IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCV2022/002
BB Civil Appeal No 15 of 2008

BETWEEN

APSARA RESTAURANTS (BARBADOS) LIMITED **APPELLANT**

AND

GUARDIAN GENERAL INSURANCE LIMITED **RESPONDENT**

Before: **Mr Justice Saunders, President**
Mr Justice Wit*
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Burgess
Mr Justice Jamadar

Date of Judgment: **22 January 2024**
29 May 2024 [Re-issued]**

Appearances

Mr Douglas Mendes, SC and Mr Clay Hackett for the Appellant

Mr Christopher Audain, KC and Mr Roger Forde, KC for the Respondent

Insurance – Uberrimae fidei – Material nondisclosure – Primary facts – Inferences drawn from primary facts – Test for interfering with concurrent findings of primary fact – Test for interfering with concurrent findings based on inferences from primary fact – Delay in issuing written judgment – Arson – Breach of policy of insurance – Extension of time – Decisive influence test – Actual influence test – Inducement – Effect of relevant circumstance on the mind of prudent insurer weighing risk – Marine insurance Act, Cap 292.

* The case was heard by all seven judges of the CCJ but, regrettably, before the judgment could be delivered, Wit J retired from the Court on the ground of ill health and passed away shortly thereafter. His inability to participate in the deliberations did not affect the outcome of the appeal as all remaining six judges have agreed that the appeal must be dismissed.

**As a result of certain errors that required correction this Judgment was re-issued on 29 May 2024.

SUMMARY

This appeal was brought by Apsara Restaurants (Barbados) Ltd ('Apsara'). Apsara is a company with two directors, Mr Mohammed, and his wife Ms Kavanagh. The respondent is Guardian General Insurance Ltd ('Guardian'), a company doing insurance business in Barbados. The case was heard by all seven judges of the CCJ but, regrettably, before the judgment could be delivered, Wit J retired from the Court on the ground of ill health and passed away shortly thereafter. His inability to participate in the deliberations did not affect the outcome of the appeal as all remaining six judges have agreed that the appeal must be dismissed.

In the early morning of 27 August 2007, fire destroyed Apsara's restaurant premises situated at Morecambe House, at Maxwell, Christ Church in Barbados. Apsara lodged a claim on a fire insurance policy it had entered into with Guardian in relation to the burnt premises. Guardian resisted the claim on several grounds. The main ones surrounded the allegations that a) Mr Mohammed was responsible for the fire; b) In proposing for the insurance coverage Apsara did not disclose several material facts and thereby induced Guardian to effect the coverage on the premises; and c) Apsara was in breach of 'Condition 11' of the policy.

The trial judge found overwhelmingly for Guardian on each of these points. The judge was not impressed with the evidence given by Apsara and in particular, by Mr Mohammed. The Court of Appeal dismissed Apsara's appeal. That court found no reason to disturb any of the findings of fact or law made by the trial judge. Apsara appealed further to this Court. Given that the Court of Appeal endorsed the trial judge's factual findings and inferences, the questions facing the CCJ for decision were as follows:

a. What is the legal consequence of the concurrent findings of the trial judge and the Court of Appeal? **'The CCJ and Concurrent Findings**'

b. Should this Court reverse or uphold the judge's finding that Mr Mohammed was somehow involved in the deliberate fire that took place at Apsara's premises? **'Arson'**

c. Was Guardian entitled to avoid the policy on any of the various grounds of non-disclosure claimed by Guardian? What is the right test for assessing the materiality of non-disclosed facts? **'Non-disclosure of Material Facts'**

d. In particular –

   i. Apsara had not, at the time it entered into the contract of insurance, disclosed to Guardian the fact that an insurance company in Trinidad and Tobago, Gulf Insurance Company ('Gulf'), had previously cancelled a policy of insurance effected some years before in Trinidad and Tobago by O'Meara Food Products Ltd ('O'Meara'), a company of which Mr Mohammed and Ms Kavanagh were the sole shareholders and directors. Did that non-disclosure entitle Guardian to avoid the fire insurance policy on the premises in Barbados? **'The Gulf Cancellation non-disclosure'**

   ii. Apsara had not disclosed to Guardian the fact that an insurance company in Trinidad and Tobago, Maritime General Insurance Co Ltd of Trinidad and Tobago ('Maritime'), had previously denied an insurance claim made by O'Meara. Did that non-disclosure entitle Guardian to avoid the policy on the premises in Barbados? **'The Spoiled Shrimp Claim'**

   iii. Apsara had not disclosed that there was an unpaid judgment debt in Trinidad and Tobago for the sum of the equivalent of approximately BBD300,000 registered against O'Meara. Did that non-disclosure entitle Guardian to avoid the policy? **'O'Meara's Judgment Debt'**

e. Did Apsara fail to comply with 'Condition 11' of the policy and if it did so, did that breach entitle Guardian to avoid the fire insurance policy on the premises in Barbados? **'Condition 11'**

The CCJ and Concurrent Findings

By a majority (Saunders P, Anderson, Barrow and Jamadar JJ), the Court held that it was entitled to review the concurrent findings of fact of the trial judge and the Court of Appeal. The majority held that if any particular fact in issue was an inference reached by the trial judge, the Court should not decline to review that inference merely because the Court of Appeal supported the trial judge's finding. Secondly, if the fact in issue is a primary fact found by the trial judge, then, if the Court of Appeal endorsed that finding, the Court may still review it in certain circumstances including where there was no or no sufficient evidence to support the finding of the trial judge. The minority (Burgess and Rajnauth-Lee JJ) took the view that the Court should decline to review the concurrent findings of fact in this case taking into consideration that Apsara did not disclose any exceptional circumstances as required by this Court's jurisprudence.

Arson

By a majority (Saunders P, Anderson, Barrow and Jamadar JJ), the Court held that there was not sufficient evidence to justify the trial judge's conclusion that Mr Mohammed was responsible for setting the fire. The majority's view was that neither the trial judge nor the Court of Appeal appeared to have taken into account circumstances that pointed away from the notion that Mr Mohammed was the likely arsonist.

Non-disclosure of Material Facts

As to whether Apsara had failed to disclose material facts thereby causing Guardian justifiably to avoid the policy, counsel on both sides of the appeal, like the courts below, had uncritically accepted the test for materiality as laid down by the House of Lords majority in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (*'Pan Atlantic'*). The House of Lords held in that case, by a 3 to 2 majority, that a fact or circumstance is material if a prudent insurer would have *wanted to know* about that fact or circumstance when forming an underwriting judgment on the risk (if it had been offered to them), even

if the prudent insurer might have made the same underwriting decision as the particular insurer in question had done. The House in *Pan Atlantic* also unanimously agreed that, further, a court will only allow avoidance of the policy where *the actual insurer* establishes by evidence that they were induced, by the non-disclosure on the part of the assured, to accept the risk undertaken, or to accept the risk on the terms that, ultimately, they did. This view of the law taken by the House of Lords majority in *Pan Atlantic* may fairly be said to be the prevailing law in Barbados regarding the test for materiality.

The CCJ judges were evenly divided on the test for materiality. Burgess, Rajnauth-Lee, and Jamadar JJ took the view that the test for determining materiality was as laid down by the House of Lords majority in *Pan Atlantic*. On the other hand, Saunders P, Anderson and Barrow JJ agreed with the position adopted by the House of Lords minority in *Pan Atlantic*. The fact that is not disclosed is material only if a prudent insurer, if he had known of the undisclosed fact, would either have declined the risk altogether or charged an increased premium. Further, to avoid a policy, the actual insurer must provide cogent evidence to establish that if they had been made aware at the outset of the circumstance that was not disclosed, they would have declined the risk or charged an increased premium.

The Court was therefore equally divided on this issue. The practical effect of this equal division of the Court as to the proper test for determining whether a non-disclosed fact is or is not material means that in Barbados the law on this point remains as it was before this judgment was issued.

As to the admitted non-disclosures, by a majority (Saunders P, Anderson, Barrow and Jamadar JJ) the Court held that, given all the surrounding circumstances, Apsara's failure to disclose to Guardian that Gulf had previously cancelled a policy of insurance effected some years before in Trinidad and Tobago by O'Meara was not, by itself, a non-disclosure that entitled Guardian to avoid its policy with Apsara.

By a majority (Saunders P, Anderson, Rajnauth-Lee, Barrow and Burgess JJ) the Court held that Apsara's failure to disclose to Guardian that O'Meara had previously made an

unsuccessful claim on an insurance policy was a material non-disclosure which entitled Guardian to avoid its policy of insurance with Apsara.

The Court also considered Apsara's failure to disclose to Guardian that in Trinidad and Tobago a judgment had been recorded against O'Meara, Mr Mohammed, and Ms Kavanagh, jointly and severally, by the Agricultural Development Bank of Trinidad and Tobago for the sum of TTD1,060,075.19 or about BBD300,000 and that this judgment was outstanding at the time Apsara made its proposal to Guardian. All six judges considered that this was a material non-disclosure which entitled Guardian to avoid the policy of insurance.

Condition 11

The Courts below had both held that the failure by Apsara to provide Guardian with particulars of the loss incurred due to the fire within the 15-day period stipulated in Condition 11 of the Policy, was such that Guardian was not obliged to honour Apsara's claim. All six Judges held that, given the extenuating circumstances revealed by the evidence, Apsara's failure to provide the particulars within the stipulated time did not entitle Guardian to avoid the policy on this ground because Guardian's conduct amounted to a waiver of the requirement for strict compliance with Clause 11.

Cases referred to:

A-G v Joseph [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *Akalazu v State* (2022) LLJR-SC; *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, KY 2018 PC 2 (CARILAW); *Ali v Hand-in-Hand Mutual Fire & Life Insurance Co Ltd* (2001) 65 WIR 186 (GY HC), (2007) 71 WIR 227 (GY CA); *Anderson v City of Bessemer* 470 US 564 (1985); *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* (BB CA, 31 December 2014); *Assicurazioni Generali SpA v ARIG (BSC)* [2003] Lloyd's Rep IR 131; *B (A Child) (Care Proceedings: Threshold Criteria), Re* [2013] 1 WLR 1911; *B (Children)*, *Re* [2009] AC 11; *Baffsky v Brewis* (1976) 51 ALJR 170; *Barbados Rediffusion Services Ltd v Merchandani (No 1)* [2005] 1 CCJ (AJ) (BB), (2005) 69 WIR 35; *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514; *Bater v Bater* [1951] P 35; *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] 4 All ER 418; *Beaudoin-Daigneault v Richard* [1984] 1 SCR 2; *Benmax v Austin Motor Co Ltd*

[1955] AC 370; *Biogen Inc v Medeva plc* [1998] 1 LRC 21, [1977] RPC 1; *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC); *Blyth v Blyth* [1966] AC 643; *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455; *Boodoo v A-G of Trinidad and Tobago* [2004] UKPC 17, (2004) 64 WIR 370; *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Brotherton v Aseguradora Colseguros SA* [2003] EWCA Civ 705, [2003] Lloyd's Rep IR 746; *Browne v Griffith* [2013] CCJ 6 (AJ) (BB), (2013) 83 WIR 62; *Campbell v Narine* [2016] CCJ 7 (GY), (2016) 88 WIR 319; *Canadian Imperial Bank of Commerce v Gypsy International Ltd* [2015] CCJ 16 (AJ) (BB), (2015) 88 WIR 23; *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162; *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, [2016] 2 LRC 46 (BS); *Chinachem Charitable Foundation v Chan Chun Chuen* (2011) 14 HKCFAR 798*; Chung v Colonial Fire and General Insurance Co Ltd* (TT CA, 23 July 1991); *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35; *Cobham v Frett* (2000) 59 WIR 161 (VG PC); *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476; *Cook v Thomas* [2010] EWCA 227; *D (Secretary of State for Northern Ireland intervening), Re* [2008] 1 WLR 1499; *Dass v Marchand* [2021] 1 WLR 1788 (TT PC); *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325; *Devi v Roy* [1946] AC 508; *Dellow's Will Trusts, Re* [1964] 1 WLR 451; *Diab v Regent Insurance Co Ltd* [2007] 1 WLR 797; *Drake Insurance plc v Provident Insurance plc* [2004] 2 All ER (Comm) 65; *Edgington v Fitzmaurice* (1885) 29 Ch D 459; *Ewer v National Employers' Mutual General Insurance Association Ltd* [1937] 2 All ER 193; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299; *Gestmin SCPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm); *Glicksman v Lancashire and General Assurance Co Ltd* [1927] AC 139; *Grenada Electricity Services Ltd v Peters* GD 2003 CA 1 (CARILAW), (28 January 2003); *H (Minors) (Sexual Abuse: Standard of Proof), Re* [1996] AC 563; *Harracksingh v A-G of Trinidad and Tobago* [2004] UKPC 3, (2004) 64 WIR 362 (TT); *Hicks v Chief Constable of the South Yorkshire Police* [1992] UKHL 9, [1992] 2 All ER 65; *Higgins v J & C M Smith (Whiteinch) Ltd* 1990 SC (HL) 63; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Housen v Nikolaisen* [2002] 2 SCR 235; *Howard v R* [1994] 2 SCR 299; *Ingles v Tutkaluk Construction Ltd* [2000] 1 SCR 298 ; *Ionides v Pender* (1874) LR 9 QB 531; *Issais v Marine Insurance Co Ltd* [1923] 15 LI L Rep 186; *JEB Fasteners Ltd v Marks Bloom & Co* [1983] 1 All ER 583; *Joseph v Clico International General Insurance Co Ltd* (2006) 71 WIR 31 (BB CA); *Juman v A-G of Trinidad and Tobago* [2017] UKPC 3, [2017] 2 LRC 610 (TT); *Khawaja v Secretary of State for the Home Office* [1984] AC 74; *Kimathi v The Foreign and Commonwealth Office* [2018] EWCH 2066 (QB); *Knox v Deane* [2021] CCJ 5 (AJ) (BB), (2021) 102 WIR 94; *Konowsky v Pacific Marine Insurance Co* [1923] 2 DLR 1198; *Lachana v Arjune* [2008] CCJ 12 (AJ) (GY); *Lambert v Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep 485; *Leriche v Cherry* [2008] UKPC 35, LC 2008 PC 4 (CARILAW); *Locker and Wolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408; *Louth v Diprose* (1992) 175 CLR 621; *Lumbert v Co-op Insurance Society* [1975] 2 Lloyd's Rep 485; *Major v Bretherton* (1928) 41 CLR 62; *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2003] 1 AC 469, [2001] 1 All ER 743 (HL); *Marek v CGA Fire & Insurance Co Ltd* (1985) 3 ANZ Insurance Cases 60-665; *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* [1976] 2

Lloyd's Rep 631; *Mayne Nickless Ltd v Pegler* [1974] 1 NSWLR 228; *McGraddie v McGraddie* [2013] 1 WLR 2477; *Mersey Docks and Harbour Board v Procter* [1923] AC 253; *Michael v I E & D Hurford Ltd* [2021] EWHC 2318 (QB); *Miller v Minister of Pensions* [1947] 2 All ER 372; *Molodi v Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB); *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73; *Mutual Life Insurance Co of New York v Ontario Metal Products Co Ltd* [1925] AC 344; *N Michalos & Sons Maritime SA v Prudential Assurance Co Ltd* (*The Zinovia)* [1984] Lloyd's Rep 264; *National Justice Cia Naviera SA v Prudential Assurance Co Ltd* (*The Ikarian Reefer)* [1995] Lloyd's Rep 455; *Natwest Markets Plc v Bilta (UK) Ltd (in Liquidation)* [2021] EWCA Civ 680; *North Star Shipping Ltd v Sphere Drake Insurance Plc* [2006] EWCA Civ 378; *NV Bocimar SA v Century Insurance Co of Canada* [1987] 1 SCR 1247; *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403; *Ontario (Attorney General) v Bear Island Foundation* [1991] 2 SCR 570; *P Caland v Glamorgan Steamship Co Ltd* [1893] AC 207; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 WLR 677; *Panday v Gordon* [2005] UKPC 36, (2005) 67 WIR 290 (TT PC); *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Pompey v DPP* [2020] CCJ 7 (AJ) GY, GY 2020 CCJ 2 (CARILAW); *Pratt v Renz* [2014] CCJ 7 (AJ) (GY); *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin* [2017] 1 SCR 478; *R v D* [2013] 9 WLUK 348, [2013] Eq LR 1034; *R v NS* [2012] 3 SCR 726; *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY; *Ramdehol v Ramdehol* [2017] CCJ 14 (AJ) (GY); *Ramlagan v Singh* [2014] CCJ 5 (AJ) (GY), GY 2014 CCJ 2 (CARILAW); *Ramlagan v Singh* [2015] CCJ 7 (AJ) (GY), (2015) 86 WIR 332; *Raso v NRMA Insurance Ltd* (Supreme Court of New South Wales Court of Appeal, 14 December 1992); *Refjek v McElroy* (1965) 112 CLR 517; *Reid v Charles* [1989] UKPC 24 (TT); *Reid v Reid* [2008] CCJ 8 (AJ) (BB), (2008) 73 WIR 56; *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330; *Ryan v Victoria (City)* [1999] 1 SCR 201 ; *Sancus Financial Holdings Ltd v Holm* [2022] 1 WLR 5181 (VG PC); *Sandy Lane Hotel v Cato* [2022] CCJ 8 (AJ) BB; *Sea Havens Inc v Dyrud* [2011] CCJ 13 (AJ) (BB), (2011) 79 WIR 132; *Shillingford v Andrew* [2020] CCJ 2 (AJ), DM 2020 CCJ 1 (CARILAW); *Sir Robert Peel, The* (1880) 4 Asp MLC 321, 43 LT 364; *Smith v Chadwick* (1884) 9 App Cas 187, [1881-85] All ER Rep 242; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] Bus LR 1304; *Solomon Ghany Oil Engineering Ltd NEM (West Indies) Insurance Ltd* (TT HC, 19 May 2000); *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1939) 39 SR (NSW) 174; *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37; *St Paul Fire & Marine v McConnell Dowell Constructors Ltd* [1996] 1 All ER 96; *Stein v The Ship 'Kathy K'* [1976] 2 SCR 802; *Tex Services Ltd v Shibani Knitting Co Ltd* [2016] UKPC 31; *Thompson v Government Insurance Office of New South Wales* (Supreme Court of New South Wales Commercial Division, 15 June 1994); *Traille Caribbean Ltd v Cable and Wireless (Jamaica) Ltd* [2023] UKPC 19, JM 2023 PC 3 (CARILAW); *Ville de Montréal v Lonardi* [2018] 1 SCR 104; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Ward v Walsh* BB 2012 CA 14 (CARILAW), (28 November 2012); *Watt or Thomas v Thomas* [1947] AC 484; *Wealth Duke Ltd v Bank of China Ltd* (2011) 14 HKCFAR 863*; Wheat v E Lacon & Co Ltd* [1966] AC 552; *Whitehouse v Jordan* [1981] 1 WLR 246; *Zurich General Accident and Liability Insurance Co Ltd v Morrison* [1942] 1 All ER 529.

Legislation referred to:

Australia - Insurance Contracts Act 1984; **Barbados** - Companies Act, Cap 308, Constitution of Barbados 1966, Marine Insurance Act, Cap 292, Supreme Court of Judicature Act, Cap 117; **Canada** - Ontario Insurance Act RSO 1990, c I.8; **United Kingdom** - Consumer Insurance (Disclosure and Representations) Act 2012, Insurance Act 2015, Marine Insurance Act 1906 (8 Edw 7 c 41).

Other Sources referred to:

Anderson W, 'The Duty to Disclose Material Information Not Solicited in the Proposal For Insurance' (1991) 3(1) Caribbean Law and Business 45; Anderson W, 'Post-Contract Disclosures in Insurance Law' (1991) 1(2) Carib L Rev 64; Appendix to Practice Direction 57AC (Statement of Best Practice) <https://www.judiciary.uk/wp-content/uploads/2020/10/CPR-PD57AC-Appendix-Final-Draft-2.pdf > accessed 10 November 2023; Aune R K, 'The influence of perceived source reward value on attributions of deception' (1993) 10 Communication Research Reports 15; Birds J and Hird N J, 'Misrepresentation and Non-disclosure in Insurance Law - Identical Twins or Separate Issues?' (1996) 59 Mod L Rev 285; Birds J, *Birds' Modern Insurance Law* (6th edn, Sweet & Maxwell 2004); Birds J, Lynch B and Milnes S, *MacGillivray on Insurance Law: Relating to All Risks Other Than Marine* (13th edn, Sweet and Maxwell 2015); Bolonik K, 'Toxic Assets and English Syntax: Aleksandar Hemon Talks with Bookforum' 16 (2) Bookforum cited in N Mostyn, 'The Craft of Judging and Legal Reasoning' (2015) 12 TJR 359 < www.bookforum.com/inprint/016_02/3828 > accessed 10 November 2023; Bond C F and DePaulo B M, 'Accuracy of Deception Judgments' (2006) 10 (3) Personality and Social Psychology Review 214; Bond C F and DePaulo B M, 'Individual Differences in Judging Deception: Accuracy and Bias' 2008) 134(4) Psychological Bulletin 477; Booth P, 'Heading Out', in *Selves* (Middx Penguin Books 1990); Cole G and others, *Making Decisions Judicially: A Guide for Decision Makers* (Hart Publishing, 2022); DePaulo B and others, 'Cues to Deception' (2003) 129 Psychological Bulletin 74; 'Disability and Inclusion Awareness Guidelines: For Judiciaries and Judicial Officers' (Caribbean Association of Judicial Officers (CAJO) 2023); Ellsworth P C, 'Legal Reasoning and Scientific Reasoning' (2012) 63 Ala L Rev 895; Foss S*, 'The Calf-Path'* in *Whiffs from Wild Meadows* (Lee and Shepard Publishers 1895); Global Deception Research Team, 'A World of Lies' (2006) 37(1) Journal of Cross-Cultural Psychology 60; Goodhart A L, 'Appeals on Questions of Fact' (1955) 71 LQR 402; *Halsbury's Laws of England* (4th edn, 2003) vol 31; Harris A P and Sen M, 'Bias and Judging' (2019) 22 Annual Review of Political Science 241; Huhn W, *The Five Types of Legal Argument* (3rd edn, Carolina Academic Press 2014); Jamadar P and Elahie E, *Proceeding Fairly: Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago* (Judicial Education Institute of Trinidad and Tobago 2018) < https://www.ttlawcourts.org/jeibooks/ > accessed 10 November 2023; Judicial College, *Equal Treatment Bench Book* (2021 edn, 2023 rev) <

https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/ > accessed 10 November 2023; 'Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers' (Belize Judiciary 2018); 'Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers' (Judicial Education Institute Trinidad and Tobago 2018); Lady Rose of Colmworth, 'The Art and Science of Judicial Fact Finding' (Canadian Institute for Advanced Legal Studies, The Cambridge Lectures, Queens' College, Cambridge, 14 July 2023); Leach A-M and others, 'Less is more? Detecting lies in veiled witnesses' (2016) 40 (4) Law and Human Behavior 401; Leggatt Lord G, 'Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony', (At a Glance Conference, 12 October 2022); Levine T R and others, 'Sender Demeanor: Individual Differences in Sender Believability Have a Powerful Impact on Deception Detection Judgments' (2011) 37 Human Communication Research 377; Levine T R, *Duped: Truth-Default Theory and the Social Science of Lying and Deception*, (University of Alabama Press 2020); Marshall, *A Treatise on the Law of Insurance* (2nd edn) vol 1; Mostyn N, 'The Craft of Judging and Legal Reasoning' (2015) 12 TJR 359; *Percy Anecdotes, The* (1900) 108 Law Times 520; Posner R A, *Reflections on Judging* (Harvard University Press, 2013); Vrij A & Akehurst L, 'The Existence of a Black Clothing Stereotype: The Impact of a Victim' Black Clothing on Impression Formation' (1997) 3 Psych, Crime & L 227; Vrij A, 'Credibility judgments of detectives: The impact of nonverbal behavior, social skills and physical characteristics on impression formation' (1993) 133(5) Journal of Social Psychology 601; Ying Y H, 'Recent Developments in Materiality Test of Insurance Contracts' (1995) 1995 Sing J Legal Stud 56.

JUDGMENT

Reasons for Judgment:

SAUNDERS P:

[1] All seven judges of this Court sat and heard this appeal in person. Unfortunately, some time after the close of the oral submissions Wit J became very ill, necessitating his retirement from the court. Shortly after his retirement, Wit J passed away. He has therefore been unable to take part in critical stages of the deliberative process and so he has not signed this judgment. This circumstance has not affected the outcome of the appeal. It is agreed by all that the appeal must be dismissed. There are, however, significant differences regarding the precise reasons for the dismissal and the manner in which certain issues in the appeal should be resolved.

[2] Substantial opinions have been given by Burgess J (who has written for himself and Rajnauth-Lee J), Anderson and Jamadar JJ. I am content to set out briefly my views on the major issues in the appeal, indicating where I concur with the opinions set out by one or other of my colleagues. Barrow J has joined in this opinion.

[3] The opinions of Burgess and Anderson JJ more fully set out the factual background to the dispute. It is therefore only necessary for me to sketch the following bare outline. The action was brought by Apsara Restaurants (Barbados) Ltd ('Apsara') against Guardian General Insurance Ltd ('Guardian'). Apsara is a company with two directors, Mr Mohammed, and his wife Ms Kavanagh. Throughout my opinion, purely for the sake of convenience, I may refer to acts and statements of Mr Mohammed as having been made by 'Apsara'.

[4] After a fire destroyed its restaurant premises in Barbados, Apsara desired to claim on a fire insurance policy it had entered into with Guardian in relation to the burnt premises. Guardian resisted the claim on several grounds. The main ones surrounded their contention that a) Mr Mohammed was responsible for the fire; b) In proposing for the coverage Apsara did not disclose several material facts and thereby induced Guardian to effect the insurance coverage on the premises; and c) Apsara was in breach of 'Condition 11' of the policy. The trial judge found

overwhelmingly for Guardian on each of these points. The judge was not at all impressed with the evidence given by Apsara and in particular, by Mr Mohammed. The Court of Appeal dismissed Apsara's appeal. That court found no reason to disturb any of the findings of fact or law made by the trial judge. Apsara appealed further to this Court.

[5] Given that the Court of Appeal endorsed the trial judge's factual findings and inferences, the essential questions facing us for decision may be listed as follows:

a. What is the legal consequence for this Court of the concurrent findings of the trial judge and the Court of Appeal? **'The CCJ and Concurrent Findings**'
b. Should this Court reverse or uphold the finding that Mr Mohammed was 'somehow involved in the deliberate fire' that took place at Apsara's premises? **'Arson'**
c. Was Guardian entitled to avoid the policy on any of the various grounds of non-disclosure as claimed by Guardian? What is the right test for assessing the materiality of non-disclosed facts? **'Non-disclosure of Material Facts'**
d. In particular -
    i. Apsara had not, at the time it entered into the contract of insurance, disclosed to Guardian the fact that an insurance company in Trinidad and Tobago, Gulf Insurance Company ('Gulf'), had previously cancelled a policy of insurance effected some years before in Trinidad and Tobago by O'Meara Food Products Ltd ('O'Meara'), a company of which Mr Mohammed and Ms Kavanagh were the sole shareholders and directors. Did that non-disclosure entitle Guardian to avoid the fire insurance policy on the premises in Barbados? **'The Gulf Cancellation non-disclosure'**
    ii. Apsara had not disclosed to Guardian the fact that an insurance company in Trinidad and Tobago, Maritime General Insurance Co Ltd of Trinidad and Tobago ('Maritime'), had previously denied an insurance claim made by O'Meara. Did that non-disclosure entitle Guardian to avoid the policy on the premises in Barbados? **'The Spoiled Shrimp Claim'**

iii. Apsara had not disclosed that there was an unpaid judgment debt in Trinidad and Tobago for the sum of the equivalent of approximately BBD300,000 registered against O'Meara. Did that non-disclosure entitle Guardian to avoid the policy? **'O'Meara's Judgment Debt'**

e. Did Apsara fail to comply with 'Condition 11' of the Guardian fire insurance policy and if it did so, did that non-compliance entitle Guardian to avoid the fire insurance policy on the premises in Barbados? **'Condition 11'**

Concurrent Findings of Fact

[6] For the reasons he advances, I share the opinion of Anderson J on this issue. I agree that if any particular fact in issue was an inference reached by the trial judge, this Court should not decline to review that inference merely because the Court of Appeal supported the trial judge's conclusion. Secondly, if the fact in issue is a primary fact found by the trial judge, then, if the Court of Appeal endorsed that finding, we should only review it in exceptional circumstances. An exceptional circumstance would include, for example, instances where we were of the view that there was no or no sufficient basis for the finding or where our failure to review the finding would result in a miscarriage of justice. It may be said that the former is embraced within the latter. I take this approach to concurrent findings because my view is that an apex court should not lightly or ordinarily encourage re-litigation of *factual* disputes between or among individual litigants that have already been contested and resolved at the courts below. That is plainly not the prime role of a final appellate court.

Arson

[7] I agree that there was cogent evidence presented that someone deliberately set fire to the restaurant. The judge was clearly entitled to arrive at that conclusion. But I share the opinion of Anderson J, for the reasons he advances, that there was no sufficient basis to lead the trial judge to infer that Mr Mohammed was involved in

setting the fire. Moreover, neither the trial judge nor the Court of Appeal appeared, in my view, to take into account a number of circumstances that pointed away from the notion that Mr Mohammed was the likely arsonist. It is a very serious matter to infer that a man deliberately set fire to his own restaurant, and I could not find in the evidence the commensurate proof upon which such an inference could be premised.

Non-Disclosure of Material Facts

[8] It is trite law that an insurance contract is one which requires each party to demonstrate the utmost good faith. In particular, the proposer for insurance has an obligation to disclose to the insurer every circumstance that is material and which is or ought to be within the knowledge of the proposer. What is a material circumstance? Determining materiality is a question of law. A circumstance is material if it would influence *the judgment* of a prudent insurer in fixing the premium, or determining whether they will take the risk.

[9] Differences have arisen among common law judges as to what is meant by the word '*judgment*' in the paragraph above. The meaning has implications for circumscribing what is material and hence what *must* be disclosed by the insured. Does '*judgment*' refer to the evaluative process insurers and underwriters undertake when making up their minds whether to accept a proposal or fix the terms upon which they might accept it? Or does '*judgment*' refer to the actual decision they ultimately reach, so that a circumstance is material only if it would cause a prudent insurer to fix the premium at a particular figure, or determine whether they will take the risk? The differences of approach to these questions have resulted in different tests being put forward to ascertain when a fact is material and must be disclosed.

[10] Counsel on both sides of this case, like the courts below, uncritically accepted the test for materiality as laid down by the House of Lords in *Pan Atlantic Insurance*

Co Ltd v Pine Top Insurance Co Ltd[1] (*Pan Atlantic*). By a majority, the House of Lords held in that case that the word '*judgment*' refers to the evaluative process. As a result, by a 3 – 2 decision, the highest court in England decided that a fact or circumstance is material if a prudent insurer would have *wanted to know* about that fact or circumstance when forming an underwriting judgment on the risk (if it had been offered to them), even if the prudent insurer might have made the same underwriting decision as the particular insurer in question had done. The House in *Pan Atlantic* also unanimously agreed that, further, a court will only allow avoidance of the policy where *the actual insurer* (or underwriter) establishes by evidence that they were induced, by the non-disclosure on the part of the assured, to accept the risk undertaken, or to accept the risk on the terms that, ultimately, they did. This view of the law taken by the House of Lords majority in *Pan Atlantic* may fairly be said to be the prevailing law in Barbados.

[11] For the reasons set forth in the dissenting judgment of Lord Lloyd in *Pan Atlantic*, and supported below by Anderson J, I agree with the view urged by Michael Beloff KC, but not accepted by the House of Lords majority in *Pan Atlantic*, namely, a fact that is not disclosed or is misrepresented is material if a prudent insurer, if he had known of the undisclosed fact, would either have declined the risk altogether or charged an increased premium (the 'decisive influence' test). That approach represents a significant difference from the want-to-know test. I also agree that, to avoid a policy, the actual insurer must provide cogent evidence to establish that if they had been made aware at the outset of the fact or circumstance that was not disclosed, they would have declined the risk or charged an increased premium (the 'actual influence' test). In my view, the word '*judgment*' at [8] above refers not to the decision-making *process* but rather to the actual decision itself.

[12] Unfortunately, this Court is evenly divided on this important question as to the proper test for determining whether a non-disclosed fact is or is not material. The practical effect of this is that the law in Barbados on this point remains as it was

[1] [1994] 3 WLR 677.

before this judgment was issued. Whether *Pan Atlantic's* want-to-know test is embraced or disapproved by this Court must await another day.

The Cancellation Non-Disclosure

[13] The difference between the *Pan Atlantic's* want-to-know test and the decisive influence test is far from academic. For me, the difference is well illustrated in this case in relation to the first of the previously listed allegations of non-disclosure, that is, the allegation that Apsara had not disclosed that Gulf had previously cancelled a policy held by O'Meara.

[14] A curious aspect of this case is that no proposal form was completed by Apsara. The insurance was effected by way of a broker's slip. There was tendered into evidence, however, a blank Guardian proposal form to indicate the kind of matters Guardian likely considered material. One of the questions on the form asks: Have you, or any of the Partners or Directors ever had a Proposal or Policy Refused, Declined, Cancelled or Special Terms imposed?

[15] The uncontradicted evidence is that the policy with Gulf was actually never issued and was labelled 'cancelled' for the sheer administrative convenience of the insurer. It would appear that O'Meara's (or Mr Mohammed's) brokers had placed the insurance with Gulf without Mr Mohammed's authority; that Gulf had never actually issued the policy; and that there had been no premium 'refunded' as such. A debit note was quashed by a credit note. The clear evidence was that after the broker had, without authority, proposed for the policy with Gulf, but before the policy could be issued, O'Meara had instructed its broker to end the transaction because it had effected insurance elsewhere. Gulf accepted this and indicated that the most convenient way of addressing the situation was formally to indicate on its books that the policy was cancelled.

[16] I don't blame a prudent insurer for 'wanting to know' about all that transpired above with respect to this 'cancellation'. Prudent insurers want to know about most if not

everything. But in my respectful view, for a truly prudent insurer, the materiality of the cancellation of a policy of insurance lies in the reason(s) for the cancellation. This particular non-disclosure, standing by itself, could not reasonably have caused any prudent insurer to decline coverage on Apsara's restaurant in Barbados or to charge a higher premium than that which was negotiated by Apsara with Guardian if the Gulf 'cancellation' had been disclosed.

[17] According to the Notes of Evidence of these proceedings, Guardian's witness, an undoubted prudent and experienced insurer, testified that this cancellation:

> …would be material in that the underwriter, had he been informed of the cancellation, would have been able to make further inquiries into reasons which *might* then influence as to whether to run the risk of insurance (emphasis added).

With respect, I am not at all impressed with that answer. We now have the benefit of hindsight. We know all the circumstances surrounding the cancellation. We are now aware of the reasons for the cancellation. The results of the 'further inquiries' were revealed in this case. It is not enough for the prudent insurer to testify whether those 'further inquiries into reasons', *might* have exerted some influence on whether to accept the risk. The question is whether full disclosure *would* have caused the prudent insurer to resile from the negotiations or increase the premium.[2] The operative word is *would*, not *might*. The facts surrounding this matter unequivocally show that no moral hazard could conceivably have attended the non-disclosure of the cancellation and as such, in my opinion, the insurer fails on this point as a matter of law.

[18] It has been said that the *Pan Atlantic* want-to-know test redresses any imbalance between underwriter and insured because it is coupled with a requirement imposed on the insurer to prove that they were induced by the non-disclosure. The truth is

[2] See *Pan Atlantic* (n 1) at 680 (Lord Templeman).

that it could be said that the test reinforces the imbalance. For an immaterial non-disclosure, as illustrated here by the cancellation example, the want-to-know test immediately places on the back foot an innocent insured whose non-disclosure was harmless. Although the burden of proof is on the underwriter, effectively still, the insured must invariably now go on to establish a negative in the face of an insurer who would naturally be inclined to assert, as was done here, that they were induced by the non-disclosure.

'The Spoiled Shrimp Claim'

[19] Another question on the Guardian proposal form was: Have you, or any one of the Partners or Directors of your Company ever suffered a loss (whether insured or not) at these premises or elsewhere? Apsara led Guardian to believe, as Guardian and its witness claimed they did believe, that Apsara and its directors had no Claims history; that they had never had any issues with previous insurers. It turned out that this was false. O'Meara had previously made a claim in Trinidad on a policy it held then with Maritime. That claim was for loss and damage to its fish and shrimp products allegedly caused by malicious damage to its refrigeration compressor. Mr Mohammed is unlikely to have forgotten this incident as the matter was stoutly and successfully defended by Maritime at a trial.

[20] The circumstances surrounding the claim were not entirely clear. In the present proceedings, Guardian alleged in their pleadings that O'Meara had made fraudulent and/or baseless claims against Maritime; that O'Meara's claim against Maritime had been denied because it was discovered that O'Meara had fraudulently insured or attempted to insure shrimp that was already spoilt and that, since none of this was disclosed by Apsara to Guardian, the latter was entitled to avoid the policy effected in Barbados on Apsara's restaurant. In truth, however, this was not quite the basis upon which Maritime had defended the Trinidad suit, nor was it the precise ground upon which the Trinidadian courts upheld the denial of O'Meara's claim. Maritime had resisted the claim, among other things, on the grounds that O'Meara

was in breach of Condition 11; that O'Meara's losses were as a result of burglary and not as a result of malicious damage; and that Maritime could not be sure, because of the breach of Condition 11, that the losses allegedly incurred by O'Meara did not include spoilt fish and shrimp returned to O'Meara from Jamaica. Condition 11 required Apsara to notify Guardian 'forthwith' of the occurrence of any loss or damage and, within 15 days after the loss, to deliver in writing a particularised claim. Ultimately, O'Meara's claim was denied by the court for breach of Condition 11.

[21] The judge in the present proceedings rightly found that Apsara had failed to disclose to Guardian that its principals did have a claims history that included the fact that O'Meara had made a claim on Maritime which had been denied. The judge also found, rightly in my view, that this non-disclosure was material. Evidence was led by and on behalf of Guardian that Apsara's non-disclosure (that its principals did indeed have a claims history and that one of their company's claims had previously been rejected) did induce Guardian to accept the risk posed by Apsara.

[22] Mr Mendes for Apsara, artfully takes the technical pleading point that since Guardian did not prove its pleaded case (that O'Meara had made fraudulent and/or baseless claims against Maritime), the trial judge should not have gone on to find that the proven non-disclosures were material and/or that Guardian had been thereby induced to negotiate with and agree the terms with Apsara that they did. Particulars had been sought and supplied of the pleading, but, at the end of the day, it is not a huge stretch to state that O'Meara's claim on Maritime was baseless because it was made in breach of Condition 11. More fundamentally, Apsara could not have been taken by surprise.

[23] As previously indicated, the judge's decision to find that Guardian was entitled to avoid Apsara's policy on this ground was upheld by the Court of Appeal. I agree that it was a material non-disclosure on the part of Apsara or its broker to withhold information about its claims history and I find no exceptional circumstances here

that would warrant this Court going behind the concurrent findings of fact that support the avoidance of the policy by Guardian on this ground. This finding, standing on its own, is enough to dismiss this appeal.

O'Meara's Judgment Debt

[24] It was not denied that a) a judgment had been recorded against O'Meara by the Agricultural Development Bank in Trinidad and Tobago for the sum of TTD1,060,075.19 or about BBD300,000; b) O'Meara had not satisfied this judgment; c) the judgment was entered jointly and severally against O'Meara, Mr Mohammed and his wife; and d) that none of this was disclosed by Apsara when it negotiated with Guardian for fire coverage of Apsara's restaurant premises.

[25] The trial judge had before her evidence from a Mr Yeadon who was a Chartered Loss Adjuster, Chartered Insurance Practitioner and Certified Fire & Explosion Investigator. Mr Yeadon's evidence was to the effect that no prudent insurer would have accepted the risk accepted by Guardian if the prudent insurer had known of this outstanding judgment debt against the principals behind Apsara. The Operations Manager of Guardian also testified that all three items of non-disclosure (the cancellation, the spoilt shrimp claim and the judgment indebtedness) were bits of 'information that a prudent insurer would consider material in assessing its risk'.

[26] The trial judge took the view that the withholding of information about the judgment debt was a material non-disclosure; that the non-disclosures constituted serious moral hazards and that Guardian was induced by the non-disclosure to accept the risk on the terms on which it did. The Court of Appeal endorsed these findings of the trial judge.

[27] Counsel for Apsara suggests that mere indebtedness does not necessarily affect the moral hazard and that the indebtedness of an insured might go to his or her credit risk, but not to the risk which is to be insured. The cases of *North Star Shipping Ltd*

v Sphere Drake Insurance plc (No 2)[3]; *Marek v CGA Fire & Insurance Co Ltd*[4]; and *Ali v Hand-in-Hand Mutual Fire & Life Insurance Co Ltd*[5] were cited in support. Significantly, none of these cases dealt with the situation of a judgment debtor who is unable or unwilling to comply with an order of court.

[28] It is my opinion that the trial judge had enough material before her to arrive at her findings on this point. Another judge may have required greater proof of inducement but, given the concurrent findings of the judge and the Court of Appeal I would not interfere with the decision reached on this point.

Condition 11

[29] At [20] above I gave a broad indication of the content of Condition 11. I agree entirely with the judgment of Anderson J on this issue and I have nothing further to add.

Miscellaneous

[30] For the avoidance of doubt, I wish also to indicate my agreement with Anderson J's comments regarding the inordinate delay by the courts below in delivering the judgments in this case. Regretfully, this Court must persist in calling attention to this issue until the problem is resolved.

[31] Given my views on the two non-disclosures, I too would dismiss this appeal.

[3] [2006] EWCA Civ 378 at [50].
[4] (1985) 3 ANZ Insurance Cases 60-665 at 136-137.
[5] (2001) 65 WIR 186 (GY HC) at 195-196.

ANDERSON J:

Introduction

[32] In the early morning of 27 August 2007, a fire destroyed the Apsara Restaurant situated at Morecambe House, at Maxwell, Christ Church in Barbados. The restaurant was owned by the appellant, Apsara Restaurants (Barbados) Ltd, ('Apsara'), a limited liability company incorporated under the Companies Act of Barbados[6]. Apsara's sole directors and shareholders were Mr Sharif Mohammed and his wife Ms Marie Kavanagh.

[33] At the time of the fire, the restaurant was covered by a Fire Commercial Insurance Policy issued by the respondent, Guardian General Insurance Co Ltd, ('Guardian'), a limited liability company incorporated in Trinidad and Tobago and registered as an external company under the Companies Act of Barbados[7]. Guardian was entitled to conduct the business of insurance and underwriting in Barbados, and the policy covered BBD2,000,000 on the plant, machinery, and equipment; BBD4,000,000 on the improvements and betterments; and BBD500,000 on the stock.

[34] On the very day of the fire, notification of its occurrence was orally communicated by Apsara to Guardian and the latter began its investigations. It immediately took control of the insured premises and conducted forensic as well as accounting and actuarial investigations, relinquishing control to Apsara on 2 September 2007. There were subsequent written correspondences between the parties. Then, by letter dated 17 January 2008, Guardian denied the claim and Apsara brought proceedings before the High Court of Barbados.

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[6] Cap 308.
[7] ibid.

High Court Proceedings

[35] By proceedings filed in the High Court on 6 March 2008, Apsara alleged that Guardian had breached the terms of the policy of insurance by failing to pay to Apsara the sum of BBD6,092,690.60 representing loss of leasehold improvement, equipment, furniture and content, and restaurant stock damaged or destroyed in the fire. Guardian admitted to having issued the policy of insurance but denied liability to pay, alleging that Apsara had: (i) breached its duty of *uberrimae fidei* by failing to disclose all material information in effecting the policy of insurance; (ii) breached condition 11 of the policy by failing to give particulars of the claim within 15 days of the loss and damage; and (iii) occasioned the fire loss and damage by its wilful act and/or connivance contrary to condition 13 of the policy.

[36] The trial was held for some 10 days between 17 October 2011 and 2 November 2011 and heard five witnesses on behalf of Apsara: Sharif Mohammed (Co-owner of the Apsara Restaurant); Marie Kavanagh (Co-owner of the Apsara Restaurant); Megan Hopkins-Rees (Interior designer responsible for the interior fitting of Apsara Restaurant); Franklyn Browne (Operations Manager at Apsara Restaurant); and Karan Ramlal (Underwriting Manager for Gulf Insurance Ltd). Rovena Mangru-Peters was an employee at Apsara at the time of the fire incident and her Witness Statement was prepared by lawyers for Apsara but was not relied upon at the trial. Anthony Walcott (of Anthony Walcott Electrical) also provided an official statement. There were six witnesses on behalf of Guardian: Nigel Adams (employee of Guardian); Patrick Zoë (Expert in Fire Investigation); Mark Sargeant (Expert in Fire Investigation); Elvis Simpson (Expert in Insurance Loss Adjusting); Gregory Mark Yeadon (Chartered Loss Adjustor and Certified Fire and Explosion Investigator); and Glenda Clarke (Expert in Accounting).

[37] In a detailed judgment dated 31 December 2014, just over three years after the trial began, the Learned Trial Judge, Crane-Scott J, held in favour of Guardian on the three grounds enumerated in [34]. Firstly, the Judge held that the appellant had

failed to make the following material disclosures: (1) the cancellation by Gulf Insurance Ltd of its policy covering O'Meara, a company of which the Directors and Shareholders were Mr Mohammed and Ms Kavanagh, ('Cancellation of the Gulf Insurance'); (2) that Maritime General Insurance Company Ltd, had denied a malicious damage claim which was made by O'Meara, whose Director and Shareholder was Mr Mohammed, ('Denial of The O'Meara Foods Claim'); and (3) there was an outstanding debt, in the sum of TTD1,060,075.19, due to Agricultural Development Bank by O'Meara, ('Indebtedness to the Agricultural Development Bank')**.**

[38] Secondly, the Judge held that the cause of the fire was not fortuitous but was deliberately set, and that Mr Mohammed, a director of Apsara, had the opportunity and was in all probability directly involved in causing the fire. It may have been that an important ingredient in this finding was that a 'bronze Buddha' of religious and cultural significance to the directors and shareholders of Apsara, appeared to have been removed from 'Morecambe House' prior to the fire; although there appeared to have been mixed findings by Crane-Scott J on this point.[8]

[39] Thirdly, the Judge found that the failure by Apsara to provide Guardian with particulars of the loss incurred by virtue of the fire within the 15 days stipulated in Condition 11 of the Policy, was such that Guardian was not obliged to honour the claim. Apsara was accordingly not entitled to recover the claimed loss.

[40] Being dissatisfied with the decision of the High Court, Apsara appealed to the Court of Appeal.

The Court of Appeal

[41] In a judgment dated 22 July 2022, the Court of Appeal upheld the judgment of Crane-Scott J and dismissed the appeal by Apsara. The Court of Appeal upheld all

[8] *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* (BB CA, 31 December 2014) at [260], [277] and [283].

the Judge's findings of fact and conclusions of law in their entirety. In respect of her findings of non-disclosure the Court of Appeal held that the Judge was entitled to reach the conclusion that she did, based on the evidence before her and having heard and seen the witnesses; there was no reason to disturb her findings of fact. As regards the origins of the fire, the Trial Judge had based her determination that there was no electrical fire on the evidence of two Fire Investigators and their uncontroverted testimony that there were two separate and distinct seats of the fire. The Judge had found that Mr Mohammed, had the opportunity and was in all probability directly involved in causing the fire, and had been untruthful about the bronze statue of the Buddha which appeared to have been removed before the fire, and that he was an untruthful witness in relation to other matters which touched and concerned the fire. The Court of Appeal also held that the Learned Trial Judge was entitled to hold that there was a breach of Condition 11 of the policy, and as such, the claim had been barred.

Appeal to the Caribbean Court of Justice

[42] By Notice of Appeal dated 8 December 2022, Apsara appealed the orders and decision of the Court of Appeal. The Notice of Appeal listed 21 details of the Orders appealed against and contained a list of undifferentiated 39 grounds of appeal. The relief sought was the setting aside of the judgment of the Court of Appeal, award of judgment for Apsara on the insurance claim, costs, and such other relief as may be just and appropriate.

[43] This is an unusually large number of grounds of appeal to come before an apex court. While appreciating the duty of counsel to present all relevant grounds of interest to their client, and while I make no finding of prolixity, it may be that the grounds could have been considerably abbreviated. Meaning no disrespect to counsel, I consider that the pleadings and subsequent written and oral submissions may properly be dealt with under the following three headings: (1) non-disclosure, (2) arson, and (3) clause 11. In respect of non-disclosure, this is the first time that

this Court has been called upon to state the law concerning this important issue in Insurance Law, and in particular, the attitude that this Court should take towards the test of materiality for non-disclosure as discussed in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*[9]. These three matters are referred to compendiously as the 'Insurance Law Issues'.

[44] Much of the written and oral submissions of counsel on both sides turn on the findings of fact by Crane-Scott J which were affirmed by the Court of Appeal. Accordingly, before embarking on a discussion of the insurance law issues, it is necessary to restate this Court's approach to concurrent findings of facts by the courts below, including such findings in the context of delay in the delivery of those judgments. In this regard, it will be particularly important to make clear the distinction between findings of facts and findings of inferences to be drawn from facts. These matters are referred to as the 'Preliminary Issues'. I will consider the preliminary issues first.

Preliminary Issues

The Approach to Concurrent Findings of Fact

[45] Mr Forde, counsel for Guardian, proposes that this Court adopts the tradition that an appellate court ought not to interfere with findings of fact by trial judges, especially where these findings are confirmed by the Court of Appeal, unless compelled to do so. He argued that the tradition applies not only to findings of facts, but also to the evaluation of those facts and to inferences to be drawn from them. Mr Forde cited numerous cases in support: *Biogen Inc v Medeva plc*[10]; *Piglowska Piglowski*[11]; *Datec Electronics Holdings Ltd v United Parcels Service Ltd*[12]; *Re B (A Child) (Care Proceedings: Threshold Criteria)*[13]; *McGraddie v McGraddie*[14].

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[9] *Pan Atlantic* (n 1).
[10] [1998] 1 LRC 21, [1977] RPC 1.
[11] [1999] 1 WLR 1360.
[12] [2007] 1 WLR 1325.
[13] [2013] 1 WLR 1911.
[14] [2013] 1 WLR 2477.

[46] In furtherance of his overarching position, Mr Forde submitted that an appellate court should be cautious in substituting its own decision for that of the trial judge because the latter had sat through the entire case and the ultimate judgment reflected this total familiarity with the evidence. The insight thus gained by the trial judge may be far deeper than that of the appellate court whose view of the case is much more limited, narrow, and often shaped and distorted by various orders, rulings and challenges. *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*[15]; and *Canadian Imperial Bank of Commerce v Gypsy International Ltd*[16] were cited by Mr Forde. This, it was argued, was especially so where a finding turns on the judge's assessment of the credibility of a witness. Counsel argued that this Court had accepted these principles in its decisions in the cases of *Sancus Financial Holdings Ltd v Holm*[17] and *Ramdehol v Ramdehol*[18]. He further submitted that Apsara had failed to identify exceptional circumstances in respect of each finding of fact which could justify this Court's overturn of factual findings in the courts below.

[47] Mr Mendes, for Apsara, acknowledged that the traditional approach was that a final appellate court would not interfere with concurrent findings of fact unless there had been some miscarriage of justice or violation of some principle of law or procedure: *Devi v Roy*[19]; *Dass v Marchand*[20]*; Sancus Financial Holdings Ltd v Holm*[21]. However, counsel alluded to the preference stated by this Court in *Lachana v Arjune*[22]*,* for a 'more flexible approach' than that adopted by the Privy Council given the CCJ's proximity as a regional Court: *Browne v Griffith*[23]. Mr Mendes admitted that in the subsequent case of *Ramdehol v Ramdehol*[24] this Court had required 'exceptional circumstances' before it would overturn concurrent findings of fact.

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[15] [2014] 4 All ER 418.
[16] [2015] CCJ 16 (AJ) (BB), (2015) 88 WIR 23.
[17] [2022] 1 WLR 5181 (VG PC).
[18] [2017] CCJ 14 (AJ) (GY).
[19] [1946] AC 508.
[20] [2021] 1 WLR 1788 (TT PC) at [15]-[17].
[21] *Sancus Financial* (n 17).
[22] [2008] CCJ 12 (AJ) (GY).
[23] [2013] CCJ 6 (AJ) (BB), (2013) 83 WIR 62 at [9].
[24] *Ramdehol* (n 18).

The Traditional Test for Overturning Concurrent Findings of Fact

[48] The traditional approach by a final appellate court to the concurrent findings of fact of lower courts was stated by the Judicial Committee of the Privy Council in the colourful and extraordinary case of *Devi v Roy*[25] involving the plaintiff's apparent resurrection from the dead. In respect of the appellant's argument in that case against the factual finding to this effect, the Privy Council said:

> The appellant is at once faced with the concurrent judgments of two Courts on a pure question of fact, and the practice of this Board to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from this practice. Their Lordships propose to review the decisions of the Board to ascertain the practice as it now stands, as there can be no doubt that the latter decisions have somewhat modified the earlier form of the practice, and also in order to discuss the nature of the special circumstances which will justify a departure from the practice.

[49] The Board went on to explain that the practice was supported by a plethora of cases (some twenty-two cases were reviewed) and concluded that eight propositions were applicable.[26] Of these propositions, the following three are most pertinent for present purposes:

> (4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question of whether there is evidence on which the courts could arrive at their finding is such a question of law.
> …

[25] *Devi* (n 19) at 513.
[26] ibid at 521 – 522.

> (6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify a departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.
>
> (7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs, or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.
> …

[50] The *Devi v Roy* test for the overturning of concurrent findings of facts has been accepted time and again. The recent Privy Council decision of *Dass v Marchand*[27] on appeal from the Court of Appeal of Trinidad and Tobago**,** concerned a conflict of evidence of the factual circumstances in which the claimants came to sign a deed of conveyance. Having considered all the evidence and having had the benefit of seeing and hearing the witnesses (except one witness, whose witness statement was part of the evidence but who had died before the trial) Rampersad J found that the claimants' version of the facts concerning the conveyance was the more convincing account than that of the defendant. The Court of Appeal, through the leading judgment delivered by Pemberton JA, upheld the decision of Rampersad J both on the facts and the law. In the Privy Council, Lord Burrows stated that:

> 15…in accordance with the Board's normal practice, we do not think it appropriate to go behind the concurrent findings of fact of the two lower courts (i e the facts which Rampersad J found proven and on which his findings were upheld by the Court of Appeal). For that practice of the Board see, for example, *Devi v Roy*; *Central Bank of Ecuador v Conticorp SA*, para 4; *Juman v Attorney General of Trinidad and Tobago*, para 15; *Al Sadik v Investcorp Bank BSC* at [43]-[44].[28]
>
> 16. Although there can be rare exceptions to this practice (… where there has been an error of law in relation to the findings of fact), this case falls far short of coming within such an exception. It is worth here clarifying that the practice of the Board (in not going behind the concurrent findings of fact of two lower courts) imposes a super-added constraint on this appellate court. That is, it goes beyond the standard constraints on an appeal court and adds

[27] *Dass* (n 20).
[28] ibid (citations omitted).

> an additional hurdle for an appellant to overcome when appealing to the Privy Council. This is for two main reasons. First, the trial judge, given his or her opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. Where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court - the third court looking at the facts - is more likely to be correct about the facts than the two courts below. Secondly, the Privy Council wishes to respect factual circumstances peculiar to the country from which the case comes (especially, for example, local customs, attitudes, and conditions) and the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.

[51] Lord Burrows found that the submissions by counsel were about the facts. Although the complaint was that the judge went so far wrong in his evaluations that he erred in law, the reality was that the complaints were about the judge's assessment of the evidence and hence his finding of fact. Counsel's submissions had not raised matters of law or even of mixed law and fact. Accordingly, the court was satisfied that, 'We are squarely within the ambit of the Privy Council's practice regarding concurrent findings of fact and there is nothing here to justify a departure from that practice'[29].

[52] *Sancus Financial Holdings Ltd v Holm*[30] is an even more recent decision of the Privy Council on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) asserting the 'super-added constraint' on an apex court overturning concurrent findings of fact. Lord Briggs and Lord Kitchin (with whom Lord Burrows, Lady Rose, and Lord Lloyd-Jones agreed) referred to the long-standing practice of the Board not to engage with challenges to concurrent findings of fact by the courts below. Having quoted the eight propositions from *Devi v Roy,* (referenced above at [49]) the Board made clear that:

> 4. This practice, which applies only to second (or further) appeals, builds on, but is not to be confused with, the equally well-settled practice of all appellate courts in the common law world not lightly to override fact-

[29] ibid [17].
[30] *Sancus Financial* (n 17).

> finding by the trial judge. This is also re-affirmed by a wealth of recent authority, such as *Piglowska v Piglowski*, *Fage UK Ltd v Chobani UK Ltd, Biogen Inc v Medeva plc*, and *McGraddie v McGraddie*. As Lord Burrows JSC put it in *Dass v Marchand* at para 16, the practice with which the Board is here concerned is a "super-added constraint" over and beyond the reluctance of any appellate court to interfere with findings of primary fact by the trial judge.[31]

[53] This traditional attitude, although stated by the Privy Council in *Devi v Roy* to not be a 'cast-iron one', has been applied rigidly. It has formed the basis of the strict approach adopted by various other common law apex courts. It was applied by the Supreme Court of Canada in *Housen v Nikolaisen*[32], see: *Stein v 'Kathy K' (The Ship);*[33] *Ingles v Tutkaluk Construction Ltd*[34]*; and Ryan v Victoria (City).*[35] The Hong Kong Court of Final Appeal has taken a similar position in *Chinachem Charitable Foundation v Chan Chun Chuen*[36] and *Wealth Duke Ltd v Bank of China Ltd*.[37] The minority in the Australia High Court case of *Roads and Traffic Authority (NSW) v Dederer*[38] *considered that the question of concurrent findings did not arise on the facts; however, the majority expressed a preference for the UK approach though one member of the majority did make it clear that* the apex court ought not to constrain itself in the exercise of its constitutional mandate and must always be open to reviewing and, in a clear case of error, overturning concurrent findings of fact.

The CCJ's Approach to the Overturning of Concurrent Findings of Fact

[54] This Court has considered the principles on which it would act when asked to overturn concurrent findings of fact. In the first case directly on point, *Lachana v Arjune*[39]*,* a case on adverse possession, this Court reviewed the decision in *Devi v*

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[31] ibid at [4] (citations omitted).
[32] [2002] 2 SCR 235.
[33] [1976] 2 SCR 802.
[34] [2000] 1 SCR 298 at [42].
[35] [1999] 1 SCR 201 at [57].
[36] (2011) 14 HKCFAR 798 at [38] and [42].
[37] (2011) 14 HKCFAR 863 at [31] and [32].
[38] (2007) 234 CLR 330.
[39] *Lachana* (n 22).

Roy and expressed a clear preference for a 'more flexible approach'. The Court stated the rationale for this preference as follows:

> [12] We do not think that it is proper for us to adopt wholesale the practice followed by the Privy Council if only because the position of our Court is quite different from that of the Privy Council. When their Lordships decided *Devi v Roy* they were at the judicial apex of an empire that spanned all five Continents. In a way they still are, although the empire has dwindled substantially. The point is that their Lordships are both geographically and culturally far removed from the countries that still retain the Privy Council as their final appellate court. They are, quite understandably, unfamiliar with local situations and customs, and therefore have to tread very carefully and cautiously with the facts as they emerge from the findings of the local courts. The disadvantages of that situation have become clear with some regularity. To take a recent example, in *Panday v Gordon* their Lordships expressly opted to defer to the findings of the lower courts even though it meant depriving the appellant of a fresh look at the factual substratum of the case. The difference with our Court is obvious. We are a regional Court and thus much closer to home as it were. Our closeness to the region and our greater familiarity with its social and cultural dimensions make it easier for us to descend into the facts of the case, especially where the facts do not turn on the credibility of the witnesses or where they are the result of inferences from primary facts.

[55] The evident proximity of the CCJ to the jurisdictions from which the appeals come to the Court was the *raison d'être* for this Court to pay less deference, than does the Privy Council, to findings of fact by the lower courts. It was for this reason that the Court expressed the intention 'to develop our own practice, for the time being on a case by case basis'. It will be noted that the *ad hoc* approach was intended 'for the time being'.

[56] In the 15 years since *Lachana v Arjune* was decided, the Court has made several pronouncements on our practice towards concurrent findings of fact. In *Browne v Griffith*[40], another case on adverse possession, this Court accepted that it would not apply a hard and fast rule of not reversing concurrent findings of the courts below (citing *Lachana*). However, Nelson J went on to say that:

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[40] *Browne* (n 23).

> Where the trial judge saw and heard the witnesses and observed their demeanour, an appeal court *would only in exceptional cases* differ from the trial judge's assessment of the credibility and reliability of such witnesses. Reluctance to differ from such an assessment is increased where the trial judge's assessment is affirmed by the Court of Appeal…[41] (emphasis added).

[57] The next two cases dealt with reversal of the trial judge's findings of fact. In *Ramlagan v Singh (No 2)*[42]*,* also on adverse possession, this Court refused to interfere with findings of fact by the trial judge. It could not be concluded, 'that the judgment of the trial judge was affected by material inconsistencies or inaccuracies, or that she failed to appreciate the weight of the evidence or was otherwise plainly wrong.' Similarly, in *Campbell v Narine*[43]*,* this Court accepted decisions by Caribbean courts[44], the Privy Council[45], and the Canadian Supreme Court[46], to support its view that the findings of the trial judge who had sat through the entire case and whose ultimate judgment reflected the total familiarity with the evidence ought not to be easily overturned. Based on these principles, this Court refused to countenance the interference by an appellate court with the findings of the trial judge regarding whether a relationship of influence existed between the parties before the court.

[58] In *Ramdehol v Ramdehol*[47] this Court revisited the approach it would take to the overturning of concurrent findings of fact. While not resiling from the 'more flexible approach' advocated in *Lachana*, Anderson J agreed with the dictum of Nelson J in *Browne* proposing a return to the more traditional approach of requiring 'exceptional circumstances' for the overturn of concurrent findings of fact[48].

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[41] ibid at [9].
[42] [2015] CCJ 7 (AJ) (GY), (2015) 86 WIR 332 at [43].
[43] [2016] CCJ 7 (AJ) (GY), (2016) 88 WIR 319.
[44] *Grenada Electricity Services Ltd v Peters* GD 2003 CA 1 (CARILAW), (28 January 2003) at [7].
[45] *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37 at 47, endorsed by the Privy Council in *Harracksingh v A-G of Trinidad and Tobago* [2004] UKPC 3, (2004) 64 WIR 362 (TT) at [10]-[11] and *Beacon Insurance* (n 15) at [14].
[46] *Housen* (n 32).
[47] *Ramdehol* (n 18).
[48] ibid at [45].

[59] Concurrent findings of fact deserve appropriate deference from this apex Court. The 'more flexible approach' expressed in *Lachana* is now to be interpreted as no more than the willingness to entertain arguments to overturn concurrent findings of fact in 'exceptional' cases where there has been some miscarriage of justice or violation of some principle of law or procedure. This is to be contrasted with what was referred to as the 'hard and fast' rule adopted by the Board and this principle applies to all appeals coming before the CCJ, whether as of right, with leave of the Court of Appeal, or with the special leave of this Court.

[60] There are sound reasons in policy for requiring the existence of 'exceptional circumstances' that occasion a miscarriage of justice or a violation of law or procedure before the apex Court will accept an invitation to overturn concurrent findings of fact, several of which were rehearsed in *Devi v Roy*. Firstly, a clear and decisive test engenders certainty in the law and the legal profession in contrast with development on an *ad hoc* basis. The parties are entitled to a reasonable degree of confidence in the finality in litigation, at least where no contentious point of law of wider public importance is engaged. Secondly, it must be accepted that the reliability of the trial judge's findings has already been subjected to careful review by what must be taken to be a qualified and properly constituted Court of Appeal, thus satisfying this aspect of access to justice. There is no reason to suppose that a second appellate court will be better placed to disagree with both lower courts on what constitute the facts in the case, with any degree of confidence. Thirdly, flexibility is maintained in the competence to review findings of fact where to do otherwise involves a risk of miscarriage of justice or the sanctioning of a breach of law or legal procedure. For example, there is a risk of a miscarriage of justice where the trial judge's findings cannot be supported having regard to the totality of the evidence. Fourthly, unrestricted review of concurrent findings of fact blurs the distinction between the functions of first instance and intermediate appellate courts on the one hand, and apex courts on the other. Uncertainty in or lack of respect for the respective roles of the different levels of courts does harm to the overall coherence in the administration of justice.

[61] It remains to be said that I will not easily be persuaded that the burden placed upon the appellant to satisfy the 'exceptional circumstances' test as required by this Court to review concurrent findings of primary fact, has been satisfied in this case. That burden is a difficult though not an impossible one to discharge. I shall return to this point in relation to some specific findings, later. For now, it is important to consider a key basis put forward for invoking a right by the appellant to have this Court review the concurrent findings of primary fact in the courts below. This concerned the question of delay.

Delay in Ascertainment of Facts

[62] Mr Mendes for Apsara pressed the argument of delay in delivering the judgments in this case as (it would not be unfair to say) the primary reason for this Court to adopt an approach of particularly strict scrutiny of the findings of fact in the courts below. There is no question that there were significant delays. The trial took place over 10 days between 17 October 2011 and 2 November 2011, but the judgment was delivered some three years later, on 31 December 2014. It is also the case that oral hearings in the Court of Appeal took place on 18 May 2016, 12 October 2016, and 20 October 2016, but that the judgment of the Court of Appeal was delivered some five and a half years later, on 22 July 2022.

[63] These unexplained delays are unacceptable. This Court has repeatedly urged greater promptness in the delivery of judgments after trial: *Sea Haven Inc v Dyrud*[49]; *Reid v Reid*[50]. Those observations and admonitions are repeated here. However, where it is alleged that the delay has had an impact on the judicial officer's assessment of the evidence, it must be established that the judicial ability to deal properly with the issues has been compromised by the passage of time. For example, it must be shown that the judge's recollection of important matters is no longer sufficiently clear, or notes have been mislaid or misplaced, or that the judge has misremembered

[49] [2011] CCJ 13 (AJ) (BB), (2011) 79 WIR 132 at [7].
[50] [2008] CCJ 8 (AJ) (BB), (2008) 73 WIR 56 at [22].

important details. In *Cobham v Frett*[51] it was held that the 12-month delay, with a consequent dimming of the judge's recollection of the evidence and of the witnesses' demeanour, was not a ground of appeal. It was impermissible to conclude that the judge had a difficult task, let alone an 'impossible' one, in remembering the demeanour of witnesses. To be actionable, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay; and the appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the litigant.

[64] In *Tex Services Ltd v Shibani Knitting Co Ltd.*[52] the Judge, regrettably, did not deliver judgment for three years. No explanation was given for the delay. It was accepted that the advantage which a trial judge enjoys in relation to matters of fact may be weakened by such a delay and that such delay calls for special care when reviewing the evidence which was before, and the findings of fact which were made by, the judge. However, '… it is still for an appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay.'[53]

[65] In *Bond v Dunster Properties Ltd*[54], the thrust of the appeal was against the judge's findings of fact. A major cause of complaint was that the judge did not hand down judgment until some 22 months after the conclusion of the hearing and that one result of his findings of fact was against the weight of the evidence. The Court of Appeal of England and Wales stated the following:

> …there is an additional test in the case of a seriously delayed judgment. If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go

[51] (2000) 59 WIR 161(VG PC).
[52] [2016] UKPC 31.
[53] ibid at [7].
[54] [2011] EWCA Civ 455 at [7].

> further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed.

[66] In *Natwest Markets plc v Bilta (UK) Ltd (in Liquidation)*[55] the trial took place over five weeks in June and July 2018 but there was a very lengthy delay in handing down the reserved judgment, which eventually took place on 10 March 2020, some 19 months after the closing submissions at trial. There was then a further delay of six months in dealing with consequential matters, including permission to appeal. The Court of Appeal of England and Wales stated[56]:

> A delay of the magnitude in the present case, whatever the explanation may be, is plainly inexcusable. It should not have happened and should not have been allowed to happen, particularly in a case where there were allegations of dishonesty, and the reputations and future employment prospects of the individuals concerned were at stake. Nevertheless, it is quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence, and the appellate court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning.

[67] It may be taken that the following three principles guide this Court in considering the impact of delays on concurrent findings of fact. Firstly, extensive delay between the hearing of the trial and delivery of judgment must be avoided. There may sometimes be a plausible explanation for some delay, as in the sudden and unexpected death of a judge responsible for or otherwise involved in the delivery of the judgment: see *Boodhoo v Attorney General of Trinidad and Tobago*[57]. However, as a rule it is the responsibility of the Head of the Judiciary to develop and implement policy and administrative mechanisms to ensure the timely delivery of judgments by members of the judiciary. In some of our jurisdictions, more direct

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[55] [2021] EWCA Civ 680.
[56] ibid at [45].
[57] (2004) 64 WIR 370 (TT PC) at [3].

control by the chief judicial officer of enforcing the timetable for delivery of judgments would appear to be needed.

[68] Secondly, delay in the delivery of judgments can influence the assessment of the facts particularly regarding recall of demeanour and credibility of witnesses. Extensive delay could indeed attract and justify heightened scrutiny by the appellate court of findings of facts by the court or courts below. However, in assessing the situation it must be borne in mind that the reviewer has no clear idea of exactly *when* in the judgment preparation process preliminary or even final views were formed on factual findings. In *Knox v Deane*[58] Saunders P, criticised a delay of four years in the delivery of a judgment by the Barbados Court of Appeal, but restated the principle that, in challenging a judgment as denying an appellant justice based on excessive delay, the appellant must adduce evidence that the judgment contained errors that could possibly have been attributable to the excessive delay. President Saunders stated, 'we do not know (and admittedly it may be impossible for a litigant to know) the date when the Court of Appeal Bench *decided* this matter as distinct from the date when that decision was reduced to writing, dated or pronounced'.

[69] In other words, it is possible that the delay in judgment delivery could be attributed to related but different reasons from the findings of fact. It therefore remains the responsibility of the party that complains about the delay to point to some specific aspect of the judgment or some fallacious finding of fact which in all probability is attributable to the delay. It is only where this is done that an appellate court is likely to exercise heightened scrutiny of the findings of court or courts below on the ground of delay.

[70] Thirdly, where delay-occasioned or related inconsistencies and inaccuracies are multiple, so that they mangle the fact findings by the court or courts below, they may be such as to rise to the level that constitutes potential violation of the right to the protection of the law. It is not outside the realm of possibility that particularly

[58] [2021] CCJ 5 (AJ) BB, (2021) 102 WIR 94.

egregious cases of delay induced errors of fact finding could result in a violation of constitutional rights for which the appropriate remedy is to vacate the judgment and, where appropriate, order a new trial: see *Boodhoo v Attorney General of Trinidad and Tobago*[59]. This will not easily be done bearing in mind the additional time and expense of a new trial and the burden on the winning party who would usually not be responsible for the delay. But it remains a remedy in appropriate cases.

[71] The Notice of Appeal delineated three grounds (xxxiii, xxxiv and xxxv) on which delay in issuing the judgment was said to be to the unacceptable disadvantage of Apsara. These were:

> (xxxiii) The Court of Appeal erred in law in failing to hold that the reliability of the Learned Trial Judge's assessment of the evidence and the credibility of witnesses was materially affected and compromised by the unreasonable delay of 36 months in the delivery of her judgement after the completion of the trial.
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> (xxxiv) The Court of Appeal erred in law in failing to hold that the Appellant's and its directors' right to a fair trial was compromised and denied by virtue of the delay in the Learned Trial Judge's delivery of her judgment and the instances in which the Learned Trial Judge made adverse findings even though the contrary proposition was not put to the Appellant's witnesses during cross-examination.
>
> (xxxv) The Court of Appeal's ability to adequately and effectively review the reliability of the Learned Trial Judge's assessment of the evidence and the credibility of witnesses was materially affected and compromised by the unreasonable delay of 56 months in the delivery of its judgement after the completion of the hearing of the appeal, more so having regard to the fact that one of the Justices of Appeal had resigned her position as a Justice of Appeal to take up the post of Governor General at least three years before the delivery of judgment and the other two Justices of Appeal retired from the bench just under two years before the delivery of judgment.

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[59] *Boodhoo* (n 57) at [12].

[72] For the reasons already explored, the delay was excessive. There is one instance in relation to the findings on arson in which there is incoherence in the factual findings regarding the 'missing Buddha',[60] but the trial Judge eventually made that finding irrelevant to her ultimate decision on the point. I shall return to this in due course. As a general proposition, however, I believe Apsara has failed to produce any convincing evidence that any misinterpretation of the facts or circumstances surrounding this case was probably due to the delay between the hearing of the matter and the writing and delivery of the judgment. In the premises, Apsara failed to discharge the burden of warranting application of the 'particularly strict scrutiny' criterion for the review of concurrent findings of fact.

Inferences to be Drawn from Facts

[73] The accepted rule concerning the non-interference with concurrent findings of fact except for exceptional circumstances is concerned with findings of what is often called 'primary facts'[61] and leaves entirely undisturbed the well-established distinction between such factual findings and inferences to be drawn from them. From 1904, in *Montgomerie & Co Ltd v Wallace-James*[62], Lord Halsbury noted that where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court. Similarly, in *Mersey Docks v Procter*[63], Lord Cave LC stated the duty of the Court of Appeal to make up its own mind in drawing inferences from the facts proved or admitted. In the middle of the century, Viscount Simmonds emphasised in *Benmax v Austin Motor Co Ltd*[64] the need 'to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found or, as it is sometimes said between the perception and evaluation of facts'. The Viscount stated:

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[60] See *Apsara Restaurants* (n 8).
[61] See eg, *Dass* (n 20) at [16] (Lord Burrows).
[62] [1904] AC 73 at 75.
[63] [1923] AC 253 at 259.
[64] [1955] AC 370 at 373, 374.

> In a case like that under appeal where, so far as I can see, there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge.

[74] Lord Reid in the same case stated[65]:

> But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.

[75] The House of Lords decision in *Wheat v E Lacon & Co Ltd*.[66] is illustrative. The plaintiff's husband had died following his fall down some three flights of a back staircase at night and she sued in negligence and breach of occupiers' liability. There was no controversy that the handrails stopped directly above the third step, but it was also undisputed that there was an electric light at the top of the staircase which had no bulb in it at the time of the accident. In disagreeing with the inferences drawn from these facts by the trial judge in finding that the defendant had breached their duty as occupiers, Viscount Dilhorne adopted the dictum of Viscount Simmonds in *Benmax* and stated the following:

> There being in this case no dispute as to the primary facts and no direct evidence as to the cause of Mr Wheat's fall it is, I think, the duty of your Lordships not to shrink from the task of evaluating the evidence and to decide what inference, if any, can properly be drawn from the undisputed evidence.[67]

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[65] ibid at 376.
[66] [1966] AC 552.
[67] ibid at 569.

[76] English law continues to draw a sharp distinction between the finding of specific facts and the findings of fact which is really an inference drawn from facts specifically found. In the case of 'inferred' facts an English appellate court will more readily form an independent opinion than in the case of 'specific' facts which involve the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing: *Michael v I E & D Hurford Ltd*[68]; *Molodi v Cambridge Vibration Maintenance Service*[69]; *Cook v Thomas.*[70]

[77] In the Eastern Caribbean Supreme Court case of *Grenada Electricity Services Ltd v Peters*[71] Byron CJ (later President of this Court) adopted this distinction when he stated the following:

> It is in the finding of specific fact, or the perception of facts that the court is called on to decide on the basis of the credibility of witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving the testimony. On the other hand the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inferences or to evaluate as the trial judge.

[78] This dictum was adopted by Burgess JA (as he then was) in *Ward v Walsh*[72] who then went on to say:

> It is clear from the authorities, then, that a distinction is to be drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts. The process of finding primary facts involves assessing the credibility of witnesses. Inferences are concerned with the evaluation of primary facts. An appellate court is more reluctant to interfere with the former than the latter.[73]

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[68] [2021] EWHC 2318 (QB).
[69] [2018] EWHC 1288 (QB).
[70] [2010] EWCA 227.
[71] *Grenada Electricity Services* (n 44) at [7].
[72] BB 2012 CA 14 (CARILAW), (28 November 2012) at [58].
[73] ibid at [59].

[79] For present purposes, therefore, there is a critical distinction between the perception of facts and the evaluation of those facts, where the credibility of a witness is not in issue. Moreover, where an inference is drawn as to findings as to credibility based on factual findings which are plainly wrong or contradictory, such inferences will also be open to appellate scrutiny. The importance of the distinction between findings of facts and findings of inferences derived from facts is that concurrent findings of facts will only exceptionally and rarely be interfered with in the interest of preventing a miscarriage of justice, but inferences enjoy no such privileged status in an appellate court. This remains the case in respect of agreement by the courts below on inferences to be drawn from the facts. It may not always be easy to distinguish between facts and inferences, which is another matter altogether. But the distinction is one embedded in the law and which serves a useful and fundamental purpose of appellate court supervision as one aspect of the fact-finding process. It is an aspect which is well worth preserving.

Insurance Law Issues

[80] As foreshadowed at [43] this case requires consideration of three important issues in Insurance Law, namely, (a) the doctrine of non-disclosure, (b) the effect of arson on the insurance claim, and (c) Clause 11 of the policy of insurance. It will be important to firmly bear in mind the preceding discussion of the preliminary issues and in particular the distinction between findings of fact and inferences to be drawn from those facts.

Non-Disclosure

[81] It is necessary to establish the general rules applicable to non-disclosure. Only then will it be possible to consider and evaluate the findings by the trial Judge, affirmed by the Court of Appeal, that Apsara was guilty of material non-disclosure by failing to disclose three matters:

a. Cancellation of the Gulf insurance policy,

b. The O'Meara Foods Claim, and

c. Indebtedness to the Agricultural Development Bank.

General Rules on Non-Disclosure

[82] In the landmark case of *Carter v Boehm,*[74] decided in 1766, Lord Mansfield delivered what is still widely regarded as the *locus classicus* of the duty of the proposer for insurance to make disclosures to the insurer:

> Insurance is a contract [based] upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. … Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

[83] Lord Mansfield was, in 1766, attempting to introduce into English commercial law a general principle of good faith[75], which would involve a duty of disclosure on both sides to a contract[76]. That attempt was ultimately unsuccessful and only survived in a limited class of transactions, of which the insurance contract was, until very recently, the prime example (recent legislative developments seem to have removed even insurance contracts from the purview of the doctrine of utmost good faith in the UK[77]). Lord Mansfield's judgment in *Carter v Boehm* was based upon the inequality of information as between the proposer and the underwriter and the character of insurance as a contract upon a 'speculation'. A proposer for insurance who fails to make relevant disclosures runs the chance that the policy may be rendered void at the option of the insurer if the non-disclosed fact was considered material to the risk insured.

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[74] (1766) 3 Burr 1905, 97 ER 1162.
[75] *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2003] 1 AC 469, [2001] 1 All ER 743 (HL) (Lord Hobhouse).
[76] Winston Anderson, 'Post-Contract Disclosures in Insurance Law' (1991) 1(2) Carib L Rev 64.
[77] Insurance Act 2015.

[84] The notion that the undisclosed fact must have been one that would have influenced the judgment of the prudent insurer was introduced in *Ionides v Pender*[78] to import a measure of objectivity rather than reliance upon the subjectivity of the actual insurer. Accordingly, the common law test for non-disclosure became codified in s 18(2) of the Marine Insurance Act 1906 of the United Kingdom in the following terms, '*Every circumstance is material that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk*.' The Marine Insurance Act of Barbados[79] contains identical wording in s 21(2) but it is useful to quote more extensively from ss 20 and 21, as follows:

> 20. A contract of marine insurance is a contract based upon the utmost good faith; and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.
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> 21. (1) Subject to this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance that is known to the assured; and the assured is presumed to know every circumstance that, in the ordinary course of business, ought to be known by him; and if the assured fails to make any such disclosure, the insurer may avoid the contract.
>
> (2) *Every circumstance is material that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk*.[80]

[85] These are provisions on marine insurance, but it is widely accepted that they apply equally to the common law duty of disclosure in non-marine insurance: *Lambert* v *Co-op Insurance Society*[81]; *Pan Atlantic Co Ltd* v *Pine Top Insurance Co Ltd*[82]. Further, the common law rules emerged, developed, and were codified at a time when it was necessary to protect a fledgling insurance industry against exploitation by the insured. The rules therefore contained several mechanisms to refuse claims,

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[78] (1874) LR 9 QB 531.
[79] Cap 292.
[80] Emphasis added.
[81] [1975] 2 Lloyd's Rep 485.
[82] *Pan Atlantic* (n 1).

even where this did not reflect the commercial merits of the case.[83] As the insurance industry became more powerful, concern shifted to the need to protect the policyholder against the competence of the insurance company to entirely avoid a meritorious claim by pleading breach of good faith and non-disclosure even if the circumstance not disclosed would have made no difference to the taking of the risk.

[86] In the much-criticised case of *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* (*CTI* case),[84] the English Court of Appeal decided that it did not have to be shown that the misrepresented or non-disclosed fact had had a 'decisive influence' on the mind of the insurer, in the sense that he would have acted differently if he had known the true facts. It was enough to prove that a prudent insurer would 'have wished to know' the facts when making his assessment of the risk. The Court of Appeal also rejected the argument that the insurer should be required to show that he was induced into the contract because of the undisclosed fact.

[87] In *Pan Atlantic Co Ltd v Pine Top Insurance Co Ltd,*[85] the English courts again considered the vexed question of the meaning of materiality in English insurance law. Pan Atlantic submitted that for a fact to be considered material the insurer must show: (1) that a prudent insurer, had he known of the undisclosed fact, would either have declined the risk altogether or charged an increased premium; and (2) that the actual insurer himself would have declined the risk or charged an increased premium. Pine Top, to the contrary, argued that it was enough for an undisclosed fact to be material if the prudent insurer would have 'wanted to know' or would have 'taken into account' the undisclosed fact, even though it would have made no difference to his conduct as a result.

[88] At first instance, Waller J applied the test laid down in the *CTI* case and accepted Pine Top's submission but was unhappy at the result. The Court of Appeal rejected

[83] See eg, Explanatory Notes to the Insurance Act 2015 (UK), para 6.
[84] [1984] 1 Lloyd's Rep 476.
[85] *Pan Atlantic* (n 1).

both submissions and proposed its own test: if the insurer wishes to avoid the contract, then it must show that not only would a prudent insurer have 'wanted to know' the undisclosed fact, but also that he would have regarded the undisclosed fact as increasing the risk; he, however, need not have acted differently.

[89] The House of Lords was unanimous in overruling one aspect of the *CTI* case. Whatever the test for materiality, it was agreed, by all the Law Lords, that the undisclosed fact must have induced the actual insurer to enter into the insurance contract. However, the House was deeply divided on the actual test for materiality.

[90] By a bare majority, the House upheld the *CTI* test for materiality. In a masterful judgment which reviewed all the major decisions Lord Mustill (with whom Lords Goff and Lord Slynn agreed) rejected the decisive influence test largely on the ground of the difficulties facing both the court as well as the prospective insured and insurer to decide before the risk is undertaken whether a particular fact, if undisclosed would be decisive on the terms of the contract. The key to the difficulty was explained by Lord Mustill in the following words:

> Furthermore, the argument for Pan Atlantic demands an assumption that the prudent underwriter would have written the risk at the premium actually agreed on the basis of the disclosure which was actually made. Yet this assumption is impossible if the actual underwriter, through laziness, incompetence or a simple error of judgment, has made a bargain which no prudent underwriter would have made, full disclosure or no full disclosure. This absurdity does not arise if the duty of disclosure embraces all materials which would enter into the making of the hypothetical decision, since this does not require the bargain actually made to be taken as the starting point.[86]

[91] Lord Mustill considered the requirement that the undisclosed fact must be such that it 'would influence the judgment of a prudent insurer'. He accepted that the word 'would' creates a standard that was 'definite rather than speculative' but then held that this was only part of the inquiry. He continued:

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[86] *Pan Atlantic* (n 1) at 696.

> The next step is to decide what kind of effect the disclosure would have. This is defined by the expression 'influence the judgment of the prudent underwriter'. The legislature might here have said '*decisively* influence'; or *conclusively* influence; or 'determine the decision;' or all sorts of similar expressions… But the legislature has not done this, and has instead left the word 'influence' unadorned. It therefore bears its ordinary meaning, which is not, as it seems to me, the one for which Pan Atlantic contends. …Furthermore, if the argument is pursued via a purely verbal analysis, it should be observed that the expression used is 'influence the judgment of the underwriter in … determining *whether* he will take the risk'. To my mind, this expression clearly denotes an effect on the thought processes of the insurer in weighing up the risk, quite different from words which might have been used but were not, such as 'influencing the insurer to *take* the risk.'

[92] Accordingly, the majority held that the test of materiality of disclosure for both marine insurance under s 18(2) of the 1906 Act and non-marine insurance was whether the relevant circumstance would have effect on the mind of a prudent insurer in weighing up the risk, not whether had it been fully and accurately disclosed it would have had a decisive effect on the insurer's decision whether to accept the risk and if so, at what premium. The majority considered that this test complied with the good faith duty of the insured to disclose all matters which would be considered by the insured when assessing the risk. Any harshness of the 'want to know' test would be ameliorated by requirement for inducement of the actual insurer into the insurance contract.

[93] In an incisive and penetrating judgment Lord Lloyd, with whom Lord Templeman agreed, was unpersuaded by these arguments. He began by observing that the 1906 Act did not change the law but rather restated the common law as to non-disclosure or concealment as it had first been laid down by Lord Mansfield in *Carter v Boehm*. He then asked, what is the central question, that is, the meaning of the words 'would influence the judgment of a prudent insurer' and suggested the following answer:

> If I ask myself what the phrase as a whole means, I would answer that it points to something more than what the prudent insurer would want to

know, or take into account. At the very least it points to what the prudent insurer would perceive as increasing, or tending to increase the risk.

[94] Lord Lloyd found that the increased risk theory of materiality fitted neatly with the specific provision of s 18(3)(a) [the same as s 21(3)(a) of the Barbados Marine Insurance Act[87]] that the assured need not disclose a circumstance by which the risk is diminished. In other words, if by statute facts which *diminish* the risk are not material disclosures which the insured must make; it would seem to follow that it is only those facts which *increase* the risk that are material. Lord Lloyd in *Pan Atlantic* at 721-22 engaged in an insightful scrutiny of the statutory provision as follows:

> If I analyse the phrase word by word, I reach the same conclusion, but I am carried one stage further. The ordinary meaning of 'influence' is to affect or alter. 'Judgment' is a word with a number of different meanings, so it is not possible to identify *the* ordinary meaning in the abstract. In a legal or quasi-legal context it is often used in the sense of a decision or a determination, as 'in the judgment of Solomon' or 'the judgment of Paris', or the formal judgment of a court of law. Kerr L.J. in the *C.T.I.* case [1984] 1 Lloyd's Rep. 476,492 considered that it meant not the decision itself, but what he called the decision-making process. I accept that the word may bear that meaning. But it is not the primary meaning given in the *Oxford English Dictionary*, as Kerr L.J.'s judgment may suggest, and I see no reason to give it that meaning in the present context. A Daniel come to judgment would not ordinarily be understood to mean a Daniel come to a decision-making process.
>
> In a commercial context 'judgment' is often used in the sense of 'assessment'. A market assessment means a judgment as to what the market is going to do, not the process by which a stockbroker arrives at that judgment. That is, in my opinion, the sense in which the word is used in section 18(2) of the Act of 1906 . Parker L.J. in the *C.T.I.* case, at p. 510, attached importance to the words '*in fixing*' the premium and '*in ... determining*' whether to take the risk. But I do not regard these words as pointing to a decision-making process, rather than to the decision itself.
>
> Finally, there is the word 'would'. Kerr L.J. in the *C.T.I.* case, at p. 492 … refers to things which the insurer *might* have done if he had been told of the undisclosed fact. In my judgment it is never enough to show that a prudent

[87] Cap 292.

> insurer might have declined the risk or charged an increased premium. It is necessary to show that he would have done.

[95] In the opinion of Lord Templeman[88]:

> 'the judgment of a prudent insurer' cannot be said to be 'influenced' by a circumstance which, if disclosed, would not have affected acceptance of the risk or the amount of the premium. … The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of course they suffer if the risk matures but that is the risk accepted by every insurer.

[96] The minority cited a multitude of cases in support of the 'decisive influence' test: *Mutual Life Insurance Co of New York v Ontario Metal Products Co Ltd*[89]; *Zurich General Accident and Liability Insurance Co Ltd v Morrison*;[90] *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd*;[91] *Mayne Nickless Ltd v Pegler;*[92] *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd;*[93]. ; *Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd* (1987) 8 NSWLR 514[94]

[97] The Court of Appeal of New South Wales in *Barclay Holdings (Australia)* expressly refused to follow the *CTI* decision on materiality, which Glass JA described as 'discordant'[95] and in respect of which Kirby P stated:[96]

> As expressed by Samuels J in *Mayne Nickless Ltd v Pegler* the issue is not whether the insurer would have been interested in the information or would have liked to have had it in order to consider it. It is whether the insurer, acting reasonably, would have been affected in deciding the critical questions mentioned. Such a test is to be preferred to one which affords the

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[88] *Pan Atlantic* (n 1) at 680-681.
[89] [1925] AC 344.
[90] [1942] 1 All ER 529.
[91] (1939) 39 SR (NSW) 174.
[92] [1974] 1 NSWLR 228.
[93] [1976] 2 Lloyd's Rep 631.
[94] (1987) 8 NSWLR 514.
[95] ibid at 523.
[96] ibid at 519.

> insurer the privilege of insisting upon the disclosure of any material whatsoever that could have had an impact on the formation of the insurer's opinion and on its decision making process, even though, in the end, such information was not critical to or determinative of the conclusions finally reached…

[98] With respect, I believe that the line of reasoning of the minority in *Pan Atlantic* provides an entirely convincing approach to the interpretation of s 20(2) of the Barbados Marine Insurance Act. A 'want to know' prudent insurer test would give *carte blanche* to the test of avoidance of insurance contracts on ambiguous grounds of non-disclosure supported, as said by Lord Templeman 'by vague evidence even though disclosure would not have made any difference'[97]. This is because materiality permeates both limbs of the non-disclosure test. The test of materiality also controls the question of whether the particular insurer was induced into the contract of insurance; the second limb that the majority in *Pan Atlantic* was willing to imply into the statutory provision on disclosure.[98] The observation by Lord Lloyd[99] that if the prudent insurer 'would have accepted the risk at the same premium and on the same terms, … [the non-disclosure cannot] as a matter of ordinary language, … be described as material, when it would not have mattered to the prudent insurer whether the circumstance was disclosed or not', is simply unanswerable.

[99] The 'decisive influence test' places greater responsibility on the particular insurer to show that the non-disclosed fact would be material to the prudent insurer and is therefore more in line with the concept of materiality as envisioned by Lord Mansfield in *Carter v Boehm*. It must be remembered that Lord Mansfield referenced non-disclosure intended to mislead the insurer into a belief that a circumstance does not exist and (thereby) to induce the insurer to estimate the risk as if it did not exist. This suggests a direct correlation between the undisclosed fact, the insurer's estimation of the risk, and inducement; it is where the non-disclosure

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[97] *Pan Atlantic* (n 1) 681.
[98] ibid at 71 (Lord Mustill).
[99] ibid at 719.

caused the insurer to enter a contract of insurance where the risk being run is different from that which the insurer thought was being run, that the entitlement to avoid the contract arises. This interpretation is also entirely consistent with the evident implication from the provision in s 21(3)(a) of the Barbados Marine Insurance Act that the assured need not disclose a circumstance that *diminishes* the risk.

[100] The 'decisive influence test' is also favoured by leading academics who offered a stinging rebuke of the majority decision in *Pan Atlantic* soon after it was handed down (see, eg, articles by John Birds and Norma J Hird in the Modern Law Review[100] and by Yeo Hwee Ying in the Singapore Journal of Legal Studies[101]). Birds and Hird argued that the law after *Pan Atlantic* was much the same as it was after the much-criticised *CTI* decision, although it was arguable that it was worse in that it is no longer open to the insured to argue the 'increased risk' theory that was propounded by the Court of Appeal. The authors suggested that there must now be a very strong argument for referring this whole issue back to the House of Lords for clarification and resolution.

[101] In the United Kingdom, the matter is now largely academic because of the very significant modern statutory developments in that country and indeed in other Commonwealth jurisdictions which now provide protection to the insured against the broad duty of disclosure.[102] In the UK, the Consumer Insurance (Disclosure and Representations) Act 2012 removes the duty of consumers to disclose any facts that a prudent underwriter would consider material and replaces this with a duty to 'take reasonable care not to make a misrepresentation to the insurer'; a duty 'to be determined in the light of all the relevant circumstances'.[103] The UK Insurance Act of 2015 abolishes the remedy of avoidance of the contract for breach of good faith in s 17 of the 1906 Act and modifies the good faith doctrine to the extent required

[100] John Birds and Norma J Hird, 'Misrepresentation and Non-disclosure in Insurance Law - Identical Twins or Separate Issues?' (1996) 59 MLR 285.
[101] Yeo Hwee Ying, 'Recent Developments in Materiality Test of Insurance Contracts' (1995) Sing J Legal Stud 56.
[102] See eg, Explanatory Notes to the Insurance Act 2015 (UK), para 6.
[103] Section 2.

by the provisions of the 2012 Act. In an important development the 2015 Act eschews the 'all or nothing' approach to avoidance for non-disclosure under the common law codified in the 1906 Act and provides for a range of 'proportionate' remedies for the insurer where the insured fails to make a 'fair presentation'. For (1) deliberate/reckless breaches (avoidance of contract and no return of premiums); for other types of breaches: (2) if the insurer would not have entered into the contract on any terms: (avoidance of the contract but the insurer must return premium); (3) if the insurer would have entered into the contract but on different terms - relating to premium – (contract may be treated as if it included those terms from the outset); (4) if the insurer would have entered into the contract but would have charged a higher premium (the amount paid on claim may be reduced proportionately).

[102] These are radical departures from the 'all or nothing' approach for non-disclosure at common law. Undoubtedly, in the view of the House, these gradations in available remedies were properly introduced by legislation and not common law. The premises on which the five judgments in *Pan Atlantic* were constructed implied that the common law on non-disclosure resulted in avoidance or non-avoidance of the insurance policy, an 'all or nothing' approach. Innocent misrepresentation allows for a wider range of remedies but, as Birds and Hird point out, is conceptually distinct from non-disclosure.[104] In *Pan Atlantic*, the House itself expressly rejected any equation of misrepresentation and non-disclosure.[105] Whilst admitting the apparent attractiveness of 'proportionality' Lord Mustill cited the judicial view that adjustment in the premium or, perhaps, in the amount of cover, were 'not options available under English law. The remedy was all or nothing.'[106] He then alluded to academic authority from as early as 1808, that, 'Nor can the insured, by tendering any increase of premium, require the insurer to confirm the contract'[107] and added that, 'there has never subsequently been any suggestion that

[104] *Pan Atlantic* (n 1).
[105] ibid at 697.
[106] ibid at 692.
[107] ibid at 693. See Marshall, *A Treatise on the Law of Insurance* (2nd edn) vol 1, 463.

an intermediate solution of this kind was the common law.'[108] His Lordship noted that the words of the 1906 Marine Insurance Act, (identical with the wording of Barbados Marine Insurance Act) speak in terms of 'avoidance' of the insurance contract, and were therefore plainly against any such intermediate solution, and continued: 'It may be that the question of a statutory change is due for reconsideration in the light of the last 20 years' experience, but this is not an area in which the courts have any freedom of choice.'[109]

[103] The Australia Insurance Contracts Act[110] has gone beyond that country's equivalent of the UK Marine Insurance Act 1906 and has made provisions specifically for non-disclosure in general insurance. Further, the Australian Act relates non-disclosure to misrepresentation, and provided for the consequences of failure to disclose and of misrepresentation. Part IV concerns disclosure and misrepresentations. Section 21 imposes a duty on the insured to make disclosure to the insurer, before the relevant contract of insurance is entered into, of every matter that is known to the insured, being a matter that: (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant. Sections 23-27 link non-disclosure to misrepresentation. Section 28 concerns the consequences of failure to comply with the duty of disclosure or with the making of misrepresentation to the insurer before the contract was entered into, but does not apply where the insurer would have entered into the contract, for the same premium and on the same terms and conditions, even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into. If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract. However, if the insurer is not entitled to avoid the contract (because, for example, there was an innocent non-disclosure or misrepresentation) or, being entitled to avoid the contract has not done so, the liability of the insurer in respect of a claim

[108] ibid.
[109] ibid.
[110] Act No 80 of 1984, as amended and in force on 1 July 2016.

is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made. This latter point was emphasised in *Thompson v Government Insurance Office of New South Wales*[111].

[104] In Canada, the omnibus Ontario Insurance Act[112] covers administration of the insurance industry as well as a wide array of categories of insurance. As far as general insurance (such as fire) is concerned there is an obvious shift in emphasis in the duty of disclosure. Under s 124(5), a contract is not to be invalidated by erroneous statements in the application unless those statements are material. For fire insurance, materiality is stated in s 124(6) to be a question of fact for the jury, or for the court if there is no jury, and no admission, term, condition, stipulation, warranty, or proviso to the contrary contained in the application or proposal for insurance, or in the instrument of contract, or in any agreement or document relating thereto, has any force or validity.[113] Section 129 provides the insured relief from forfeiture where the court considers it inequitable that the insurance should be forfeited.

[105] There has been no similar legislative protection of the insured in Barbados, nor, indeed, in any Caribbean common law country of which I am aware. Neither were there any Caribbean cases brought to the attention of the Court which provided detailed reflection on the issue. Only two cases were cited that squarely addressed the *Pan Atlantic* decision. In *Ali v Hand-in-Hand Mutual Fire & Life Insurance Co Ltd*[114] the court noted both the contributory influence test and the decisive influence test but did not decide between them, coming to its conclusion on another issue. In *Joseph v Clico International General Insurance Co Ltd*[115] the court accepted without discussion, that the majority in *Pan Atlantic* had settled the test for materiality in favour of the contributing influence test, ie, whether the non-disclose

[111] (Supreme Court of New South Wales Commercial Division, 15 June 1994).
[112] RSO 1990, c I.8, s 124.
[113] ibid.
[114] *Ali* (n 5).
[115] (2006) 71 WIR 31 (BB CA).

circumstances would have contributed to the decision-making process of the underwriter. In the present case, the Court of Appeal quoted the views of both the minority[116] and majority[117] in *Pan Atlantic* with evident approval.

[106] In the circumstances, I believe it to be important that s 21(2) of the Barbados Marine Insurance Act be interpreted in a manner consistent with the common law which it codifies. Gratefully adopting but adapting the test set forth by Lord Lloyd in *Pan Atlantic*, I would state the test for non-disclosure thus: whenever an insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non-disclosure, there will be two separate but closely related questions: (1) Would the prudent insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded? (2) Did the misrepresentation or non-disclosure induce the actual insurer to enter the contract? It is only if the first question is answered in the negative and the second in the affirmative that the insurer may avoid the contract of insurance. On both questions the burden of proof lies on the insurer to establish its case in respect of which rebuttal evidence may then be called by the insured.

[107] It is necessary to say a further word concerning inducement. The requirement that the actual insurer must have been induced to enter the insurance contract is now codified in s 8(1) of the UK Insurance Act 2015. It was suggested that inducement could be presumed where it has been proven that the non-disclosure or misrepresentation was material. However, there is no such presumption, as was held in the English case of *Assicurazioni Generali SpA v ARIG (Arab Insurance Group (BSC)).*[118] To prove inducement, evidence from the underwriter is generally required. Without such evidence, the insurer will face difficulties proving that the underwriter would not have written the risk or would have charged a higher premium. To put the matter in more general terms whether a circumstance would have a decisive influence on the judgment of a prudent insurer is a question usually

[116] ibid at [33]-[34].
[117] ibid at [36].
[118] [2003] Lloyd's Rep IR 131.

of law generally proven by industry practice but whether an insurer was induced into entering the contract of insurance is generally a matter of fact to be proved by the insurer who alleges that it was so induced: *Drake Insurance plc v Provident Insurance plc*[119].

[108] The inducement requirement may appear superfluous where the decisive influence test is adopted, a point made by Lord Goff in *Pan Atlantic*.[120] However, with respect, this overlooks an important consideration. The decisive influence test is concerned with the hypothetical *prudent* insurer introduced into the law by *Ionides v Pender* in 1874 and codified in the Marine Insurance Act. The inducement requirement is concerned with the motivation and action of the *actual* insurer in question. Attracting and keeping desirable clients are among the many commercial reasons why an insurer might have ignored a material non-disclosure (where, for example, it would cause only a small increase in premium) and offer cover on the same terms had the fact been disclosed. In such circumstances, the actual insurer would not have discharged the burden of proving inducement.

Cancellation of the Gulf Insurance Policy

[109] There were concurrent findings of fact by the trial Judge and the Court of Appeal, based on unchallenged evidence, that the Gulf Policy was cancelled, and that this fact was not disclosed to Guardian. Both courts held that this was sufficient to render the policy of insurance void. Apsara sought to challenge this decision in two ways.

[110] Firstly, Apsara alleges that the Gulf Policy was 'issued' and 'cancelled' in form only, but not in substance since before the policy had been issued by Gulf, that company was informed that O'Meara had not given instructions for insurance to be placed with them. It was further alleged that the application for insurance cover

[119] [2004] 2 All ER (Comm) 65.
[120] *Pan Atlantic* (n 1) at 683.

was requested to be withdrawn, and that Gulf had agreed and had reversed the transaction from inception. Although O'Meara had not paid the premium, it was necessary to issue a Credit Note for internal accounting purposes to reverse the Debit Note since the premium was no longer due to Gulf. Accordingly, a Credit Note was issued recording a 'refund due to cancellation of policy'.

[111] In my view, this argument, as framed, is doomed to fail. There was a concurrent finding by the courts below based on unchallenged evidence that the Gulf Policy had been cancelled, and there are no exceptional circumstances that would justify this Court interfering with this finding. There is no injustice in that finding to be rectified. Under traditional law cancellation of a prior insurance policy is always a relevant fact, whether elicited in a proposal form or not[121], which ought to be disclosed to a prospective insurer ignorant of that fact. However, based on the test adopted earlier, whether Apsara ought to have disclosed the cancellation to Guardian depends on whether the cancellation would have had a decisive influence on the judgment of the prudent insurer.

[112] This reaches to Apsara's second argument, namely, that the cancellation of the Gulf policy was not material. There had been no intention by O'Meara to enter a policy of insurance. The cancellation note had been a purely technical denotation designed to satisfy O'Meara's internal auditing accounting practices. Nevertheless, the trial Judge said that she 'was easily persuaded' by the evidence of Nigel Adams and Gregory Yeadon 'that the fact of the cancellation of an insurance policy and the return of premiums is a moral hazard which will almost invariably excite the interest of a prudent insurer' and cause the prudent insurer to make 'further enquiries with a view to ascertaining, prior to issuance of the policy, the reasons for the cancellation and in particular, whether the cancellation had occurred for an adverse reason.'

[121] Anderson W, 'The Duty to Disclose Material Information Not Solicited in the Proposal For Insurance' (1991) 3(1) Caribbean Law and Business 45.

[113] The trial Judge also found that the mere fact of the cancellation of a policy was material and ought to have been disclosed even if the cancellation was not in fact based on any factor which called into question the moral integrity of the insured. Similarly, the Court of Appeal deferred to the Judge's findings. The Chief Justice noted that, 'The starting point of that disclosure is that they had a policy with Gulf Insurance that was cancelled at the inception.'. The Chief Justice took the view that, 'Apsara confuses the issue of whether the insurance with Gulf was requested by Apsara or its agent with the wholly unrelated question whether it was obligated to disclose the fact of the cancellation of the Gulf policy to Guardian'.

[114] As discussed above, materiality is partly a question of fact and partly a question of law. Identification of circumstances that may be relevant in relation to non-disclosure is an exercise in fact-finding; whether the circumstances pass the test of materiality is one of law: (see judgment of Crane-Scott J at [72] and [121]). Furthermore, whether the insurer was induced to enter the contract is also a question of fact.

[115] The fact of the cancellation of the *Gulf Insurance Policy* has been established. As regards the test of materiality, the court must be satisfied that the non-disclosure would have decisively influenced the judgment of the objective prudent insurer in fixing the premium or determining whether to take the risk. This is a question of law. The Learned trial Judge had earlier acknowledged that, 'a fact does not become ''material'' simply because the particular insurer regards it as such' and that, 'whether a given fact is or is not ''material'' is a question of fact to be determined by the Judge as the trier of fact'. With respect, this is entirely correct, with the caveat that the determination of the judge must be based on an evaluation of the influence of the fact on the mind of the objective prudent insurer. In this regard, the trial Judge was, with respect, wholly correct to note that the evidence of Mr Yeadon was, 'not very useful to this Court in deciding the materiality of the undisclosed facts' because his evidence did not satisfy the test of materiality as set out by the House of Lords in the *Pan Atlantic case.*

[116] In my view, there is nothing unreasonable about the finding by the trial Judge, confirmed by the Court of Appeal, that the fact of non-disclosure of a previous cancellation of an insurance policy would be something that a prudent insurer would wish to know about, to make further inquiries as to the reason for the cancellation. But that is not the relevant question. The relevant question is whether the non-disclosure of the cancellation, bearing in mind the reasons and circumstances surrounding it, if disclosed, would have had a decisive influence on the decision to take on the insurance. After due consideration, I am not convinced that it would have. Whether a fact is material depends on whether it would have decisively influenced the mind of the prudent insurer in the ways described earlier.

[117] Materiality depends on the reason for the cancellation and not the mere fact that the policy has been cancelled. As the learned authors of *MacGillivray on Insurance Law*[122] explain, '… it would appear that the bare fact of refusal is not in itself material but rather the reason given for it, such as claims experience, where that is known to the insured.' Similarly, in *Konowsky v Pacific Marine Insurance Co*[123], the insurer sought to deny a claim upon a policy of insurance covering loss by fire of an automobile on the ground that the insured failed to disclose the cancellation of an earlier policy. In rejecting the insurer's contention, Adamson J said: [124]

> All the evidence discloses is the bald fact that there was a cancellation; by whom, how, or under what circumstances is not shown. There may very well have been a cancellation under circumstances making it clearly not a 'circumstance material to be known to the Company.' … *Something more than the mere fact that [there was] some sort of cancellation must be shown. Materiality must be really proven and will not be assumed*… (emphasis added).

[118] There are several further authorities that focus on the reason for declining or cancelling the policy as the determinant of materiality including: *Locker and Woolf*

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[122] John Birds, Ben Lynch and Simon Milnes, *MacGillivray on Insurance Law: Relating to All Risks Other Than Marine* (13th edn, Sweet and Maxwell 2015) 493, para 17-068.
[123] [1923] 2 DLR 1198.
[124] ibid.

Ltd v Western Australian Insurance Co Ltd[125]; *Ewer v National Employers' Mutual General Insurance Association Ltd*[126]*; North Star Shipping Ltd v Sphere Drake Insurance Plc (No 2)*[127]*; Barclay Holdings (Australia) Pty Ltd v British National Insurance Co Ltd*[128]*; Brotherton v Aseguradora Coloseguros SA*[129].

[119] In this case, I am of the view that the non-disclosure was not material. I believe that had the fact of the cancellation of the Gulf Policy and the circumstances surrounding the cancellation been disclosed, the judgment of the prudent insurer would not have been decisively affected in deciding whether to take the risk and the appropriate premium. The evidence did not reveal that the reason for cancellation reflected on the moral integrity of Apsara nor increased the moral hazard to a prudent insurer in underwriting the Apsara policy of insurance.

[120] In these circumstances where the non-disclosed fact was not material, Guardian must fail to void the policy on this ground, and no issue of inducement of Guardian arises.

Denial of The O'Meara Foods Claim

[121] Guardian pleaded that the appellant had failed to disclose that O'Meara Food Products Ltd had made a fraudulent and/or baseless claim against its Insurers, Maritime General Insurance Co Ltd of Trinidad and Tobago and that the claim had been dismissed by the Supreme Court of Trinidad and Tobago. The trial Judge summarised Guardian's case on this point as follows:

> At the trial, the Defendant sought to establish that O'Meara Food Products Limited had insured two containers of spoilt shrimp which had been rejected and returned by a purchaser in Jamaica. The Defendant's allegation was that having insured the containers of shrimp, O'Meara Foods had attempted to claim against the insurance policy and the claim was refused.

[125] [1936] 1 KB 408, 414.
[126] [1937] 2 All ER 193, 198 (C-D).
[127] *North Star Shipping* (n 3) at [2] and [50].
[128] *Barclay Holdings* (n 94) at 523 (F-G), 524 (C-D) and 525 (D-F).
[129] [2003] EWCA Civ 705, [2003] Lloyd's Rep IR 746.

[122] Having examined the agreed correspondence and pleadings in the O'Meara claim, the Judge noted that Maritime had not alleged fraud as a defence to O'Meara's claim and that liability had been denied on the ground of failure to provide satisfactory or sufficient details or evidence to support its claim. The judge found that the Apsara, 'had failed to disclose to the Defendant the fact that O'Meara Food Products Ltd … had had its claim denied by its insurer, Maritime Insurance for breach of condition'. The Court of Appeal upheld the Judge's findings, holding that it, 'was indeed open to her and proper for her to look at the circumstances of that matter as being one which was material to the considerations of Guardian and thus one which should have been disclosed'. There were therefore concurrent findings of fact that Apsara had failed to disclose an unsuccessful claim against another insurer. This fact is not disputed by Apsara who seeks to provide explanations for the non-disclosure.

[123] I consider that the fact that a proposer for insurance has had a previous claim rejected by another insurer is a relevant circumstance. That the rejected claim related to a different subject matter does not prevent it from nevertheless being material, as was decided in *Ewer v National Employers' Mutual General Insurance Association Ltd*[130]. Whether the non-disclosed claim would have decisively affected the judgment of the prudent insurer in deciding whether to enter the proposed insurance contract and at what premium must turn on the reasons for the denial of the claim.

[124] The Judge found and the Court of Appeal affirmed that Apsara's claim had been rejected because of a failure on its part to provide satisfactory or sufficient details or evidence to support its claim, in breach of condition 11 of its policy with Maritime General Insurance Co Ltd of Trinidad and Tobago. I consider that this reason clearly constitutes a material circumstance. A prudent insurer may well be placed on notice by the fact that a proposer for insurance had breached a condition in another albeit unrelated insurance contract by failing to provide sufficient or

[130] *Ewer* (n 126).

satisfactory details of a claim. I consider that a prudent insurer would consider this non-disclosed fact to constitute a moral hazard in respect of which he would decline the risk or charge an increased premium.

Indebtedness to the Agricultural Development Bank

[125] It is not disputed that O'Meara, Mr Mohammed, and Ms Kavanagh were jointly and severally liable to the Agricultural Development Bank for the sum of TTD1,060,075.19 (approximately BBD300,000) and that a judgment had been entered and registered against them in that amount. It is also not disputed that this was not disclosed to Guardian. The Learned trial Judge determined that the indebtedness of O'Meara, Mr Mohammed and Ms Kavanagh was a material fact which ought to have been disclosed. The Court of Appeal agreed that the registered and unpaid judgment was a material consideration which, 'went to more than just the credit risk of the insured but clearly would have brought up consideration of priority and assignment of any policy which the insured would be subject to if the policy was ever engaged'.

[126] The indebtedness of an insured might go to his or her credit risk but not necessarily to the risk which is to be insured (cf *North Star Shipping Ltd v Sphere Drake Insurance plc (No 2)*). In *Marek v CGA Fire & Insurance Co Ltd*[131] the insured failed to disclose severe financial difficulties which were compounded by the fact that there was a lien registered on the insured property as well as a mortgage. Nevertheless, the Supreme Court of South Australia held that notwithstanding such severe financial difficulties, the insurer had not established the materiality of the insured's financial circumstances. In *Ali v Hand-in-Hand Mutual Fire & Life Insurance*[132], the insurers sought to deny liability on the ground that the insured had failed to disclose that he had been declared bankrupt in Canada and had unpaid

[131] *Marek* (n 4) (Legoe J).
[132] *Ali* (n 5).

debts in Canada in the sum of CAD362,500, which was subsequently discharged a little over one year later. Bernard CJ (as she then was) stated[133]:

> The previous bankruptcy of an insured may be a fact which a prudent insurer would want to be informed about in keeping with the utmost good faith which must attend all contracts of insurance. *However, it must be shown that it influenced the moral hazard assumed by the defendants who issued the policy. Was the cover exposed to the risk of the plaintiff's dishonesty or deceptive conduct? No allegation of dishonesty or criminality has been alleged against the plaintiff* and in addition it has not been shown that the defendants were induced by the non-disclosure to issue the policy, as was held in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427 to be the basis for avoiding a contract of insurance (emphasis added).

[127] I consider that the fact of the outstanding indebtedness for which judgment was entered is a material consideration which ought to have been disclosed. A prudent insurer would likely regard the inability or unwillingness to pay a judgment debt registered against O'Meara (of which Mr Mohammed and Ms Kavanagh were the sole shareholders and directors) to be a serious failing affecting the moral hazard which should be accounted for either in declining the risk or charging a higher premium.

Inducement

[128] The evidence that the facts not disclosed regarding the *denial of the O'Meara Foods Claim* and the *indebtedness to the Agricultural Development Bank* induced Guardian into the contract with Apsara, is rather thin. The authorities agree that the actual insurer must produce evidence to show inducement, which makes proof of inducement primarily a question of fact: *Drake Insurance plc v Provident Insurance plc*[134]*, Assicurazioni Generali SpA v ARIG*[135]. There is little more than bald assertions by Guardian that it was induced into the contract with Apsara because of

[133] ibid at 195 – 196.
[134] *Drake Insurance* (n 119).
[135] *Assicurazioni* (n 118).

the non-disclosures. This is hardly overwhelming evidence and could be regarded as self-serving, as being made by the insurer in the cause of avoiding a claim. But that evidence was accepted by the trial Judge and affirmed by the Court of Appeal. Nothing produced on cross-examination could reasonably lead to the conclusion that there are exceptional circumstances warranting interference with these concurrent findings. Apsara produced no evidence tending to contradict Guardian's assertion of inducement. Accordingly, the concurrent finding of inducement must stand.

Arson

[129] Clause 13 of the policy of insurance states as follows:

> *Forfeiture*
>
> 13. If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain a benefit under this Policy; or, if loss or damage be occasioned by the willful act, or with the connivance of the Insured; or, if the claim be made and rejected and an action or suit shall be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this Policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this Policy shall be forfeited.

[130] The Court of Appeal upheld several crucial findings by the trial Judge in relation to the fire damage of the insured property. These findings culminated in her decision that Apsara had breached Clause 13 and had therefore forfeited all benefits under the policy. Firstly, the fire was deliberately set. The trial Judge based this finding on the expert evidence of Mr Patrick Zoë and Mr Mark Sargeant who both found that the fire was not started accidentally, and in particular not as a consequence of some electrical fault. Secondly, that Apsara through the person of Mr Mohammed was probably involved in setting the fire to its own restaurant. She found that Mr Mohammed (i) had the opportunity to set the fire because: a) the

premises were secured by an employee of Apsara and the keys were handed to Mr Mohammed; b) when the fire officers arrived the gates were locked so that Mr Mohammed had to be alerted to unlock the gates; c) he was physically present in the nearby Annex situated on the first floor and adjacent to both restaurants when the fire started. Thirdly, that Mr Mohammed was less than credible regarding several aspects of his testimony such as i) asserting that there were no fire alarms on the premises, ii) making a claim for the loss of a bronze Buddha statue when no relevant remnants were found in the debris from the fire. Fourthly, as regards motive, the Trial Judge found that i) Apsara was experiencing financial difficulties and incurring severe losses at the time of the fire; in particular, its fixed assets were less than its liabilities, it was in overdraft and had no cash. The judge concluded that the fire was occasioned by arson, or with the connivance of the insured.

[131] Apsara contends that the evidence led at trial fell woefully short of what was required to discharge the burden cast on Guardian to deny liability under Clause13. Most significantly, Apsara alleges that the Learned Trial Judge failed to consider and assess any of the factors which indicated that Mr Mohammed had no reason to burn the restaurant, and that this failure was not rectified by any analysis of the evidence by the Court of Appeal who simply 'rubber-stamped' the findings of the learned Judge.

[132] To provide context it may be useful to quote as briefly as feasible from the relevant findings of the trial Judge. At [282] of her judgment she said as follows:

> [282] The Court's finding that the fire was deliberately set is based to a great extent on the evidence presented by the forensic scientists, Messrs Zoë and Sargeant coupled with the absence of other expert evidence which might have contradicted their findings and conclusions. In particular, the Court found the following facts were established by the evidence:
>
> (a) The fire originated in two areas of the building, specifically, on the ground floor as well as on the First Floor. The Court was satisfied that the presence of a minimum of two seats of fire each burning

simultaneously and unrelated to each other, was a strong indicator of a fire which was deliberately set;

(b) Coupled with this, the state of complete fire destruction in several areas of the building indicated '*extreme high temperature burnings'* wholly consistent with the use of fire enhancers or accelerants;

(c) Added to this, the Court was satisfied that the contents of the rooms in the building namely the chairs, tables and tablecloths and the wooden floors, ceilings and facades were incapable of producing such high temperature burning without the use of accelerants;

(d) Additionally, the downward burning patterns on the ground and the first floors coupled with the '*phenomenal fire spread*', the wide extent of extensive and complete fire destruction of floorings at both floor levels, the evidence of high temperature fire and the fact that the ceilings, which were built with fire-retardant Gypsum materials, had been completely destroyed reflected unnatural or abnormal fire behaviour;

(e) At or around the time of the fire, the Plaintiff company was experiencing financial difficulties and incurring severe losses. In particular, as at August 31st, 2007: (i) the company's fixed assets which represented 97.27% of the company's asset base was less than the company's total indebtedness of $8,975,895.70; (ii) the company's bank accounts were all in overdraft; and (iii) the company had no cash;

(f) Within a period of 3 hours immediately prior to the fire, an employee of the Plaintiff company had locked up the premises and handed the keys to Mr Sharif Mohammed;

(g) Mr Mohammed was physically present in the nearby Annex situated on the first floor and adjacent to both restaurants where the fire occurred;

(h) Quite suspiciously, the fire alarms installed in the building were found by investigators to have been disabled prior to the fire.

[133] These are evidently compound findings of facts and inferences, which were all upheld by the Court of Appeal without engaging in its own evaluation exercise to assess whether the inferences drawn by the trial Judge were reasonable. Among the findings of primary fact are that (1) Mr Mohammed had the opportunity to occasion the fire, and (2) the insured company was in a financially precarious position. To buttress her ultimate conclusions, the Judge made certain adverse findings of the credibility of Mr Mohammed which Apsara alleges were either unfair or did not

adequately take cognisance of exculpatory factors which could have shed a more favourable light on his evidence.

[134] Applying the test earlier discussed in this judgment at [23] – [29], I do not consider that there is anything exceptional or indicative of a possible miscarriage of justice such as would justify relitigating the findings of primary facts made by the judge in this case. The findings of the non-fortuitous origin of the fire, the opportunity of Mr Mohammed to have caused the fire, and the financial health of the insured company were all based on expert or other credible evidence before the court which Apsara had ample opportunity to cross-examine and dispute. None of the findings on these matters is outlandish or even unreasonable. I therefore propose to revisit none of these. However, the inferences drawn from these and other facts are another matter altogether. In respect of several of these inferences I consider that insufficient attention or emphasis may have been given to additional factors which could have led to the drawing of different inferences or at least less certainty concerning the adverse inferences drawn.

[135] In considering these exculpatory factors, it would be well to bear in mind that where an insurer alleges fraud to deny a claim under an insurance policy, the law imposes a burden of proof which is an enhancement of the usual civil standard of balance of probabilities. In the case of *Bater v Bater*[136] Denning LJ stated:

> A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require *a degree of probability which is commensurate with the occasion* (emphasis added).

[136] This dictum has been echoed in subsequent English cases (*Hornal v Neuberger Products Ltd*[137], *N Michalos & Sons Maritime SA v Prudential Assurance Co Ltd*

[136] [1951] P 35.
[137] [1957] 1 QB 247.

(*The Zinovia)*[138]) as well as Caribbean cases (*Chung v Colonial Fire and General Insurance Co Ltd*,[139] *Solomon Ghanny Oil & Engineering Ltd v NEM (West Indies) Insurance Ltd*,[140]). In *The Zinovia* it was stated that the burden of proof where fraud is one alleged is one, 'falling not far short of the rigorous criminal standard.'

[137] Adjudication in other jurisdictions has also affirmed the care which is required in deciding whether the onus of proof of a fraudulent insurance claim has been satisfied. In the Australian case of *Briginshaw v Briginshaw*[141] Dixon J said at 362:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

[138] Later, at 362-363, his Honour said:

> This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues .... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected (citations omitted).

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[138] [1984] Lloyd's Rep 264.
[139] (TT CA, 23 July 1991).
[140] (TT HC, 19 May 2000).
[141] (1938) 60 CLR 336.

[139] In *Rejfek v McElroy*[142] it was said[143]:

> The clarity of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see Briginshaw v. Briginshaw, per Dixon J; Helton v. Allen per Starke J; Smith Bros. v. Madden, per Dixon J. But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge ... (citations omitted).

[140] These observations were accepted in *Thompson v Government Insurance Office of New South Wales*[144], a case concerning an alleged fraudulent claim under a fire insurance policy. It was accepted that the case against the insured was circumstantial as is usual in arson cases. However, the court did accept that, '… mere suspicion is not sufficient. One's mind must move from one infected by suspicion to one satisfied by appropriate evidence to the extent required.'[145]

[141] The standard of proof to be demonstrated by the insurer who resists a claim based on arson is not the criminal standard of proof beyond reasonable doubt, but the required proof should not fall far short of that standard. Where a person is being accused of arson, the seriousness of the allegation has implications, not just for the financial outcome of the litigation but also for the good name of the insured and even the insured's future continuance in business. Grave moral delinquency in the form of criminal conduct is being alleged and, in these circumstances, proof of arson cannot be left to uncertain and inconclusive innuendoes. The insurer must

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[142] (1965) 112 CLR 517.
[143] ibid at 521-522.
[144] *Thompson* (n 111).
[145] ibid.

demonstrate proof to a high degree of probability commensurate with the seriousness of the allegation. Concomitantly, evidence of the insured tending to disprove arson or motive for arson must be carefully considered and evaluated.

Opportunity

[142] Apsara rightly acknowledges that Mr Mohammed had the opportunity to start the fire. He had the keys to the restaurant, and he was there on the compound in the apartment annex. If he was minded to, he could easily have opened up the restaurant, poured the accelerant which the experts say was used to start the fire, and then thrown a match. However, as Apsara also pointed out, the same may be said of almost any property owner who suffers by fire on premises they occupy or are adjacent to the premises they occupy. The owner will almost always have access to the premises so that access by itself will not be enough to discharge the onus of proof on the insurer. Moreover, the evidence that established access by Mr Mohammed also contained exculpatory elements in that the evidence adduced was that he had retired to the apartment annex on the night of the fire (it was here that an employee delivered the keys to him) and one seat of the fire was in the north of the restaurant, where the apartment is located.

[143] The evidence by Mr Mohammed that he was asleep in the annex when the fire officers arrived and had to be alerted by them to retrieve the keys. This evidence seemingly went unchallenged under cross-examination. Also unchallenged was Mr Mohammed's evidence that the fire had already reached the roof of the laundry room which is adjacent to the kitchen where there were gas pipes. Had the fire reached the kitchen, there was the likelihood of an explosion, thereby endangering Mr Mohammed in the adjoining apartment. The implication being that Mr Mohammed was unlikely to be the author of a fire that could easily have placed him in grave danger. Apsara was able to point to others who also had access to the premises, one of whom was allegedly not on good terms with Mr Mohammed and

therefore could have had a motive for damaging the restaurant. None of these matters appear to have been considered in the courts below.

The Fire Alarm

[144] The trial Judge stated that, 'the fire alarms installed in the building were found by investigators to have been disabled prior to the fire'. Apsara points out that no such finding appears in Mr Zoe's witness statement or report. Apsara acknowledges that Mr Sargeant did say that:

> …from reviewing the electrical panel for the bottom floor, it would stand to reason that the power was switched off on the main panel for the power panel that controls the power that goes to the bottom floor rooms which include lights, fans, outlets and smoke alarms ... With that being the case, it would be hard pressed to find out why the breakers were in off position in the first place.
>
> However, Apsara points out that while Mr Sargeant did raise the question as to why the breakers were in the off position, he never said in his witness statement or his report that this was done before the fire, nor speculated about who had done it.

[145] It is unfortunate that there appears to have been no exploration of the question of whether the fire alarm was turned off *before* the fire. Apsara points out that its witness, Anthony Walcott, gave evidence that the smoke detectors were electric and were attached to the electrical panel but that none of Guardian's investigators, Messrs Zoe, Sargeant, or Simpson, made any claim to have investigated and/or examined the panels on 27 August 2007. Apsara's witness, Rovena Mangru-Peters, who was not subject to any cross-examination, gave evidence that she visited the premises on 27 August 2007 because two fires had re-started during the day. Fire officials directed them to leave and said that 'they were going to turn off the power'. None of the investigators gave any indication that they interviewed the fire officers to ascertain whether it was the fire officers who turned off the breakers. During his cross-examination, Mr Sargeant accepted that even though he spoke to the fire

officials, he did not ask them if they turned off the breakers. Apsara maintains that a strong inference which can be drawn is that the fire officials did what they told Ms Manrgu-Peters they were going to do, namely, turn off the main breakers to reduce the risk of the restarting of the fires and the risk of electrocution from the beaded wires hanging about the premises.

[146] Apsara states that Mr Charles Hall was the only witness who gave evidence that he conducted an examination of the panels. He had gone to the premises on Mr Mohammed's request to examine the panels to see if there were any electrical faults. He saw that both panels were burnt out and that all the breakers were in the trip position but the main breaker on each panel was in the off position. Apsara asserts that this evidence is inconsistent with any conclusion that it was Mr Mohammed who had disabled the alarms by shutting off the main breaker since had he done so, he would hardly have invited someone to inspect the breakers and obtain evidence against him. Further, the fact that all the breakers were in a 'trip position' contradicts any conclusion that the main breakers had been turned off before the fire. If the breakers had been 'tripped' the main breakers could not have been 'off'; otherwise, there would have been no surge in current or other reason to trip the minor breakers.

[147] Apsara contends that neither the trial Judge nor the Court of Appeal had regard to any of this highly relevant evidence which contradicted the conclusion that it was Mr Mohammed who turned off the main breakers and therefore the fire alarms.

The Bronze Buddha

[148] Mr Mohammed's denial of the existence of a 'bronze Buddha' was contradicted by his own witness, Megan Hopkins-Rees who testified that she had accompanied Mrs Kavanagh to Thailand where they purchased a large gilded wooden Buddha 42 inches tall and a small 16-inch bronze Buddha. The smaller bronze Buddha was kept in a cabinet in the Buddha room while the large gilded wooden Buddha was

positioned on a curved chest out in the open in the Buddha room. This large wooden Buddha was highly significant for both Mr Simpson and Mr Zoe in their analysis of the identity of the person who started the fire.

[149] Mr Simpson emphasised the religious importance of the statuette and concluded that because no remnants of the bronze Buddha were found in the debris, it must have been deliberately removed before the fire, the inference being that the person to whom the bronze Buddha was of religious or cultural significance would have taken the precaution to preserve it before the fire was set. However, later in his evidence, Mr Simpson appeared to suggest that a bronze Buddha was indeed found among the ruins which would contradict the premise of his prior conclusion about the identity and motives of the arsonist. On the other hand, Mr Zoe who similarly took the view that the 'bronze' Buddha' in the Buddha room was 'a highly regarded symbol of the East Indian Community at large', suggested that remnants of the statuette would have been expected to be found after the fire, leading him to conclude that the fire was 'pre-meditated'. To complicate matters further, under cross-examination Mr Mohammed maintained that the Buddha in the Buddha room was a gilded wooden Buddha, made to look as if it were bronze.

[150] The evidence regarding the fate of the 'bronze' Buddha is certainly confusing, to say the least. In the end, the statuette appears not to have had a decisive effect on the decisions of the trial Judge. Her finding that the 'bronze Buddha' appeared to have been removed from Morecambe House buttressed her stinging and adverse findings on the credibility of Mr Mohammed who she found had lied about the presence of the statuette. However, rather puzzlingly, the Judge later admitted that the missing bronze Buddha may have been found in the ruins when she stated that:

> [283] In reaching its decision, the Court refused to draw an inference adverse to the Plaintiff or to Mr Mohammed from the fact that, according to Mr Zoe, following the fire no remnants of the bronze Buddha statue were found in the debris. The Court considered that it was neither logical nor reasonable to conclude that the Buddha had been removed prior to the fire

simply because the Plaintiff had made a claim for a 16 inch bronze Buddha and because no remnants of the statue had been found in the debris.

[284] Furthermore, Mr Sargeant's Report had clearly indicated that brass objects had been observed in the debris. In the absence of evidence of closer examination of these objects by both the investigators, it was, in the view of the Court, very possible that one of those objects could have been the deformed remnants of the "missing" Buddha.

Financial Health of Apsara

[151] The Court of Appeal upheld the inference drawn by the Trial Judge that Apsara was experiencing financial difficulties. The judge pointed to the fact that around the time of the fire the company was experiencing financial difficulties and had incurred severe losses. She pointed specifically to the fact that the company's fixed assets, which represented 97.27% of the company's asset base, was less than the company's total indebtedness, that the company's bank accounts were all in overdraft, and that the company had no cash.

[152] It does not appear unreasonable to say that Apsara was experiencing stringent financial circumstances but, on the other hand, there was evidence from Mr Mohammed that early losses in a start-up restaurant are to be expected and were in fact planned for. Even so, Mr Brown for Apsara testified that in the few months preceding the fire, business had picked up and the restaurant was taking in between 8 to 10 thousand dollars per day which he said from his experience, 'is quite good for a restaurant in its first year'. There was also evidence that the restaurant was meeting mortgage payments between BBD78,000 to BBD80,000 per month.

[153] Apsara contends that the courts below totally missed the significance of the restaurant being in its first year of business. Financial common-sense dictates that the business would be financed by startup capital and other expenditure on renovations, furniture, fittings and equipment, which would tend to make liabilities rise above fixed assets in the short term. Moreover, the insurance on the premises was reduced by BBD2 million in April 2007, which is inconsistent with any plan

to burn the building. Finally, the shareholders restarted the business sometime after the fire and continued to run it for some time, and Apsara spent large sums repairing the restaurant and paying staff salaries for the entire six-month period during closure. Apsara argues:

> It was highly unlikely that Mr Mohammed would spend significant sums building a business, reduce the insurance on it, and then start a fire within a year to burn it down. It does not make common or business sense to do so. All that would have been achieved, prima facie, is the recovery of expenses incurred just one year previously. Significant sums would still have to be found to start up the business again. In other words, there was no apparent financial gain to be won by taking this dangerous and risky course and no evidence was led to that effect. Respectfully, these are all matters which the courts below ought to have taken into account in determining whether it was highly probable that Mr Mohammed burnt down his own restaurant.

[154] It must be recalled that the standard of proof required is that of a high probability of the involvement of Apsara in the arson. Two contrasting cases from New South Wales are illustrative. In *Raso v NRMA Insurance Ltd* the Court of appeal of New South Wales[146] considered that certain adverse findings on credibility against the plaintiff and their witness were not sufficient to justify any positive inference of their involvement in arson. There had to be other evidence from which the inference could be drawn. This may be contrasted with *Thompson* where there was a mountain of evidence: the plaintiff insured had left the premises to go on a road trip with his wife after purchasing a phone for his friend Robert Silkman on which they could communicate. A police patrol observed two men running away from the fire on the plaintiff's insured premises, one of whom was suspected to be Silkman, who subsequently gave implausible explanations as to how he became badly burnt. The plaintiff insured denied knowing Silkman even though he received calls from him shortly after the fire started and had telephoned Silkman the morning after the fire on the phone he had given to Silkman. These matters among other others led the judge to the conclusion that Mr Silkman (who pleaded the Fifth at trial) and an accomplice, 'started the fire with the acquiescence and knowledge of the plaintiff.'

[146] (Supreme Court of New South Wales Court of Appeal, 14 December 1992).

[155] In the present appeal there is no overwhelming inference that can be drawn from the primary facts found by the courts below. Accepting the finding that the fire was deliberately started still leaves unresolved the question of whether Apsara was involved in the burning of its restaurant. The bases on which the courts below drew that positive influence are not, in my respectful view, sufficiently persuasive. Each inference was plausibly explained by Apsara consistent with an innocent rationale, whether these related to opportunity, the fire alarms, the Buddha statue, or the financial health of the company.

[156] Applying the standard of proof on a balance of probabilities, I am not satisfied that it has been established that Apsara was involved in the arson of the insured premises. There is evidence both ways. Admittedly, connivance will often be difficult to prove in the context of circumstantial evidence, but such proof is possible, as the case of *Thompson* illustrated. In this case, the insurance company has not discharged that burden.

Condition 11

[157] Condition 11 of the insurance policy required Apsara, on the occurrence of a fire, to forthwith give Guardian notice of the damage caused by the fire and to deliver to Guardian a claim in writing for the loss or damage containing an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, 'within 15 days after the loss or damage, or such further times as the Company may in writing allow in that behalf'. Apsara was also obliged to give such further particulars as may be reasonably required by Guardian. The precise wording of Condition 11 is as follows:

> *Occurrence of a Fire*
>
> 11. On the happening of any loss or damage the insured ***shall forthwith*** give notice thereof to the Company and ***shall within 15 days*** after

> the loss or damage, or such further times as the Company may in writing allow in that behalf, deliver to the Company:
>
> a. a claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind.
>
> b. particulars of all other insurance, if any.
>
> The insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, duplicates, or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

[158] The fire occurred on 27 August 2007 and therefore the 15-day period from the fire stipulated in Condition 11 would have expired on 11 September 2007. However, pursuant to its rights under clause 12, Guardian took possession of the premises from the date of the fire and remained in possession for a period of seven days and posted security guards. The building was eventually returned to Apsara on the afternoon of 2 September 2007.

[159] The Court of Appeal affirmed the trial Judge's holding that Apsara gave Guardian notice of the damage caused by the fire forthwith, in compliance with Condition 11. Within the 15-day period stipulated in Condition 11 Apsara also delivered to Guardian the particulars of other insurance as required by Condition 11, and a Claim Form which did not contain the particulars of loss. Apsara submitted the outstanding particulars of loss on 1 October 2007.

[160] The Learned Trial Judge found that compliance with Condition 11 was a condition precedent to liability under the policy. As quantification of the loss was only provided on or about 4 October 2007, about 5 weeks after the fire, rather than within 15 days, Condition 11 had not been satisfied and since there was no 'clear and unequivocal representation' to Apsara that the time bar would not be relied on, Guardian was entitled to reject the claim. This finding was upheld by the Court of Appeal.

Condition Precedent or Implied Term to Act Reasonably

[161] Apsara argues that strict compliance with the stipulated period in Clause 11 ought not to be regarded as a condition precedent to Guardian's liability. Apsara cited the judgment of the Privy Council in *Diab v Regent Insurance Co Ltd*[147] where, in relation to an identically worded provision, Lord Scott[148] said, admittedly *obiter*:

> 14 … It does not necessarily follow … that every element of condition 11 must be treated as a strict condition precedent with any failure to comply barring the claim... [S]uppose the claim in writing and the particulars had been delivered reasonably promptly after the fire, within, say, a month. Condition 11 does refer to 'such further time as the company may in writing allow …' and Regent might have accepted the late delivery. Does this contractual provision give Regent a completely free and uncontrolled discretion or is there an implied contractual proviso that further time should not be unreasonably refused?
> ...
>
> 16 In a case where notice of a claim has been given forthwith to the insurer and where a claim in writing with the requisite particulars of the loss and damage has followed sufficiently promptly to enable the insurer to verify that the claim is a good one, it is not obvious that a failure to deliver the claim in writing and the particulars within the specified period should be treated as relieving the insurer of any liability in respect of the claim. Perhaps the specified time should ... be treated as directory, not mandatory. Perhaps the insurer's consent to an extension of the time should be subject to a proviso that it be not unreasonably withheld. But no argument on these

[147] [2007] 1 WLR 797.
[148] ibid at [14] – [16].

points has been addressed to their Lordships and no conclusion on them can be reached on this appeal.

[162] As to the discretion to extend time, Apsara cited the case of *Braganza v BP Shipping Ltd*[149] where the UK Supreme Court held that contractual discretions were subject to an implied term that the decision making process be lawful and rational in the public law sense, such that a contractual decision may be overturned if the decision-maker took into account an irrelevant consideration or failed to take account of all relevant considerations, or reached a decision which no rational decision-maker would reach. Both Lady Hale[150] and Lord Neuberger[151] endorsed the summary of the law given by Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd*[152] where he said as follows:

> It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness …

[163] Several other cases were cited by Apsara to the same effect as *Braganza v BP Shipping Ltd*: Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)*[153]; Ramsey J in *Bluewater Energy Services BV v Mercon Steel Structures BV*[154].

[164] It is also noteworthy that modern legislation in some jurisdictions contains relevant provisions. For example, in the Insurance Act of Ontario, Canada,[155] there is deemed to be as part of every fire policy certain statutory conditions. These include the requirements after loss of (a) forthwith giving notice in writing to the insurer,

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[149] [2015] 1 WLR 1661.
[150] ibid at [22].
[151] ibid at [102].
[152] [2008] Bus LR 1304 at [66].
[153] [2001] 2 All ER (Comm) 299 at [67], [73].
[154] [2014] EWHC 2132 (TCC) at [1011].
[155] RSO 1990, c I.8, s 48 and Statutory Conditions, s 148 6(1), (2).

and (b) delivering 'as soon as practicable to the insurer', among other things, a complete inventory of the destroyed and damaged property.

[165] Condition 11 does provide that 'No claim under this Policy shall be payable unless the terms of this Condition have been complied with'. However, the wording of the clause itself envisages the possibility that Guardian could exercise its discretion to enlarge the time permitted for compliance. Further, Condition 11 only requires the delivery of a claim containing particulars of loss 'as may be reasonably practicable'. This must be understood against the background that Clause 12 gave Guardian the right to take possession of the insured premises for potentially an indefinite period during which Apsara would effectively be denied access to assess the nature and extent, and therefore to particularise, the loss sustained.

[166] The Court of Appeal found[156] that there was no evidence before the court that Apsara had requested an extension of time to produce the full details of the loss sustained. It is the case that the Claim Form dated 5 September 2007 did not contain any such request. However, the 5 February 2010 witness statement[157] of Sharif Mohamed, company director of Morecambe House, on behalf of Apsara, asserted that the Claim Form had been submitted with a covering letter and a request for additional time to submit full particulars of the claim. Furthermore, the trial Judge found[158] that, 'The evidence disclosed that the Defendant company received the initial correspondence from the Plaintiff asking to be allowed more time to submit their detailed claim. It appears that the Plaintiff's letter went unanswered, and that the Defendant company continued to adjust the claim'.

[167] I am satisfied on principle and on the authorities cited that it is appropriate to imply a term into clause 11 of the contract of insurance that a request for an extension of time to submit full particulars of loss ought not to be unreasonably withheld. This is so based on the cases to which I have been referred, on principle, and in the

[156] *Apsara Restaurants* (n 8) at [87].
[157] ibid at [59].
[158] ibid at [307].

interest of mutual trust and confidence that underlies insurance contracts, no less than contracts of employment (*Braganza v BP Shipping Ltd*; *Sandy Lane Hotel v Cato*[159]).

[168] I am persuaded that the stipulation of the 15-day period within which particulars of the claim must be given should be read subject to the implied term that a request by the insured for an enlargement of time ought not to be unreasonably refused by the insurer. Under this implied term Guardian would not arbitrarily refuse to extend time for the delivery of the particularised claim but rather would exercise its discretion to extend time honestly, in good faith and genuinely and not capriciously, perversely, or irrationally. Such a term is necessary to give business efficacy to the contract between the parties.

[169] This is especially so in the present circumstances. Apsara had provided notice forthwith of the fire and had, within the 15-day period stipulated in Condition 11, delivered to Guardian the particulars of other insurance as required by Condition 11, and a Claim Form which did not contain the particulars of loss, but which was accompanied by a request for additional time to provide such particulars. Guardian did not respond to this request for an extension of time but rather 'continued to adjust the claim' seeking further information outside the 15-day time frame which information it then used to dispute aspects of the claim. Given that Guardian's taking possession of the premises had in effect deprived Apsara of 7 days of the 15-day period, it may not have been reasonably practicable for Apsara to have complied with the 15-day period. In these circumstances, in the absence of any reason for withholding permission, I am of the view that Guardian acted unreasonably in denying the request for the extension.

[159] *Braganza* (n 149); *Sandy Lane Hotel* [2022] CCJ 8 (AJ) BB.

Waiver

[170] I respectfully consider that there is much force in the argument by Mr Mendes for Apsara that Guardian's conduct amounted to a waiver of the requirement for strict compliance with Clause 11. There was undoubtedly no 'clear and unequivocal representation' by Guardian that it would not insist on strict compliance with Clause 11. However, waiver may arise by conduct. I accept as persuasive the view of the Privy Council in *Diab v Regent Insurance,* where that court held that[160]:

> A waiver by an insurer of a procedural obligation on the insured, such as the delivery of particulars of loss or damage within a specified period, may be produced by conduct either before or after the insured is in breach of the obligation. The principle is expressed in *MacGillivray on Insurance Law*, 10th ed (2003), at para 10–102: '[Waiver] means the abandonment or relinquishment of a right of defence which may occur either as the result of an election by the insurer or of the creation of an estoppel precluding him from relying on his contractual rights against the assured.'

[171] Apsara made a request for an extension of time within which to submit the required particulars. Guardian did not respond to this request but sought, as Condition 11 entitled it to do, further information which Apsara supplied. Ultimately, Apsara submitted the details of the loss as required under Condition 11, on 4 October 2007, some three weeks late. Guardian did not repudiate liability at that point in time by invoking Condition 11. Rather, it continued to investigate and to process the claim and asked Apsara to provide yet further information which it used to build the case that Apsara was in financial difficulty and therefore had the motive to set the property on fire. In all the circumstances, as it seems to me, this conduct constituted a waiver on the part of Guardian that it would insist upon compliance with the stipulation in Condition 11 that Apsara provide the fuller particulars within 15 days.

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[160] *Diab* (n 147) at [25].

Conclusion

[172] Overall, this case must be decided for Guardian, but for the foregoing reasons, I would decide some of the issues raised in this appeal in favour of Apsara and others in favour of Guardian. I find that Apsara did not breach its duty of disclosure in relation to the cancellation of the Gulf Insurance Policy. Nor was it proven that Apsara was involved in the arson of the insured premises. There was no breach of Condition 11 of the insurance policy. But I also find that Guardian is entitled to avoid the policy on the ground that Apsara did not disclose the denial of the O'Meara Foods Claim and the indebtedness to the Agricultural Development Bank and that these were material non-disclosures which induced Guardian to enter the policy of insurance with Apsara.

[173] I would therefore dismiss this appeal because of these non-disclosures.

[174] I would have invited the parties to seek to agree on the matter of costs bearing in mind the conclusions at [172] and invite them to make brief written submissions on costs in the absence of agreement.

BURGESS J:

Introduction

[175] This appeal raises for the first time before this Court the principles enunciated in the landmark House of Lords decision of *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*.[161] That case purports to settle the test of what is a material non-disclosure in insurance law at common law as codified in the UK Marine Insurance Act 1906. The *Pan Atlantic* decision is relevant in Barbadian law because the Barbados Marine Insurance Act, Cap 292 is a virtual carbon copy of the UK Act.

[161] *Pan Atlantic* (n 1).

[176] The appeal concerns much more than simply issues on the *Pan Atlantic* principles, however. The notice of appeal is somewhat unusual in that it challenges 21 details of the orders of the Court of Appeal appealed against and also discloses 39 grounds of appeal against the decision of the Court of Appeal. This large number of particulars and grounds reflect the fact that this appeal is at bottom an appeal against the concurrent findings of fact by the courts below that the appellant/assured was guilty of material non-disclosure; that the appellant/assured deliberately set fire to insured property; that the appellant/assured committed a breach of a condition of the insurance contract, and that there was 'procedural unfairness in adverse findings on the credibility' of the appellants' principal witness. Indeed, Mr Mendes SC, counsel for the appellants, candidly concedes that this appeal turns in large part on whether this Court in the circumstances of this case should interfere with the concurrent findings of facts by the trial judge and the Court of Appeal. Mr Forde KC, counsel for the respondents, agrees.

Factual Background

[177] The appellant, Apsara Restaurants (Barbados) Ltd ('Apsara'), is a limited liability company incorporated under the Companies Act, Cap 308 of the Laws of Barbados. The sole directors and shareholders of the company at all relevant times were Ms Marie Kavanagh (Kavanagh), and her husband, Mr Sharif Mohammed (Mohammed).

[178] The respondent, Guardian General Insurance Ltd ('Guardian'), is a limited liability company incorporated in the Republic of Trinidad and Tobago and registered as an external company under the Barbados Companies Act, Cap 308. Guardian conducts the business of insurance underwriting in Barbados.

[179] Sometime in 2006, Apsara opened and began to operate two restaurants known as 'Apsara' and 'Tamnak Thai' respectively. Both operations were located at Apsara's premises in 'Morecambe House', Maxwell, Christ Church, Barbados.

[180] Sometime in April 2007, the directors of Apsara appointed Lynch Insurance Brokers ('Lynch') as the agent of the company to effect a policy of insurance on the contents and leasehold improvements of the company's restaurants. After considering other quotations, Apsara, acting through Mohammed, instructed Lynch to acquire a policy of insurance with Guardian.

[181] Guardian agreed to grant Apsara a policy of insurance against loss or damage by fire at its premises at 'Morecambe House'. The policy was issued in early 2007. The particulars of insurance were BBD2,000,000 on the plant, machinery, and equipment; BBD4,000,000 on the improvements and betterments; and BBD500,000 on the stock.

[182] In the early morning hours of 27 August 2007, a fire occurred at the restaurants 'Apsara' and 'Tamnak Thai'. The fire destroyed the leasehold improvements and betterments, furniture, equipment, and stock.

[183] That same day, Guardian was orally informed by Apsara of the fire which had taken place at 'Morecombe House'. Guardian appointed EA Simpson & Associates Inc ('Simpson'), a company specialising in 'Loss Adjusting & Risk Surveying Services', to take control of the premises and carry out investigations. Simpson remained in control of the premises until 2 September 2007 when they relinquished control to Apsara.

[184] As part of their investigation, Simpson hired Mr Mark Sargeant of Forensic Consultants Inc to carry out an investigation, determine the cause of the fire and provide a report of his findings. Simpson also appointed Blackstone Consultants to

interview persons and record statements from them of any information relevant to the fire.

[185] Thereafter, in compliance with the insurance agreement which required Apsara to submit the written claim within 15 days of the event, Apsara submitted a claim form dated 5 September 2007 signed by both directors.

[186] On 3 December 2007, Simpson wrote to Apsara requesting the balance sheet for the period September 2006 to August 2007; detailed monthly management accounts for the period September 2006 to August 2007; bank Statements from Royal Bank of Trinidad and Tobago ('RBTT') for October, November, and December 2006; and a breakdown of administrative expenses.

[187] By letter dated 12 December 2007, Apsara replied to Simpson providing the information requested save that they provided an income statement ending 31 August 2007 rather than the monthly accounts requested.

[188] On 17 January 2008, Guardian wrote to Apsara over the signature of its claim manager, Mr Ryan Williams, as follows:

> **Re: Fire claim of August 2007**
> **Insured: Apsara Restaurants Barbados Limited**
>
> We refer to the matter at caption and advise that subsequent to a thorough investigation into the circumstances of the proposer's purported loss, serious doubts persist regarding the fortuity of this event.
>
> In addition, we are concerned about the failure on the proposer's part to disclose information that was material to the underwriting and acceptance of the proposal at inception.
>
> In light of the foregoing, we are not in a position to honour your claim in respect of the loss at caption.

History of Litigation

i. Proceedings in The High Court

[189] On 6 March 2008, Apsara commenced an action against Guardian in the High Court. In it, Apsara claimed damages for Guardian's failure to pay out on the fire insurance contract and costs.

[190] On 17 October 2011, the trial proceedings commenced in the High Court before Crane-Scott J. She heard the matter over a 10-day period between that date and 9 December 2011. During these proceedings, five witnesses were heard on behalf of the appellant and seven on behalf of the respondent. It is to be carefully noted here, parenthetically, that a copy of the 'Notes of the Proceedings' for each day of the hearings was included in the Record of Appeal.

[191] On 25 October 2013, Crane-Scott J dismissed Apsara's claim and indicated that detailed reasons for her decision would be given later. A 78-page judgment with 318 paragraphs containing these reasons was delivered on 31 December 2014. In her judgment, Crane-Scott J gave three reasons for her decision.

[192] First, at [46] of her judgment, the judge stated:

> At paragraph 8 of the Further Amended Defence, the Defendant company alleged that the following 'material' facts were not disclosed:
>
> i. That Mr Sharif Mohammed and Ms Marie Kavanagh, the sole shareholders and directors of the Plaintiff Company were also the sole shareholders and directors of O'Meara Food Products Limited, a company registered under the Companies Act of the Republic of Trinidad and Tobago which company had effected a Fire and Special Perils Policy of Insurance Number GHF 5885 with Gulf Insurance Limited which policy was cancelled and the premium refunded;
>
> ii. That the said O'Meara Food Products Limited had made fraudulent and/or baseless claims against its insurers, Maritime General Insurance

Company Limited of Trinidad and Tobago which claims were dismissed by the Supreme Court of Trinidad and Tobago;

iii. That a judgment in the sum of TT$1,060,075.19 had been registered jointly and severally against the said O'Meara Food Products Limited and against the said Sharif Mohammed and Marie Kavanagh by the Agricultural Development Bank of Trinidad and Tobago for the failure to repay a loan which had been granted to the said company and which judgment debt remained unsatisfied.

[193] The judge found as a fact that each of the facts raised in Guardian's defence was 'material' and that there was a failure by Apsara to disclose those facts to Guardian during the underwriting. She also found that Guardian was induced to enter the insurance contract with Apsara by the non-disclosure. Accordingly, she dismissed Apsara's claims mainly for non-disclosure.

[194] The judge's second reason for dismissing Apsara's claim was that she found, as a fact, that the fire had been deliberately set. The judge based her conclusion on the reports and testimony of the experts that the fire started in two areas and was caused by an accelerant and not by any electrical fault.

[195] The judge's third reason for dismissing Apsara's claim was that Apsara's failure to notify Guardian within 15 days as stipulated in Condition 11 of the Policy entitled Guardian to treat its obligations to pay under the Policy as discharged. Accordingly, Apsara was not entitled to claim under the policy.

ii. **The Court of Appeal**

[196] The Court of Appeal's judgment, delivered on 22 July 2022, upheld the decision of Crane-Scott J. After a careful review of her judgment, the Court of Appeal held that her findings in respect of material non-disclosure were such that she was entitled to reach the conclusions that she did, based on the evidence before her and having heard and seen the witnesses.

[197] The Court of Appeal also held that the trial judge was entitled to determine that the fire was not an electrical fire. The Court of Appeal noted that her determination was based on the evidence of two professional fire investigators and in particular their uncontroverted evidence that there were two separate and distinct seats of the fire. The trial judge further found that Mohammed had the opportunity and was in all probability deliberately involved in causing the fire. The Court of Appeal further noted that the trial judge found as a fact that Mohammed had been untruthful about a bronze statue of Buddha which appeared to have been removed and that he was an untruthful witness in relation to other matters which touched and concerned the fire.

[198] Finally, the Court of Appeal held that the trial judge was correct in holding that there was a breach of Condition 11 of the policy of insurance by Apsara. She was therefore correct in holding that Apsara's claim under the policy was barred.

[199] I feel bound to add here that, contrary to Mr Mendes' claim that the Court merely 'rubber-stamped' the trial judge's findings, it is manifest that the Court of Appeal engaged in a painstaking review and analysis of the trial judge's decision. It is clear to me that that court reviewed all the evidence considered by the trial judge and formed its own opinion. This conclusion shouts out from the fifty-three (53) page judgment of Gibson CJ, who delivered the judgment of the court.

Issues Before This Court

[200] By Notice of Appeal dated 8 December 2022, the appellant appealed the orders and decision of the Court of Appeal. As already noted, the notice of appeal listed 21 details of the orders appealed against and 39 grounds of appeal against the decision.

[201] In my opinion, despite the profusion of details of the order of the Court of Appeal appealed against and the grounds of appeal against its decision, the issues raised in this appeal may be conveniently dealt with as follows:

a. The concurrent findings issue;
b. The material non-disclosure issue;
c. The arson issue; and
d. The Condition 11 claim issue.

[202] I have had the privilege of reading the opinion of Anderson J. In my respectful view, he has subjected issue d to meticulous examination. I am happy to say that I am in full agreement with his discussion of and his conclusion on this issue. This absolves me from the need to engage that issue. I do not, however, agree with his discussion and conclusions on the first three issues and so the remainder of my judgment will present my opinion on these issues seriatim.

The Concurrent Findings of Fact Issue

[203] This appeal rests almost entirely upon challenges to the trial judge's findings of primary fact, some of which were disputed and some of which were undisputed, inferences from those primary facts, and judgment as to what reasonableness required in the circumstances which were upheld by the Court of Appeal. In some ways, this appeal comes very close to seeking to have this Court retry the case, as it were, to give the appellants a third opportunity to persuade a court to take a view of the facts favourable to them. Not surprisingly, then, as has been noted above, senior counsel for Apsara concedes that this appeal depends in large measure on whether this Court in the circumstances of this case should interfere with the concurrent findings of facts by the trial judge and the Court of Appeal and that Mr Roger Forde KC, counsel for Guardian, agrees.

[204] Given the foregoing, it may be advisable that the law relating to the approach of this Court, as an apex court, to the question of concurrent findings of facts, be fully explored. In this regard, senior counsel correctly observes that there are two approaches to be found in this Court's precedents, namely, what he calls the 'more flexible approach' and the 'exceptional circumstances approach'. In my view, this

appeal presents an opportunity for this Court to explain its precedents. In doing so, it is particularly advantageous to explore these precedents through the prism of the principles which guide the approach of apex courts in the common law system.

i. **The Practice in Common Law Apex Courts**

[205] Let me begin by defining concurrent findings of fact as a legal concept. Concurrent findings of fact connote the findings of fact by a trial court which are upheld by an intermediate appellate court or a majority of such a court. Concurrent findings of fact are such findings of fact which are then appealed from the intermediate appellate court to the apex court. This analysis is synchronistic with Lord Burrows' useful differentiation in the recent Trinidad and Tobago case of *Dass v Marchand*,[162] between what he calls the 'standard constraint' on intermediate appellate courts of a trial court's findings of fact and the 'super-added constraint' on an apex appellate court. The constraint in both cases is that an appeal court should pay deference to the lower court's findings of fact.

[206] As early as 1891 in the case of *The Sir Robert Peel*,[163] James LJ adumbrated what may be called the 'standard constraint' rule on intermediate appellate courts on a trial court's findings of fact. He stated the rule to be that an (intermediate) appeal court 'will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression'.[164] The standard constraint rule is firmly entrenched in the common law system as an appellate principle. (See, e g, *Clarke v Edinburgh and District Tramways Co*[165]; *SS Hontestroom v SS Sagaporack*[166]; *McGraddie v*

[162] *Dass* (n 20).
[163] (1880) 43 LT 364.
[164] ibid at 365.
[165] [1919] SC (HL) 35.
[166] *SS Hontestroom* (n 45) at 47 .

McGraddie[167]; *Housen v Nikolaisen*[168]; *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*[169]).

[207] The concurrent findings rule is different from the standard constraint rule. As Lord Burrows pointed out in *Dass*,[170] the concurrent findings rule imposes a 'super-added constraint' on an appellate court which goes beyond the standard constraints on an appeal court and adds an additional hurdle for an appellant to overcome when appealing to it. The super-added constraint principle is a principle of long standing in the common law system that an apex court, as a second appellate court and court of final resort, save in narrowly circumscribed circumstances, will not disturb concurrent findings of fact of the courts below.

[208] This rule finds expression as early as 1893 in the House of Lords case of *P Caland (Owners) v Glamorgan Steamship Co Ltd (P Caland)*.[171] In that case there were concurrent findings on the question whether a vessel was showing a red light when it came into collision with another vessel. The House of Lords was asked to disturb the findings of fact. It was held that a finding of fact in which both the courts below had concurred ought not to be disturbed unless it could be clearly demonstrated that the finding was erroneous. Lord Herschell LC said:

> In the present case, although I might probably myself have come to a different conclusion, I cannot say that any cardinal fact was disregarded or unduly estimated by the Courts below. I can lay hold of nothing as turning the balance decisively the one way rather than the other. I think the decision of the question of fact at issue depends upon which way the balance of probability inclines, and I am not prepared to advise your Lordships that it so unequivocally inclines in the opposite direction to that indicated in the judgments of the Courts below, that this House would be justified in reversing the judgment appealed from.

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[167] *McGraddie* (n 14) at 53.
[168] *Housen* (n 32) at 14.
[169] [2017] 1 SCR 478.
[170] *Dass* (n 20).
[171] [1893] AC 207.

[209] Lord Herscell LC added:

> … I quite agree with what has been said in this House in previous cases as to the importance of not disturbing a mere finding of fact in which both the Courts below have concurred. I think such a step ought only to be taken when it can be clearly demonstrated that the finding is erroneous.

[210] I would also note that in that case, Lord Watson opined that it was '…a salutary principle that judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at ... a tolerably clear conviction that [those] findings are erroneous.'

[211] The *P Caland*[172] principle is firmly entrenched in the House of Lords and UK Supreme Court decisions. This was recently reiterated by Lord Jauncey of Tullichettle, in a speech with which the rest of their Lordships agreed, in *Higgins v J & C M Smith (Whiteinch) Ltd,*[173] (see also *Hicks v Chief Constable of the South Yorkshire Police*[174]), where he said at 82:

> Where there are concurrent findings of fact in the courts below generally this House will interfere with those findings only where it can be shown that both courts were clearly wrong. It is nothing to the point that this House might on the evidence have reached a different conclusion, . . . *The principle does not depend upon the advantage possessed by the judge of first instance of seeing and hearing the witnesses - that advantage will already have been reflected in the decision of the lower appellate court to confirm the findings of the judge* (emphasis added).

[212] In *Dass v Marchand*,[175] the Privy Council affirmed that the concurrence rule so firmly entrenched in the House of Lords' jurisprudence accords with '…the Board's normal practice.' Lord Burrows, who delivered the judgment of the Board, gave as examples of the application of the practice the cases of *Devi v Roy*[176]*; Central Bank*

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[172] ibid .
[173] 1990 SC (HL) 63.
[174] [1992] UKHL 9, [1992] 2 All ER 65.
[175] *Dass* (n 20).
[176] *Devi* (n 19).

of Ecuador v Conticorp SA[177]; *Juman v Attorney General of Trinidad and Tobago*[178]; *Al Sadik v Investcorp Bank BSC*.[179] In the very recent Jamaican Privy Council appeal in *Traille Caribbean Ltd v Cable and Wireless (Jamaica) Ltd*,[180] Lord Hamblen and Lord Burrows, citing D*evi v Roy*[181]; *Dass v Marchand*[182]; and *Sancus Financial Holdings Ltd v Holm*,[183] noted that, as the Board has frequently emphasised, it is only in exceptional and limited circumstances that concurrent findings of fact will be disturbed.

[213] It is to be noted that in *Dass v Marchand*,[184] Lord Burrows clarified that the Board's practice occurs in two main situations. The first is in respect of factual findings in general. Here, the trial judge, given his or her opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. So that, where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court - the third court looking at the facts - is more likely to be correct about the facts than the two courts below. The second is in respect of factual circumstances peculiar to the country from which the case comes (especially, for example, local customs, attitudes, and conditions). In such cases, the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.

[214] The question as to the approach of the High Court of Australia to concurrent findings of facts was raised 'for the first time definitely' in *Major v Bretherton*.[185] In that case, a judge in the Supreme Court of Victoria had found that the defendant had not acted fraudulently. The Full Court of the Supreme Court upheld that finding. Isaacs J, after referring to decisions of the Privy Council and the House of

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[177] [2015] UKPC 11, [2016] 2 LRC 46 (BS) at [4].
[178] [2017] UKPC 3, [2017] 2 LRC 610 (TT) at [15].
[179] [2018] UKPC 15 KY 2018 PC 2 (CARILAW) at [43] – [44].
[180] [2023] UKPC 19, JM 2023 PC 3 (CARILAW).
[181] *Devi* (n 19).
[182] *Dass* (n 20).
[183] *Sancus Financial* (n 17).
[184] *Dass* (n 20).
[185] (1928) 41 CLR 62.

Lords, said that the rule of the High Court was as stated by Lord Herschell LC and Lord Watson in the *P Caland*.[186] He went to explain:

> By following it, I do not mean that as soon as I see there are concurrent findings I abstain from forming my own opinion. I am bound to consider the evidence and to form my own opinion consistently with judicial obligation and precedent. But when I have done so, the rule comes into play, and, unless I reach the point of clear conviction predicated by the House of Lords in the *P. Caland Case*, the appeal should, in my opinion, fail.

[215] The approach of the High Court of Australia decision was recently considered in *Roads and Traffic Authority (NSW) v Dederer*.[187] In that case, Gleeson CJ pointed to a catena of decisions where the concurrent findings of facts rule were recognised by the High Court. These include: *Baffsky v Brewis*[188]; *Louth v Diprose*[189]; and *Waltons Stores (Interstate) Ltd v Maher*.[190]

[216] The approach of the Supreme Court of Canada is similar to that of the other common law apex courts already mentioned in this judgment. In *Ontario (Attorney General) v Bear Island Foundation*,[191] the court stated:

> This case …raises for the most part essentially factual issues on which the courts below were in agreement. On such issues, the rule is that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his or her assessment of the facts: *Stein v. The Ship 'Kathy K'*[192]; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*[193]; *Beaudoin-Daigneault v. Richard*[194]. The rule is all the stronger in the face of concurrent findings of both courts below.

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[186] *P Caland* (n 171).
[187] *Dederer* (n 38).
[188] (1976) 51 ALJR 170.
[189] (1992) 175 CLR 621 at 634.
[190] (1988) 164 CLR 387.
[191] [1991] 2 SCR 570 at 574.
[192] *Stein* (n 33).
[193] [1987] 1 SCR 1247.
[194] [1984] 1 SCR 2.

[217] *Bear Island*[195] has been consistently applied by the Supreme Court of Canada. Thus, in *Howard v R*,[196] Gonthier J, delivering the judgment of the court, stated:

> This case is similar to *Ontario (Attorney General) v. Bear Island Foundation*,[197] in that the issues are essentially factual in nature and the subject of concurrent findings in the courts below. The reasoning in *Bear Island* is equally applicable to this case. In the absence of palpable and overriding error which affected the trial judge's assessment of the facts, an appellate court should not reverse the conclusions of the lower court.

[218] More recently, in the case of *Ville de Montréal v Lonardi*,[198] the Supreme Court of Canada observed:

> … [T]he question whether there is a causal connection between a fault and damage is one of fact, and the City has not identified a palpable and overriding error made by the trial judge in this regard. This Court recently noted that in such cases, "given its position at the second level of appeal, this Court's role is not to reassess the findings of fact of a judge at the trial level that an appellate court has not questioned: '. . . the principle of non-intervention "is all the stronger in the face of concurrent findings of both courts below"…'"

[219] It is interesting to note that the Supreme Court of Nigeria also adheres to a strict concurrent findings rule. Thus, in the very recent decision in *Akalazu v State,*[199] (drawn to my attention by Dr Olufemi Elias, President of the OPEC Administrative Tribunal), that Court stated:

> The attitude of this Court to the concurrent findings of facts by the two Courts below is no longer in doubt. This Court will only interfere or disturb such concurrent findings if the Appellant can show that the concurrent findings of facts are either perverse or they occasioned a miscarriage of justice to the Appellant.

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[195] *Bear Island* (n 191).
[196] [1994] 2 SCR 299 at 307.
[197] *Bear Island* (n 191).
[198] [2018] 2 SCR 103 at [76].
[199] (2022) LLJR-SC.

ii. **The Ambit of the Common Law Appellate Deference Rule**

[220] In oral argument before this Court, senior counsel for Apsara submitted that the appellate deference rule operates in respect of primary findings of fact but is not strictly observed in relation to inferences arising from primary facts. This is because, senior counsel contended, the appellate Court is in as good a position as the courts below to draw the proper inferences from those primary facts.

[221] In a seminal article A L Goodhart, 'Appeals on Questions of Fact' (1955) 71 LQR 402, Professor Goodhart examined the existing conflicting case law in England on appeals on questions of fact. He suggested that the conflict in the cases arose because the appellate courts had failed to distinguish between what he called the 'perceptive function' and the 'evaluative function' of a trial court. In relation to the perceptive function, the appellate court which did not have the opportunity to see the witnesses must accept the trial judge's conclusions on facts. In relation to the evaluative function, however, while accepting the specific facts as determined by the trial court, the appellate court was at liberty to evaluate them for itself.

[222] In *Benmax v Austin Motors Ltd*,[200] the House of Lords accepted Professor Goodhart's thesis and held that, as the sole question was as to the proper inference to be drawn from the accepted primary facts, the Court of Appeal was entitled to form an independent opinion. Courts of Appeal in the Commonwealth Caribbean have embraced this approach: see, eg, *Grenada Electricity Services Ltd v Peters*[201]; *Ward v Walsh.*[202] It is clear from these authorities that the rule that intermediate appellate courts, like the Courts of Appeal, may interfere with inferences from primary facts drawn by the trial is well settled. Indeed, s 61(1)(e) of the Supreme Court of Judicature Act, Cap 117 (Barbados) confers a power on the Court of Appeal to '…draw any inference of fact that might have been drawn' by the trial court.

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[200] *Benmax* (n 64).
[201] *Grenada Electricity Services* (n 44).
[202] *Ward* (n 72).

[223] All that said, it is important to quickly underline that none of the above cases nor the statutory provision purport to be authority on the rule as it relates to apex courts and concurrent inferences of fact by the lower courts. Admittedly, apex courts statutorily have all the powers of the Court of Appeal. However, the Court of Appeal by definition has no powers in respect of concurrent inferences of fact to pass on to the apex court.

[224] The rule on concurrent inferences of fact was addressed in the House of Lords case of *Hicks v Chief Constable of the South Yorkshire Police*.[203] The question in that case of what injuries were suffered by the victims before death was purely one of fact. The trial judge's conclusion on the evidence that the plaintiffs had failed to discharge the onus of proving any such injury sufficient to attract an award of damages was a finding of fact affirmed by the Court of Appeal. It was submitted by the appellant that as the primary facts were not in dispute the House was in as good a position as the courts below to draw the proper inferences from those primary facts. Lord Bridge of Harwich answered:

> … [T]his submission ignores the special restraint with which the House approaches findings of fact which are concurrent. In *Higgins v J & C M Smith (Whiteinch) Ltd,*[204] Lord Jauncey of Tullichettle, in a speech with which the rest of their Lordships agreed, said:
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> Where there are concurrent findings of fact in the courts below generally this House will interfere with those findings only where it can be shown that both courts were clearly wrong. It is nothing to the point that this House might on the evidence have reached a different conclusion…*The principle does not depend upon the advantage possessed by the judge of first instance of seeing and hearing the witnesses - that advantage will already have been reflected in the decision of the lower appellate court to confirm the findings of the judge* (emphasis added).

[225] Lord Bridge of Harwich then concluded:

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[203] *Hicks* (n 174) at 68.
[204] *Higgins* (n 173) at 82.

> This statement of principle in a Scottish appeal accurately reflects previous authority to the like effect in an English appeal (see *P Caland and freight (owners) v Glamorgan Steamship Co Ltd*...) and clearly applies to concurrent inferences of fact whether or not the primary facts are in dispute.

[226] In my view, there is a compelling reason why the *Hicks'* approach to concurrent inferences is justified. It is that it has not been shown that a final appellate court is likely to draw better factual inferences which lead to better justice than two concurring lower courts. In this regard, the observation of Iacobucci and Major JJ in the Supreme Court of Canada decision in *Housen v Nikolaisen*,[205] that 'there is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result.' is worth remembering.

[227] Pointing to the same conclusion is the observation of the United States Supreme Court in *Anderson v City of Bessemer*,[206] that:

> Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the main event' … rather than a 'try-out on the road.'

[228] Finally, I cannot help reminding myself of Lord Hoffmann's speech in *Biogen Inc v Medeva plc*,[207] where he said:

> The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made

[205] *Housen* (n 32).
[206] 470 US 564 (1985) at 574-575.
[207] *Biogen* (n 10).

> upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

[229] To summarise, the foregoing authorities establish that there are two aspects to the concurrent findings of fact rule. The first is the general rule that an apex appellate court should only interfere in concurrent findings of fact exceptionally and in circumstances where the courts below have made a palpable and overriding error which affected their assessment of the facts. This rule is applicable in respect of both findings of primary facts as well as inferences drawn from primary facts.

[230] The second is that there is a special appellate deference rule practiced in the Privy Council, but not in other apex courts, with respect to factual circumstances peculiar to the country from which the case comes involving local customs, attitudes, and conditions. In such cases, the Privy Council does not interfere with concurrent findings of fact on the basis that the lower court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.

iii. **This Court's Precedents on Concurrent Findings of Fact**

[231] In my view, this Court's precedents make it plain that in general, in relation to concurrent findings of primary facts, this Court's practice is similar to that in other common law apex courts. Thus, in *Ramlagan v Singh*,[208] Nelson J stated that, generally, it is only in exceptional circumstances that the Court would review concurrent findings of fact of the courts below. The principle in *Ramlagan* was affirmed by Anderson J in *Ramdehol v Ramdehol*.[209] He explained what was meant by exceptional circumstances as follows:

[208] [2014] CCJ 5 (AJ) (GY), GY 2014 CCJ 2 (CARILAW).
[209] *Ramdehol* (n 18).

> When we speak of exceptional circumstances, we mean cases including those where this Court is satisfied that:
>
> a. there was a miscarriage of justice;
> b. any advantage enjoyed by the trial judge, by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion;
> c. the reasons of the lower courts are not satisfactory;
> d. there is a lack of clarity and conflicting findings of fact; or
> e. there is a lack of any evidential basis.

[232] It is clear from Anderson J's explanation that the general concurrent findings appellate deference rule of the Court is to be strictly applied, at least in concurrent findings of primary facts.

[233] The law in the Court as it relates to concurrent inferences from primary facts is less clear. The decision in *Campbell v Narine*,[210] has sometimes been cited as authority that the strict concurrent findings rule does not apply to concurrent inferences from primary facts. With utmost respect to such a view, *Campbell* cannot be viewed as authority for any such proposition. *Campbell* was not a case of concurrent inferences. On the contrary, this was a case where the majority of the Court of Appeal of Guyana disagreed with the trial judge's findings of primary facts and inferences from those facts. This Court held that there was no sufficient basis for the Court of Appeal to have interfered with the findings of fact by the trial judge.

[234] Hayton J, who delivered the judgment of the Court in that case, in an obiter statement, mentioned *Benmax v Austin Motors Ltd*[211] and *Grenada Electricity Services Ltd v Peters*[212] but this was in relation to the appellate deference rule as it relates to the Court of Appeal and the trial judge. It was palpably not in relation to this Court and its practice on concurrent inferences from primary facts. Indeed, as explained above, neither *Benmax v Austin Motors Ltd*[213] nor *Grenada Electricity*

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[210] *Campbell* (n 43).
[211] *Benmax* (n 64).
[212] *Grenada Electricity Services* (n 44)
[213] *Benmax* (n 64).

Services Ltd v Peters[214] is any authority on an apex court's approach to concurrent inferences from primary facts.

[235] In my respectful view, the authority which this Court should follow in its approach to concurrent inferences from primary facts is the House of Lords decision in *Hicks v Chief Constable of the South Yorkshire Police*.[215] The strict approach which this Court adopts in respect of concurrent findings of primary facts should apply in respect of concurrent inferences from findings of primary facts as otherwise the concurrent findings rule would easily be rendered ineffective by labelling. One would not be surprised to find counsel wishing to relitigate concurrent findings of fact labelling their challenge as one against inferences from primary facts and not one against findings of primary facts.

[236] This Court's approach to the special appellate deference rule practiced in the Privy Council but not in other common law apex courts was, in my respectful opinion, correctly stated by Wit J in *Lachana v Arjune*.[216] He said of the Privy Council special rule articulated in *Devi v Roy*[217]:

> When their Lordships decided *Devi v Roy* they were at the judicial apex of an empire that spanned all five Continents. In a way they still are, although the empire has dwindled substantially. The point is that their Lordships are both geographically and culturally far removed from the countries that still retain the Privy Council as their final appellate court. They are, quite understandably, unfamiliar with local situations and customs, and therefore have to tread very carefully and cautiously with the facts as they emerge from the findings of the local courts. The disadvantages of that situation have become clear with some regularity. To take a recent example, in *Panday v Gordon* their Lordships expressly opted to defer to the findings of the lower courts even though it meant depriving the appellant of a fresh look at the factual substratum of the case. The difference with our Court is obvious. We are a regional Court and thus much closer to home as it were. Our closeness to the region and our greater familiarity with its social and cultural dimensions make it easier for us to descend into the facts of the

[214] *Grenada Electricity Services* (n 44).
[215] *Hicks* (n 174).
[216] *Lachana* (n 22).
[217] *Devi* (n 19).

> case, especially where the facts do not turn on the credibility of the witnesses or where they are the result of inferences from primary facts.[218]

[237] In my respectful view, Wit J was correct in recognising that, like the Privy Council, this Court has jurisdiction over a number of independent states with their own local cultural idioms and customs which could bring into play the special appellate deference rule practiced in the Privy Council. With regard to this, he held that because this Court is not geographically and culturally separated from these states like the Privy Council, this Court would take 'a more flexible approach' in approaching the special appellate deference rule than the Privy Council. As it appears to me, both Nelson J in *Ramlagan v Singh*[219] and Anderson J in *Ramdehol v Ramdehol*,[220] accepted the approach articulated by Wit J in *Lachana v Arjune*[221] without commenting on the ambit of its operation.

iv. **Application of the Concurrent Findings Rule to this Appeal**

[238] Senior Counsel accepts that this is not a case where the *Lachana v Arjune* rule is applicable. Senior Counsel accepts that, consequently, to bring this appeal outside the concurrent findings rule, he must show 'exceptional circumstances' consistent with the Court's precedents in *Ramlagan v Singh*[222] and *Ramdehol v Ramdehol*.[223]

[239] In seeking to show 'exceptional circumstances', Senior Counsel points to 'the delay of over three years for the delivery of the judgment of the High Court and the further delay of four and a half years for the delivery of the judgment of the Court of Appeal' as constituting such exceptional circumstances. Citing *Boodhoo v Attorney General of Trinidad and Tobago*,[224] Senior Counsel argues that such delays in themselves always raise concerns as to whether there has been a proper

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[218] *Lachana* (n 22) at [12] (footnote omitted).
[219] *Ramlagan* (n 208).
[220] *Ramdehol* (n 18).
[221] *Lachana* (n 22).
[222] *Ramlagan* (n 208).
[223] *Ramdehol* (n 18).
[224] *Boodhoo* (n 57).

consideration of the evidence and issues of law. They therefore constitute a potential violation of the right to the protection of law. Senior Counsel contends further that the delay in this case is compounded by the fact that all the members of the Court of Appeal had long retired by the time the judgment was delivered, with one of the Justices having taken up the position of Head of State.

[240] As was said by Lord Carswell in *Boodhoo*,[225] the case so heavily relied on by Senior Counsel:

> The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.

[241] Indeed, from as early as the first appeal heard by this Court, *Barbados Rediffusion Services Ltd v Mirchandani (No 1)*,[226] this Court has consistently condemned delay in the delivery of judgments: see also, eg *Reid v Reid*[227]; *Sea Haven Inc v Dyrud*.[228] In my view, these precedents support Mr Mendes' caution that such delays could have a negative impact on the parties' access to justice. It is also easy to accept Mr Mendes' further contention that such delays may have the potential effect of compromising the advantage which a trial judge enjoys in relation to matters of fact and that such delay calls for special care when reviewing the evidence which was before and the findings of fact which were made by the judge. But the authorities firmly establish that these theoretical propositions are not enough: Mr Mendes must do more. He must '…pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay.'

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[225] ibid at [1].
[226] [2005] 1 CCJ (AJ) (BB), (2005) 69 WIR 35 at [45].
[227] *Reid* (n 50).
[228] *Sea Haven* (n 49).

[242] The words of Lord Mance in the Privy Council decision in *Tex Services Ltd v Shibani Knitting Co Ltd*[229] are instructive. He explained:

> Regrettably, the judge did not deliver judgment for three years, until 14 January 2013. No particular explanation was vouchsafed for the delay. It is accepted by Mr Sauzier SC for Shibani that the advantage which a trial judge enjoys in relation to matters of fact may be weakened by such a delay and that such delay calls for special care when reviewing the evidence which was before and the findings of fact which were made by the judge. But it is still for an appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay.

[243] The operation of the *Tex Services* principle is well illustrated in the earlier Privy Council case of *Cobham v Frett*.[230] This case involved an appeal against an order of the Court of Appeal of the British Virgin Islands allowing an appeal of the respondent against the order of Georges J. The order declared that two parcels of land belonged to the appellant. The case concluded on 13 July 1994 and the judge did not give his judgment until 4 August 1995. A question arose as to what the legal effect of the admittedly excessive delay was on the judge's findings of fact.

[244] Lord Scott of Foscote, who delivered the judgment of the Board, answered as follows:

> In their Lordships' opinion, if excessive delay, and they agree that twelve months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.

[245] The delay in the delivery of the judgment of the trial judge is attacked by Apsara in two grounds in the notice of appeal. Ground (xxxiii) asserts that 'reliability of the Learned Trial Judge's assessment of the evidence and the credibility of the

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[229] *Tex Services* (n 52) at [7].
[230] *Cobham* (n 51) at 170.

witnesses was materially affected and compromised by the unreasonable delay of 36 months in the delivery of her judgment after the completion of the trial'. Meanwhile, ground (xxxiv) state that 'the Appellant and its directors' right to a fair hearing was compromised and denied by virtue of delay in the Learned Trial Judge's delivery of her judgment and the instances in which the Learned Trial Judge made adverse findings even though the contrary proposition was not put to the Appellant's witnesses during cross-examination'.

[246] Apsara has not in its written submissions nor in its oral arguments to this Court added anything to ground (xxxiii) to substantiate the allegation that the trial judge's assessment of the evidence and the credibility of witnesses contains errors that are in anyway attributable to the trial judge's delay in delivering her judgment. Similarly, nothing in the appellant's written submissions nor oral arguments to this Court added anything to ground (xxxiv) to justify its allegation of compromise and denial of its right to a fair hearing. As regards this latter failure to add anything to ground (xxxiv), I am reminded of the statement by Lord Carswell in *Boodhoo* that:

> In the Board's opinion delay in producing a judgment would be capable of depriving an individual of his right to the protection of the law, as provided for in s 4(b) of the Constitution of Trinidad and Tobago, but only in circumstances where by reason thereof the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should…The Board do not think it profitable to attempt to define more precisely the circumstances in which this may occur or to specify periods of delay which may bring about such a result, since cases vary infinitely and each has to be considered on its merits, applying this principle…The Board consider that no finite period can be prescribed and that the only applicable principle is that which the Board have enunciated.

[247] The delay in the delivery of the judgment of the Court of Appeal is challenged by Apsara in ground (xxxv) and ground (xxxvi). Ground (xxxv) states:

> The Court of Appeal's ability to adequately and effectively review the reliability of the Learned Trial Judge's assessment of the evidence and the

> credibility of the witnesses was materially affected and compromised by the unreasonable delay of 56 months in the delivery of its judgment after completion of the hearing of the appeal, moreso having regard to the fact that one of the Justices of Appeal had resigned her position as a Justice of Appeal to take up the post of Governor General at least three years before the delivery of the judgment and the other two Justices of Appeal retired from the bench just under two years before delivery of the judgment.

[248] Ground (xxxvi) reads as follows:

> The Appellant was denied the full measure of justice it could receive from the Court of Appeal by virtue of the retirement of all of the members of the panel who heard the appeal. Madame Justice of Appeal now Dame Sandra Mason was appointed Governor of Barbados in 2018 and by 2020 both Chief Justice Sir Marston Gibson and Madame Justice of Appeal had retired from the bench.

[249] As regards ground (xxxv), Apsara merely repeats the allegation in this ground in its written submissions to this Court and did not address it in its oral presentation to this Court. Nothing is offered to establish a nexus between the delay in the delivery of judgment and the alleged denial to the appellant of 'the full measure of justice it could receive from the Court of Appeal'.

[250] It is instructive that in this Court's decision in *Knox v Deane*[231], Saunders P, whilst decrying a delay of four years in the delivery of a judgment by the Barbados Court of Appeal, affirmed the principle that, in challenging a judgment as denying an appellant justice based on excessive delay, the appellant must adduce evidence that the judgment contained errors that could possibly have been attributable to the excessive delay. In this regard, a statement of Saunders P in that case is especially resonant. He said in relation to the delay in that case: 'we do not know (and admittedly it may be impossible for a litigant to know) the date when the Court of Appeal Bench decided this matter as distinct from the date when that decision was reduced to writing, dated or pronounced.'

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[231] *Knox* (n 58).

[251] As regards ground (xxxvi), Apsara has not addressed the allegation in this ground in either its written or oral submissions to this Court. Nothing is offered to establish how the retirement of the three Justices of Appeal contributed to the appellant being 'denied the full measure of justice it could receive from the Court of Appeal'. What is more, the appellant did not seek to explain such a denial in light of s 84(2) of the Barbados Constitution which provides in the relevant part:

> Notwithstanding that he [a judge] … (b) has retired or resigned… a person may sit as a Judge for the purpose of delivering judgment or doing any other thing in relation to proceedings which were commenced before him before he attained that age or, as the case may be, retired or resigned.

[252] Nor indeed, has the appellant cited or attempted to explain this Court's decision in *Knox v Deane* which confirmed that s 84(2)(b) of the Barbados Constitution expressly permits the delivery of a judgment or the doing of any other thing commenced by her/him before retirement or resignation.

[253] There is no doubt that there was excessive delay in this case and that any such delay is to be decried in the strongest possible terms. However, the appellant has not adduced any evidence to suggest that the trial judge misremembered or forgot any evidence in writing her judgment. In fact, the trial judge produced a carefully written judgment which was 78 pages long and covered 318 paragraphs wherein she explored in minute detail the evidence of the witnesses who appeared before her and the examination, cross-examination, and submissions of counsel. The Court of Appeal, whilst correctly observing the principles of appellate deference, diligently reviewed the trial judge's findings of fact and satisfied itself that her findings should be upheld.

[254] To be sure, Apsara challenged 19 findings of fact made by the Trial Judge which were upheld by the Court of Appeal. There was nothing advanced by Apsara that even vaguely suggests that the admitted excessive delay adversely affected the quality of justice in this case. Without a demonstration by the appellant of such

adverse effect, the 'exceptional circumstances' test required by this Court to review concurrent findings of fact was not satisfied.

[255] And so, I turn to the next issue raised in this appeal, namely, the non-disclosure of material facts issue.

The Non-Disclosure of Material Facts Issue

Introduction

[256] Crane-Scott J's main reason for denying Apsara's claim was that it was guilty of material non-disclosure in that it failed to disclose three material facts. These are (i) that Gulf Insurance Co Ltd had cancelled a policy with O'Meara Food Products Ltd (O'Meara), a company whose directors and shareholders were the same as the directors and shareholders of Apsara; (ii) that O'Meara had made a claim under an insurance policy with Maritime General Insurance Co Ltd which was denied; and (iii) that O'Meara and the directors of Apsara owed substantial sums of money to the Agricultural Development Bank of Trinidad and Tobago in respect of which judgment had been entered against them.

[257] The Court of Appeal upheld the decision of Crane-Scott J on this issue.

[258] In its grounds of appeal (ii) to (xii), Apsara has challenged the Court of Appeal's decision to uphold the decision of the trial judge as being wrong as a matter of law. Mr Mendes SC has dealt with these grounds in his written and oral submissions under the headings (i) The cancellation of the Gulf Insurance; (ii) The O'Meara Foods Claim, and (iii) Indebtedness to the Agricultural Development Bank. I propose to utilise this schema. However, considering that the question whether any of these three facts which were held not to be disclosed by Apsara is material is a question of law whereas the actual determination of materiality involves the

resolution of a question of fact, I propose to begin by examining the law on the insured's disclosure duty.

i. **Pan Atlantic and the Insured's Disclosure Duty**

[259] The insured's disclosure duty was long ago settled in the case of *Carter v Boehm*.[232] In that case, Lord Mansfield famously propounded that:

> First, insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. Keeping back such circumstance is a fraud, and, therefore, the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement. The policy would equally be void, against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to be arrived, and an action would lie to recover the premium.
>
> The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.

[260] In Barbados, Lord Mansfield's dictum is codified in ss 20 and 21 of the Barbados Marine Insurance Act, Cap 292. These sections read as follows:

> 20. A contract of marine insurance is a contract based upon the utmost good faith; and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.
>
> 21. (1) Subject to this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance that is known to the assured; and the assured is presumed to know every

[232] *Carter* (n 74).

circumstance that, in the ordinary course of business, ought to be known by him; and if the assured fails to make any such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry, the following circumstances need not be disclosed:
(a) any circumstance that diminishes the risk;
(b) any circumstance that is known or presumed to be known to the insurer; and the insurer is presumed to know matters of common notoriety or knowledge, and matters that an insurer in the ordinary course of his business, as such, ought to know;
(c) any circumstance in respect of which information is waived by the insurer; and
(d) any circumstance that it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance that is not disclosed is material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

[261] Two observations must be made in respect of these provisions. The first is that the provisions are based on ss 18 and 20 of the UK Marine Act, 1906 and that, based as they are on the UK Act, it is universally recognised that, even though occurring in an Act on marine insurance, the provisions are a codification of the common law and as such apply to all types of insurance contracts: see *Joseph v CLICO International General Insurance Co Ltd*;[233] *Lambert v Co-op Insurance Society Ltd*.[234]

[262] The second is that the House of Lords decision in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*,[235] subjected s 20(2) of the UK Act, the sub-s *in pari materia* with s 21(2) (Barbados), to extensive analysis and that this case is now

[233] *Joseph* (n 115).
[234] *Lambert* (n 81).
[235] *Pan Atlantic* (n 1).

regarded as the leading authority on the meaning of materiality in insurance law in the Commonwealth Caribbean: See *Joseph v CLICO International General Insurance Co Ltd*[236]; *Ali v Hand-in-Hand Mutual Fire & Life Insurance Ltd*.[237] Indeed, without venturing any discussion on what *Pan Atlantic* decides, both Mr Mendes and Mr Forde claimed to base their arguments on the authority of that case. For these reasons, assessment of their arguments as to whether there was material non-disclosure in the instant case must be preceded by a close examination of the *Pan Atlantic* case.

[263] The brief facts of *Pan Atlantic* are that Pan Atlantic claimed payment from Pine Top under a long-term (tail) insurance. Pine Top refused to pay, claiming that the contract was void because of misrepresentation or nondisclosure. Pan Atlantic had not disclosed an insurance claim of USD25,000 in relation to a 1980 reinsurance contract and had incorrectly stated that the total amount of claims in 1981 was USD235,768 whereas it was in fact USD468,168. Pan Atlantic had conceded, ever since the service of the amended Defence, that there had been inadvertent non-disclosure in respect of those items. It had not been suggested that the non-disclosure was deliberate.

[264] Before the House of Lords, *Pan Atlantic* argued that the test of whether a fact could be considered material was: (i) whether a prudent insurer, if it had known of the undisclosed fact, would either have declined the risk altogether or charged an increased premium ('decisive influence' test); and (ii) whether the actual insurer would itself have declined the risk or charged an increased premium ('actual underwriter' test). Pine Top, on the other hand, contended that the test was whether a prudent insurer would have 'wanted to know,' or would have 'taken into account' the undisclosed fact, even though it would have made no difference to its conduct as a result ('want to know' test). *Pine Top* also contended that the effect on the actual insurer was irrelevant.

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[236] *Joseph* (n 115).
[237] (2001) 65 WIR 186 (GY HC) and (2007) 71 WIR 227 (GY CA).

[265] The arguments before the House of Lords in *Pan Atlantic* are best understood in light of the UK Court of Appeal decision in *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [238] (the *CTI* case), the then leading English authority on materiality in Insurance Law. The *CTI* case had decided that it did not have to be shown that the misrepresented or non-disclosed fact had had a 'decisive influence' on the mind of the insurer, in the sense that it would have acted differently if it had known the true facts; it was enough to prove that a prudent insurer would 'have wished to know' the facts when making its assessment of the risk. The effect of this decision was that, if an insured made a material non-disclosure or misrepresentation, the insurer would be entitled to avoid the policy, even where its underwriter would still have written the risk, albeit on different terms, or even where the underwriter was entirely unaffected by the non-disclosure.

[266] As Lord Mustill who delivered the leading judgment of the majority in *Pan Atlantic* noted the *CTI* case was widely criticised as being too harsh. Indeed, this was the bane of Pan Atlantic's argument before the House that the *CTI* materiality test should be altered so that only misrepresentations or non-disclosures that would have 'decisively influenced' a prudent insurer would be material.

[267] The House of Lords decided firmly by a majority (Lords Goff, Mustill and Slynn) that the prudent insurer materiality test did not require it to be shown that a prudent insurer would have reached a different decision, it was enough that a prudent insurer would have 'wanted to know'. Thus, the majority rejected the 'decisive influence' test for materiality, taking the view that a 'decisive influence' requirement would be contrary to the natural and ordinary meaning of the provisions in ss 18 and 20, and in particular s 20(2), of the 1906 UK Act (ss 20 and 21, and in particular s 21(2) of the Barbados Act). They reasoned that these sections refer to circumstances which would 'influence the judgment' of a prudent insurer in fixing the premium or in determining whether he will take the risk. According to

[238] *Container Transport International* (n 84).

Lord Mustill, 'influence the judgment' in s 18(2) UK is not the same as 'change the mind' (at 695).

[268] There was strong dissent from the minority by Lord Templeman and Lord Lloyd. They both suggested that nothing could be construed as influencing the judgment of a prudent insurer, as required by s 18(2) UK, if the insurer would have not acted differently. For this reason, they favoured the decisive influence test.

[269] The upshot of the foregoing is that the *CTI* materiality test was left largely undisturbed by the House in *Pan Atlantic*. However, the House held unanimously that inducement should be introduced as an element of non-disclosure or misrepresentation. Lord Mustill reasoned:

> … [T]here is to be implied in the Act of 1906 a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract, using "induced" in the sense in which it is used in the general law of contract.

[270] According to Lord Mustill, the requirement for inducement was in line with the common law position for misrepresentation generally. He noted that there was no equivalent common law for non-disclosure. However, as noted by Birds (see [100]), he reasoned that given that 'the rules relating to misrepresentation and non-disclosure, at least as they affect materiality and subsequent avoidance, should be, and indeed always have been, the same', the inducement test applicable to misrepresentation should apply also to non-disclosure. He summarised the position as follows:

> A circumstance may be material even though a full and accurate disclosure of it would not in itself have had a decisive effect on the prudent underwriter's decision whether to accept the risk and if so at what premium. But…if the misrepresentation or non-disclosure of a material fact did not in fact induce the making of the contract (in the sense in which that

expression is used in the general law of misrepresentation) the underwriter is not entitled to rely on it as a ground for avoiding the contract.

[271] It is clear beyond peradventure, then, that two principles were firmly established by the House of Lords in *Pan Atlantic*. The first is that the materiality test is whether a prudent insurer would have 'wanted to know,' or would have 'taken into account' the undisclosed fact, even though it would have made no difference to his conduct as a result. The test is not whether the undisclosed fact would have a 'decisive influence' on the prudent insurer. The second is that the insurer is not entitled to rely on the non-disclosure unless the insurer can show that the non-disclosure did in fact induce the making of the contract. The 'actual underwriter' test.

[272] Of course, House of Lords' decisions are not without more binding on this Court. Notwithstanding, they are three good reasons, in my judgment, why this Court should treat the principles laid down in *Pan Atlantic* as correctly representing the law in Barbados. First, the courts in Barbados, and indeed in the common law Caribbean, have so treated that case: see *Joseph v CLICO International General Insurance Co Ltd* [239]; *Ali v Hand-in-Hand Mutual Fire & Life Insurance Ltd*[240] What is more, courts in the Bahamas, Jamaica, some OECS countries and Trinidad and Tobago are bound *ipso jure* by the *Pan Atlantic* principles. In the absence of the most compelling reasons, this Court should be slow to create divergent materiality tests amongst CARICOM countries with the implications that would have for the insurance industry in CARICOM.

[273] The second reason is that the 'want to know' test accords best with the words used in s 18(2) of the 1906 UK Marine Insurance Act and thus s 21(2) of the Barbados Act. As Lord Mustill said, the words *'*influence the judgment of a prudent insurer*'* in s 18(2), *'*denotes an effect on the thought process of the insurer in weighing up the risk*'*. Put differently, the words in s 18(2) refer to the insurer's decision-making process rather than the final decision that was made by the insurer.

[239] *Joseph* (n 115).
[240] Ali (n 237).

[274] The third, and for me, most persuasive reason is the introduction of the inducement test which makes it more difficult for an insurer to avoid a policy where there has been a non-consequential material non-disclosure. Before the introduction of the inducement test, an insurer only needed to show that the non-disclosure was material. Since *Pan Atlantic*, an insurer must also establish that the non-disclosure either affected whether it would have written the policy at all or at least affected the terms it offered. In my view, the inducement requirement renders superfluous the 'decisive influence test' and may be of signal importance in consumer type insurance in our Caribbean countries where there is no consumer insurance protection legislation.

ii. **Application of the Pan Atlantic Test to this Case**

[275] I now turn to the application of the *Pan Atlantic* test to this case. In this regard, two questions must be answered. These are (i) whether there were facts which were not disclosed; and (ii) whether the non-disclosed facts were material.

iii. **Whether there were Non-Disclosed Facts**

[276] The trial judge held that Apsara did not disclose to the respondent the cancellation of the Gulf Insurance policy. As regards this, Apsara contends that the trial judge was wrong in holding that the Gulf Insurance Ltd insurance policy was in fact cancelled. In particular, the appellant maintains that the trial judge wrongly rejected the evidence of Mohammed and Mr Ramlal, the Underwriting Manager of Gulf Insurance Ltd at the time, that there was no cancellation of that policy and that the Court of Appeal was wrong in upholding this finding.

[277] In respect of this contention, and as has already been extensively discussed, I would be slow to countenance disturbing this concurrent finding of fact and therefore I find it unnecessary to recite the evidence of Mohammed and Mr Ramlal. Suffice it to say that apart, there appears to me to be documentary evidence before the trial

judge from which to draw the conclusion that the policy was in fact cancelled. What is more, the trial judge noted that Ramlal 'under cross-examination by counsel for the defendant… conceded that the policy had been cancelled'. So that there was also testamentary evidence on which the trial judge could base her factual finding that the Gulf Insurance Policy was cancelled. It is to be noted that it is agreed on all sides that the fact of the cancellation was not disclosed by Apsara to Guardian.

[278] Apsara also challenges the trial judge's finding of fact that it, acting through its brokers, failed to disclose to Guardian that Maritime refused to pay out a claim to O'Meara, in circumstances where Mohammed and Kavanagh were the alter egos of O'Meara and Apsara. They argue that the evidence before the trial judge did not disclose fraud as was pleaded by Guardian and that based on *Ewer v National Employers' Mutual General Insurance Association Ltd*,[241] Apsara was not bound to disclose claims made under other policies in respect of a different subject matter.

[279] That argument fails for two good reasons. First, the trial judge expressly noted that the claim was not denied because of fraud. She held however that Guardian had also pleaded that the claim was denied because it was baseless and that the evidence supported the fact that the claim was denied because it was baseless as pleaded.

[280] Second, the case of *Ewer v National Employers' Mutual General Insurance Association Ltd* [242] is not authority for the proposition contended by Apsara. That was a case where the insurers sought to argue that (i) the insured under a fire insurance policy was under a duty to disclose every claim he had ever had upon any other insurance policy no matter what the subject matter, (ii) the fact that any other insurance company had declined to insure or to renew an insurance upon another subject matter, and (iii) similar details of the insured's insurance history. It was held that the insured was not bound to disclose any of those facts. What is telling is that the editorial note to this case reads: 'The present case did not really test the exact

[241] *Ewer* (n 126).
[242] ibid.

limits of disclosure.' In my respectful view, *Ewer v National Employers*'[243] is a case which turned on its peculiar facts and is no authority to support a legal proposition that Apsara was not bound to disclose claims made under other policies in respect of a different subject matter.

[281] Considering the foregoing, I am of the view that the trial judge was correct in law and in fact in finding that Apsara did not disclose the O'Meara claim and that it was obligated to do so.

[282] In relation to this aspect of the appeal, I must note Apsara's challenge 'to certain adverse findings which the trial judge made in relation to Mohammed's credibility.' As to this, I can do no more than rely on the deluge of authority against appellate courts interfering with the trial court's findings on the credibility of witnesses: see eg *Onassis v Vergottis*[244]; *Grenada Electricity Services Ltd v Peters*[245] These authorities make it plain that, absent glaring examples of the trial judge treating 'Mr Mohammed unfairly in drawing adverse inferences as to his credibility' as claimed by the appellant, this Court should decline interfering with her assessment in this regard.

[283] For emphasis, I think it useful to cite the judgment of Stuart-Smith LJ in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (The *Ikarian Reefer)*,[246] on the approach of an appellate court in cases in which the court is asked to reverse a judge's findings of fact which depends upon her/his view of the credibility of the witnesses. He stated there as follows (at 458):

> (1) The burden of showing that the trial Judge was wrong lies on the appellant. …
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> (2) When questions of the credibility of witnesses who have given oral evidence arise the appellant must establish that the trial Judge was

[243] ibid.
[244] [1968] 2 Lloyd's Rep 403 at 431 (Lord Pearce).
[245] *Grenada Electricity Services* (n 44) (Byron CJ).
[246] [1995] 1 Lloyd's Rep 455.

> plainly wrong. Once again there is a long line of authority emphasizing the restricted nature of the Court of Appeal's power to interfere with a Judge's decision in these circumstances though in describing that power different expressions have been used. In *SS Hontestroom v. SS Sagaporak* … [1927] A.C. 37 at p. 47 Lord Sumner said:
>
> > None the less not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the results of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

[284] The third fact whose materiality is in dispute is the indebtedness of the directors of Apsara to the Agricultural Development Bank of Trinidad and Tobago. Here, the appellant admits that O'Meara, Mohammed, and Kavanagh were jointly and severally liable to the Agricultural Development Bank for the sum of TTD1,060,075.19 and that a judgment was entered and registered against them in that amount. Apsara also admits that this fact was not disclosed by them to Guardian. Their only contention here is that that fact was not material.

iv. **Whether the Undisclosed Facts were Material**

[285] In approaching this question, it is important to recall two relevant, settled principles. The first is that, as already seen, based on *Pan Atlantic*, the materiality test is whether a prudent insurer would have 'wanted to know,' or would have 'taken into account' the undisclosed fact, even though it would have made no difference to its conduct as a result. The test is not whether the undisclosed fact would have a 'decisive influence' on the prudent insurer.

[286] The second is that the question of materiality is a question of fact to be determined by the trial judge and that materiality may be proved by the court relying on its own sense of the prudent underwriter or by calling expert evidence in addition to the

insurer's own evidence. Of this, Professor John Bird, in *Birds' Modern Insurance Law* (6th edn, Sweet & Maxwell 2004), writes:

> While the test to be applied to determine whether or not a non-disclosed fact is material is a question of law, the actual determination of the issue in any particular case involves the resolution of a question of fact. As such, it is generally a question solely for the trial judge or arbitrator and not subject to appeal, and, furthermore, strictly no decision is actually binding in a later case under the doctrine of precedent.

[287] I turn then to assessing the materiality of the three non-disclosed facts.

[288] First the non-disclosure of the cancelled policy. Apsara proceeded on the basis that for the non-disclosure of a cancellation of an insurance policy to be material the reason for the cancellation must be known and would have had an effect on the mind of the prudent insurer in estimating the risk. In his oral presentation to this Court, I raised the question with Senior Counsel as to how this view of the law fit into the *Pan Atlantic* test. Senior Counsel, as it appears to me, relied on his written submissions in answer to this question. And so, I turn to the appellant's written submissions.

[289] In his written submissions, Senior Counsel cites as authority a sentence from *MacGillivray on Insurance Law* (13th edn, Sweet & Maxwell 2015) 493, para 17-068 which states: '…it would appear that the bare fact of refusal is not in itself material but rather the reason given for it, such as claims experience, where that is known to the insured.' Senior Counsel cites in support of this 'principle' the Manitoba decision in *Konowsky v Pacific Marine Insurance Co*,[247] *Locker and Woolf Ltd v Western Australian Insurance Co Ltd,*[248] and *Ewer v National Employers'Mutual General Insurance Association Ltd* .[249] It does not appear to me, however, that any of these authorities support any such principle.

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[247] *Konowsky* (n 123).
[248] *Locker* (n 125).
[249] *Ewer* (n 126).

[290] To begin with, Senior Counsel cited Adamson J in *Konowsky v Pacific Marine Insurance Co,*[250] where he said:

> All the evidence discloses is the bald fact that there was a cancellation; by whom, how, or under what circumstances is not shown. There may very well have been a cancellation under circumstances making it clearly not a 'circumstance material to be known to the Company.' … Something more than the mere fact that [there was] some sort of cancellation must be shown. Materiality must be really proven and will not be assumed…

This dictum was uttered in relation to a 'circumstance material to be known to the Company' within the meaning of a requirement under the Manitoba Fire Insurance Policy Act 1913. Adamson J was not purporting to enunciate any general principle as suggested by Apsara.

[291] Similarly, the decision of *Locker and Woolf Ltd*[251] does not support that principle. The principle which emerges from this case is that the obligation on a person making a proposal for insurance against fire insurance is not limited to matters exclusively relating to fire risks but extends to any matter which would influence the judgment of the insurance company in deciding whether to take or refuse the risk. Thus, it was held in that case that the non-disclosure of the refusal of motor car insurance was the non-disclosure of a material fact in the proposal for the fire insurance.

[292] I have already dealt with *Ewer v National Employers' Mutual General Insurance Association Ltd*[252] and this case does not support the principle alleged by Apsara. In any event, all the decisions cited by Senior Counsel must now be read in the light of *Pan Atlantic*.

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[250] *Konowsky* (n 123).
[251] *Locker* (n 125).
[252] *Ewer* (n 126).

[293] In my judgment, the trial judge set out the relevant principles of law with respect to materiality. In particular, the trial judge relied on the *Pan Atlantic* test of materiality, namely, whether the non-disclosure of the cancellation of the Gulf Insurance Ltd policy is a fact which a prudent insurer would have 'wanted to know,' or would have 'taken into account' in evaluating the risk, even though it would have made no difference to its conduct as a result.

[294] On this matter, the judge heard and accepted the evidence of Mr Yeardon and Mr Nigel Adams to the effect that the cancellation of an insurance policy and return of premiums is a moral hazard which will almost invariably excite the interest of a prudent insurer and cause it to make further enquiries with a view to ascertaining, prior to the issuance of the insurance policy, the reason for the cancellation and in particular, whether the cancellation has occurred for an adverse reason. The judge was therefore correct in finding the non-disclosure of the Gulf Insurance Ltd policy a material non-disclosure as this was a fact which a prudent insurer would have 'wanted to know,' or would have 'taken into account' in evaluating the risk.

[295] Second, the materiality of the non-disclosure of the O'Meara Food claim. Here, the trial judge held the non-disclosure by the appellant of the denial by Maritime Insurance claim to be a material non-disclosure. In reaching this conclusion, the trial judge relied upon her 'own sense of the attitude of a prudent underwriter'. She was entitled to do so. That conclusion is a question of fact, and the appellant has not shown any plain error by the judge in reaching her conclusion sufficient to allow this Court to get beyond her finding of fact.

[296] Third, the non-disclosure of the appellant's indebtedness to the Agricultural Development Bank. Here again, the judge found that the non-disclosure of the indebtedness of O'Meara, Mohammed and Kavanagh to the Agricultural Development Bank of Trinidad and Tobago was a material non-disclosure. In reaching that conclusion, the judge relied on the expert evidence of Mr Yeardon to the effect that this would be a fact which the prudent insurer would want to know.

On this finding, I would say like Viscount Dunedin in *Glicksman v Lancashire and General Assurance Co Ltd*,[253] commenting on an arbitrator's findings of materiality: 'I have considerable doubts, but then I am not entitled to take any view of my own on that, because that is a fact and the arbitrator has found it as a fact and I cannot get beyond the arbitrator's finding'.

v. **Whether the Non-Disclosure of these Material Facts Induced the Issuance of the Policy**

[297] It bears repeating that *Pan Atlantic* firmly establishes that it is not sufficient to avoid liability that the non-disclosure is material, the material non-disclosure must induce the contract in the sense in which it is used in the general law of contract. It was not necessary in *Pan Atlantic* to consider the precise meaning of 'induced' in the general law of contract. However, Lord Mustill referred to a presumption of inducement.

[298] Of the presumption of inducement, *Halsbury's Laws of England* (4th edn, 2003) vol 31, para 766 states as follows:

> Inducement cannot be inferred in law from proved materiality, although there may be cases where the materiality is so obvious as to justify an inference of fact that the representee was actually induced; but, even in such exceptional cases, the inference is only a prima facie one and may be rebutted by counter-evidence (footnotes omitted).

The learned authors of Halsbury cite numerous authorities in support of this principle including the House of Lords decision of *Smith v Chadwick*.[254]

[299] In my view, considering the general law on misrepresentation, the inducement must be an effective cause of the actual insurer entering into the contract but need not be

[253] [1927] AC 139.
[254] (1884) 9 App Cas 187, [1881-85] All ER Rep 242.

the sole cause: *Edgington v Fitzmaurice*[255]*; JEB Fasteners Ltd v Marks Bloom & Co*.[256] If the insurer would have entered the contract on the same terms in any event, the representation or non-disclosure will not, however material, be an effective cause of the making of the contract and the insurer or reinsurer will not be entitled to avoid the contract.

[300] As it appears to me, the post *Pan Atlantic* cases on the presumption of inducement may be summed up in this way. There is no presumption of law that an insurer or reinsurer is induced to enter into the contract by a material non-disclosure or misrepresentation. However, a presumption arises where the evidence before the court is enough to lead to the inference that the insurer was, as a matter of fact, induced to enter into the contract even in the absence of evidence from the insurer, in the sense that the non-disclosure was an effective cause of it entering the contract on the terms on which it did: *Fairchild v Glenhaven Funeral Services Ltd*[257]*; St Paul Fire and Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd*,[258] Of course, as is pointed out in Halsbury (supra), '…the inference is only a *prima facie* one and may be rebutted by counter evidence.'

[301] In the extant case, the trial judge held at [169] of her judgment that the facts before her established 'an evidential presumption' that the non-disclosed facts had 'induced the unsuspecting insurer in this case to enter the contract of insurance'. She also relied on the evidence of the Guardian's Operations Manager that had the undisclosed facts been known to Guardian, it would have 'declined the risk'. Apsara did not adduce any evidence to either rebut the presumption of inducement or the evidence of the Operations Manager. The trial judge's conclusion was in consonance with the principles on inducement as I understand them. Accordingly, I find that the Court of Appeal was correct in upholding the judgment of the trial judge that the inducement requirement was satisfied.

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[255] (1885) 29 Ch D 459.
[256] [1983] 1 All ER 583.
[257] [2003] 1 AC 32.
[258][1996] 1 All ER 96.

The Arson Issue

[302] The trial judge considered the issue of arson between [171] to [288] of her judgment. The trial judge phrased this issue as follows: 'was the fire occasioned by arson, or with the connivance of the (claimant)?' as alleged by Guardian.

[303] The judge began by reciting Condition 13 of the policy which reads as follows:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices used by the insured or anyone acting on his behalf to obtain a benefit under this policy, or, if loss or damage be occasioned by the willful act, or with the connivance of the insured, or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.

[304] Citing the authorities of *Bater v Bater*[259]*; Chung v Colonial Fire and General Insurance Co Ltd*[260]; *Hornal v Neuberger Products Ltd*[261]*; inter alia*, the trial judge accepted that the legal burden of proof rested with Guardian to satisfy the court to a high degree of probability that the 'loss and damage to property insured under the policy was occasioned … by the wilful act of the (claimant) company or with its connivance and contrary to the conditions of the policy.'

[305] Against this background, the trial judge considered expert evidence from Mr Patrick Zoë: double certified investigator by the New York Department of State, Forensic Fire Cause and Points of Origins Specialist Investigator for more than 15 years, Member of the International Association of Arson Investigators for more than 15 years; and Mr Mark Sargeant: the managing director of Forensic

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[259] *Bater* (n 136) (Denning LJ).
[260] *Chung* (n 139).
[261] *Hornal* (n 137).

Consultants Inc, BSc in Forensic Science from John Jay College of Criminal Justice, New York 1995 and MSc in Forensic Science from John Jay in 1997.

[306] Mr Zoë's evidence was that the fire was not accidental and that it was deliberately started. He also ruled out electrical fault and spontaneous combustion. In support of his conclusion, Mr Zoë pointed to what he termed the 'phenomenal fire spread', the wide extent of extensive and complete fire destruction of floorings at both floor levels, the evidence of high temperature fire and two fire seats and the fact that the Buddha statue appeared to be missing.

[307] The evidence of Mr Sargeant was that the fire was incendiary in nature. His expert opinion was based primarily on the fact that he had ruled out accidental causes, spontaneous combustion and mechanical, electrical and chemical causes.

[308] Two fire investigators also gave evidence that there was no electrical cause to the fire. This was buttressed by evidence from an electrician, Mr Walcott, that, without some accelerant, an electrical cause 'would not explain the obviously rapid spread of the fire between the floors and the ultimate near total destruction of 'Morecambe House' and its contents'.

[309] The trial judge found as a fact that the fire had been deliberately set and that there was a high degree of probability that the 'loss and damage to property insured under the policy was occasioned, as alleged by the defence by the wilful act of the (claimant) company or with its connivance and contrary to the conditions of the policy.

[310] The judge indicated that her finding that the fire was deliberately set was based 'to a great extent on the evidence of the forensic scientists'. She made the following findings of fact based on the evidence at [282] of her decision:

a. The fire originated in *two areas of the building,* specifically, on the ground floor as well as the First Floor. The Court was satisfied that the presence of a minimum of two seats of fire each burning simultaneously and unrelated to each other, was a strong indicator of a fire which was deliberately set;

b. … the state of complete fire destruction in several areas of the building indicated "*extreme high temperature burnings*" wholly consistent with the use of fire enhancers or accelerants;

c. … that the contents of the rooms in the building namely the chairs, tables and tablecloths and the wooden floors, ceilings and facades were incapable of producing such high temperature burning without the use of accelerants;

d. … the downward burning patterns on the ground and first floors coupled with the "*phenomenal fire spread*", the wide extent of extensive and complete fire destruction of the floorings at both floor levels, the evidence of high temperature fire and the fact that the ceilings, which were built with fire-retardant Gypsum materials, had been completely destroyed reflected unnatural or abnormal fire behaviour;

e. [That Apsara] was experiencing financial difficulties and incurring severe losses… (i) the company's fixed assets which represented 97.27% of its asset base was less that its total indebtedness…; (ii) the company's bank accounts were all in overdraft; and (iii) the company had no cash;

f. [That] within a period of 3 hours immediately prior to the fire, an employee of the [claimant] company had locked up the premises and handed the keys to Mr. Sharif Mohammed;

g. [That] Mr. Mohammed was physically present in the nearby Annex situated on the first floor and adjacent to both restaurants where the fire occurred; and

h. …the fire alarms installed in the building were found by investigators to have been disabled prior to the fire.

[311] The appellant challenges the decision of the trial judge, which was upheld by the Court of Appeal, on a number of grounds. These grounds are substantially challenges of the trial judge's findings of fact and the Court of Appeal's upholding of these findings. In my view, these challenges would require this Court to depart

from its settled practice with respect to interfering with concurrent findings of fact. As noted in this judgment, exceptional circumstances would have to be shown by the appellant for this Court to so depart.

[312] The appellant has not pointed to any such exceptional circumstances. The appellant has simply provided its interpretation of the evidence which the trial judge was entitled to reject when weighed against other evidence provided by the forensic experts. As an example, whilst it may have been open to the trial judge to determine, as Apsara suggests, that other substances contributed or not to the spread of the fire, there was no evidence before her on which she could make that determination. She quite properly accepted the evidence of the experts, and she was well within her remit to refrain from speculating on matters outside her ken.

[313] As a general comment, it is my view that, contrary to the appellant's contention, the trial judge was entitled to rely on the evidence of the experts before her and to refrain from making pronouncement on evidence outside of the ambit of the record. The trial judge was entitled to consider all the evidence before her and consider the weight to place on it to arrive at her determination.

[314] To conclude on this issue, the appellant has failed in presenting exceptional circumstances which would warrant this Court interfering with the concurrent findings of fact by the trial judge and the Court of Appeal. Its submissions on the issue of arson have not raised matters of law or even of mixed law and fact. They are submissions about the facts. These submissions have been presented as challenges to the judge's evaluation of facts, but the reality is that those challenges were of the judge's assessment of the evidence before her and hence of her findings of fact. This puts the appeal on the issue of arson squarely within the ambit of this Court's concurrent findings of fact rule and the appellant has not shown anything to justify a departure from that rule. In my judgment, that is a sufficient reason for dismissing the appeal on the issue of arson.

Conclusion

[315] For the foregoing reasons, I would uphold the decision of the Court of Appeal that the respondent was entitled to cancel the policy of insurance and return the premiums to the appellant based on the appellant's non-disclosure of material facts and the fact that the fire was occasioned by arson, or with the connivance of Apsara. I agree with the majority that the decision of the Court of Appeal that the appellant was in breach of Clause 11 cannot be upheld and must be reversed on this issue. Accordingly, I would order that the decision of the Court of Appeal be upheld and that the respondent is entitled to costs as ordered.

JAMADAR J:

Introduction

[316] I agree with the following outcomes: (i) that the respondent was entitled to cancel the policy of insurance and return the premiums to the appellant based on the appellant's non-disclosure of inducing material facts, and (ii) that the decision of the Court of Appeal that the appellant was in breach of Clause 11 cannot be upheld and must be reversed. On the arson issue, I am of the view that it has not been established on the evidence that the appellant was deliberately involved in setting the fire, whether acting through Mr Mohammed or otherwise, as explained below in my discussion on the concurrent facts analysis. On the non-disclosure issue, and in the unique circumstances in which this issue has arisen for consideration by this Court, I agree with the legal test preferred by Burgess J with certain nuances, but differ somewhat on its application to the facts, as explained below. On the Clause 11 issue and like Burgess J and Rajnauth-Lee J, and as well Saunders P and Barrow J, I also align myself with the analysis of Anderson J.

[317] This opinion is in two parts. Part I deals with concurrent findings of fact and my interpretation of this Court's past jurisprudence and a proposed way forward. It also addresses the arson issue. Part II deals with non-disclosure and the avoidance of an insurance contract, including the preferred test for the proof of the first limb of materiality, as well as nuances and reservations.

Part I – Concurrent Findings of Fact

'Memories are creative. To treat memory as a fact is nonsense. It's inescapable fiction.'[262]

[318] I think it necessary to share some thoughts on the matter of approaches to concurrent findings of facts by an apex court, such as this Court, and to do so in light of the prevailing scientific research. This opinion associates itself with the flexible approach unanimously advocated by a five-member panel of this Court in *Lachana v Arjune*.[263] which has been applied since then. I am indebted to Wit J, whose insights have contributed to my own thinking on the issue of concurrent findings and whose ideas helped to research and develop the content discussed in this opinion.[264]

[319] *Lachana* was an appeal in which the Court of Appeal concurred in the findings of fact of the first-tier judge.[265] This Court was asked to review those findings and the issue was whether it should do so.[266] In an opinion authored by Wit J, the Court would state as follows:

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[262] K Bolonik, 'Toxic assets and English syntax: Aleksandar Hemon talks with Bookforum' (BOOKFORUM, June/July/August 2009 cited in Nicholas Mostyn, Judge of the Judiciary of England and Wales, 'The Craft of Judging and Legal Reasoning' (2015) 12 TJR 359 <https://www.bookforum.com/inprint/016_02/3828> accessed 10 November 2023.
[263] *Lachana* (n 22).
[264] In Civil Law jurisdictions the general position is that an appellate court may look afresh at all the evidence, though there is deference to first-tier courts as the primary fact finders. For example, in the German legal system, the principle of 'freie Beweiswürdigung,' which translates to 'free evaluation of evidence,' underscores the importance of the trial court's assessment of facts. However, if there are procedural errors in the fact-finding process that could impact outcome, or manifest or obvious errors in the first-tier court's factual findings, an appellate court may intervene, review, and correct them, including receiving new evidence. Section 529 (1) 1 of the German Code of Civil Procedure is illustrative: appeal courts may review first instance findings of fact where 'specific indications give rise to doubts as to the court having correctly or completely established the facts relevant for its decision …'.
[265] *Lachana* (n 22) at [9].
[266] ibid at [10].

[11] Counsel for the Arjunes referred us to the well known case of *Devi v Roy*[267] where the Privy Council "codified" their (utter) reluctance to review the evidence for the third time where there are concurrent findings of two courts on a pure question of fact. This decision was the culmination of a long line of cases in which the Privy Council developed a rather rigid practice of non-intervention with the facts of the case including those facts that were mere inferences from the primary facts. Even when there was a dissentient in the appellate court or where different reasons were given by the judges in arriving at the same findings of fact, the Privy Council was loath to interfere. It would do so in case of "some miscarriage of justice or violation of some principle of law or procedure." Although the Privy Council stated in *Devi v Roy*, and has repeatedly said so in later cases, that this practice is not a "cast-iron one", it would seem that its approach has been more rigid than the practice of other final courts in the Commonwealth. We would in this context expressly refer to recent statements in the High Court of Australia[268] which clearly show a tendency toward more flexibility.

[12] *We do not think that it is proper for us to adopt wholesale the practice followed by the Privy Council if only because the position of our Court is quite different from that of the Privy Council.* When their Lordships decided *Devi v Roy* they were at the judicial apex of an empire that spanned all five Continents. In a way they still are, although the empire has dwindled substantially. The point is that their Lordships are both geographically and culturally far removed from the countries that still retain the Privy Council as their final appellate court. They are, quite understandably, unfamiliar with local situations and customs, and therefore have to tread very carefully and cautiously with the facts as they emerge from the findings of the local courts. The disadvantages of that situation have become clear with some regularity. To take a recent example, in *Panday v Gordon*[269] their Lordships expressly opted to defer to the findings of the lower courts even though it meant depriving the appellant of a fresh look at the factual substratum of the case. The difference with our Court is obvious. We are a regional Court and thus much closer to home as it were. Our closeness to the region and our greater familiarity with its social and cultural dimensions make it easier for us to descend into the facts of the case, especially where the facts do not turn on the credibility of the witnesses or where they are the result of inferences from primary facts.

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[267] *Devi* (n 19) at 521-522.
[268] *Dederer* (n 38), in particular the judgment of Heydon J at [284] - [294].
[269] [2005] UKPC 36, (2005) 67 WIR 290 (TT PC).

> [13] Furthermore, it would seem to us that a policy of rigid judicial restraint with regard to concurrent findings of fact might be much more appropriate in appeals with special leave where a final court has a broad discretion whether to hear a case or not than in appeals as of right. We note, however, that the Privy Council has maintained its practice even in those appeals (see *Benoit Leriche v Leon Cherry*[270]).
>
> [14] *It is against this background that we intend to develop our own practice, for the time being on a case by case basis.* As this is an appeal as of right and only deals with factual findings we will, for now, deal with the issues before us as fully as necessary (emphasis added).

[320] This has come to be known as the more 'flexible' approach to the review of concurrent findings of fact and is in contradistinction specifically to the Privy Council's more rigid 'exceptional circumstances' practice of non-intervention. A few general observations are noteworthy. First, there is a contextual justification based on the lived reality that the CCJ is an indigenous regional apex court situated in the region (in contradistinction to the Privy Council). Second, a distinction is drawn between primary facts on the one hand and inferences and credibility on the other hand, and in the case of inferences greater review permissiveness is acknowledged, and there is also no rigid policy exception for review of the former. Third, and building on the preceding, the intention and approach to be taken by the Court is articulated as being 'on a case-by-case basis', underlining flexibility in relation to credibility, as well as to primary and inferential findings of facts. Fourth, this approach is historically grounded in Caribbean realities.

[321] Accepting that there must be some organising principle that will distinguish between and/or inform the circumstances when a review of primary fact or credibility is warranted in one case and when it is not warranted in another case, and given the current science, the more facilitative and probabilistic 'plainly/clearly wrong'[271] filtering standard is better suited to a review of concurrent findings by

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[270] [2008] UKPC 35, LC 2008 PC 4 (CARILAW).

[271] These terms and different variations are frequently used in the precedents. They indicate a standard of review to be used by appellate courts, which requires a demonstration of a clear and obvious error. In Australia, the standard is expressed as a 'clear conviction', see

this Court, than what tends to be associated with a more exclusionary 'exceptional circumstances' and 'rare case' standard as advocated in the opinion of Burgess J in this appeal, following the lead of the Privy Council. That this 'flexible' approach is apt, is demonstrated further in this case where there has been a serious delay in the delivery of the judgment post hearing.[272]

[322] Thus, if it can be demonstrated that a trial court in its assessment and determination of primary facts has made a clear, manifest, or obvious error in, and/or has reached conclusions that cannot be supported having regard to the totality of the evidence, and/or not provided clear, cogent, and reasonable justifications for making those findings, and/or there is otherwise no sufficient basis for its findings, an apex court can re-visit and review them even when there are concurrent findings (that is, the findings are affirmed by an intermediate appellate court). In the case of concurrent findings of primary facts, the deference afforded is achieved by applying the standard that any mistake must be demonstrated to be both significant and obvious. In relation to concurrent inferences no such equivalent deference is due as an intermediate appellate court is not in any more privileged position than an apex court. And in relation to credibility the position is the same as in relation to primary facts. Finally, it may very well be that this approach can be accommodated within the conventional nomenclature of 'exceptional circumstances', especially if one adopts the more fluid approach as now advocated by Anderson J, and if so, that is fine. But what is critical is the flexibility that this formulation affords, and which is necessary at this time in Caribbean contexts.

An Enigmatic Bronze Buddha

[323] The Buddha means 'The Awakened/ Enlightened One'. This Court has repeatedly stated that 'science enlightens the law.'[273] This appeal and the interrogation of the

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Major (n 185), in Canada as an 'overriding error', see *Bear Island* (n 191); *Howard* (n 196); and *Lonardi* (n 198) – *'palpable and overriding error'*), and more traditionally in the UK Supreme Court as 'clearly wrong', see (*Higgins* (n 173) at 82.

[272] See below, 'The impact of delay'.

[273] *Pompey v DPP* [2020] CCJ 7 (AJ) GY, GY 2020 CCJ 2 (CARILAW); *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY.

issue at hand allow us to apply this scientific approach to law, and potentially awaken from a centuries year old slumber, one enabled by the force of precedent, much like the path created by the calf in Sam Foss' 'The Calf-Path'.[274]

i. **Pleadings, Proofs, and Proceedings**

[324] There is no need to rehearse all of the case facts, that has been done in sufficient detail in the opinions of Burgess J and Anderson J. I propose to focus on one fact in dispute as illustrative, and to explain my support for the flexible approach to the review of concurrent findings of fact by lower courts.

[325] In August 2007 a fire destroyed the Apsara Restaurant. The restaurant was insured. This case is about the Appellant's (owner's) claims for the sums assured. Among other things, the Defendant alleged that the fire was deliberately set by the owner of the restaurant.[275] One particular pleading in support of this was the fact that: 'Within six hours of the commencement of the fire, the said Sharif Mohammed … removed from the said property a statue of "Buddah"' [sic].[276] The Defendant therefore raised fraud on the part of the appellant, in claiming insurance monies when it had deliberately caused the fire.

[326] As a matter of procedural and substantive law, a party who alleges must prove what is asserted. It was for the Defendant to establish the alleged fraud (the burden/onus of proof). Furthermore, the degree of probability to be satisfied by the Defendant on this issue is higher than the usual balance of probabilities (the standard of proof).[277] Commensurate with the seriousness of the allegation (arson) and the potential gravity of its consequences, the *de facto* standard of proof where fraud is alleged in a case such as this one (what is sometimes called the degree of

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[274] Sam Foss, '*The Calf-Path' in Whiffs from Wild Meadows* (Lee and Shepard Publishers 1895).
[275] Record, 'Further Amended Defence', [10].
[276] Record, 'Further Amended Defence', [10 (g)].
[277] *Bater* (n 136); approved in *Blyth v Blyth* [1966] AC 643; and endorsed *in Khawaja v Secretary of State for the Home Department* [1984] AC 74.

persuasion), is beyond a mere preponderance of probabilities.[278] Indeed, in *Issais v Marine Insurance Co Ltd*[279] an early case involving an allegation of arson in an action on an insurance policy, Lord Atkin would opine, 'if the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.'[280]

[327] The point is, whereas the usual civil standard of proof (a balance of probabilities) is satisfied in favour of a party that can tilt the scales of justice to a degree of more than 50% (it is 'more probable than not that an event had occurred'),[281] in this case the Defendant was required to prove this issue to a higher degree of cogency commensurate with both the seriousness and potential consequences of the allegation.

[328] The language used to explain the standard of proof in serious civil cases admittedly lacks some clarity, though it is not entirely vague. Standard of proof has been defined as 'the degree of cogency or persuasiveness required of the evidence adduced by a party, in order to discharge a burden of proof borne by the said party.'[282] Practically, what is operative in relation to this issue, is a different and higher degree of proof than is usual in civil matters, something more than mere probabilistic proof of the occurrence or existence of facts.[283] In serious civil cases, cogency therefore imports and mandates careful attention and awareness to both the degree of proofs and persuasiveness that are required. Again, practically, the degree of cogency goes to the weight of evidence required, and therefore to the degree of proof, and therefore also, pragmatically, to the 'standard' of proof – simply put, the more serious the case, the higher the degree of proof.[284] As Ungoed-Thomas J has put it: 'The more serious the allegation the more cogent is the

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[278] *Bater* (n 136) at37.
[279] *Issais v Marine Insurance Co Ltd* [1923] 15 LI L Rep 186.
[280] ibid at 192. Note, this is a decision pre *Bater v Bater*.
[281] *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373–74.
[282] ibid.
[283] Because the balance of probabilities standard merely requires a probability proof of at least 51%.
[284] Technically, the legal standard of proof remains 'on a balance of probabilities'.

evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'[285]

[329] Indeed, in *Re H*,[286] Lord Nicholls would frame the correct approach this way:

> … the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that *the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence* before the court concludes that the allegation is established on the balance of probability (emphasis added).

[330] More recently, in *Re D*,[287] what is referred to as the 'anxious scrutiny' test, by which primary fact finders are tasked with interrogating facts 'more critically or anxiously' and to apply caution when evaluating evidence in serious civil cases, has been proffered as an appropriate approach. And in *Re B*[288], fact finders, in dealing with issues such as this one, have been specifically cautioned against making adverse evaluations based on 'unsubstantiated suspicions'.[289]

[331] This extended discussion on standards of proof in serious civil cases is important because of its implications for reviews on appeal. The degree, or level, at which the standard of proof is set in a case, can determine the range of errors that a fact finder can make. In serious civil cases, generally, the closer the primary fact finder can get to certainty, to being sure, to being able to show that the relevant evidence is clear, convincing, and compelling, the less likelihood of a successful review. The seriousness of the allegations and consequences on the issue of arson in this case warrant very careful consideration of the evidence. Analysis and reasoning must demonstrate that these higher standards have been satisfied by the party upon whom their proofs are demanded. And intermediate courts of appeal in agreeing or

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[285] *Re Dellow's Will Trusts* [1964] 1 WLR 451 at 455.
[286] [1996] AC 563 at 586.
[287] [2008] 1 WLR 1499 at 1509.
[288][2009] AC 11.
[289] ibid at 30.

concurring with the conclusions of primary fact finders, also have a responsibility to demonstrably bear these considerations in mind during their review process.

ii. **The Mysterious Bronze Buddha(s)**

[332] The proceedings commenced in 2008. In 2011, three years later, the trial judge heard the matter over the course of 10 days (between October and December). On 25 October 2013 a decision was given, and on 31 December 2014, another three years later, reasons were given. On the issue of arson, the trial judge acknowledged the evidential importance of the bronze Buddha issue: 'A bronze Buddha statue was the subject of many questions during this trial.'[290] The salience was, in the trial judge's opinion, as follows:[291]

> The importance of the material of the Buddha being that if it was indeed wooden as the Plaintiff claimed, it may have been completely consumed by the fire. However, if it was bronze, it was expected that there would have been some remnants of the statue, *none of which were found by either fire investigator* (emphasis added).

[333] Accepting the evidence of Ms Hopkyn-Rees (a plaintiff witness), the trial judge held that there were in fact two Buddha statues in the restaurant, one gilded wooden, and a second smaller bronze statue.[292] On this point she disbelieved Mr Mohammed (the Appellant's main witness and owner of the restaurant), who testified that there was only one Buddha statue in the restaurant, a gilded wooded 'bronze' Buddha statue.

[334] She found, among other things, that 'the fire was deliberately set',[293] and after reviewing the expert evidence on the cause of the fire, concluded: (i) 'the circumstances surrounding the fire appear … to be highly suspicious',[294] and (ii) 'I find that Mr Mohammed had opportunity and was somehow involved in the

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[290] *Apsara Restaurants* (n 8) at [260].
[291] ibid.
[292] ibid at [263] - [264].
[293] ibid at [282], [287].
[294] ibid at [275].

deliberate fire.'[295] Then in the very next paragraph, the trial judge held that Mr Mohammed 'lied about the bronze Buddha' and was 'an untruthful witness in relation to other matters.'[296]

[335] Remarkably and also in light of what had been stated earlier by the trial judge at [260], six paragraphs later, the trial judge stated that 'this Court refused to draw any inference adverse to the Plaintiff or to Mr Mohammed from *the fact that ... following the fire no remnants of the bronze Buddha statue were found in the debris.*'[297] Why? Because: 'Mr Sargeant's report[298] had clearly indicated that *brass objects had been observed in the debris*' and 'it was, in the view of the Court, *very possible that one of those objects could have been the deformed remnants of the 'missing' Buddha*.'[299]

[336] The issue of the bronze Buddha was clearly important to the judge's conclusions about whether Mr Mohammed had deliberately set the fire. This was because it was reasoned, as supported by the expert evidence, that if there was bronze Buddha in the building metal remnants would have been found after the fire.[300] Indeed, as the Defendant's witness, Patrick Zoë, one of the fire investigators, explained:[301]

> Question: In the event that there was a bronze Buddha and it was burned would there be any evidence of its remnants?
> Answer: Yes there would be. I would expect to find remnants in a deformed state, not in its holistic former existence. I would expect to find metal.
>
> Question: Did you find evidence in the Buddha room?
> Answer: I found evidence of other metallic symbols, but nothing of the Buddha, other than the stand that the Buddha was placed upon.

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[295] ibid at [276].
[296] ibid at [277].
[297] ibid at [283]. Emphasis added.
[298] Mr Sargeant and Mr Zoë were the two fire investigators referred to at [260].
[299] ibid at [284]. Emphasis added.
[300] ibid at [260].
[301] Record, 'Witness Statement of Patrick Zoë', 822-823.

[337] And there was also evidence that there was a 'bronze' Buddha in the restaurant when it was closed up on the day before the fire, and that the keys or the building were subsequently sent to Mr Mohammed.[302] Thus, the Defendant's case on arson required that inferences be drawn that Mr Mohammed had removed the 'bronze' Buddha, as he had access to the restaurant after it had been closed up and before the fire, and did so because of its special value – corroborating inferentially the assertion that he had set the fire.

[338] The fundamental problem with this analysis is that it misevaluates the totality of the evidence, relevant explanations, and un-contested testimony in the context of the applicable standard of proof. Another hurdle is that though this was specifically pleaded by the Defendant as part of its case, it led no positive probative and cogent evidence to establish as a primary fact what it had asserted, that Mr Mohammed set the fire deliberately and fraudulently made an insurance claim.

[339] In Mr Mohammed's evidence in chief, he stated that: 'Prior to fire nothing at all was removed. In fact the Buddha which is referred to at 20 of Marc Sargeant's fire report was a wooden Buddha.'[303] Patrick Zoë, had also been questioned about this, as follows:[304]

> Question: Mr Shepherd Q.C. referred you to a picture of Buddha and expressly/implicitly suggested it was wooden. Did you find any remnants of wood?
> Answer: Yes.
>
> Question: Did you find any remnants of a bronze Buddha?
> Answer: I found no remnants of a bronze Buddha

[340] Furthermore, in the cross examination of Mr Mohammed, he explained:[305]

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[302] Record, 'Witness Statement of Franklyn Browne', 793.
[303] Record, 'Witness Statement of Mr Mohammed', [38].
[304] Record, 'Witness Statement of Patrick Zoë', 844.
[305] Record, 'Witness Statement of Mr Mohammed', 775-776.

> Question: Did you have in the premises a bronze Buddha.
> Answer: No.
>
> Question: Did you make a claim for a bronze Buddha.
> Answer: We made a claim for a gilded Buddha. Any reference to a bronze Buddha is inaccurate.
>
> Question: Are you sure?
> Answer: There was no bronze Buddha inside. The head of the bronze Buddha was outside. It is still there near the pond. Yes, we made a claim for a gilded Buddha.
>
> Question: You just said you didn't make a claim for a bronze Buddha?
> Answer: That was lost in the fire. Because it was gilded, it looked bronze. People said it was bronze. We had a bronze looking seated Buddha. … It was not bronze. It was a bronze looking seated Buddha. It is a gilded Buddha.

[341] This evidence about the bronze garden Buddha was corroborated by the evidence of Franklyn Browne, when he was cross-examined:[306] 'Yes I saw a bronze Buddha. I think it is situated in the Garden.' Thus, the mystery of the bronze Buddha in the restaurant and how it may have implicated the Claimant in the allegation of arson had to be resolved as a mixture of credibility, primary fact, and inferential conclusions.

[342] On a reading and evaluation of the totality of the evidence, much of it not having been undermined or challenged in any material way and/or was corroborated, it is likely that there was a gilded wooden 'bronze' Buddha in the restaurant, remnants of which were found in the building after the fire, and there was also a true bronze Buddha in the garden, near a pond – apparently still there after the fire! Mr Mohammed was clearly truthful about all of this. And as well, there may also have been a smaller metallic third 'bronze' (brass) Buddha inside of the restaurant.

[306] Record, 'Witness Statement of Franklyn Browne', 793.

[343] In fact, the evidence of Patrick Zoë in relation to his fire inspection and its relatedness to the bronze Buddha, ought to have been relevant to any inferences of culpability based on this aspect of the case:[307]

> Question/Answer: My fire cause inspection had nothing to do with the Buddha, did not.
>
> Question: The Buddha played no part in your determination that the ….
>
> Question (sic): No, my finding that the fire had been set was based …

[344] The judge's determination that Mr Mohammed had the opportunity and was somehow involved in the deliberate setting of the fire is an inference, as there was no direct evidence to prove this. It was therefore not a finding of primary fact. A finding of primary fact refers to a conclusion reached by a court or fact finder based on direct, observable, evidence and/or witness testimony presented during a trial. This evidence is typically tangible, observable, or perceivable information that does not require any additional reasoning or interpretation. An inference is a logical deduction or conclusion drawn from the primary facts and relevant circumstances, to establish a connection between the evidence and a broader proposition or conclusion. It involves making a logical and reasonable connection between established primary facts and a proposition or conclusion that is not explicitly proven by direct evidence. A key distinction between the two lies in the sources of information. A finding of primary fact relies on explicit evidence or testimony, while an inference is a logical and reasonable deduction based on available and credible evidence.

[345] Whether there was or was not a metallic third bronze (brass) Buddha statue in the restaurant, and whether it was removed by Mr Mohammed before the fire, or whether its remnants were found in the building after the fire (as per the evidence of Mr Sargeant), may forever be an unsolved mystery, but the implications for a

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[307] Record, 'Witness Statement of Patrick Zoë', 829-830, 831.

review of facts on appeal are important. This is because a fundamental distinction exists between satisfaction of proof that the fire at the restaurant was caused by arson simpliciter, and proof that that fire was set deliberately by the Plaintiff acting through Mr Mohammed (or anyone else). In this latter regard, the standard of proof is that for a serious civil issue, as discussed above.

iii. **The Approach of the Court of Appeal**

[346] The Court of Appeal heard the matter in 2016 (May and October) and about six years later, in July 2022, delivered its decision with reasons. It agreed with the trial judge's findings of fact with respect to arson, her assessment of Mr Mohammed's lack of credibility and his culpability in this regard.[308] On the specific issue of arson, the Court of Appeal, identified the issue as being, 'was the fire occasioned by arson, or with the contrivance of the (claimant)?'[309] It noted that:

> The trial judge also accepted the following based on the evidence: … 4) That Mr Mohammed, had the opportunity and was involved somehow in the deliberate fire, 5) That Mr Mohammed lied about the removal of the bronze statue of Buddha … and further that he was an untruthful witness in relation to other matters.[310]

[347] Following upon this, it also noted:[311]

> She held that the fire had been deliberately set and there was a high degree of probability that the loss … was occasioned, as alleged by the defence by the wilful act of the (claimant) company or with its contrivance…

[348] The grounds of appeal raised questions of fact and law for review, including challenging Mr Mohammed's alleged role in causing the fire, and about the burden of proof. The approach of the Court of Appeal is summarised in the following: 'These grounds of appeal would invite this Court to delve into the mind of the trial

[308] At [3], [16].
[309] At [64].
[310] At [69].
[311] At [70].

judge and make determinations that are not properly within the ambit of an appellate court.'[312]

iv. **The Impact of Delay**

[349] The impact of delay on the integrity of the fact-finding exercise is a relevant consideration for the issue of concurrent findings and the approach to review by this Court. Delay can lead to the degradation or loss of relevant evidence. It can also lead to witnesses' recollections becoming less reliable for a multitude of reasons (discussed below) and can therefore have a knock-on effect on their apparent credibility. Furthermore, delay in the delivery of a judgment after the close of a hearing in which fact finding is integral to decision making can also have an impact on the integrity of the analysis and evaluation of evidence.

[350] In *Bond v Dunster Properties Ltd*,[313] a 22-month delay in handing down judgment did not render the judgment unsafe. This was because the judge's findings of fact and conclusions were based on uncontroversial and uncontradicted facts, did not overlook any relevant or vital evidence, and did not depend in any significant way on an assessment of witness credibility. In the instant appeal the same cannot be said to be true.

[351] Arden LJ explained the standard of review on appeals against findings of fact in a seriously delayed judgment, as follows:[314]

> Findings of fact are not automatically to be set aside because a judgment was seriously delayed. *As in any appeal on fact, the court has to ask whether the judge was plainly wrong.* This high test takes account of the fact that trial judges normally have a special advantage in fact-finding, derived from their having seen the witnesses give their evidence. *However there is an additional test in the case of a seriously delayed judgment. If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point*, then (unless the error could not be due to the delay in the

[312] At [73].
[313] *Bond* (n 54). The delay of 22 months occurred between the end of the hearing and the delivery of judgment.
[314] ibid at [7].

> delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, *it cannot be satisfied that the judge came to the right conclusion.* This is the keystone of the additional standard of review on appeal against findings of fact in this situation (emphasis added).

[352] A few things are noteworthy, (i) the articulation of the 'plainly/clearly wrong' standard of review as applicable generally for appeals against findings of fact, (ii) consideration or whether, when there is undue delay in the delivery of a judgment, a judge's recollection of the evidence can be demonstrated to be faulty on material points, and (iii) a probabilistic standard of assessment by a reviewing court as to whether the primary fact finder came to the right conclusions. In the instant appeal, the judgment of the trial judge was delayed by three years and was accordingly a seriously delayed judgment. As explained above and also in the opinions of Saunders P and Anderson J, there were flaws in the judge's treatment of other facts (primary and inferential) on material points.

[353] Memory is unreliable, malleable, and reconstructive. Judges' memories and recollections are not exempt, unless they have some supernatural powers akin to what was believed of ancient fact finders. Serious delay in the writing of judgments post hearing, diminishes, or negates any potential advantages gained from seeing and hearing (experiencing) witnesses' testimony over transcript recordings of the same.

A Policy of Review for the CCJ, Concurrent Findings of Fact

i. Some General Context, and what Science Reveals

[354] Lady Rose, in her paper 'The Art and Science of Judicial Fact-Finding',[315] underscores that 'the truth is nuanced and multi-faceted.'[316] In an interesting tour of select ancient approaches to fact finding, she points out that 'the judicial process of fact-finding has a varied significantly based on time period, culture and region,[317] and illustrates how in the ancient world (for the ancient Athenians, Egyptians, and Hebrews) it was anchored in supernatural elements.

[355] But what of more contemporary times? Lady Rose confronts the question: 'How to tell whether the witness is telling the truth?', with a pragmatic statement:[318]

> Let's start with one important point. Whereas lay people may think that there are only two possibilities – that a person is either giving an accurate account of what happened or is deliberately lying – it is clear that in many cases it is a third situation – the person thinks they are telling the truth but *in fact their memory is unreliable or distorted by later events and emotions* (emphasis added).

[356] In support she cites Leggatt J,[319] who used scientific research into the nature of human memory to shed light on the issue:

> …psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. … External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else...

[357] This then is the current state of scientific insight into the reliability and plasticity of human memory. It is against this background that the capacity of a primary fact

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[315] Lady Rose of Colmworth, 'The Art and Science of Judicial Fact Finding' (Canadian Institute for Advanced Legal Studies, Queens' College, Cambridge, 14 July 2023).
[316] ibid 1.
[317] ibid 2.
[318] ibid 10-11.
[319] *Gestmin SCPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [16]–[20].

finder to evaluate primary facts and inferences, as well as truthfulness and credibility, and of an appellate tribunal to review such findings, must be examined.

[358] One of the long-standing judicial myths is the assumption that judicial officers who see and hear witnesses have some compelling advantage in being able to determine whether a witness is lying or truthful. This is what we may now call the 'demeanour dilemma'. It finds expression in the principle of appellate reticence to overturn first instance fact finders on their assessments of credibility, reliability, and fact finding. Thus, the well-known and oft quoted judicial mantra:[320]

> … not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at …

[359] This is a position that this Court has uncritically supported (ie, without reliance on any scientific of other empirical proofs in support). Thus, in *Campbell v Narine*,[321] this Court would explicitly endorse Lord Sumner's statement in *SS Hontestroom (Owners) v SS Sagaporack (Owners)*, cited above, including the following last sentence:[322] '… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge and, … *If his estimate of the man forms any substantial part of the reasons for his judgment the trial judge's conclusions of fact should be let alone* (emphasis added).

[360] However, current science demands that this traditional view has to be reconsidered. And as Lord Leggatt rightly points out in *Gestmin SCPS SA*[323], in relation to oral evidence based on the recollection of events that may have occurred months or

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[320] *SS Hontestroom* (n 45) at 47 (Lord Sumner).
[321] *Campbell* (n 43) at [40].
[322] *SS Hontestroom* (n 45) at 47, and the Court would note that this statement was endorsed by the Privy Council in *Harracksingh v A-G of Trinidad and Tobago* (2004) 64 WIR 362 (TT PC) at [10] and *Beacon Insurance* (n 15) at [14].
[323] *Gestmin* (n 319).

years prior to testifying:[324] (i) human perception and memory are unreliable and fallible, and (ii) memory is constantly being rewritten and reconstructed. His explanations are based on robust and reliable scientific research, and are well worth restating verbatim:

> [16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
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> [17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called "flashbulb" memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description "flashbulb" memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
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> [18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
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> [19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses

[324] ibid at [16] – [22].

often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

[21] It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

[22] In the light of these considerations, the best approach for a judge to adopt in, …in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination

> affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

[361] Basically, there are compelling scientific reasons for distrusting demeanour as a guide to honesty or accuracy, and for recognising that that honesty is no assurance of accuracy or reliability. Lord Leggatt compellingly demonstrates that, 'modern scientific research has shown that the assumption (that demeanour can provide useful information for the fact-finding process) is false.'[325] This science therefore undermines assumed bases for appellate reticence in reviewing a trial judge's assessments of credibility, reliability, and fact-finding, especially when based on demeanour, with knock on effects in relation to policies for concurrent findings of fact.

[362] What then are we to do with well-known judicial statements, such as:[326]

> witnesses … may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of an eyelid, left an impression upon the man who saw and heard them which can never be repeated in the printed page.

[363] This is not a quaint outdated approach. In 2012 the Supreme Court of Canada would rule that a sexual assault victim should remove her niqab, that covered her face for religious reasons, in order to ensure a fair trial, which would be undermined if it was not possible to see her face to be able to access her demeanour while she was testifying.[327] And in 2013, Murphy J would do the same in the UK, reasoning that 'the ability of the jury to see the defendant for the purposes of evaluating her

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[325] Lord Leggatt, 'Would You Believe It? The Relevance of Demeanour in Assessing the Truthfulness of Witness Testimony' (At a Glance Conference, 12 October 2022) 3. See also, *Kimathi v Foreign and Commonwealth Office* [2018] EWCH 2066 (QB) at [95] – [96] (Stewart J), summarising the best approaches to fact finding in light of current science.
[326] *Clarke* (n 165) at 36 (Lord Shaw).
[327] *R v NS* [2012] 3 SCR 726.

evidence is crucial' and that this is 'a fundamental and necessary attribute of the adversarial trial'.[328]

[364] Indeed, as Lord Leggatt points out, this judicial principle has deep roots in the common law:[329]

> As long ago as 1615, at the trial of Ann Turner as an accessory to the murder of Sir Thomas Overbury, the defendant protested that if she could be covered in church it ought to be the same in court. Sir Edward Coke replied:
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> 'that from God no secrets were hid, but it was not so with man, whose intellects were weak; therefore in the investigation of truth . . . the court should see all the obstacles removed; and because the countenance is often an index to the mind, all covering should be removed from the face.'[330]

[365] What useful light may science shed on these judicial approaches to veiled witnesses? Lord Leggatt explains:[331]

> To return for a moment to the topic of veiled witnesses, after the Canadian Supreme Court case was decided a research study was carried out in Canada, the UK and the Netherlands designed specifically to test whether accuracy in lie detection is impaired by wearing a niqab. In this study, accuracy in distinguishing truth from lies was found to be no worse when speakers wore niqabs than when they were bare-headed. In fact, accuracy was slightly higher in relation to the speakers who wore niqabs.

[366] It is true that the impressions which a trial judge experiences in hearing testimony are not available to an appellate court from a written record of the evidence. But is that 'advantage' overrated? Is the assumption, 'the accepted judicial view', 'backed by centuries of practice'[332] true, that in order to effectively assess the credibility of a witness, there is some special advantage in being able to observe demeanour? Not

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[328] *R v D* [2013] 9 WLUK 348; [2013] Eq LR 1034 at [69] – [70].
[329] Lord Leggatt (n 325) 7.
[330] (1900) 108 Law Times 520.
[331] Lord Leggatt (n 325) 11. Citing the following research: Amy-May Leach and others, 'Less is More? Detecting Lies in Veiled Witnesses' (2016) 40(4) Law and Human Behavior 401.
[332] *R v NS* (n 327) at [48] – [49].

quite. The current science does not support that such experiences are a reliable source for assessing honesty or credibility.[333]

[367] Some witnesses do not ever intend to be truthful; some simply lie. The scientific research on detecting lying witnesses (deception) is equally compelling. Lord Leggatt also summarises the research as follows:[334]

> There have now been literally hundreds of experimental studies involving thousands of participants carried out by psychologists to test whether people can detect lies on the basis of a speaker's demeanour. The results of these studies have been strikingly consistent. They have consistently found that, when people are asked to judge whether individuals are lying or telling the truth from how they appear and behave when speaking, such judgments are accurate on average just slightly more than half the time.

[368] In a 2006 meta data analysis, 'Accuracy of Deception Judgments',[335] the mean percentage accuracy in detecting untruth from appearances was 54%. That is, accuracy was about as predictable as rightly calling 'heads or tails' on the flip of a coin, just slightly better than chance. In fact, accuracy where the person being assessed was both seen and heard (54%) was only marginally better than when the person was only seen (50%). It made no noticeable difference whether the persons observed were deliberately and intentionally lying, or just doing so in the moment. And the length of observation also made no material difference.

[369] For our purposes, however, the most salient data was that, 'people who might be thought to be experts at lie detection - such as law enforcement officers, psychiatrists and … judges - proved to be no more accurate in their assessments than lay people.'[336] The research shows that the average percentage accuracy for people classified as 'experts,' and we would expect to count judicial officers among

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[333] See, Timothy R Levine, *Duped: Truth-Default Theory and the Social Science of Lying and Deception*, (University of Alabama Press 2020).
[334] Lord Leggatt (n 325) 8.
[335] Charles F Bond and Bella M DePaulo, 'Accuracy of Deception Judgments' (2006) 10 (3) Personality and Social Psychology Review 214.
[336] Lord Leggatt (n 325) 9–10.

these given the judicial policy deference to their fact-finding prowess, was the same as for non-experts – 54%![337]

ii. Some Implications

[370] Lord Leggatt, conveniently identifies some implications of all of the above, as follows:[338]

> To sum up so far, there is extensive scientific research showing that, as a method of distinguishing truth telling from lying, judging on the basis of demeanour is slightly, but only slightly, more reliable than spinning a coin… This finding is, I think, enough by itself to demonstrate that attaching any weight to demeanour in making such assessments is not a rational approach to decision-making.

[371] But this is not even the end of the matter. There is more scientific research that shows how assessments of credibility based on the 'advantage' of having seen and heard a witness, can be positively flawed and biased.[339] In fact, individual differences among the persons observed (not the observers) who were being assessed for honesty/lying (credibility) were a significant consideration. For example, whether a person is assessed as having an honest demeanour has a bigger impact on whether the person is judged to be telling the truth than whether they are actually the truth. However, the scientific research shows that there is no significant correlation between the assessed honesty of the observed person's demeanour and whether that person was actually truthful.[340]

[372] Observers (such as judicial officers) rely on behavioural cues, largely shaped by cultural beliefs, to make the 'honest demeanour' assessment.[341] Some of these include, avoidance of eye contact, shifting posture, delay in response time to

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[337] A subsequent 2008 meta-data study confirmed these findings, Charles F Bond and Bella M DePaulo, 'Individual Differences in Judging Deception: Accuracy and Bias' 2008) 134 (4) Psychological Bulletin 477.
[338] Lord Leggatt (n 325) 12.
[339] Bond and DePaulo (n 338). See also, Lord Leggatt (n 325) 13.
[340] Timothy R Levine and others, 'Sender Demeanor: Individual Differences in Sender Believability Have a Powerful Impact on Deception Detection Judgments' (2011) 37 Human Communication Research 377. See also, Lord Leggatt (n 325) 16-17.
[341] Timothy R Levine and others, 'Sender Demeanor: Individual Differences in Sender Believability Have a Powerful Impact on Deception Detection Judgments' Human Communication Research (2011) 37 Human Communication Research 377.

questions, accelerated speech, speech errors, pauses and hesitations, and nervousness - all of which are commonly assumed to be indicators of untruthfulness. Among these cues, and across cultures, the most prevalent belief in a cue that was an indicator of lying, was gaze aversion.[342] In real time, such as during a hearing while a witness is testifying, these assessments are being made spontaneously and at a largely subconscious level in and by the observer. However, scientific research has been unable to support this widespread belief that liars do not 'look you in the eye'. In fact, the research demonstrates that 'the correlation found between gaze aversion or reduced eye contact and lying was close to zero.'[343]

[373] And there is still further research, more directly related to credibility conclusions, which demonstrates how the 'advantage' of seeing and hearing a witness may be overrated in the judicial folklore, if not actually placing it for practical purposes in the realm of myth. The following common assumptions and beliefs and their translation into credibility assessment principles and findings, are illustrative: (i) that individuals who are untidily dressed are more likely to be disbelieved than those who are smartly dressed, [344] (ii) that black clothing makes a negative impression in comparison with light clothing,[345] and (iii) that facial appearance has an impact and that people with attractive faces are typically thought of as more honest.[346]

[374] Taken in the round, one can conclude about the assumption that seeing and hearing a witness affords some significant and reliable advantage to assessing honesty and credibility, that this is not scientifically established. Instead, 'the fact that accuracy is only slightly better than chance shows that the reliability of such inferences is so poor as to be of no practical use.'[347] Which begs the question, why pay such

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[342] Global Deception Research Team, 'A World of Lies' (2006) 37(1) Journal of Cross-Cultural Psychology 60.
[343] Bella DePaulo and others, 'Cues to Deception' (2003) 129(1) Psychological Bulletin 74. See also, Lord Leggatt (n 325) at 14-15.
[344] Aldert Vrij, 'Credibility Judgments of Detectives: The Impact of Nonverbal Behavior, Social Skills and Physical Characteristics on Impression Formation' (1993) 133(5) Journal of Social Psychology 601.
[345] Aldert Vrij and Lucy Akehurst, 'The Existence of a Black Clothing Stereotype: The Impact of a Victim's Black Clothing on Impression Formation' (1997) 3 Psych, Crime & L 227.
[346] R Kelly Aune, 'The influence of perceived source reward value on attributions of deception' (1993) 10(1) Communication Research Reports 15.
[347] Lord Leggatt (n 325) 15.

deference to primary factfinders' evaluations and opinions when they are so potentially unreliable?

iii. Decision Maker Bias/Preference

[375] To compound matters, it is now scientifically irrefutable that all humans are biased, and since judicial officers are human (for the time being), they too are inherently biased.[348] As Professors Maya Sen, of Harvard Kennedy Law School, and Allison Harris, of Pennsylvania State University, state, after careful research based analysis, 'research shows that judges' personal backgrounds, professional experiences, life experiences, and partisan and ideological loyalties impact their decision-making.'[349] Indeed, Professors Sen and Harris point out that:

> Like other political elites, judges have policy preferences, shaped by an amalgam of factors that include their race, gender, and, most importantly, ideology or partisanship (which themselves could be influenced by race or gender). In other words, judges are nuanced decision-makers who bring their preferences and experiences to bear on what are sometimes difficult questions …

[376] In addition, judicial officers, like all ordinary people, are susceptible to cognitive heuristics.[350] Thus, hindsight bias, anchoring and adjustment, confirmation bias, and the effects of categorical thinking have all been established as impacting judicial decision making.[351]

[377] The idea of a 100 percent neutral judicial officer is pure myth! Which is not to say that judicial officers cannot strive for impartiality. But it is necessary to confront this inconvenient reality. Judging is a human endeavour, and judges bring all of

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[348] Allison P Harris and Maya Sen, 'Bias and Judging' (2019) 22 Annual Review of Political Science 241. See also, Phoebe C Ellsworth, 'Legal Reasoning and Scientific Reasoning' (2012) 63(1) Ala L Rev 895. See also, Godfrey Cole and others, *Making Decisions Judicially: A Guide for Decision- Makers* (Hart Publishing 2022) 21 – 22: 'There is a large body of research … considering the issues of unconscious and confirmation bias, ... which shows the impact of unconscious and confirmation bias on judges and other decision makers.'

[349] Allison P Harris and Maya Sen, 'Bias and Judging' (2019) 22 Annual Review of Political Science 241.

[350] Phoebe C Ellsworth, 'Legal Reasoning and Scientific Reasoning' (2012) 63(1) Ala L Rev 895.

[351] ibid.

whom and what they are into the process. Thus we need to accept that, 'judges' backgrounds including their race, gender, ethnicity, and religion shape their decision-making.'[352] What we do about this, is what really matters.

iv. Reconciling Law and Science

[378] Both law and science pride themselves on the rationality of their intellectual methods and believe that those methods are designed to analyse questions and reach the correct conclusions by means of reason, free from cognitive or emotional biases. Of course, both law and science often fall short of this ideal at all levels, from the decisions about individual legal cases or scientific studies to the acceptance of general theories.[353]

[379] There seem to be some inescapable tensions between the fields of law and science. Law often strives for consistency, certainty, predictability, and finality (stability), and so can tend to rest in inertia. Courts therefore incline towards reliance on precedents, looking to the past for guidance, sometimes even uncritically so (*stare decisis*). Science on the other hand is inherently curious and investigative and is always changing with new research, new evidence, and new proofs. Yet science is an important tool in the search for justice. Both seek truths, in their own ways. A challenge for jurists, is how best to reconcile these two in service of just outcomes, justice.

[380] This challenge confronts the policy of apex courts in relation to concurrent fact-finding head on. And it invites a couple of questions: Have the courts considered the relevant science in shaping their policy towards concurrent findings of fact? And, if not: What should such a policy look like enlightened by the relevant science?

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[352] Harris and Sen (n 349).
[353] Ellsworth (n 350).

[381] What exactly is that policy for the CCJ? And how has the CCJ navigated it? *Lachana v Arjune* was the first written opinion that addressed the matter and expressed preference for a flexible approach. There have been other decisions which I will consider. But first a paraphrase of the classic non-interventionist policy, described in *Lachana* as a more rigid approach. It may be stated as follows, determinations by a primary fact finder such as a trial judge, whether to believe or disbelieve a witness, and on findings of fact and inferences, can be overturned on appeal only in exceptional circumstances. The reason is said to be the inestimable value, the privileged advantage in assessing credibility and reliability, of seeing and hearing the witness rather than reading a transcript of their evidence. And this is because a transcript excludes indications that bear on an assessment of honesty and truthfulness that are supplied by demeanour cues, such as tone of voice, hesitation, body language, and other nonverbal expressions.

[382] More recently, the Privy Council, in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd*,[354] an appeal from Trinidad and Tobago, cited with approval the following dictum of Lord Hoffman in *Biogen Inc v Medeva plc*[355]:

> The need for appellate caution in reversing the [trial] judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.

[383] It also endorsed the following statement of Lord Neuberger,[356] in *Re B (A Child) (Care Proceedings: Threshold Criteria)*:[357]

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[354] *Beacon Insurance* (n 15) at [16].
[355] *Biogen* (n 10) at 39.
[356] *Beacon Insurance* (n 15) at [13].
[357] *Re B (A Child)* (n 13) at [53].

> [T]his is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).

[384] A couple of things are noteworthy: (i) the policy of restraint in reviewing concurrent findings remains grounded in the opportunity and advantage of a trial judge to form 'impressions' based on demeanour (hearing and seeing witnesses), and (ii) this continues to be justified on the basis of traditional judicial 'good sense'. Wither science! However, what also appears is a candid justification based in judicial policy and judicial economy (cost, delay, practicality).

[385] The traditional policy of restraint and non-intervention is applied to both intermediate and final appellate courts because both are in exactly the same position in relation to the primary fact finder. However, in relation to an apex court, the policy has become even more rigid and strict when an intermediate appellate court agrees with the primary court's findings of fact (concurrent findings). For a regional apex court located *in situ*, such as the CCJ, there is no additional juristic basis for this, except for that of judicial economy. For a court such as the CCJ any increased reticence to look into concurrent findings of fact is therefore an approach that is pure judicial policy (without one justification claimed by the Privy Council, as Wit J explained in *Lachana*). Hence the rationality of preference for a more flexible approach than that of the Privy Council.

[386] In *Ramlagan v Singh*,[358] this Court acknowledged the flexible approach explained in *Lachana* but went on to say that 'generally only in exceptional circumstances would it review concurrent findings of fact of the courts below.'[359] And in *Pratt v Renz*,[360] *Lachana* is cited, when it is asserted that this Court, 'may review fact-finding in an exceptional case where on a review of the evidence findings of fact have been entirely unwarranted or else have not been made as and when required so that there is a real possibility of a serious miscarriage of justice.'[361] The Court opined that proof of an exceptional case created a 'heavy burden' on the party seeking to review concurrent findings.[362] The 'exceptional circumstances' exception to the non-interventionist policy in relation to concurrent facts, was also asserted by this Court in *Shillingford v Andrew*.[363]

[387] There is nonetheless also an intermediate and nuanced position, that distinguishes primary findings of fact and credibility, from inferences drawn from primary facts. One that *Lachana* anticipates, when it stated that appellate review by a regional apex court was justifiable 'especially where the facts do not turn on the credibility of the witnesses or where they are the result of inferences from primary facts.'[364] Already one sees a departure from the Privy Council's rigid use of 'exceptional circumstances' and the creation of increased flexibility, by adopting a more permissive approach to the review of credibility and inferential findings.

[388] In *Campbell v Narine*,[365] which was not really on concurrent findings but a case in which the court of appeal had intervened and reviewed the trial judge's findings of fact, this Court distinguished 'between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found or, as it is sometimes said, between the perception and evaluation of facts.'[366] The Court

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[358] *Ramlagan* (n 208).
[359] ibid at [8].
[360] [2014] CCJ 7 (AJ) (BZ).
[361] ibid at [2].
[362] ibid at [3].
[363] [2020] CCJ 2 (AJ) DM, DM 2020 CCJ 1 (CARILAW) at [16], citing *Ramdehol* (n 18).
[364] *Lachana* (n 22) at [12]. See also, *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY.
[365] *Campbell* (n 43).
[366] *Campbell* (n 43) at [39]. Citing with approval Byron CJ in *Grenada Electricity Services* (n 44) at [7] and noting the endorsement by Burgess JA in *Ward* (n 72) at [58].

would opine (adopting the Privy Council's statements in *Harracksingh v Attorney General of Trinidad and Tobago*[367]), and without any reference to a governing criterion of exceptionality but adopting an overarching 'plainly/clearly wrong' approach, that an intermediate appellate court should refrain from interfering with a trial judge's finding of fact 'unless it can be demonstrated that it is 'affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved *or otherwise to have gone plainly wrong*''[368] (emphasis added).

[389] In *Ramdehol v Ramdehol*,[369] an appeal to this Court on concurrent findings, a summary of this Court's jurisprudence (including a non-exhaustive listing of possible 'exceptional circumstances'), was described as follows (even further evidence of increased flexibility):[370]

> [45] We have previously discussed the principles to be applied by this Court in relation to overturning concurrent findings of fact by lower courts in the cases of *Lachana v Arjune, Ramgalan v Singh,* and *Campbell v Narine*. *Unlike the Privy Council's strict approach, we opted in Lachana for a more flexible approach. Even so, in the subsequent case of Singh we held that generally it was only in exceptional circumstances that we would review concurrent findings of fact* of the courts below. When we speak of exceptional circumstances, we mean cases including those where this Court is satisfied that:
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> a. there was a miscarriage of justice;
> b. any advantage enjoyed by the trial judge, by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion;
> c. the reasons of the lower courts are not satisfactory;
> d. there is a lack of clarity and conflicting findings of fact; or
> e. there is a lack of any evidential basis.
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> [46] In *Campbell,* we also took the time to explain exactly what ought to be considered a 'finding of fact' as distinguished from a perception of the facts. We noted that Byron CJ developed the concept in *Grenada Electricity Services Ltd v Isaac Peters* where he noted as follows:

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[367] (2004) 64 WIR 362 (TT PC) at [11].
[368] *Campbell* (n 43) at [41]. And citing with approval, Lord Macmillan in *Thomas v Thomas* [1947] AC 484, at 491.
[369] *Ramdehol* (n 18).
[370] ibid at [45] – [46] (footnotes omitted).

> "It is in the finding of specific fact or the perception of facts, that the court is called on to decide on the basis of the credibility of the witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving testimony. On the other hand, the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inference or to evaluate as the trial judge" (emphasis added).

[390] In *Ramdehol,* the 'exceptional circumstances' filter was applied to deny a review: 'On appeal, the appellant did not raise any exceptional circumstances that could persuade the Court of Appeal to disturb the trial judge's findings. Similarly, no exceptional case has been put before us and as such we do not consider it permissible to review and vary the concurrent findings of fact …'.[371] Nevertheless, the Court also endorsed the Lachana flexible approach in contradistinction to the 'strict' approach of the Privy Council.

[391] Thus, it would appear that the Court has been straddling two conceptual poles, *Lachana* 'flexibility' and *Ramlagan v Singh* 'exceptional circumstances', without trying to disavow either and allowing both to sit in an inclusive reciprocal tension. Floating, as it were, in between these two conceptual poles, is the *Campbell* 'plainly/clearly wrong' standard for review, which is more facilitative and probabilistic than what tends to be the Privy Council's more exclusionary 'exceptional circumstances' standard. In practice therefore, it seems that the *Lachana* 'on a case-by-case basis' approach has been countenanced. And further, the Court has also expressly reserved a right of review in instances of inferences and evaluative conclusions drawn from primary findings.[372] Again, indicative of a

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[371] ibid at [47].

[372] Note, that at the other end, *an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision***.** *Persaud v Mongroo* [2023] CCJ 16 (AJ) GY at [36]. In Persaud, the Court did repeat the traditional demeanour advantage justification and the usual qualifier of non-intervention 'unless it can be shown that the trial judge failed to use or has palpably misused their advantage', however with a moderated probabilistic standard for review, ie 'the higher court *ought not to* reverse findings of primary facts', at [34]. See also, at [36], 'where the trial judge has made a fair and reasonable assessment of the evidence before the trial court, an appellate court *ought to be* reluctant to differ from the findings of primary facts of the trial judge.' Nicholas Mostyn, 'The Craft of Judging and Legal Reasoning' (2015) 12 TJR 359. In *Whitehouse v Jordan* [1981] 1 WLR 246 at 269–270, Lord Hodge pointed out in relation to the reviewability of inferences: '[T]he importance of the part played by those advantages

more flexible approach. One thing is clear, the Court has consistently denounced the 'rigid' or 'strict' approaches of the Privy Council and has parted ways with it in this regard.[373]

[392] In fact, this Court in *Campbell* (as noted above) and most recently in *Persaud v Mongroo*,[374] has formulated an approach to a review of primary fact finding in more general terms. In *Campbell,* the catch all filter being whether the trial judge was plainly wrong. And in *Persaud,* no mention is made of exceptionality and instead the Court adopted a moderated probabilistic standard for review, that 'an appellate court *ought not to lightly reverse* findings of credibility arrived at by the trial judge.'[375] (emphasis added).

[393] There is no doubt that in 'exceptional circumstances' an appellate court can intervene and review concurrent findings. The pure flexible approach advocated in *Lachana* would allow intervention 'on a case-by-case basis.' A rigid or strict and exclusive application of the exceptional circumstances approach may not be as facilitative. The principled 'plainly/clearly wrong' approach and 'ought not to lightly reverse' standard are inherently and self-evidently more flexible and facilitative. However, in none of the justifications advanced by the Court, in the cases cited, has any reference been made to what current science has revealed about the unreliability of primary fact finding and how these scientific insights may influence the approaches articulated as policy for the review of concurrent findings.

[394] Indeed, and as judge Mostyn has also so correctly pointed out (supported by robust scientific evidence):[376]

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in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, *an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision*.'

[373] However, see footnote above.

[374] [2023] CCJ 16 (AJ) GY at 36.

[375] ibid. In *Persaud*, the Court did repeat the traditional demeanour advantage justification and the usual qualifier of non-intervention 'unless it can be shown that the trial judge failed to use or has palpably misused their advantage', however with a moderated probabilistic standard for review, ie 'the higher court *ought not to* reverse findings of primary facts', at [34]. See also, at [36], 'where the trial judge has made a fair and reasonable assessment of the evidence before the trial court, an appellate court *ought to be* reluctant to differ from the findings of primary facts of the trial judge.'

[376] Nicholas Mostyn, 'The Craft of Judging and Legal Reasoning' (2015) 12 TJR 359.

> Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time.

[395] In my opinion a more flexible approach is to be preferred, if only because of the scientifically demonstrated fallacy of the assumptions underpinning non-intervention in relation to a factfinder's determinations in the forensic exercises involving both primary fact finding and credibility assessments, especially when these are based on assessments of demeanour. Indeed, I would suggest that the CCJs jurisprudence, in its variations, is in fact applying a more flexible approach on a 'case by case basis' – a la *Lachana.* However, accepting that there must be some organising principle that will distinguish between and/or inform the circumstances when a review of primary fact or credibility is warranted in one case and when it is not warranted in another case, and given the current science, the more facilitative and probabilistic 'plainly/clearly wrong' filtering standard[377] is best suited to a review of concurrent findings by this Court, than a rigid or strict application of what tends to be the more exclusionary 'exceptional circumstances' and 'rare case' standard.

[396] For some jurists, the 'plainly/clearly wrong' formulation of the standard of review is problematic. I find no magic in those words. As I have already explained, if it can be demonstrated that a trial court in its assessment and determination of primary facts has made a clear, manifest, or obvious error in, and/or has reached conclusions that cannot be supported having regard to the totality of the evidence, and/or not provided clear, cogent, and reasonable justifications for making those findings, and/or there is otherwise no sufficient basis for its findings, an apex court can re-visit and review them even when there are concurrent findings. In the case of concurrent findings of primary facts, the deference afforded is achieved by applying

[377] As per *Campbell* (n 43).

the standard that any mistake must be demonstrated to be both significant and obvious. In relation to concurrent inferences no such equivalent deference is due as an intermediate appellate court is not in any more privileged position than an apex court. And in relation to credibility the position is the same as in relation to primary facts. But what is critical is the flexibility that this approach affords, and which is necessary at this time in Caribbean contexts.

[397] The simple scientific truth is that human memory is unreliable, and that factfinders' ability to discern truth from lies based on the 'advantage' of seeing and hearing a witness, is little better than chance, akin to the flip of a coin.

v. Forging a Path Forward

[398] The constitutional standard of an entitlement, a guarantee, of a fair trial, is not a promise of infallibility. In an inherently human system, which judging is, fairness does not equate to perfection. Its guarantee resides in process. That is, fact finders are expected to know and apply a robust and measurable (hence evaluative) forensic process in relation to findings of primary facts, credibility, and inferences. Overreliance on mythical and empirically un-validated, and even scientifically disproven, theories which are really beliefs, cannot be uncritically considered normative for modern day fair hearing and due process constitutional standards. Reliance on a witness's demeanour and/or on impressions and non-verbal clues to assess truth, reliability, accuracy, and to make determinations on primary or inferential facts, is surely a most unsafe judging technique and method.

[399] Judge Richard Posner opines:[378]

> Nonverbal clues to veracity are unreliable and distract a trier of fact (or other observer) from the cognitive content of the witness's testimony. Yet it would occur to few judges to question the proposition that the trial judge has superior ability to judge credibility than the appellate judge, because

[378] Richard A Posner, *Reflections on Judging* (Harvard University Press 2013) 123 – 125.

> nothing in the culture of the law encourages its insiders to be sceptical of oft-repeated propositions accepted as the old-age wisdom of the profession, and because appellate judges (indeed all judges) usually are happy to hand off responsibility for deciding to another adjudicator.

[400] How then may we negotiate this inter-space between the legal values of consistency and flexibility, the former of which is, maybe, better served by a strict non-interventionist policy, whereas the latter facilitates the fundamental and core value of fairness and more liberal notions of justice. The answer I propose is through the development and use of clear, yet sufficiently flexible guidelines.

[401] In 1968, Lord Pearce, in *Onassis v Vergottis*,[379] presciently explained:

> "Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? *Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others?* Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. *For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.* And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. *And in the process contemporary documents and admitted or*

[379] *Onassis* (n 244) at 431.

> *incontrovertible facts and probabilities must play their proper part* (emphasis added).

[402] A little over twenty years later and in relation to the exercise of fact finding, Lord Ackner in *Reid v Charles*,[380] an appeal from Trinidad and Tobago, would opine in relation to a submission that the impression which a witness' evidence makes upon the trial judge is of the greatest importance, that:

> This is certainly true. *However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that impression* against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. *Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses* (emphasis added).

[403] In a similar vein, in *Gestmin SCPS SA*[381], Lord Leggatt, fully aware of the relevant scientific research, would emphasise that:

> 'In the light of these considerations, the best approach for a judge to adopt … is, in my view, *to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*'[382] (emphasis added).

[404] What we see in these three statements, is a consistent, clear, and coherent method, an outline of best practice guidelines, for fact finding that seeks to overcome the shortcomings of demeanour assessments. Without making the advice of Lord Ackner formulaic, the following practical guidelines can be articulated. Demeanour assessments of credibility and/or fact-finding ought to engage a process of checking

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[380] [1989] UKPC 24 (TT).
[381] *Gestmin* (n 319) at [16]–[20].
[382] ibid at [22].

impressions against: (i) any relevant contemporary documents, (ii) the pleaded case, (iii) the inherent probability or improbability of the rival contentions, (iv) facts and matters which are common ground or unchallenged, and (v) facts and matters disputed only as an afterthought or otherwise in a very unsatisfactory manner.

[405] The value of contemporaneous documentary evidence cannot be overstated, and its efficacy as a basis of review is obvious. However, it would be a paradox if contemporaneous documents, which provide a more reliable basis for fact finding and credibility assessments, facilitate opportunities for review, but instances of hard swearing do not. That would be a contradiction and an irony. Another reason why deference to primary fact finders ought to be subject to a more flexible probabilistic approach to review.

[406] Best practice is, it is therefore suggested, at a minimum and as a baseline, for trial judges to base factual findings on inferences drawn from the documentary evidence and known or probable facts, before relying on witness recollection of events wherever possible. In fact, this approach is documented in a UK Appendix to a Practice Direction,[383] which reflects some of the current scientific research, and which states:

> 1.3 Witnesses of fact and those assisting them to provide a trial witness statement should understand that *when assessing witness evidence the approach of the court is that human memory*: (1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but (2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore (3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration. (emphasis added.)

[407] When demeanour must be relied on, best practice also suggests that it 'ought to be used, if at all, in conjunction with other methods of assessing whether a witness is

[383] Appendix to Practice Direction 57AC (Statement of Best Practice) < https://www.judiciary.uk/wp-content/uploads/2020/10/CPR-PD57AC-Appendix-Final-Draft-2.pdf > [1.3].

lying, such as inferences based on various kinds of inconsistency and the outcomes of cross-examination.'[384] Indeed, the current science on memory, recall, and reliability invites all primary fact finders to carefully review how they go about the process of determining primary and inferential facts, as well as drawing conclusions about credibility, reliability, and plausibility.[385]

[408] In addition to these purely evaluative evidential considerations, it is also suggested that primary fact finders need to be more holistically aware of and sensitive to prevailing socio-legal cultures, systems, and other discriminating considerations that can adversely affect certain groups in Caribbean society, and how these may impact the exercise of credibility assessment and fact finding. Thus, and for example, judicial officers ought to robustly satisfy the procedural fairness standards that conduce to a fair trial. These have been researched in Caribbean contexts and facilitate accurate fact finding through the consideration of court users' experiences of fairness an inclusivity and hence their capacity to participate fully, freely, and meaningfully in court processes.[386]

[409] As well, accuracy in fact finding is enhanced through gender sensitive adjudication, and Caribbean resources have been developed to facilitate the effectiveness of this approach.[387] Finally, ensuring that persons with disabilities enjoy the procedural and substantive safeguards that conduce to fairness and equality, and a sensitivity by judicial officers of these needs and for necessary accommodations, will also go towards mitigating against fact finding errors. Caribbean research and best practices guidelines are available on this.[388]

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[384] Lady Rose (n 315) para 50.
[385] For a current, practical, and useful general guide to assessing evidence, see, Godfrey Cole and others, *Making Decisions Judicially: A Guide for Decision-makers* (Hart Publishing 2022)118 – 126. The distinctions between reliability, credibility, and plausibility, filtered through the lenses of current science, are instructive.
[386] See, Justice Peter Jamadar and Elron Elahie, *Proceeding Fairly: Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago* (Judicial Education Institute of Trinidad and Tobago 2018) < https://www.ttlawcourts.org/jeibooks/ > accessed 10 November 2023.
[387] See, 'Justice Through a Gender Lens: Gender Equality Protocol for Judicial Officers' (Belize Judiciary, 2018) and (Judicial Education Institute Trinidad and Tobago, 2018).
[388] See, 'Disability and Inclusion Awareness Guidelines: For Judiciaries and Judicial Officers', (Caribbean Association of Judicial Officers (CAJO) 2023).

[410] The UK Equal Treatment Bench Book is an excellent and broad ranging resource. It is an aid to increasing awareness and understanding about court users and to enabling more effective communication and participation by all parties. It also addresses a broad cross-section of relevant areas, for example, the intersection of demeanour and cultural conditioning, as well as how impairments can impact credibility assessments.[389]

[411] I would therefore suggest that (i) a fact finder ought to demonstrate the application of their method(s) of evaluation whether to matters of credibility, primary facts, or inferences, and (ii) the discharge of such an obligation by way of reasoned explanation forms a rational and reviewable basis for the intervention of appellate courts. Such reviews by this Court in instances of concurrent findings, are applicable to both primary fact finder's and intermediate appellate court's analysis and assessments, 'on a case-by-case basis,' applying a 'plainly/clearly wrong' probabilistic standard.

[412] Even if exceptionality is not a strict condition to be satisfied for review, a measure of deference to lower courts' assessments of credibility, reliability, and findings of fact and inferences is appropriate. Finally, if a primary fact finder is shown to have been 'plainly/clearly wrong' as explained in this opinion, or to have committed any of the other five shortcomings listed in *Ramdehol,* or otherwise to have demonstrably clearly, manifestly, or obviously erred in their assessments of facts and credibility, this Court may in the exercise of its flexible power of review intervene and review those evaluative findings. Indeed, there is a sense in which the review standard of exceptional circumstances can even be seen as a sub-set of the category 'plainly/clearly wrong'.

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[389] *Equal Treatment Bench Book* (Judicial College 2023) < https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/ > accessed 10 November 2023. See, for example, at para21, 'Science and a growing understanding indicates the difficulties with, and the possible fallibility of, evaluation of credibility from appearance and demeanour in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new.'

Conclusion

[413] The seriousness of the allegations and consequences on the issue of arson in this case warranted very careful consideration of the evidence. Indeed, the Defendant's case on arson required that an inference be drawn about the motives and behaviour of the Appellant and Mr Mohammed in relation to the cause of the fire. Credibility assessments, primary fact finding, and inferential determinations were all necessary and were all carried out by the trial judge. The opinion of Anderson J and the commentary above on the facts relating to the bronze Buddha, demonstrate some of the relevant shortcomings, especially in relation to credibility findings and inferences. In addition, the principles of review where there is serious delay in delivering a judgment are apposite (see above the analysis of *Bond's* case).

[414] Salient considerations were the burden of proof, the standard of proof, and degree of cogency required to establish such proofs, including the relevant nuances for the proof of the cause(s) of the fire generally and arson by the appellant specifically. In relation to the allegation of arson by the Appellant, which was specifically pleaded and alleged, the standard of cogency demanded careful attention and awareness to both the degree of proofs and persuasiveness that are required. The more serious the allegation, the higher the degree of proof. An allegation of arson is a most serious accusation with severe consequences, as in this case, the avoidance of any obligation to pay compensation under the insurance policies. Put another way, the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it (to quote Ungoed-Thomas J, cited above). The awareness and application of these nuances were not readily discernible in the reasoning of the trial judge or in the review by the Court of Appeal.

[415] The grounds of appeal raised questions of fact and law for review, including challenging Mr Mohammed's alleged role in causing the fire, and about the burden of proof. The Court of Appeal was required to scrutinise the trial judge's forensic

analyses in relation to credibility, primary facts, and inferences, generally and in relation to the allegation of arson implicating the Appellant, before agreeing with those conclusions. However, the approach of the Court of Appeal did not, in my respectful view, demonstrate a sufficient forensic critique. Instead, it adopted a broad-brush approach summarised by its statement: 'These grounds of appeal would invite this Court to delve into the mind of the trial judge and make determinations that are not properly within the ambit of an appellate court.'

[416] As the findings in relation to the bronze Buddha demonstrate and their analysis in the opinions of this court show, this case is one which, despite the existence of concurrent findings, some of those findings were amenable to review by this Court. The flexible 'plainly/clearly wrong' probabilistic approach advocated in Lachana and Campbell appropriately permits this.

Part II – Non-Disclosure

'How you get there is where you'll arrive.'[390]

Materiality: Avoiding the Policy for Non-Disclosure

[417] The instant appeal also concerns three alleged material non-disclosures by the appellant, that the respondent contends each has the effect of rendering void the insurance contract between the parties. The opinions of Burgess and Anderson JJ have quite comprehensively explored the law and facts and there is no need to repeat them. However, those opinions disagree on the formulation of the relevant test for materiality. Thus, it is in the interpretation and application of both law and facts that I must explain my own position and in so doing clarify what I agree with.

[390] Philip Booth, 'Heading Out', in *Selves* (Penguin Books 1990).

The law: Determining the Relevant Test for Materiality

[418] In so far as ss 20 and 21 of the Barbados Marine Insurance Act 1979 (the Act), which mirror ss 17 and 18 of the UK Marine Insurance Act, 1906, govern the relevant legal approaches (accepted to be and treated as being a codification of the common law in the UK in 1906[391] and applicable to all types of insurance contracts), this issue can be viewed as a matter of (statutory) interpretation and applied pragmatic commercial (insurance) common sense. However, the principle that the common law is forever evolving and must do so in ways that are relevant for Caribbean contexts, must also be borne in mind.[392] And as well, that this issue is being debated by the judges of this Court in circumstances in which both attorneys agree on what the relevant test is – the majority view in *Pan Atlantic*.

[419] Sections 20 and 21 of the Act state as follows:

> 20. A contract of marine insurance is a contract based upon the utmost good faith; and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party.
>
> 21. (1) Subject to this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance that is known to the assured; and the assured is presumed to know every circumstance that, in the ordinary course of business, ought to be known by him; and if the assured fails to make any such disclosure, the insurer may avoid the contract.[393]
>
> (2) Every circumstance is material that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.[394]
>
> (3) In the absence of inquiry the following circumstances need not be disclosed:

[391] Sections 20 and 21 of the Act are virtually identical to ss 17 and 18 of the UK Marine Insurance Act, 1906.
[392] *A- G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *Lachana* (n 22).
[393] Note the parallel in relation to representations at s 23(1) of the Act and s 20(1) of the 1906 UK legislation, 23(1) 'Every material representation made by the assured or his agent to the insurer… must be true; and if a representation is untrue the insurer may avoid the contract'.
[394] Note the parallel in relation to representations at s 23(2) of the Act and s 20(2) of the 1906 UK legislation, 23(2) 'A representation is material that would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk'.

(a) any circumstance that diminishes the risk:

(b) any circumstance that is known or presumed to be known to the insurer; and the insurer is presumed to know matters of common notoriety or knowledge, and matters that an insurer in the ordinary course of his business, as such, ought to know:

(c) any circumstance in respect of which information is waived by the insurer; and

(d) any circumstance that it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance that is not disclosed is material or not is, in each case, a question of fact.

(5) The term 'circumstance' includes any communication made to, or information received by, the assured.

[420] For the insurance industry, the issue of whether and when a circumstance is material and must be disclosed, divided the opinions in the House of Lords in the *Pan Atlantic* case,[395] as it has also done before this Court. Precedents of the highest authority can be found to support the competing positions, as can academic writings. It is also clear, that the commercial customs on this point in the Anglo-Caribbean have followed the majority approach in *Pan Atlantic*, and so that approach may be described as the industry standard and practice – the commercial tradition (broadening and building upon, as it does, the earlier approach taken in the 1995 *CTI* case[396]). Indeed, in this appeal both sides agreed that this was the appropriate test, and the appeal was argued on that basis, as was the case in the courts below.

[421] Anderson J prefers the minority view in *Pan Atlantic* and Saunders P, and Barrow J agree with him. Burgess J adopts the majority position in *Pan Atlantic* and Rajnauth-Lee J agrees with him, a position which aligns with my own views at this time, with the nuances and clarifications set out below. In *Pan Atlantic*,

[395] *Pan Atlantic* (n 1).
[396] *Container Transport International* (n 84).

consideration of the UK Marine Insurance Act, and in particular ss 17 and 18, were subjected to rigorous textual and intentional/purposive analyses.

[422] In my opinion, this issue is ultimately to be resolved on a policy analysis, on ideological grounds, despite any naysaying. Policy analysis is best achieved by considering, first, the consequences that may flow from one interpretation or another, and then, second, an evaluation of which set of consequences is more consistent with the underlying and operative values, principles, objectives, the purposes, of the law in question.[397] What is called for on this issue is a policy decision that is suited to current Caribbean needs and realities.

[423] Thus, my reservations about this Court, in this matter, in the circumstances in which this issue is being interrogated, taking any final and determinative positions on an appropriate test. No side has advanced an argument that the test should be anything other than that stated by the majority in *Pan Atlantic*. Despite all appearances, this is also not strictly a matter of pure statutory interpretation. It is as well a matter of the development of Caribbean insurance common law. To date the insurance industry has operated on the basis of the majority view in *Pan Atlantic*. In my opinion, comparative expert and other relevant evidence from all perspectives, as to the pragmatic realities of and consequences for the Caribbean insurance industry if the minority view in *Pan Atlantic* is adopted (as compared to the majority view), would be invaluable to making a fully informed policy decision to aid both the interpretation of the legislation and the development of the common law. As indeed, would fuller legal argumentation and the benefit of first-tier and intermediate appellate courts opinions on the matter. Nevertheless, the issue has been tabled by some members of this panel and so demands a response. This response is constrained by these limitations.

[397] Wilson Huhn, *The Five Types of Legal Argument* (3rd edn, Carolina Academic Press 2014) 51.

The Two Limbs

[424] In my opinion, on materiality and non-disclosure and on the choice of a suitable test to satisfy the requirements of s 20(1) and (2) of the Act, I think that on the first limb of the *Pan Atlantic* formulation, a slightly nuanced 'want/wished to know' assessment is apt. This is an objective, reasonable, and prudent insurer materiality assessment. The burden of proof is on the insurer on an objective standard to be established by clear evidence of industry practice, and not mere say-so, *ipse dixit*.

[425] On the second limb, the subjective inducement aspect of the materiality test in relation to non-disclosure, I think that the burden of proof is on an insurer to establish on the basis of clear, compelling, and credible evidence and to a reasonableness standard, that as between this particular insurer and this particular insured (the subjective aspect), the non-disclosure did in fact induce the insurer into making the insurance contract (though it may not have been the only reason for doing so). The insurer must establish that the non-disclosure had a decisive impact on whether this insurer would have taken the risk with or altered the premiums for this insured in relation to the particular insurance contract.

[426] Establishing a material non-disclosure for the purposes of avoiding an insurance contract requires proof of both limbs. There is a single test with two aspects or components. That is, materiality must be demonstrated both as industry practice and in relation to the particular circumstances as inducement.

The First Limb

[427] It seems to me that the competing tests on the first limb may be conceptualised as points along a standard of proof scale, to be viewed through the lens of information gathering. The 'decisive influence' assessment is akin to an evaluative standard that requires proof that an objective, reasonable and prudent insurer '**must** know/have'

the information that was not disclosed to decide whether to accept or decline the risk and/or set premiums.

[428] The 'want/wish to know' assessment, on the other hand, is akin to an evaluative standard that requires proof that an objective, reasonable and prudent insurer '*would* want/wish to know/have' or '*would* have taken into account' the information that was not disclosed. In my opinion, the latter may also be described, nuanced, as a '*may need to* know/have' information evaluative assessment. 'May' qualifies 'need' to distinguish it from the decisive influence 'must know/have', and to confirm the objective standard of a reasonable and prudent underwriter-insurer. The information wished/wanted, that may be needed, is material for the purposes of the first limb, even though it would not necessarily have made a decisive difference to the insurer's final decisions whether to undertake the risk or in relation to the premiums set. And, for the purposes of avoiding a policy on the basis of material non-disclosure, a final evaluation of materiality must await the inducement (second limb) assessment. That is, materiality must satisfy both the general and specific components of the test.

[429] The important distinction between these two competing first limb assessments, is the impact of each on the range of information that is considered *prima facie* material (and therefore to be disclosed by a proposer-insured), because, taken together with the second limb assessment, it '*would* influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk'.[398] In this regard s 21(1) of the Act is also instructive, because it only places on an insured a duty to disclose 'every material circumstance that *is known* to the assured', and an insured is only 'presumed to know every circumstance that, in the ordinary course of business, *ought to be known* by him.' Section 21(3) also exempts a proposer-insured from having the burden (in the absence of an inquiry) to disclose certain categories of information, including 'any circumstance that diminishes the

[398] *Barbados Marine Insurance Act* (n 79) s 21(2).

risk.'[399] These limitations are consistent with the overarching and mutual 'good faith' duty of disclosure that underpins, in particular, insurance contracts,[400] and are at the same time anchored in commercial pragmatism that does not place an unrealistic or unfair obligation on an insured.[401]

[430] An insurance contract is fundamentally dependent on the obtaining and assessment of relevant information. In this regard an insured has a special duty and responsibility, based in good faith, and because much of the relevant information may only be known to them. In 1766, in *Carter v Boehm,*[402] Lord Mansfield explained this good faith duty of disclosure in the context of insurance contracts, as follows:

> Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist and to induce him to underestimate the risk, as if it did not exist.
> …
> Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

[431] Insurance contracts are fundamentally premised on an inequality of access to information as between the insured-proposer and the underwriter-insurer, and as well on the commercial nature of insurance as a contract upon a 'speculation', that is, on fact dependant risk assessments. It is simply pragmatic commercial (insurance) common sense, in a context of freedom to contract (or to decline to do so), that an insurer would reasonably want and may need all relevant information that could influence their either accepting of rejecting an insurance risk, or that

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[399] ibid s 21(3)(a).
[400] ibid s 20.
[401] ibid s 21(1) and (3).
[402] *Carter* (n 74).

could influence the premiums that may be considered. The duty on a proposer-insured to disclose such material information, only in so far as it is known or ought to be known to them, is eminently fair to all parties (bearing also in mind the exemptions at s 21(3) of the Act).

[432] Further, s 21(3) of the Act anticipates inquiries by an insurer as to information that it wants/wishes to know/have. The import of this section is relevant. Whatever may have been the insurance culture in 1906, in 2023 judicial notice can be taken of the pervasive insurance practices of disclosure that a proposer-insured is required to abide by. Indeed, any notion that when an insured makes a proposal they must somehow imagine out of thin air what information is to be disclosed, seems to be out of touch with current insurance realities. A modern-day proposer-insured does not start with a *tabula rasa*, but usually with a proposal form. In this case, it would appear that no proposal form was completed and that a 'broker's slip' was used (which has not been produced in these proceedings). However, this did not absolve Apsara from its duty to disclose matters and circumstances that were material.

[433] The s 20 requirement of mutual good faith requires, certainly it seems that it must be so in these times, that an insurer indicate the kinds and categories of information that it wants/wishes to have disclosed in a proposal form, even if the actual proposal is done *via* a brokers slip, as the facts in this case demonstrate. This good faith requirement may be considered another nuance. It is one that adds greater balance and fairness to the proposer-underwriter, insured-insurer contractual relationship. A proposal form offers assistance with the determination of both general materiality *per se* and specific inducement. However, having the benefit of more comprehensive evidence on this industry practice and culture would have been helpful.

[434] Moreover, material, relevant information, may not be 'decisive influence' information, as to whether or not to finally accept the risk or as to what premiums are set, but that does not mean that it is not relevant or needed (and therefore

wanted) to enable making those assessments. The decisive influence assessment forecloses such information sharing that could be known to a proposer-insured and may be relevant and material to risk-premium assessments but is not decisive. And further, in the context of the decisive influence assessment, any such foreclosure in the context of the second limb, seems to prevent any consideration of the second limb assessment in relation to that information in the event that a policy of insurance is contested on the basis of non-disclosure.

[435] To my mind, and in the real commercial world of evaluating and/or insuring risk-premium, such pre-emptive foreclosure is eminently unfair to an insurer, especially where, with the use of proposal forms, information that is considered relevant and material and to be disclosed by an insured are part of the evaluative process. For example, there may be several pieces of information, known to a proposer-insured, none of which on their own can qualify as material under the decisive influence assessment, but taken cumulatively may very reasonably influence an underwriter-insurer as to whether they should accept or deny a risk and/or as to what premiums are apt. The cumulative effect of the information can have an inducing impact. Indeed, this very appeal is potentially illustrative of such a situation.

[436] The '*would* want/wish to know/have' or '*would* have taken into account' and the '*may need to* know/have' evaluative assessment approach would facilitate consideration (both by an underwriter-insurer and by a reviewing court) of any such relevant, and material, information (even if not considered to be decisive influence '*must* know/have' information). It would also facilitate a potential second limb assessment. From an interpretative standpoint, it is certainly worth noticing how the language of s 21(2) of the Act aligns with the '*would* want/wish to know' and 'may need to know' assessment.

[437] Finally, the s 21(2) assessment appears to anticipate both an evaluative process and final decision. In the sub-s, the word 'judgment' is qualified by the preceding explanation: 'Every circumstance is material that would influence the judgment.'

The use of 'would' indicates a conditional mood, that if certain requirements are satisfied a consequence will follow. An information gathering process seems to be anticipated, in which process there is a duty on a proposer-insured to disclose every material circumstance that would influence both the evaluation and decision(s) as to whether an underwriter-insurer will undertake a risk and what premiums may be set. The current and pervasive use of proposal forms facilitates and evidences this in practice. The mitigating consideration in relation to a proposer-insured, that adds balance and equity to the proposer-underwriter, insured-insurer contractual relationship, is that a proposer-insured is only required to disclose what is known or ought to be known by them (s 21(2), and because of the s 21(3) exceptions. As well, because of the mutual good faith requirement for proposal forms, as described. This all accords with good faith, fairness, and pragmatic commercial (insurance) common sense.

The Second Limb

[438] It is also noteworthy, that the second limb introduced in the *Pan Atlantic* case is in fact a development of the common law on non-disclosure in relation to all types of insurance contracts. Both limbs pertain to the test for materiality. Proof of inducement is now essential to establishing material non-disclosure sufficient to avoid an insurance contract.

[439] The inducement requirement does not necessarily have anything to do with the first limb or the express language of the statutes, *per se*, but arises because the common law on misrepresentation includes inducement, and because of the parallels between ss 23(1) and (2) of the Act and ss 20(1) and (2) of the 1906 UK legislation on the one hand, and the codified common law on non-disclosure (ss 21 of the Act and 18 of the 1906 UK legislation). That said, s 21(2) of the Act, which provides that '(e)very circumstance is material that would influence the judgment of a prudent insurer … ', clearly intends that material non-disclosures that 'influence' an insurer's decisions are pertinent. Thus, in so far as influence and inducement

converge in reliance on information to make decisions, there is statutory underpinning.

[440] However, and as a further nuance, not only must the inducement be an effective, an actual, cause for the insurer entering into the contract,[403] the burden of proof for which lies on the insurer on the basis of clear, compelling, and credible evidence, but there is also no presumption of inducement to be inferred from any proof of materiality (the first limb).

Policy

[441] As explained, this assessment is made in the context of the limitations identified. The two limbs are aspects, components, of a single test for proof of materiality for the purposes of avoiding an insurance contract. As well, at the deliberative and decision making stages and before a contract of insurance is agreed, the two limbs are akin to two filtering lenses, by which the duty to disclose is mediated – information that an objective, reasonable, and prudent insurer in the general industry would want/may need to know (prompted, as is usually the case, by a proposal form), and also information that for this particular insurer in this specific situation would have the influencing effect of inducing the insurer to either accept or decline the risk, or as to the terms of premiums.

[442] In my opinion, and on policy grounds, and at this time as presently informed, there is every good reason to continue using the materiality test for non-disclosure explained by Burgess J. Burgess J has articulated three reasons for doing so, with which I agree. Indeed, judicial notice can be taken that the insurance industry in the Caribbean is a truly regional enterprise, yet largely dependent on non-regional entities for re-insurance purposes (more information on this aspect would have been helpful). Given that legitimate textual, intentional, precedential, and customary bases exist for the justification of this approach, which is the *status quo*, and given

[403] *Edgington* (n 255).

that in my view as presently informed, there is no undue unfairness or inequality caused to an insured with the formulation of the process and test as explained in this opinion, and given the possible adverse consequences for the industry (insurers and insured) to have two different tests in one region administered by single insurers which are re-insured extra-regionally purposes (again, more information on this aspect would have been helpful), I think these are compelling reasons to maintain the current approaches as explained by Burgess J and in this opinion. Certainly, in the context of this appeal.

The Facts: Finding Material Non-Disclosure

[443] It was alleged that the appellant failed to disclose: (i) the cancellation of a Gulf insurance policy, (ii) a failed insurance claim for a shipment of shrimp, and (iii) its indebtedness to the Agricultural Development Bank. It was contended that each non-disclosure was material and sufficient to avoid the policy. There is no dispute that these matters were not disclosed by the appellant. The issue turns on materiality and its inducement component, bearing especially in mind the requisite burden and standards of proof and that this is a single test with two limbs. Because this is an appeal to an apex court in which there are concurrent findings of material non-disclosure on all these three matters, this review is also undertaken by applying the 'clearly/plainly wrong' test as explained above.

[444] In this case the respondent's 'Fire Proposal Form Business Premises' has been put before this Court. Though not completed, it is an indication of the kinds of information that the insurer considered material. One must assume that the insured's broker ought to have been aware of it and whatever was on the broker's slip ought to have been informed accordingly. It therefore remains, evidentially, a guide to materiality. The Proposal Form states, in the heading: 'EACH OF THESE QUESTIONS MUST BE ANSWERED COMPLETELY (Do not leave blanks and do not answer a question with a dash)'. There are fourteen questions which clearly cover information that the insurer wants in order to make a decision – an evaluative

judgment as to whether to undertake the risk and what premiums to set. The form concludes with the following statement, which appears just above the place for the ate and proposer's signature:

> I/We hereby wish to effect an insurance with GUARDIAN GENERAL INSURANCE LIMITED in terms of the Policy issued by the Company. I/We hereby declare that to the best of my/our knowledge and belief and the statements and particulars given by me/us in this proposal are true and Complete and no material fact, that is those facts which the Company would regard as likely to influence the acceptance and assessment of this Proposal has been misrepresented, misstated, suppressed or withheld. I/We agree that this proposal shall form the basis of the contract between me/us and GUARDIAN GENERAL INSURANCE LIMITED.

[445] Questions 6, 7, 8, and 9 are particularly relevant. Question 6 states: 'Have you, or any of your Partners or Directors of your Company ever suffered a loss, (whether insured or not) at these premises or elsewhere?' Question 7 states: 'Have you, or any of your Partners or Directors of your Company been convicted of Arson, Fraud, or any other crime, related to loss of property during the last five years?' And Question 8 states: 'Have you, or any of your Partners or Directors of your Company ever had a Proposal or Policy Refused, Declined, Cancelled or Special Terms imposed?'. Question 9 is a two-part question, part (b) states: 'Do you anticipate being able to pay all of the charges, Debts, or Liabilities against you?'

[446] These questions disclosed some of the information that the insurer (respondent) wished/wanted to have. This information was considered material by the insurer. Thus, in so far as a 'broker's slip' is prepared by a broker who acts as an intermediary between insurer and insured, and is expected to contain all the information that an underwriter needs to know in order to determine whether to provide coverage and to undertake the risk proposed, a reasonable assumption is that a conscientious broker would have inquired about the information contained in the proposal form and provided all material details disclosed by the appellant. The

idea that the appellant could somehow be unfairly disadvantaged in relation to disclosure of these categories of information, is therefore rather disingenuous.

i. **Cancellation**

[447] On the cancellation issue, I accept that on the objective would want/wish and may need to know evaluative assessment, an objective, reasonable, and prudent underwriter-insurer would want to know this information, the *prima facie* fact of a cancelled policy. Question 8 on the proposal form is apposite. Good faith demanded that this be done (and with full explanations). There could be no surprise, ambush, or unfairness in relation to this information and the respondent's argument for avoidance of the policy based on it. However, on the subjective inducement limb which would delve deeper into the circumstances, given that there was in fact never an intention to enter into a contract of insurance, and that the cancellation note was merely a technical administrative step to meet internal auditing requirements, it cannot reasonably be asserted, without clear, compelling, and credible evidence (of which there is none sufficient, in my opinion, to prove inducement), that this was a material non-disclosure that met the standards of proof required to satisfy the inducement limb of the test. In my opinion, more was needed evidentially, than the assertion that this non-disclosure might or would have induced the respondent to accept the risk. Both the trial judge and the Court of Appeal were therefore clearly in error and there is no sufficient basis for their findings.

ii. **Failed Claim**

[448] On the failed claim issue, I accept that on the objective would want/wish and may need to know evaluative assessment, an objective, reasonable, and prudent underwriter-insurer would want to know this information, the fact of a failed insurance claim. Question 6 on the proposal form is apposite. There could be no surprise, ambush, or unfairness in relation to this information and the respondent's argument for avoidance of the policy based on it. However, on the subjective

inducement limb, where details of that claim and the circumstances and reasons for its failure would reasonably be considered, and where the failure was not on the basis of fraud but because of a failure to provide satisfactory or sufficient details or evidence to support the claim, it cannot reasonably be asserted, without clear, compelling, and credible evidence (of which there is none sufficient, in my opinion, to prove inducement), that this was a material non-disclosure that met the standards of proof required to satisfy the inducement limb of the test. In my opinion, more was needed evidentially, than the assertion that this non-disclosure would have induced the respondent to accept the risk. Both the trial judge and the Court of Appeal were therefore clearly in error and there is no sufficient basis for their findings.

iii. **Indebtedness**

[449] On the indebtedness issue, I accept that on the objective would want/wish and may need to know evaluative assessment, an objective, reasonable, and prudent underwriter-insurer would want to know this information, the fact of indebtedness of just under USD150,000, especially where a judgment for those monies had been registered and was unpaid. Questions 6 and 9(b) on the proposal form, read together, are apposite. It is obvious that the insured (appellant), to truthfully respond to information contemplated by question 9(b), would have had to disclose this judgment debt. Good faith demands no less. There could be no surprise, ambush, or unfairness in relation to this information and the respondent's argument for avoidance of the policy based on it. On the subjective inducement limb, where details of that debt and the particulars of repayment and other material factors would reasonably be considered, I am of the view that this non-disclosure was material and that in the context of concurrent findings the evidence met the standards of proof required to satisfy the inducement limb of the test.

[450] The trial judge determined that the indebtedness was a material fact which ought to have been disclosed. The Court of Appeal agreed, explaining that this registered

and unpaid judgment 'went to more than just the credit risk of the insured but clearly would have brought up consideration of priority and assignment of any policy which the insured would be subject to if the policy was ever engaged'. In addition, there was expert evidence called by the respondent that the fact of indebtedness was information that a prudent insurer would want to know, and specific evidence from the Operations Manager of the respondent that if this undisclosed fact had been known that the respondent would have 'declined the risk'. The appellant also called no evidence to contradict the testimony of the respondent's Operations Manager. Finally, in Caribbean commercial contexts one can take judicial notice that USD150,000 is no trifling sum, and an unpaid registered judgment debt in that amount is a significant consideration.

[451] Question 9(b) on the proposal form clearly intimated that this was information that was considered material and potentially inducing, information and details that the appellant deliberately suppressed and/or withheld, and by way of subscribing to the declaration on the form, consciously chose to mislead about. This is all evidence that is arguably clear, compelling, and credible, even if more could have been done by the respondent in this regard. In these circumstances it cannot be said that the trial court and/or the Court of Appeal were 'plainly/clearly wrong' or there is otherwise no sufficient basis for their findings, that this non-disclosure was material and that the evidence met the standards of proof required to satisfy the inducement limb of the test. There is therefore no reviewable opportunity on these concurrent findings before this Court on this matter.

Conclusion

[452] However, this is not necessarily the end of the matter. Approaching the issue in the round and on the totality of the evidence and in all the circumstances, the cumulative effect of all three of the non-disclosures **could** in their totality have had an influencing, an inducing impact on the insurer (respondent) whether to take the

risk and as to premiums. Thus, even though on the cancellation and failed claim issues, taken on their own, there may have been no material non-disclosures sufficient to avoid the policy because of a failure to establish inducement, taken together with the indebtedness issue, the cumulative effect of this information ***could*** also ***arguably*** have satisfied the requirements of material non-disclosure and inducement for the purposes of avoiding the policy, ***if*** **there was, say,** positive evidence that the cumulative effect of the three non-disclosures actually induced the insurers (respondent). Which makes the point, that the 'want/wish to know/have' and 'may need to know/have' assessments on the first limb remain appropriate at this time, in the context of a single test of materiality which includes an inducement limb.

[453] Thus, in my opinion, the respondent was entitled to cancel the policy of insurance and return the premiums to the appellant based on the appellant's non-disclosure of material facts. Accordingly, I too would order that the decision of the Court of Appeal in that regard be upheld.

ORDERS OF THE COURT

[454] The Court orders that:

i) The appeal is dismissed.

ii) The respondent was entitled to cancel the policy of insurance and return the premiums to the appellant.

iii) The issue of costs is reserved.

/s/ A Saunders

Mr Justice A Saunders (President)

	/s/ W Anderson
Mr Justice J Wit*	**Mr Justice W Anderson**
/s/ M Rajnauth-Lee	/s/ D Barrow
Mme Justice M Rajnauth-Lee	**Mr Justice D Barrow**
/s/ A Burgess	/s/ P Jamadar
Mr Justice A Burgess	**Mr Justice P Jamadar**

* The case was heard by all seven judges of the CCJ but, regrettably, before the judgment could be delivered, Wit J retired from the Court on the ground of ill health and passed away shortly thereafter. His inability to participate in the deliberations did not affect the outcome of the appeal as all remaining six judges have agreed that the appeal must be dismissed.