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

Civil Appeal No. ABU 0015 of 2017
(High Court Civil Action No. 171 A of 2009)

BETWEEN: **NEW INDIA ASSURANCE (FIJI) LIMITED**

Appellant

AND: **SANJEEV KAPOOR**

1st Respondent

AND: **RAJEN BUILDERS LIMITED**

2nd Respondent

AND: **UNITY INSURANCE BROKERS (FIJI) LIMITED**

3rd Respondent

Coram	:	**Basnayake, JA** **Almeida Guneratne, JA** **Jameel, JA**
Counsel	:	**Mr. G. O'Driscoll for the Appellant** **Ms. S. Devan for the 1st Respondent** **Mr. S. Nandan for the 2nd Respondent** **Mr. A. Nand for the 3rd Respondent**
Date of Hearing	:	**11 September 2018**
Date of Judgment	:	**05 October 2018**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Jameel, JA.

Almeida Guneratne, JA

[2] I agree with the reasons, conclusion and the proposed orders contained in Justice Jameel's judgment.

Jameel, JA

Introduction

[3] This is an appeal from the judgment of the High Court of Suva, dated 2 February 2017, by which the High Court ordered the Appellant to indemnify the 2nd Respondent a sum of $ 250,000 including the monies paid by the 2nd Respondent to the 1st Respondent, and the monies deposited in court.

Factual Background

[4] Sanjeev Kapoor ("Sanjeev"), the 1st Respondent, was nineteen years old, and employed as a semi-carpenter under the 2nd Respondent. On 5 February 2009, whilst repairing the roof of a house, he fell and was injured. It was admitted that the accident took place when he was acting within the course and scope of his employment.

[5] In the court below, the 1st Respondent was the Plaintiff, the 2nd Respondent was the Defendant, the Appellant was the original 1st Third Party, and the 3rd Respondent was the original 2nd Third Party.

[6] The 1st Respondent filed Writ of Summons claiming damages for personal injuries suffered due to the negligence and breach of statutory duty by the 2nd Respondent. The Appellant and 3rd Respondent, were subsequently added as Third Parties, and they filed their respective Statements of Defence.

[7] The learned trial Judge found that the 2nd Respondent had been negligent, and that the 1st Respondent had been contributorily negligent. The learned trial Judge made order awarding the 1st Respondent damages in a sum of $414,976.00, found that the Common Law insurance cover (at the time of the accident) was $250,000 and made order that the Appellant indemnify the 2nd Respondent up to a sum of $250,000 under the Common Law cover.

[8] This appeal arises from the order of indemnity made against the Appellant, who at all material times was the 2nd Respondent's insurer, but claimed that its liability under the renewed policy of insurance was limited to $100, 000 and not $ 250,000 as claimed by the 2nd and 3rd Respondents.

The Judgment of the High Court

[9] On behalf of the 2nd Respondent, it's Managing Director, Rajendra Prasad and its Administrative Officer, Sneh Lata testified. The learned trial Judge believed the testimony of the 2nd Respondent's witnesses to the effect that the 2nd Respondent did not have any knowledge of the decrease in the Common Law cover from $250, 000 to $100, 000.00, between 2007 and 2011. It first came to light only in 2011 or 2012.

[10] The learned Judge found that the evidence did not establish that the 2nd Respondent had ever requested a change in the Common Law cover. The evidence of the witness for the Appellant (Insurer) was that when a Renewal or Premium Debit Note is received, it is verified against the Quotation Slip and that if any change in cover is noticed its Underwriting Department liaises with the Broker, (the 3rd Respondent) to discuss the change.

[11] The learned Judge found that the 2nd Respondent had failed and or, neglected to verify the details of the Renewal/ Debit Note dated 7 November 2006, relating to the period of the policy covering the first renewal, i.e. 7 November 2006 to 7 November 2007, against the Quotation Slip. However, this did not prevent him from holding that in the circumstances, the coverage in the original policy continued throughout the renewals from 2006 to 2009.

[12] In arriving at his findings, the learned Judge noted that it could not be concluded that the 2nd Respondent as the insured, and the 3rd Respondent, as the broker would have willingly agreed to have the Common Law cover reduced from $250,000 to $100,000 whilst the premium remained unchanged. On the evidence, the learned Judge found that the 3rd Respondent as broker, was an agent of the 2nd Respondent and not of the Appellant.

[13] The learned Judge took cognizance of the fact that the contents of page 2 of the Renewal Notice (Exhibit TP2 (1) issued by the Appellant contained the names of several parties, and that the documents maintained showed that the 2nd Respondent had a Common Law cover of $250,000. It was only in 2011 or 2012, that they discovered that it had been reduced to $100,000.

[14] The learned Judge relied on the principle of *"uberrimaie fidei"* which underlies all contracts of insurance, and which binds the insurer and the insured, and found that in all the circumstances of the case, it would be unconscionable for the Appellant to deny liability on the basis of what the court found to be, an honest and innocent mistake on the part of the 3rd Respondents.

[15] The learned Judge found that the reduction of the Common Law coverage from $250,000 to $100,000 was not intentional in any way or intended to mislead or cause harm or damage to anyone, but was a result of an honest mistake of the 3rd Respondent's officers. He found that the 3rd Respondent was not liable for its innocent mistake, and dismissed and struck out the Third-Party proceedings brought against it.

[16] After a detailed analysis and a careful consideration of the evidence of several witnesses and documents, the learned Judge found that the Common Law cover had not been changed from $250,000 to $100,000, and ordered that the Appellant indemnify the 2nd Respondent up to a sum of $250, 000.00.

The Grounds of appeal

[17] The grounds of appeal urged are reproduced below:

1. *The Learned Judge erred in law and in fact in not properly considering that the policy at issue had been renewed not once, but three times, since the Common Law has reduced from $250,000 to $100,000 and as such should have held that the 3rd Respondent had not merely made a mistake but should be liable to indemnify the 2nd Respondent for a sum*

of $150,000 with the Appellant only having to indemnify the 2nd Respondent up to the sum of $100,000.

2. *That the learned trial Judge erred in law and in fact in not considering the Appellant's witness' testimony that the calculation of the premium in respect of the policy at issue had nothing whatsoever to do with the amount of Common Law coverage, being a policy for Workmens' Compensation and dependent on the number and level of employees of the 2nd Respondent rather than linked to the Common Law coverage.*

3. *That the learned judge erred in law and in fact in not considering that full implications of an earlier Order in the High Court that had limited the Appellant to payment of a sum of $100,000 notwithstanding the later third-party proceedings.*

The first ground of appeal

The Appellant's position

[18] The Appellant's position was that the 2nd Respondent's insurance policy when first renewed in 2006, reduced the Common Law cover from $250,000.00 to $100, 00.00 (RHC, p. 190), and that the witnesses testified to this fact, and neither the 2nd or 3rd Respondent ever made any complaint about the reduction in cover. The argument seemed to be that it was either an intentional reduction, or if it was not intentional, then it was a mistake the consequences must be borne by the 2nd Respondent.

[19] Whilst it is true that the evidence revealed that the coverage was reduced at the point of the first renewal, the matter that remains for determination by this court is whether such a reduction was done in the manner contemplated by or provided for by the contract of insurance, and more significantly, whether it reflected the real intention and common understanding of the parties themselves. My view is that the reduction in the Common Law coverage did not properly reflect the real intention of the parties, and the learned trial Judge was correct when he held that

the Appellant is not entitled to benefit from what was found to be, an obvious error, which amounted to a genuine mistake.

[20] The policies were renewed again in 2007 and 2008 where the Common Law coverage under the Workmen's Compensation Policy remained at $100,000.00. In other words, the error continued unnoticed.

[21] Although the 1st Respondent was represented by Counsel, no submissions were made on his behalf, as the present dispute is essentially between the Appellant and the 2nd and 3rd Respondents.

The Second Respondent's position

[22] The 2nd Respondent (the assured) had retained the services of the 3rd Respondent (the broker), and had requested the 3rd Respondent to obtain quotations for insurance cover for Public Liability and Workmen's Compensation Liability. The 3rd Respondent was a broker who introduced the 2nd Respondent to the Appellant. The 2nd Respondent requested a Common Law Limit of $250,000 and a Public Liability limit of $150,000. Accordingly, the 3nd Respondent sent the 2nd Respondent a quotation, and the former agreed to purchase both covers.

[23] The premium for Common Law Liability was $914.69.00 and for Public Liability it was $500.00. The policy was initially valid from 7 November 2005 to 7 November 2006.

The first renewal and the initial 'mistake'

[24] It is significant that the Appellant failed to produce the original Insurance Policy, which the learned Counsel for the 2nd Respondent referred to as 'the genesis document'. It would have been in the interest of the Appellant to have produced it to establish that the contract did not provide that renewal was to result in an automatic renewal of all the terms, including the extent of the coverage, and that every renewal required an entering into of fresh terms. However, in this regard, on 18 October 2006, a renewal notice was received, and the 2nd Respondent

requested the 3rd Respondent to proceed with the renewal. The policies to be obtained as per the renewal notice were as follows:

> *"Public Liability Limit $500,000.00 with a premium at $500.00 and Common Law Limit at $250, 000.00 at a premium of $916.49".*

[25] When the first renewal took place, an employee of the 3rd Respondent erroneously typed and thus changed the Common Law cover to $100,000.00. The Placing Slips were then forwarded, to the Appellant with the erroneous figure for execution, and to the 2nd and 3rd Respondents for their records. The 2nd Respondent had not noticed the mistake at the time, and the error continued unnoticed.

[26] The 2nd Respondent and the Appellant did not enter into a new contract every time there was a renewal. What was being issued by the 3rd Respondent to the Appellant was a 'Renewal/Premium Debit Note, (RHC, p.189, 190, 194). This is an indication and/or acceptance by all parties that the initial policy entered into between the 3rd Respondent and the Appellant was only being renewed on the same terms, although a fresh premium was paid every year.

[27] The 3rd Respondent admitted making a mistake in the documentation when effecting the renewal of the policy for 2006-2007, whilst intending to keep the cover at $250,000, when it filled in the Paying Slip for $100.000, and sent it to the Appellant. It contends that the Appellant should have been aware of the mistake and cannot rely on the mistake in the Paying Slip, and is obliged to provide cover for $250,000.00. I will revert to this matter at a later stage.

[28] It is to be noted that the Appellant's contention that the 3rd Respondent was the agent of the 2nd Respondent was upheld by the learned Judge. Flowing from that, it must mean that as far as the Appellant was concerned, since it dealt only with the 3rd Respondent, the knowledge of the 3rd Respondent is imputable to the 2nd Respondent. The facts revealed that both, the 2nd and 3rd Respondents did not

realize that the policy coverage had been reduced. Therefore, where both the 1st and 2nd Respondents were concerned, they were unaware of the typing mistake.

[29] Even if the 3rd Respondent was found to have been in breach of its duties to the 2nd Respondent, that does not absolve the Appellant, or entitle it to benefit from an obvious mistake in the Paying Slip, at the point of renewal.

[30] The reason the reduction of cover is regarded as and deemed to be an error that does not affect the contract already formed is, because amongst the other circumstances that existed between the parties, the premium remained unchanged. This crucial fact pointed clearly to the inescapable conclusion and that is that, both the Appellant and the 2nd Respondent did not intend to change a fundamental term of the contract, namely the extent of the cover, and that is why even at the point of renewal there were no endorsements or changes made.

The 3rd Respondent's position

[31] The 3rd Respondent admitted making the initial mistake in the documentation when requesting cover for $250,000.00 for the 2nd Respondent to the 1st Third Party, and that it was an error which the Appellant too should have become aware of, and cannot be allowed to rely on the mistake and therefore the Appellant is obliged to provide cover for $250,000.00. In view of the evidence that was led, the learned trial Judge was correct in holding that the Appellant was disentitled to rely on the mistake in the Paying Slip to avoid coverage of $250,000 as contracted between it and the 2nd Respondent.

Discussion

The formation of the contract of insurance

[32] Although most contracts of insurance are contained in a written agreement described as 'the policy', it is said that:

"The contract of insurance may be embodied in a policy, but unless required by statute or contract may exist and be enforceable without a policy. The policy is the physical incarnation of the contract, but they should not be confused.". **New Hampshire Insurance Company v MGN Ltd**. [1997] L.R.L.R.24, *(per* Potter, J.), 58 (*per* Staughton L.J.). (cited in Chitty on Contracts, Sweet & Maxwell, 2004, Vol 2, para. 41-047).

Renewal of an Insurance Policy

[33] Text writers describe such a situation as follows;

"A renewal is presumed to be on the terms of the earlier cover unless there is express agreement to the contrary. If there are renewal negotiations, and there is no evidence of agreement to varied terms, the terms of the earlier policy will remain in place for the renewed policy": **Great North Eastern Railway Ltd v Avon Insurance plc** [2001] EWCA Civ. 780, [2001] Lloyd's Rep IR 793, **Burrows v Jamaica Private Power Co Ltd** [2002] Lloyd's Rep IR 466 (Comm) (Colinvaux's Law of Insurance in New Zealand, Thomson Reuters, 2nd Edition, 2017, para.1.4.1).

[34] I accept the position of the 2nd and 3rd Respondents that the renewal did not amount to a change on the content of the original agreement. It was only renewing the former terms. Thus, the contract continued on the same terms, with only the duration being extended. To hold that every renewal by way of the Paying Slip, amounted to a fresh agreement would mean that a fundamental term of the contract could be changed without reference to the original agreement. In my judgment, the conduct of the parties shows that that is not how the parties to the contract would have intended a fundamental term of the contract to be amended.

[35] In my judgment, the learned trial Judge was correct in holding that the testimony of the 2nd and 3rd Respondent's witnesses established that they continued to assume that the renewals were on the same terms as contained

in the original policy. The Appellant's witness Mahesh Kumar also testified that at the time of renewal, the brokers or assured may change the coverage. However, he was unable to establish that any change in the coverage was done, except to point to the typographical change in the figure of the Common Law coverage.

[36] Although the 2nd Respondent cannot be regarded as a vulnerable victim, in my judgment, in view of the premium remaining unchanged during the renewals effected in respect of the periods covering 2006 to 2009, since the renewals in this case were not conditional, the 2nd Respondent was entitled to assume that the Common Law coverage remained unchanged. I am satisfied that the learned trial Judge was correct in finding that the Common Law coverage had not been reduced, in the circumstances of this case.

Discussion

The effect of mistake

[37] In all the circumstances of this case, the typing mistake cannot be regarded as being sufficient to vitiate the contract, or amount to an amendment agreed to by the parties to the contract. There was no evidence that the Appellant got the distinct impression that the Common Law coverage had been reduced, or that it had it acted on the purported reduction to its disadvantage in a manner, or to an extent that now entitles it to contend that the coverage had been altered. Nor could the Appellant reasonably claim that allowing the Common Law coverage to remain at $250, 000 resulted in loss to it.

[38] Even if the Paying Slip is regarded as part of the contract, as far as the assured was concerned, it was under the reasonable impression that because it continued to pay the same premium that applied to Common Law coverage, the coverage remained unchanged. The fact that an incorrect amount was recorded in the Paying Slip will not, in my judgment, rebut the reasonable presumption in the mind of the assured, that the terms of the contract continued unaltered.

[39] In this case, the Appellant sought to argue that it presumed that the 2nd Respondent had intentionally reduced the Common Law coverage, and that it was too late for it to claim that it was unaware of the alteration, or as the Appellant finally sought to argue, the 3rd Respondent had been professionally negligent and breached its duty of care it owed to the 2nd Respondent.

[40] In all the circumstances of this case, the principles of professional negligence will not apply, and the first ground of appeal can be disposed of without a consideration of that matter.

[41] Turning now to the 'silence' on the part of the 2nd Respondent; the Appellant claimed that if the 2nd Respondent had not actually intended the reduction in the cover, it ought to have 'picked it up' and realized it earlier, and not have waited for three years to discover it. It therefore claimed that the silence on the part of the 2nd Respondent indicated that the 2nd Respondent had intended to reduce the coverage, and that it had knowledge that the Common Law coverage had been reduced. This argument of the Appellant is not convincing in the context of the continued silence on the part of the Appellant, which seems to claim that it had realized the reduction in the cover, and therefore 'presumed' that the 2nd Respondent had also intended the reduction in the cover.

[42] In my view, the Appellant was not entitled, in all the circumstances of this case, to 'presume' such a change of intention on the part of the 2nd Respondent, in regard to the terms of the policy, and particularly in regard to such a fundamental term as the extent of the coverage itself. Although in a contract of insurance, the duty of disclosure of material facts lies predominantly on the assured, the law will not condone the silence on the part of the insurer in respect of a material fact which would have had a significant bearing on the formation of the contract itself, namely the extent of the coverage. In this case, the Appellant argues that every renewal was a separate and new contract; it may be so in certain instances. However, in this case, this contention is demolished by the fact that the premium continued to remain the same, and I have already covered this matter earlier.

[43] In regard to the issue of 'silence' and its impact on the contract, I find guidance in the following passage:

> *"Mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground of invalidity, for the principle that in relation to sale is referred to as caveat emptor ('let the buyer beware') is still the starting point of the English law of contract. Bell v Lever Brothers Ltd. [1932] A.C. 161, 227; Keats v Lord Cagodan (1851) 10 C.B. 591; Smith v Hughes (1871) L.R. 6 Q.B.597, 603; Turner v Green [1895] 2 Ch.203). This sets English law apart from many of the other continental systems which may allow a party who has made a unilateral mistake about the subject matter to avoid the contract provided the mistake was sufficiently serious. The rule seems to represent a strong policy underlying English contract law. As Lord Atkin said, (Bell v Lever Bros Ltd. [1932]A.C. 161, 224, referring to common mistake, but the policy appears to be a general one),' It is of paramount importance that contracts should be observed, and that if parties honestly comply with the essential of the formation of contracts-i.e. agree in the same terms on the same subject matter-they are bound and must rely on the stipulations of the contract for protection from the effect of facts unknown to them."*(Chitty on Contracts, (*supra*) paragraph 5-007).

Mistake and Unconsionability

[44] In holding the Appellant liable for the full amount of the contracted cover of $250,000, at paragraph [162] of his Judgement the learned trial Judge held that it was 'unconscionable' for the Appellant to "hide behind an honest and innocent mistake" and refuse the full extent of the Common Law cover. This is correct, and this principle is rooted in fairness and good faith, which takes on particular significance in insurance contracts.

[45] In my judgment, in the absence of a mutual amendment to the Common Law coverage being effected in terms of the contractually provided procedure, it was not only implausible, but was also unconscionable for the Appellant to contend that the obvious typing error on the Paying Slip was sufficient evidence of a positive and conscious act on the part of the 2nd Respondent to reduce the Common Law coverage. Although the 2nd Respondent ought to have been vigilant in the process of renewal, nevertheless, in the circumstances of this case, I am prepared to hold that it would be unconscientious for the Appellant to avail itself of the advantage it seeks to gain.

[46] Although the right to avoid a contract has been prevented by the doctrine of unconscionability, it has usually been adopted only in cases when one party is suffering from a 'special disability' such as 'poverty', 'ignorance' or 'lack of advice'. However, there is indication that the courts are inclined to give a broader interpretation, as set out in the following passage:

> "*There is some suggestion that the doctrine may sometimes be used more broadly to prevent one party taking unconscientious advantage of the other's mistake. In Bank of Credit & Commerce International SA (In Liquidation) v Ali (No. 1) [2001] UKHL 8, [2002] AC.251 Lord Nicholls said that where the party to whom a general release was given knew that the other party has or might have a claim and knew that the other party was ignorant of this, to take the release without disclosing the existence of the claim or possible claim could be unacceptable sharp practice. The law would be defective if it did not provide a remedy, and while the case did not raise the issue, he had no doubt that the law would provide a remedy, (In Bank of Credit & Commerce International SA (In Liquidation) v Ali (No. 1)".* (Chitty on Contracts, *(supra)* Vol.1, para. 5-012).

[47] Accordingly, in my judgment, in the circumstances of this case, the Common Law coverage was not reduced in terms of the actual intention of the parties, and therefore no benefit flows to the Appellant from the mistaken reduction in the Common Law coverage.

[48] In this case, the learned Judge found that the reduction in the common-law cover was a result of a typing error which was evidently caused by an innocent mistake. There was no evidence whatsoever that any of the parties ever contemplated a variation in the terms of the contract.

Significance of the "Paying Slip" and the reduction in the Common Law coverage

[49] The Paying Slip, though not part of the original policy of insurance, appears to be a usage of trade and a commercial practice that existed between the 2nd and 3rd Respondents. As between these parties, this reflects a term of the main contract, i.e. the payment of the premium and the extent of the coverage. Depending on the circumstances of the case, the Paying Slip will not override the substantial contract. This is because the Paying Slip which necessarily follows the execution of the main contract is not part of the terms already entered into between the insurer and the assured, reflects one aspect of the contract.

[50] The genuine mistake reflected in the Paying Slip does not reflect the real intention of the parties to the contract which is reflected in a separate document, in this case, the very policy of insurance.

[51] Therefore, it is not the agreement in the policy itself which is to be rectified, but the information that wrongly reflects the real intention of the parties, and to that extent, the Paying Slip is not determinative of the contents of the Policy of insurance, which reflects the terms of the agreement between the parties, and which therefore takes precedence over the obvious and genuine mistake contained in the Paying Slip.

[52] It is said that:

> *"Thus, rectification forms an exception, but a justifiable exception, to the cardinal principle that parol evidence cannot be given to vary a written agreement. The basis of that principle is that the writing affords better evidence of the intention of the parties than any parol proof can supply; but to allow it to operate in a case of genuine mistake would, as Story has said,*
>
> > *'be to allow an act origination in innocence to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to promote it. In a practical view, there would be as much mischief done by refusing relief in such cases, as there would be introduced by allowing parol evidence in all cases to vary written contracts.'."* (Cheshire, Fifoot & Furmston's Law of Contract, Butterworths, 1996, p.250).

[53] Having said what I have said above, even if the Paying Slip were to be regarded as a component of the main contract, since the main contract was indisputably, antecedent to the Paying Slip, the antecedent agreement (the contract of insurance) was rectifiable, and the evidence revealed that in all the circumstances of this case, it could have been brought within this principle.

[54] No doubt the common intention in the original contract between the Appellant and the 2nd Respondent was for Common Law coverage of $250,000.00 and *consensusad idem* was in respect of this sum. Further, the testimony in this case revealed that the 2nd Respondent did not, at any time, intend to reduce the Common-law liability.

[55] Allowing the Appellant to benefit from the typing error would bestow on it an unreasoned or ungifted advantage which is contrary to the agreement. For the foregoing reasons, I dismiss the first ground of appeal.

The second ground of appeal

[56] The essence of this ground of appeal is that the learned Judge erred in law in not considering the testimony given by the Appellant's witness Mahesh Kumar; that the calculation of the premium had nothing whatsoever to do with the amount of Common Law coverage. In this regard, is significant that the original policy of insurance was not tendered in evidence.

[57] Although witness Mahesh Kumar stated that the premium is calculated by the Underwriting Department, there was no testimony from an underwriter or anyone from the Appellant's Underwriting Department, to corroborate this position.

[58] In this regard, I observe that the learned trial Judge in paragraphs [144] to [160] of that Judgment had very carefully analyzed the testimony of the Appellant's witness. The sum effect of Mahesh Kumar's testimony that the calculation of the premium had no relationship to the Common Law, coverage, (on which evidence ground two of the appeal is based), is not creditworthy and the learned Judge did not place any reliance on his testimony. For the reasons I have set out above, and in the absence of independent or corroborative evidence in this regard, the learned trial Judge rightly disbelieved his testimony in that regard. Accordingly, the second ground of appeal is both factually incorrect and without merit, and is dismissed.

[59] That premium is calculated based on variable data and was described as follows:

> "*The premium ultimately payable is fixed by data derived from the whole of the year of insurance. Such as the amount of wages paid, or the number of persons employed, or of vehicles used, and provision is made for adjustment at the end of the year. For this purpose, the insured is required to keep a proper record, such as, for instance, if the premium is based on wages, a wages book, and at the end of the year he must furnish the insurers with an account from which the premium properly payable can be calculated.* (Halsbury's Laws of England, 2003 Reissue, para 666).

[60] On an examination of the documentary and oral evidence that was before the learned trial Judge, I am satisfied that ground two of the appeal is without merit. I therefore dismiss the second ground of appeal.

The third ground of appeal

[61] This ground of appeal is based on the Order made by the learned Master of the High Court of Suva on 22 February 2013, in respect of an application made by the former Solicitors for the 2nd Respondent, for withdrawal as Solicitors.

[62] When the 1st Respondent's claim was filed, the Appellant as insurer of the 2nd Respondent originally defended the action filed against the 2nd Respondent. The 1st Respondent's claim for damages was $450,000. However, since the Appellant took the position that the maximum liability was $100, 000, it refused to continue to defend the 2nd Respondent. The Solicitors who had been defending the 2nd Respondent were then permitted to withdraw.

[63] In those circumstances, the learned Master made order that:

> *"the Appellant do indemnify the 2nd Respondent under the Workmen's Compensation Insurance Policy and/ Common Law Liability to the sum of $100, 000 of which a sum of $20,000 has already been paid and the balance sum is $80, 000."*

[64] When the Appellant took up the order made by the learned Master as a preliminary objection, before the learned trial Judge, in overruling the said preliminary objection raised by the Appellant, the learned trial Judge gave the following reasons:

> *" (I)On 17 January 2013, the First Third Party who was defending Plaintiff's claim under right of subrogation until then filed the Application as appears at paragraph 13 of this Judgment.*
>
> *(ii) His Lordship Justice Amaratunga when making Order in terms of the Application stated that: -*

'There is no Order of Court to $80, 000 which under the Policy NIA is liable. They need not deposit this to court as they have given an assurance to pay up to $100,000.

(iii) The court did not at any time determine First Third-Party total liability for Common Law cover and as such this issue is not res judicata.

(iv) If however, First Third Party would have sought a declaration the cover for common liability is $100, 000 and Court determines this issue, the issue would be res judicata.

[65] In paragraphs [130] to [134] of the Judgment, the learned trial Judge has dealt with the preliminary objection taken by the Appellant, based on the Order made by the learned Master. Having relied on the relevant authorities, the learned Judge held that the facts do not bring the case within the principles of *res judicata.* Therefore, the Appellant's submission that the learned trial Judge had failed to "consider the full implication of an earlier Order in the High Court that limited the Appellant to payment of a sum of $100,000 notwithstanding the later Third-Party proceedings", is factually incorrect and without any basis in law. I therefore see no basis to interfere with that finding of the learned Trial Judge, and therefore dismiss the third ground of appeal.

[66] For the reasons set out above, I see no reason to interfere with the findings and conclusion of the learned trial Judge and the appeal is dismissed.

The proposed Orders of the Court are:

1. *The Appeal is dismissed.*

2. *The Appellant is ordered to indemnify the 2nd Respondent in a sum of $250,000.00, together with interest at the rate of 4% per annum from the date of payment by the 2nd Respondent to the 1st Respondent, until the date of indemnification by the Appellant.*

3. *The Appellant is ordered to pay the 1st and 2nd Respondents a sum of $2,500.00 each, as costs of this appeal.*

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

.....
Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL