In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT

1999: No. 108/ 2001 No. 79

B E T W E E N:

LISA S.A.

Plaintiff

- v -

LEAMINGTON REINSURANCE COMPANY LTD.

First Defendant

- and -

AVICOLA VILLALOBOS S.A.

Second Defendant

RULING ON COSTS AND INTEREST

Dates of Hearing: October 3, 2008
Date of Ruling: October 17, 2008

Mr. Narinder Hargun and Mr. Paul Smith Conyers Dill & Pearman, for the Plaintiff
Mr. John Riihiluoma, Appleby, for the First Defendant
Mr. Jan Woloniecki and Ms. Shade Subair, Attride-Stirling & Woloniecki, for the Second Defendant

Introductory

1. The present litigation has been on foot for almost ten years. The trial lasted for three weeks and involved three categories of expert evidence. The issues of costs and interest are clearly of considerable commercial import to the parties, a fact which was reflected in the fulsome written submissions placed before the Court.

2. As far as costs are concerned, two comparatively novel issues of principle were raised: (a) is there a distinction between the scope of the discretionary jurisdiction to award indemnity costs under Bermuda's pre-CPR Rules of Court and under post-CPR persuasive English authorities, and (b) did the present case fall within the category of case where the 1st Defendant could be ordered to pay the 2nd Defendant's costs and/or that the successful 2nd Defendant should not be permitted to recover its costs from the Plaintiff in any event? As far as pre-judgment interest is concerned, it was far from clear (in light of two conflicting Supreme Court decisions) whether (a) section 10 of the Interest and Credit Charges (Regulation) Act 1975 conferred a discretion to award interest at less than the statutory rate of 7%, and (b) even if it did not, how this impacted (if at all) on the undoubted discretion to determine the period in respect of which interest should be awarded.

3. The successful Plaintiff (Lisa) sought indemnity costs from the 1st Defendant (Leamington) and contended that either Leamington should pay the costs of the successful 2nd Defendant (AVSA) or that no order should be made for AVSA's costs due to (a) its support for Leamington's unsuccessful defence of Lisa's fraud claims, and (b) the fact that AVSA and Leamington were under common ownership. Leamington accepted that costs must follow the event, but contested the appropriateness of indemnity costs and invited the Court to disallow specific aspects of Lisa's costs claim. AVSA sought its costs against Lisa on an indemnity basis on the grounds that the claim against it had been pursued in an abusive manner.

4. As far as interest is concerned, Lisa sought interest at the rate of 7% from the date that the relevant reinsurance premiums were received. Leamington contended that a more just rate was the lower rate at which monies held pursuant to a mareva injunction obtained by Lisa in or about 2000 actually earned interest. Alternatively, Leamington submitted that since the claim upon which Lisa

succeeded was not effectively advanced until an application to re-amend granted in March 2006, interest should not in fact run before this later date.

Findings: Lisa's claim for indemnity costs against Leamington

5. Lisa seeks indemnity costs on two principal grounds: (1) Leamington has been found guilty of deliberate wrongdoing, and (2) Leamington filed a false affidavit dated October 8, 1999 in support of an aborted application to discharge the *ex parte* mareva injunction Lisa obtained early in this litigation. Both of these grounds are unmeritorious.

6. Mr. Hargun relied a more flexible approach to indemnity costs under the English CPR regime: "*The making of a costs order on the indemnity basis would be appropriate in circumstances where the facts of the case and/or the conduct of the parties was such as to take the situation away from the norm*"[1] As Mr. Riihiluoma rightly pointed out, later in the same paragraph cited by Mr. Hargun, it is made plain that "*it is incorrect for a judge to be guided by the many pre CPR cases*". Although CPR has not been adopted in Bermuda, our current post-January 1, 2006 costs regime (which narrows the financial gap between indemnity and standard costs) combined with Order 1A of the Rules (the Overriding Objective) may in appropriate cases mean that the post-CPR principles may not be wholly irrelevant in the local context. But in the vast majority of cases this will occur where the application for indemnity costs is based on the way the litigation has been conducted; not on the nature of the underlying claim.

7. Where a party obtains relief in a proceeding based on perjured evidence, the relevant order may be set aside and indemnity costs awarded in respect of both the original application and the proceedings to set aside the order obtained in reliance of the perjured evidence: *Fidelity Advisor Series VIII –v-APP China Group Ltd.*[2007] Bda LR 35 (see especially paragraphs 196-197). In the latter case,

[1] '*Civil Procedure*', Volume 1 (Sweet & Maxwell: London, 2006) paragraph 44.4.2.

indemnity costs were awarded in the secondary proceedings in which no misconduct occurred, by necessary implication, to punish the party who deceived the Court in the earlier proceedings. In this exceptional context, the cause of action relied upon is inextricably bound up with the conduct of proceedings before the Court. The present case could not be further removed from the factual matrix which would justify awarding indemnity costs in proceedings brought to set aside an order procured by fraud. The false affidavit had no material impact on the aborted application in relation to which it was filed, and Lisa's claim was not in any material sense seeking relief for the misconduct of proceedings before this Court.

8. Accordingly, I find that Lisa is only entitled to recover costs at the standard rate from Leamington.

Findings: Leamington's application for Lisa's costs to be disallowed in part

9. Leamington submitted that the Court should either (a) disallow pre-re-amendment costs, allow 50% of the insurance expert Mr. Spragg's costs and disallow accounting expert Mr. Gardemal's costs altogether, or (b) only award Lisa 50% of its costs because it has only succeeded in financial terms to a limited extent. Each of these points was, at first blush, potentially meritorious.

10. As far as the pre-re-amendment costs were concerned, Mr. Hargun at the costs hearing purported to confirm my belief that a formal order was actually drawn up to give effect to my February 10, 2006 Ruling by which this Court, *inter alia*, granted Lisa leave to re-amend its Statement of Claim and awarded costs occasioned by the amendment to the Defendants. Mr. Riihiluoma indicated that he did not recall any such order ever being drawn up. No such order was included in the trial bundle, and having examined the Court file it is apparent that no such order was ever settled and signed. My February 10, 2006 Ruling anticipated that I would hear counsel as to costs and that a formal order giving effect to the ruling

would in due course be drawn up. The Re-Amended Statement of Claim (RASC) was simply served on or about March 16, 2006 by Lisa without a formal order being drawn up and any order as to the costs of the trial of the preliminary issue and application for leave to re-amend being made. On March 8, 2006, Leamington appeared on an ex parte basis to seek leave to appeal against the February 10, 2006 Ruling. I adjourned the application to an *inter partes* hearing to be listed "*after the final order has been drawn up.*" The appeal appears to have proceeded on the basis that I granted leave, but I have been unable to locate any formal order (nor hearing notes) in this regard.

11. The Court of Appeal dismissed Leamington's appeal against my granting Lisa leave to re-amend and allowed Lisa's cross-appeal against my resolution of the preliminary issue in favour of the Defendants (essentially Leamington).The November 22, 2006 Court of Appeal judgment did not deal with costs, and invited submissions on the form of order to be drawn up. The Notice of Appeal sought costs, but made no reference to the costs of the hearing before this Court, which costs were still at large. No order giving effect to the Court of Appeal's 2006 judgment was included in the trial bundle. From the Court of Appeal file, it also appears that no order giving effect to the Court Of Appeal judgment was drawn up so it is unclear what order (if any) was made as to the costs of the appeal. It seems reasonable to assume, however, that the Court of Appeal made no order as to the costs before this Court, because the issue of first instance costs was not raised on appeal.

12. It follows that the appropriate costs order to be made in respect of the application for the trial of the preliminary issue (in respect of which the Court of Appeal substituted "no order" for my order in favour of Leamington) is to make no order as to those costs. The usual order as regards the re-amendment application, namely that the Defendants should be awarded the costs thrown away by and the costs of Lisa's application in any event is also made.

13. Should Lisa be penalized for not getting its house in order prior to March 16, 2006? The remaining costs of the action for this period are not likely to be substantial as the January 2006 hearing appears to have been the first substantial interlocutory application. The outstanding costs prior to January 1, 2006 will have to be taxed according to the old taxation regime[2] according to which Lisa may be entitled to recover as little as one-third of its actual costs. It is now clear that Leamington was somewhat unfortunate to have been (implicitly) deprived by the Court of Appeal of a clear right to recover on the more generous modern basis the costs of the four-day preliminary issue trial. This was decided on a version of the pleading which was for all practical purposes irrelevant at trial. It is also now clear that Lisa could not rely on its standing as an indirect shareholder of Leamington, a point which was also unclear before the Court of Appeal.

14. Lisa has essentially succeeded on the case pleaded in the RASC served on March 16, 2006, prior to which no sustainable personal claim had been asserted against Leamington, even if its core complaints remained the same in purely factual terms. In the exercise of my discretion, and without prejudice to any costs orders which have already been made, I make no order as to the costs prior to March 16, 2006 as between Lisa and Leamington.

15. Having accepted this first limb of Mr. Riihiluoma's submissions, I see no justification for departing from the usual rule that costs should follow the event in respect of the post-March 16, 2006 costs. Lisa has comprehensively succeeded in terms of its substantive fraud-based claims and has clearly recovered more in both cash and global value terms than the sums tendered in the open March 2008 settlement letter. I see no justification for disallowing half of Lisa's costs. To justify disallowing the costs of expert witnesses in whole or in part, in my judgment more is required than the assertion that the Court did not fully accept the relevant experts' conclusions. In my judgment Mr. Spragg and Mr. Gardemal

[2] See rule 15(3), Rules of the Supreme Court Amendment Rules 2006.

contributed to the process by which the Court reached its findings to a sufficient extent to justify the related costs being recovered by Lisa in full.

Findings: should the Court make no order as to AVSA's costs by reason of its conduct before and during the proceedings or award AVSA indemnity costs?

16. I accept Mr. Hargun's submission that the Court has the discretion in "*special circumstances*" not to award AVSA its costs, having regard to the successful 2nd Defendant's conduct "*connected with or leading up to the litigation*": *Donald Campbell & Company –v-Pollack* [1927] AC 732 at 811-812. In my judgment no such special circumstances have been made out. The mere fact that Lisa was able, very narrowly, to survive AVSA's 2007 strike-out application can hardly constitute grounds for depriving AVSA of its costs. Having found that AVSA was not involved in the relevant fraud for liability purposes, it would be peculiar to deprive AVSA of its costs on the grounds that its ultimate owners are the same as Leamington's.

17. I find that AVSA should have its costs on a standard basis, but limited to those costs which relate to Lisa's claim against AVSA and which would not have been incurred in any event. By way of illustration, AVSA would not be able to claim its 50% share of the experts it retained jointly with Leamington (Lozada and Yip). I reject AVSA's claim for indemnity costs against Lisa on the grounds that AVSA was joined for improper motives, although I accept AVSA's formulation of the applicable legal principles.

18. The history of the proceedings suggests that AVSA was joined because it was genuinely believed to be the parent company of the Avicola Group and was reinsured by Leamington. AVSA itself did not plead the true position until its Amended Defence was filed on May 26, 2006. Mr. Woloniecki argued that there was no commercial necessity for joining AVSA as the compensation claimed could have been recovered from Leamington, but Lisa did assert at least one free-

standing claim against AVSA (Article 176) which might have supported an application for non-pecuniary relief. Nor does the media and political campaign launched against AVSA in Guatemala, apparently at the instance of persons connected with Lisa, warrant a punitive costs order by this Court, having regard to the overall result of this litigation and the limited information before this Court about precisely what transpired in Guatemala.

19. It remains to consider whether these costs should be paid by Lisa or Leamington.

Findings: should Leamington be ordered to pay, or indemnify Lisa in respect of, any costs awarded in favour of AVSA?

20. Leamington's counsel vigorously challenged the contention that it should be responsible for its co-defendant's costs. It was common ground that Lisa's application that Leamington should indemnify Lisa in respect of AVSA's costs or pay AVSA such costs required the Court to find that there were grounds for departing from the usual rule that costs follow the event. Counsel contended that the principle established in *Sanderson –v- Blyth Theatre* [1903]2 K.B. 533 and *Bullock-v- The London General Omnibus Company* [1907] 1 K.B. 264 was fluid enough to apply to the present case. Mr. Hargun accepted that he was aware of no judicial precedent for one defendant being ordered to pay another's costs outside of the context of cases where the plaintiff advances alternative claims.

21. I have regard to the following passage in the *Sanderson* case which illustrates both the exceptional nature of this jurisdiction and the scope of its operation in the specific context of alternative claims:

> "*I concur in the judgments of my learned brethren, because I think there is jurisdiction under the old Chancery practice for ordering recoupment of costs directed to be paid by another litigant. It may be necessary to exercise this jurisdiction in a case like the present, where there are claims against*

alternative defendants, and the issues are tried by a jury. But generally I think that under the Judicature Act this jurisdiction should only be exercised in exceptional cases…"[3]

22. I also have regard to the context in which the unsuccessful defendant was required to pay the successful defendant's costs in the *Bullock* case, where Collins MR observed:

> "*The action was brought to recover damages in respect of personal injuries sustained by the plaintiff. The plaintiff joined as defendants the General Omnibus Company, the owners of the omnibus in which she was a passenger, and the owners of another vehicle which, in her view, took a part in bringing about the collision which caused the injuries of which she complained. Her case was framed in the statement of claim in three ways. Firstly, it was charged that the two defendants by their joint negligence caused the injuries sustained by the plaintiff, and then followed a charge of negligence against each of the defendants separately. In the result there was a verdict for the plaintiff against the General Omnibus Company and against the plaintiff in favour of the other defendants. The learned judge entered judgment for the plaintiff, with costs against the General Omnibus Company, and a verdict for the other defendants, with costs against the plaintiff. Having got thus far, he made an order that there should be included in the costs recoverable from the General Omnibus Company by the plaintiff the costs that she had to pay to the other defendants.* **The common sense underlying this order is clear, because the learned judge when he made it had before him evidence that, owing to the attitude taken up by the General Omnibus Company, it was reasonable for the plaintiff to join the other defendants**." [4] [emphasis added]

[3] Per Vaughan-Williams J at 544.
[4] At pages 268-269.

23. The rationale for a ‘Sanderson’ or ‘Bullock’ order is that the Plaintiff was compelled, to avoid a multiplicity of proceedings, to join the successful defendant because the unsuccessful defendant represented in the course of his defence that the former was liable instead of him. Where it is possible for both defendants to be held liable and the unsuccessful defendant does not contend that the successful defendant is the culpable party, this rationale does not exist. Because of my unfamiliarity with this type of order, I sought confirmation of my preliminary conclusions from authorities which were not placed before the Court. Lord Brandon in *Bankamerica Finance Ltd.-v-Nock* [1988] 1 AC 1002 at 1011 pithily observed:

> “*The first question is whether the judge was right in holding that the nature of the case was such that he had power to make a Bullock or a Sanderson order. The second question is whether he was right in holding that, on the basis that he had such powers, the choice between making the one order or the other was in his discretion. The third question is whether, in choosing to make a Sanderson order, he exercised his discretion judicially.*
>
> *With regard to the first question I am of opinion that the finance company's claims against the hirer and the dealer were in substance alternative claims. The finance company was bound to succeed on one or other of the two claims, and could not succeed on both. That being so, the judge clearly had power, without infringing Ord. 62, r. 3(3) and in accordance with long established practice, to make either a Bullock or a Sanderson order.”*

24. The jurisdiction to grant such exceptional costs orders was, for present purposes, even more clearly articulated by Gray J in *Rackham-v- Sandy* [2005] EWHC 1354:

> "*[23] The last question which arises for decision is whether, as Mr Rampton invites me to do, I should direct that Mr Sandy should pay the costs which I have ordered should be paid by Mr Rackham to Mr Etheridge and Mr Hardman in accordance with the principles laid down in Sanderson. In the course of his submissions Mr Rampton referred me to a series of authorities including, Sanderson itself; Bullock; Besterman v British Motor Cab Company Limited [1914] 3 KB 181; Goldsworthy v Brickell [1987] 1 Ch 378; Irvine v Commissioner of Police for Metropolis [2005] EWCA Civ 129 and King v Zurich Insurance Company [2002] EWCA Civ 598. It appears to me from that line of authority that a Sanderson order will be appropriate where two or more defendants are blaming each other and the claimant cannot reasonably predict which defendant will be found liable. In the present case Mr Rackham knew who had signed the letter. Qualified privilege was conceded from the outset. There was no question of any one of the three Defendants blaming the others. Mr Rackham had to decide whether he would be able to prove malice against all three Defendants. As I have already said, he elected to sue all three Defendants. That was his decision. I do not accept that it would be just in all the circumstances for Mr Sandy to bear the additional burden of paying the costs which I have ordered that Mr Rackham must pay to Mr Etheridge and Mr Hardman."*

25. The application for Leamington to be ordered to pay or indemnify Lisa in respect of AVSA's costs is accordingly dismissed.

Findings: what rate of interest in respect of what pre-judgment period is payable by Leamington?

26. Lisa contended that the Court had no discretion to award interest at less than the statutory rate of 7 % and that the nature of their claims meant that interest should be calculated from the date of receipt of the relevant Transport Policy premiums. Leamington argued that the statutory rate was merely a maximum, but in any event justice required interest to approximate what was actually earned on the account where the monies frozen by the mareva injunction were held.

27. Each position on the construction of section 10 of the Interest and Credit Charges (Regulation) Act 1975 was supported by conflicting decisions of this Court. Mr. Hargun relied on the judgment of Hull J in *Kelland-v-Lamer* [1988] Bda LR 69, while Mr. Riihiluoma relied on the judgment of Ground J (as he then was) in *Evans-v-Tuzo* [1993] Bda LR 47. The former judgment appears to be the only Bermudian judgment to fully consider whether section 10 of the Interest and Credit Charges Act mandates the payment of interest at the rate of 7%. And since Hull J concluded that the Court had a discretion as to the period over which pre-judgment interest was awarded, the contrary interpretation (hinted at in the later decision) need not lead to a different commercial result. The approach adopted is somewhat different, however section 10 provides in salient part as follows:

> "*10 In any proceedings tried in any court for the recovery of any debt or damages, including proceedings in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at the statutory rate on the whole or any part of the debtor damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment…*"

28. Section 10 empowers the Court to award "*interest at the statutory rate*". It seems clear from *Kelland-v-Lamer* that section 10 is based on section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934 as amended by section 22 of the Administration of justice Act 1969 (U.K.). Although the Bermudian language is in all material respects otherwise identical, the draftsman departed from the UK provision insofar as the latter empowered the UK courts to award pre-judgment interest "*at such rate as it thinks fit.*" In my judgment the logic underlying the conclusion reached by Hull J in *Kelland-v-Lamer* [1988] Bda LR 69 is difficult to find fault with:

> "*The difference in wording in section 10 is of course to be taken as having been deliberately adopted, and in any case I have no doubt that that was so. The section does not say that the court may award interest "at a rate not exceeding the statutory rate. The Legislature has, in the first instance, fixed the rate itself-and it has also given to the Bermuda Monetary Authority, but not to the courts, delegated authority to alter this rate of interest from time to time, by order.*"[5]

29. Mr. Riihiluoma pointed out that the foreign exchange policy underlying the 1975 Act no longer exists, and this gives greater even greater force to Ground J's observation in *Evans-v-Tuzo* [1993] Bda LR 47 that it was "*difficult to see why the legislature would have intended to constrain the judiciary in this way, while allowing them full freedom to abridge the period for which interest might run.*" [6] One possible answer to this question is what Hull J referred to as "*the importance of uniformity and predictability in the assessment of damages, including interest on damages*", articulated in the specific context of personal injuries cases by Lord Diplock in *Wright-v-British Railways Board* [1983] 2 All ER 698. In this regard, what I consider to be the technically correct approach to the rate of interest

[5] At page 10.
[6] At page 5. The point was not fully considered in any event.

payable under section is not intended in any way to disturb the apparently settled practice in Bermuda of awarding pre-judgment interest at rates equivalent to those fixed by the English courts. In other contexts, my approach has been and will likely continue to be to award pre-judgment interest (if at all) at the rate of 7%, and then to consider what the appropriate period of interest should be.

30. Assuming section 10 of the 1975 Act is engaged and no question of contractual interest is involved[7], the normal rule will likely be that interest will be awarded at the statutory rate from the date of the accrual of the cause of action until judgment. This period may be abridged where it would be unjust to do otherwise. Where a plaintiff has been guilty of serious delay, as Mr. Riihiluoma submitted, this may be grounds for limiting the period before judgment in respect of which interest is payable. In a case which was not referred to in argument but which confirms the obviously unfettered discretion conferred by section 10, Hull J held:

> "*The plaintiffs are entitled to interest at the statutory rate from today, i.e. from the date of judgment, until payment of the judgment debt.*
>
> *But they also ask me to exercise my discretion, under section 10 of the Interest and Credit Charges Act 1975, to award interest prior to judgment.*
>
> *There appear to me to be three relevant principles:*
>
> > *(1) First of all it is for the plaintiffs to make out a case for the exercise of that discretion.*
> > *(2) Secondly, however, the defendant has in the meantime had the benefit of the money to which I have judged them entitled, and they have been kept out of it.*

[7] In which case the statutory rate does not apply at all: see proviso (b) to section 10. To this extent section 10 appears to prescribe the statutory rate as the rate which must be awarded unless the parties have agreed a lower or higher rate of interest. The wording of the proviso fortifies the view that 7% is the rate which must apply if interest is in fact awarded at all under this section.

> *(3) But thirdly any delay - undue delay - on their part in prosecuting this claim is undoubtedly a factor to be taken into account. For that 'proposition, I would refer counsel to the case of Birkett* ***v.*** *Haves (1982), 1 W.L.R. at 816.*
>
> *The law contemplates that litigants will pursue their rights with reasonable dispatch. Mr. Gibbons is now a very elderly man. The plaintiffs, for the reasons I have given, are in my view entitled to judgment, but I am not prepared to grant interest for the whole of the period that has elapsed.*
>
> *It may be somewhat rough and ready, and it may be a little robust, but my own view as to this matter is that I should balance the competing factors, and on that basis, what I propose to do is to award interest under the section from the date in which the plaintiffs with expedition began to bring this case ahead again, which by my reckoning was the 16th November 1987, when after a long, long delay, they decided to give notice that they intended to proceed.*"[8]

31. This was a case which was commenced in 1975 in respect of events occurring in 1973 and which seemingly went to sleep for well over ten years. It was also a claim asserted by a firm against an individual defendant. The present proceedings were commenced comparatively promptly and prosecuted somewhat slowly, rather than being allowed to lapse for any unreasonable period of time. Two years were absorbed by interlocutory skirmishes in which Leamington and/or AVSA sought to strike out the proceedings. Lisa seemingly failed to progress the action for over 20 months after the Defendants filed their Defences; however the same broad dispute was also seemingly being prosecuted elsewhere during this period of time. It took three years for Lisa to re-amend to assert the claim was eventually determined at trial, but the misconceived nature of the derivative claim fell to be

[8] *Marshall Bernardo Partnership-v-Gibbons* [1991] Bda LR 47.

determined under Guatemalan law, not straightforward principles of Bermudian law. In my judgment it is not tenable to suggest that Lisa was guilty of delay so unreasonable that it ought to be denied pre-judgment interest on sums held to be due by reason of fraud. In any event, Lisa is being penalized in pre-March 16, 2006 costs for having spent so long formulating a viable claim.

32. It follows from the conclusions reached above on the terms and effect of section 10 of the Interest and Credit Charges (Regulation) Act 1975, that Leamington's submission that pre-judgment interest ought to be awarded at the same rate that was earned by the monies frozen by Lisa's injunction in a bank account must be rejected. When monies in a bank account are frozen by a mareva injunction, the purpose of the order is to prevent the dissipation of the relevant funds. Neither the court nor the plaintiff can be expected, in the ordinary case[9], to be concerned about the commercial terms on which the frozen monies are held. If a defendant wishes to protect its commercial position by moving the funds to an account within the jurisdiction which will earn more interest, this can always be done by consent or with the permission of the Court. Where it fails to take such steps, there is no justification for penalizing the plaintiff by reducing the amount of pre-judgment interest awarded.

33. Accordingly, I find that Lisa is entitled to pre-judgment interest at the statutory rate of 7% from the date the premiums were received, in accordance with Appendix A to its Submissions and Authorities on Costs.

Summary

34. Lisa is awarded the costs of the action to be taxed if not agreed on the standard basis as against Leamington. However, no order is made as to Lisa's pre-March 16, 2006 costs, including the costs of the trial of the preliminary issue.

[9] The position will be different where a plaintiff has reason to believe the defendant to be insolvent.

Nevertheless, the Defendants are awarded the costs thrown away by the Plaintiff's application to re-re-amend the Statement of Claim.

35. AVSA is awarded its costs of the action to be taxed, if not agreed, on the standard basis, and to be paid by Lisa, not by Leamington.

36. Lisa is also awarded pre-judgment interest at the statutory rate of 7% from the date that the relevant premiums were wrongfully received by Leamington, as set out in Appendix A to the Plaintiff's Submissions and Authorities on Costs.

Dated this 17th day of October, 2008

KAWALEY J