28/10/11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Cause No. 290 of 2009

BETWEEN:

BRITISH CAYMANIAN INSURANCE COMPANY LIMITED — Plaintiff

AND: GARFIELD "JUNIOR" LINDO — Defendant

AND: DAMION ONEIL BROWN — Second Defendant

Appearances: Mr. Paul Reed QC instructed by Mr. Richard Annette of Stuarts for the Plaintiff

Mr. Tom Lowe QC instructed by Mr. Steven Barrie & Mr. Colm Flanagan of Nelson & Company for the Second Defendant

Before: Hon. Justice Henderson

Heard: July 11 & 12 and Sept. 5 & 6, 2011

Court Reporter: (from the U.S.A.) Ms. Kelli Ann Willis

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

1. On November 22, 2008 Mr. Garfield Lindo, the first defendant, died in a motor vehicle accident on Eastern Avenue in Grand Cayman. He was driving his own car ("the car"), a Honda Civic, at the time. His passenger, Mr. Damion Brown (the second defendant), suffered extensive injuries and has sued Mr. Lindo in a related action. The plaintiff, British Caymanian Insurance Company Limited

("BCIC"), is Mr. Lindo's insurer. In this action, BCIC seeks to avoid any liability it might otherwise have on the grounds of misrepresentation and non-disclosure by Mr. Lindo when he obtained the policy.

Facts

2. On February 6, 2007 Mr. Lindo applied to BCIC for a policy of insurance ("the original policy") which would provide an indemnity against third party liability arising from his operation of the car. He completed a Proposal Form ("the Proposal") on a one-page standard printed form used by BCIC for all such applications. The Proposal takes the form of a questionnaire; the answers are in Mr. Lindo's hand and the form is signed by him.

3. The Proposal identifies Mr. Lindo as a carpenter living in Bodden Town. It begins with this warning:

> "IMPORTANT: You should inform British Caymanian of all facts likely to influence the acceptance and rating of your proposal. If you withhold information, any policy subsequently issued may be declared to be void. All questions must be answered."

4. The Proposal ends with a Declaration which reads in part:

> "I/We declare that the above statements and particulars are complete and correct, and no material fact has been misrepresented, misstated or withheld."

5. Mr. Lindo answered in the negative to each of the following questions:

5. Do you hold or have you held a motor policy with British Caymanian or any other insurer?

...

9. Have you ever sustained a loss arising from fire damage to a motor vehicle and/or inundation from the sea?

...

10. Has the car(s) been specially tuned, modified or adapted to give improved performance?

6. BCIC says that each of these answers was untrue.

7. There is evidence that the car had been insured previously by Motor & General, a local competitor of BCIC. Mr. Lindo purchased the car in June, 2004.

8. Mr. Colin Redden, a retired police sergeant with expertise in accident reconstruction, inspected the car shortly after the accident. He observed "significant" rusting and corrosion on the wiring, seats, floorboard and in the area behind the dashboard. The corrosion had a "characteristic" green colour which led Mr. Redden to say that it had been caused by sea water. The rusting and corrosion had "severely compromised" various electrical components and the structural integrity of the car.

9. The car's original engine generated 106 horsepower when new. By the time of the accident, the original engine had been replaced with one which, when new, would generate 100 horsepower. The car had been fitted with DC exhaust "headers" which, Mr. Redden said, would add 10 to 12 or 14 horsepower to the engine's power. The car's original air box had been replaced with a power flow cone air filter which would have added a further 3 to 4 horsepower.

10. In addition, the car suffered from a number of other defects. It had been in a previous accident and suffered major damage to its frame which, in Mr. Redden's view, had been repaired improperly. The car had two vehicle identification numbers although a car should only have one. Some wiring had been spliced and certain warning lights and the airbags were disconnected.

11. On the strength of the Proposal BCIC issued the original policy. It remained in effect for one year; the contract between insurer and insured embodied in the original policy terminated on February 5, 2008.

12. BCIC issued a new policy of insurance ("the new policy") to Mr. Lindo on August 1, 2008. It has been referred to in evidence as a "renewal" of the original policy and there is no doubt that BCIC regarded it in that light. However, the characterization is not apt; neither party had any contractual obligation to the other between February 6 and July 31, 2008. This was simply a fresh contract between two parties who had entered into a similar contract in the past.

13. There is very little evidence about the circumstances surrounding the issuance of the new policy. No new proposal form was completed by Mr. Lindo. There is no evidence of any meeting or telephone conversation between Mr. Lindo and any representative of BCIC. A cover note describing the period of insurance as running from August 1, 2008 to July 31, 2009 has been produced. It bears a rubber stamp impression reading "seen by Lucie" and the date of October 20, 2008. At some point, a Certificate of Roadworthiness issued for the car on August 22, 2008 by the Department of Vehicle and Drivers' Licensing was provided to BCIC. Beyond these few facts, the record is silent about the nature and content of any communication between the parties.

Notice

14. Policies of motor vehicle insurance against third party liability are regulated by the *Motor Vehicle Insurance (Third Party Risks) Law (2007 Revision)* ("the Law"). The Law requires such a policy to provide an indemnity of at least $1,000,000 in respect of bodily injury or death caused to any person: Law, s. 4(1)(d) and s. 5(2). Subject to one exception, an insurer is required to provide such an indemnity "notwithstanding any rule of law": Law, s. 4(2). The effect of this is to limit an insurer's right to escape liability by establishing that the policy was obtained by misrepresentation or non-disclosure; in such circumstances, the insurer will still be liable for the first $1,000,000 of coverage although not for any excess: Law, 15(1).

15. There is one exception. An insurer can establish that the contract was induced by misrepresentation or non-disclosure and escape liability entirely if it complies with the provision set out in s. 15(3) of the Law. An action for the purpose of establishing non-liability must be commenced within 3 months after the start of the injured claimant's action. Within 10 days of commencing its action, the insurer must give notice to the injured plaintiff of its action and specify "the non-disclosure or misrepresentation upon which he proposes to rely". There is no provision for extending these time limits. The injured plaintiff may then join himself to the insurer's action.

16. Mr. Brown has sued Mr. Lindo. BCIC commenced this action for a declaration as to its entitlement to avoid the policy. Its first notice to Mr. Brown, delivered within the 10-day period, attached its Writ and Statement of Claim as a means of specifying the misrepresentations and non-disclosure upon which it relied. The Statement of Claim referred only to the original policy which was not in effect at the time of the accident. Later, but still within the 10-day period, BCIC amended its Statement of Claim to substitute the new policy for the original policy and delivered the amended pleading to Mr. Brown. I accept that an amendment of a s. 15(3) notice given within the mandatory 10-day period is valid. I will refer to the Amended Statement of Claim below as "the Notice".

17. The Notice alleges one misrepresentation only – Mr. Lindo's negative answer to question 10 about modifications to the car. The Notice said that the car had been modified in 2 ways – by means of the power flow cone air filter and the DC headers – which rendered Mr. Lindo's answer a material misrepresentation.

18. The Notice also alleged non-disclosure of material facts by Mr. Lindo, saying he should have disclosed the following "defects" in the car:

Flood damage
Spliced wiring
Corrosion of the power lead
Rusting on the rear seat and parts of the floor well
Damage to the frame and roof suffered in a previous accident
2 vehicle identification numbers, 1 appearing on a replacement dashboard
Non-functioning airbags
Dashboard warning lights had been removed
The muffler had rusted through
The engine was not the original one
The battery hold-down brace was loose

19. Finally, the Notice contains an allegation that Mr. Lindo failed to disclose a previous insurance claim made in respect of the car.

20. On October 11, 2010, over a year after the 10-day notice period expired, BCIC obtained an order granting it leave to deliver a Re-Amended Statement of Claim. BCIC now says that its somewhat expanded claim advanced in this pleading "relates back" to its original pleading and therefore becomes incorporated into the Notice. At the start of the trial, BCIC sought leave to file a Re-Re-Amended

Statement of Claim alleging for the first time that the answers to questions 5 and 9 (regarding previous insurance and flood damage) were misrepresentations entitling it to avoid the contract. Again, the contention is that an amendment of the pleading "relates back" to the original pleading and effects an amendment of the Notice.

21. I do not agree that the Notice can be amended in this or any other way after the 10-day period has passed. The subject of the Notice was not addressed in the order of October, 2010. The Court did not intend, by a simply order granting leave to amend a pleading, to extend the notice period. If that was the applicant's intention, it should have been made plain at the time. In any event, the 10-day time limit is an important protection for those who stand in jeopardy of losing their coverage. To accept BCIC's relation-back argument would be to permit them to do indirectly what they cannot accomplish directly – amend the Notice after the mandated time for giving notice has passed. If that is permitted I expect that insurers will always say to an injured plaintiff that "your notice is in our pleading and will include any subsequent amendments to it" so as to preserve their ability to supplement the grounds of avoidance at any time prior to judgment. The Legislative Assembly cannot have intended that. It would rob the notice provision of its force. That is a conclusion reached by the Court of Appeal on similar facts in *Zurich General Accident and Liability Insurance Co. v. Morrison & others* [1942] 2 KB 53; applied in *British Caymanian Insurance Company v. Dawson and Carter* 1997 CILR 304 (Grand Court).

22. As a consequence, BCIC can only escape liability entirely if it establishes a misrepresentation or non-disclosure of one of the matters described in the Notice, i.e., in the Amended (but not Re-Amended) Statement of Claim.

23. On the other hand, BCIC's liability will be limited to $1,000,000 if it succeeds in establishing any misrepresentation or non-disclosure contained in its Re-Re-Amended Statement of Claim. I give it the necessary leave for the most recent amendments, but on the understanding that the newly amended pleading does not form part of the Notice.

Law

24. To be entitled to avoid the contract, BCIC must establish the facts upon which it relies on the balance of probabilities.

25. BCIC must establish that the misrepresented or undisclosed fact was material to its decision to issue the policy or to its decision in setting the premium. The traditional definition of materiality is set out in s. 15(5) of the Law as follows:

> In this section –
>
> "'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he would take the risk, and if so, at what premium and on what conditions;"

26. And see *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.* [1995] *1 AC 501 (HL)*; applied in *McLaughlin v. American Home Assurance Co., July 13, 1995,* Grand Court.

27. The insurer must also establish that it was in fact induced by the misrepresented or undisclosed fact to enter into the policy on the relevant terms. Evidence of inducement is needed and it must rise to the usual standard of proof in civil claims. No presumption is available to assist the insurer on these questions. This principle emerges very clearly from the judgment of the Court of Appeal in *Joel v. Law Union and Crown Insurance Co. [1908] 2 KB 863.* The burden is on the insurer to prove the elements of misrepresentation and non-disclosure including, with respect to the latter, the state of knowledge of the insured at the material time.

28. There is a possible distinction between misrepresentation and non-disclosure.

29. Mr. Lindo's obligation was to provide truthful answers to the questions posed in the Proposal. Its wording required him to declare that his answers were correct. Nothing in the wording of the form allowed him to answer to the best of his knowledge and belief; the declaration is worded so as to obtain from Mr. Lindo a guarantee of truthfulness. This fact serves to distinguish the decision of the Privy Council in *Zeller v. British Caymanian Insurance Co. 2009 WestLaw 169777* relied upon by Mr. Lowe. In Zeller's case, the questionnaire called repeatedly for answers which were true to the best of Mr. Zeller's knowledge and belief. The insurer's attempt to avoid the policy failed because its evidence did not establish

that the insured knew or believed his answers to be false. If such limiting language referring to the insured's knowledge is absent, an innocent misrepresentation may entitle an insurer to avoid the policy if it consists of an untrue statement as to a present or past fact which is material to the appraisal of the risk and if it has induced the insurer to enter into the contract: *MacGillivray on Insurance Law, 11th edition, para. 16-010.* At least, that is the state of the law in the United Kingdom as a result of the provisions of the *Marine Insurance Act, 1906.* Recent authorities there have confirmed that this applies to all types of insurance. Whether that legislation applies in the Cayman Islands was not a point addressed in argument before me.

30. Quite apart from the answers given in the Proposal, Mr. Lindo was under a general duty to disclose all material facts to BCIC. This duty arises from the nature of a contract of insurance which imposes an obligation of utmost good faith upon the parties.

31. Materiality is judged by an objective standard: the insured's duty is to disclose everything which a reasonable man would recognize as material: *Joel v. Law Union and Crown Insurance Co.* [1908] *2 KB 863 (CA).*

32. However, and this is crucial in the present case, the general duty to disclose extends only to matters within the knowledge of the applicant for insurance. The test on this aspect is subjective; it is not a question of what facts a reasonable man would have knowledge of when applying for insurance. The question turns on what the individual insured actually knew at the material time. The onus of

proving that he knew of a fact which he failed to disclose rests upon the insurer. This principle emerges clearly from the judgment of Fletcher Moulton, LJ in *Joel*, supra:

> "There is, therefore, something more than an obligation to treat the insurer honestly and frankly, and freely to tell him what the applicant thinks it is material he should know. That duty, no doubt, must be performed, but it does not suffice that the applicant should bona fide have performed it to the best of his understanding. There is the further duty that he should do it to the extent that a reasonable man would have done it; if, it he has fallen short of that by reason of his bona fide considering the matter not material, whereas the jury, as representing what a reasonable man would think, hold that it was material, he has failed in his duty, and the policy is avoided. This further duty is analogous to a duty to do an act which you undertake with reasonable care and skill, a failure to do which amounts to negligence, which is not atoned for by any amount of honesty or good intention. The disclosure must be of all you ought to have realized to be material, not of that only which you did in fact realize to be so.
>
> But in my opinion there is a point here which often is not sufficiently kept in mind. The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognize it to be so. But the question always is, was the knowledge you possessed such that you ought to have disclosed it?"

33. Also see *ColinVaux's Law of Insurance, 9th edition, para. 6-02.*

To What Extent Is BCIC's Notice Effective?

34. The Notice (in its amended form) refers correctly to the new policy. However, the Proposal to which it refers was completed in the course of negotiation for the original policy and was intended only to induce BCIC to issue that policy. After the original policy terminated there was an hiatus of about 6 months during which the parties were under no obligation to each other. During that time, Mr. Lindo had no continuing obligation to disclose anything and no continuing obligation to correct any of his prior answers if the circumstances were to alter their accuracy.

35. When BCIC issued the new policy it treated it as a "renewal" and now says it continued to rely upon the representations made in the original Proposal. Its reliance was misplaced. The representations made for the purpose of inducing the original agreement cannot be accorded that status vis-à-vis the new policy except by agreement of both parties. Had Mr. Lindo repeated the representations or agreed expressly that his earlier representations should be treated by the insurer as made for the purpose of inducing a fresh contract, BCIC's Notice might now achieve its desired effect. In the absence of a consensus *ad idem* on this question, the accuracy of the answers in the Proposal is simply immaterial. The decision in *Synergy Health (UK) Limited v. CGU Insurance Plc & others* [2010] *EWHC 2583 (Comm)*, where an earlier misrepresentation was found to have been "implicitly repeated" at the time of renewal, is to be distinguished on its facts. In *Synergy*, there was no interruption in the insurance coverage between the earlier misrepresentation and the

subsequent renewal and thus the duty of disclosure continued throughout the period.

36. Despite the lack of an agreement between BCIC and Mr. Lindo that the Proposal representations applied to the issuance of the new policy, I am content to approach the issues of fact upon that assumption because of the result at which I have arrived. I therefore begin by considering whether BCIC has proved that Mr. Lindo's answer to Question 10 ("has the car(s) been specially tuned, modified or adapted to give improved performance?") was false.

Question 10

37. I am satisfied from Mr. Redden's evidence that the installation of DC exhaust headers and a power flow cone air filter were modifications which were intended to improve the performance of the vehicle. That was their only purpose.

38. BCIC says that this finding alone entitles it to avoid the policy. It argues that question 10 must be read disjunctively, as posing two distinct sub-questions, and that it focuses upon intention rather than results. The two questions are, in paraphrase:

a) has the car been specially tuned or modified with the intention of improving performance, whether or not that was the result? and

b) has the car been adapted with the intention of improving performance, whether or not that was the result?

39. I am satisfied that question 10 asks just one question, not two. The words "tuned", "modified" and "adapted" are used here as three closely-related variations on one theme. Question 10 is asking whether there has been any sort of (material) alteration of the car from its factory state.

40. The Proposal is a standard printed form created and used by BCIC as a means of obtaining the representations it desires from its prospective customers. The principle of *contra proferentem* applies. Any ambiguity in question 10 must be resolved in Mr. Lindo's favour. Question 10 may be aimed at the intentions of the owner, as BCIC has said, or at the effect upon the car's performance. Either construction is reasonable. I will therefore take the question as asking whether there has been an alteration of the car which has resulted in improved performance.

41. The next question is the choice of a benchmark against which to measure the car's performance so as to determine whether its performance has "improved". There are two possibilities: an improvement over the performance of the car as it would have been when new, with the original engine in place; and an improvement over its performance immediately prior to the modifications. The latter possibility seems much less likely to be of interest to an insurer. An "improvement" of performance which does not surpass the car's performance when new would have little relevance to the decision to ensure or to the setting of

the premium. BCIC's burden here is to satisfy me on the balance of probabilities that the changes to the car gave it a level of performance which exceeded, to a material degree, the car's performance when new.

42. A brief report from Mr. Brown's expert, Mr. Owen Laurenson, states that the effect of the modifications would be "minimal" and offer "very little performance improvement". He also said that the only way to determine with certainty whether the performance had been enhanced would be to test the engine and modifications on the open road (an impossibility).

43. Mr. Redden's original opinion was that the original engine generated 106 horsepower while the "more powerful" replacement engine produced 130 horsepower, a 23% increase. This opinion formed the cornerstone of his report on the question of modifications.

44. Both engines were made by Honda. For reasons which are unexplained, Mr. Redden did not obtain technical data from the manufacturer. The horsepower of the original engine was taken from an article in Wikipedia and that of the replacement engine from an unknown internet web site. The perils of this approach are well illustrated by what happened next. When a letter was obtained from Honda on the subject, it became clear that the replacement engine generated (when new) just 100 horsepower, a 6% decrease in power. Mr. Redden corrected his error in a supplementary report. On this occasion he also observed that the only way of "definitely" establishing the horsepower of the new

engine would be to test it with a dynamometer. The focus of inquiry then shifted to the DC exhaust headers and the power flow cone air filter.

45. Mr. Redden says that the DC exhaust headers added 10 to 14 additional horsepower and the power flow cone air filter added a further 3 to 4 horsepower. The headers are manufactured by DC Sports. Mr. Redden's opinion of their effect is based upon data he obtained on the internet from distributors of the product (Octane Motor Sports and DoctorImport.com), not from its manufacturer. The web site text is promotional in nature. In the absence of evidence to the contrary, I infer that the opinion about the power flow cone air filter was reached in the same way.

46. Thus, the opinion about increased horsepower is derived from double hearsay – what Honda said (I assume) to its two distributors and what they then conveyed (through the medium of their web sites) to prospective purchasers and to Mr. Redden. While it is clear that an expert's opinion based upon hearsay is admissible, the source of important data is always a material consideration on the question of weight. I have heard no evidence permitting me to assess the reliability of these two web sites. No reason has been advanced by BCIC to explain why the data was not obtained directly from the manufacturers in question. In the one instance in which a manufacturer (Honda) was asked for data, Mr. Redden's initial opinion turned out to be incorrect. The result is that I am not satisfied to the required standard that the effect of the modifications was an improvement in performance. BCIC has failed to prove that Mr. Lindo's answer to question 10 was untrue.

Do the Defects Alleged in the Notice Entitle BCIC to Avoid the Policy?

47. Mr. Lindo's general obligation to disclose material facts now falls to be considered. BCIC's Notice specifies a number of undisclosed defects in the car (enumerated above) which it says entitle it to avoid the policy without paying the $1,000,000 "cap".

48. Mr. Lindo's obligation of utmost good faith required him to make disclosure of any defects in the car of which he was aware provided that a reasonable man would agree that the defect was material.

49. Some of the defects alleged in the Notice have not been shown to be material to the insurer's decision to issue the policy in the sense that a reasonable observer would consider them to be so. I am not satisfied that the spliced wiring (para. 12(b)), the corroded power lead (para. 12(c)), rusted muffler (para. 12(j)) or untightened brace (para. 12(l)) were material considerations. A reasonable observer would not consider them to bear in any significant way upon the decisions the insurer had to make about policy issuance and pricing. They do not give rise to any significant concern about the safety of the vehicle.

50. As for the remaining defects, BCIC carries the burden of proving on the balance of probabilities that Mr. Lindo knew of the defects and failed to disclose them.

51. There is no evidence of what, if any, conversation Mr. Lindo may have had with BCIC. I am asked to infer his failure to disclose from the fact that BCIC has no record of his making any disclosure to it when the new policy was issued. No BCIC witness has testified to any conversation with Mr. Lindo. The witness who dealt with him on the original policy has kept no notes.

52. We know very little of Mr. Lindo's interests or habits. There is no evidence that he had (or did not have) an enthusiasm for cars. The fact that the car had been modified does not by itself show that Mr. Lindo was a car fancier as he purchased the car second-hand and may not have commissioned the modifications. We know nothing of what Mr. Lindo may have been told about the car when he bought it or when he had it serviced or repaired. We do not know how often or how far he drove the vehicle.

53. Given the state of the evidence, I cannot infer that Mr. Lindo knew of the non-functioning airbags, the replacement engine, the prior damage to the frame and roof, or the fact that the car had two vehicle identification numbers. It is more likely than not that Mr. Lindo was aware of the fact that the dashboard warning lights had been removed and that there was rusting on the rear seat and on parts of the floor well. It has not been shown that Mr. Lindo would have known that the rusting was "flood damage"; it could have been caused in other ways, such as driving through brackish puddles or storing sodden items in the car. (I also find that BCIC has failed to prove that Mr. Lindo was aware of the spliced wiring, the

corroded power lead and the untightened brace. It is more probable than not that he knew of the rusted muffler.)

54. I have concluded that Mr. Lindo knew of, but did not disclose, two defects which a reasonable observer would consider material: the missing dashboard warning lights and the rusting on the rear seat and floor well. Were these defects in fact material to BCIC's decision? Did its lack of knowledge of one or both of these deficiencies cause it to act to its detriment?

55. The evidence shows that Mr. Lindo obtained a Certificate of Roadworthiness for the vehicle on August 22, 2008 issued by the Department of Vehicle and Drivers' Licensing. Given its official status, the Certificate likely reassured Mr. Lindo that the vehicle had no defects which needed to be disclosed to BCIC. Of course, the Certificate is dated 22 days after the policy was issued but I do not infer that BCIC bound itself to the contract before receiving the Certificate; it is more probable than not that BCIC agreed to issue the policy on August 22 and backdated it to August 1. For this conclusion I rely upon the following evidence of Ms. Winsome Ruddock, Motor Manager of BCIC at the relevant time:

> "Q. There's no question here that seeks to find out whether the car is in roadworthy condition?
>
> A. Not on the proposal form.
>
> Q. Why is there no question to the insured to inform you of the roadworthiness of the car?
>
> A. Because there's a document that proves that.
>
> Q. Exactly. There's a roadworthiness certificate, is there not?

A. That's right.

Q. And that's what you rely on. That has to be produced by the proposer, doesn't it?

A. Usually it is, yes.

Q. Usually he brings it along, doesn't he?

A. Yes, he does, if it's available.

Q. And it's that certificate on which you rely in relation to the roadworthiness of the car, isn't it?

A. That's correct, right.

Q. And that's the only thing you ask for in relation to roadworthiness?

A. That's right."

56. In the light of Ms. Ruddock's evidence and BCIC's insistence upon obtaining a Certificate of Roadworthiness, I am not satisfied that Mr. Lindo's failure to disclose the missing dashboard warning lights and the rusting was material to BCIC's decision.

57. The final allegation in the Notice is that Mr. Lindo failed to disclose a prior claim on his insurance. There is no evidence of this. The car was damaged in a previous accident but that does not demonstrate that Mr. Lindo made a prior claim under a policy of insurance.

58. The result is that BCIC is not entitled to avoid the policy under the provisions of the Law and must satisfy any future award of damages at least to the level of the $1,000,000 cap.

Is There an Entitlement to Avoid Under the General Law?

59. If BCIC is entitled under the general law of insurance to avoid the policy then its liability will not exceed $1,000,000. For that reason, the additional grounds for avoidance which have been pleaded but did not form part of the Notice must be considered. There are just two: the answers to questions 5 and 9 in the Proposal. In question 5 BCIC asked Mr. Lindo if he holds or has held a "motor policy" with BCIC or any other insurer. Question 9 asked Mr. Lindo if he had ever sustained a loss "arising from fire damage to a motor vehicle and/or inundation from the sea".

60. Neither party presented a fully-developed argument on this aspect at the hearing. Each of the parties is at liberty now to set down a hearing on this question, or, if the parties agree, their arguments may be submitted in writing without the need of a further court appearance.

Dated this 28th day of October, 2011

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS