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IN THE FIJI COURT OF APPEAL
(AT SUVA)

CIVIL JURISDICTION

CIVIL APPEAL NO.44 OF 1989

CIVIL ACTION NO. 1257 OF 1986

BETWEEN:

JADU NANDAN f/n Ram Samuj — Appellant

And

QUEENSLAND INSURANCE CO.LTD. — Respondent

Mr. V. Parmanandam — for the Appellant
Mr. J. Singh — for the Respondent

Date of Hearing: 6th November, 1992
Date of Delivery Judgment: 27th November, 1992.

JUDGMENT

This is an appeal from the High Court in a claim arising out of a Fire Insurance Policy.

One Sukhia f/n Manbodh or Sudhi was the agricultural leasehold title holder of a 2.4281 hectare portion of crown land, Lot 934A Kuku in Bau, Tailevu - (the land). She is the Appellant's mother.

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On the 10th November, 1971, Sukhia executed a document in the following terms:-

*"To: Mr. JADUNANDAN,*
*also known as RAM HARAKH*
*(f/n Ram Samiyh)*
*Bau Road,*
*Watchman.*

*Dear Son,*

*Re: Your House and My Tenancy Land*

*At my request became the family is growing bigger, you have agreed to build a house of over $500.00 (FIVE HUNDRED DOLLARS) in my tenancy land, and the plans etc. have been prepared and passed under my name.*

*Should in future you have to leave my tenancy land and go elsewhere at my request or my demand (or at the request of my executors administrators and assigns) then I covenant and agree with you that before you vacate the premises built by you I shall pay you the sum of #500.00 (FIVE HUNDRED DOLLARS) or the real value valued by a competent and recognized valuer, whichever shall be the higher value.*

*This consent to you to carry permission or authority to you to carry on with the building you are proposing to build at my request is an inrevocable authority, and my covenant to pay you is an equitable and voluntary one. But it shall not apply in the case of your leaving the premises at your own volution.*

*WITNESSTO*
*SIGNATURE After*
*interpretation in Hindi*
*.....* *SUKHIA (f/n Manbodh)*

*I have received a copy hereof:-*

*Witness to:* *.....*
*SUKHIA (f/n Manbodh)* "

The appellant built a house upon the land in 1972 and made some alterations to it in 1976 (the building). On 29th April, 1982 Sukhia was granted approval of an Agricultural lease over the land for 20 years to run from 1st January, 1980. On 13th September, 1985 Sukhia effected a transfer of the land to Chandra Pal, the younger brother of the Appellant, for the balance of the 20 year lease.

The Appellant completed a Fire Insurance Policy proposal with the Respondent company on 10th December 1985 to insure the building for $50,000 and contents for $10,000.00. Fire Policy No.33F/30071 was issued to him in due course.

On 15th March, 1986 the building and contents were destroyed by fire. The Appellant duly lodged a claim with the Respondent on 25th March, 1986.

The Respondent gave notice to the Appellant denying liability and purporting to cancel the Policy from inception on the alleged basis of non-disclosure of material facts and lack of insurable interest in the building on the part of the Appellant.

The Appellant issued a writ of summons on 12th December, 1986 claiming the sum of $60,000.00 the sum insured under the Policy, being $50,000 for the building and $10,000 for the contents.

The Respondent filed defence alleging that, in filling out answers to questions in the proposal form the Appellant gave false answers to material facts, that is that in answer to 'name of owner of building' he put down his name Jadu Nandan and in answer to 'state nature of proposers interest' he put down, owner.

These, the Respondent contended were misrepresentations, because the land was owned by Chandra Pal, the younger brother, at the material time, and consequently the Policy was absolutely void ab initio.

The Respondent further contended that the Appellant had no insurable interest in the building.

The learned trial judge found on trial that the building was owned by the Appellant's brother Chandra Pal, as he was bound to in law, and that "the Plaintiff at best was a bare licencee". The learned trial judge found the statements as to ownership by the Appellant were misrepresentations which "were clearly material affecting the Defendant's view of the risk they were

asked to undertake," and "the Defendant was entitled to the opportunity to consider whether to accept Chandra Pal as the owner of the building as an insured and also how to assess the premium in these circumstances".

His Lordship also found the Appellant guilty of non-disclosure, which was another cause for the company to avoid the policy in accordance with its terms, in that he failed to disclose the name of the true owner.

The learned trial judge thus found that the defendant company was entitled to avoid the policy and accordingly gave judgement for the defendant.

The Appellant appeals from that Judgment.

It is argued for the the Appellant that the learned trial judge erred in his conclusion that the Appellant at best was a bare licensee only which by inference did not find in him an insurable interest.

The facts of the agreement between the Appellant and his mother the leaseholder were these; that the Appellant had lived with his mother on the property since birth. Because the family had grown bigger, the Appellant, at the mother's request, agreed to build a house for over five hundred dollars, at his own cost,

on the mother's land. The mother made agreement with the Appellant that if he were to leave her land and vacate the premises in the future, at her request or demand, she would repay his $500.00 or the real value, whichever be the higher. She further covenanted that the permission or authority she was granting to the appellant to build the house was an irrevocable authority and the covenant to repay him was an equitable and voluntary one.

The mother also declared these agreement conditions in a statutory declaration executed on 24th July, 1986, in which she also stated, inter alia.

> *"In order to safeguard my son Jadu Nandan from being pushed out of the property I gave him an irrevocable authority on 10.11.71 a copy of which is attached herewith, so that he could build a concrete house and have security over the property."*

In MacGillivray & Parkington on Insurance Law 6th Ed. at paragraph 115 'Licence to Use Property' it is stated:

> *"Where a person has a license to use and enjoy any property jointly with the owner there can be no doubt that he has an insurable interest in it if the licence is contractual. But it is less clear whether this is the case when he has the mere revocable licence."*

In Errington v Errington and Woods (1952) 1 K.B.290 Lord Denning said:

> *"The couple were licensees having a permissive occupation short of a tenancy, but with a contractual right, or at any rate an equitable right, to remain so long as they paid the instalments, which would grow into good equitable title to the house itself as soon as the mortgage was paid."*

It was also submitted, relying on para.114 on Possession in MacGillivray & Parkington that:

> *"The mere possession of property is probably sufficient to give the person in possession an insurable interest in that."*

It seems clear to us in the total circumstances of this case that the Appellant had more than just a bare licence. He enjoyed an irrevocable contractual permission and authority to occupy the building, the subject of the policy. It is therefore in our view sufficient beneficial interest to bestow an insurable interest in the appellant, though he did not legally own the land or the building.

We note also that the policy taken out was for both buildings and contents. The learned trial Judge did not address his mind to the separate issue whether, notwithstanding that the Appellant did not own the building, he did have insurable interest in the contents which he could insure and thus be entitled to claim for their loss.

We consider that the Appellant undoubtedly had insurable interest in the contents of the building such as household furniture and personal effects which belonged to him, for which he was entitled to claim.

The next main issue is that of misrepresentation. The learned trial judge found the statements already referred to as to ownership of the building to be misrepresentations.

We are satisfied that the answers provided by the Appellant did amount to misrepresentation as to the true owner of the building. It is trite property law that permanent fixtures on the land belong to the owner of the land. The Appellant was not the owner of the land; his brother Chandra Pal was the owner at the time the Policy was being filled out.

However, in all the circumstances and bearing in mind the Judge's own observations it is inferentially clear to us the Appellant genuinely believed he owned the building, having spent his own money and having built it himself. We find that the misrepresentation was an innocent one. We are mindful of the fact that the Appellant was ill-educated.

We are also satisfied that there was a non-disclosure on the part of the Appellant as to the name of the true owner, as a consequence of the innocent misrepresentation that he was the owner of the building.

The Appellant did correctly point out that there was no specific question on the Policy form as to the owner of the land. However, that does not avail the appellant greatly in law.

Again in all the circumstances referred to above we consider the non-disclosure to be innocent and not with any intent to defraud. As the learned trial judge acknowledged and as the Appellant's Counsel impressed upon us, "it may well be that the plaintiff thought of himself as the owner of the dwelling house in terms of common parlance in as much as he had built and/or paid for the building of the same entirely by himself."

The next main issue that flows from the misrepresentations and non-disclosure, is as to their materiality such as will have the effect of avoiding the policy.

While the test of materiality has not been precisely defined, we consider that for present purposes it can be described as that of the reasonable or prudent insurer (McGillivray and Parkington, para.748).

The question of whether a given fact is or is not material is one of fact to be determined by a jury or a judge as the trier of fact (ibid para.754). The materiality of an uncommunicated fact may be so obvious that it is unnecessary to call expert evidence to establish the point (ibid para.755).

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In this case the Judge apparently regarded the non-disclosure as to the true owner of the land to be self-evidently material. With respect, we are unable to agree that this was so. The witness Keshwar Nand made the bald statement that, had he known the true position as to ownership, he would have refused the insurance then and there. He gave no reasons of any kind to support that assertion and we are not prepared to accept that it was justified. Indeed, on the contrary, we can see no reason, obvious or otherwise, why the acceptance of the risk or the amount of the premium might have been affected had the witness known the true position.

We are not persuaded that the innocent misrepresentations and non-disclosure are necessarily material to the risk the Respondent would have undertaken and in fact undertook. No evidence was produced to demonstrate that the risk would have been different or that the premium would have been more or less. We cannot conceive of any different risk to the Respondent, and we have not been shown any.

In the result we consider that the learned trial judge erred in concluding that the misrepresentations materially affected the risk being undertaken by the Respondent so that they were entitled to avoid the policy.

The Respondent finally submitted that the agreement between the mother Sukhia and his son the Appellant was illegal because the approval of the Director of Land had not been obtained under S.12 of the Crown Lands Act, to deal with the land.

The submission was that such an agreement amounted to "dealing with the land" and that under S.12 any "dealing effected without such consent shall be null and void." Consequently no valid interest could be derived from an illegal transaction which was null and void.

We do not consider that the scope of S.12 arises for consideration in the circumstances of this case, involving as it does the issue of insurable interest arising out of a fire insurance policy. The interest of the state in the land is not affected by the ruling as to insurable interest as between the assured and the insurer. We do not believe that the issue as to whether or not consent had been obtained or whether the agreement was legal or not affects the equitable interest in the assured to find insurable interest for the purposes of the claim.

For these reasons we uphold the appeal and accordingly there will be judgment for the plaintiff in the sum of $25,000 (being the amount agreed to in the Court below) with costs of this appeal and the trial.

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Sir Moti Tikaram
Vice President

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Sir Peter Quilliam
Judge of Appeal

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Mr. Justice Arnold Amet
Judge of Appeal