THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim C.V. No. 2009 – 04349

BETWEEN

TYSA COMPANY LIMITED

Claimant

AND

GUARDIAN GENERAL INSURANCE LIMITED

Defendant

****

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mr. Garnet Mungalsingh instructed by Mr. R. Mungalsingh for the Claimant

Ms. Nadine Ratiram instructed by Ms. A. Narine for the Defendant

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JUDGMENT

BACKGROUND

1. On November 19th 2009 the claimant instituted proceedings against the defendant seeking an indemnity under a policy of insurance in respect of property damage that occurred as a result of a fire on September 24th 2008.

2. The Defendant refused to indemnify the Claimant for loss arising out of the fire on the bases that:-

(1) Proceedings were **not instituted within Twelve (12) months** of the fire; the fire occurred on the **24th day of September, 2008** and proceedings were commenced on the 19th day of November, 2009.

(2) The Claimant its servant and/or agent **deliberately caused the fire**;

(3) The claim of the Claimant is **fraudulently exaggerated**.

ISSUES:

3.

i. **a. Whether there is a contract of insurance** between the Claimant and the Defendant in respect of the property at 90 Robert Hill, Siparia ("the insured property") and if so,

b. What constitutes the contract?

ii. **Whether Conditions 8 and 15** are terms of the contract of insurance between the Claimant and the Defendant.

iii. **Whether, as the action was filed more than 12 months after the fire**, the Defendant is entitled to deny liability under **condition 15 of the policy**

iv. **Whether** the **fire was deliberately set** with the connivance of the Claimant's directors, (thereby entitling the Defendant to deny liability under **Condition 8 of the policy**)

v. **Whether** the Claimant submitted a **fraudulently exaggerated claim**, (thereby entitling the Defendant to deny liability under **Condition 8 of the policy**)

CONCLUSION

4**.** I find that

i. There was a contract of insurance between the Claimant and the Defendant.

ii. The Contract of Insurance in force between the Claimant and the Defendant at the material time comprised the Policy Wording Code: GG-FIR-ATTIC-POL-05/07 and the New Business Schedule dated 29th July, 2008.

iii. **Conditions 8 and 15** are terms of that contract of insurance between the Claimant and the Defendant.

iv. **As the action was filed more than 12 months after the fire**, the Defendant is entitled to deny liability under **condition 15 of the policy.**

v. The Defendant has failed to prove that the **fire was deliberately set** with the connivance of the Claimant's directors.

vi. The Defendant has failed to prove that the Claimant submitted a **fraudulently exaggerated claim.**

DISPOSITION

5. a. The Claimant's claim is dismissed.

b. The Claimant is to pay to the Defendant 25% of the costs calculated on the prescribed costs basis for a claim in the amount of $2,000,000.00.

ANALYSIS AND REASONING

THE PLEADINGS

6. By Amended Claim Form and Statement of Case filed 27th May, 2010 the Claimant claimed against the Defendant, *the sum of $2,000,000.00 being an indemnity for damages under a **contract of insurance** contained in or **evidenced** by a **proposal** submitted by the Claimant to the Defendant acting by its agent, Messrs. SDS Insurance Brokers Limited and the oral **acceptance** thereof and **receipt of payment of the premium** on the 6th June, 2008 with an effective date of acceptance of risk being the 11th July, 2008 by the Defendant, (sic) in*

consideration of premiums paid to them by the Claimant, the Defendant insured the Claimant against loss or damage by fire for the period 11th July, 2008 to 11th July, 2009 as follows, namely $2,000,000.00 on inter alia a private dwelling house situate at No. 90 Roberts Hill, Siparia.

7. The claimant claims that:-

By a contract of insurance contained in or evidenced by a proposal submitted by the Claimant to the Defendant acting by its agent Messrs. SDS Insurance Brokers Limited and the oral acceptance thereof and receipt of payment of the premium on the 6th June, 2008 with an effective date of acceptance of risk being the 11th July, 2008 ~~made by~~ the Defendant, in consideration of premiums paid to it by the Claimant, **the Defendant insured the Claimant against loss or damage by fire for the period 11th July, 2008 to 11th July, 2009 as follows $2,000,000.00 on *inter-alia* a private dwelling house situate at 90 Robert Hill, Siparia**. (Paragraph 3 – Amended Statement of Case)

8. This is admitted by the defendant in its Amended Defence filed on 1st July, 2010 at paragraph 4, save for the portions underlined above. The defendant therefore admits that there was a contract of insurance between it and the claimant by which **the Defendant insured the Claimant against loss or damage by fire for the period 11th July, 2008 to 11th July, 2009 as follows $2,000,000.00 on inter alia a private dwelling house situate at 90 Robert Hill, Siparia.**

9. It also admits at paragraph 8 that the proposal formed the basis for that contract of insurance but denies that the contract of insurance is contained in or evidenced by that proposal. It denies that the contract of insurance was created in the manner alleged by the claimant.

10. By its Amended Defence filed on 1st July, 2010 the Defendant disputed the Claimant's claim on the following grounds:

1. That the statement of case disclosed **no contract** between the Claimant and the Defendant **whatsoever**: *pg. 2, para. 3 of the Amended Defence.*

However the defendant could not seriously pursue this, as material was pleaded by the claimant which prima facie disclosed the elements of a contract, and in fact the defendant admitted at paragraph 4 of its amended defence that there was a contract of insurance.

2. That no admission was made that the Claimant was interested in and/ or had an **insurable interest** in the subject matter of the policy: *pg.4, para. 11 of the Amended Defence*.
This was quietly abandoned at paragraph 103 of the defendant's written submissions.

3. That the fire which occurred at premises at 90 Robert Hill, Siparia on **24th September, 2008** was **wilfully and deliberately caused by the servants or agents of the Claimant** and/ or **with the connivance and/ or complicity of the Claimant** its servants and/ or agents and the claim in respect thereof under **policy** between the Claimant and the Defendant is fraudulent and that all benefit under the **contract of insurance,** and therefore the claim of the Claimant, is forfeited and/ or void as a result of the operation of Condition 8 of **Contract of Insurance**: *pgs. 4 and 5, paras. 13(a) and 14 of Amended Defence.*

4. That the claim or account of its loss made by the Claimant is **fraudulently exaggerated** and that all benefit under the contract of insurance and therefore the claim of the Claimant is forfeited and/ or void as a result of the operation of **Condition 8** of Contract of Insurance: *pgs. 4 and 5, paras. 13(b) and 14 of Amended Defence.*

5. That the action herein was **not commenced within 12 months** of the loss or damage alleged and therefore the Defendant is not liable to the Claimant under **the Contract of Insurance** or at all pursuant to **Condition 15 of the Contract of Insurance**: *pgs. 6 and 7, para. **19** of the Amended Defence.*

11. The Defendant submits that the Contract of Insurance No. TT FCP 0476228 on which it relies, (annexed as A to the Amended Defence), is the contract of insurance in force between the Claimant and the Defendant at the material time and that it comprises the Policy Wording Code:

GG-FIR-ATTIC-POL-05/07 and the New Business Schedule dated 29th July, 2008. (*paragraph* 5 *of the Amended Defence)*

ISSUE 1

12. **a. Whether there is a contract of insurance between the Claimant and the Defendant in respect of the property at 90 Robert Hill, Siparia ("the insured property") and if so,**
b. What constitutes the contract?

Departure from pleadings/Failure to prove pleaded case

13. Although on the pleadings it is common ground between the claimant and the defendant that there was a contract of insurance, it was submitted on behalf of the Defendant that:-

a. The Claimant has failed to prove its pleaded case against the Defendant in that
    i. **It failed to rebut** *the presumption that SDS Insurance Brokers was acting as agent of the Claimant* and;
    ii. That it **failed to prove** that the **contract of insurance as pleaded** *is "**contained in or evidenced by a proposal** submitted by the Claimant to the Defendant acting by its agent Messrs. SDS Insurance Brokers Limited and the oral acceptance thereof and receipt of payment of the premium on the 6th June, 2008*".

14. It submitted that the Claimant's case as pleaded discloses **no reasonable cause of action** against the Defendant and **ought to be struck out**. This was amended in the defendant's submissions to "*The Claimant has **failed to prove its pleaded case** against the Defendant and the claim ought therefore to be struck out as disclosing no reasonable cause of action*." This makes it clearer that the defendant is attempting to conflate two concepts - *departure from pleadings*, and *disclosing no reasonable cause of action*. Neither has any merit.

Disclosing no reasonable cause of action

15. In fact it is common ground on the pleadings that there was a contract of insurance. Therefore it cannot be contended that there is no reasonable cause of action, as the cause of action is based on an indemnity under a contract of insurance between the claimant and the defendant.

Departure from pleadings

16. There is an issue on the pleadings as to whether the contract of insurance as pleaded is "***contained in or evidenced by a proposal*** *submitted by the Claimant to the Defendant* ***acting by its agent*** *Messrs. SDS Insurance Brokers Limited and the* ***oral acceptance*** *thereof and* ***receipt of payment*** *of the premium on the 6th June, 2008*", or whether Guardian General Fire Policy wording code GG-FIR-ATTIC-POL- 05/07 and New Business Schedule dated 29th July, 2008 comprise the contract of insurance between the Claimant and the Defendant and reflect the terms and conditions of the contract of insurance between the Claimant and Defendant.

17. The court was asked to strike out the claim if the Claimant could not establish that the contract came into being in the manner it alleged, that is, if the contract of insurance established was not the one alleged by the Claimant, or did not come into being in the manner alleged by the Claimant.

18. The Defendant contended that the Claimant's case against it is premised on Messrs. SDS Insurance Brokers Limited being or acting as **agent for the Defendant** at the time of those transactions.

19. However it is in fact premised on a **contract of insurance**, the existence of which is common to both parties, and the proposal evidences such a contract. In fact the Defendant admits that the proposal forms the basis of the contract of insurance.

20. I do not accept that failure to establish that SDS Insurance Brokers were in fact the agent of the Defendant is such a fundamental departure from the Claimant's pleaded case as to disentitle it to relief. The basis of the Claimant's claim is that there was a contract of insurance that came into being between the Claimant and Defendant. That is common ground. What needs to be ascertained are the precise terms of that contract.

21. However, even if the Defendant's evidence is accepted, rather than the Claimant's, as to what comprised the contract of insurance, it would still be common ground that there was a contract of insurance between the claimant and the defendant. Even if the defendant's version of

the contract is established, it cannot reasonably be contended that the Claimant has so fundamentally departed from its pleaded case that its claim must be struck out, or that it disentitles the claimant to succeed, as in **Waghorn v Wimpey [1970] 1 All ER 474.**

22. This instant case is not like **Waghorn v Wimpey**, where the Claimant pleaded that his fall had taken place on a sloping bank, and pleaded particulars of negligence that were specific to that location, which the defendant had to rebut by its evidence. As it turned out on the evidence the location of the accident was just outside a caravan, and not, as had been pleaded, 20-25 feet away on the sloping bank. The particulars of negligence in that case were irrelevant, based on an alleged factual scenario which turned out not to have existed at all.

23. In the instant case the Claimant has clearly pleaded that it is entitled to an indemnity under its contract of insurance with the Defendant. The Defendant accepts that there was in existence **a contract of insurance** between it and the Claimant, though it denies liability under such contract of insurance. The Defendant cannot possibly claim to be taken by surprise by any alleged fundamental departure from the pleaded case of the Claimant if, as it turns out, it is the Defendant's version of the contract that is upheld on the evidence. On both parties pleaded cases there is a contract of insurance.

24. This is unlike **Waghorn v Wimpey**, where it was the departure from the pleaded case that caused prejudice to the Defendant in having to meet a completely new case, after having prepared for trial to meet allegations of negligence specific to the pleaded location of the accident. It was taken by surprise, and would have been prejudiced if the new case had been permitted. In the instant case the defendant cannot claim to have been prejudiced or taken by surprise if its own evidence is accepted as forming the basis of the contract of insurance which it admits.

25. The detailed analysis as to whether SDS brokers were the agent of the Claimant or the defendant, in order to establish whether the Claimant had proved its pleaded case is therefore irrelevant. It is a distraction from the real issue, common to both parties, namely, what was the

contract of insurance, and the terms of the contract of insurance that both parties agreed came into existence between them.

26. In any event the Claimant pleaded that the contract of insurance was merely contained in or evidenced by the matters it alleged, not that those matters were the entire substance of the contract.

27. It was submitted that **the Claimant has led no evidence whatsoever to prove that the terms of any insurance contract, and in particular the one under which it claims, is "contained in or evidenced by a proposal … the oral acceptance thereof and receipt of payment of the premium**…" (*Amended Claim Form pg. 2 para. 1)* and that the Claimant has failed to prove its pleaded case. Yet the Defendant admits at paragraph 9 of its amended defence that the proposal forms the basis of the contract of insurance, though denying that the contract of insurance is contained in or evidenced by the proposal.

28. It cannot in the circumstances be fairly contended that the Claimant made a radical departure from the case stated in its pleadings, which amounted to a new, separate and distinct case, such that it is disentitled to succeed. The case of **Waghorn v George Wimpey** is therefore distinguishable and not applicable as here there is no radical departure from the Claimant's case. Its case is that there was a contract of insurance between it and the Defendant, under which it expected to be insured against risks, including the risk of fire. In fact the Defendant admits at page 2 paragraph 5 of the Amended Defence that at the material time **there was in force a contract of insurance between itself and the Claimant**, comprising fire policy and fire commercial policy new business schedule, and this was the only contract of insurance in existence.

29. In those circumstances it is difficult to understand why such emphasis was placed on this submission by the Defendant. This argument, which was persisted in throughout the Defendant's extensive written submissions, is completely misconceived.

30. I find that there was a contract of insurance, this is common ground between the parties, and the submission that the Claimant has fundamentally departed from its pleaded case to the extent that its claim should be struck out, or that it should be disentitled to relief, is misconceived and without merit. It is necessary therefore to address the issue of what constitutes the contract and the terms thereof.

Whether there is a contract of insurance between the Claimant and the Defendant in respect of the property at 90 Robert Hill, Siparia ("the insured property") and if so, what constitutes the contract?

31. As set out above I have found that there was a contract of insurance.

What constitutes the contract /conditions of the contract of insurance?

32. The exact contract of insurance that came into being between the Claimant and the Defendant must be ascertained, as it is a critical component of the defendant's defence that the Claimant's claim is out of time, being time barred by Condition 15 of the policy of insurance. If that is so, and Condition 15 were in fact a term of the contract of insurance, then the applicability and effect of Condition 15 must be considered.

33. The Defendant contends that the Documents annexed as "A" to the Amended Defence, (Guardian General Fire Policy wording code GG-FIR-ATTIC-POL-05/07 and New Business Schedule dated 29th July, 2008), comprise the contract of insurance between the Claimant and the Defendant and reflect its terms and conditions.

34. By its Amended Reply dated 30th June, 2011 the Claimant avers inter alia:

1. That the **policy of insurance marked "A" which is attached to the Amended Defence does not form part of the subject contract of insurance** and that the terms of the subject contract of insurance is (sic) contained in or **evidenced** by **proposal** submitted to (the Defendant) by Messrs. SDS Insurance Brokers Limited and the oral acceptance thereof and receipt of payment of the premium on the 6th June, 2008, and that the issuing of the policy of insurance dated 29th July, 2008 referred to at

paragraphs 5 and 6 of the Amended Defence was **subsequent to the contract** of insurance: *pg. 2, para. 3 of the Amended Reply*.

2. That condition 15 of the policy marked "A" which is attached to the Amended Defence is unconscionable, unreasonable and oppressive as the Claimant had **no notice** of the aforesaid policy prior to the invoice dated 29th July, 2008: *pg. 4, para. 9b of the Amended Reply*.

35. What constituted the contract of insurance was therefore directly in issue on the pleadings, and consequentially, whether Condition 15 was incorporated into the contract of insurance.

THE EVIDENCE

36. What should have been a straightforward matter of evidence was inexplicably complicated when

1) At trial Keisha Taylor, on behalf of the Defendant insurer, gave evidence that the policy of insurance was inadvertently omitted from exhibit "I" to her witness statement, and that the document exhibited at "C" to her Witness Statement ought also to have been exhibited at "I" together with the New Business Schedule.

2) **The document marked "C" exhibited to the Witness Statement of Keisha Taylor is a Guardian General Fire Policy wording code GG-FIR-ATTIC-POL- 05/07.**

On the first page of the Schedule is stated:

"Fire Commercial Policy"

New Business Schedule

Policy Number: **TT FCP 0476228**"

Policy Period 7/11/08- 7/11/09

<u>This schedule and the Policy form the contract of insurance</u>

"Policy Information

This schedule forms part of and is to be **attached** to this Policy"

"Wording code: **GG-FIR-ATTIC-POL-05/07".**

Policy No. **TT FCP 0476228 therefore consists of the new business schedule and policy w**ording code: **GG-FIR-ATTIC-POL-05/07** which is **to be** attached.

37. The evidence of the Insurance Brokers is that the Claimant had a previous policy which had expired. Although the evidence of the Brokers was that there was no renewal and what was applied for was new insurance, they claimed that the provisions of the expired contract of insurance applied to the "new insurance" because they were "standard" terms and conditions.

38. The evidence needs to be carefully examined.

Witness Statement of Keisha Taylor pgs. 2 – 3 paragraphs 4 and 5

"*4. On or about **14th February, 2006** the Agency received Policy No. TT FCP **0401240** issued by the Insurance Company, which said policy was a contract of insurance between the Insurance Company and the Claimant in respect of the insured premises containing the Terms and Conditions set out in document attached hereto and marked "**C**".*

*5. On or about the 14th February, 2006, upon receiving Policy No. TT FCP **0401240** containing the aforesaid Terms and Conditions, I called one Mr. Dereck Soobransingh, broker, in the employ of the Claimant's Brokers and informed him that I was in possession of Policy No. **TT FCP 0401240**. Shortly thereafter Mr. Dereck Soobransingh visited the Agency's offices and I handed him Policy No. TT FCP **0401240**, which said policy he took and left the Agency's offices."*

39. The Claimant renewed this contract of insurance for the period February 2007 to February 2008:

Witness Statement of Keisha Taylor pg. 3 para. 3 (as amended)

"*6. On or about 13th February, 2007 the Claimant's Brokers advised the Agency that the Claimant wished to* ***renew*** *Policy No. TT FCP* ***0401240*** *for another year on the same terms…*

40. The contract of insurance was not renewed in February 2008 as a result of which it lapsed.

Witness Statement of Keisha Taylor pg. 3 para. 7

"*7. On or about the* ***13th February, 2008*** *Policy No.* ***TT FCP 0401240 was not renewed*** *by the Claimant and as a result of which it* ***lapsed****."*

41. On or about 6th June, 2008 the Claimant indicated to its brokers that it wished to "renew" contract of insurance to increase its coverage from $500,000.00 to $2,000,000.00:

Witness Statement of Keisha Taylor pg. 3 para. 8 – Trial Bundle # 2 pg. 89:

"*8. On or about 6th June, 2008 the Claimant's Brokers advised the Agency by telephone that the Claimant wished to renew policy and to increase its coverage from $500,000.00 to $2,000,000.00.*

Witness Statement of Rayette Bailey pg. 2 para. 6 – Trial Bundle # 2 pg. 218:

"*6. On or about 6th June, 2008 the Insurance Company received an e-mail from Agent informing the Insurance Company that the Claimant* ***wished to renew policy and to increase its coverage*** *from $500,000.00 to $2,000,000.00.*

42. The Defendant **required that a proposal be completed** on behalf of the Claimant. The proposal form dated 7th July, 2008 contained a declaration that "I/We wish to effect an insurance with Guardian General Insurance Limited **in terms of the Policy to be issued by the Company**": *Commercial Property Insurance Proposal at pg. 4*

43. A **Policy of Insurance** was later issued by the Defendant **along with a New Business Schedule dated 29th July, 2008**:

Witness Statement of Keisha Taylor pg. 9 paragraph 12 (as amended)

"12. On or about the first week of August, 2008 **the Agency received from the Insurance Company Policy No. TT FCP 0476228 together with a New Business Schedule to** the said **Policy No. TT FCP 0476228**. A true and correct copy of the said Policy No. TT FCP **0476228 together with the New Business Schedule** to Policy No. TT FCP 0476228 is exhibited hereto and marked "**I**"."

Witness Statement of Rayette Bailey pg.3 paragraph *9*

"*9. On or about 29th July, 2008 the Insurance Company caused to be prepared* ***Policy No. TT FCP 0476228 together with a New Business Schedule to*** *the said* ***Policy No. TT FCP 0476228 (hereinafter collectively referred to as "****the said* ***Contract of Insurance")*** *and* ***delivered same*** *to Agent. A true and correct copy of the said* ***Policy*** *No. TT FCP* ***0476228*** *together with the said* ***New Business Schedule*** *to Policy No. TT FCP 0476228 together with the said (sic) is exhibited hereto and marked "****G****"."*

44. In fact, curiously, only the **New Business Schedule** was exhibited to Bailey's and Taylor's witness statements above. What is annexed as the new insurance policy as exhibit "I" to the witness statement of Keisha Taylor is only the New Business Schedule on which is endorsed *"this schedule forms part of and is to be attached to this Policy Wording Code: GG-FIR-ATTIC-POL-05/07."*

45. The Defendant purported to exhibit as "**I"** to the witness statement of Keisha Taylor the policy FCP 0476228. However, Policy Wording Code: GG-FIR-ATTIC-POL-05/07 is not attached as "I". In fact at trial it was indicated that exhibit "**I**" was simply the New Business Schedule, and that the policy wording which should also have been exhibited, had been inadvertently omitted. The explanation was then provided that this policy wording was the same as that at exhibit **C** to the same witness statement.

46. Exhibit **C** was described by the witness Taylor at paragraph 4 of her witness statement as follows –"*on or about 14th February* ***2006*** *the Agency received Policy No. FCP 0401240 issued by the insurance company, which said policy was a contract of insurance between the insurance company and the claimant in respect of the insured premises containing the terms and conditions set out in document attached hereto and marked* ***C***."

47. Document **C** on examination is a policy which on its face is in form No. GG- FIR ATTIC – POL – 05/07, though it relates to the policy received by the agency in 2006- (Policy TT FCP 0401240) – which was not renewed by the claimant and which lapsed.

48. In fact however the new policy -**Policy Number**: **TT FCP 0476228- for the Policy Period 7/11/08- 7/11/09 states that this schedule and the Policy form the contract of insurance.** The **schedule** obviously refers to the New Business Schedule itself. The **Policy** is identified by the following wording:-

> **This schedule and the Policy form the contract of insurance".**
>
> *"**Policy** Information*
>
> *This schedule forms part of and is to be **attached** to this Policy"*
>
> Wording code **GG-FIR-ATTIC-POL-05/07**

49. The policy to which it is to be attached, and together with which it forms the contract of insurance, is that with wording code **GG-FIR-ATTIC-POL-05/07**. This is the same wording code as the previous lapsed policy.

50. Accordingly I find that the contract of insurance was **evidenced by** the submission of the claimant's proposal form, but the New Business Schedule and the Policy wording code GG-FIR-ATTIC-POL-05/07 **form** the contract of insurance. That wording code is in fact set out at exhibit C, though in the context that it forms part of the previous lapsed contract of insurance.

51. The most important aspect of the defendant's defence was its reliance on conditions in the policy. For this purpose it was critical that it properly exhibited the contract of insurance. It purported to do so at exhibit I of Keisha Taylor's witness statement, but omitted the critical policy wording, only including the New Business Schedule.

52. There is **no pleaded case** that **the terms and conditions of the lapsed policy of insurance** or **the Defendant's standard terms and conditions applied to the new insurance**. In any event that would be inconsistent with the Defendant's evidence by which the Defendant identified the policy contract containing the terms and conditions of the **new** insurance.

53. It clumsily sought to correct this omission in the witness box by reference to exhibit **C**, which was the policy wording applicable to the lapsed policy. Fortunately for the defendant, as it turns out, that policy wording on the lapsed policy is, on a balance of probabilities, the same as the policy wording in the new 2008 policy, as revealed by reference thereto in the New Business Schedule itself.

54. The failure to properly identify the current policy, and the need to embark on the extensive analysis required to identify the actual policy, would have been obviated by simply exhibiting the proper contract of insurance – **the policy wording and** the New Business Schedule – as "**I** "to the Taylor witness statement – as it in fact purported to do – but did not.

55. This issue was significantly and unnecessarily complicated by the omission to properly identify the relevant contract of insurance. The omission significantly extended the length of the submissions and introduced a level of obfuscation that was completely unnecessary.

56. That being so it is necessary to address other aspects of the Claimant's submissions which sought to challenge the applicability of Condition 15 of the Policy **wording code GG-FIR-ATTIC-POL-05/07.**

57. It was suggested that the policy offered by the insurer was in different terms from what the claimant sought by its proposal form. I find that the evidence is clear that the claimant had received the policy in August 2008, and took no issue with it, despite having adequate time to do so if it wished.

58. The Claimant's proposal for insurance on a **reinstatement** basis was accepted by the Defendant from 11th July, 2008 – (paragraph 9 amended defence). The liability/risk accepted by the Defendant was to "pay to the Insured the **value of the property** at the time of the happening of its destruction or the **amount of such damage**".

59. It was contended, that Miss Taylor admitted that the risk/liability accepted by the Defendant in the lapsed policy was materially different from the risk described in the proposal form (reinstatement), and accepted by the Defendant. This had not been pleaded. However even if that were so, a contract of insurance would have come into effect when the claimant received and retained, without objection, the new policy. **See MacGillivray on Insurance Law 10th Ed.pg. 108 - 109 para. 2-25**:

> *"Difficulties arise where the policy sent to the assured appears on a cursory reading to be an acceptance of the proposal sent by him, but is in fact a counter-offer, as would appear if the policy were scrutinised carefully. Is the assured's* ***retention of the policy*** *and payment of the premiums to be seen as a conclusive acceptance by him of the counter-offer contained in the policy? In general it will bind him to the terms expressed in it, if the assured is able to read, has had* ***ample opportunity to examine the policy,*** *and could fairly have been expected to discover the alteration in terms if he had done so."*

60. Further the claimant impliedly offered to take insurance on the insurers' usual, or standard, terms of cover. See **MacGillivray on Insurance Law 10th Ed. pg. 103, para. 2-10**:

> *"It will be readily assumed that, when an applicant seeks insurance cover from particular insurers,* ***he impliedly offers to take an insurance on the insurers' usual, or standard, terms of cover****...When therefore, the insurers come to issue their policy, their only obligation is to issue it with the terms and conditions usually attached to their policies, in so far as these are not inconsistent with the express terms of the parties' preliminary contract." This principle extends only to the implication of usual terms of cover and no more.* (Emphasis added)

61. In this case however, as the policy wording in the new policy was the same as for the lapsed policy it can be even more readily so assumed that the claimant impliedly offered to take an insurance on the insurers' usual, or standard, terms of cover, as it had done so previously.

62. Further the claimant expressly sought cover in **terms of the policy to be issued.** In the proposal form under the heading "DECLARATION" signed by the defendant, it is stated, "*We wish to effect an insurance with Guardian General Insurance Limited in* ***terms of the policy to be***

issued", (and in fact the terms of the new policy issued were the same as those for the lapsed policy).

63. It therefore is not necessary for the purposes of this argument to analyse in detail what, if any difference there was between insurance on a reinstatement basis and that on a replacement basis. It does not matter, as a contract of insurance would have been effected, in any event, on the terms of the policy actually issued, and/or received, and retained, by the claimant.

64. Alternatively if, contrary to my finding above, it did not accept the terms of the policy issued, the issue of the policy would in that case have amounted to a counterproposal by the insurer. No contract of insurance would therefore have come into effect. If that were the case there would be no indemnity payable and the claim would necessarily fail on this basis.

65. It was contended that **the Claimant was not provided with a policy contract for the new insurance** and had **no notice that the lapsed policy contract applied to the new contract of insurance** for the period the 11th day of July, 2008 to the 11th day of July, 2009 .That contention is unsustainable in light of the judgment of the Privy Council in the case of **Superchem Products Ltd v American Life General Insurance Co. Ltd. [2004] UKPC 2 (PC) (Superchem)**.

66. Lord Steyn stated in his judgment in the case of **Superchem Products Ltd v American Life General Insurance Co. Ltd. [2004] UKPC 2 (PC)** at paragraph 9 thereof as follows:
(In that case it was common ground that the policy, which was in standard form, was prepared by the insured's brokers).

> "***It is common ground that a contract was concluded on the basis of the standard form***. *But at trial the judge was persuaded that Condition 4 and Condition 5 were not incorporated. Her reasoning was that in order to establish incorporation of the limitation provision the insurers ' must prove that the brokers knew about the condition upon which they [the insurers] now rely ... On this point the judge wrongly adopted a subjective approach to the formation of the contract.* ***The decisive fact is that the brokers, whatever they may have known, committed the insured to a contract on all the standard form***

terms of the consequential loss policy. *They* ***unquestionably*** *had authority to do so.* ***Conditions 4 and 5 were validly incorporated***." (Emphasis added)

67. The Claimant's brokers, and the Claimant itself, here similarly committed the Claimant to receiving insurance coverage in terms of a policy to be issued.

68. Furthermore, I find that the Claimant was in fact provided with the policy of insurance. Though it was contended that the Claimant's witness had admitted receiving the very policy of insurance that the Defendant claimed to have issued, the note of the cross examination submitted by the Defendant's attorneys in their written submissions did not bear this out.

Q: And the policy was issued to you at a later date, which you will come to, wasn't it?

Shiva Ramadhar: Yes it was.

Q: It was. And this policy that was issued to you on a later date. I am going to show you a document and you will tell me whether this was the policy that was issued to you on a later date. If you turn to page 15 on that bundle, ***do you see a document there*** *headed "Guardian General Fire Policy"*

Shiva Ramadhar: (Looks at Trial Bundle # 3 pg. 15) ***Yes****.*

Q: ***Yes and that in fact was the policy issued to you****. And that policy ends, at the bottom of that policy, to the left hand side, you will see a number, on the 1st page you will see a number. Can you read to the Court and tell the Court what that number is? It starts with "Form number".*

Shiva Ramadhar: Form number GG-FIR-ATTIC-POL – 05/07."

69. According to the Defendant itself, the witness never had the opportunity to confirm that was the policy issued to him. Counsel asked him if he saw document at page 15 and his response was *yes*. Then Counsel simply stated that that was the policy issued to him and asked him to read the number. Shiva Ramadhar confirmed in cross-examination that a representative of the Claimant, Ms. Dubarry, collected the Policy and brought it to him. He did not confirm that it was Policy Wording Code: GG-FIR-ATTIC-POL-05/07. (See above).

70. However, despite this, I find that there can be little doubt that what he received was in fact Policy Wording Code: GG-FIR-ATTIC-POL-05/07, based on the reference to that policy wording code in the New Business Schedule. Having received that policy since August 2008 he raised no issue about the coverage that it provided, and must therefore be deemed to have accepted it.

Whether Condition 15 is a term of the contract of insurance between the Claimant and the Defendant.

71. a. By the Proposal dated 7th July, 2008 the Claimant offered to accept insurance from the Defendant in the terms of the Policy to be issued by Defendant.

b. A policy was delivered to the claimant and received by him in or about August 2008.

c. The New Business Schedule is part of the policy that was issued to the claimant.

d. Guardian General Fire Policy wording **code GG-FIR-ATTIC-POL- 05/07** is the policy wording referred to in the New Business Schedule.

e. On a balance of probabilities Guardian General Fire Policy wording **code GG-FIR-ATTIC-POL- 05/07 as** referred to in the New Business Schedule, would have been received by the Claimant, as there is absolutely no reason to believe, or evidence to indicate, that anything other than that policy wording would have been supplied to it, and it is the same wording as applied to the previous policy that it held before it lapsed.

e. Guardian **General Fire <u>Policy</u> wording code GG-FIR-ATTIC-POL- 05/07** contains at page 6 thereof Condition 15 which states:

> "*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."*

72. It is common ground that the Claimant received the policy. I find,

i. That the policy the claimant must have received was **Guardian General Fire <u>Policy</u> wording code GG-FIR-ATTIC-POL- 05/07**, which did in fact contain Condition 15.

ii. That the loss or damage occurred on 24th September, 2008.

iii. That this action was commenced on November 19th 2009, after the expiration of 12 months from that date.

Whether Condition 15 of the Policy applies

73. It was contended that despite the clear wording of Condition 15 it should not apply in the circumstances of this case for the following reasons:

1. Condition 15 of the Policy "is contrary to Section 15 of the Unfair Contract Terms Act and is therefore null and void and of no effect".
   However, that Act does not apply to insurance contracts.

2. Condition 15 is "*unconscionable, unreasonable, and oppressive as the Claimant had* ***no notice of the aforesaid policy*** *prior to the invoice dated the 29th July, 2008*".
   However the claimant by his proposal agreed to accept insurance on terms of a policy to be issued. Further, he received the policy, which I have found must have been the policy code wording referred to in the New Business Schedule, and did not object to the terms of that policy. It would have been surprising if it had done so, as the evidence is that the terms of that policy wording would have been the same as the lapsed policy wording code GG-FIR-ATTIC-POL- 05/07.

3. That Condition 15 and Condition 8 are inconsistent.

Whether Condition 15 and Condition 8 are inconsistent

74. This was not pleaded, but was raised in cross examination. However the Conditions are not inconsistent. They set out two separate limitation periods for instituting proceedings, and the defendant does not seek to rely on the limitation period in Condition 8 as it is inapplicable, the action having been brought within 3 months of rejection of the claim.

75. Condition 15 provides 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."

76. Condition 8 provides, inter alia, that:

"... 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.":

77. Condition 8 in the instant policy is in material respects identical to Condition 11 of the stock policy in **Superchem** supra.

78. Condition 15 in the instant policy is identical to Condition 19 of the stock policy and Condition 5 of the consequential loss policy in **Superchem**,

79. In the case of **Superchem Products Limited v American Life and General Insurance Company Limited and Others supra** the insured commenced action **after the expiration of twelve months** from the date of the happening of the loss but **before the rejection of the claim by insurers** (and thus, not after the expiration of 3 months from the rejection).

80. In this case the Claimant's claim was rejected by insurers by letter dated 26th August, 2009. This action was commenced on 19th November, 2009, less than 3 months after such rejection of the claim. Condition 8, in so as it relates to a limitation period of 3 months from the date of rejection of the claim, is not available as a defence to the Defendant as in the case of **Superchem Products Limited v American Life and General Insurance Company Limited and Others.**

81. As in **Superchem** however the Claimant's claim is barred in time under Condition 15 or its equivalent. Although this action was commenced within 3 months from the date of the rejection by the Defendant, Condition 15 is a separate time bar. A claimant can run afoul of the equivalent of Condition 15, (a twelve month time limit from date of incident giving rise to the claim), while yet commencing proceedings within 3 months of rejection of the claim as occurred in **Superchem**.

82. In **Superchem** more than a year had elapsed before proceedings were brought under the stock policy, and the claim was held to be time barred under the equivalent of Condition 15

unless a successful defence of waiver or estoppel could be established, which it could not. The existence of the equivalent of Condition 8 had no impact upon, neither did it prevent reliance upon, the equivalent of Condition 15. Compliance with time limits under Condition 8 or equivalent, (as in **Superchem** in relation to the stock policy), did not preclude reliance upon, and a successful defence to claim, based upon the equivalent of Condition 15.

83. In **Superchem** the Court was dealing with two policies, a stock policy and a consequential loss policy. On the 3rd April, 1990 a fire occurred destroying large parts of a factory, stock, equipment and offices. **Superchem** commenced proceedings on the 19th September, 1991 under the **stock** policy **before denial of liability** by the insurers on the 11th October, 1991, and, under the **consequential loss policy** on the 18th March, 1992, **more than 3 months from the denial of liability** on the 11th October, 1991.

84. Condition 13 of the stock policy in **Superchem** is in all material respects identical to condition 8 in the instant policy.

85. Condition 19 of the stock policy and condition 5 of the consequential loss policy in **Superchem** were identical to, Condition 15 in the instant policy.

86. Condition 13 set out the 3 month limit. Condition 19 set out the 12 month limit.

87. In **Superchem** the 3 month limit, (for filing of claim within 3 months of rejection), was not triggered in relation to the stock policy as proceedings were instituted under the stock policy on September 11, 1991, but liability was only later denied on October 11, 1991 under both the stock policy and the consequential loss policy.

88. The 3 month limit did apply to the consequential loss policy, as proceedings under that policy were instituted on March 18, 1992, more than 3 months after the rejection of the claim under that policy.

89. In the instant case 3 months from rejection of the claim on the 26th August, 2009 would be on or around the 26th November, 2009. The instant action was commenced on the **19th November, 2009**, within 3 months, so the three month time limit does not apply, nor is it being relied upon by the insurer.

90. However 12 months from the happening of loss and damage would be on or around the 24th September, 2009. The twelve month limit would therefore be applicable, subject to consideration of whether waiver and / or estoppel apply.

91. It was further contended that equity should not permit reliance on Condition 15 in this case because "the Defendant could have rejected the Claimant's claim since December 2008 … but the Defendant choose to stand by and less than a month before the Claimant would have been bound by Condition 15 … the Defendant wrote the letter dated 26th August, 2009 rejecting the Claimant's claim". This appears to be an estoppel argument and is dealt with as such.

Whether an estoppel debars the Defendant from relying on Condition 15.

92. Lord Sleyn stated in his judgement in **Superchem Products Ltd v American Life General Insurance Co. Ltd. [2004] UKPC 2 at para. 21**:

> "*It will be convenient to consider in the first place the issues of waiver and estoppel in the context of the time bar in the stock policy. It is common ground that the insured never asked for an extension of the limitation period and that the insurers never volunteered an extension of time.* ***The insured relied in support of its pleas on conduct****. Depending on the nature of the conduct that is, of course, a tenable position.* ***The insured enlisted the doctrines of waiver and estoppel … The Board considers that in the present context the insured must establish either a waiver or an estoppel****... 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 Isreal Cocoa Ltd v SA Nigerian Produce Marketing Co. Ltd. [1972] 2 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**." (Emphasis added)*

93. There is no evidence in this case of any ***clear and unequivocal representation*** as to justify the inference of either waiver or estoppel.

94. The Defendant denied the Claimant's claim on 26th August, 2009 "less than one month" from the expiry of the limitation period prescribed by Condition 15. In that case there is no reason why the claimant could not have instituted proceedings within the twelve month limit.

95. Lord Steyn in **Superchem Products Ltd v American Life General Insurance Co. Ltd. [2004] UKPC 2** at paragraph. 23 continued:

"*…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 the negotiations break down, cannot give rise to a waiver or estoppel … The Judge and the Court of Appeal were right to conclude that the insurers' conduct in **investigating the claims** could not give rise to a waiver or estoppel."*

*It is now necessary to turn to the issues of waiver and estoppel in the context of the time bars in the consequential loss policy, viz the 30 days' notice provision under Condition 4 and the **3 months** provision under Condition 5. **Having held these conditions to be validly incorporated, it is not disputed that, subject to waiver and estoppel, these time bars took effect.** The provision under Condition 4 took effect 30 days after the expiry of the indemnity period, i.e. 30 days after 3rd April, 1990. The provision under **Condition 5 took effect on 11 January 1992**. The writ was, of course, only issued on 18 March 1992." (paragraph 25)*

96. **It was contended that Condition 8 and Condition 15 were inconsistent with one another, and that being so, must be construed contra preferentum.**

Contra preferentum

Condition 8 of Policy Wording Code **GG-FIR-ATTIC-POL- 05/07** is as follows:

> *"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**, or in case of an arbitration taking place in pursuance of Condition 14 of this Policy within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited."(*Emphasis added)

97. All benefit under Policy shall be forfeited *inter alia* where:

1) If any claim be in any respect **fraudulent**, or

2) If any **false declaration** be made or used in support thereof, or

3) 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

4) If the loss or damage be occasioned by the **wilful** act, or with the **connivance** of the Insured, or

5) **If any claim be made and rejected** and an **action or suit be not commenced** (i) **within three months after such rejection**, (or (ii) in case of an arbitration taking place in pursuance of Condition 14 of this Policy within three months after the arbitrator or arbitrators or umpire shall have made their award).

98. As recognized in **Superchem**, Conditions 8 and 15 are independent conditions. The existence of the 3 month time limit does not impact upon, or derogate from, the 12 month time limit.

a. If the claim has been filed **less than three months after the rejection** and **less than a year after the happening of the loss, neither Condition 8 nor Condition 15 applies.**
b. If the claim has been filed **more than three months after rejection** and **more than a year after the loss**, **both Conditions 8 and 15** apply.
c. If the claim has been filed **more than three months after the rejection,** but **less than a year after** the **loss**, (or if the one year limit is inapplicable), Condition **8 only applies.**
d. If the claim has been filed less than three months after the rejection but more than a year after the happening of the loss, only Condition 15 applies, as in the instant case, and in the case of the stock policy in **Superchem**.

99. Condition 8 and Condition 15 **are not in conflict, as they are independent conditions, and in any event are unambiguous**. The doctrine of *contra preferentum* does not therefore apply to Conditions 8 and 15.

100. I find that Condition 15 applies. This action was commenced outside the time period prescribed thereby. Accordingly this action must be dismissed.

COSTS

101. While this is sufficient to dispose of the action, the broader context of the conduct of this action needs to be considered, in so far as it affects the costs, if any, awardable to the defendant.

102. The contract of insurance was critical to a determination of whether condition 15 applied. The applicable contract of insurance was put in issue by the claimant in its pleadings, particularly its Reply. Accordingly it was for the defendant, who was relying on a limitation in the policy that it claimed to be applicable, to prove that such a limit existed. To do this it needed to prove that the policy applicable contained the necessary policy wording. Remarkably, this was omitted in the witness statements of both Taylor and Bailey. It was possible to establish that limit as applicable by the indirect route of reference to the New Business Schedule, which had been annexed, noting the incorporation of policy wording **GG-FIR-ATTIC-POL-05/07** in the new contract of insurance, and noting that that wording code was the same as that which applied to the **lapsed policy**, which had been exhibited.

103. Though the wording of the lapsed policy was available, as it was exhibited, the wording of the current policy was not exhibited as such. However, because, and only because, the New Business schedule indicated that the wording of both bore the same policy wording code, it was possible to infer that in all likelihood they were identical.

104. The reference to standard wording by the defendant was unhelpful, and a distraction from the exercise of identifying what was the applicable policy and its content.

105. That failure to specifically annex the full policy which the defendant was relying upon introduced an unnecessary element of confusion as to the applicable policy wording, and significantly contributed to a significant lengthening of the written submissions.

106. Further, the defendant pursued the defence that the fire was deliberately set. The evidence did not support this. A significant proportion of the trial, and the submissions, had to be devoted to addressing this issue, and the many other technical points taken, and persisted in, (as reflected in the written submissions). As it turned out most of these were based on much ado about nothing.

107. It was even specifically put to the claimant's Managing Director that he set the fire personally, without a shred of evidence of any kind being led in support of that specific aspect of what must be assumed to have been the defendant's case. Yet no witness of the defendant was produced to corroborate this allegation that the claimant was not only complicit in, but actively participated in having set fire to his own premises in order to make a fraudulent claim against insurers. Needless to say, the examination of that evidence is necessitated.

108. The conduct of the defendant's case contributed significantly to the increase of costs of trial, and time involved and length of written submissions. It would be unfair in those circumstances to burden the claimant with any costs of his representation so increased.

109. Accordingly the costs which it would normally have to pay to the defendant on a prescribed costs basis are reduced by 75% to alleviate the enhanced costs occasioned by the unnecessary complications introduced and caused by the Defendant's conduct of this case.

110. **Further Matters**

The following further matters were canvassed in the evidence and in the parties' written. submissions.

Whether the fire was deliberately set

111. Patrick Zoe, produced as an expert fire investigator, concluded that the fire was **deliberately caused**.

Evidence of Patrick Zoe

112. **Patrick Zoe** visited the insured property on October 23rd, November 17th and December 1st 2008. There he made observations which included *inter alia* the following:

Abnormal fire burning patterns - Two separate Points of Fire Origins

Paragraphs 13 and 14 witness statement

*I noted on my first visit to the loss site that the **burning patterns** of the **fire activities** at the northern section of the building had been **markedly heated and extensive**, with clear and distinct **characteristics of abnormality**. A normal fire burning pattern is one where fire and heat travels upwards. Whenever **fire travels downwards**, **destroying an entire wooden flooring** in the process, such burning pattern is an indication of **abnormality**.*

*I noted on my first visit to the loss site **burning characteristics of the floorings** at the living room and middle bedroom at the top floor of the northern section of the building had been **independent** of each other, constituting **separate Points of Fire Origins**. I noted as well that the **very heated abnormal fire activities** which existed **inside of these rooms** had impacted burning activities at the floors directly below with **just about absolute completeness**.*

113. This is language that appears intended to obfuscate rather than clarify. An expert would be expected to state clearly what precisely were these alleged burning characteristics, which led to the critical conclusion that there were "***separate*** points of fire origins".

Paragraph 15

*I noted on my first visit to the loss site the **fire activities and burning patterns** at the Conference Room at ground floor where **drop-ceiling tiles** throughout the northwestern areas had been **reduced to powdered ash**. These drop-ceiling tiles **would normally retard** fire and therefore, **would** require **extreme heat of the kind caused by use of high temperature fire accelerants** to be reduced to powdered ash. I **also** noted **severe spalling** had been caused to the western and southern walls of room. **Spalling** is the breaking off of large chunks of plastered mortar from the wall and **this is indicative of extreme and tremendous heat**. Upon viewing same I came to the conclusion that the **very heated and abnormal burning patterns** had **been symptomatic/ characteristic of the presence and/ or use of high temperature fire accelerants**.*

*I noted on my first visit to the loss site the **fire activities and burning patterns** at the Conference Room at ground floor where **drop-ceiling tiles** throughout the northwestern areas had been **reduced to powdered ash**. These drop-ceiling tiles **would normally retard** fire and therefore, **would** require **extreme heat of the kind caused by use of high temperature fire accelerants** to be reduced to powdered ash. I **also** noted **severe spalling** had been caused to the western and southern walls of room. **Spalling** is the breaking off of large chunks of plastered mortar from the wall and **this is indicative of extreme and tremendous heat**. Upon viewing same I came to the conclusion that the **very heated and abnormal burning patterns** had **been symptomatic/ characteristic of the presence and/ or use of high temperature fire accelerants**.*

114. Heated and abnormal fire activities and **burning patterns,** and **spalling** were suggestive of the use of **high temperature fire accelerants**. He did not explain in his witness statement what these **high temperature fire accelerants** could have been. His own source material indicated that spalling was also consistent with **rapid cooling** of masonry, not just high temperatures. He inferred high temperatures from the fact that drop ceiling tiles had been reduced to ash. He provided no indication of what material those tiles would have been made of, and what temperatures were required to reduce them to ash.

115. He inferred the use or presence of high temperature fire accelerants from the heat, and from abnormal burning patterns. The fire burning downward was unusual, though he conducted no char test, nor any test, to confirm his alleged observation.

116. **Separate** points of origin would have been highly suspicious .However the basis for the fire having separate points of origin is left extremely unclear. He observed "***burning characteristics of the floorings*** *at the* ***living room*** *and* ***middle bedroom*** *at the top floor of the northern section of the building had been* ***independent*** *of each other,* but does not explain with any clarity what these ***burning characteristics*** were, save that he does indicate that with respect to the other bedrooms on the top floor, *the entire flooring of the* ***southeastern bedroom at top floor*** *of the southern building had been destroyed by fire, and that approximately 98% of the entire flooring of the* ***northeastern bedroom at top floor*** *of the building had been destroyed by fire as well.*

Paragraph 16

I also noted with interest that the ***entire flooring*** *of the southeastern bedroom at top floor of the southern building had been destroyed by fire, and that approximately* ***98%*** *of the* ***entire flooring*** *of the northeastern bedroom at top floor of the building had been* ***destroyed*** *by fire as well. Based upon these* ***physical evidence (*****sic*****) of burning patterns****, I concluded that the burning from the flooring, which* ***burnt downwards****, had been totally characteristic of* ***abnormal fire behaviour****,* ***consistent with the use of fire accelerant****.*

(Electrical short circuitry or spontaneous self combustion of material were **ruled out as** causes of the fire).

117. As a result of the above Mr. Zoe concluded that the insured property "had been destroyed **by at least two major Seats of Fire**, **one** seat having been found in the **middle bedroom at the top floor** and the **other** in the **living room also at the top floor of the building** and that these fires were incendiary in nature, meaning that they had been **deliberately caused**."

Relevant extracts from his report are set out hereunder.

FIRE CAUSE INVESTIGATION & DETERMINATION (continues (page 8)):(all emphasis added)

We have noted *the fire activities* ***and burning patterns*** *at the Conference Room at ground floor where drop-ceiling tiles throughout the northwestern areas there had been reduced to powdered ash, and where severe spalling had been caused to the western and southern walls of room.* ***Our evaluation*** *of the* ***physical evidence*** *of* ***these burning patterns*** *reveals same to have been* ***symptomatic/characteristic of the presence and, or use of high temperature fire accelerants****.*

We have noted with interest, that the entire flooring of the southeastern bedroom at top floor had been destroyed by fire, and that approximately 98% of the entire flooring of the northwestern bedroom at top floor of the building had been destroyed by fire as well. ***Approximately 98% of the flooring of the living room*** *had been* ***destroyed by fire*** *, evidence of which reflected that the burning was from the flooring downwards. This, under the circumstances which actually obtained, amounted to abnormal fire behavior.*

NOTEWORTHY OBSERVATION (continues – page 9):

We must add to this, the fact that Messrs. Shiva Ramadhar, Raj Sookdeo and ***John Clement*** *all* ***made poor appearances*** *before us in the course of their respective statement interviews, meaning that* ***we were aware*** *that* ***they were not truthful in and with their respective statement accounts****.*

TESTING OF MATERIAL SAMPLES: (page 10)

The evidence of extreme high temperature combustion which existed at both the top and bottom floors of the building simultaneously had been clearly manifested in the total destruction of the entire wooden roof frame, together with complete devastation of five (5) out of the six (6) wooden floorings at the top floor of the building. In case scenarios such as this, ***where physical evidence of such high temperature burnings*** *and devastations abounds, the* ***presence of fire accelerants usually gets evaporated*** *in the massive course of combustion. As a consequence of this,* ***no testing of material samples for possible accelerants*** *had been carried out.*

RANGE OF OPINIONS AS TO FIRE CAUSE & POINTS OF ORIGINS:

Our Fire Cause Determination as expressed on Pages 6 &7 of our Report dated December 4, 2008, did take into consideration some information as ***provided by eyewitnesses*** *which had* ***corroborated*** *our* ***forensic finding of fact****.* ***One of the persons interviewed informed us*** *that he entered the building during the early stages of the fire, searching for and calling out his neighbours names, not having seen anyone around. The information obtained was that the fire was seen burning throughout the entire building*

simultaneously, meaning there was fire at various rooms upstairs, as well as downstairs of the building, all burning at the same time.

We refer to our photographs as submitted together with our Report dated December 4, 2008 on page #s, 2, 4, 7, 10 & 11 reflecting ***physical evidence of holistic fire devastation*** *of the various floors throughout the southern building. The burnings* ***appeared to have been of high temperature status, and abnormal****. Combustions throughout the building* ***appeared*** *to have* ***taken place simultaneously****, since there was* ***no evidence linking the fire spread f****rom one room and, or, floor to the others.*

We refer also, to our Photographs as submitted on Pages #s 12, 3 & 13 and submit that the ***burning patterns as noted therein*** *are consistent with* ***fire combustion from the top surface areas of the flooring downwards****. It has been* ***our findings*** *that these abnormal downwards burning occurrences* ***were of very high temperature status*** *as well, and had been Deliberately Caused/ Incendiary. We cite* ***in support of our findings****,* ***evidence*** *of the following:*

1) *that the* ***physical evidence of extremely high temperature combustion*** *had been incompatible with the ordinary household contents of the Ramadhar family, as well as the ordinary business contents and Equipments of Tysa Company Limited.*

2) *That there was a distinct and noticeable physical* ***absence*** *and, or, scarcity of burnt and partly burnt debris/residues of residential absence and, or,* ***scarcity of*** *burnt and partly burnt debris/****residues of residential household contents, as well as business operational contents*** *on the premises of the northern building after the fire, as can be viewed and noted in the 16 pages of photographs which had been attached to our report of December 4, 2008.*

3) *that five (5) floorings in five separate rooms at the top floor of the northern building had abnormally* ***burnt away completely****, leaving* ***evidence*** ***which indicates*** *that in some cases holistic burnings had taken place from top surface areas of the floorings downwards…..*

6) *Our* ***Forensic evaluation*** *and* ***determination of the burning patterns*** *throughout the northern building* ***revealed*** *that* ***combustion throughout the various rooms*** *and floors of the building* ***had taken place simultaneously****. This* ***forensic finding of fact*** *had been corroborated by information we received from persons interviewed in the course of our canvass investigation of the neighbourhood. This scenario, in this particular of circumstances, speaks to occasions of incendiary acts as addressed at chapter 22 of the NFPA Guide as covered hereunder*

OPINION & FINDINGS OF THE T&T FIRE SERVICES

...Having a full understanding of the services which had been required and expected of the fire services on this occasion, and that which they had actually provided, we stand somewhat restrained in our comments to state merely that information had been misleading, ***totally void of scientific expertise and generally useless****. We cite in support of our findings, Point #2 of the fire services letter which states – "A heavy fire loading and material of construction assisted in the rapid spread of fire."*

The letter ***does not say what type of material*** *the* heavy fire loading *in the building had comprised of; it* ***does not state where*** *in the building this* ***heavy fire loading*** *had been situated; it* ***does not*** *state or* ***identify from what room and, or floor, to what room and or floor the fire had spread rapidly to****; the letter stated that "material of construction assisted in the rapid spread of fire." Suggesting to our understanding that these materials of construction had been in addition to the "heavy fire loading" as referred to;' the letter* ***does not identify the physical materials*** *which actually constitute "construction, material",* ***nor state where in building*** *premises these* ***material of construction had been situated*** *or stored.*

We described this letter as misleading*, as the evidence as referred to at Point #2 would usually afford the trained investigator* ***scientific evidence and information to determine the point, or points of fire origins****, and* ***adequate evidence*** *in this particular case to* ***make proper and scientific fire cause determination****. To state therefore at Point #4, that, "During the course of investigation, Fire Officers were unable to unearth any significant evidence to establish a possible cause (s) of fire", is a clear reflection of the fire investigators not knowing what they were doing.*

One can glean from Chapter 4, Basic Methodology, of the NFPA 921 guide, 2004 Edition and in particular, Chapter 4 1; 2; 4.4.31; chapter 5, Basic fire Science, and in particular, Chapter 5.1.1; Chapter 6, Fire Patterns, and in particular Chapter 6.1.1;6;2; 6.2.1' 6.2.1.1, that one has to possess a standard of ***basic forensic and scientific expertise in order to conduct fire investigations of this nature.*** *It is evidently clear to us that the author/Producer of the fire services letter dated March 18, 2010 is generally untrained in the science of fire investigations and ought not to have engaged in expressing opinions on fire cause determination as they have done in this case.*

Whether fire accelerant used

118. Zoe conclusion that the fire was deliberately caused was based on his inference that **fire accelerant** was present. This inference he based on:-

(i) **Abnormal burning patterns , with the flooring burning downwards,**

(ii) **"Separate Points of Fire Origins",**

(iii) **Intense heat** resulting in

a. **almost complete destruction of the wooden floor**,

b. **spalling**, and

c. **ceiling tiles reduced to ash**.

Fire accelerants - physical evidence

119. **No physical evidence** was taken for testing which may have assisted in determining, or eliminating the alleged presence of fire accelerants, or assisting in determining the ignition points of material on site. In cross-examination Mr. Zoe re-iterated that **he did no laboratory test for fire accelerants,** but stated that in addition to the reason set out in his report *("the presence of accelerants* ***usually*** ***gets evaporated*** *in the massive course of combustion*", he also did not **carry out any laboratory test** because he expected **such test would not be of assistance 3 weeks after the fire.**

120. In an era where traces of chemicals in miniscule concentrations can be detected, an expert who fails to perform any physical test whatsoever or to adequately explain and support a failure to take samples for laboratory investigation runs the risk that his expertise, and / or his conclusions will be brought into question. Expert opinion is accepted by a court, because, though opinion, it is the product of knowledge, expertise, and rigorous logical analysis. (See paragraph 12 Civ App P 277 of 2012 per the Honourable Jamadar J.A. delivered March 19th 2013.

"…We also wish to note, that the factors of cogency and usefulness/helpfulness may also be relevant at the stage in the proceedings when the trial judge has heard the evidence and is analyzing the expert evidence and determining the matter on the merits."

121. Its cogency must depend inter alia on the degree to which conclusions are supportable by objective evidence, if available.

Separate Points of Fire Origins

122. Mr. Zoe concluded that the fire was deliberately caused because it had separate points of origin. "Burning characteristics" were "noted" in the living room and middle bedroom which

"were determined to have been independent and separate Points of fire origin and seats of fire" - (page 8 of his Fire Investigation Report of November 5th 2011).

123. At pages 10 and page 11 he simply asserts that there was more than one point of origin, but does not explain the basis of this assertion, save to assert that this was corroborated by persons interviewed. One is left none the wiser as to what precisely had been observed by Zoe that led to the very important conclusion that the fire had more than one seat of origin.

124. In fact Zoe is aware of what is required in a fire investigation report, as revealed in his criticisms of the letter from the fire services. He stresses, correctly, the need for scientific evidence / investigation. Yet his own report substitutes bare conclusions devoid of scientific support, as revealed in the extracts set out above -with emphasis added. His conclusions are described, for example, as "*forensic evaluations"* or "*forensic findings of fact*" - without setting out objective tests or independently verifiable facts on which those conclusions are based.

Intense heat

125. Mr. Zoe (in cross examination), stated that the ceiling was asbestos which was reduced to ash. Asbestos, he claimed, burns at very high temperatures - between 900ºF to 1200ºF. This is not in his report. In so far as it would be material to the hypothesis of high temperatures being consistent with use of accelerants, it would be reasonable to expect this to be mentioned in the report. This would have given the claimant the opportunity to explore in cross examination whether the ceiling tiles really were asbestos, and the temperature at which asbestos, (or any material on site), burns, or is reduced to ash, if at all.

Spalling

126. At Paragraph 6.6 et seq of the guidelines "spalling" is described.

"6.6.2.2 *The* ***rapid cooling*** *of a heated mass of concrete, brick, or masonry* ***can*** *also* ***cause spalling. A common source of rapid cooling in a fire is extinguishment by water.***

*6.6.2.*3 *The* ***presence or absence of spalling at a fire scene should not, in and of itself, be construed as an indicator of the presence or absence of liquid fuel accelerant.*** *The presence of ignitable liquids* ***will not normally cause spalling beneath the surface of the liquid****. The ability*

of the surface to absorb or hold the liquid may be a factor in the production of spalling, especially on horizontal surfaces such as concrete floors. For example, a painted or sealed concrete floor is unlikely to spall. Rapid and intense heat development from an ignitable liquid fire ***may*** *cause spalling on adjacent surfaces, or a resultant fire may cause spalling on the surface after the ignitable liquid burns away*.

127. It is not in dispute that water was used in an attempt to extinguish the fire. Mr. Zoe took no account of the fact that the spalling he observed could have been caused by the rapid cooling by water used in attempts to extinguish the fire. In concluding that the spalling was due to intense heat caused by the presence of fire accelerants, that alternative cause of spalling was not referred to.

128. Again Mr. Zoe 's report would be far more convincing if he had stated that he took into account this alternative cause but eliminated it in favour of the presence of accelerants. It does not so state.

Whether electrical in nature

129. Zoe's investigations as to whether the fire's origin was electrical in nature were less than convincing. He eliminated electrical fault as a possible cause of the fire simply based on his examinations of the "electrical wires, and outlets such as lights, plugs and switches, panels and equipment throughout both sections of the building, looking for possible evidence of electrical short circuit and / or fault and found none.

130. His report does not explain what type of evidence he was looking for. When asked, he indicated to the court that he did not notice "arcing". He looked for "evidence of short circuitry disturbance" but could not answer what specifically this evidence would actually be. This was unconvincing testimony and the basis on which he eliminated electrical fault was surprisingly and unaccountably vague, leaving the impression that he did not know actually know, except in general terms, what to look for to eliminate a possible electrical cause of the fire. His bare assertion that he inspected wires which would have been left after the fire, was devoid of the

detail necessary to establish that he actually had done the necessary tests and investigations to rule out electrical fault.

131. It is all the more surprising therefore that he did not consult with specialists in that area, and in particular the Trinidad and Tobago Electricity Commission (TTEC), although in the statement he recorded from Shiva Ramadhar he was informed, *"For about two (2) weeks before the fire we had been experiencing low voltage throughout the area here. About 1 month prior to the fire, T&TEC had to come and change the main wire which made connection with our house from the light pole as that wire had caught on fire."*

132. That would be expected to be an important matter to confirm, especially if TTEC had produced a report on the state of the electrical infrastructure they encountered at the premises. Any objective investigator would be expected to include this in his report.

133. If he were disputing their finding on a matter as critical as the possible cause of the fire then, as an expert, he would have to lay the logical basis for his opinion in this regard. In so far as Zoe himself purports in his report to rule out an electrical cause, it is not accepted that he did the necessary investigations or possessed the necessary expertise to do so.

Role of expert

134. In the case of **Civil Appeal No. 62 of 2003 Between Dayal Moonsammy-v-Rolly Ramdhanie and Capital Insurance Limited** at **paragraph 12** the Honourable Kangaloo JA stated:

"12. *It should be noted that the case of Gerard Martinez & Or. V. Harrilal Ramdeen & Or. H.C.A. No. 2372 of 1979 Best J. cited the well known case of Davies v. Edinburgh Magistrates 1953 SC 34 which was approved and applied by our Court of Appeal in Edmund & Ors. v Ralph Morris Mag. App. 5 of 1973 (unreported) on the* ***duty of expert witnesses****. "Their duty is to furnish the court with the* ***necessary scientific criteria*** *for* ***testing the accuracy*** *of their conclusions, so as to enable the judge or jury to form their* ***own independent judgment*** *by the application of those criteria to the* ***facts proven in evidence****."*

135. The presence of the combination of spalling, intense heat, and fire travelling downwards, leads to his conclusion that accelerants were used.

136. In fact, analysis of Zoe's basis for concluding the presence of each of the factors that led him to suspect that the fire was deliberately caused reveals:-

(i) That with respect to **Abnormal burning patterns, with the flooring burning downwards,** he eliminates the possibility that the fire having been in a confined space could have accounted for this, as, though he could not specify a time period, he formed the view that the roof burned too quickly to allow that space to be confined for sufficiently long. He performed no char test , or any other test, to corroborate his view that the flooring burned downward, relying solely on his own interpretation of his observations that in his view the fire began upstairs, and the floorings were almost entirely destroyed.

(ii) That with respect to **"Separate Points of Fire Origins",** the basis for his conclusion that this was the case is left extremely unclear. He relies on John Clements' statement to "corroborate "his determination that this is the case, yet he discredits Clement as a truthful witness within that same report. He makes categorical statements in this regard without explaining the basis for this very important conclusion. In fact, despite complete devastation of 5 out of 6 wooden floorings at the top floor of the building, and ***98% of the flooring of the living room*** *being* ***destroyed by fire,*** Zoe claimed to have been able to ascertain that ***burning characteristics of <u>the floorings</u>*** *at the* ***living room*** *and* ***middle bedroom*** *at the top floor of the northern section of the building had been* ***independent*** *of each other* and that that there were separate seats of fire.

(iii)That with respect to **Intense heat** resulting in -

a. **Almost complete destruction of the wooden floor**, this is alleged to be indicative of high temperatures. The alleged high temperatures were ***symptomatic/ characteristic of the presence and/ or use of high*** **temperature fire accelerants**. These "high temperature fire accelerants"

which could result in such a fire are not specified, nor is any information supplied as to the increased temperature that any such accelerant could produce, nor any material to corroborate the assertion that almost complete destruction of the wooden floors is ***symptomatic/ characteristic of the presence and/ or use of high*** **temperature fire accelerants.** The "evidence" in relation to the use of a fire accelerant is simply an inference that it must have been present. There is no physical evidence that an accelerant was used, and none was sought, it being assumed that to even attempt to take samples for analysis would be futile.

b. That with respect to **spalling**, this is consistent with both heat, and rapid cooling, and in any event is not indicative of the use of accelerants. The photographs attached to the report show alleged spalling damage to the conference room on the **ground** floor of the building.

c. That with respect to **ceiling tiles reduced to ash**, there is no evidence or basis for even determining the temperature at which the ceiling tiles, or any other material would have had to burn to be reduced to ash. There was no analysis of the debris whatsoever.

137. There was not even an attempt to support this hypothesis of the use of an accelerant by hard evidence.

138. He observed ash at the premises. It appeared to him to be ash from the ceiling tiles – which he assumed were asbestos. He never tested the ash to see what it really consisted of, so as to corroborate his hypothesis that it burned at very high temperatures, and that such high temperatures were consistent with the use of an accelerant. He relied on his "experience" in concluding that that material usually burned at high temperatures. Yet he didn't even know with certainty what that material was. No test was done to ascertain whether the material that Zoe observed reduced to ash was asbestos, or mineral fibre or gypsum, or some other material. When

asked what he thought was the ignition point of the material that produced the ash that he observed, his answer was 900- 1200 degrees.

139. Based on his assumption of the composition of the ceiling tiles he assumes that it would have had to have been reduced to ash at high temperature .This was obviously a guess. As he did not even know what the material was, he was therefore unable to truthfully state what its ignition point would have been.

140. Without knowing the composition of the ceiling tiles, his assumption that they were of asbestos was worthless as evidence, and his guess at the ignition point of a substance for which he had no basis for knowing the composition, was equally worthless as evidence.

141. There is no therefore no basis for concluding that this would be determinative of a high temperature fire. The further conclusion that unspecified high temperature fire accelerants had to be present is therefore without foundation.

142. The hypothesis of use of a high temperature or any accelerant would carry greater credibility if, rather than its presence being inferred as it appears to be in this case, it had been sought or detected by laboratory analysis.

143. Zoe explains that he got his commission to investigate this fire more than 3 weeks after it had occurred. By that time it would have been too late to detect the use of accelerants, as after 72 hours there would be no trace. In those circumstances he did not even bother to take samples for analysis.

144. Again however this is a general statement, and not completely convincing. In answer to the court he indicated that by accelerant he had in mind something like gasoline, which would have evaporated after 72 hours –long before he came on the scene.

145. He did not appear to appreciate the possibility -

a. that if some other accelerant had been used then it may have left a trace, discernible on detailed analysis of what was left behind after combustion.

b. that the absence of any trace of accelerant may have narrowed the range of possible accelerants that could have been used.
c. that analysis of the composition of the debris could have revealed what the original materials were, and the temperatures at which they burned.

146. In any event the assumption that his own observations were sufficient, and that laboratory analysis of samples from the site was unnecessary, and his apparent aversion to any type of test to substantiate his conclusions, deprived his conclusions of a significant level of credibility. In those circumstances to speculate as to the composition of the source material, and then speculate that the ignition points of the materials that burned, could have been 900 to 1200 degrees Fahrenheit, is completely unhelpful, when he cannot say with certainty what that material actually was.

147. This is significant as the reduction of that material to ash was proffered in support of the contention that it burned at very high temperature, and that high temperature was consistent with the use of fire accelerants.

148. Zoe's evidence amounted to shoehorning some of the observed facts to support the hypothesis that an accelerant was used, without a critical, and scientific, analysis of all the facts and physical evidence. There is nothing scientific about an exercise which avoids any objective test of subjective observations made.

149. The use of an accelerant is a serious allegation. The accusation that an insured used such an accelerant on his property to fraudulently present a claim is even more serious. No one should benefit from insurance fraud, and fraudulent claims, when detected, should be severely penalized.

150. However, if a claim on a policy, for which an insured has paid premiums, is to be rejected on the basis of arson then the evidence in support must justify such a serious allegation.

151. Zoe's findings are not consistent with his source material. They are based on his interpretation of his observations made weeks after the fire. They are based on tenuous physical

evidence. They are based on no scientific evidence whatsoever. They depend to too great a degree upon an unquestioning acceptance of Zoe's alleged expertise in interpreting his observations. His conclusions, rather than bearing the hallmark of a critical logical analysis of the evidence, and recognition of the importance of its corroboration by physical evidence and objective tests, appear speculative and based on surmise and conjecture.

152. The conclusions of Zoe are not the product of the rigorous and logical analysis that are the hallmark of the true expert, and that enable a court to place confidence in such an expert's opinion. The reluctance to perform any objective tests, and the insistence that his training and expertise from fire investigations allowed him to draw the correct conclusions:-

a. that a high temperature accelerant was used,
b. that the fire had separate seats of origin,
c. . that it was not electrical in origin, and therefore,
d. that it was deliberately set were, when examined, found to be an insufficient basis for those critical conclusions.

Mr. Zoe has failed to, "furnish the Court with the necessary scientific criteria". His conclusion that the fire was deliberately caused is not sustainable on his evidence.

153. This fire does have elements that attract suspicion. It started suddenly. It appeared to have started in an upstairs bedroom, and /or living room, in locked premises. It occurred apparently after the claimant had returned to the house for a short period after a long day at the beach, but on his way, despite the lateness of the hour, to his mother in law. However, it has not been established on the evidence of Mr. Zoe, that the fire was in fact deliberately set.

154. Even if it had been deliberately set, arson by someone other than the claimant or his agents has not been properly excluded from consideration. The basis on which the very specific case was put to the claimant's principal that, inter alia, he, together with a named other party, actually set the fire, therefore remains unclear to date.

155. Counsel put to the claimant a detailed accusation that he returned to this house after a day at the beach, with his friend and worker Raj, went upstairs ,set the house alight, and exited the building, even locking the house behind them, so as to account for the fact that the house was found locked.

156. Even Zoe was adamant that while his report concluded that the fire had been deliberately set, he did not conclude that the claimant had set it. To use this report to put such a case to the claimant in this matter is inexplicable.

157. The test postulated by Lord Justice Denning in **Hornal v Neuberger Products Ltd. (1957) 1 QB 247 at pg. 258** is:

"*The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case reach the very high standard required by the criminal law*."
It was submitted "*... while certain corroborative tests were not performed by Mr. Zoe, same were not necessary and/ or practical in the circumstances of this case…* and that "*the opinion evidence of Mr. Zoe should be accepted by this Honourable Court and that there should be a finding that* ***on a higher balance of probabilities*** *the fire of 24th September, 2008 was* ***deliberately*** *set.* "

158. The circumstantial evidence, of inferences from observations of the scene three weeks after the fire, to establish the use of such high temperature accelerants, did not survive cross examination. Without something more than subjective interpretations from this witness, of observations he made weeks after the fire, it is not possible to find, especially on the higher balance of probabilities required, that this fire was deliberately set.

Motive

159. On 6th June, 2008 the Claimant applied for insurance at and sought to increase the value of the insurance on the insured property from $500,000.00 to $2,000,000.00. In September 2008 the premises were subjected to fire, and a claim was made on the policy.

160. A letter of RBTT Bank Limited dated 5th March, 2009 was produced as purported evidence that as at the date of the fire on 24th September, 2008 the Claimant held 4 loans with RBTT Bank Limited and none of these loans had been consolidated.

161. This was a misrepresentation of the effect of that letter, which was not corrected even when this was pointed out to counsel for the defendant in the course of cross examination. That letter is in response to a letter of inquiry which was not produced. The answers in the RBTT response of March 5th were clearly to the unknown queries which had apparently been made in that letter of inquiry.

162. A different letter of inquiry was exhibited as "I" to Zoe's statement .That was a letter of inqury re Kelly Ramadhar only, and there was exhibited a response from RBTT in relation to the letter of inquiry re Kelly Ramadhar, which answered, item by item, the queries made in relation to her.

163. In any event the out of context response of RBTT to the unknown query is actually
*"3. Nil there were **no consolidated loans** as at September 24th 2008 in the names of Tysa Company Limited or Shiva Ramadhar."*

Item 1 of that letter referred to 2 installment loans and 4 demand loans. In relation to each loan facility there is set out the **original** amount of the proceeds**.** There is no date of the grant or expiration of any of those loans, or even whether or not they were repaid. In the absence of the original letter of inquiry it is impossible to make sense of the response. To therefore attempt to link the answer at 3 above (*3. Nil there were **no consolidated loans** as at September 24th 2008 in the names of Tysa Company Limited or Shiva Ramadhar")* - to make the case that none of these loans had been consolidated (paragraph 188 Defendant's written submissions), and therefore the sum total of those loans represented Tysa's indebtedness, thus affording a motive for arson, is stretching the evidence beyond breaking point. In any event this was unnecessary, as it is not in dispute that the debenture was for $600,000.00, itself a significant sum.

164. To do so when, suspiciously, the letter of inquiry which would have placed in context the query that the response was in answer to, and to then persist in doing so, is misleading, especially when the Defendant had the letter from Cordell Borde dated April 7th 2009, which established that the loans had in fact been consolidated and secured by the debenture.

165. The Claimant took out a debenture on 10th June, 2008 to secure the sum of $600,000.00. The mere existence of a debenture, or even a consolidation of indebtedness, is not suspicious in itself. The evidence of Shiva Ramadhar, which was not refuted, is that at the time of the debenture the claimant had contracts in excess of its indebtedness, and that since the fire , even without the insurance proceeds , the claimant had repaid the overdraft/ debenture.

166. Mr. Ramadhar agreed that there had been a history of Tysa exceeding its overdraft limit of $125,000.00 and that it frequently exceeded its overdraft of $125,000.00 by significant amounts, reaching as much as $409,225.23 on 10th June, 2008.

167. It was submitted that an inference could properly be drawn that the Claimant had been experiencing financial difficulties at or around the time of the fire and that this, taken together with the Claimant increasing the value of its insurance, may be viewed as a motive for the burning of the insured property. However the alleged financial difficulties are not supported on a critical examination of the evidence.

168. Examination of the same bank statement reveals that on June 13 deposits of $259,647 were made, and the ending balance for that month was an overdraft of $124,575.33 – within the claimant's overdraft limit. It remained within that limit until November 2008, after the fire. This is consistent with the evidence of Shiva Ramadhar that the Claimant's indebtedness to the bank was consolidated and secured by the debenture.

Motive -Financial difficulties of the claimant

Mr. Cordell Borde

169. Cordell Borde, an insurance adjuster concluded that "financial difficulties being experienced by both the Company and its Directors support "a **motive** for a fire being deliberately set". Borde admitted that he was a claims adjuster with no expertise in analyzing financial statements, including bank statements.

170. The issue of the demand loan and the consolidation of the insured's debt is coincidental with the proposal for new insurance on the subject premises, and the increase of the Sum Insured from $500,000.00 to $ 2,000,000.00. The subject premises were not used as security for the consolidated loan.

171. Mr**.** Borde-

a. admitted that there was no default with respect to the consolidated loan and

b. took no accounts of significant deposits/ credits in the Claimant's accounts, for example:-

STATEMENT DATE	AMOUNT OF DEPOSIT
24/6/08	$261,338.00
25/7/08	$203,696.48

172. No attempt was made to ascertain what the Claimant's receivables, if any were. There was a one sided focus on debts and indebtedness, and failure to appreciate that the bank must have been sufficiently satisfied as to the Claimant's ability to repay its consolidated indebtedness. The consolidation of its debt allowed it to reduce its overdraft to within its approved limit of $125,000.00, and there was no default with respect to this consolidated indebtedness. In fact there were significant deposits thereafter, reflective of ongoing business operations. This selective approach to, and interpretation of, the evidence of financial standing of the Claimant, rendered the evidence in this regard dubious, and of little weight.

Opportunity

173. There is no doubt that the claimant's principals had the necessary opportunity. According to their own evidence they were at the premises shortly before the fire, which apparently began shortly after they had left it. According to the evidence of Shiva Ramdahar at page 3 paragraphs 5 and 6 of this Witness Statement he arrived home at "about 9:00p.m." He left his home and drove with Raj Sookdeo to his mother-in-law's home "five (5) minutes drive from (his) home". At about 9:40 p.m that night whilst at the home of (his) mother in law" someone called to inform them that the insured property was on fire. He then left his mother-in-law's home and returned home to find that "fire was flaring through all the windows of the house and smoke through the roof."

174. Therefore, according to Shiva Ramadhar, he arrived home at approximately 9:00 p.m., left for his mother-in law's home at about 9:05 p.m, arrived at his mother in law's at about 9:10 p.m, received a call that his house was on fire at approximately 9:40 p.m, returned home at about 9:45 p.m at which point "fire was flaring through all the windows of the house and smoke through the roof."

175. Shiva Ramadhar claims that all he did when he arrived at the insured property was to offload 4 speaker boxes with Raj Sookdeo, and it took him and Raj "probably about 5 minutes" to offload the 4 speaker boxes.

176. Undue emphasis was placed by the defendant's attorney on a minute by minute dissection of the recollection of witnesses of times of an event that occurred more than 4 years previously, resulting in a suggested conclusion that Shiva was at home for 20 minutes, if his evidence were to be accepted, or more than one hour, if his wife's recollection of times were accepted. However, I find that taking the evidence in its proper context "fire was flaring through all the windows of the house and smoke through the roof" within 35 minutes of Shiva Ramadhar and Raj Sookdeo leaving the insured property. In either event he allegedly had sufficient time to set the fire which was discovered well underway within an hour of his first leaving the scene, around 9.00 pm.

177. It was submitted that the fire had to have been set by someone with access to the keys to the insured property, as the premises, save for the front door, which had been broken down by John Clement, were found locked. However, this is not correct. As Shiva Ramadhar pointed out, a window could have been broken, either for entry, or to insert material, if the fire had in fact been deliberately set.

178. It was submitted that it is not likely that anyone other than Shiva Ramadhar and/ or Raj Sookdeo would have had the time to break into the insured property and set the fire, given that "fire was visible within (35) minutes of Shiva Ramadhar and Raj Sookdeo leaving the insured property at approximately 9.05pm. There is no evidence as to how much time would have been required for anyone else to have set the fire, or how long it would have taken for the building to be well alight.

179. Despite spending the day at the beach, and the following day being a working day, Shiva Ramadhar and Kelly Ramadhar carried their infant children and Raj Sookdeo to the home of Kelly's 65 year old mother, after 9 o'clock in the night. It was submitted that the Court can infer that the Claimant's servants and/ or agents had the opportunity to set the fire. I find that they did have such opportunity.

Alleged inconsistencies of Claimant's Witnesses relating to the events of the night of 24th September, 2008

What time did they get home?

180. Kelly's evidence is that ""we *left the beach* ***when it began to get dark****."*

She accepted that ***it was around 6****. She eventually* arrived at her ***mother's home****...****after 8, minutes to 9****, not after 9.* Shiva Ramadhar says that he got home **around 9** *–"At about some minutes to nine o'clock that evening we left KFC for home and get there* ***about 9:00 p.m****."*.

Given that his evidence is that he spent approximately 5 minutes home offloading music boxes, and that his mother in law is approximately 5 minutes away, and that he made it clear that his recollection of times was approximate, there is no real inconsistency here.

Did Kelly go straight to her mother's house?

181. Her evidence is that her house was on the way to her mother's house, and that though she stopped by the house when Shiva, travelling separately in his vehicle, went to offload the boxes, she did not enter the compound. There was no interaction between Shiva and Kelly at the house, which was for a very short period in any event. I find that nothing turns on this.

Did Kelly call Shiva to tell him she was going by her mother or did she tell him when she "passed home"

182. In fact she could have called on the phone while still being at the house, as she says she did not leave the car or enter the compound. I find that nothing turns on this. These matters were suggested by the defendant as demonstrating inconsistencies in the evidence of the witnesses, from which adverse inferences on their credibility should be drawn .They turn out upon examination to be explicable.

The value of the loan granted by RBTT to Kelly

183. *Letter from RBTT to Patrick Zoe 05/03/09 states*

"Our Reference: Kelly Khan-Ramadhar ...Installment Loan dated July 27, 2007 Original proceeds - $56,098.00." This is in relation to a query made to the bank to provide the figure for that loan **inclusive of interest and bank charges**. In that light Kelly's evidence that "*I don't understand this letter because I did not take a loan for $56,000.00, I took a loan for $30,000.00*." is quite explicable. The loan was repayable over 4 years and there had never been a default - facts that were not commented upon by the defendant.

184. Raj Sookdeo was not called as a witness by the Claimant to corroborate the version of events put forward on its behalf. This Court declines to draw an adverse inference from the Claimant's failure to call Raj Sookdeo as a witness in this matter. His statement was given to Zoe and was before the court. His absence could not, as contended by the insurer, "*go to weaken the evidence on behalf of the Claimant that its servants and/ or agents* ***did not set the fire***". The burden of proof lies with the insurer.

185. However, there are other aspects of the evidence that are less explicable. For example, did Shiva and Kelly go to the beach in one vehicle, as Raj Sookdeo stated to Zoe, or did Kelly drive separately, as she stated under cross examination. (According to Sookdeo's purported statement to Zoe, he went with them to the beach, they went in one vehicle, (PCB 3507), and Shiva was driving). Why, after a long day at the beach was it so critical to pass home to offload the music boxes, when this would have taken only 5 minutes and could have been done on their return or the next day. Why not remain at the house in that case as the children were in Kelly's car and were hungry after a very long day at the beach?

186. **The evidence of Shiva and Kelly Ramadhar** is that:

i. They went to the beach.
ii. They spent all day there.
iii. They went in two separate vehicles.
iv. The children were with Kelly.
v. They did not go straight home.
vi. They stopped in Siparia opposite KFC – a fast food restaurant - to play very loud music at a "sound off" although their children 2 and 5, who were awake, and tired, were with them.
vii. Shiva then went home to drop off music boxes.
viii. Kelly also went there but did not go inside the house. Shiva joined her at her mother's house.
ix. The message that the house was on fire came when they were at her Kelly's mother's house shortly within 35 minutes of leaving the subject premises.

187. Kelly testified under cross examination that she went by her mother, for her to make something for the children to eat, as she did not have bread in her house on a weekend – although it was pointed out to her that it was a weekday. This contains elements that appear suspicious, but the level of suspicion aroused from

i. not going to one's own house after a long tiring day at the beach with 2 young children,
ii. then remaining with the children outside a fast food restaurant while Shiva was playing music there at high volume,

iii. then passing home solely to drop off the speakers ,and
iv. then, at around 9 pm, going to Shiva's mother in law's house to have her make sandwiches/ hotdogs for the children, and
v. more importantly, the fact that the house was detected to be on fire within 35 minutes of after the claimant's managing director and wife having left it,

has to be far greater to establish the specific case of arson that was put to the claimant.

188. The submission was made that **adverse inferences** should be drawn from the **increase in insurance** and **not calling Raj Sookdeo as a witness**. Adverse inferences are no substitute for proof, the burden of which lies on the defendant to establish arson and fraud.

189. If no survey was done by the insurer as initially required, the inference is that the Defendant waived that requirement, or otherwise satisfied itself as to the amount of coverage, and was prepared to accept the Claimant's proposed reinstatement figure prior to issuing the new insurance coverage. To draw an adverse inference from the increase in coverage in those circumstances would be questionable.

190. In the final analysis the material from the bank that was put to the claimant did not support the motive that Tysa and its directors were in financial difficulty and burned the house to obtain insurance proceeds.

191. Shiva Ramadhar testified, and his evidence was not refuted or discredited in this regard, that the claimant had contracts to cover twice the overdraft, and that he had paid off the overdraft even without insurance proceeds.

192. The burden of proof is on the defendant to establish that the fire was deliberately set by the claimant, or its servants or agents, or with their connivance or complicity. The defendant has put forward evidence only that the fire was deliberately set, the weight of which has been addressed above. Opportunity alone is not such evidence, and is not sufficient. Opportunity, in conjunction with the evidence as to motive, such as it is in this case, is also not enough to satisfy

the burden of proof. There is no direct evidence that the claimant or its agents set the fire, and insufficient indirect or circumstantial evidence to draw that inference.

Whether the Claimant's claim is fraudulent in so far as the sum claimed by the Claimant to reinstate the insured property is overstated and excessive?

193. Condition 8 is headed **fraudulent claims/rejected claims**

*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, or in case of an arbitration taking place in pursuance of Condition 14 of this Policy within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited.)*

194. *A claim is fraudulent if the insured has suffered no loss[1] or has brought about his own loss[2]; if the claim is supported by the use of fraudulent means or devices[3]; or if the insured has deliberately suppressed a defence which would otherwise be open to the insurers[4]. **The position is not so clear where the claim is for an amount in excess of the real amount of the loss and the charge of fraud is based upon the suggestion that the claim has been fraudulently exaggerated. The mere fact that the insured has claimed an excessive amount is not necessarily proof of fraud; questions of amount are largely matters of opinion and the insured may have honestly overestimated the value of his property or the amount of his loss[5]. The excess may be so great as to justify the conclusion that, having regard to the circumstances, the exaggeration of the amount cannot be an honest estimate but must have been intended to deceive the insurers and to induce them to pay a larger sum than is properly payable; in this case the exaggeration is fraudulent[6]. An exaggeration of amount may also be classified as fraudulent where the insured puts forward deliberately exaggerated figures, not for the purpose of inducing the insurers to pay the full amount of the claim, but for the purpose of fixing a basis upon which to negotiate a settlement[7]**. A claim will also be fraudulent if the insured, having made a genuine claim, subsequently discovers that he had not suffered any loss*

or that the amount of loss was significantly smaller than was originally thought, but has proceeded with the full amount of the claim[8]. However, ***very clear evidence of fraud will be required and the court will pay regard to the reality of commercial negotiation***[9]*. Fraud in relation to part of a claim will cause the whole claim to fail*[10]*, and the claimant is not entitled to recover that part of the claim to which the fraud does not apply*[11]*. ….:* **Halsbury's Laws of England Volume 60 (2011) 5th Edition paragraph 203**

195. *In Danepoint Ltd v Allied Underwriting Insurance Ltd [2005] EWHC 2318 (TCC)* it was stated as follows:

> ***[47]*** *The onus of proving fraud is on the party alleging it, in this case AUA.* ***That onus is to some degree greater than usual in civil cases****. This point is perhaps best summarised by the Lord Nicholls in* ***Re H*** *[1996] AC 563, [1996] 1 All ER 1. He said:*
>
> ***"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. 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. . . 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 required 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 would be established."***
>
> ***[48]*** *The definition of fraud in circumstances such as these is that of Mance LJ (as he then was) in The Aegeon [2003] QB 556. At para 30 he said:*
>
> ***"A fraudulent claim exists where the insured 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."***
>
> ***[49]*** *As to the concept of a fraudulent device, this was developed further at para 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? . . . My tentative view of an acceptable situation 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 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 wining at trial. . ."*

[50] *Mr Rhys also helpfully drew my attention to the definition of dishonesty in Twinsectra Ltd. v Yardley [2002] UKHL 12, [2002] 2 AC 164 in which Lord Hutton observed:*

". . . it must be established that the Defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'."

[51] *The fraud must be material in that it must have a decisive effect on the readiness of the insurer to pay. Thus in the South African case of Guardian Royal Exchange v Ormsby [1982] 29 SASR 498, fraud, which consisted of supplying photographs which included damage inflicted after the relevant event, was held not to be material because the insurer would have paid the same amount anyway. However, it appears that that case might have been decided differently in this country if the conduct amounted to a fraudulent device (see above).*

[52] *In addition, the fraud must be substantial. Provided that the effect of an exaggeration to a claim is not simply 'de minimis', a claim that is partly or even largely true but* ***exaggerated*** *is nonetheless regarded as* ***substantially fraudulent****: see para 27-2B1 of The Law of Insurance Contracts by Malcolm Clarke (November 2004 update).*

[53] *Of particular importance on this question of* ***exaggeration*** *is the decision of the Court of Appeal in Galloway v Guardian Royal Exchange [1999] LRLR 209. There the Claimant had a valid claim for over £16,000 but he added to it a dishonest claim for a* ***non-existent*** *computer which he valued at £2,000. It was found that as a result of that dishonest element of the claim the whole claim was tainted and was forfeit. Lord Woolf said at p 213, second column:*

". . . if the fraud is material it does have the effect that it taints the whole. In determining whether or not the fraud is material so that it has that effect, one of course has, in my judgment, to look at the whole of the claim, but if you have a claim (which admittedly there is for a much more substantial sum than the part which is fraudulent) where the part which is fraudulent is nonetheless in relation to £2,000 (which amounts to about 10% of the whole) that is an amount which is substantial and therefore an amount which taints the whole. I would take the view that the consequences are that the view of the judge was right and the whole of the claim was thus tainted by the fraud. The position is that the contact remains one of good faith and the insured is required to exercise good faith in the making of the claim. ***In the***

making of the claim the facts are normally wholly within the insured's knowledge. *The insurers are dependent on the insured exercising good faith in order to evaluate the claim."*

[54] *Both counsel helpfully drew my attention to a number of authorities dealing with the* ***exaggeration*** *of insurance claims. In some the exaggeration of the claim was not regarded as fraudulent: see, for example, Ewer v National Employers' Mutual General Insurance Association Ltd. [1937] 2 All ER 193.* ***More recently, Thomas J. (as he then was) in*** *Nsubuga v Commercial Union* ***[1998] 2 Lloyd's Rep 682 at 686, referred to the "commercial reality that people will often put forward a claim that is more than they believe that they will recover". The judge said that that was "because they expect to engage in some form of 'horse trading' or other negotiation". He made the point that it "would not generally in those circumstances be right to conclude readily that someone had behaved fraudulently merely because he put forward an amount greater than that which he reasonably believed he would recover."***

[55] *In similar vein, and again not addressing willful exaggeration, Lord Hoffmann in Orakpo v Barclays Insurance Services [1995] LRLR 443, said:*

"In cases where nothing is misrepresented or concealed and the loss adjuster is in as good a position to form a view of the validity of the claim as the insured, it will be a legitimate reason that the assured was merely putting forward a starting figure for negotiation."
[56] It seems to me that mere exaggeration of an insurance claim will not *of itself* ***be fraud. On the other hand, exaggeration which is wilful, or which is allied to misrepresentation or concealment will, in all probability, be fraudulent. In addition, I consider that exaggeration is more likely and more excusable where the value of the particular claim or head of loss in question is unclear or a matter of opinion; where, as Lord Hoffmann put it, the insurer's loss adjuster is in as good a position to value the claim as the insured. Conversely, where the value of the claim is or should be clear-cut, and the information on which it is based is wholly within the control of the insured, exaggeration is much less easy to excuse and thus much more likely to be fraudulent.*** (All emphasis added).

196. In view of my findings above it is not necessary to the determination of this case to consider whether there has been a fraudulent exaggeration of this claim. If I were to have considered it then the following issues fell to be considered

i ***Did the Defendant discharge the burden placed upon them in alleging fraud?***

ii. Mere exaggeration need not in itself be fraud unless allied to misrepresentation or concealment.

iii. ***Was anything misrepresented or concealed?***

In this case the claimant's premises were available for inspection by the defendant's agents, who claimed to have inspected them. In this case the defendant's loss adjuster was in as good a position as the insured to form a view as to the cost of repairing the building.

197. **Is the exaggeration more excusable when the value of the claim or head of loss is unclear or a matter of opinion?**

In this case it is a matter of opinion as to the costs involved. At no time was the defendant at risk of having to pay a claim based solely on the claimant's own estimate of its loss. It had the full advantage of its own loss adjuster and his estimate.

EVIDENCE

198. On or about 8th October, 2008 the Claimant submitted to insurers an estimate of the cost to reconstruct the insured property in the sum of $2,250,000.00. However, Stephen Affoo, an expert witness on behalf of the Defendant, provided the Defendant with an estimate to repair the insured property in the sum of $801,470.00 and an estimate to replace the insured property in the sum of $1,048,000.00.

Witness Statement of Stephen Afoo pgs. 3 and 4 paragraphs. 10 and 11

"10. *In light of my observations made during my visits to the loss site and by application of my expertise it was my opinion that the cost of repairing building was $801,470.00, broken down as follows*: (Next to Affoo's figure the court has inserted for ease of comparison the claimant's figures for the same or similar items from its estimate of October 8th 2008)

Demolition and removal of debris	$ 51,800.00	cl- **100,000.00**
Setting out	$ 7,500.00	cl . $10,000
Replace damaged floor	$ 76,990.00	cl . 300,000 plus stairs etc
Replace damaged Walls and Partitions	$170,275.00	cl – **300,000.00**
Replaced damaged Windows and Doors	$ 38,760.	**cl 200,000 plus moulding 100000**
Replace damaged Floor Finishing	$ 52,960.00	cl **125,000**
Replace Ceiling 1st Floor	$ 32,565.00	cl **115000.00**
Replace damaged Roof	$ 97,490.00	cl **300,000**
Replace Architrave	$ 9,970.00	
Replace Ceiling Ground Floor	$ 18,920.00	**cl 75,000**
Replace damaged Electrical Installations	$ 85,970.00	**cl 200,000.00**

Repair damaged Plumbing Installations	$ 74,450.00	cl **100000.00**
Repaint Building	$ 76,890.00	**cl 225000.00**
Repair External Works	$ 6,930.00	
Total Estimated Cost of Repair Work	$801,470.00	

199. 11. *In light of my observations made during my visits to the loss site and by application of my expertise, it was my opinion that the replacement cost of building was $1,048,000.00*." (Affoo did not include any figure for repairing stairs. The claimant's estimate did.)

200. There is therefore a difference of $1,202,000.00 between the replacement cost claimed by the Claimant and that found to be reasonable by Stephen Affoo, which it was submitted, was a fraudulent exaggeration. There is a difference of $1,448,530.00 between the replacement cost claimed by the Claimant and the sum found by Stephen Affoo to be the reasonable cost of repair. The issue is whether the difference in the replacement cost between the estimates of claimant and of the defendant is a fraudulent exaggeration such that the claim can be rejected by the defendant under the policy.

201. There is a significant difference between Affoo and the claimant in respect of each item in so far as they may be comparable, as terminologies, and scope of individual items may vary. However some are directly comparable, for example, roof, painting, electrical, plumbing, and ceilings.

202. A further quotation was prepared dated November 1 2011 purporting to be for the ground floor only in the amount of $1,040,000.00. It is also headed "cost estimate to reconstruct dwelling house for Shiva Ramadhar", though individual items are modified to reflect that those items quoted are for the downstairs only. The items underlined above are common to both of the Claimant's quotations and reveal that, in respect of the items common to both the disparity between the Affoo figures and the Claimant's figures remains significant. The Claimant's quotations are self serving, and compared with Affoo's figures, appear extremely exaggerated.

203. It was submitted that the estimate of Shiva Ramahdar should not be accepted as he was not an expert, that the burden lay on him to establish his claim, and that as he was not an expert, his opinion on the cost of repair was inadmissible. This misses the point as to whether the claimant's claim, whether or not it can be proved or substantiated by admissible evidence, was fraudulent.

204. The onus of establishing that it was **fraudulent** is on the Defendant. It was submitted that Shiva Ramadar, not having set out the methodology for arriving at his estimates of the cost to reconstruct the insured property and/ or the "downstairs portion" thereof, the Claimant has not adduced credible evidence that the cost to reconstruct the insured property is $2,250,000.00 as claimed by the Claimant, or $1,040,000.00 as stated in estimate dated 1st November, 2012. This criticism of the claimant's estimate applies to equally Affoo's. Though Mr. Affoo's methodology is set out at section 6.0 at pg. 5 of his Amended Report dated 25th October, 2011 which is marked "F" and annexed to his Witness Statement, this is not sufficiently explanatory of the basis for his figures.

205. At section 7.0 at pg. 5 of his Amended Report dated 25th October, 2011 Affoo states that his estimate was "*based upon reinstatement of building to the standard of construction and finishings present immediately prior to fire and also based upon prevailing market prices at the time of the preparation of the report of 10th November 2008.*"

206. With respect to how he arrived at the figures he used, Affoo testified that :-

a) He got this figure from his office data base which he claimed to be "recently historical";
b) He had just done figures for another building destroyed by fire about one week before.

207. The evidence is that the claimant does have some expertise in this area. However, even if admissible it will be given little weight on the basis that it is self serving. It is curious that the claimant would seek to rely upon its self prepared estimate to establish the quantum of its loss. But this is different from asserting that the claim is exaggerated, and therefore fraudulent.

208. If Affoo had condescended to particulars in relation to how his individual items had been arrived at then the court would have been in a position to make a finding that that disparity in the figures was the result of the claimant's exaggerating its claim. The further exercise could then have been embarked upon to ascertain whether that degree of exaggeration was so gross as to amount to presentation of a fraudulent claim. The recitation of the formula "by virtue of my expertise" is simply not sufficient to blindly accept the figures submitted, without any basis whatsoever. There is no reason to doubt Mr Affoo's extensive experience and expertise. However his reports, and witness statement, do not provide sufficient basis for accepting and preferring his figures, to the extent required to justify a finding that the claimant's own figures are excessively overstated to the point of fraud.

209. In the normal course of things the defendant, if it accepted the claim, or even if it did not, would retain its own expert to adjust the estimate. In this case that is what it did. The cost of repairing the insured premises was a matter that was ascertainable. As the claimant said, he provided an estimate, and the defendant was free to provide its own estimate. He disagreed with the quantum in the defendant's estimate, but testified that if they could repair the premises for the amount in that estimate they were free to do so.

210. The evidence of Affoo is not sufficiently specific to conclude that it is accurate. In fact the very criticisms of the claimant's estimate apply to Affoo. It would be far more compelling if Affoo, or the claimant for that matter, were to have stated further the type of labour, the number of man hours involved, the rate per hour or per day, the quantity and cost of materials, and the level of necessary profit. Even better, if a contractor could be identified who was prepared to undertake the work for the cost estimated.

211. Both estimates are deficient. In those circumstances it cannot be concluded that the claimant's estimate is fraudulent and excessive as it is equally possible that Affoo's is an underestimate. The detail and methodology in each estimate are equally deficient.

Windows

215**.** Item 6, of the estimates provided on behalf of the Claimant, refers to the cost of replacing *inter alia* windows. Shiva Ramadhar admitted in cross-examination that he removed the windows from the entire property after the fire and stored them for reuse. It was submitted that the Claimant by submitting estimate dated 8th October, 2008 which included the replacement of windows, made a claim for a total loss to the insured property knowing it to be a false claim. In the context of the entire claim, and without any evidence of the value of those windows, and whether or not de minimis, the court declines to make such a drastic finding in relation to this issue.

Value of the insured property at the time of the loss vs. Replacement Cost of the insured property

216. It is not necessary to burden this judgment with a lengthy recitation or analysis of the submissions that there was a difference between these, and/or that this difference is of any significance in relation to either:-

a. the actual insurance that was offered to the claimant being different from what was applied for, or

b. the lack of comparability between the claimant's estimate and that of the defendant's witness.

The contract of insurance issued to the Claimant did in fact provide coverage on a "Reinstatement Basis". That reinstatement can be replacement or it can be repair depending on the circumstances. The policy wording speaks for itself. Suffice it to that I accept the defendant's submissions in this regard and expressly find that there was no such difference.

CONCLUSION

217. I find that

i. There was a contract of insurance between the claimant and the defendant.

ii. The Contract of Insurance in force between the Claimant and the Defendant at the material time comprised the Policy Wording Code: GG-FIR-ATTIC-POL-05/07 and the New Business Schedule dated 29th July, 2008.

iii. **Conditions 8 and 15** are terms of that contract of insurance between the Claimant and the Defendant.

iv. **As the action was filed more than 12 months after the fire**, the Defendant is entitled to deny liability under **condition 15 of the policy.**

v. The Defendant has failed to prove that the **fire was deliberately set** with the connivance of the Claimant's directors.

vi. The Defendant has failed to prove that the Claimant submitted a **fraudulently exaggerated claim.**

DISPOSITION

218. a. The Claimant's claim is dismissed.

b. The Claimant is to pay to the Defendant 25% of the costs calculated on the prescribed costs basis for a claim in the amount of $2,000,000.00.

Dated this 10th day of April, 2013

Judge

Peter A. Rajkumar

The court is indebted to counsel for both parties and their teams for the diligence and industry which characterised their written submissions and their invaluable assistance provided to the Court, as well as to Judicial Research Assistant Ms. E. Ali for her contribution to this judgment.