

IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. AB00060 OF 1997S
(High Court Civil Action No. 276 of 1993)

BETWEEN:

DOMINION INSURANCE LTD

Appellant

AND:

ALISHER F/N USMAN ALI

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Hon. Justice Ian R. Thompson, Judge of Appeal
The Hon. Justice Devendra Pathik, Judge of Appeal

Hearing:

Tuesday, 11 May 1999, Suva

Counsel:

Messrs. M.B. Patel and J.K. Sharma for the Appellant
Dr. M. S. Sahu Khan for the Respondent

Date of Judgment:

Friday, 14 May 1999

JUDGMENT OF THE COURT

In the High Court the parties agreed the following facts:

- “(a) Policy No.124490FCP005 (“the policy) is and was at all relevant times a valid insurance policy binding the Defendant(subject to certain exclusions) to indemnify the Plaintiff against (inter alia) damage caused by flood to the Plaintiff’s stock in trade.
- (b) Stock in trade in the Plaintiff’s premises Main Street, Nadi, covered by the Policy (“the Stock”) was damaged by flood on or about 27 February 1993.”

They also agreed that the issues to be decided by the Court were:

- “1. Is the Defendant’s liability to indemnify the Plaintiff excluded by clause 29 of the Policy?
- 2. If not -
 - (i) What was the value of the damage caused to the Stock?

- (ii) How much, if anything should the Defendant pay to the Plaintiff by way of indemnity ("the Indemnity") against the damage caused to the Stock?
- (iii) In addition to the Indemnity, how much, if anything, should the Defendant pay to the Plaintiff by way of interest to the date of judgment on the Indemnity and/or by way of general damages?"

Subsequently they agreed that the first of those issues should be tried separately before the remaining issues. Sadal J. decided that the appellant's liability was not excluded by clause 29 of the policy. That decision is under appeal in these proceedings.

The grounds of appeal are :

1. *THE learned trial Judge erred in failing to hold that the Appellant was not liable to indemnify the Respondent on account of the exclusion clause, clause 29, of the policy of insurance concerning cover against damage caused by flood struck between the Appellant and the Respondent.*
2. *THE learned trial Judge erred in failing to find that there was satisfactory evidence of water level and/or the presence of the water level and that such water level was in satisfaction of reliance by the Appellant of its exclusion of liability in accordance with the contract of insurance between the parties.*
3. *THE learned trial Judge erred in finding as a fact that there was no satisfactory evidence before the Court to say what the actual height of the water level inside the shop, from the floor level or from ground level was, by failing to take note of and/or take cognisance of the water level as depicted in the video film, by virtue of the water marks on the wall as a reliable and/or satisfactory guide from which inferences could be drawn as to the water level as a result of the flooding.*
4. *THE learned trial Judge erred in holding and/or referring to stock as being or could have been left on the floor and would have been damaged in any case considering the high level of water inside the shop on the basis that such a finding and/or observation was against the evidence and the weight of the evidence and against the findings as to the alleged unsatisfactory evidence of what the water level was inside the store.*

5. *THE learned trial Judge erred in failing to hold that the evidence of the film was satisfactory and/or sufficient to enable an inference to be drawn as to the presence of the water and to a height sufficient to invoke the reliance on the exclusion clause - clause 29 - by the Appellant in the circumstances as made and provided by the contract of insurance between the parties."*

The respondent has filed, with leave, a notice under rule 19(2) of the Court of Appeal Rules, that the judgment should be affirmed on the following grounds not relied on by the High Court:

1. *THAT in any event the goods subject to the insurance were stored over 160 cm above the ground level and above 60 cm above the floor level as required by the policy.*
2. *THAT the Appellant was bound by the definition of the ground level and floor level as given by its agent.*
3. *THAT if in the event the contention of the Appellant is correct (which is denied by the Respondent) that the goods damaged were not covered by the insurance policy due to the height requirements then the Statements and/or advice given by the agent of the Appellant to the Respondent were given negligently and were misleading and false and actionable under the laws of Fiji at common law.*
4. *THAT in any event in view of the advice so given by the agent of the appellant as referred to in the Amended Statement of Claim and the evidence:*
 - (i) *the Appellant is estopped from raising the issue of the heights.*
 - (ii) *It is unfair unconscionable and inequitable for it to do so.*
5. *THAT in any event the Appellant was guilty of acquiescence."*

Clause 29 of the policy, so far as is relevant in this appeal, reads:

"29. FLOOD - Sub limit if applicable \$.....

Excluding destruction or damage caused directly or indirectly.

.....

- (4) *To property fixed or stored at or below ground level unless raised 30 centimetres above the floor for non prone flood areas and 60 cm for flood prone areas - Nausori and Navua.*
- (5) *To property fixed or stored in the Flood Prone Areas - Ba, Nadi and Lami unless raised 60 centimetres above the floor level.*
- (6) *Notwithstanding (5) above all destruction or damage caused to property fixed or stored below 160 centimetres above the ground level is excluded in the Flood Prone Areas - Ba, Nadi and Lami.*

.....
Flood Cover

Prone area: Ba, Nadi, Nausori, Lami, Navua.

Non Prone area: All other areas other than above."

Evidence was given at the trial by the Nadi Town Engineer which established the following facts.

- (a) The building in which the stock was situated when the flood occurred was adjacent to a main road.
- (b) The main road, and the footpath between it and the building, had been built up to some height above the original ground level.
- (c) The floor of the building was 30cm above the level of the footpath and 63 cm above the level of the road.
- (d) The floor of the building was 4 to 5 feet or 170 cm above the original ground level at the rear of the building, but the respondent had raised the level by filling.
- (e) The floor of the building was 43 cm plus 6 feet above mean sea level.

There was dispute regarding the height above the floor to which the water rose inside the building. The respondent gave evidence that it averaged 47 cm. above the floor. He

said that boats passing by in the flooded road created waves and in some places the wall of the building was wet to a higher level. On the other hand, the appellant's claims manager, who inspected the building a few days after the flood and supervised an assistant taking measurements, gave evidence that goods on shelves more than 30-35cm. above the floor were not damaged and that it appeared from water marks on the walls that the water had risen only to 30 cm. He had a video film made of the inside of the building; it was shown both in the High Court and in this Court but was not of any help to either Court.

As Sadal J. stated in his judgment, the main area of argument at the trial was the height of the water and the interpretation of the terms of the insurance contract. However, the respondent also gave uncontradicted evidence that advice about the height which the floor of the building should be above the ground level was given to him by a representative of the appellant, Mr. Segran, before he erected the building and that he acted on that advice. He said that Mr. Segran "went out and measured the ground level", and told him that "the floor height should be 170 cm. from ground level" and "showed that". He said that the building was erected with its floor at that height and that, after it had been erected, Mr. Segran inspected it, took measurements and then gave him the policy. He said that Mr. Segran also saw how he had stored his stock and confirmed that that was how he should store it. In the High Court he tendered a letter from the appellant in which the appellant described Mr Segran as its underwriting manager. He admitted that Mr Segran did not expressly tell him that the exclusion clause would not apply but he gave evidence, which was not contradicted, that Mr. Segran told him that, with the building erected at the height it was, he "would be covered".

Sadal J. reviewed the evidence and found that there was no satisfactory evidence to establish what was "the actual height of water level inside the shop from the floor level or from the ground level". Consequently he held that the appellant could not rely on the exclusion provisions of clause 29. He did not deal in any way with the issues raised in respect of the advice given to the respondent by Mr. Segran nor did he consider any questions concerning the interpretation of clause 29. He held that the onus of proving the facts necessary to establish the exclusion for which that clause provided rested on the appellant. He, therefore, found in the respondent's favour on the issue of liability.

Before us Mr. Patel submitted that the onus of proving those facts rested on the respondent. He said that clause 29 merely qualified the promise of indemnity made by the appellant in the policy and did not create an exclusion from the promise. We do not accept that; in our view, clause 29 by its express terms was an exclusionary provision. However, having said that, we do not agree with Sadal J. that the appellant did not discharge the onus of establishing the height to which the water inside the building reached. As stated above, its claims manager gave firm evidence that the water level did not exceed 30 cm. above the floor and the respondent himself admitted that the average level was 47 cm. with some higher levels. He said that at one place there was "a thick mark" 110 cm. above the road level; we note that, as the floor of the building was 63 cm. above the road level, that was 47 cm. above the floor. Finally, he said that the water rose to a height "much higher than 40 cm.", that it "could be above 47 cm. to 55 cm." and that it "could be 60 cm. or 70 cm." In those circumstances the preponderance of the evidence from **both** parties was that the water did not rise to a height of more than 60 cm. above the floor. In our view, the learned trial judge was not entitled to find, as he did, that that had not been established.

It is necessary, therefore, to turn to matters not discussed by Sadal J. but argued at the hearing before him. The first is the interpretation of paragraph (5) of clause 29 of the policy; at the hearing Dr. Sahu Khan submitted that it was ambiguous. As we pointed out to Mr. Patel, paragraph (6), although clear on the face of it, is in fact seriously ambiguous. The expression "ground level" is not defined in the policy. We have set out above the facts of which the Town Engineer gave evidence. In relation to the respondent's building, is the ground level the level of the footpath, the level of the road, the original ground level at the back of the building, the level (of which no precise evidence was given) to which the land at the back of the building had been raised or the natural ground level remaining in the vicinity of the building? As water runs down hill one would expect it to be the lowest of at least the existing levels of the land immediately adjacent to the building, if not the level of the nearest land in the vicinity still at its natural level. When the above question is posed, the ambiguity in paragraph (6) immediately becomes apparent.

Paragraph (5) is not necessarily ambiguous simply because paragraph (6) is ambiguous. Nevertheless, Dr. Sahu Khan has pointed out that paragraph (4) requires the height

is to be measured from "the floor", not from "the floor level". Although the natural meaning of both those expressions is substantially the same, one would expect a person drafting a legal document such as the policy, if he intended to refer to the same thing, to use the same expression to describe it. Conversely, it may be reasonable to infer that, by using different expressions, the draftsman intended to describe two different things. Dr. Sahu Khan has suggested that "the floor level" was used to describe the lowest level at which the floor could lawfully have been built. He refers to the evidence of the Town Engineer that that level is six feet above mean sea level.

Dr. Sahu Khan pointed out the illogicality of the provisions of paragraph (5), when read with those of paragraph (6), if in paragraph (5) "the floor level" means the level of the actual floor. Its effect is then that a person who erects his building with its floor only 100cm. above the ground level will be paid benefits under the policy if the water level reaches 160 cm. above the ground level, but a person who erects his building with its floor 110 cm. above the ground level will not be paid unless the water level reaches 170 cm. above the ground level. The more prudent person is penalised for his prudence. That illogicality of the provisions of paragraph (5) is relevant to the inquiry whether they are ambiguous.

In a written submission tendered at the hearing Mr. Patel, referring to the provisions of paragraphs (5) and (6), wrote:

"They state the height above which property has to be stored in order to be covered. The property has to be 160cm above ground level in all events.

If the stock is such that it cannot be stored on shelves, or it is not practical to store them on shelves, especially goods like very heavy spare parts for vehicles etc., then clause 29(6) applies. In those cases the floor should be constructed 160cm clear from the ground. But in cases where the goods are such that they can be stored on shelves, then clause 29(5) applies. Then 60cm would be the clearance between the floor and the shelves, provided that the floor is constructed 100cm above the ground. (160cm - 60cm = 100cm: the distance between the floor and the ground). [He then inserted a diagram to illustrate what he said the paragraphs meant.]

If a particular insured deals in goods which can be stored on shelves, then he does not have to built (sic) the actual floor 160cm above the

ground. The floor can be constructed 100cm above the ground and then the insured can store his goods on a shelf which should be at least 60cm above the floor."

In that passage, particularly in the last three lines, Mr. Patel is implicitly equating "the floor level" with a height related to the ground level. He appears to distinguish between "the actual floor" and such a "floor level."

We have come to the conclusion, therefore, that the fact that different expressions are used in paragraphs (4) and (5) is significant, as Dr. Sahu Khan has submitted, and that there is ambiguity. That being so, "the floor level" in paragraph (5) must be accorded a meaning which enables the paragraph to have a reasonable, logical application and not one that is unreasonable and illogical. In light of Mr Patel's submission we are satisfied that it means a level 100cm. above the ground level referred to in paragraph (6). As discussed above, the meaning of "the ground level", in its application to the situation of the respondent's building, is uncertain. As the appellant is responsible for the wording of the policy, the meaning most favourable to the respondent must be applied, that is to say the ground level must be taken to be the level of such land in the vicinity of the building as is still at its natural level. As stated above, there is another reason for preferring that meaning to any other, namely that water runs down hill to the lowest level of the land, so that one would expect that to be the reference point for measurement of flood water. The actual floor of the respondent's building was 170cm. above that level but "the floor level", for the purposes of paragraph (5), was only 100cm. above it. As the water rose to at least 30 cm. above the actual floor, it was at least 100cm above "the floor level"; so on the facts established the appellant could not rely on the exclusionary provisions of clause 29. Accordingly the appeal must be dismissed.

It is, therefore, not necessary for us to deal with the matters raised by the respondent in paragraphs 3, 4 and 5 of the respondent's notice. However, as they were argued before us by both parties, as a matter of courtesy to counsel we shall do so.

Mr. Patel submitted that the respondent had not established that Mr. Segran was qualified to give the advice which the respondent said he gave. Mr. Segran clearly gave it as the appellant's agent and we cannot see how it can possibly be said that the appellant was not itself

qualified to give the advice. But, in any event, the appellant in a letter to the respondent described Mr. Segran as its underwriting manager. Underwriting by its nature involves the assessment of specific risks to determine whether or not insurance cover should be provided in respect of them and, if so, at what price. The advice given related directly to the risk in respect of which the respondent wished the appellant to provide insurance cover. Mr Segran, as the appellant's underwriting manager, was the best person to advise on what risks would be covered by the policy and what risks would not be covered by it. That is precisely what, according to the respondent's evidence, Mr. Segran did. As noted above, the appellant's evidence regarding the advice given was not contradicted; the appellant called no evidence in rebuttal of it.

Clearly the respondent relied on Mr. Segran's advice and made it clear to him that he would do so. Mr. Segran inspected the building after it had been erected and confirmed that it complied with his advice. He did not give evidence; so it is not possible to know how he interpreted paragraphs (5) and (6) of clause 29 of the policy, and their application to the situation of the respondent's building, when he gave that advice. In view of the manner in which Mr. Patel interpreted them as disclosed in the passage from his written submissions set out above, it is possible that Mr. Segran's advice was founded on a similar interpretation. In view of our finding that that was the correct way of ascertaining "the floor level" for the purpose of paragraph (5), it is apparent that he probably identified "the ground level" appropriately, so that his advice was in fact sound.

However, if we had come to the conclusion that "the floor level" in paragraph (5) meant the actual floor of the building, Mr. Segran's advice would necessarily have been wrong. As he knew that the respondent intended to rely on it, and did rely on it, the appellant would have been estopped from rejecting the respondent's claim because of the terms of that paragraph.

Although, in our view, the learned trial judge was wrong to make his decision on the basis on which he did, for the reasons we have given above we are satisfied that it was the right decision and that the appeal must be dismissed. The appellant is to pay the respondent's costs of the appeal which we fix as \$1,500.00.

Decision: Appeal dismissed. Decision of the High Court affirmed, albeit for different reasons.

Appellant to pay the respondent \$1,500.00 as the costs of the appeal.



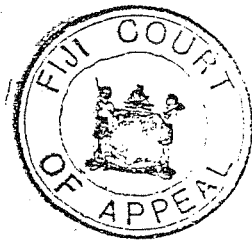
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Sir Moti Tikaram
President



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Justice I.R. Thompson
Judge of Appeal



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Justice Devendra Pathik
Judge of Appeal



Solicitors:

Messrs. M.B. Patel and Associates, Suva for the Appellant
- Messrs. Sahu Khan and Sahu Khan, Ba for the Respondent