ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2005/0268

FRANKLYN REYNOLDS

Claimant

And

STATE INSURANCE CORPORATION

Defendant

Appearances:

Mr. Dane Hamilton Snr for the Claimant
Mrs. Denise Jonas-Parillon for the Defendant

……
2006: July 21st
2007: January 17th
……

JUDGMENT

[1] Blenman J, This is a claim for indemnity.

[2] Mr. Franklyn Reynolds (Mr. Reynolds) owned a glass bottom boat "the Lady Magdolyn" which was passenger carrying. Mr. Reynolds insured the boat with State Insurance Corporation (the Corporation) and renewed his policy of insurance on a yearly basis. There is no dispute that the policy was amended and covered third party liability to the extent of $500,000.00.

[3] The conditions/warranties of the insurance policy include the following namely: (a) owner in charge of vessel at all times (b) excluding swim, dive, snorkel and crew liability (c) maximum number of 50 passengers.

[4] Mrs. Susan Norman (Mrs. Norman) who was a passenger was injured when the propeller of the boat came into contact with her foot. She sued Mr. Reynolds for damages based on

the injuries she had suffered and obtained judgment in default against him on November 25th 2002 together with damages to be assessed.

[5] Olivetti J, on May 12th 2002 assessed damages in the sum of $359,245.45 together with prescribed costs and interest in favour of Mrs. Norman against Mr. Reynolds.

[6] During the assessment hearing Mr. Reynolds was represented by Counsel.

[7] Mr. Reynolds commenced the payment of the judgment debt and later instituted these proceedings against the Corporation and sought to be indemnified in the sum of $359,245.45 which the Court had ordered him to pay together with legal costs which he had incurred during the assessment hearing.

[8] In support of his claim, Mr. Reynolds alleges that the Corporation was always aware that he used "the Lady Magdolyn" to take passengers snorkeling and swimming. He contends that Mrs. Norman was injured, while she was ascending the ladder leading into the boat and when one of the crew members negligently turned on the engine causing the propeller to come into contact with her foot.

[9] Mr. Reynolds complains that the Corporation had through its servants and/or agents indicated to him and/or Mrs. Norman's solicitor that the Corporation was in the process of settling Mrs. Norman's claim. In fact, he says that he was never aware that the Corporation had intended to deny liability until 5 years after the accident had occurred.

[10] Judgment having been granted against him and his having commenced the liquidation of the judgment debt, Mr. Reynolds says that he is entitled to be paid the full amount of the debt on an indemnity basis together with the costs he has incurred in defending the matter. He says that the Corporation is now estopped from denying liability based on its actions mentioned earlier.

[11] The Corporation strongly resists Mr. Reynolds' claim for indemnity on the following grounds:

(a) Mr. Reynolds had represented to the Corporation that the boat would have been used to transport passengers to view under sea water through the glass bottom of the boat;

(b) The insurance coverage excluded liability for injuries sustained whilst swimming, snorkeling or diving;

(c) Mrs. Norman sustained injuries whilst swimming to the boat's under water ladder after engaging in snorkeling about the boat at Cades Reef;

(d) Mrs. Norman was injured when she had swum towards the boat and when she had just placed her hand on the ladder to climb aboard;

(e) Mr. Reynolds negligently and suddenly started the engine causing the propeller to injure Mrs. Norman's foot.

[12] In view of the alleged circumstances, the Corporation maintains that Mr. Reynolds had no insurance coverage under the contract of insurance and is not entitled to be indemnified.

[13] Further, the Corporation states that at no time did it accept liability to indemnify Mr. Reynolds for the damages he had to pay to Mrs. Norman and puts Mr. Reynolds to strict proof.

Issue

[14] The issues for the Court's determination are:

(a) Whether Mr. Reynolds, in the circumstances that obtained, was in breach of the condition/warranty of the insurance policy;

(b) Whether he is entitled to be indemnified;

(c) Alternatively, whether the Corporation is estopped from denying liability.

[15] Mr. Reynolds filed a witness statement and was cross examined.

[16] Mr. Leslie Ellis (Mr. Ellis) and Mr. Damler McCoy (Mr. McCoy) the latter who is the manager of the Corporation filed witness statements on behalf of the Corporation and they too were cross examined.

Claimant's Evidence

[17] In his witness statement Mr. Reynolds stated as follows:-

> "I used the glass bottom boat, the Lady Magdolyn" to ply my trade as a water sports operator. I would take passengers, mainly tourists to Cades Reef for sightseeing and snorkeling. I would anchor the boat by the mooring at Cades Reef where the passengers would either go swimming or snorkeling. This was well known to the Defendants. Those who go snorkeling usually go with a tour guide.
>
> On 9th December, 1998 I went on my normal tour with about 14 passengers, including a tourist Susan Norman. We anchored (tied up to the mooring at Cades Reef) and some of the passengers went snorkeling. Susan Norman went swimming. She was in the water at the stern (back) of the boat holding unto the life ring.
>
> Accidentally, the boat cut its mooring and so we had to start the boat to try and secure it. When we started the engine, Susan Norman was climbing up the ladder which was at the rear of the boat and the engine propeller cut her heel. Myself and other crew members had failed to notice that she was ascending the ladder prior to restarting the engine."

[18] He further stated at paragraphs 12 and 13 of his witness statement as follows:

> "On May 7th 2001 a letter was sent by the new Attorneys for Susan Norman, Christian Lovell and Walwyn & Co. to Mr. Dalmer McCoy, the Claims Manager of the Defendant and that letter was copied to my solicitor who discussed the same with me. This letter was sent in response to an earlier letter dated 12th February, 2001 sent to me by Mrs. Norman's Attorney and copied to the Defendants.
>
> That although I was not expressly written to by the Defendant with regards to settling the claim, I was aware and was advised by my Attorney that settlement discussions were taking place between the defendant, Mrs. Norman's Attorney and himself. At no time between the dates of the accident that is to say December 9th 1998 to May, 2001 did the Defendant advise me or my Attorney that they were not settling the claim for Susan Norman. This persisted through to September 2001 during which time discussions continued with the Defendant's claims manager. On September 11th 2001 a formal money sum was claimed by Mrs. Norman's Attorney on her behalf in the amount of $322,956.97.

> An itemized claim together with supporting documents, I am advised was sent to the Defendant sometime after September 11th 2001 and I am advised by my Attorney that on November 27th 2001, the Defendant's Attorney provided the Defendant with a legal opinion advising that an offer of settlement be made to Mrs. Susan Norman in the region of EC$136,738.38 - $145,738.38. That opinion ended with the statement that "…since the action is at the state of a Claim Form only, legal costs of no more than $2,500.00 may be paid." Of importance, although I was not yet served with a copy of the claim form, State Insurance Corporation, the Defendant was already served with the same by the Attorneys for Mrs. Norman. I am further advised that a copy of this Legal Opinion was transmitted to my Attorney by the Manager of the Defendant's Claims Department under the instructions of the then General Manager for his imput, advise and opinion, which he tendered."

[19] During cross examination by Learned Counsel Jonas-Parillon, Mr. Reynolds admitted that the insurance policy does not cover snorkeling or swimming. He stated however, that during 1997 – 1998 he continued to take his passengers swimming and snorkeling using the boat "the Lady Magdolyn".

[20] Mr. Reynolds said that the Cover Note of the insurance policy excluded swimming and snorkeling and he was aware of the exclusion clause at the time when he took his passengers swimming and snorkeling. He stated further that "*he took his passengers swimming and snorkeling at his own risk. Mrs. Norman was not a professional snorkelor, she was just at the back of the boat snorkeling."*

[21] During further cross-examination, Mr. Reynolds maintained that Mrs. Norman was climbing the ladder when she was injured. Mr. Reynolds denied that Mrs. Norman was injured while she was snorkeling or swimming. He insisted that she was at the back of the boat snorkeling and said "*we started the boat, and she tried to board the boat."*

[22] Mr. Reynolds said that he reported the matter to Mr. Ellis the day after the accident had occurred. He also said that while he had signed the Small Claim Form in front of Mr. Ellis, the Corporation had only contacted him informally and not in writing. However, his Attorney wrote the Corporation in relation to the matter and while he was of the view that his Attorney had written on his behalf in relation to the settlement of Mrs. Norman's claim he admitted that he had not seen anything in writing.

[23] At paragraphs 14 and 15 of his witness statement he stated that up to this point he was convinced and confident that Mrs. Norman's claim would have been duly settled after the passage of some three years, during which time his boat "the Lady Magdolyn" continued to be insured with the Corporation. He thought the Corporation was dealing with the claim in good faith, through discussions between the parties and the soliciting of opinions as to the amount of compensation to be paid. He was surprised that on or about 1st February, 2001 he was served with a Claim Form in High Court Claim No. ANUHCV 2001/0307 – Susan Norman v Franklyn Reynolds wherein Susan Norman claimed damages for her injuries suffered on the 9th December, 1998 by the propeller of his boat engine.

[24] He contacted his solicitor Mr. Dane Hamilton Snr and gave him a copy of the Claim Form and his solicitor entered appearance on his behalf. Mr. Reynolds said he always felt that he was liable for the injuries suffered by Mrs. Norman and he was initially advised that the Attorneys for Mrs. Norman had issued the Claim out of caution as time was running pending settlement and given his admitted liability there was no need for him to defend the claim.

[25] Mr. Reynolds said that his solicitor by letter dated February 4th 2002 forwarded a copy of the Claim Form to State Insurance and thereafter State Insurance through their solicitors, Hill and Hill and Mrs. Norman's solicitors, Christian Walwyn and Co and have been in further discussions aimed towards settling the claim. Up to that date, the Corporation never advised his Attorney that they were denying liability. His understanding was that the claim would have been settled.

[26] In bad faith some five (5) years after the occurrence of the accident the Corporation wrote to Mrs. Norman's Attorney (letter dated September 2003) first apologizing for late responses to various correspondences relating to the claim and in bad faith indicated for the first time ever that it was not liable in any way whatsoever by virtue of the contract of insurance for the injuries sustained by Susan Norman. This letter was copied to his

Attorney. At no time prior thereto was he advised by the Corporation that they were denying liability or did they ever communicate such to his Attorney. He felt aggrieved and let down by the actions of his Insurers, who had taken five years to arrive at this view.

[27] The assessment took place on the 7th April, 2005 and on the 12th May, 2005 final judgment was awarded to Mrs. Norman in the total amount of $452,910.39 inclusive or interest and costs. During the course of the assessment, full written submissions with authorities, were filed by his Attorney who cross examined the witnesses and he has tendered a bill for $25,000.00 for professional fees over a period of seven (7) years.

[28] During further cross examination, Mr. Reynolds admitted that while he was aware of ongoing settlement discussions he could not remember how he became aware of those discussions. In fact, to the best of his knowledge his Attorney wrote to the Corporation about the settlement of the matter even though he had no written proof of this. Further, and during intense cross-examination, Mr. Reynolds was forced to admit that all of the matters to which he had testified about the settlement negotiations were told to him by his Attorney.

[29] He said that he was convinced and confident that Mrs. Norman's claim would have been settled because "*I had insurance coverage and that is what I think insurance is about.*"

[30] Mr. Reynolds said that he did not agree with the contents of a letter dated 14th July 1999 that was purportedly written by Mrs. Norman's Attorney to the Corporation and which at paragraph 2 states that:

> "While snorkeling she experienced problems with her swimming mask. You instructed her to come on board so that you could assist her with the mask. She made her way to the boat and when she had just placed her hand on the ladder to climb aboard, you suddenly started the engine causing the propeller to catch her left hip and sever her heel."

[31] Mr. Reynolds told the Court that he had advised Mr. Ellis that "while Mrs. Norman tried to board the boat she sustained injuries."

Defendant's Evidence

[32] Mr. McCoy, who is manager of the Corporation, told the Court that in 1992 the Corporation issued a marine policy to Mr. Reynolds in relation to his glass bottom boat "the Lady Magdolyn." Mr. Reynolds renewed the policy yearly until 1999 when it was renewed and amended by the Cover Note dated July 1st 1998.

[33] The Cover Note stated as a condition/warranty that swim, drive, snorkel and crew liability were excluded. The cover note provided for third party liability of $500,000 for any one accident or occurrence.

[34] Mr. McCoy said that on December 18th, 1998, Mr. Reynolds reported to the Corporation that he was involved in an accident. Mr. Reynolds completed the Corporation's Small Craft Claim Form and submitted it to the Corporation on December 18th 1998. The Small Craft Claim Form report indicated that on 9th December, 1998 the boat was anchored on the Cades Reef and the anchor rope cut; the boat started drifting. Mr. Reynolds then started the engine to avoid damages to the boat on the coral. One of the passengers tried to board the boat while it was moving she got cut from the propeller. No claim had been made on Mr. Reynolds as yet. The Corporation directed Mr. Reynolds in the Small Craft Claim Form in capital letters that "If a claim has been received from a third party … DO NOT ADMIT LIABILITY…"

[35] On July 16th, 1999, the Corporation received a copy of a letter dated 14th July, 1999 from Lake and Kentish which was addressed to Franklyn Reynolds. The letter from Lake and Kentish indicated that Mrs. Norman was at that time their client and that "on December 9th 1998 while snorkeling Mrs. Norman experienced problems with her swimming mask. Mr. Reynolds instructed her to come aboard so that he could assist her with the mask. Mrs. Norman made her way to the boat and when she had just placed her hand on the ladder to climb aboard, Mr. Reynolds suddenly started the engine causing the propeller to catch her left leg and sever her heel."

[36] He also received correspondence from Mr. Jason Martin Solicitor on behalf of Mrs. Norman.

[37] By letter dated March 30th, 2001, he (Mr. McCoy) responded to Mr. Martin's letter and indicated to him that the Corporation was prepared to enter negotiations "without prejudice" and requested that Mr. Martin submit his client's statement of claim and all relevant documentations.

[38] Mr. McCoy said that their negotiations continued "without prejudice" and Mr. Martin submitted his client's claim to the Corporation which was filed September 17th, 2001 and he requested an opinion from our solicitor as to the amount of damages the Corporation may have to pay if the Corporation decided to settle the matter. In the meantime, the Corporation contacted its reinsurers for their opinion on the matter and the reinsurers indicated that their first impression was that the insurance contract excluded liability. Mr. McCoy said that they continued our discussions with our reinsurers concerning the matter over several months. Within the first half of February, 2002, the Corporation invited Mr. Dane Hamilton Snr to a meeting at the Corporation to debate the interpretation of "swim, snorkel and dive" as it relates to Mrs. Norman's accident and the insurance contract. Mr. Josiah, Mr. Patry and himself disagreed with Mr. Hamilton and indicated to him (Mr. Hamilton) that the Corporation was not liable for Mrs. Norman's injury in the circumstances of Mrs. Norman's accident.

[39] During cross examination by Learned Counsel Mr. Hamilton, Mr. McCoy was adamant that the Corporation never accepted liability for the injuries which Mrs. Norman sustained.

[40] The next witness, Mr. Ellis, is presently the manager of the General Division of another Insurance Company. Mr. Ellis told the Court that he was the Assistant Manager of the Corporation and was familiar with Mr. Reynolds' insurance policy in relation to "the Lady Magdolyn". He says that in 1992 the Corporation issued a policy to Mr. Reynolds with respect to his glass bottom boat "the Lady Magdolyn". The policy issued to Mr. Reynolds

consisted of the Institute Yacht Clauses of 1/11/85 which is a standard form policy and the Yacht and Motor Boat Insurance Schedule.

[41] Mr. Ellis further stated that after 1992, a cover note was issued to Mr. Reynolds whenever he renewed the policy. The cover note formed part of the insurance contract.

[42] In 1997, Mr. Reynolds' policy clauses were changed to the Institute Time Clauses Hulls Port Risks including Limited Navigator.

[43] During cross examination by Learned Counsel Mr. Dane Hamilton, Mr. Ellis maintained that in 1992 he gave Mr. Reynolds a copy of the policy of insurance. He denied that the Corporation never provided Mr. Reynolds with an executed policy. Mr. Ellis said that he had general oversight of the claims department and while he was aware of the accident he could not say that Mr. Reynolds had reported the accident to him personally. However, they spoke from time to time and Mr. Reynolds could have told him of the accident.

Institute Time Clauses Hulls Port Risks (Including Limited Navigation)

[44] I propose now to address Section 10 of Institute Time Clauses Hulls Port Risks including Limited Navigation (ITCHPR) Protection and Indemnity which provides as follows:

> 10 PROTECTION AND INDEMNITY
>
> "10.1The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable, as owner of the vessel, for any claim, demand, damages and/or expenses, where such liability in consequence of any of the following matters or things and arise from an accident or occurrence during the period of this insurance.
>
> 10.1.4 Loss of life, personal injury, illness or payments made for life salvage.
>
> 10.2.5 Legal cost incurred by the Assured, or which the Assured may be compelled to pay, in avoiding, minimizing or contracting liability with the prior written consent of the Underwriters.

> 10.4 The indemnity provided by this Clause 10 shall be in addition to the indemnity provided by other terms and conditions of this insurance.

Claimant's Submissions

[45] Learned Counsel, Mr. Hamilton submitted that it is clear from the Cover Note 1st July, 1998 that the cover of insurance extended to personal injuries suffered by a third party by reason of the negligence of either master or crew or both. Third Party liability is in no way defined or limited as it merely states $500,000.00 any one accident or occurrence. Neither is there any section in the 'Institute Time Clauses Hulls Port Risks including Limited Navigation' which deals directly with Third Party liability. Further, 10.4 of the ITCHPR above clearly states that the indemnity provisions in the Institute Time Clauses Hulls Port Risks including Limited Navigation are in addition to the other terms and conditions of this insurance such as the Third Party Clause of the Cover Note.

[46] Mr. Hamilton, further, submitted that on any version of the events of December 9th 1998; Mrs. Norman was not swimming at the time the accident occurred. She was in the process of ascending the ladder to get aboard the boat. It is true that she went swimming and/or snorkeling however, her injuries did not occur whilst swimming, but on boarding the boat. Swimming was not the causa causan of the accident; it was the negligence of Mr. Reynolds which caused the injury. The primary cause of the injury sustained by Mrs. Norman was the act of the Mr. Reynolds in starting the engine (which was negligent).

[47] Mr. Hamilton next submitted that to establish the claim under the Cover Note, the Claimant was required to prove that the injury which Mrs. Norman suffered was caused by some involuntary act, or by an external happening which interfered with her voluntary act in boarding the boat, that involuntary and/or external happening was the act of starting the engine of the boat which resulted in the injury caused by the propeller. The voluntary act of starting the engine was the means by which the injury was caused. It was unforeseen and unexpected. "It was the proximate and direct cause of the injury, and not the cause of a cause or the mere occasion of the injury such as having gone swimming, that activity was over." Mr. Hamilton referred the Court to Australia Casualty Co Ltd v Frederico [1987] LRC Comm 171 at p. 181.

[48] Next, Mr. Hamilton argued that the Cover Note dated July 1st 1998 specifies the extent of its cover. It provides that there shall be liability to third parties in the amount of $500,000.00 for any one accident or occurrence. Counsel stated that those words are sufficiently wide to embrace acts of negligence occasioned by the Master (Claimant) or crew. It does not speak to injury occasioned by the accident but is further submitted that must be read in as a term of the contract to give business efficacy to the Cover Note, likewise, it excludes "swim, dive or snorkel" as a condition. This, Mr. Hamilton submitted has to be so construed taking the Cover Note as a whole and the total circumstances.

[49] Mr. Hamilton referred to Australia Casualty Co. Ltd. v Frederico cited above Brennan J in his judgment had to generally consider the words *accident and "injury caused by accident."* At page 187 he had this to say:

> "A claim of causation will often lead back from a bodily injury to a cause which is not an accident. Even if a deliberate act is not itself the proximate cause of the bodily injury, a deliberate act may be a more remote cause which sets in train a series of events the last of which the proximate cause of bodily injury. In the familiar case of a collision between motor vehicles, where the deliberate act of driving a car is a cause of an accident – the collision – from which injury results, nobody doubts that an injury suffered by the driver is caused by an accident, though it is also caused, more remotely, by his deliberate act of driving. The rule in applying contracts of insurance is that the proximate cause of loss is alone regarded, as Lord Lindley pointed out in Fenton v Therly & Co. at page 455 and as Lord Loreburn affirmed in Clover, Clayton & Co. Ltd. v Hughes [19100] A.C 242 at page 245. But where the accident is a remote cause of a loss, the loss may nevertheless be regarded as caused by that accident. The ordinary consequences of an accident which are links in the chain of events causing a loss do not carry the loss outside the cover granted by a policy insuring against loss caused by an accident…"

[50] Finally, Mr. Hamilton stated that there can be no doubt in the Court's mind that Mrs. Norman was injured while she was ascending the ladder; while the exclusion clause prohibits swimming, diving and snorkeling, Mrs. Norman who had been swimming and/or snorkeling earlier was neither swimming nor snorkeling at the time when she sustained the injuries. The injuries suffered by Mrs. Norman were covered by the Third Party Liability Clause and was not excluded. He urged the Court to construe the coverage provision broadly. Mr. Hamilton stated that the contra preferendum is applicable to the matter. He

referred the Court to Beaulieu v Reliance Insurance Co [1971] 19DLR (3rd) 399. He also adverted the Court's attention to Lloyds of London v Scalera [2000] 4 LRC 361 at 384. He referred the Court to Alderslade v Hendon Laundry Ltd [1945] 11C 189 which is authority for the proposition that if liability for negligence is sought to be excluded the clause must on the face of it show clearly that negligence is excluded.

Defendant's Submissions

[51] Learned Counsel, Mrs. Jonas-Parillon stated that the burden of proof lies with Mr. Reynolds to prove, on a balance of probabilities, his alleged entitlement to his claims for:

> "An indemnity of the judgment sum of $359,245.45, interest and costs awarded to Susan Norman in Civil Claim No. 307/2001 together with prescribed costs and legal fees."

[52] Mrs. Jonas-Parillon submitted that Mr. Reynolds has failed to prove that he is entitled to any of his above-mentioned claims as pleaded in his Statement of Claim.

[53] Counsel stated that third party liability coverage was not denied by the Corporation but the condition precedent to such liability was pointed out to Mr. Reynolds and that condition excluded swim, dive, and snorkel and crew liability from the insurance contract. Any liability of the insurer to Mr. Reynolds with respect to Mr. Reynolds' passengers provided for under the insurance contract ceased once the passengers went swimming, diving or snorkeling. Mr. Reynolds knew that. There was consensus ad idem on this point between the parties. Further, Mr. Reynolds admitted in cross examination that he knew that when he sent his passengers swimming diving and snorkeling he did so at his own risk since all liability under his insurance contract with respect to swimmers, divers and snorkellors was excluded. He knew he had no insurance with respect to his passengers once they left the boat to swim, dive or snorkel.

[54] Next Mrs. Jonas-Parillon submitted that at the time of Mrs. Norman's injury, any liability coverage provided for under the insurance contract with respect to Mrs. Norman, a third party, was excluded as she was engaged in underwater swim/dive/snorkel activity at the

time of her injury. Mrs. Norman's swim/dive/snorkel activity was one of the simultaneous or proximate causes of her injury. Mrs. Norman's underwater injury by the propeller of the boat could not have occurred unless she was engaging in swim/dive/snorkel activity. Her swim/dive/snorkel activity did not cease until she was back on the boat where the insurance contract contemplated she would be at all times.

[55] Mrs. Jonas-Parillon buttressed her argument by saying that the purpose or use for which the boat insured is relevant to the Court's determination this can be gleaned from the policy schedule shown on page 5 of the Defendant's Bundle of Documents and also on the Marine Hull Proposals signed by Mr. Reynolds on 8th January, 1992 and 8th April, 1997, respectively shown on pages 1 and 17 of the Defendant's Bundle of Documents. The policy schedule (Yacht and Motor Boat Insurance Schedule) states the use as "sightseeing day charter" and both the 1992 and 1997 proposals signed by Mr. Reynolds specify that the purpose for which the vessel will be used is "day charters". It must be noted also that Mr. Reynolds is insured as the owner and skipper of the boat, not as a water sports operator as he styled himself in his witness statement.

[56] Next Mrs. Jonas-Parillon stated that the policy clearly contemplated that Mr. Reynolds would use his glass bottom boat only for sightseeing day charters, not for water sports activity as Mr. Reynolds wants this Honourable Court to believe. This policy must be interpreted as one for "a sightseeing day charter glass bottom boat". The passengers are expected at all times to be on the boat once it is at sea and to view the underwater wonders of the sea through the boat's glass bottom. If a passenger leaves the boat to engage in water sports activity (which of necessity involves swim, dive or snorkel activity), all coverage under the insurance contract with respect to that passenger ceases until the passenger is back on the boat. It is liability with respect to swim, dive, snorkel and crew activity that is excluded. This is a condition precedent to any liability of the insurance company to Mr. Reynolds. Counsel stated that Mrs. Susan Norman was not back on the boat, rather only one of her hands had reached the underwater ladder of the boat. This is a fact.

[57] Mrs. Jonas-Parillon then stated that if there were no exclusion clause on the 1998 Cover Note concerning crew liability, the negligence of the crew with respect to Susan Norman's accident would not have been covered under the contract of insurance.

[58] She disagreed with Learned Counsel for Mr. Reynolds, the latter who had submitted that the negligence of the master and crew is covered under the contract between the parties. An examination of the perils clause (clause 50 of the Institute Time Clauses Hulls Port Risks including Limited Navigation reveals that this is not the case; Clause 5.2.3. (including the proviso) provides:

> "The insurance covers loss of or damage to the subject-matter insured caused by … negligence of the Master Officers Crew or Pilots … provided such loss or damage has not resulted from want of due diligence by the Assured, Owners of Managers." (Emphasis mine)"

[59] Mrs. Jonas-Parillon therefore submitted that first of all the subject matter insured refers specifically to the boat, not its passengers. More importantly, it must be noted that the negligence referred to in the said clause is covered only if the resulting loss of damage "has not resulted from want of due diligence by the Assured."

"Due diligence" is defined in the Black's Law Dictionary, Sixth Edition, by Henry Black, as:

> "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

[60] Certainly, Mr. Reynolds did not exercise due diligence in the circumstances because he anchored close to a reef and sent Mrs. Norman off the boat into the sea water to engage in swim/dive/snorkel activity close to the boat's engine even though the policy excluded swim/dive/snorkel liability and even though he was insured only to use the boat for sightseeing day charters.

[61] Mrs. Jonas-Parillon took issue with the submissions of Mr. Hamilton when he stated that the 1998 Cover Note provided coverage for the negligence of the crew and Mr. Reynolds where it stated:

> "Third Party Liability - $500,000.00 any one accident or occurrence."

[62] Mrs. Jonas-Parillon said that that provision on the 1998 Cover Note refers only to the limit of liability to third parties under the contract and to nothing else. Wherever under the contract there is provision for an indemnity to the insured, Mr. Reynolds, with respect to his liability to third parties such provision is accordingly amended by the Cover Note to allow for indemnification to the limit of $500,000.00. There is no other interpretation.

[63] Mrs. Jonas-Parillon disagreed with Mr. Hamilton's submission that suggests that "the third party liability provision of the Cover Note of July 1st 1998 is distinct from and in addition to the indemnity provisions in Clause 10 of the Institute Time Clauses Hulls Port Risks including Limited Navigation."

Court's Analyses and Findings

[64] It seems to me that the resolution of the first two issues in this matter lies in the Court's determination of the terms and conditions that applied to the insurance policy that covered Mr. Reynolds' boat.

[65] As stated earlier, Mrs. Jonas-Parillon Learned Counsel for the Corporation maintains that the terms excluded liability for injuries sustained whilst swimming diving and snorkeling and since Mrs. Norman had just concluded swimming and/or snorkeling Mr. Reynolds is debarred from obtaining indemnity from the Corporation. Learned Counsel Mr. Dane Hamilton Snr for Mr. Reynolds insists that Mr. Reynolds is entitled to be indemnified since at the material time Mrs. Norman was neither swimming nor snorkeling when she sustained the injuries. Mr. Hamilton does not dispute that if Mrs. Norman was either swimming or snorkeling at the time of the incident this would have been in clear breach of the condition/warranty of the policy. He is adamant however that Mrs. Norman was neither swimming, snorkeling or diving when she sustained her injuries.

[66] I have given careful consideration to the evidence adduced in this matter and the able submissions made by both Counsel. I have also perused the agreed bundle of documents and the following represents my findings:

[67] Mr. Reynolds having insured the boat with the Corporation obtained insurance coverage for third party liability from the Corporation. The main condition of the policy excluded liability to third parties for injuries sustained while swimming, snorkeling or diving. Based on his own evidence, I have no doubt that Mr. Reynolds took passengers both swimming and snorkeling knowing full well that he was violating the terms of the policy.

[68] I am of the respectful opinion that Mrs. Norman was taken in the boat to swim and/or snorkel and having swum and/or snorkeled she was attempting to re-enter the boat when she sustained severe injuries. I am of the further view that nothing turns on the issue as to whether she was in the process of entering the boat or attempting to re-enter the boat, (since this is a matter of semantics). In my considered view, the clear intention of the parties to the agreement was that the boat should not be used for snorkeling, swimming or diving and more importantly should any injuries be sustained by a third party as a consequence of such activities Mr. Reynolds would be debarred from obtaining compensation by way of indemnity. Despite the very attractive argument advanced by learned counsel on behalf of Mr. Reynolds, I am therefore, far from persuaded that Mr. Reynolds is entitled to indemnified for the sum he has claimed or any sum whatsoever.

[69] In my respectful view the act of attempting to re enter the boat was an integral part of Mrs. Norman's conduct of swimming and/or snorkeling both of which are clearly prohibited. To put it another way, the act of attempting to re enter the boat was part and parcel of the self same acts which the parties agreed, if they were undertaken namely swimming and snorkeling and injuries should result to third parties, would debar the insured from being indemnified.

[70] To reiterate, the justice of the matter prevents any nice distinctions from being made as to whether Mrs. Norman was swimming or snorkeling as distinct from reentering the boat. Mrs. Norman's swim/snorkel activity was one of the proximate causes of her injuries. Had she not left the boat to go swimming and/or snorkeling she would not have sustained the injuries. I am fortified in my view and accept the submissions made by Counsel for the Corporation that once the passenger has left the boat to either dive or snorkel any liability

of the insurer to indemnify Mr. Reynolds ceased. Her efforts to return to the boat were part of her snorkeling and/or swim activity. I am buttressed in my position based on my respectful opinion had Mrs. Norman remained in the boat, as she should have she would not have sustained any injuries whatsoever.

[71] Additionally, Mr. Hamilton skilfully argued that the third party liability as stated in the Cover Note is not defined or limited since it merely states $500,000 for any one accident or occurrences.

[72] Mr. Hamilton stated that there is no provision in the Institute Time Clauses, Port Risks including Limited Navigation ITCPRH which deals directly with third party liability. Counsel argued that clause 10.4 clearly states that the indemnity provisions in the Institute Time Clauses Port Risks including Limited Navigation is in addition to the other terms and conditions of this Insurance such as the Third Party Clause of the Cover Note.

[73] For my part, I see no significance of whether the injuries were occasioned as a result of an accident or were caused due to the negligence of crew members. The Cover Note specifically excludes coverage for liability to third parties in circumstances where the third party was swimming, diving or snorkeling. I therefore fail to see how a general provision in the Institute Time Clauses Hulls Port Risks which speaks to indemnity in general can override a specific clause which precludes the Corporation from indemnifying Mr. Reynolds for loss suffered by a third party as a result of injury or damage sustained while swimming, diving or snorkeling. The general provision must be read subject to the exclusion clause.

[74] Accordingly, I am of the respectful opinion based on my above reasons that Mr. Reynolds is not entitled to be indemnified by the Corporation since he breached the important warranty/condition of the Cover Note.

Estoppel

[75] Learned Counsel Mr. Hamilton also argued that the Corporation is estopped from denying liability for Mrs. Norman's claim in so far as it is alleged that the Corporation treated with

Mrs. Norman's Attorneys Lake and Kentish and negotiated a settlement of Mrs. Norman's claim with the Lawyers Lake and Kentish. The Corporation having agreed to indemnify Mr. Reynolds cannot renege on the agreement.

[76] Mr. Hamilton stated, further, that the Corporation had represented to Mr. Reynolds at all material times that Mrs. Norman's claim was in the process of settlement. He says that on 27th November 2001, the Corporation's Attorney recommended a settlement of the claim in the amount of $145,738.35 with costs of $25,000.00 which recommendation was communicated to Mr. Reynolds' Attorney for his comments. On 11th August 2003, Mrs. Norman's Attorney requested settlement in the sum of $382,641.95 with costs of $38,265.00.

[77] Five years after the accident, on 11th September 2003, the Corporation's Attorney advised Mrs. Norman's Attorney that they were not accepting liability in any way whatever.

[78] Mr. Hamilton next submitted that the principles which are applicable to this aspect of the case [indemnity and estoppel] are adequately stated in the judgment of the Court of Appeal Singapore in Hartford Insurance Co. (Singapore) Ltd v Chiu Ten Construction Pte Ltd [2002] 5 LRC 1. In that case the Court quoting the dicta of Mellish J in Parker v Lewis [1873] 8 Ch App. 1035:

> "I think the law with reference to express contracts of indemnity is, that if a person has agreed to indemnify another against a particular claim or a particular demand, and an action is brought on that demand, he may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come, and refuses to come in, *he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity.* On the other hand if he does not choose to trust the other person with the defence to the action, he may if he pleases, go on and defend it, and then, if a verdict is obtained against him and judgment is signed upon it, I agree that at law that judgment in the case of express contract of indemnity is conclusive. But I apprehend it as conclusive on account of what the law considers the true meaning of such a contact of indemnity to be. It is obvious that when a person has entered into a bond, or brought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and the verdict of a jury obtained against him, it would be very hard, indeed, if and when he came

> to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity the judgment is conclusive; but in my opinion it is conclusive because that is the meaning of the contract between the parties, for it is unquestionably not the general rule of law that a judgment obtained by A against B is conclusive in an action by B against C."

[79] Also cited in the Hartford Insurance Co. case is the ruling of Ong J in the Malaysian Case Tee Liam Toh v National Employers Mutual General Insurance Association [1954] MLJ 320. In this case a workman claimed compensation under his employers Workmen Compensation Policy. The employers disputed the claim and it went to arbitration which ruled against the employer. The employer claimed an indemnity under the policy from insurers who resisted and that dispute went before a second arbitrator who held that the workman injury and subsequent death was due to natural cause and did not arise out of or in the course of the employment and that the insurers were not liable. The employer moved the High Court to have the award of the second arbitrator set aside for error on the face of the award. Ong J held that there was an error in not giving effect to the estoppel arising from the first arbitrator. He relied on Mellish L.J in Parker v Lewis (1873) 8 Ch App 1035. His ruling was as follows:-

> "… with full notice of a claim against their insured, the insurance company elected to lift not a finger to assist their insured or protect themselves by defending the claim. Under condition 3 they had a right to take over the conduct of the defence against the claim put forward by the dependents of the deceased, and if dissatisfied with the decision, they should have appealed. Having left their insured to carry the burden, they nevertheless subsequently insisted on raising the very same questions before the arbitrator which had already been decided by a competent tribunal against their insured. Of course, they are precluded by the decision of the Learned President, as arbitrator, from agitating these questions again."

[80] Learned Counsel Mrs. Jonas-Parillon vehemently disagrees that at any time whatsoever, the Corporation agreed to settle Mrs. Norman's claim. In fact, Counsel says that at no time did the Corporation ever represent to either Mr. Reynolds or Mrs. Norman that it was accepting liability for the claim.

Court's Analyses and Findings

[81] I have very carefully reviewed the evidence led on this aspect of the case together with the helpful legal submissions and have also carefully examined the series of letters exchanged between the Corporation's Attorneys and Mrs. Norman's Attorneys and I am unable to find a scintilla of evidence or any documentation whatsoever which leads me to the conclusion that at any time during their negotiation, the Corporation either led Mrs. Norman or Mr. Reynolds to believe that they were accepting responsibility to indemnify Mr. Reynolds for the specific claim.

[82] Mr. Hamilton referred the Court to the letter dated 30th March 2001 which states "I refer to your letter of February 12, 2001 and our discussion on the caption subject. However, although the circumstances surrounding the accident leave our insured servant to be blamed we are prepared to enter negotiations without prejudice on the part of the insured."

[83] In addition, the letter of the 7th May 2001 sent on behalf of Mr. Reynolds to Mr. McCoy who is employed by the Corporation read as follows:

> "We note with increasing concern the lack of response from State Insurance with respect to the above captioned matter (Susan Norman). We have discussed the matter with your insured's solicitor who has expressed surprise that this matter has not yet been settled. In the circumstances we would be grateful if you would indicate whether State Insurance Corporation still has intention of settling this matter."

[84] Learned Counsel Mr. Hamilton relies on the abovementioned letters in order to buttress his argument that the Corporation has tacitly admitted that their servant (Mr. Reynolds) was blameworthy and this obviated the need for Mrs. Norman to establish liability.

[85] Further Mr. Hamilton sought to rely on the Legal Opinion purportedly rendered by the Corporation's Attorney in support of his argument that the Corporation had already admitted liability and the only issue to be resolved was the question of quantum.

[86] Let me say straight away, that I have seen no evidence to persuade me that the Corporation ever accepted that it was responsible for indemnifying Mr. Reynolds in any

way whatsoever for the amount of money he had to expend in compensating Mrs. Norman for the loss/damage she suffered. At their highest, the letters from the Corporation merely address Mr. Reynolds' liability, if any to Mrs. Norman.

[87] The indemnify clause in the Institute Time Clauses Hulls Port Risks – cannot be relied on by Mr. Reynolds in the face of the express exclusion clause in the Cover Note. Further, I am of the respectful opinion that Hartford Insurance Co ibid read together with Australia Casualty Co are of no assistance to Mr. Reynolds and are clearly distinguishable from the case at bar.

[88] The general principle of estoppel prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable, or unconscious for him to do so. The person making the statement, promise or assurance is said to be estopped from denying or going back on the promise or assurance.

[89] I am not at all of the view, based on my review of the several correspondence, that the legal opinion rendered by Attorney to their clients (the Corporation) in anyway whatsoever indicate that the Corporation has communicated to either Mrs. Norman or Mr. Reynolds or led either of them to believe that the Corporation either accepted or admitted that it had a responsibility to indemnify Mrs. Norman. Further all the correspondence exchanged by the Corporation's lawyer and Mrs. Norman's Attorney were done "without prejudice". The evidence of Mr. Reynolds falls very short of the threshold required of him in order to establish that the Corporation had communicated or led him to believe that it was going to accept that it was responsible to indemnify Mr. Reynolds for the damages he would have been required to pay and indeed had to pay as a result of the accident. Further, I have no admissible evidence before me to substantiate Mr. Reynolds' contention.

[90] It seems clear to me that no time did the Corporation agree to indemnify Mr. Reynolds for the specific loss. All of the evidence points to the contrary position. For what it worth, I emphasize that the Corporation had not made any representation to Mrs. Norman that it

would accept liability for Mr. Reynolds' or his crew's member's negligence which resulted in the accident during which Mrs. Norman sustained injuries. Had it been otherwise Mrs. Norman's Attorney would not have been required to obtain default judgment (if as is canvassed, the Corporation's Attorney had communicated to Mrs. Norman's Attorney any acceptance of liability). Further all of the material communications sent on behalf of the Corporation apart from being "Without Prejudice" were equivocal. The principles of estoppel are therefore of no assistance to Mr. Reynolds See: Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co. Ltd [1972] AC 741 at p 768; Allied v Marine Transport Ltd v Vale Do Rio Doce Navegacao SA The Leonidas D [1985] 2 ALL ER 796 in which it is stated very clearly that the representation on which a party seeks to rely must be clear and unequivocal.

Conclusion

[91] In conclusion and for the above reasons, Mr. Reynolds has failed to establish his claim for an indemnity against the Corporation.

[92] Accordingly, I dismiss Mr. Franklyn Reynolds' claim against the State Insurance Corporation with prescribed costs unless otherwise agreed.

[93] I thank both Learned Counsel for their assistance.

Louise Esther Blenman
Resident High Court Judge