IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2011/0293

BETWEEN:

LIBERTY CLUB LTD.

Claimant

and

BEACON INSURANCE COMPANY

Defendant

Appearances:

Mr. Karl Hudson-Phillips, QC and Ms. Jennifer Hudson-Phillips, instructed by Mr. Neil Noel for the Claimant
Mr. Leslie Haynes, QC with Ms. Ria Marshall for the Defendant

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2012: April 25;
October 24.

JUDGMENT

[1] **ELLIS, J.:** By notice of application filed on 18th July 2011, the defendant/applicant seeks a declaration pursuant to CPR Part 9.7 and/or under the inherent jurisdiction of the court that the Honourable Court should not exercise its jurisdiction to hear the claim form and statement of claim dated and filed on 17th June 2011.

[2] The grounds of the application are as follows:

1. The claim form and statement of claim are an abuse of process of the court.
2. The claim is statute barred as being outside the time limit set by the Limitations Act of the United Kingdom the same having been received into

the Laws of Grenada by virtue of section 11 of the West Indies Associated States Supreme Court (Grenada) Act.

[3] This application follows a protracted litigation history between the parties which is critical to the determination of the matters in issue. For that reason, the background is set out below:

BACKGROUND

1. By claim form and statement of claim filed on 16th September 2005, the claimant sued the defendant under a policy of insurance dated 17th September 2004, LE PAR 0300080 (the Policy) for loss, damage and consequential loss sustained to its property and business as a result of Hurricane Ivan.[1] The claim is initiated on the basis that a claim was made in writing under the policy and that the defendant has wrongfully failed to honour that claim (the 2005 Suit).
2. In an amended statement of claim filed on 8th November 2005, the amended prayer reflects an overall claim of EC$16,977,420.94.
3. In its amended defence, the defendant pleads that the claimant's claim was time barred under Condition No. 11 (1) (b) of the policy of insurance. In the premises the defendant claims that it is not liable to pay and the claimant not entitled to recover the sums claimed under the statement of claim.
4. Following copious and varied interlocutory applications and a number of case management conferences, the 2005 Suit was set down for trial on 18th November 2009 to 26th November 2009 for a period of 5 days.
5. On the morning of the trial, the claimant made an application for an order permitting it to amend its reply to plead waiver. The claimant also gave notice of its intention to apply to further amend its amended statement of claim to plead reduced sums of loss on the basis that there has been a

[1] GDAHCV: 2005/409 Liberty Club Ltd v Beacon Insurance Company

change in circumstances. The trial judge ordered that an application be filed and that the Attorney General be served to appear. The trial therefore had to be aborted.

6. Both applications were heard on 8th March 2011. The applications to amend was opposed by the defendant on the basis of the clear wording of CPR Part 20.1 (3) which provided that the court may not give permission to a party to amend a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the case management conference.

7. At the hearing the claimant conceded that no change in circumstance had occurred in respect of the application to amend its reply but sought to challenge the constitutionality of CPR Part 20.1 (3). In a judgment rendered in November 2011 (having found that CPR Part 20.1 (3) did not offend section 8 (8) of the Constitution of Grenada in that it does not deny the right of access to the court) the learned Price Findlay J dismissed the claimant's application.

8. In respect of the application to amend the amended statement of claim, Price Findlay J found that there had been a change in circumstances since the case management conference and allowed the amendment sought.

9. In Appeal No. 30 of 2010, the claimant appealed the trial judge's decision refusing leave to amend the reply. During the appeal, the claimant no longer sought to argue that CPR 20.1 (3) (as it then was) was unconstitutional as contravening section 8 (8) of the Grenada Constitution but rather argued that the amendment ought to be allowed so as to ensure compliance with the claimant's constitutional right to a fair trial. The claimant's attorney argued inter alia that to deny the claimant the right to amend its reply in order to plead waiver solely on the basis of a technical pleading rule would be disproportionately prejudicial.

10. The Court of Appeal reviewed the relevant authorities on proportionality and examined the several factors which were relevant to this issue and dismissed the claimant's appeal and affirmed the decision of Price Findlay J.

11. The claimant made an application to the Privy Council for special leave to appeal the Court of Appeal's decision but this was denied on the basis that the application did not raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee.[2]

12. In Appeal No. 29 of 2010 the defendant appealed the trial judge's decision to grant leave to amend the statement of claim on the basis that there had been no change in circumstances after the first case management conference; that no costs had been awarded to the defendant in accordance with CPR Part 65.11 (3); and further that no leave had been granted to the defendant to make consequential amendments to its defence.

13. The Court of Appeal set aside the trial judge's decision allowing the amendment to the statement of claim reasoning that the fact that different sums have been pleaded in respect of loss being claimed to accord with one basis or method of assessment does not amount to a change of circumstances.

14. Thereafter, on 1st October 2011, the **Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011** came into force and *inter alia* repealed and substituted a new Part 20.1 which relaxed the former inflexible regime which governed amendments to statements of case.

15. This led to a second application for leave to amend the reply filed on 4th November 2011 and which was heard on the same day as the instant application.[3]

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[2] A copy of the certificate dated 15th February 2012 evidencing the disposition of this appeal was presented to the Court during the hearing of this Application.

[3] As at the date of this Judgment, this Court refused leave to amend Claimant's Reply in an interlocutory judgement rendered in GDAHCV2005/409 – "the 2005 Suit".

16. Thereafter, on 17th June 2011, the claimant commenced a second action, (the 2011 Suit) in which it claims general damages, costs and further or other relief.[4] The statement of claim alleges that it was an implied term of the policy that the defendant owed a duty of good faith and fair dealing to the claimant in the performance of its obligations pursuant to the policy and that the defendant acted in breach of this implied term, as a result of which the claimant was forced to expend borrowed monies in rebuilding the property and suffered loss and damage.

The Defendant/Applicant's Case

[4] The application is made pursuant to CPR Part 9.7 (2) on the following grounds:

1. **The claim is an abuse of process**
2. **The claim is statute barred**

[5] In support of the first ground the defendant/applicant submits that the claims made in the 2011 Suit arise out of the same subject matter as the 2005 Suit. According to counsel, a review of both claims would reveal that:

1. The parties in both suits are the same.
2. Both suits are based on the same Policy of Insurance - numbered LE PAR 0300080 and dated 17th September 2004.
3. The insurable interest claimed in both suits are also the same.
4. The insurable loss alleged to have been suffered by the claimant is the same in both suits.
5. The alleged substantive breach by the defendant - that of wrongfully refusing to satisfy the written claim (or any part thereof) submitted by the claimant under the insurance policy – is also the basis of both suits.

[6] He stated that the main change in the 2011 Suit is set out at paragraph 9 (d) of the statement of claim, which sets out the basis upon which the claimant alleges that

[4] GDAHCV 293 of 2011 Liberty Club Ltd v Beacon Insurance Company

the defendant wrongly adjudged the claimant's insurance claim to be out of time under Condition 11 (1) (b) of the policy.

[7] Molly Roberts, Manager of the defendant/applicant swore an affidavit in support of the application in which she deposes that:

1. The instant proceedings were commenced by claim form and statement of claim dated and filed on the 17th June 2011 in which the claimant claims damages, costs and other relief for the defendant's alleged breach of a contract of insurance as a result of the defendant's refusal to accept and pay an insurance claim made by the claimant pursuant to an Indemnity Policy Numbered LE PAR 0300080 ("the Policy") for damage caused to its property by Hurricane Ivan on 7th September 2004.
2. Under the statement of claim, the claimant contends that it delivered to the defendant a claim in writing for loss and damage and a claim for consequential loss dated the 30th November 2004 and 19th January 2005 respectively. The claimant avers that the defendant has not paid these claims.
3. By suit GDHCV 2005/409 commenced on 16th September 2005, the claimant claimed against the defendant payment of the sum of EC$16,977,420.94 under the policy for damage caused to its property by Hurricane Ivan. The 2005 Suit arose out of the same damage to property of the claimant caused by Hurricane Ivan.
4. Condition 11 (1) (b) of the policy of insurance provides that:

   > "On the happening of any damage the insured under the policy must make a claim not later than 30 days after the expiry of the indemnity period or such further time as the insurer may in writing allow."

5. The defendant has defended the 2005 Suit on the basis that the claim was submitted to the defendant out of time and that the claim made by the claimant for payment under the policy is fraudulent and/or fraudulently exaggerated.

6. The 2011 suit is founded on contentions that could have been advanced by the claimant in the 2005 Suit but which have not been and accordingly to permit these proceedings to continue will be an abuse of the process of the court.

7. The 2011 Suit is a backhanded attempt by the claimant to circumvent the failure of its attempts to achieve an amendment to its pleadings in the 2005 Suit to include the matter that ought to have been pleaded in the 2005 Suit. This is evidenced in paragraph 5 of the affidavit of Leon Taylor filed on 10th December 2010 in the 2005 Suit.

[8] Counsel for the defendant/applicant submitted that where there is one suit between two parties concerning the same subject matter it is incumbent on the litigants to bring to the court all the issues which can be raised in one proceeding and not duplicate the issues by filing additional proceedings. He contended that all of the matters alleged in the 2011 Suit could have been pleaded in the first action – the 2005 Suit.

[9] For this submission counsel relied on the case of **Yat Tung Investment Co. Ltd. v Dao Heng Bak Ltd. and Anor** [1975] AC 581. In that case a company purchased a property from the defendant bank who had taken it back into possession from a former borrower. The company itself fell into arrears; the property was retaken and resold. The company sought a declaration that the sale had been a sham and a fraud. That allegation was later dropped and judgment entered for the bank. The Company then began a second action. The bank sought to restrain the second action, saying it was an abuse.

[10] The Privy Council held that the issues in the second action should have been raised in the first. There had been opportunity to raise the issues as to incorrect accounting. Not having challenged those matters in the first action and having suffered judgment, it would be wrong to allow a second action.

[11] Lord Kilbarandon at page 590 of the judgment, after conceding that the second action could not be prescribed on the basis of res judicata because there had been no formal repudiation of the pleas raised by the appellant in the first action, observed that:

> '...it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings'.

[12] Counsel also referred to the judgement of Sir Thomas Bingham MR in the case of **Barrow v Bankside Members Agency Ltd. and Anor.** [1996] 1 All ER 981. In that case the first defendant, Bankside Members Agency Ltd. appealed from the order of the High Court dismissing the summons issued by the first defendant and second defendant in which they ought to strike out the writ issued by the plaintiff in 1944 on the grounds that he was estopped from bringing the proceedings and/or the points of claim and the action was an abuse of the court's process and/or frivolous and vexatious. The defendants' contention was that Mr. Barrow had previously recovered damages in respect of the same loss pursuant to the judgment in an action begun in 1993 when he, together with 3,062 other plaintiffs, claimed damages for negligence against 71 defendants, including the first defendant, for alleged breach of their duty to conduct the underwriting business with reasonable skill and care.

[13] The court held that:

> "The rule that parties to litigation were required to bring their whole case before the court at the outset and that, in the absence of special circumstances, they could not return to court to advance arguments, claims or defences which they had failed to put forward for decision on the first occasion, applied only to matters that could and should have been dealt with on that occasion, the purpose of the rule being to avoid a multiplicity of proceedings and abuse of process and bring a certain end to litigation."

[14] Counsel for the defendant/applicant therefore concluded that if the claims in the 2011 Suit are sustainable then they should have been pleaded in the 2005 Suit.

He contended, however, that the claims made in the 2011 Suit have no realistic prospect of success and are not sustainable in law.

[15] Counsel submitted that the breach outlined in the 2011 Suit is not actionable as the only claim which can arise under a policy of insurance is a claim for indemnity in respect of loss. No breach of contract attracting damages can arise where an insurer fails or refuses to satisfy a claim. He posits that the defendant is entitled to rely on the certainty that its liability will be confined to the terms of the indemnity policy otherwise it would be seriously prejudiced.

[16] Counsel noted that in the 2011 Suit, the claimant is seeking to recover damages for failure to pay a valid claim under an indemnity policy. He referred the court to the classic case **President of India v Lips Maritime Corporation** [1987] 2 Lloyds Law Reports 311 **("The Lips")** which definitively sets out the English common law position. In that case the House of Lords held that there can be no such thing as a cause of action in damages for the late payment of damages.

[17] In **Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express** (No. 2) [1992] 2 Lloyd's Rep. 281 **("The Italia Express")** the court, following the decision in The Lips, held that the insurers' obligation to indemnify the insured under a policy of insurance gives rise to a liability in damages on the part of the insurer with the consequence that there can be no recovery of damages in respect of a failure to pay the original indemnity.

[18] And later, the Court of Appeal in **Sprung v Royal Insurance (UK) Ltd** [1999] 1 Lloyd's Rep. 111 **("Sprung")** approved and applied **The Italia Express**. Counsel for the defendant referred the court to page 118 of that judgment in which Evans LJ stated:

> "The question which arises is whether the plaintiff nevertheless can claim substantial damages from the defendants for their refusal to accept liability at the stage or for failing to day, "Go ahead if you wish to do so and are so advised." In my judgment it is impossible to say that any such breach; even if and to the extent that it was a breach of contract would carry with it

> a right to substantial damages representing the claim which is now put forward. .... in such circumstances, the cause of any loss which the plaintiff suffered must be regarded as the consequence of his own decision not to proceed with repair of reinstatement, whether that decision was voluntary or not. In other words, if unfortunately through his own financial circumstances he is unable to do so without assistance from the defendants, he cannot allege that the defendants were in breach of contract by failing to accept liability at that stage."

[19] Accordingly, the court concluded that an insured is not entitled to recover damages for breach of contract. This legal position has since been confirmed by the English Commercial Court in the case of **Normhurst Ltd et al. v Dornoch Ltd. et al.** [2004] EWHC 567 **(Comm) ("Normhurst")** which now stands as an authority for the fact that an insured is not entitled to recover as damages for breach of contract, consequential losses flowing from an insurer's failure or refusal to pay a valid claim under an indemnity policy.

[20] Counsel for the defendant/applicant contends that the 2011 Suit cannot be maintained because, as matters stand, there is no cause of action which exists under English law. However, if the claimant's cause of action is maintainable then counsel submitted that it should properly have been pleaded in the 2005 Suit.

[21] Counsel for the defendant/applicant further submitted that in any event, 2011 Suit is statue barred under section 5 of the Statute of Limitations UK Act (1980). He suggested that while there may be some doubt as to the applicability of that statute to Grenada, it is clear that if it does apply, the claims set out in the 2011 Suit would be proscribed by the statutory limitation period of 6 years. Further and in the alternative, he submits that the 2011 Suit is also time barred by reason of the insurance policy which provides that in no case whatsoever shall the insurer be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

[22] He concluded that the abuse of process is compounded by the fact that Suit 2011 was filed after a refusal of an amendment without which the claimant says that it has no case. The claimant chose not to withdraw the 2005 Suit but rather to leave it hanging like the proverbial 'Sword of Damocles' and to file a second suit which attempts to disguise the nature of the claim but which in fact seeks the same substantive remedy.

The Claimant/Respondent's Case

[23] Counsel for the claimant referred to paragraph 8 of the claimant's statement of claim in the 2011 Suit, which sets out the substance of the claimant's claim as follows:

> "It was an implied term of the Policy that the defendant owed a duty of good faith and fair dealing to the claimant in the performance of its obligations pursuant to the Policy with respect to the aforementioned loss including:
>
> 1. A duty to refrain from putting its own interest ahead of the interests of the claimant
> 2. A duty to act in the best interest of the claimant
> 3. A duty to carry out settlement negotiations in a timely manner so as to protect the claimant's interest
> 4. A duty to disclose to the claimant all material information including their loss adjuster's report
> 5. A duty to properly investigate and assess the claim
> 6. A duty to act fairly in deciding whether to pay the claim
> 7. A duty to assist in claim preparation and to advise the policy rights
> 8. A duty to pay undisputed portions of the claim while negotiating the disputed portions"

[24] Counsel for the claimant/respondent posited that no abuse of process arises because the causes of action in the two suits are plainly not the same. The 2005 Suit seeks to enforce an indemnity under the policy while the 2011 Suit is a cause of action which is recognised in Canadian jurisprudence as a claim for breach of a duty of good faith.

[25] Counsel for the defendant/applicant referred the court to copious extracts from the second edition of the text **Insurance Bad Faith by Gordon G. Hilliker [2009]** in which the author analyses the insurers' duty of good faith. He highlights statute and case law in certain Canadian provinces which, he says, demonstrates that the duty of good faith now operates as an implied term of the insurance contract, the breach of which will give rise to a right to claim damages whether in contract, in tort or some other basis.

[26] Counsel also referred the court to the Canadian case of **Norman Albert Baudisch v Co-operators General Insurance Company** [2004] ABPC 229 in which the Provincial Court held that a claim for breach of good faith is an independently actionable cause of action. The court in that case approved the principle that the respective duties of the insured and the insurer 'arise not only from the specific terms of their insurance contract but from the nature of the insurer/insured relationship itself'.

[27] The court confirmed that Canadian jurisprudence recognizes a breach of an insurer's duty of good faith as an actionable wrong. The court also remarkably concluded that damages in respect of this cause of action may be awarded for matters and in amounts beyond the scope of the insurance coverage taking into account intangible losses, aggravated damages and in extreme circumstances, punitive damages.

[28] However, counsel readily conceded that this Canadian jurisprudence is not consistent with the position in English law. The judgments in **Banque Keyser**

Ullman SA v Skandia (UK) Insurance Co. [1991] 2 AC 249 and **Manifest Shipping Co. Uni-Polaris Shipping Co** [2001] 1 All ER 743 together 'finally and authoritatively' determined in so far as English common law is concerned, that the requirement of good faith does not arise as an implied term of the insurance contract and that damages are not recoverable when there has been a breach of good faith.

[29] He contended that although the English House of Lords may have definitively pronounced on the issue, he noted that the Judicial Committee of the Privy Council has not. He further submitted the common law is by its nature dynamic and constantly developing and that in the circumstances it is within the jurisdiction of this court to develop the law by proactively incorporating the Canadian jurisprudence into the common law of Grenada. This is particularly so because denying the Claimant such a cause of action would effectively deprive it of a hearing and a possible remedy.

[30] If the court accepts that such a cause of action can be maintained then counsel submits that it could not have been properly ventilated in the context of the 2005 Suit. He states that the defendant's breach could not have been discovered until the discovery process in the 2005 Suit when the list of documents was inspected in 2006. He states that the cause of action would not have accrued until the claimant had knowledge of the defendant's bad faith.

[31] Finally, he submitted that the judicial authorities cited by the defendant/applicant are cases in which the actions had been determined and the successful party sought to bring a second action. In respect of the trio of authorities, **The Lips, The Italia Express** and **Sprung,** counsel submits that they do not deal with the subject cause of action which is a breach of duty of good faith.

[32] He submitted that the 2005 Suit has not been left hanging but is being actively pursued. He contends that there is nothing wrong with bringing two actions based

on separate causes of action. He suggested that there was yet room to consolidate since the court has made no determination in the 2005 Suit.

[33] Finally, counsel submitted that in this case where no defence has yet been filed, the issues are not clear cut and the court cannot be satisfied that there is absolutely no cause of action or that the claim has not been filed within the limitation period.

Abuse of Process

[34] CPR 9.7 (1) provides that a defendant who disputes the court's jurisdiction to try a claim or who argues that the Court should not exercise its jurisdiction may apply to the court for declaration to that effect.

[35] The defendant alleges that the court should not exercise its jurisdiction to entertain the claim on the basis that the claim is an abuse of process, discloses no cause of action and is time barred by statute and/or by contract.

[36] In exercising its discretion under CPR 9.7, a court must be cognizant that it may deprive the claimant of its right to a trial and of its ability to strengthen its case through the process of amendment and disclosure. Such discretion must be used sparingly and should be limited to plain and obvious cases.

[37] The court must therefore critically and carefully examine the bases put forward by the defendant/ applicant in support of its application.

Does the 2011 Suit have Sustainable Cause of Action?

[38] Under English common law a policyholder who has not been paid a valid claim is entitled to sue the insurer for the money owed under the policy, plus interest.

[39] A policyholder is not however entitled to damages for any further loss resulting from a failure of an insurer to pay a valid claim under a policy. The insurer's primary obligation is to 'hold the insured harmless' i.e. in the event that the insurable loss occurs the insurer is then liable to pay the amount of the claim as liquidated damages.

[40] This position has been definitively confirmed in **'Normhurst'** and recently the English Court of Appeal solidified this legal position in **Mandrake v Countrywide Assured Group** [2005] **EWCA Civ. 240.** This case concerned an application to strike out a claim for damages for late payment under an insurance policy. The Court of Appeal considered itself bound by the decision in **Sprung** and held that the proposed claim could not succeed as a matter of English law with the effect that the application for permission to amend the particulars of claim had to be refused.

[41] The defendant/applicant contends that the 2011 Suit therefore discloses no sustainable cause of action under English law and has no prospect of success because it seeks to recover damages due to the defendant's failure or refusal to satisfy what the claimant says is a valid claim under the policy.

[42] However, counsel for the claimants submitted that the cause of action in the 2011 Suit goes further than that. The 2011 Suit alleges that the defendant owed a duty of good faith and fair dealing in the performance of its obligations under the policy, which duty was an implied term of the policy. The claimant's cause of action therefore hinges on an alleged contractual breach of the duty of good faith.

[43] Counsel for the claimant contends that the circumstances of this case are ripe for the court in Grenada to examine the scope of the duty owed by insurers and to determine whether and what cause of action arises from a breach of that duty.

Insurer's Duty of Good Faith under English Common Law

[44] It is now settled law that a contract of insurance is one of *uberrimae fides* – mutual and utmost good faith. Many have attributed the origin of this principle to Lord Mansfield in **Carter v Boehm** [1766] 97 ER 1162 but the concept has since been codified in section 17 of the English Marine Insurance Act 1906 which is repeated verbatim in section 22 of the Marine Insurance Act Cap.182 of the Laws of Grenada which reads as follows:

> 'A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party'.

[45] Over the years the statutory formulation of utmost good faith has been applied under common law to all other types of insurance and the courts have mandated that this duty of good faith is to be observed by both sides of the contract, the insured as well as the insurer.

[46] The English law however has recognised only one remedy for breach of the duty of good faith, and that is - avoidance. Thus where a party (usually the insurer) successfully proves a breach of duty the consequence is that the contract is declared void and the insurer may refuse all claims and simply return the premium.[5] A breach of the duty of good faith has therefore never given rise to a claim in damages.

[47] The first established authority for the existence of a post-contractual duty of good faith is the case of **Black King Shipping Corporation v Massie "The Litsion Pride"** [1985] 1 Lloyd's Rep. 437 where at pp.518-9 the implied term theory was adopted by Hirst J as the juristic basis for the duty of good faith during the claim stage. It was accepted that this would permit a more flexible remedy to be employed, that of avoidance of the claim, as opposed to avoidance of the policy *ab initio.*

[5] In that respect it is said to be one sided remedy, much more useful to the insurer than the insured.

[48] Subsequent case law however disapproved of the implied term theory as the basis for the duty of utmost good faith. This position is reflected in the case of **Banque Keyser Ullman SA v Skandia (UK) Insurance Co.** [1991] 2 AC 249.

[49] In that case, the plaintiff banks entered into separate two year loan agreements in respect of four companies owned or controlled by B. Credit insurance policies and gemstones were the principal securities offered for each loan. The policies were to protect the banks in the event of non-payment of the loans. A reputable firm of insurance brokers, acting as the banks' agent, arranged all the policies, each of which contained a clause excluding liability in the event of fraud, through their manager L. It was a condition of the agreements that the banks would only advance the money when they were satisfied that the securities were in place. Although the insurance cover was not complete, L issued cover notes representing that it was, and money under the first loan agreement was advanced. Cover was completed later. D, the senior underwriter of the primary insurance company, later became aware of L's deceit, but still underwrote the second and further loan agreements on behalf of the primary insurance company. D did not inform the brokers, the insurance companies, or the banks of L's deceit. The borrowing companies defaulted on the loans and the insurers refused to pay on the policies, relying on the fraud exclusion clause.

[50] Counsel for the Bank argued that a right to damages could arise from the breach of the duty of utmost good faith. This argument was based on the assumption that there was an implied term of the contract allowing avoidance of the claim.

[51] The trial judge, Steyn J held the bank entitled to damages for breach of the insurers' obligation of utmost good faith and for their negligence.

[52] The Court of Appeal later reversed Steyn J. Slade LJ, delivering the judgment of the Court of Appeal, held that since a contract of insurance was based on the

utmost good faith, insurer and insured owed each other reciprocal duties of pre-contractual disclosure, the fulfillment of which were conditions precedent to the enforceability of the parties' obligations, imposed by the general law and not by virtue of any implied contractual term. The insurer's duty required him at least to disclose all facts known to him material to the nature of the risk or the recoverability of a claim which a prudent insured would take into account in deciding whether to place the risk with him.

[53] The Court of Appeal found that although the insurers had been in breach of that duty, the breach did not sound in damages since it was not a tort or a breach of contract of fiduciary duty. The insurers had not voluntarily assumed any responsibility to disclose and the bank had not relied on such an assumption and, since justice and reasonableness did not require otherwise, the insurers had not owed the bank any duty of care to disclose the broker's dishonesty. The Court of Appeal therefore confirmed that where an insurer breaches its duty of good faith, the policyholder is not entitled to damages for the loss suffered.

[54] The case went to the House of Lords on appeal, where their Lordships judgment ultimately turned upon a point of construction not taken in the lower courts. However, as far as the duty of utmost good faith was concerned, while their Lordships agreed that the obligation of the utmost good faith in the insurance context is reciprocal, that is, owed by both the insurer and the insured, they roundly endorsed of the Court of Appeal's decision that a breach of the obligation of the utmost good faith does not sound in damages and approved the dicta of Slade LJ.

[55] Some have questioned whether this case provided the definitive statement on the nature of the insurer's duty of utmost good faith in the post contract sphere. Could an insurer breach its duty of good faith if it unreasonably delayed payment or refused a claim it knew to be valid?

[56] Given the flexible and variable approach taken by the House of Lords in **Manifest Shipping Co. Ltd. v Uni-Polaris Shipping Co. Ltd. et al** [2001] 1 All ER. 743, it appears to be possible that an unreasonable refusal to pay a claim would be in breach of the duty of good faith. As Lord Clyde put it at paragraph 7 of the judgment:

> "The idea of good faith in the context of insurance contracts reflects the degrees of openness required of the parties in various stages of their relationship. It is not absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue once the contract has been made."

[57] However, what is critical is that even if such behaviour does amount to a breach of the duty of good faith, the Courts have held that the insured is not entitled to damages.

[58] **In Manifest Shipping Co. Ltd. v Uni-Polaris Shipping Co. Ltd. et al** counsel for both parties accepted that the only remedy was the option of avoidance in line with the wording of s.17 of the Marine Insurance Act. They also accepted that the post-formation duty of utmost good faith was derived from a principle of law from s.17 that supports the right to avoid the contract retrospectively. This seems to indicate that both counsel conceded that the implied term theory was inapplicable.

[59] Although the House of Lords accepted that the duty of utmost good faith as a form of "fair dealing" continued to apply after the conclusion of the insurance contract, it firmly disapproved of the reasoning in **The Litsion Pride** which effectively divorced the requirement of good faith from the provisions of s.17 of the Marine Insurance Act and the remedy of avoidance. Their Lordships definitively adopted 'rule of law theory', and put aside any suggestion that the remedy of the utmost good faith might sound in conventional contractual terms.

[60] Their Lordships reiterated that there is no remedy in damages for any want of good faith. Lord Hobhouse at paragraph 46 of the judgment observed that:

> "Whether there was a remedy in damages for a failure to observe good faith was finally and authoritatively considered by the Court of Appeal in **Banque Keyser Ullmann SA v Skandia (UK) Ins Co.** [1990] 1 QB 665, affirmed by your Lordships' House at [1991] 2 AC 249 at p 280. In order to answer the question, both Steyn J at first instance (p 699 *et seq*) and the Court of Appeal (p 773 *et seq*) examined the basis of the requirement that good faith be observed. Having concluded on the authorities that the correct view was that the requirement arose from a principle of law, having the character I have described, the Court of Appeal held that there was no right to damages."

[61] This position has presented some disquiet among some writers who, like Lord Hobhouse, have noted that it could lead to a wholly one-sided remedy in favour of the insurer. At paragraph 57 of the judgment he noted that if an insurer was in breach of its duty, it is completely implausible that an insured would seek to undo the contract. Instead, a policyholder would hope to receive payment under the insurance policy and any additional damages for losses suffered.

[62] In other words, under the current law, the only available remedy for breach of good faith is inherently of little use to the insured.

[63] It is however the current legal position that under English insurance law, the breach of good faith has not so far given rise to a claim in damages. The case of ***Banque Financiere v Westgate Insurance Co.*** defines that position. Indeed, Lord Justice Slade at page 775 of that judgment, unequivocally denied that damages were available for the insurer's breach of good faith, even where avoidance "may be quite inadequate" as a remedy for the policyholder.

[64] Though that case related to pre-contract non-disclosure, the reasoning that damages are not available for breach of the duty of good faith has been

entrenched in subsequent case law. In **HIH v Chase Manhattan**[6], Lord Justice Rix held that:

> "The duty of good faith which the law had developed especially for contracts of insurance provides a remedy only in avoidance and not in damages".

[65] It therefore still remains the law that an insurer is not required to pay damages for non-payment of a valid claim. There appears to be no help to be gained (in aid of damages) by contending that this was done in breach of a duty of good faith.[7]

[66] Thus, in English law breach of good faith has not so far given rise to a claim in damages whether in contract, tort or otherwise. There, are however, jurisdictions which offer a much wider protection for policyholders than obtains under English law. What then is the position in this region?

Implied Terms and Insurer's Duty of Good Faith in the Eastern Caribbean Supreme Court

[67] Neither side in this application provided the court with any relevant regional authorities on the point. However, in considering the application, the court came across the case of **Ennia General Insurance Co. Ltd. v J. Astaphan & Co. (1970) Ltd.**, the facts of which bear a striking and somewhat uncanny resemblance to the instant case.[8] As in this case the action arose out of a policy of insurance. A substantive part of the appeal in that case was against the trial judge's (Singh J) award of $33 million to the insured for damages for breach of contract. This award was made on the basis of the trial judge's acceptance of a claim made by the insured that in relation to the contract of insurance there was an

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[6] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250; [2001] 2 Lloyd's Rep 483 at [68].This point was not overturned in the subsequent appeal: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER(Comm) 349

[7] This position is currently under review in the England and Wales where the UK and Scottish Law Commissions consider that there is a strong case for reform through legislation. Law Reform Commission Consultation Paper No. 201 and Scottish law Commission Discussion Paper No. 152.

[8] Civil Appeals No. 8/84 and 16/84, a decision of the Court of Appeal of the Commonwealth of Dominica

implied term that following upon the peril insured against (hurricane), the insurance company would have acted promptly and with due diligence in the performance of its obligations to indemnify the insured for loss and damage covered by the said policy so that the insured could continue competitively in business.

[68] In a judgment numbering some 138 pages, the Court of Appeal considered the parties submissions and the applicable law and guiding principles. The Court's position on the question of whether such a term could be implied in a contract of insurance was perhaps best summarized in the judgment of Sir Lascelles Robotham CJ where at page 121 he stated:

> "I return therefore to what was said earlier that neither the extraordinary industry of Counsel in this case, or my own humble efforts have unearthed any case in which a term was implied such as that being sought here. Once it is accepted that the policies between the appellant and the respondent were policies of indemnity, it is in my view contrary to all legal principles that a term should be implied founded upon either policy where damages could be awarded over and above the limit of the stipulated liability".

[69] At page 124 of the judgment he observed further:

> "In the final analysis I hold that not only was there never a point in time when there was an undisputed sum payable, but that on authorities as they stand it is not possible for the court to imply a term such as is being sought in the policies of insurance. Not only is it a contract of indemnity which limits the extent of the Insurer's liability but it is in particular with Clause 18 which gives the right to go to arbitration which is a fundamental and express term not only of this Policy under consideration but of most is not all indemnity insurance."

[70] The court consequently set aside the award for damages made by the trial judge.

[71] This confirms the English law and crystallizes the legal position in Grenada.

[72] However, in relation to the issue of an insurer's duty of good faith, the Eastern Caribbean Court of Appeal's position was unfortunately not as helpful.

[73] Counsel for **J. Astaphan Co.** contended that the observance of utmost good faith was required not only from the insured but also from the insurer; and that the necessity for the exercise of good faith continued after the execution of the contract of insurance and beyond the making of the claim. This submission was accepted by the trial judge (Singh J) who not only accepted that the insurer's agent had acted in an unethical manner to the detriment of the respondents but he also determined that the refusal of the insurer to disclose certain relevant information to the respondents, after the claim was made, was a breach of the requirement of good faith.

[74] Counsel for the respondent submitted since a breach of the duty of good faith was a breach of contract, then the trial judge was entitled to conclude that the insurer's breach of duty of good faith constituted a breach of contract.

[75] In deliberating on this appeal ground, Bishop JA considered and adopted the reasoning of Hirst J in **The Litsion Pride** and concluded that:

> "I would say that utmost good faith was required of Ennia, after it made its inquiries and ascertained what sales of damaged and destroyed vehicles had been transacted, and with whom, to disclose such information to Astaphans, especially when it was specifically requested by Astaphans. There was a duty of disclosure on Ennia. The obligation was to reveal facts of which it was aware, and which, in my view, would have influenced the judgment of Astaphans. I would not say, however, that it was "culpable misrepresentation or non-disclosure". In any event when the disclosure was eventually made, Astaphans asked for appropriate deductions from its claim. Insofar as utmost good faith on the part of Astaphans was concerned, on the totality of the evidence before us, I am unable to say that the requirement was breached by the Company."

[76] Moe LJ, after considering the Singh J's ruling, agreed that the duty of utmost good faith must be observed not only by the insured but also by the insurer. He further concluded that maintaining perfect good faith means that both parties to the insurance contract must observe it in dealing with each other throughout the contractual relationship and that such observance must include or have implied in it, the duty to act fairly and in good faith in handling claims of the insured.

[77] In that regard he noted that the case of **Banque Keyser Ullman SA v Skandia (UK) Insurance Co.** (1986) **The Times 4th October (Steyn J)** supported the proposition that in appropriate circumstances, insurers have a duty to disclose material facts relating to the policy.

[78] The learned Justice of Appeal agreed with the trial judge that on the facts of the case the insurer's conduct amounted to an act of bad faith and noted the following:

> "The learned Judge having found the appellant in breach of the "Uberrimae Fides" principle held the appellant guilty of a breach of the contract of insurance. While it does not clearly appear that this finding affected the award made by the learned Judge it is quite reasonable to assume that he took this conclusion into account in the assessment of damages for breach of contract."[9]

[79] Unfortunately, that is the extent of the court's reasoning on this issue. Although the learned Judges appeared to have no difficulty in outlining the principle of *uberrimae fides*, they did not definitively pronounce on the juristic basis of this duty, and more importantly they did not conclusively address the consequences or remedies which would follow a breach of that duty. However, what is noteworthy is that the Court of Appeal in any event set aside the award of damages for breach of contract made by the trial judge on the basis already indicated.

[80] More importantly, it is clear that the state of the law has changed dramatically since this judgment was rendered. It is clear that in arriving at its decision the Court of Appeal considered and applied English case law which has since been conclusively overturned in higher courts.

[81] As has been indicated, the **The Litsion Pride** has been expressly not followed by the House of Lords in **Manifest Shipping Co. Uni-Polaris Shipping Co.** It is also clear that Steyn J's ruling in **Banque Keyser Ullman SA v Skandia (UK) Insurance Co.** (1986) **The Times 4th October** (which was referenced by Moe LJ

[9] The trial judge's award of damages was eventually set aside on the basis already indicated.

in arriving at his conclusions) has since been reversed by the Court of Appeal in **Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)** [1990] 1 QB 665. The Court of Appeal decision was later affirmed by the House of Lords **Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)** [1991] 2 AC 249.

[82] Both **Manifest Shipping Co. Uni-Polaris Shipping Co. and Banque Financiere de la Cite SA (formerly Banque Keyser Ullmann SA) v Westgate Insurance Co (formerly Hodge General & Mercantile Co Ltd)** reflect the current state of the English law. Two main legal principles were settled in these cases and are now clear. First, the courts have concluded that the post-contract duty of good faith is not derived from an implied term in the contract, but rather from the general law. Second, because the duty arises by virtue of the general law and not an implied term in the contract, there is no question of a breach giving rise to a right to damages.

[83] It is clear that the expressed limitation on the remedies available to an insured for breach of good faith stem from the way in which the duty of good faith is framed in s. 17 of the Marine Insurance Act 1906 (s. 22 of Marine Insurance Act of Grenada). The remedy provided by the Marine Insurance Act for breach of good faith is like the English legislation limited to the right of the aggrieved party to declare the policy void. The legislation provides no right to sue for damages. This legislative provision has been construed in case law at the highest levels of the English judicial system and for that reason they are strongly persuasive.

[84] In light of clear wording of section 22 of the Grenada Marine Insurance Act and the clear legal authorities which have been considered and which must guide the court, the court is therefore not persuaded that there is any sustainable cause of action disclosed in the 2011 Suit.

[85] The claimant's pleadings in Suit 2011 do not establish a cause of action which is recognized under English law and learned counsel for the claimant readily acknowledged this. First, the claimant grounds the claim for breach of good faith on an implied term of the insurance contract, thus giving rise to a cause of action in contract. This runs contrary to the "rule of law" theory which is now the accepted juristic basis of the duty of good faith in English jurisprudence.

[86] Secondly, the claimant seeks to recover damages as a remedy for the alleged breach of good faith. Section 22 of the Grenada Marine Insurance Act does not afford such a remedy.

[87] Finally, at its core, the claimant's statement of claim is in essence seeking to recover as damages for breach of contract, consequential losses flowing from the defendant/applicant's failure or refusal to pay what the claimant says is a valid claim under an indemnity policy.[10] This would fly in the face of established legal precedent not only in England but also in the region.[11]

[88] The court is cognizant that litigants are not without scrupulous examination of all the circumstances, to be denied the right to bring a genuine subject of litigation before the court. However, if a court reaches the clear conclusion that the claim is bound to fail because, on the way that the claimant advances his case, no cause of action can properly be said to exist then in such circumstances it is important both that substantial expenditure in costs should cease and expectations should not be raised.

[89] For the reasons set out, the court is of the view that in regards to the 2011 Suit, it is clear that this claim could not succeed as a matter of law and is bound to fail.

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[10] Paragraph 10 of the Statement of Claim in 2011 Suit

[11] Ennia General Insurance Co. Ltd. V J. Astaphan & Co. (1970) Ltd

Abuse of Process – Re Litigation

[90] Given the conclusions already drawn as regards the sustainability of the cause of action in the 2011 Suit, it is not necessary to rule on the other two grounds of the defendant's application. However, the court is compelled to make the following observations.

[91] Counsel for the defendant also submitted that the 2011 Suit is an abuse of process because it is founded on contentions that could have been advanced by the claimant in the 2005 Suit but which have not been. The claimant in response states that these matters could not have formed part of the earlier action because the documents upon which the claimant grounds the alleged breach of the duty of good faith only came to its knowledge in 2006 during the discovery process in the 2005 Suit. This cause of action therefore only accrued when the claimant had knowledge of the Defendant's loss adjuster's report which was not disclosed to the claimant although apparently favourable to it.

[92] The House of Lords in **Johnson v Gorewood** [2001] 2 WLR 72 held that when considering whether a second claim is an abuse of process a broad, merits based judgment has to be made taking into account all the public and private interests involved and all of the facts. A second claim should be struck out only, if in all the circumstances it should, rather than merely could, have been brought in the first claim.

[93] Where the issues raised in an earlier claim are identical to the issues raised in a later claim then commencing the later claim would clearly be an abuse of process. However, where the first and second claims are of a different nature, compelling reasons are required before the claim will be struck out.

[94] Although the two suits stem from essentially the same facts, they are nevertheless different in nature. Further, given the claimant's contention that the circumstances

giving rise to the alleged breach of the duty of good faith (including the discovery and disclosure of the claimant's loss adjuster's report) were only discovered well into the 2005 litigation, it is unlikely that the claimant could have raised therein the earlier and yet extant proceedings. Had the 2011 Suit proffered a viable and sustainable cause of action, in those circumstances, the court would have found it very difficult to strike out the claim on this basis.

Conclusion

[95] **It is therefore ordered as follows:**

1. **That the defendants/Applicant's application is granted.**
2. **The claimant's claim form and statement of claim filed on 18th July 2011 are struck out as an abuse of process, they having disclosed no sustainable cause of action.**
3. **The claimant will pay the defendant's costs of the application to be assessed if not agreed.**

[96] The court gratefully acknowledges the assistance and industry of both learned Queen's Counsel.

Vicki Ann Ellis
High Court Judge