TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV NO. 2007-00373

BETWEEN

MAHARAJ BOOKSTORE LIMITED **Claimant**

AND

THE BEACON INSURANCE COMPANY LIMITED **Defendant**

Before the Honourable Justice P. Moosai

APPEARANCES:

Ms. V. Maharaj instructing Mr. R .L. Maharaj SC and Mr. Prem Persad-Maharaj for the Claimant
Ms Nyree Dawn Alfonso instructing Mr. Michael Quamina for the Defendant

JUDGMENT

1. Introduction

1. The Claimant in its claim form claimed the sum of $789,386.43 being: (i) $756,586.43 for stock consisting of books, stationery and the like; and (ii) $32,800.00 for business and office equipment, furniture, fixtures and fittings, under a policy of Insurance for goods which the Claimant alleges was destroyed in a fire on its premises on November 3, 2005. At the commencement of the trial item (i) was modified to read the sum of $753,056.83.

2. At all material times the Claimant operated a bookstore at business premises located at No. 117 Southern Main Road, Marabella.

3. By a policy of insurance dated September 29, 2005 the Defendant agreed to insure the Claimant against loss or damage by fire and other perils as follows: (i) $900,00 on stock, consisting of books, stationery and the like, the property of the insured, or held by it in trust on commission or for which it may be responsible, whilst contained in the building on the said premises: (ii)$50,000.00 on business and office equipment, furniture, fixtures and fittings, the property of the insured whilst contained in the said building.

4. On November 3, 2005 whilst the policy was in force, there was a fire at the Claimant's business premises resulting in loss and damage. The Claimant duly submitted its claim in writing for: (i) the sum of $756,586.43 with respect to the loss of stock; and (ii) the sum of $32,800 with respect to the loss of business and office equipment, fixtures and fittings.

5. By letter dated November 7, 2006 from The Bertrands Doyle Limited, Insurance Consultants and Adjusters for the Defendant, to the Claimant, the Defendant formally repudiated liability on the ground that there was a breach of condition 8 of the said policy in that the claim was fraudulent. Condition 8 of the said policy provides:

> "If any claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy, or if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured or, if any claim be made and rejected and an action or suit be not commenced within three months after such rejection, …….. all benefit under this Policy shall be forfeited."

6. In that said letter of November 7, 2006 the said Insurance Adjusters stated that the Claimant claimed the sum of $197,791.44 for purchases between the period July 12, 2005 to October 27, 2005 and provided 57 documents purporting to represent bills and

documents in support thereof. However they contend that a review of the documents revealed that at least 10 of the "Bills" and/or "Receipts" could qualify as false declarations on the low end of the scale, or deliberately fraudulent on the upper end, with the total sums represented by the false declarations/fraudulent documentation amounting to $117,263.56.

7. By letter dated November 28, 2006 the Defendant offered the Claimant purely by way of an ex gratia payment the sum of $225,000, which represented 50% of the adjusted loss figure.

8. By letter dated January 22, 2007 Attorneys for the Claimant wrote to the Defendant pointing out that the bills referred to in the Defendant's said letter of November 7, 2006 were not false declarations, fabricated bills or documents and that any errors in the submission of these bills were caused by mere oversight and accidental inaccuracy. The Claimant further indicated that there was no basis upon which the Defendant was entitled to repudiate liability.

9. The Claimant commenced proceedings on February 6, 2007 for the following sums which it alleges is due under the policy of insurance:

(i) the sum of $756,586.43 for stock consisting of books, stationery and the like allegedly destroyed in the said fire;
(ii) the sum of $32,800.00 for business and office equipment, furniture, fixtures and fittings allegedly destroyed in the said fire

10. The Defendant is asserting that the documentation supplied by the Claimant in support of its claim evidencing purchases for the period July 10, 2005 to September 12, 2005 is fraudulent. The said documentation relates to five different entities (see para 34 below for particulars).

2. The issue

11. The central issue that arises for determination is whether the defendant insurers are entitled to avoid the policy on the ground that there was a breach of condition 8 thereof in that the claim was fraudulent.

3. The Law

(i) The burden and standard of proof

12. The duty of the assured is not to make or present a fraudulent claim. Where the claim is in part genuine and in part fraudulent, whether or not the claim as a whole can be characterised as fraudulent depends on whether or not the fraud was substantial, that is not trivial or insignificant. The burden of proving fraud is on the Defendant who must satisfy same on the balance of probabilities. In ***Re H (Minors) (Sexual Abuse: Standard of Proof)***[1] Lord Nicholls of Birkenhead illustrated the approach to the civil standard of proof:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. **Fraud is usually less likely than negligence**. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established….." [Emphasis Added.]

[1] [1996] AC563 at 586-587

13. A principle universally applicable to all types of insurance contracts is that a contract of insurance is one based on the utmost good faith, and if the utmost good faith is not observed by either party, the contract may be avoided by the other party[2]. The duty of good faith and the corresponding right to disclosure will apply in such degree as is appropriate for the moment. Thus Lord Hobhouse in ***Manifest Shipping Company v. Uni Polaris Insurance Company ("The Star Sea")***[3] stated that "the content of the obligation to observe good faith has a different application and content in different situations." Similarly Lord Clyde construed the concept of utmost good faith in such a manner as to give it the degree of flexibility required to encompass both the pre-contract and post-formation contract stages, and to take account of the varying circumstances[4]:

> But once it is recognized that in a contract of insurance, and indeed in certain other contracts, an element of good faith is to be observed and that that element may impose certain duties particularly of disclosure between one party and the other, duties which may vary in their content and substance according to the circumstances, then a question may arise as to the utility of the concept of an utmost good faith or an uberrima fides. In my view the idea of good faith in the context of insurance contracts reflects the degree of openness required in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made.

(ii) Duty to make disclosure

14. **Halsbury's** on ***Insurance*** summarises the position with respect to the duty to make disclosure[5]:

> The duty to disclose material facts in a contract of insurance is mutual, although the occasions for disclosure by the insurers are rare since the facts material to the insurance are not, as a general rule, known to the insurers but only to the proposer for insurance. Particularly, it is the

[2] Halsbury's Laws of England, 4th edn, Vol 25, Insurance, 2003 Reissue, para 36.
[3] [2003] 1 AC 469 at [48]
[4] ibid [7]
[5] Halsbury's Insurance (n2) para 37

> duty of the proposer during the preliminary negotiations to make full disclosure of all material facts known to the proposer. This duty is a positive duty to disclose and a mere negative omission constitutes a breach. However it is sufficient if the facts disclosed put the insurers on inquiry and their inquiry would in the normal course elicit such further facts as may be material.

15. Thus a person proposing for insurance has a duty to disclose to the insurer all facts within his knowledge which are material to the assessment of the risk. Lord Mansfield in ***Carter v Boehn***[6] equated pre-contractual non-disclosure with fraud giving rise to the remedy of avoidance ab initio: "The keeping back [in] such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void."

16. **Halsbury's *Insurance***[7] also describes the relationship between the principle of the utmost good faith **after the contract has been made** and the duty of disclosure:

> **Continuation of the duty of good faith after conclusion of the contract.**
> The principle of utmost good faith has a continuing relevance to the parties' conduct after the contract has been made, at least in relation to a duty of disclosure. The extent of the duty depends on the particular circumstances but may arise in the cases of alterations of the risk, renewals and 'held covered' clauses, where the insurer has a right to information under the policy although not in the making of claims. However there is a clear distinction to be made between the pre-contract duty of disclosure and any duty of disclosure which may exist after the contract is made. In the latter case an injured party will not be able to avoid the contract as a whole but must rely on his contractual remedies.

17. In the instant case there is an express fraudulent claims clause. Condition 8 of the said policy provides:

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[6] (1766) 3 Burr 1905 at 1909
[7] Halsbury's Insurance (n2) 45

> "If any claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy, or if the loss or damage be occasioned by the wilful act, or with the connivance of the Insured or, if any claim be made and rejected and an action or suit be not commenced within three months after such rejection, …… all benefit under this Policy shall be forfeited."

18. In ***The Star Sea***[8], Lord Hobhouse articulated the view that once the parties are in a contractual relationship "the source of their obligations the one to the other is the contract (although the contract is not necessarily conclusive …..)." He went on to state[9] that "a coherent scheme can be achieved by distinguishing a lack of good faith which is material to the making of the contract itself (or some variation of it) and a lack of good faith during the performance of the contract." The former "derives from the requirements of the law which pre-exist the contract" and the latter "can derive from express or implied terms of the contract."

19. Clearly the duty of good faith applies when the insured makes a claim. This duty must also be observed by the insurer. While condition 8 of the said policy expressly provides for forfeiture of all benefits under the policy for the making of a fraudulent claim and if any fraudulent means or devices are used by the insured to obtain any benefit under the policy, it is also applicable "if any false declaration be made or used in support thereof." The effect of such a term is primarily a matter of construction of the term. **Malcolm Clarke**, ***The Law of Insurance Contracts***[10] rationalises that the insertion of such a term in a contract should be construed as being "fraudulently false" to avoid forfeiture by insurers for inadvertent and unintentional errors in the figures:

> If a statement is innocently or even carelessly false at the time of contracting that may well be enough to entitle the insurer to avoid the

[8] n3 para [50]
[9] n3 para [52]
[10] Malcolm Clarke, The Law of Insurance Contracts (2006) Volume 2, 27-B2

> contract but in a claim it is not. For a successful defence to a claim on the ground of false statement the falsity must have been wilful: in some degree the falsity must have been known to and, by inference, intended by the claimant. A controversial policy term on fraud is that which "forfeits" cover, if a statement in a claim is simply "false". Taken literally this makes "forfeiture" too easy for the insurer who checks the claim closely and finds inadvertent and unintentional errors in the figures. Courts in various countries have refused to interpret such a term literally but have read it in some degree as "fraudulently false". English courts are likely to take a similar line – not least because, absent any term of the policy, the (default) rule of law is that, for fraud, the Claimant's misstatement must be wilful: it must have been made intending to obtain an advantage, generally monetary, or put someone else at a disadvantage.

Thus the material part of condition 8 in issue in this case is underpinned by the notion of fraud.

20. In ***The Star Sea***[11] the House of Lords clarified the scope of the assured's duty in the presentation of his claim: the assured's duty in respect of the presentation of his claim is no wider than a duty not to make a fraudulent claim. In ***Lek v Matthews***[12] in respect of a fraudulent claim clause in an insurance contract, Lord Summer opined that a statement known to be false is fraudulent, but a misstatement made inadvertently or carelessly is not. In between a statement made recklessly, not caring whether it is true or false, is also fraud. This accords with the common law definition of fraud in the leading authority of ***Derry v Peek***[13]. Thus, as regards insurance law, fraud appears to be common law fraud[14].

(iii) Fraudulent devices

21. Condition 8 also proscribes the use of fraudulent means or devices (compendiously referred to as "fraudulent devices") to obtain any benefit under the

[11] n3 para 72
[12] (1927) 29 L1 L Rep 141, 145 [HL]
[13] (1889) 14 App Cas 337 [HL]
[14] n10 para 27-2B

policy. In the leading authority of ***Agapitos v Agnew ("The Aegeon")***[15] Mance LJ held that the juristic basis of the fraudulent claims jurisdiction (of which fraudulent devices is a sub-species thereof) lies not on section 17 of the Marine Insurance Act, 1906 [UK], but on a common law rule based on public policy. He drew a distinction between fraudulent claims and the use of fraudulent devices in the following manner:

> That some distinctions exist between fraudulent claims in the narrow sense of cases of no exaggerated loss, and the use of fraudulent devices is clear. A fraudulent claim exists where the assured claims, knowing that he has suffered no loss, or only a lesser loss than that which he claims (or is reckless as to whether this is the case). A fraudulent device is used if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie. There may however be intermediate factual situations where the lies become so significant that they may be viewed as changing the nature of the claim being advanced.

22. Mance LJ went on to consider the approach to the use of a fraudulent device[16]: What then is the appropriate approach

> 45 What then is the appropriate approach for the law to adopt in relation to the use of a fraudulent device to promote a claim, which may (or may not) prove at trial to be otherwise good, but in relation to which the insured feels it expedient to tell lies to improve his prospects of a settlement or at trial? The common law rule relating to cases of no or exaggerated loss arises from a perception of appropriate policy and jurisprudence on the part of our 19th century predecessors, which time has done nothing to alter. The proper approach to the use of fraudulent devices or means is much freer from authority. It is, as a result, our duty to form our own perception of the proper ambit or any extension of the common law rule. In the present imperfect state of the law, fettered as it is by section 17, my tentative view of an acceptable solution would be: (a) to recognise that the fraudulent claim rule applies as much to the fraudulent maintenance of an initially honest claim as to a claim which the insured knows from the outset to be exaggerated; (b) to treat the use of a fraudulent device as a sub-species of making a fraudulent claim—at least as regards forfeiture of the claim itself in relation to which the fraudulent device or means is used (the fraudulent claim rule may have a prospective aspect in respect of

[15] [2003] QB 556 (CA) at [30]
[16] Ibid at [45]

future, and perhaps current, claims, but it is unnecessary to consider that aspect or its application to cases of use of fraudulent devices); (c) to treat as relevant for this purpose any lie, directly related to the claim to which the fraudulent device relates, which is intended to improve the insured's prospects of obtaining a settlement or winning the case, and which would, if believed, tend, objectively, prior to any final determination at trial of the parties' rights, to yield a not insignificant improvement in the insured's prospects—whether they be prospects of obtaining a settlement, or a better settlement, or of winning at trial; and (d) to treat the common law rules governing the making of a fraudulent claim (including the use of fraudulent device) as falling outside the scope of section 17 (as advocated, though more generally, by Howard N Bennett in the article to which I have already referred in paragraph 36). On this basis no question of avoidance ab initio would arise.

23. Further Mance LJ at para. 37 stated:

37 What is the position where there is use of a fraudulent device designed to promote a claim? I would see no reason for requiring proof of actual inducement here, any more than there is in the context of a fraudulent claim for non-existent or exaggerated loss. As to any further requirement of "materiality", if one were to adopt in this context the test identified in the Royal Boskalis case [1997] LRLR 523 and The Mercandian Continent[2001] 2 Lloyd's Rep 563, then, as I have said, the effect is, in most cases, tantamount to saying that the use of a fraudulent device carries no sanction. It is irrelevant (unless it succeeds, which only the insured will then know). On the basis (which the cases show and I would endorse) that the policy behind the fraudulent claim rule remains as powerful today as ever, there is, in my view, force in Mr Popplewell's submission that it either applies, or should be matched by an equivalent rule, in the case of use of a fraudulent device to promote a claim—even though at the end of a trial it may be shown that the claim was all along in all other respects valid. The fraud must of course be directly related to and intended to promote the claim (unlike the deceit in The Mercandian Continent). Whenever that is so, the usual reason for the use of a fraudulent device will have been concern by the insured about prospects of success and a desire to improve them by presenting the claim on a false factual basis. If one does use in this context the language of materiality, what is material at the claims stage depends on the facts then known and the strengths and weaknesses of the case as they may then appear. It seems irrelevant to measure materiality against what may be known at some future date, after a trial. The object of a lie is to deceive. The deceit may never be discovered. The case may then be fought on a false premise, or the lie may lead to a favourable settlement before trial. Does the fact that the lie happens to be detected or unravelled before a settlement or during a trial make it immaterial at the time when it was told? In my opinion, not.

> Materiality should take into account the different appreciation of the prospects, which a lie is usually intended to induce on insurers' side, and the different understanding of the facts which it is intended to induce on the part of a judge at trial.

24. The public policy basis of the fraudulent claims jurisdiction has attracted some criticism. In that regard **Mac Gillivray on Insurance Law**[17] criticises para (c) of Lord Justice Mance's tentative view above [para 22 above] on the basis that "this is an elaborate test which will not be easy to apply, and one may question the necessity to extend the ambit of the fraudulent claim rule to conduct which is immaterial to the liability of the insurer. He is already protected by powerful defences against fraud which are not enjoyed by parties to other types of contract." **Malcolm Clarke**, ***The Law of Insurance Contracts***[18] echoed similar concerns on Mance LJ's test and considered the penal nature of same on consumers and small businesses.

(iv) Consequences of express fraudulent claims clauses

25. In the instant case there is an express fraudulent claims clause setting out the consequences of a fraudulent claim. Thus condition 8 stipulates that if any claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured to obtain any benefit under the policy, **then all benefit under the policy shall be forfeited**. Clearly once the Defendant can successfully invoke condition 8, the Claimant would not be entitled to recover any loss sustained as a result of the fire.

4. The evidence

26. I can now go on to examine the evidence.

27 The Claimant from 1994 operated the business of a bookstore at No. 117 Southern Main Road, Marabella. Typical of many businesses, the Claimant's operations initially

[17] Mac Gillivray on Insurance Law 10th edn (2003) 19-60
[18] n10 27-2B4

began on a small scale but grew albeit slowly over the years. For its records the Claimant maintained a purchase file, a sales file and a stock book.

28. In order to effect the said insurance, an officer of the Defendant responsible for the issuance of the said policy of insurance visited the Claimant's business premises and requested its stock book, which contained a record of the Claimant's stock as at June 2005.

29. The said officer inspected the stock book and viewed the stocks. He also advised the Claimant to keep a copy of its records in a place other than the business address in the event that some untoward event were to occur. As such the Claimant kept a copy of the stock, sales and purchase books at home.

30. Pausing there I hold that at the time of viewing and inspecting the Claimant's inventory the Defendant would have been satisfied that as at June 2005 the Claimant would have had in its possession stock valued at $900,000.

31. Whilst there was some attempt by Mr. Quamina in cross-examination to portray the Claimant as a company which was not very profitable, the fact remains that the Claimant had a significant amount of inventory at the time that the Defendant viewed and inspected its stock ($900,000). The Claimant's principal director, Seunarine Maharaj, confirmed that most of the Claimant's investment was in stock.

32. Additionally the Defendant focussed its intention on the Claimant's purchases between the period July 1, 2005 to October 2005 in the sum of $197,791.44, alleging that approximately $117,000 of that sum was fraudulent. Clearly the Defendant was suggesting that this was a significant acquisition of stock during this period. However from a general standpoint the Defendant never sought to address an equally important, although countervailing consideration, namely that the Claimant during that same period stated that it had sales of approximately $127,758.28, a significant sum, and sought to set off that sum from the amount claimed from the Defendant. In this regard the evidence

reveals that the high turnover was because it was the peak season when most parents would be looking to obtain their children's schoolbooks.

33. Finally on the issue of the Claimant's financial state, Seunarine Maharaj stated in chief that after the fire he was so traumatised over the loss of his business that he had to be admitted to the Medical Centre, San Fernando. When he came out he began having discussions with the Defendant. The Defendant requested that he show where he obtained funds to purchase the books and stocks. Initially he provided bank statements. The Defendant then requested proof that he had taken guarantees in order to have the capital to run the business. He provided the Defendant with proof of same. The Defendant also told him that it could not locate the owners with respect to some of the bills he submitted. He volunteered to locate the individuals upon being provided with a list of names. However the Defendant never provided him with such a list. The Defendant also requested that he send audited financial statements from a chartered accountant. At great cost he complied with that request only to be told by the Defendant that it did not need the information again. Surprisingly the Defendant never sought to challenge this evidence. This would suggest that the Claimant was able to satisfy the Defendant that it was capable of having the stocks contained in the said store.

34. As I indicated earlier, the Defendant is asserting that the documentation supplied by the Claimant in support of its claim evidencing purchases for the period July 10, 2005 to September 12, 2005 is fraudulent. The said documentation relates to five (5) different entities and the particulars of fraud pleaded are as follows:

1. Four (4) invoices from K & S Bookstore, St Mary's Village, Moruga dated between July 10 and September 10, 2005.

Particulars of Fraud

(a) There is no entity known as K & S Bookstore in St Mary's Village Moruga;

(b) The items described in the 4 invoices were never supplied to the Claimant

nor were they located at its premises at the time of the fire or at all.

2. Statement dated July 15, 2005 from Unique Services Limited in the sum of $12,188.22.

Particulars of Fraud

(a) The balance on this statement was altered from the sum of $2,985.72 to that of $12,188.22;
(b) The date on the Statement was inserted by an unknown and unauthorized person;
(c) Items from the body of the statement have been deleted, and
(d) The items described in this said statement were not part of the Claimant's stock at the time of the fire or at all.

(3) Invoice dated July 19, 2005 from Lexicon Trinidad Limited in the amount of $27,127.10.

Particulars of Fraud

Submitted as an invoice to evidence that items purchased and were part of stock when in fact the said document was a quotation and the items were never purchased by nor supplied to the Claimant.

(4) Three (3) invoices dated July 12 to September 12, 2005 from Caribbean Children's Press Limited totaling $11,641.60.

Particulars of Fraud

(a) The identity to which these items were sold has been obliterated by an unknown and unauthorized person

(b) The name of the Claimant was inserted by an unknown and unauthorized person as being the location where the items were to be shipped.
(c) These items were sold and delivered to S&R Bookstore, High Street, Siparia.
(d) The items described in the said invoices were not part of the Claimant's stock at the time of the fire or at all.

5. Bill dated August 13, 2005 from Mohammed Bookstore Associates Ltd. In the amount of $6,726.60.

Particulars of Fraud

(a) The identity of the entity to which these items were sold was adjusted from Moy's Book Store to read Maharaj Book Store;
(b) The address of the identity to which these items was sold was changed from Point (Fortin) to Point-a-Pierre, Marabella;
(c) These items were sold to Moy's Book Store;
(d) The items described in the said invoices were not part of the Claimant's stock at the time of the fire at all.

35. While the Defence contended that the fact that the Claimant continued to maintain its claim for the entirety of the sum claimed was evidence of its fraudulent design, in my view that is strictly not correct. While the entire sum was claimed, it is manifest that by its letter dated January 22, 2007, **and before it commenced these proceedings February 6, 2007,** the Claimant set out its true position. This was that with respect to the invoice from Unique Services, the Claimant accepted that the balance on the bill was $2,985.72 and not $12,188.22. Similarly with respect to Lexicon Trinidad Limited, the Claimant accepted that this document was a quotation and not a bill. Moreover the Claimant's Statement of Case adopted the position set out in the said letter.

36. In assessing the evidence of Seunarine Maharaj, I have factored in that he admitted he was doing something illegal by having Unique Services print certain texts

without the knowledge of the publishers. However while there were areas in which Seunarine Maharaj was not as precise as he should have been, I have formed the view that he is generally to be regarded as a credible witness. I have also factored in the somewhat inelegant drafting of his witness statement. One area of concern is his general assertion that as a result of complaints made by retailers to the wholesalers, he was "unable to purchase and/or refused to be sold, books by these wholesalers due to my underselling books. This form of competition prevented me from directly purchasing certain books at wholesale prices." His evidence did not support such a broad assertion. As it turned out he admitted that Caribbean Children's Press Limited was not one of the wholesalers that refused to sell him books. In my view that admission by itself does not suggest a sinister motive on the Claimant's part. I am of the view that the correct inference to be drawn, which the retailers themselves may not be willing to admit, is that the retailers themselves have found a way to maximise their returns by allowing retailers to purchase books in bulk from the wholesalers and obtain the maximum discount on same. In turn, those retailers would resell same to the other retailers even at times at a slightly higher markup. In effect such retailers would be competing directly with wholesalers. The testimony of Krishendath Ganga-Bissoon, the brother of Seunarine Maharaj, and Peter Ramnarine support the foregoing conclusion. I also factor in that we are a small society. News travels quickly so that wholesalers in the San Fernando area, and possibly all over, would be aware of retailers who were not playing by the book. I therefore do not accept the Claimant's broad assertion that it was unable to purchase books from wholesalers in the San Fernando area.

(i) Unique Services

37. When one looks at the document submitted by the Claimant to the Defendant, (document 9) it is manifest, as conceded by the Claimant, that Seunarine Maharaj wrote in things on that statement.

38. That statement is from Unique Services and Unique Services wrote in the name "Maharaj Bookstores" on the line for the name of the purchaser. Pausing there, while the

Defendant complained generally in these proceedings about endorsements made on documents, clearly in commercial transactions businessmen often make mistakes in describing purchasers, failing at times to recognize the distinction between companies and other trading entities. Hence in this case the Claimant, while a company, is wrongly described by Unique Services as "Maharaj Bookstore."

39. The said document also reveals:

(i) that on December 16 (the year must be 2004) on Invoice No. 6926 there was a **debit** in the sum of $4,400, with the balance owing by the Claimant to Unique Services as at December 16 being $4,400;
(ii) that on May 16, 2005 on Invoice No. 7023 there was a **debit** in the sum of $402.50, so that the balance owing by the Claimant to Unique Services as at May 16, 2005 was $4,802.50 ($4,400 +$402.50).
(iii) that on July 20, 2005, Unique Services **credited** the Claimant with the sum of $1,816.78 for schoolbooks received by it from the Claimant, thereby leaving a balance of $2985.72 owing by the Claimant to Unique Services ($4,802.50 - $1,816.78).

40. In the said document the Claimant admitted inserting on the address line the Claimant's address namely "117 Southern Main Road, Marabella." The Claimant also admitted putting the date "15-7-05" on that statement on the line marked "Date" which was previously left blank.

41. Additionally the Claimant inserted the word "BOOKS" on the two lines where Invoice No. 6926 and Invoice No. 7023 were situated, reflecting that both invoices pertained to books 25. The Claimant also went on to total the amounts in the column marked "Balance," namely added the sums $4,400.00 plus $4802.50 plus $2,985.72 and totalled them to be $12,188.22. Thereafter he wrote that sum of $12,188.22 in the middle of the statement and wrote the word "PAID" on same.

42. The Claimant explained that in submitting his claim for the said amount of $12,188.22, he did all of the above to make it easier for the insurance company to understand the transaction.

43. I have considered the Claimant's evidence on this issue as well as the entirety of the evidence in this trial and I accept the Claimant's contention that the error in the calculation was a genuine one not intended to be fraudulent or deceive anyone. Clearly the Claimant proceeded to add all the amounts in the balance column, in arriving at $12,188.22 not recognizing that the last figure in that balance column ($2,985.72) would have been the actual amount due and owing at the time.

44. Further the insertion of "117 SMR Marabella" by the Claimant simply reflected its address. As such no real complaint can be made of same.

45. With respect to the insertion of the date by the Claimant, much the same comment can be made. The inference can be drawn that it was intended to reflect the approximate date of the transaction.

46. With respect to the insertion of the word "BOOKS" by the Claimant with respect to Invoice No. 6296, the Claimant was absolutely correct on this score, even though the Insurance Adjusters wrote to Unique Services seeking to have them confirm that that purchase by the Claimant was for **stationery**, **not books**.

47. With respect to the insertion of the words "BOOKS' by the Claimant with respect to Invoice No. 7023, the evidence reveals that the said invoice related to flyers and call cards, not books. Again I do not attach such significance to the endorsement. The Claimant's conduct must be looked at in the light of the entire transaction involving claims pertaining to thousand of documents and possibly hundreds of thousands of items. In those circumstances mere misdescriptions do not automatically become fraudulent.

48. Moreover even that said document 9 was incomplete. Document "VM 4" which was admitted by consent reveals that there were further transactions after July 20, 2005. VM4 revealed that there was no outstanding balance by August 29, 2005.

49. Significantly the entire transaction between the Claimant and Unique Services supports the notion that commercial transactions among retailers of books have a level of fluidity such that books can be bought and paid for in cash, or there can be an exchange of books, or credit is given for some period. More than that the evidence in this case reveals a degree of harmony among retailers who would assist each other in, for example, getting rid of "dead stock" or, significantly, may assist fellow retailers who have been blacklisted by certain wholesalers and assist by purchasing items for them from these wholesalers. It is conduct not unknown in the corporate world. In this instance wholesalers who are also retailers seeking to exercise their power and influence in the industry over retailers whom they perceive to be not playing according to the rules.

50. Finally the manner in which these alterations were made on the said document leads one to the reasonable inference that there could not be the remotest possibility that there was any intention on the Claimant's part to dupe the Defendant. Seunarine Maharaj admitted he made those alterations. However the handwriting, save for the words "BOOKS," is so compellingly different (in Trinidad and Tobago it would be categorised as "crapaud foot") as to warrant such an inference being drawn.

51. Courts have to be vigilant to ensure that overzealous insurance adjusters, or even insurance companies do not propel inadvertent and unintentional errors to a higher level.

(ii) Lexicon Trinidad Limited

52. The evidence reveals that the Claimant submitted Lexicon's document dated July 19, 2005 in the amount of $27,127.10 as an **invoice** when in fact the same was simply a **quotation** for certain text books.

53. It is important to note that the Claimant, shortly after the Insurance Adjusters purported to repudiate liability on November 7, 2006, on January 22, 2007 accepted the Defendant's assertion that this was a quotation and not a bill.

54. In chief Seunarine Maharaj explained that this was a genuine error as the document was mistakenly placed either by him or his clerk in the purchase file. No doubt this gave him the impression that the items were already purchased. He went on to state that the quotation did not form part of the stock book list submitted to the Defendant and that he subsequently purchased books from Lexicon after the date of this quotation.

55. In cross-examination Seunarine Maharaj tried to provide the context in which he made this claim. He stated that he had called Lexicon to provide these goods, and Lexicon provided him with a quotation. However around that time he also started getting a lot of used books so there was no need to purchase the entire set of books on this quotation. Interjecting here, I factor in that he had also stated in chief that, even after the date of this quotation, he had purchased books from Lexicon.

56. He went on to explain that in preparing his claim, he was puzzled when he reached this bill. He therefore wanted this verified so he called one of his staff and asked if this bill was paid and he answered in the affirmative. It was in these circumstances that he marked "PAID CASH" on same.

57. Again I accept the Claimant's explanation as to the reason why he submitted a claim on this document. It seems to me the combined effect of the document being placed in the purchase file, his being puzzled and seeking verification from staff, the fact that he had subsequently purchased other books from Lexicon, considered against the background referred to earlier involving thousands of documents (para. 47) lead me to the conclusion that this was a genuine mistake made by the Claimant. However I am of the view that the Claimant should have exercised a greater degree of care, but its carelessness

in the circumstances does not transcend into recklessness, the minimum state of mind required to establish fraudulent intent.

58. While there was some attempt in cross-examination to suggest that the Claimant purposely sought to lead the court to believe that it was making no claim for the amount as same was not in the Claimant's stock book list, it seems to me that Seunarine Maharaj himself was confused as to the reason why it was stated like that in his witness statement. It appears to me that this was inelegantly drafted, and what the Claimant was trying to convey was that the items listed in the said document were not purchased by the Claimant, not that the original stock Book List containing its stocks up to July, 2005 reflected the purchase of any of the said items.

59. The other 3 allegations relied on by the Defendant relate to invoices from Mohammed Book Store Associates Ltd. (Mohammed's Bookstore), Caribbean Children's Press Ltd. ("CCPL") and K & S Bookstore. The Defendant's common theme is that the items described in the said invoices were not part of the Claimant's stock at the time of the fire or at all.

(iii) Mohammed's Bookstore

60. This related to a bill dated August 13, 2005 in the amount of $6,726.60. The particulars of fraud were:

(i) The identity of the entity which these items were sold to was adjusted from Moy's Book Store to read Maharaj Book Store;
(ii) The address of the entity to which these items were sold was changed from Point (meaning Point Fortin) to Point-a-Pierre, Marabella.
(iii) These items were sold to Moy's Book Store.

61. In his witness statement (paras 28-30) the Insurance Adjuster set out the facts relating to this invoice and what aroused his suspicion. He went on to state that in consequence thereof he wrote Mohammed's Bookstore and received certain information which was consistent with the above particulars (para 60 above). Additionally he stated that the name "S. Maharaj" had been inserted after the words "Received by."

62. Surprisingly the Insurance Adjuster never made any enquiries of Moy's to ascertain how that document came to be in the Claimant's possession. Given the seriousness of the allegation in the instant case (fraud), the Defendant's duty was to present evidence of such cogency before the court could conclude that the allegation is established on the balance of probability: In ***re H (Minors)*** per Lord Nicholls[19]***;*** ***Secretary of State for the Home Department v Rehman*** per Lord Hoffman[20].

63. On this issue the Claimant called Jin Hing Moy ("Moy") who carries out his trade under the name of Moy's Shopping Centre. His variety store includes a book department. I should make the point at the very outset that this witness was one of the most honest witnesses that one can find, a reputable businessman of considerable experience who has carried on the above business from the past 37 years and on whose testimony I place substantial reliance. This witness struck me as someone who was independent and would not perjure himself nor be complicit in any way in assisting the Claimant to recover insurance monies to which it was not entitled.

64. In chief Moy made the point that the history of their dealings was such that he would go to the Claimant's bookstore and purchase books and "vice versa". He further stated that in discussions with him, he became aware that Seunarine Maharaj had difficulty in purchasing books from **wholesalers** as they were upset with the Claimant for selling books below their retail price. As such Seunarine Maharaj could not approach the wholesalers to buy books.

65. Moy went on to state that he normally purchases books from the wholesalers in San Fernando.

[19] [1996] A C 563 [HL] 586-537
[20] [2003]1 A C 153 [HL] para 55

66. Further retailers would have no difficulty in selling him books because they are aware that his business is in Point Fortin and their customers would hardly venture into the Point Fortin area to purchase books.

67. Finally Moy stated that on August 13, 2005 he purchased some books at the Claimant's request from Mohammed's Bookstore for the sum of $6,726.60 which included a 20% discount. He did not keep any of the books as the sale was made for the purpose of remitting same to the Claimant. The same were duly forwarded to the Claimant.

68. Pausing there, clearly the inference to be drawn from the document being in the Claimant's possession is that after Moy had completed the transaction with the Claimant, Moy handed over same to the Claimant. **As such the document served a twofold purpose in that it evidenced the sale by Mohammed's Bookstore to Moy, and it also evidenced the purchase by the Claimant from Moy.**

69. Importantly, and as emerged in the cross-examination, Moy was questioned to the manner of payment from the Claimant. Moy referred to the notation made at the bottom of the impugned document. Manifestly this was not made by Mohammed's Bookstore. This reflected that the sum of $3,017.08 was subtracted from $6,726.60 leaving a balance of $3,709.52. Moy explained thus:

> "You see at the bottom $6,726.60 and then $3,017.08. I took books to that amount. And then you see $3,709.52. He paid me that in cash."

Yet no complaint, and rightly so, was made by the Defendant as to that endorsement, which manifestly was an alteration to the invoice.

70. That endorsement underscores the twofold purpose of the said document referred to at para. 68 above. While the Defence has not addressed me on the issue, insurers cannot shut their eyes to what might be reasonable explanations. In certain circumstances

investigations ought to be as thorough as those which have to satisfy the criminal standard of proof. I therefore accept the Claimant's explanation, when it was suggested to him that his interference with the bill was for a fraudulent purpose:

> "No, since I paid for it I didn't see anything wrong with putting my name on it."

71. Moy was also able to provide some insight into the book industry and the manner of its operation. Some wholesalers would not sell you books because "they don't like your head, they don't like your price." As a means of circumventing this obstacle, retailers would purchase books for other retailers.

72. Moy also explained why it is sometimes beneficial to buy books from retailers. He stated that there is nothing precluding retailers from selling books wholesale. For example some retailers when they buy books wholesale would get bigger discounts than other retailers. Again there are instances where retailers are purchasing books from, for example, Lexicon and Longman and would buy out all the books thereby forcing retailers to buy from such retailers or other retailers who would have the books in stock.

73. In assessing the Claimant's evidence I am of the view that Moy's testimony provides a great deal of support for the testimony of Seunarine Maharaj.

74. Finally on this issue, while it was suggested to Seunarine Maharaj that Mohammed Bookstore were not the only suppliers of items on that bill. He stoutly denied same, explaining that they are the publishers so that you must buy from them. There being no evidence to the contrary I accept his evidence on this issue.

(iv) K & S Bookstore

75. The Defendant is alleging fraud with respect to the 4 invoices from K & S Bookstore, St Mary's Village, Moruga dated between July 10 and September 10, 2005 totalling $59,580.04. The particulars of fraud relied on in the Defence are:

(i) There is no entity known as K & S Bookstore in St Mary's Village, Moruga;
(ii) The items described in the 4 invoices were never supplied to the Claimant nor were they located at his premises at the time of the fire or at all.

76. The Defendant came to the first conclusion at (i) based on investigations carried out by its Insurance Adjuster, Bertrand Doyle ("Doyle"). Doyle's testimony was to the effect that, having been unable to locate any store or entity trading as "K & S Bookstore," he visited the Moruga police station. However the officers advised they were unaware of the location of any bookstore trading under that name. He continued his enquiries in Moruga and eventually located a store trading as K & S Maharaj Variety Store. There he saw school books being sold, but saw no sign referring to K & S Bookstore.

77. Doyle continued that he walked around that store and looked at several items. He purchased a text entitled "Fundamentals of Health and Physical Education." He asked the cashier to stamp his receipt and she complied. Interestingly the stamp bore the name "K & S Maharaj Book Store, 993 St Mary's Moruga Road, Tel.:656-6130".

78. Doyle inspected the said text and observed that its first page bore both the stamp aforesaid with the details of K & S Maharaj Bookstore **and a stamp detailing the Claimant's company name, address and telephone number.**

79. Doyle then closely studied the four invoices (Documents 2, 3, 4 and 5). All purported to reflect that payment in full had been made in respect of same with the words "Paid Off" and the signature "S. Maharaj" endorsed on same. Doyle concluded that all four invoices appeared to have been printed on a computer and were not printed on a

letterhead. Further all had a cellular number "752-9870" of the purported entity " K & S Bookstore" written in.

80. Based on his experience Doyle stated that all of these said features on the four invoices suggested to him that these documents had been generated at the same time and for the purpose of supporting the Claimant's claim for indemnification.

81. Doyle also conducted a search at the Companies Registry. That disclosed no record of an entity named "K & S Bookstore" either in the Companies Registry or the Registry of registered business names.

82. On the issue of the said trading entity, I accept the evidence of Krishendath Ganga Bissoon ("Ganga-Bissoon") that his business is not registered and that his wife and he interchangeably use the business names K & S Bookstore, K & S Maharaj Bookstore and K & S Maharaj Variety Store.

83. While Mr. Quamina suggested to Ganga-Bissoon that he never sold these items on the four invoices to the Claimant and that he produced same for the purpose of bolstering the Claimant's claim he stoutly denied same. I also accept Ganga-Bissoon's testimony in this regard. Seunarine Maharaj also supported Ganga-Bissoon's testimony on this issue.

84. The Defendant's attempt to ascribe some ulterior motive to Ganga-Bissoon for placing his cell phone number on the four invoices quite frankly fell flat on its face. He was able to provide a plausible explanation in that the land line number 656-1310 is at times down, and is also linked up to the fax, the phone card machine and the Linx, so that it would be easier to contact him on his cell.

85. Significantly Ganga-Bissoon was able to provide a satisfactory explanation for supplying such a large volume of books, approximately $60,000, to the Claimant during the period July 10 to September 10, 2005. He explained that period is really the "book

season." That fits in neatly with the Claimant's assertion of a significant amount of purchases ($197,791.44) and sales ($127,758.28) during the period July to October 2005 (see para 32 above).

86. Ganga-Bissoon also provided the court with an understanding (similar to Moy) of how the book industry operates. He also had the perception that the Claimant had problems not simply with Mohammed's Bookstore, but with other wholesalers as well. Clearly this witness was making the point that both he and the Claimant were in effect competing with the wholesalers.

87. I therefore hold that the Claimant purchased the items on these four invoices from the entity described as K & S Bookstore (one of its many manifestations). I also hold that these items comprised part of the Claimant's stock at the time of the fire.

(v) Caribbean Children's Press Ltd ("CCPL")

88. The Defendant is alleging fraud with respect to three invoices dated July 12, August 29 and September 12, 2005 from CCPL totalling $11,641.60. The particulars of fraud relied on in the Defence are as follows:

(i) The identity of the entity to which these items were sold has been obliterated by an unknown and unauthorized person;
(ii) The name of the Claimant was inserted by an unknown and unauthorized person as being the location where the items were to be shipped;
(iii) These items were sold and delivered to S & R Bookstore, High Street, Siparia;
(iv) The items described in the said invoices were not part of the Claimant's stock at the time of the fire or at all.

89. When one looks at Doyle's evidence in chief there is a subtle variation of the pleadings in that, instead of a complete obliteration on all three invoices, Doyle now contends that the customer information had been partially or completely obliterated on only two out of three of the invoices.

90. When one examines the three invoices the following points are noteworthy:

(i) On invoice dated July 12, 2005 comprising of two pages:

(a) On page 1, a black marker was used to completely black out the name and address of the party to whom the invoice was addressed (which would be S & R Bookstore, High Street, Siparia Trinidad);
(b) On page 1, to the right of the obliteration aforesaid, in the column marked "SHIP TO:" the words "MAHARAJ BKST MBLA" were written in;
(c) On page 1, the Customer ID TRS-011 assigned to S & R Bookstore was not interfered with;
(d) On page 2 (the heading is the same as page 1), no attempt is made to obliterate or change the name of the party to whom the invoice was addressed and no other changes are made to page 2.
(e) In effect an alteration was made to page 1, but not to page 2.

(ii) On invoice dated August 29, 2005 comprising of one page:

(a) The name of the party to whom the invoice was addressed was crossed out (S & R Bookstore etc.)

However it was done in a manner as to make it obvious to anyone that that entity was different from what was then inserted to the right in the column marked "SHIP TO;" namely, "MAHARAJ BKST LTD MARABELLA."

(b) In the body of the invoice the words "PAID CASH" are endorsed, the inference being that that was also inserted by the person who wrote in what was stated at para. (1) above.
(c) In effect any reasonable observer examining this invoice could not help but notice that the document was altered.

(iii) Amazingly on invoice dated September 12, 2005 no alteration was made to same. In effect it is the Defendant's contention that the Claimant mounted a fraudulent claim on this said invoice without even purporting to change the name of the purchaser.

91. Pausing there it seems inherently improbable that a fraudster would be so inept in perpetrating a fraud. However I must consider the evidence on the issue.

92. It is common ground that all three invoices were issued by CPPL to S & R Bookstore. Further the letter's customer identification number issued by CPPL is TRS-011, while the Claimant's is TRS-010. Additionally Seunarine Maharaj was the one who altered the invoices dated July 12 and August 29, 2005 in the manner aforesaid (para 90).

93. Both Seunarine Maharaj and the owner of S & R Bookstore, Peter Ramnarine ('Ramnarine"), testified on this issue. At the very outset I found both of them to be credible witnesses on this issue. In that regard they both appeared to be in direct competition with the wholesalers. However I reject Seunarine Maharaj's contention that he was unable to source and purchase books wholesale from CCPL. While this finding is sufficient to make me exercise a degree of caution with respect to his testimony it is insufficient to displace the burden cast upon the Defendant to convince me otherwise. It seems entirely possible that many of these retailers really have found ways of competing with exclusive wholesalers. Thus in some instances it is better that the particular retailers, who can obtain the maximum discounts, purchase from the wholesalers so that, in turn, when they sell to retailers, they would be able to make a profit on the resale, Moreover having seen Moy, Ganga-Bissoon and Ramnarine, it seems inherently impossible that each individually, or all collectively, would have been willing to perjure themselves or been complicit in perpetrating a fraud on insurers.

94. Ramnarine testified that prior to the occurrence of the fire, he regularly dealt with Seunarine Maharaj (for the past 8 years) on behalf of the Claimant in that he would have sold the latter books purchased wholesale by him at the latter's request.

95. The effect of the testimony of Peter Ramnarine is that he was aware that Seunarine Maharaj had difficulty in purchasing books from wholesalers and retailers. He would therefore purchase books from wholesalers at the request of Seunarine Maharaj and sell them back to him at the same wholesale prices on the condition that prompt payment be made.

96. However notwithstanding what was stated in the affidavit, Ramnarine was forced to concede that CCPL was not relevant to the difficulty encountered by the Claimant. He then indicated that with regard to CCPL, from time to time he had to purchase books in Port of Spain and on his way up he would sometimes call Seunarine Maharaj or pop in to see if he wanted anything in Port of Spain. With respect to these three invoices that is what happened. I accept his testimony that on his way to Port of Spain he stopped in and collected the monies from Seunarine Maharaj and purchased these items on the invoices for him.

97. I also accept Seunarine Maharaj's testimony that he made the alterations not for any fraudulent purpose but to reflect the fact that he was the owner of the goods. As he explained:

> "Because I paid for the goods, and I know the bill is in my possession now, and seeing their name [S & R Bookstore], I put in my name. And at the time I did not see nothing wrong in doing it."

98. He also went on to provide a reasonable explanation for not obtaining separate bills, like he did from his brother:

> "Because this person went directly to the company and purchased the books for me, and when they were coming down dropped off the goods for me in Marabella."

99. Most importantly I hold that the Claimant did purchase these items on these three invoices and they formed part of its stock at the time of the fire.

5. Summary of conclusions on the facts

100 To summarise, I hold that the Claimant did in fact purchase the items on the impugned invoices from Moy, K & S Bookstore and S & R Bookstore, and that same formed part of his stock at the time of the fire. Further the invoices from Moy and S & R Bookstore served a twofold purpose in that they evidenced purchases of items from the wholesalers stated therein, and they also evidenced purchases of the said items stated by the Claimant from Moy and S & R Bookstore. In those circumstances, the endorsements made thereon by Seunarine Maharaj do not fall within the parameters of fraud prohibited by condition 8 of the said policy.

101. With respect to the invoices from K & S Bookstore they are genuine invoices reflecting purchases of the items stated therein by the Claimant from K & S Bookstore.

102. With respect to the invoice from Unique Services I hold that the Claimant's error in the calculation was genuine and not intended to be fraudulent.

103. With respect to the quotation from Lexicon Trinidad Limited, I hold that while the Claimant should have exercised a greater degree of care it made a genuine mistake in submitting a document which was manifestly a quotation as an invoice.

6. Conclusion

104 By reason of the foregoing, I conclude that the Claimant has suffered a genuine loss in the amount agreed by the parties. Having regard to my findings on the facts (see summary paras 100-103 above) it is manifest that the Defendant has failed to produce evidence of such cogency before I could conclude that the claim is fraudulent. There is therefore in this case the absence of fraudulent conduct on the part of the Claimant, a prerequisite for invoking the fraudulent claims doctrine. It would` follow that the

Defendant could not reasonably argue, having regard to my findings, that the Claimant has deployed fraudulent devices to improve or embellish the facts surrounding the claim in order to derive some benefit[21]. Nor has the claimant made a false declaration, which on the authority of **Malcolm Clarke**, ***The Law of Insurance Contracts,*** has to be "fraudulently false."[22]

105. There will accordingly be judgment for the Claimant against the Defendant. I also make the following orders:

(1) The Defendant is to pay the Claimant the sum of $753,056.83 being the amount due under the policy of insurance for:
   (a) stock consisting of books, stationery and the like which were destroyed in the said fire;
   (b) business and office equipment, furniture, fixtures and fittings which were destroyed in the said fire;

(2) There will be interest on the said sum of $753,056.83 at the rate of 12% per annum from the date of the filing of the Claim (February 6, 2007) until the date of judgment herein (April 13, 2010).

(3) Costs of the action are to be paid by the Defendant to the Claimant.

(4) Costs of the action are quantified pursuant to part 67.5 (prescribed costs) in the sum of $.....

DATED this 13th day of April, 2010.

……..

PRAKASH MOOSAI

JUDGE

[21] n14 [30]
[22] n10 para 27-2B