IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION
CIVIL APPEAL NO. 24 OF 1989
(Lautoka Supreme Court Action No. 761 of 1984)

Between:

QUEENSLAND INSURANCE (FIJI) LTD. Appellant

- and -

SURENDRA PRASAD Respondent

Dr. M.S. Sahu Khan for the Appellant
The Respondent in Person.

Date of Hearing: 8 March, 1990
Delivery of Judgment: 18 May, 1990

JUDGMENT OF THE COURT

This is an appeal by the Appellant, the defendant in the court below from the Judgment of Mr. Justice Jayaratne delivered on the 30th June, 1989 wherein he awarded the Respondent the sum of $22,500 with interest at 13 1/2% from 30th July, 1984 "till the satisfaction of the Judgment" to quote from the Judgment. This sum was held to be payable under a policy of insurance affected by the Respondent with the Appellant.

We can state at once that the learned Judge was not empowered to award interest to the date of satisfaction of the Judgment. We will refer to this later.

There is also a cross-appeal by the Respondent who contends the award of $22,500 is too low.

There are five grounds of appeal as under:-

"1. *That the Learned Trial Judge erred in Law in not holding that the Plaintiff/Respondent materially made false answers in the Proposal Form and thereby there was mis-carriage of justice.*

2. *That the Learned Trial Judge erred in Law and in fact in not holding that the Plaintiff/Respondent failed to disclose in its proposal that the premises was rented and also the Plaintiff made false answer in the proposal as regards the use of the premises and in particular that the premises was to be occupied by the insured and that no inflammable goods except those used for domestic purposes were to be kept on the premises.*

3. *That the Learned Trial Judge erred in Law and in fact in not holding that the Plaintiff/Respondent ought to have made full disclosures of the facts referred above at the time of renewing and/or increasing the amount of insurance in respect of the premises.*

4. *That the Learned Trial Judge erred in Law and in fact in holding that the damages suffered by the Plaintiff/Respondent and/or the premises was in the sum of $22,500.00 (TWENTY TWO THOUSAND AND FIVE HUNDRED DOLLARS) in as much as there was no evidence as to the actual damages suffered.*

5. *That the Learned Trial Judge erred in Law and in fact in awarding interest at the rate of 13.5% per annum when there was no evidences and/or basis for awarding the interest and particularly when no opportunity was given to the Appellant/Defendant to made submissions on that issue."*

The basic facts may be briefly stated.

On 7th July, 1983 the Respondent signed a proposal form which was completed by the Appellant's agents at Lautoka.

One question in the proposal which has given rise to this appeal is as follows:-

"Will any Inflammable Goods, such as Explosives of any kind, matches, Kapok, Petrol, Mineral spirits, Kerosene Hay, Straw or Tallow, be kept except those used for domestic purposes?"

The Respondent's answer to that question was "No". The proposal indicates that the premises were occupied by the "insured" as a shop.

The proposed cover was originally for $20,000 but this was amended to $15,000. At the back of the Proposal is a Confidential Report by the Appellant's agent.

The agent's answers to some of the questions he was asked to answer establishes the following facts:-

1. He personally inspected the risk (i.e. the premises)
2. The building was in good repair and well cared for
3. There was no hazardous risk within 200 feet of the risk proposal
4. He estimated the then market value of the property proposed for insurance of buildings exclusive of land at "$15,000 approx".

This accounts for the reduction of the cover from $20,000 first proposed to $15,000.

On 6th March, 1984 the Respondent asked for the Cover to be increased to $30,000. By letter dated March, 1984 the Appellant agreed to the increased cover on payment of an additional premium of $63.80. No reason was given for the doubling of the cover 8 months after the proposal was signed.

When the policy came up for renewal the cover was increased to $33,600 as a result of the Appellant applying a local determined formula of building costs to the cover of $30,000 thereby increasing the cover to $33,600.

When sending out the renewal notice the Appellant attached an undated circular letter which, since the Respondent relies on the contents of it, we set out in full:-

"Dear Policyholder

re: YOUR BUILDING SUM INSURED

We are pleased to offer you an additional service upon this renewal that of ensuring that you do not under-insure and leave yourself open to being unable to recover the full amount of your loss in the event of a claim.

To achieve this we have applied the locally determined formula of increased building costs and arrived at a Sum Insured amount which, we feel, is closer to the current value of your property for insurance purposes.

This valuation takes into consideration the appreciation of property value generally which have occurred since you signed your original proposal and will ensure that your investment retains a more realistic worth in the event of total or partial damage.

We must point out, however, that, should our calculation have been based on a Sum Insured which was far too low, initially this increase will still not represent the full value of your assets. We can only leave this to your judgment.

Should, therefore, you feel the amount is still too low, or have any query, please contact us and we will be pleased to adjust some to your express wishes.

We are happy to have been of service to you - a valued client.

Yours faithfully

R. JACKSON
GENERAL MANAGER"

It is convenient at this stage to comment on a matter not disclosed by the Appellant to its policy holders. The fourth paragraph stresses that if the sum insured was far too low the interest "will still not represent the full value of your assets".

What was not drawn to the attention of policy holders was the fact that the policy indemnified the insured and only the actual loss incurred not exceeding the amount of the cover could be claimed. In the instant case the company shortly before the fire accepted increase of cover to $33,600 but later claimed the value of the premiums was considerably less than that sum.

The Appellant like a great many other insurers was happy to increase the cover and in this instance actively canvassed increased cover and collected the additional premium without any suggestion that premiums would be adjusted or refunded if the insurer later claimed successfully that the property was overinsured and denied liability. The Respondent, a lawyer and a magistrate, obviously believes that he is on the facts of his case entitled to claim that the Appellant is estopped from denying that the value of the premises before the fire was less than $33,600.

This is an issue we discuss later.

On 9th July, 1984 the premises were destroyed by fire.

The Appellant alleges several instances of non-disclosure entitling it to deny liability.

1. The Appellant alleged that the Respondent had failed to disclose the fact that the premises were rented at the time when the proposal was signed and again on renewal of the policy.

On this issue the relevant facts are:-

(a) The premises were not rented at the time the proposal was signed and Dr. Sahu Khan conceded this fact.

(b) Before renewal of the policy the premises were let as a shop on 1st February, 1984 to one Suresh Prasad.

(c) Also before renewal of the Policy the said Suresh Prasad insured his stock in trade, furniture etc. and refrigerator with the Appellant company for a total sum of $13,000. Presumably the premises were inspected by the Appellant's agent.

2. The Respondent failed to disclose facts found by the learned trial Judge namely that there were hazardous items such as matches, oil and kerosene in or about the premises.

The relevant facts are:-

(a) Kerosene was stored in an outside overhead tank about 20 yards away from the insured premises from which kerosene was sold and which was installed by the said Suresh Prasad after the premises were let to him.

(b) Dr. Sahu Khan conceded that no hazardous or inflammable goods were in the premises at the time the proposal was signed.

(c) Matches and oil were sold in the store operated by the said Suresh Prasad.

3. The Respondent failed to disclose the fact that there had been attempts to set fire to the insured property and/or property nearby.

The Appellant in its defence alleged affirmatively that the Respondent had failed to disclose to the Appellant company the fact of a previous attempt of alleged arson in respect of "the property the subject of the insurance".

The evidence before the learned trial Judge was to the effect that the Respondent's tenant had reported an attempted arson in respect of an adjacent building outside which some burnt clothes or rags were found.

Dr. Sahu Khan did not elicit from the Respondent, when cross-examining him the date of such attempt. It was certainly after the proposal was signed and may or may not have been before the Respondent's policy was renewed.

The onus was on the Appellant to establish non-disclosure of this attempt to set fire to a building, if it was relevant, before the Respondent's policy was renewed.

The Appellant failed to establish the date of that attempt and whether there was any damage to property as a result of that attempt or more crucial who owned that property.

The question in the proposal which the Respondent was required to answer was:

> *"Has proposer or husband wife or anyone interested in this insurance ever had any property damaged or destroyed by fire? If so, state when, whether insured situation and name of office"*

Before us Dr. Sahu Khan argued that it was a common law duty of an insured to inform an insurer of any attempt to set fire to buildings in the vicinity of the insured premises.

Those are the instances of alleged non-disclosure of relevant facts and/or false answers given in the Proposal form and subsequent non-disclosure of the same matters on renewal of the policy on which the Appellant seeks to avoid payment under the policy.

We will deal with these issues first and consider the issue of the value of the property at the time of the fire if such issue arises.

The first two grounds of appeal can be considered together.

Dr. Sahu Khan had to admit the premises at the time the proposal was signed were not let nor did they contain any inflammable goods. The dates on the Proposal and the agent's report at the back thereof indicate that the agent of the Appellant company inspected the premises on the day the proposal was signed. He reported there were no hazardous risks. He reported affirmatively that "It is a good risk".

There is no merit in either of the first two grounds.

The third ground is that the Respondent should have made full disclosure of the facts referred to in the second ground of appeal when seeking renewal of the policy.

The facts stated in the second ground do not include any reference to the alleged act or acts of attempted arson although at the hearing Dr. Sahu Khan referred to the acts in some detail.

The Appellant had pleaded that there was no disclosure of attempted arson of the insured property. The evidence did not establish that alleged fact. There was no attempt to amend the pleadings to cover failure to disclose an act or acts of attempted arson in respect of other buildings or on renewal of the policy.

In preparing the grounds of appeal Dr. Sahu Khan ignored the attempted arson in respect of the insured premises no doubt being satisfied as we are that the evidence did not disclose any false statement by the Respondent in the proposal

on this issue. It was not open to the Appellant to raise the issue in the appeal of attempted arson of adjoining or adjacent premises where the grounds of appeal have not been framed to include that issue.

On that issue it is noted from the Record that one Mr. Permallu, a clerk employed by Messrs Sahu Khan & Sahu Khan, purported on oath from his own knowledge to answer interrogatories which the Court had ordered the defendant to answer. The Appellant company has a Fiji Manager and no explanation was given as to why the Manager did not make the affidavit.

The answers disclose that it was alleged "there were two attempts of arson prior to the proposal for insurance". That was the Appellant's defence. Being later aware that the allegation was false and that the attempted arson occurred when the tenant was in the premises the appellant seeks to change its line of defence before us and seeks to argue that knowledge of attempted arson gained after the policy was issued and before the policy was renewed in respect of other premises should have been disclosed.

The only ground on which the Appellant sought to avoid payment pleaded in its original defence was alleged failure to disclose the fact of the alleged previous attempt of arson in respect of the insured property. If this was true it would have been a proper ground for denying liability. The Appellant could not establish that fact.

It should also be mentioned that the Appellant did not in its original defence raise the issue of hazardous or inflammable goods or the renting of the premises until it filed an amended defence on the 10th February, 1989 one working day before the trial commenced.

Dr. Sahu Khan in preparing this amended Defence ignored or overlooked the fact that he had prepared the answers to the interrogatories by his clerk which were on oath and sworn on the 9th June, 1988. We set out this answer in full:-

"THE ANSWER

of the abovenamed Defendant to the Interrogatories for examination by the abovenamed Plaintiff pursuant to the Order herein dated the 27th day of March, 1987.

In answer to the said interrogatories, I, PERMALLU (father's name Yenkanna) of Navoli Ba, the Clerk in the office of messrs Sahu Khan & Sahu Khan make oath and say as follows:-

1. *That I have been duly authorised by the Defendant Company to make this Affidavit on its behalf.*

2. *That to the first interrogatory, namely, in what respects does the Defendant say that the Plaintiff did not exercise good faith, that the Plaintiff did not exercise good faith in as much as he did not make disclosures referred to in Paragraph 2 of the Statement of Defence.*

3. *To the second interrogatory, namely, what material matters to risk did the Plaintiff fail to disclose, that there were two attempts of arson prior to the proposal for insurance made by the Plaintiff.*

4. *That to the third interrogatory, namely on what date does the Defendant allege that there was a previous attempt of arson in respect of the property which the Plaintiff failed to disclose, that the date are unknown to the Defendant.*

5. *To the fourth interrogatory, namely, what date or dates does the Defendant allege that the Plaintiff ought to have made the full disclosures, that on the date of proposal for insurance namely, the 12th day of April, 1984.*

6. *To the fifth interrogatory, namely, if the Defendant says that the Plaintiff was not interested in the building fixtures and fittings the subject matter of the insurance policy referred to in Paragraph 1 of the Statement of Claim, then who does the Defendant refers to Paragraph does the Defendant say was interested in*

the said items, that the Defendant refers to Paragraph 1 of the Statement of Defence and says that the Defendant puts the Plaintiff to proof of the same and the Defendant further says that there was a Mortgage and/or Bill of Sale over the same.

7. *To the sixth interrogatory, namely, if the Defendant denies that the loss was for $33,600.00 (THIRTY THREE THOUSAND AND SIX HUNDRED DOLLARS) what the Defendant says was the amount of the Plaintiff's loss, that the Defendant is not aware of the extent of the Plaintiff's loss in as much as the same was not within the knowledge of the Defendant but is with the Plaintiff and further in any event the Defendant says that in view of the average clause, the amount of the loss to the Plaintiff will be abated accordingly."*

We draw attention to answers 2 and 3.

Paragraph 2 of the answer dated the 3rd January, 1985 contains a patent error. It is paragraph 3 of the Statement of Defence which alleges failure to exercise good faith.

The Appellant was well aware that as early as 14th March, 1984 there was a tenant in the premises and if they had inspected the premises would have been aware of the kerosene overhead tank installed by the tenant and of goods such as matches and oil usually sold by rural storekeepers.

The Respondent was severely critical of the Appellant filing an amended defence one working day before the trial began raising for the first time issues which had not been raised until about 4 1/2 years after the fire destroyed the premises. His attempt to limit the issues by the answers to his interrogatories was frustrated.

The Appellant by application dated 8th February, 1989 obtained leave to amend its Statement of Defence.

We have devoted some time to this issue because it could have some bearing on the issue of costs if the Appellant succeeds. When liability was first denied it was on alleged grounds which the Respondent has had no difficulty in establishing as having no basis.

It is abundantly clear that the additioal reasons for denying liability were not contemplated by the Appellant or by Dr. Sahu Khan until a few days before the trial.

If it was otherwise Dr. Sahu Khan would not have exposed his clerk to penalties when he categorically stated, and led the Respondent to believe, that the only material matters not disclosed was the alleged two attempts to burn the insured premise before the proposal was signed.

This conduct of the defence of the case has nothing to commend it. We are however concerned with the major issue whether there were gounds on which the Appellant could legally deny liability.

We have held that there is no merit in the first two grounds of appeal.

We also hold that, as regards the alleged attempts to set fire to some adjacent building, the Appellant has not established that that attempt occurred before renewal of the insurance. The Respondent stated the tenant reported the matter to him but there is no evidence to determine the date of the report.

This leaves us with two issues namely, the failure to notify the appellant company about the renting of the premises, and the tenant having inflammable goods, matches and oil, on the premises and a kerosene tank 20 yards away.

There is no doubt in our minds that the appellant company was aware before renewal of the policy that there was a tenant in the insured premises.

Dr. Sahu Khan however argues there was no waiver of any of the conditions of the policy. He relies Conditions 1 & 2(d) which are in the following terms:

> *"1. This Policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular.*
>
> *2. The Policy shall be avoided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance -*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) whereby the Insured's interest ceases except by will or operation of law, unless such alteration be admitted by memorandum hereon or attached hereto signed by or on behalf of the Company."*

Dr. Sahu Khan contends that renting of the store premiums is in breach of Condition 2(d). We do not agree.

There is no cessation of the Respondent's interest in the premises. The Respondent's interest is that of owner and that interest does not cease on letting of the premises.

If the Appellant is interested purely in a change of occupation it was open to the company to cover that situation with an appropriate condition. It is interested when the premises are unoccupied for a period of more than 30 days and Condition 2(c) requires the insured to notify the insurer of that fact.

MacGillivray & Parkington on Insurance Law 6th Edition at paragraph 784 sets out a statement by Lord Mansfield CJ in the leading case of CARTER v. BOEHM [1786] 97 ER 1162 on the general principles as to what need not be disclosed. In subsequent paragraphs the learned authors state that insurers can not complain of having been misled by the assured's concealment when from some other source they had received knowledge of the facts which they say were not communicated (Bates v. Hewitt 1867 2 QB 593).

In the instant case the appellant had insured the tenants stock in trade before the Respondent's policy was due for renewal. The Insurer must be presumed to have knowledge of what goods are sold by a rural storekeeper in Fiji. Oil, matches and kerosene are household items. If the tenant's store was inspected the insurers would have had specific knowledge that stock included those items.

In paragraph 791 the learned authors state:

> *"Ordinary attributes of the risk. It follows that, so far as business or industrial risks are concerned, the insurers are taken to know the ordinary attributes of the risk, so that they will know what goods a tradesman in his stores, and if dangerous goods are ordinarily included in such stock, it is unnecessary to disclose the presence of such goods."*

The insured premises when first insured were not used as a shop.

The Appellant did not establish that at the time of signing the proposal the Respondent had failed to make full disclosure.

Prior to renewing the policy the Appellant was aware that the premises were rented. It insured the stock in trade and must be deemed to have actual or constructive knowledge that oil, matches and kerosene were sold from the pemises. In those circumstances the appellant cannot rely on alleged non-disclosure by the Respondent.

The third ground fails.

It is convenient to consider the fourth ground of appeal and the cross appeal together.

On the one hand the Appellant contends there was no evidence as to the damage sustained by the Respondent who, on the other hand, contends that the award of $22,500 should have been $33,600.

The Respondent appeared to have little conception as to what evidence was necessary to establish his claim. He appears to have overlooked the fact that the policy was what is known as an unvalued policy, that is to say it contained no agreed valuation of the insured premises. He was only entitled to be indemnified for the loss he actually suffered. The onus was on him to establish that loss.

The Respondent however appears to have treated the policy as a valued policy by contending that acceptance of the risk on renewal, when the appellant increased the cover to $33,600, was evidence of agreement to pay him $33,600 if the premises were destroyed by fire. This sum he says is the agreed value.

The wording of the policy is quite clear. The Appellant contracted to "pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof".

The Respondent elected to give evidence himself and called no witnesses. He estimated value of the premises at the time of the fire at $33,600 and he submitted a number of letters. His own estimate of value was not acceptable evidence to establish his loss.

There would have been merit in the Appellant's fourth ground of appeal but for introduction of evidence as to damage introduced by Dr. Sahu Khan against opposition by the Respondent. We refer to the letter dated 8th August, 1984 written by Mr. H.G. Thew, ARICS a Chartered Quantity Surveyor employed by Messrs Toplis & Harding Chartered Loss Adjusters employed by the Appellant to assess the loss.

Mr. Thew's letter is as follows:

"8th August, 1984

Toplis & Harding,
Chartered Loss Adjusters,
P.O. Box 9195,
NADI AIRPORT.

For Mr. Ian Rayment

Dear Ian,

FIRE DAMAGE TO SHOP & DWELLING,
ESTATE OF SARJU PRASAD, SARU, LAUTOKA.

The shop and house have been destroyed down to ground floor level with the exception of some steel posts which supported the front verandah roof. The building was approximately 7 x 17m and comprised advisedly a shop, two bulk storage rooms, also partly utilized as a living quarters and a small flat at the rear. It is unlikely that the concrete floor slab and foundation were destroyed

by the fire, and almost certainly the external drains and septic tank are unaffected. To repair the superstructure of the building I estimate should cost approximately $21,000. This excludes the floor slab, foundations, drains and septic tank. The cost of building the slab and drains etc. I estimate to be approximately $6,125.00.

The foundation on the right hand side of the building is cracked - this, in my opinion, is due not to the fire but to erosion of the ground rom the rear of the building where I saw the evidence of rainwater scouring out earth from under the footings which could cause differential settlement.

My repair estimate does not include for any fixed fittings such as counters, sink benches, cupboards, shelving and the like and an addition to the repair estimate could be made of perhaps $1,000 or so depending upon the extent of such fittings.

Thank you for the oppportunity to be of help. A detailed costing of the repairs is attached.

Yours sincerely,

H.G. THEW"

Attached to that letter is the detailed costing totalling to $21,500.

It is apparent that when awarding the sum of $22,500 the learned Judge accepted Mr. Thew's estimate as evidence of the loss sustained by the Respondent and in our view he was entitled to do so. We do not consider he erred.

The Respondent although he failed to establish his loss was entitled to treat Mr. Thew's letter as evidence of the cost of repairs. Mr. Thew was employed to estimate cost of repairs by the loss adjusters. He was apparently not asked to ascertain value of the premises at the time of the fire.

The loss adjusters were no doubt aware that one option the insurers had was to elect to have the premises reinstated. It is clear from the loss adjusters' letter of 4th September, 1984 to the Respondent and a letter dated three days later from the Appellant to the Respondent that subject to a report from the police the Appellant would then be in a position to discuss terms of settlement.

The evidence suggests that the Appellant was then prepared to settle for a sum not exceeding costs of repairs.

There was evidence that the premises had been renovated shortly before the fire but no evidence as to the cost of such repairs.

The Appellant accepted increase of cover to $30,000 only months before the fire and unilaterally increased the cover to $33,600.

Mr. Permallu in his seventh answer to the order for interrogatories made a curious statement on oath which we repeat.

> *".....in any event the Defendant says that in view of the average claim, the amount of the loss to the plaintiff will be abated accordingly."*

Bearing in mind that Mr. Permallu is a law clerk and his answers were prepared in Dr. Sahu Khan's offices that statement could be interpreted as meaning that the Appellant believed the $33,600 was an undervalue (emphasis added) as the "average clause" can only operate where there has been insurance at an undervalue.

There is no merit either in the Appellant's fourth ground of appeal which fails or the Respondent's cross-appeal.

As regards the last issue we have to consider namely the award of interest. The Respondent asked for interest in his Amended Statement of Claim.

The basis for his claim was section 3 of the Law Reform (Miscellaneous Provisions) (Death & Interest) Act. This section provides as follows:

> *"In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*
>
> *Provided that nothing in this section -*
>
> *(a) shall authorise the giving of interest upon interest; or*
>
> *(b) shall apply in relation to any debt upon which interest is payable as of right, whether by virtue of any agreement or otherwise; or*
>
> *(c) shall affect the damages recoverable for the dishonour of a bill of exchange."*

As stated at the beginning of the judgment the learned Judge purported to order interest to be paid to the date of satisfaction of the judgment.

Under section 3 he could only award interest to the date of judgment.

There is no merit in the fifth ground of appeal. Dr. Sahu Khan was given an opportunity to make submissions to the learned Judge as the Record clearly shows.

The error made by the learned Judge is one which we point out without the assistance of counsel or the Respondent.

To correct this error we amend the order made by the learned Judge to record that the sum awarded shall bear interest from 30th July, 1984 to date of judgment.

The appeal and cross-appeal are both dismissed with no order as to costs.

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Sir Timoci Tuivaga
President, Fiji Court of Appeal

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(Sir Ronald Kermode)
Justice of Appeal

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(Sir Moti Tikaram)
Justice of Appeal