had reasserted, be able to deny all payment to the insured*."

40. The Claimant, having referred the Court to the **Fortisbank** case, did not elaborate further as to what aspect of the case it sought to draw the Court's attention. Having read the case, the Court remains in the dark as to how the said case was intended to advance the Claimant's argument, particularly in light of the fact that the Court awarded summary judgment in favour of the defendant underwriters and concluded that waiver or estoppel did not apply.

41. The Claimant also referred to the above quoted passage of Malone J. in **Parey**. In that case, the Court found that the insurance company had obtained the forbearance of the insured for its own purpose- to await the completion of an inquest. By so doing, the Court found that the Defendant had waived its right to rely on the limitation clause in condition 19. The Court went on to find that in such circumstances, the Defendant insurer could not deny all payment to the insured by simply reasserting that right where it had not clearly intimated such re-assertion. The requirement of notice (of the reassertion of the right) thus is premised on the waiver which was deemed to have occurred by the insurer seeking the forbearance of the insured for its own purpose. That is not the case in the instant matter. There is nothing on the evidence to suggest that the Defendant obtained the forbearance of the Claimant for its own purpose which in turn, may be deemed to constitute a waiver, particularly given the **Super Chem** ruling which says that a mere investigation of the claim by the insurance company does not in and of itself amount to waiver or estoppel. As stated above, the Claimant alleged that the Defendant urged it verbally not to institute proceedings but did not provide any evidence in support of this claim, which was accordingly rejected by this Court. There being no such waiver, the need for notice in order to re-assert the waived right does not arise in the instant matter and so the **Parey** case is inapplicable here.

42. At paragraph 12 of its written submissions, the Claimant claimed that the Defendant disclaimed/denied liability on the 21st December, 2010 but did not repudiate the contract until the 5th November, 2012, almost two years after the disclaimer.

43. The Claimant referred to exhibits **DN2** and **DN5** of the Defendant's Application. Presumably, its intention was to refer to **PN2** and **PN5** of same, as DN2 and DN5 do not exist. **PN2** is the letter of the 12th May, 2010 from the Defendant denying liability on the basis that the loss location had not been declared prior to the loss, after further and final consideration by the Insurers. **PN5** is the letter dated the 5th November, 2012 from the Claims Manager of the Defendant to CIBL denying liability on the same basis and advising that their file was now closed. Reference was made by the Claimant to the case of **Juridine (sic) v. National British & Insurance Co. Ltd. [1915] AC 49 (sic)** where the Claimant says that Lord Dunedin stated at page 507 that *"when they repudiated the claim altogether and said that there was no liability under the policy- that necessarily cut the effects of Clause 17".* From the citation it is clear that the Claimant intended to refer not to "Juridine" but **Jureidini v. National British and Irish Millers Insurance Company Limited [1915] AC 499.**

44. That quoted paragraph of Lord Dunedin is similar in substance to the oft- quoted passage of Viscount Haldane L.C. in the same case where his Lordship stated that *"I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term*

*of the contract still being in force".* **Jureidini**, and in particular this specific passage by Viscount Haldane L.C., was considered at length by the Privy Council in **Super Chem.** In delivering the judgment of the Board, Lord Steyn stated that-

> *"Firstly, properly understood the insurers' defence of arson was not a repudiation of the contract but rather a defence based on the contract."*

Lord Steyn went on to state that-

> *"With profound respect it must be said that Viscount Haldane's statement of principle was either wrong or required such radical qualification as to leave it with virtually no useful content. The Board has felt it appropriate to address this point because Viscount Haldane's statement has bedevilled our commercial law for too long."*

45. His Lordship went on to state that the observation of the other Law Lords in **Jureidini** and the assessment of that case in subsequent decisions of high authority have demonstrated that Viscount Haldane's observations do not correctly state the effect of that decision.

46. In the later case of **Sanderson & Son v. Amour & Co Ltd. 122 SC (H.L.)117** Lord Dunedin (whose passage in **Jureidini** the Claimant in the instant matter has quoted for support) stated as follows:

> *"...I should say a single word as to the case of Jureidini. That case has in my view no application, for the simple reason that the clause of reference there was not a reference of all disputes, but only a reference as to the evaluation of loss. In other words, the clause was not a clause of the universal sort."*

47. In **Sanderson**, Viscount Haldane and Lord Shaw of Dunfermline expressly agreed with Lord Dunedin's opinion. Lord Steyn stated that-

> *"the ratio of Jureidini is based on the special wording of the arbitration clause and the fact that no dispute as to quantum had arisen".*

48. The learned Judge went on to conclude on the **Jureidini** issue that –

> *"It follows that as a matter of precedent Jureidini is not an authoritative decision on insurance law or general contract law. If it has any*

*remaining force it would be in the field of arbitration law, but then only on an arbitration clause on all fours with the clause in that case. The Board rejects all the insured's arguments on the Jureidini issue in both actions."*

49. Accordingly, it may be said that the passage in **Jureidini** referred to by the Claimant turned on the specific factual circumstances of that case- the arbitration clause therein- and ought not to be taken as being of general application. The clause in dispute in the case at bar is not on all fours with the arbitration clause in **Jureidini** and so the Claimant's arguments based on **Jureidini** are rejected by this Court.

50. Having considered all of the evidence, I find that there was no representation, far less a clear and unequivocal representation, made to the Claimant by the Defendant, whether by its conduct or otherwise, that the latter did not intend to rely on the Clause 19 time bar. Accordingly, the Claimant's plea of waiver and estoppel fail in respect of the said time bar and Clause 19 applies.

51. In its Response and Submissions, the Claimant refers to the Defendant's contention that the loss location was not disclosed and expands upon the duty of disclosure. In the Response, the Claimant refers to paragraphs (d) and (e) of the grounds of the Application and then embarks upon a discussion of the duty of disclosure and when same comes to an end. Accordingly, it appears that the Claimant's legal points made with respect to the non-disclosure issue hinge on paragraphs (d) and (e) of the Defendant's Notice of Application. The said Notice of Application is an application to strike out for filing the claim which seeks recovery of monies outside of the time limit stipulated in Clause 19, which in turn expressly provides for non-liability on the part of the Insurer when that time limit has expired. Insofar as paragraphs (d) and (e) refer to the loss location not being declared and accordingly non-disclosure it is only mentioned in the course of setting out the time frame and seeking to establish that the Claimant filed their action out of time, with the result that the Defendant could deny liability under Clause 19. The non-disclosure was thus mentioned in a procedural context and was not an attempt to advance the substantive issue as to whether the Defendant was in fact permitted to deny liability as they did in discussions with CIBL on the basis of the non-disclosure of the loss location. The Claimant seeks to treat with the issue of the loss location substantively in its Response and Written submissions, but I am of the view that such consideration is not relevant to the Notice of Application to strike out on the basis of having filed out of time.

52. The Claimant filed its action beyond the time limit stipulated in Condition 19 of the Insurance Policy thereby entitling the Defendant to deny liability, as it did, unless the Claimant could establish that waiver or estoppel applies, which it could not. The substantive consideration of the issue of the non-disclosure of the loss location is an issue

that would stand to be resolved at the trial, should the Claim reach that point, as it is the crux of the matter- its resolution sitting at the heart of whether the Claimant ought to succeed in recovering the $4.2 million claimed. I wish to emphasize that that would be the position should the Claim advance further beyond this point to a trial, which brings me to the question of whether the Defendant's Application to have the Claimant's Statement of Case struck out ought to succeed.

**(ii) Whether the Claimant's Claim Form and Statement of Case disclose no grounds for bringing a claim and/or whether the Claimant's Claim Form and Statement of Case are an abuse of the process of the Court and ought to be struck out?**

53. **Rule 26.2(1)(b)** and **(c)** of the **CPR** provide that the court may strike out a statement of case or part thereof if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court or that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim.

54. According to **Zuckerman on Civil Procedure Principles of Practice**[8]**:**

> ***"The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion...In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay ."*** [Emphasis mine]

55. **The White Book on Civil Procedure 2013** considers what constitutes a Statement of Case which discloses no reasonable grounds for bringing or defending the claim. At page 73, the authors of **The White Book** state that Statements of case which are suitable for striking out (on the basis that they disclose no reasonable grounds for bringing or defending the claim) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides.

56. **The White Book** also addresses at page 74, the issue of a Statement of Case which amounts to an abuse of the court's process. The authors are careful to state that the categories of abuse of process are many and are not closed. The authors then go on to

[8] Zuckerman on Civil Procedure Principles of Practice, 3rd Ed.; Sweet and Maxwell 2013 at page 373

explore some of the categories which have been recognized in the case law to date, one of which is pointless and wasteful litigation. However, in **Zuckerman on Civil Procedure**[9], the author cautions against invoking the abuse of process jurisdiction, saying this:

> *"Since abuse of process turns not on the interpretation of rules but on the use made of them, there can be no hard and fast test capable of simple application. The court must assess the effect that a particular process would have on other parties or the system.*
>
> *Given that power to deal with abuse of process is a residual jurisdiction its use is predominantly appropriate in situations where its exercise is required in order to reach a just conclusion.* ***There is no need to use this power where the court can find a satisfactory solution under the CPR or other legislation. If a claim may be dismissed on the ground that it is time-barred, it would normally be pointless to describe the act of initiating such claim as an abuse of process***[10]*."* [Emphasis mine]

57. As I indicated above, Clause 19 of the Conditions of the Insurance Policy applies and the Defendant is not liable for the Claimant's loss or damage, the Claimant having filed the proceedings outside of the twelve-month time limit and having also attempted to institute arbitration proceedings outside of that time. Given the time bar that operates to preclude liability on the part of the Defendant, the Claimant has no grounds for bringing the claim to recover monies from the Defendant under the policy for the loss or damage which occurred.

58. In its closing submissions, the Defendant submits that the Claimant's claim is essentially for recovery of the sum allegedly insured for the location lost by fire on 27th April, 2010, pursuant to the Policy of Insurance executed with the Defendant. The Defendant submits that their cause of action is therefore based on the policy and the Claimant would have no cause of action, if the policy precludes their ability to initiate a claim and or recover. This Court accepts the Defendant's submissions in that regard and finds that the Claimant's Claim is thus without ground, as the applicability of Clause 19 precludes their ability to recover the sums claimed.

59. In the circumstances, the Claimant's Claim Form and Statement of Case ought to be struck out pursuant to **Rules 26.2(1)(c)** of the **CPR,** as disclosing no grounds for bringing a claim. Having concluded that the Claim ought to be struck out pursuant to **Rule 26.2(1)(c)** of the **CPR**, there is no need to invoke the Court's abuse of process jurisdiction.

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[9] *Ibid* at page 621

[10] Ronex Properties Ltd. v. John Laing [1983] QB 398, [1982] e All ER 961,CA

60. In closing, this Court wishes to make two points. First, though the Defendant did not raise it, it is open to the Court in the circumstances of this case to award summary judgment in favour of the Defendant. **Rule 15.2** of the **CPR** provides that the Court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that, on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of the claim or issue. The Defendant not being liable to compensate the Claimant by operation of Clause 19 of the Conditions of the Insurance policy, the Claimant's claim accordingly has no realistic prospect of success. Though, **Rule 15.2** expressly speaks to the Court's power to award summary judgment on an application by either of the parties, it nonetheless appears from **Rule 25.1(b)** of the **CPR** that the Court may make an order for summary judgment on its own, without any such application having been made. **Rule 25.1(b)** deals with the Court's duty to manage cases, with **Rule 25.1(b)** providing that the Court must further the overriding objective by actively managing cases which may include deciding promptly which issues need full investigation and trial and accordingly disposing summarily of others.

61. **The White Book on Civil Procedure 2013** addresses **Rule 1.4(2)(c)** of the **UK CPR** which contains the same wording as **Rule 25.1(b)** of the CPR of Trinidad and Tobago. At page 12 thereof, it is stated that-

> *"According to r.1.4(2)(c), active case management includes deciding promptly which issues need full investigation and trial "and accordingly disposing summarily of others". In Practice Direction 26 (Case Management-Preliminary Stage: Allocation and Re-Allocation) (see para. 26PD.1) it is explained in para 5.2 that the court's powers to make orders for the summary disposal of issues which do not need full investigation and trial" include the power under r. 3.4 to strike out a statement of case, or part of a statement of case, and the power to give summary judgment where a claimant or defendant has no reasonable prospect of success in accordance with the provisions of Pt 24.* ***The court may use these powers on an application or of its own initiative****."* [Emphasis mine]

62. The second point which I wish to make concerns dealing with the issue of the applicability of Clause 19 as a preliminary issue since, as I stated earlier, the Claimant in its submissions appeared, apart from dealing with the time bar set out in Clause 19, to be delving into other issues that would form the subject matter of a trial. The issue of the applicability of Clause 19 and its limitation period imposed is best addressed as a preliminary issue as opposed of leaving same to be resolved at trial.

63. The overriding objective of the **CPR** is to enable the court to deal with cases justly.[11] Dealing with cases justly includes saving expense.[12] In **Rameshwar Maharaj and Vindra Maharaj v. Petroleum Company of Trinidad and Tobago CV 2012-01629** Seepersad J. considered the appropriate point at which a limitation issue ought to be resolved by the Court. Seepersad J. stated that-

> *"..having regard to the claimants' position that even the issue of limitation ought to be determined at the trial stage, the court had to consider whether or not it would embark upon the issue of limitation at this stage or consider it at the stage of the trial. The court looked and considered the relevant judgments as they operate to the limitation issue. The court considered the local Court of Appeal decision in Kenneth Julien v. ETECK in which their Lordships cited the dicta of Lord Millete in the case of Cave v. Robinson Jarvis & Rolfe (a firm)[2002]UKHL 18 and is of the view that in the circumstances of the instant case, the issue of limitation ought properly to be dealt with at this stage so as to avoid the possibility of the parties engaging in a trial and all the costs and inconvenience associated with that process and ultimately then, consider whether or not the limitation point is applicable."*

64. In light of the provisions of the CPR identified at paragraph [63] above, I have adopted a similar approach to my brother for the same reasons stated.

## DECISION

65. I find that the attempt at arbitration was made, and the Claim Form and Statement of Case were filed, beyond the 12 month time limit set out in Clause 19 of the Conditions of the Insurance Policy. The Claimant having been unable to establish waiver and/or estoppel, I find that Clause 19 of the Conditions of the Insurance Policy applies with the result that the Defendant is not liable to compensate the Claimant for loss or damage in connection with the fire of the 26th April, 2010. Accordingly, I find that the Claim Form and Statement of Case ought to be struck out for disclosing no grounds for bringing a Claim.

66. By its Notice of Application to strike out, the Defendant has also sought costs of the application and of the substantive matter. From the evidence I can see no reason why costs should not follow the event and so costs shall be awarded to the Defendant to be

[11] Rule 1.1(1) of the CPR
[12] Rule 1.1(2)(b) of the CPR

paid by the Claimant. The basis of quantification of such costs shall be by assessment in accordance with Part 67.11 of the CPR.

67. In light of the Court's findings the Order of the Court is as follows:

**ORDER:**

**(1) That the Claimant's Amended Claim Form and Statement of Case both filed on 29th September, 2014 be and are hereby struck out pursuant to Rule 26.2(1) (c) of the CPR.**

**(2) That the Claimant shall pay to the Defendant costs of this Application and the substantive Claim which are to be assessed in accordance with Part 67.11 of the CPR, in default of agreement.**

**(3) If after 30 days of this order no agreement on the quantum of costs is arrived at, then the Defendant to file and serve a Statement of Costs on or before 12th February, 2016 for assessment in accordance with Part 67.11 aforesaid.**

**(4) Thereafter, the Claimant to file and serve Objections, if any, on or before the 5th March, 2016.**

**Dated this 14th day of December, 2015**

**Robin N. Mohammed**
**Judge**