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

CIVIL APPEAL NO. ABU 115 of 2017
High Court Action No. HBC 435 of 2005

BETWEEN : **PUNJA AND SONS LIMITED**
OCEAN SOAPS LIMITED

Appellants

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Mr. B. C. Patel for Appellants**
Mr. F. Haniff for Respondent

Date of Hearing : **12 November, 2019**
Date of Judgment : **29 November, 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions of Dayaratne JA.

Lecamwasam, JA

[2] I agree with the reasons given and the conclusion reached by Dayaratne JA.

Dayaratne, JA

This appeal

[3] This is an appeal against the judgment of the High Court of Suva dated 31.08.2017. The said judgment was delivered consequent to an appeal filed by the Appellants against the Decision of the learned Master of the High Court (Master) dated 24.03.2016 in a matter where he was called upon to assess damages under a Fire Insurance Policy. The Appellants who were the insured under the policy were dissatisfied with the assessment made by the Master and appealed against the assessments made by him. The learned High Court Judge dismissed the said appeal and affirmed the Decision of the Master.

The facts in brief

[4] The Second Plaintiff Appellant (2nd Appellant) was a wholly owned subsidiary of the First Plaintiff Appellant (1st Appellant) and was carrying on the business of manufacturing and distributing soap products. A fire that broke out on 19.02.2003 caused destruction to the factory and buildings owned by the 1st Appellant and the business carried on by the 2nd Appellant.

[5] The Insurance Policy taken out by the Appellants from the Respondent covered them from the perils of fire and insured them under Material Damage (MD) and Business Interruption (BI) up to limits of $9,000,000 and $3,200,000 respectively. However, the cover under MD had a Malicious Damage limitation of $ 3,000,000.

[6] A claim having been made by the Appellants to the Respondent under the said Policy, the Respondent took up the position that the fire was a result of a malicious act. The Appellants took steps to appoint a claim preparer whilst the Respondent took steps to appoint a loss adjuster to go in to the matter. Progress payments were made later by the Respondent having admitted liability subject to the maximum stipulated under malicious damage in respect of the MD claim. Progress payments were made up to $ 3,000,000 in respect of MD and $1,000,000 in respect of BI. The balance sum of $981,359 claimed by the Appellants in respect of the BI claim was paid by the Respondent on 28.12.2005 consequent to the Summary Judgment obtained by the Appellants.

[7] The Appellants commenced proceedings by way of a Writ of Summons and a split trial was conducted to decide liability. The judgment delivered by the High Court on 06.05.2011 held that Malicious Damage limitation did not apply. The assessment of damages hearing commenced thereafter before the Master in October 2012 and was concluded on 12.04.2013. The Master delivered his Decision on the assessment on 24.03.2016. The Master in his Decision had assessed damages in respect of both the MD and BI claims under separate heads of claim.

[8] Being dissatisfied by the said assessment of damages, the Appellants filed an appeal to the High Court under Order 55 Rule 3 of the High Court Rules. Having heard the parties, the learned High Court Judge delivered his order on 31.08.2017 whereby the appeal was dismissed and the Master's Decision was affirmed. The Notice of Appeal to this Court was filed by the Appellants on 22.09.2017.

The Grounds of Appeal

[9] The grounds of appeal urged by the Appellants in this court are as follows:

> *"1. The decision of the learned Judge is perverse and wrong in law because:*
> *(a) The learned Judge insisted on hearing the appeal when the Court Record was incomplete in material respect, in that, it did not contain transcript of evidence of several witnesses whose evidence was crucial to the determination of several grounds of appeal.*

(b) *The learned Judge refused the Appellants' formal application to adjourn the appeal hearing to allow the Court Record to be completed.*

(c) *The learned Judge dismissed the appeal without considering each of the grounds of appeal properly or at all.*

(d) *The learned Judge expressed views in the course of the appeal hearing in such extreme and unbalanced terms as to throw doubt on his ability to consider and determine the grounds of appeal with an objective judicial mind.*

(e) *The learned Judge should not have looked at any notes or opinion of the Master which were not before the Court at the appeal hearing because the Appellants had no opportunity to comment or submit on it.*

(f) *The decision of the learned Judge was unjust because of a serious procedural irregularity in the High Court.*

(g) *The decision of the learned Judge was in breach of section 7(2) of the Constitution of Fiji, in that, the Appellants were denied their common law right to fair hearing.*

2. *The learned Judge erred in law in imposing a higher standard of proof upon the Appellants than was required by law when he said that the Appellants should have called evidence of the Revenue Authority to prove its claim for VAT (Value Added Tax) even though there was other uncontradicted evidence before the Court proving on a balance of probabilities that VAT at 12.5% was payable on the $3million paid for material damage claim under the policy.*

3. *The learned Judge erred in law in assuming that $3.75 million paid by the Respondent included VAT amount of $750,000.00 and was progress payments under the policy when in fact the Respondent has not paid the claimed VAT at all and that sum was partly progress payments and partly payment pursuant to summary judgment.*

4. *The learned Judge erred in law in stating that the Appellants had abandoned their claim for the transformer when that was not the case and the learned Judge thereby failed to consider that claim.*

5. *The learned Judge erred in law in rejecting the Appellants' submission of breach of the rule in Brown v Dunn without considering the material evidence of witnesses some of which evidence was not before the Court due to the incomplete Court Record and also without considering the Appellants submission properly or at all.*

6. *The learned Judge erred in law by treating the appeal as a simple challenge to the Master's findings of fact and failed to appreciate that the grounds of appeal also raised points of law whereby he failed to consider and determine those grounds properly or at all.*

7. *The learned Judge erred in law in dismissing the Appellant's appeal without considering the grounds of appeal individually and without giving proper reasons for rejecting each of the grounds.*

8. *The learned Judge erred in law in failing to consider the following grounds of appeal properly or at all.*

   (i) *The learned Master misdirected himself on the standard of proof required in a civil case by insisting upon documentary proof when there was other evidence to prove the claim on the balance of probabilities.*

   (ii) *The learned Master erred in law in accepting the Respondent's evidence, particularly of Mr Godfrey and Mr Wakelin's reports were not disclosed to the Appellants until after the Appellants' expert witnesses, Mr Peter Faire and Mr Vinod Kumar, had testified and so neither Mr Faire nor Mr Kumar was given an opportunity to comment on the Respondent's evidence including on the Godfrey and Wakelin Reports and when all such evidence of the Respondent was adduced in breach of the rule in* ***Brown v Dunn****.*

   (iii) *The learned Master erred in law and in fact in accepting the evidence of Mr Godfrey when his report was adduced in evidence in breach of the rule in* ***Brown v Dunn*** *and neither his report nor his testimony had met the requirements of the code of ethics and duties and responsibilities applicable to expert witnesses and insurance loss adjusters.*

   (iv) *The learned Master was wrong to reject the Appellants' claim of $1,350.00 for the two directors personal effects lost in the fire simply because no documentary proof of PAYE and FNPF membership was produced to prove their employment with the Appellants even though the Financial Controller of the Appellants had given uncontradicted sworn testimony that the two directors were in paid employment of the First Appellant.*

   (v) *The learned Master wrongly relied upon the Respondent's evidence adduced in breach of the rule in* ***Brown v Dunn*** *to disallow the Appellants' claim of $3,518.00 for professional fees.*

(vi) *The learned Master was wrong to accept Mr Godfrey's evidence adduced in breach of the rule in* ***Brown v Dunn*** *to disallow the Appellants' claim of $44,973.00 for Increased Cost of Working.*

(vii) *The learned Master wrongly rejected the Appellants' claim of $64,350.00 for non-electrical services without properly evaluating the expert evidence and by accepting the Respondent's evidence adduced in breach of the rule in* ***Brown v Dunn***.

(viii) *The learned Master failed to properly evaluate all the evidence when he rejected the Appellants claim of $6,906.00 for MSM Loss Management Fees for special trip to Fiji and unfairly cast a heavy burden of proof on the Appellants.*

(ix) *The learned Master was wrong to reject the Appellant's claim for the electricity transformer on the ground that the Appellants had not called a witness from the Fiji Electricity Authority to authenticate FEAs letter when :*

a) *the FEAs letter was in evidence and Mr Vinod Kumar had given sworn testimony in support of it; and*
b) *the onus was on the Respondent to call rebuttal evidence and it failed to do so; and*
c) *the rule in* ***Jones v Dunkel*** *had applied.*

(x) *The learned Master failed to properly evaluate the evidence of the expert witnesses and wrongly rejected the Appellants claim of $397,875.00 for electrical services including the transformer.*

(xi) *The learned Master failed to properly evaluate the evidence of the expert witnesses and wrongly reduced the Appellants' building claim from $650,000.00 to $411,875.00.*

(xii) *The learned Master failed to properly evaluate the evidence of the witnesses and wrongly accepted the Respondent's evidence adduced in breach of the rule in Brown v Dunn to reject the Appellant's claim of $568,471.00 for the Toilet Soap Line because he failed to properly evaluate the evidence or to apply the rule in* ***Brown v Dunn*** *against the Respondent's evidence adduced in breach of the rule or to appreciate the requisite standard of proof.*

(xiv) *The learned Master was wrong in law and in fact in not holding that the Respondent had breached the contract of insurance by;*

a) *Wrongly applying the malicious damage exclusion;*
b) *Failing to disclose the evidence to support malicious damage exclusion despite numerous requests;*
c) *Not admitting liability within a reasonable time;*

d) Not paying adequate progress payments within a reasonable time;

(xv) The learned Master failed to consider the Appellants' damages claim of $666,844.24 resulting from the breach of contract.

(xvi) The learned Master erred in law in holding that compound interest was not payable under s.34 of the Insurance Law Reform Act 1996.

(xvii) The learned Master failed to consider the Appellants alternative submission that compound interest was payable under the common law.

(xviii) The learned Master erred in law in awarding simple interest on the judgment sum from the date of the liability judgment on 6th May 2011 instead of awarding compound interest from either of the following dates;

a) 18 months for the date of the fire on 19th February 2003; or
b) The date on which the Respondent withdrew its instructions to their loss adjuster to liaise with the Appellants' loss adjuster to finalise the claim sometime in late 2004.

(xix) The learned Master failed to consider and award to the Appellants their unchallenged claim of $375,000.00 being the 12.5% VAT on the $3,000,000.00 MD claim the Respondent did not pay in reliance upon the malicious damage exclusion limit.

(xx) The learned Master failed to award 10% compound interest on the VAT sum of $375,000.00 from the dates VAT became due and payable:

a) On $125,000.00 from 19th May 2003;
b) On $62,500.00 from 4th July 2003;
c) On $62,500.00 from 11th April 2004;
d) On $125,000.00 from 28th August 2004.

(xxi) The learned Master was wrong not to award costs of the assessment hearing to the Appellants."

The jurisdiction of the Court of Appeal in this matter

[10] As stated earlier, the High Court judgment that is being challenged in this court was in respect of an appeal filed by the Appellants against the Decision of the Master. That appeal was governed by Order 55 Rule 3 of the High Court Rules and was by way of rehearing. The appeal to this court is against the judgment of the High Court and has been made in terms of Section 12 (1)(c) of the Court of Appeal Act. This therefore is a second tier appeal and Section 12 (1)(c) of the Court of Appeal Act provides that an appeal shall lie *"on any*

ground of appeal involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal".

[11] Before venturing to consider this appeal, this court therefore has to be first satisfied that the grounds of appeal urged by the Appellants contain questions of law. In order to do so, it is necessary to understand as to what a "question of law" is.

[12] In his submissions, the learned counsel for the Appellants emphasized that the learned High Court judge had observed that the matters urged by the Appellants were limited to matters of fact. He complained that the learned High Court judge had failed to appreciate that the failure on the part of the Master to properly evaluate the facts in line with the applicable law would amount to a question of law and that it was incumbent on the High Court to have gone in to such matter.

[13] He has stated in paragraph 25 of his written submissions that:–

> *"It is submitted the following grounds involve questions of law. They do not challenge the finding of primary facts but require evaluation of those primary fact to examine if the correct inferences have been drawn by the Master to reach his conclusion. In these circumstances this court is in as good a position as the Master to draw its own inferences from the primary facts and to come to a conclusion different from that of the Master".*

[14] In support of this position, he has also quoted Lord Donaldson MR in the case of **British Telecommunications plc v Sheridan** [1990] IRLR 27 :-

> *"On all questions of fact, the industrial tribunal is the final and only judge ……. The Employment Appeal Tribunal can indeed interfere if it is satisfied that the tribunal has misdirected itself as to the applicable law or there is no evidence to support a particular finding of fact, since the absence of evidence to support a particular finding of fact has always been regarded as a pure question of law".*

[15] There are several other judicial precedents on this issue such as **Chand v Fiji Times Ltd,** (2011) FJSC 2 (8 April 2011), **Bulu v Housing Authority** (2005) FJSC 1 (8 April 2005) and **Lakshman v Estate Management Services Ltd** [2015] FJCA 26 (27 February 2015). In the case of **Colettes Ltd v Bank of Ceylon**, (1982) 2 Sri Lanka Law Reports 514, the

Supreme Court of Sri Lanka spelt out as to what would constitute 'questions of law'. I wish to quote the following since they are relevant to this matter. They are:

> *"(a) inferences from the primary facts found are matters of law,*
>
> *(b) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has failed to take in to account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a question of law,*
>
> *(c) Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law,*
>
> *(d) Whether the evidence is in the legal sense sufficient to support a determination of fact is a question of law,*
>
> *(e) Whether there is or is not evidence to support a finding, is a question of law".*

[16] Having considered the dicta of the aforesaid cases, I am of the view that the grounds of appeal contain questions of law that this court is required to look into.

The manner in which the High Court has considered the appeal

[17] The main complaint of the Appellants with regard to the judgment of the learned High Court judge stems from the fact that he has been rather economical in his analysis of the findings of the Master and the grounds of appeal that had been urged before him. He appears to have relied to a great extent on authorities which emphasized on the need for an appellate court not to interfere with the findings of a trial judge on facts. In the process he seems to have lost sight of the aspect of having to consider as to whether there were any shortcomings in the trial judge's analysis of the evidence and whether his findings were consistent with the evidence that has been placed before him and the applicable contractual and statutory provisions.

[18] In this regard I consider it apt to quote the following passage from the judgment in the case of **Dearman v Dearman** (1980) 7 CLR 549 at 564:

> *"within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect".*

[19] On the other hand, the learned counsel for the Respondent in his written as well as oral submissions emphasized that a trial judge was in the best position to judge matters of fact and that an appellate court should interfere with the findings of a trial court on matters of fact only in extreme and exceptional cases. The Appellants were highlighting appellate obligations whilst the Respondent was highlighting appellate restraint.

[20] The Respondent has amongst several authorities, cited the case of **Rae v International Insurance Brokers (Nelson Marlborough) Ltd** [1997] 3 NZLR 190 (CA), which I agree is relevant as a guideline. Thomas J stated as follows;

> *"As the evidence unfolds the trial judge gains an impression from the evidence which is not necessary or usually apparent from the cold typeface of the transcript of that evidence on appeal. The judge forms a perception of the facts in issue from which he or she adds or subtracts further as witnesses give their evidence and so obtains as complete a picture as is possible of the events in issue. The judge perceives firsthand the probabilities inherent in the circumstances traversed in the evidence and can obtain a superior impression of those probabilities as a result.*
>
> *An appellate court has none of these advantages and must acknowledge that the court at first instance is far better placed to determine the facts. Indeed, it would be an arrogance for an appellate court to assert the capacity to be able to "second- guess" a trial judge's findings of facts*
>
> *when it does not share those advantages. Exceptional caution in departing from the trial judge's findings of fact are therefore regarded as imperative".*

[21] I am therefore of the view that this court is compelled to look at the Decision of the Master in some detail in considering this appeal. However, I will be mindful of the restraint an appellate court has to practice.

The task of the Appellants before the Master

[22] The parties had engaged the services of a claims preparer (by the Appellants) and a loss adjuster (by the Respondent) but were unable to reach agreement regarding many of the claims and hence it was necessary to have the claims assessed by the Master.

[23] I consider it necessary at the very commencement to emphasize that this being a claim made by the Appellants, it was necessary for them to prove that they were entitled to be indemnified in the sums under the respective heads of claim, unless of course the Respondent was admitting same. The standard of proof required was that required in a civil suit and hence was on a balance of probabilities.

[24] If parties were relying on a particular method of calculation, it was incumbent on such party to provide justification through a witness who was competent to provide such evidence (oral or documentary) in order for the Master to come to a proper conclusion.

[25] It must be noted that the Master has in paragraphs 5 to 12 of his Decision dealt with this aspect, namely the task of the Appellants, the standard of proof and his role as Master and I am in agreement with those observations.

Parameters within which the Master had to conduct the assessment

[26] In fulfilling the task entrusted to him, it was also necessary for the Master to be mindful of the provisions contained in the Policy of Insurance obtained by the Appellants from the Respondent, any amendments thereto, laws governing matters of insurance in the country as well as globally accepted practices in the insurance industry. He also had to be mindful that a policy of insurance was concerned with indemnification of the loss suffered by the insured and the yardsticks by which such indemnity was to be measured.

[27] I must again note that the Master has been mindful of such matters and has made specific mention of them in detail in paragraphs 13 to 32 of his Decision and I do not consider it necessary for me to repeat them here.

Identifying the relevant Grounds of appeal

[28] It must be mentioned at the very outset that the grounds of appeal as appearing in the Notice of Appeal are not coherent and that they overlap. Although several grounds of appeal have been raised, it is clear that the main complaint of the Appellants is encapsulated in grounds 6 and 7.

[29] Ground 1, is premised mainly upon the incomplete High Court record. The Appellants took up the position that certain transcripts were missing and that the learned High Court judge could not have considered the appeal properly in view of such infirmity and that the Appellants were thus deprived of a fair hearing. The contention therefore wss that the judgment is *'perverse and wrong in law'.*

[30] In view of the nature of this complaint, at the commencement of hearing, this court inquired from Mr. Patel, the learned counsel for the Appellants as to whether the brief that is before this court was complete with all the transcripts. His response was that except for a very small portion of the cross examination of one witness, the brief was complete and that it would not be a handicap for this court to determine the appeal. Mr. Haniff, the learned counsel for the Respondent agreed with the said position.

[31] Accordingly, learned counsel for the Appellants informed court that he was not pressing the issue of the High Court record being incomplete and that he is not moving that the matter be referred back to the High Court for a fresh determination of his client's appeal although he had moved for such a step in the Notice of Appeal.

[32] I observe that ground 8 spells out the particular heads of claim as assessed by the Master and avers that the learned High Court judge *"erred in law in failing to consider them properly or at all".* This ground contains sub grounds from (i) to (xxi). Out of these twenty one sub grounds, the Appellants pursued only eleven and they were (ii), (iii), (iv), (vi), (vii), (ix),(xiv),(xv), (xviii), (xix) and (xx), abandoning the rest. Some of them were also combined and ultimately they are as follows:

- Ground 8 (ix) - Transformer - $147,200
- Ground 8 (xix) & (xx) – VAT Claim - $375,000

- Ground 8(ii),(iii),(vi),(vii) – Rule in Browne v Dunn (1893) 6 R 67 (*says clear instances of the breach of this claim was seen in (a) BI Claim – increased cost of working - $44,973) (b) MD Claim – Services – Non Electrical - $64,350)*
- Ground 8(iv) – MD Claim – Personal Effects - $1350
- Ground 8(xviii) – Claim for interest & starting date of interest
- Ground 8(xiv) & (xv) – Breach of Contract – consequential loss – litigation costs

[33] The learned counsel for the Appellants made submissions only in respect of the above grounds and his position has been made very clear in paragraph 171 of his written submissions where he states that *"The Appellants invite this court to allow the appeal; set aside the judgment of the High Court and parts of the judgment of the Master and enter judgment for the Appellants for ...."* and has set out the sums that are claimed.

[34] It must be noted that I was compelled to indulge in this rather cumbersome exercise in order to discern from a plethora of grounds, the ultimate heads of claim that this court is called upon to pronounce on.

[35] It is important to mention here that the learned counsel for the Appellants informed this court that he was not pursuing his claim for compound interest and that the Appellants were only seeking simple interest.

[36] In addition, it must also be noted that although the Respondent had referred to a Cross Appeal in its written submissions (paragraphs 218 - 223), learned counsel for the Respondent informed this court that the Respondent was not proceeding with a cross appeal.

The different heads of Claim

Transformer - $147,200 (Ground 4 and Ground 8(ix))

[37] The learned High Court judge states in paragraph 7 of his judgment that "*At the outset I state that at the conclusion of the hearing, counsel for the Appellants had abandoned their claim for the transformer and for compound interest. ....".* It was pointed out by the learned counsel for the Appellants that this was not so and that on such wrong footing, the learned High Court judge has failed to consider that claim. A perusal of the transcripts

before the learned High Court judge bears this out and the learned counsel for the Respondent did not dispute the position of the learned counsel for the Appellants.

[38] The Master refused the claim of the Appellants for indemnity in respect of the destruction of the transformer that was in the premises of the Appellants. This was on the basis that the Appellants had failed to establish an 'insurable interest' in the transformer since they had failed to prove ownership as well as establish an indemnity value (paragraphs 197-199 of his Decision).

[39] The Appellants argue that the Master was wrong on both aspects and that he had misdirected himself on the law regarding proof of an *insurable interest*. They take up the position that the Master had misinterpreted the definition contained in the Policy. They also point out that evidence regarding the indemnity value had been provided.

Insurable interest in the transformer

[40] In ascertaining as to whether the Appellants had an insurable interest in the transformer, the most pertinent determinant would be the relevant clause in the insurance policy. '*Insured Property'* under the policy is defined as *"Tangible property of every description* ***not expressly excluded****, the* ***Insured's own*** *or held by the Insured jointly or in trust or on commission or* ***for which the insured is responsible*** *or* ***has assumed responsibility*** *all while located at any situation or other place anywhere in Fiji or as otherwise".* (emphasis added)

[41] The evidence led before the Master has to be looked at in order to find out if the transformer comes within this definition. The position of the Appellants was that they owned the transformer. They had produced a letter from an official of the FEA (at page 1080 of Volume 4 of the High Court Record) to support their claim of ownership. The letter had been issued in response to clarification sought regarding ownership of the substation equipment and FEA confirms that the Appellants 'owns/owned it'. The letter further clarifies that "*the FEA General Extension Policy (whereby FEA retains ownership of all the equipment inside of the substation building) is relatively new and was not in force when the substation was originally built".* The position of the Appellants was that there was no necessity to call the author of the letter to give oral evidence since the authenticity of the

letter had not been challenged. They contend that the production of the letter was well within the provisions of the Civil Evidence Act and therefore the Master should have accepted the letter as proof of ownership.

[42] The evidence reveals that this letter had been made available to the Respondent's loss adjuster Godfrey in 2004 and he has admitted receiving it (his statement of evidence at page 601-603 of Volume 3 of the High Court Record and also whilst giving evidence before the Master at page 1561). Although this letter was provided to substantiate their claim, Mr. Godfrey was hesitant to rely solely on this letter and had sought additional proof of ownership such as receipts of payment to the FEA. He also had pointed out that the transformer has not been included in the insured's valuation reports of 1994 and 1999 as a plant item and further that although the Appellants had undertaken to produce further evidence in proof, they had failed to do so. On that basis he says he *'was skeptical about this item''*. However it is important to note that he has stated that he believed the transformer had been at the premises of the Appellants for a number of years (pages 1560 – 1567 of Volume 5 of the High Court Record).

[43] It must also be noted that Mr. Faire who testified on behalf of the Appellants had been cross examined at length on the issue of the ownership of the transformer. He had maintained that the appellants owned it and that it had been within the premises owned by the Appellants. He was adamant that the letter was sufficient proof of ownership and that although he had previously indicated to Mr. Godfrey that he would provide further material as proof, he did not consider it was necessary.

[44] It is important to note that Mr. Faire has gone on to explain that ownership was not a must in terms of the Policy to create an insurable interest and relying on the definition found in the policy, has explained that the Appellants *'were responsible for and used it*". He also said that it was not an item that was excluded under the policy and that the definition contained in the policy was very wide, (pages 1366 - 1373 of Volume 5 of the High Court Record).

[45] The learned counsel for the Appellants submitted that the learned Master as well as the witness for the Respondent had sought to decide insurable interest based on ownership alone and that such position was completely contrary to the clear definition contained in

the policy. He contended that the Appellants had placed adequate evidence to prove that the Appellants owned it. He said that even assuming that they had failed to prove ownership, it was established that they had been in possession of the transformer for over 30 years. As such he submitted that the Appellants had an insurable interest based on *''being responsible''* as a bailee under common law or on account of *''being in lawful possession'',* thus coming within the broad definition contained in the policy.

[46] Learned counsel for the Appellants relied on **MacGillivray & Parkington on Insurance Law** (7th Ed at page 132) in support of his proposition. He also relied on the case of **Lucena v Craufurd** (1806) 127 ER 630 at p 643, to lend credence to his position that apart from any question of contract, the mere fact of possession, if lawful, was sufficient to give insurable interest. In the above case, Lawrence J stated that *"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it ..... interest does not necessarily imply a right to the whole part of a thing, nor necessarily and exclusively that which may be the subject of privation, but having some relation to. Or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring ……he may be said to be interested in the safety of the thing".*

[47] Having considered the evidence, I am unable to agree with the conclusion of the Master that the Appellants did not have an insurable interest in the transformer. Ownership was not the only criterion to determine insurable interest. It was necessary for the Master to first pay attention to the definition of *Insured Property* contained in the Policy and thereafter by recourse to the evidence placed before him, decide as to whether the Appellants came within that definition. The definition was very wide.

[48] At paragraph194 of his Decision, the master states that "*The burden of proof was with the Plaintiff to prove the insurable interest of the transformer but the only evidence was the letter of FEA. In the analysis of evidence the insurable interest was not proved on a balance of probability by the Plaintiff"*. The letter was not the only evidence placed by the Appellants to prove ownership. Oral evidence was led to the effect that they had purchased it. In my view, the oral testimony of the Appellants' witnesses together with the letter

issued by EFA was adequate to establish ownership, although their claim to ownership would have been stronger had they called a witness from FEA.

[49] The Master goes on to state in his Decision *(*At paragraph194) that "*The said letter does not indicate how the insurable interest was decided by the signatory to the letter. So an explanation was needed from an authorized official from FEA".* It must be noted that the said letter was produced by the Appellants as an item of evidence to prove ownership and the signatory to the letter did not seek to express any views regarding *insurable interest*. That was a matter left for court to decide.

[50] Further, the Appellants did not rely solely on ownership to prove that they had an insurable interest. Their position was that it was a fixture in their premises and had been in their possession for over thirty years. They were responsible for its maintenance. It was not property that was '*expressly excluded'*. The evidence led was sufficient to prove that they 'were responsible' for the transformer and that they had lawful possession of it. That was sufficient to bring it under the definition of *Insured Property* as contained in the policy. It certainly came within the limb *'for which the insured is responsible or has assumed responsibility'* as contained in the definition.

[51] For the above reasons, it is clear that the Master has misdirected himself in determining as to whether the Appellants had an insurable interest and I hold that the Appellants had an insurable interest in the transformer as envisaged under the policy of insurance.

Indemnity value of transformer

[52] Having come to the above finding, it is now necessary to determine as to whether the Appellants had established an indemnity value for the transformer since the Master concluded that an indemnity value had not been established by the Appellants. When questioned by this court as to whether the Appellants had placed any evidence with regard to the indemnity value, the learned counsel for the Appellants submitted that the amount can be found in the report dated 20.02.2004 prepared on their behalf by MSM Management in respect of the MD claim (signed by Peter Faire, who gave evidence and David Maritz). A perusal of the said report (at page 963 of Volume 4 of the High Court Record) reveals that it is addressed to the Respondent and it has Schedules M2 – M5 and Appendices A

and B as supporting documents. Schedule M3 (at page 995 of Volume 4 of the High Court Record) contains a heading called *"Electrical Services Schedule''* and under it is mentioned *Transformer Rooms* and a value of $147,200 is given. That is under the column *'Kumar'.* A value of $1,810 is given under the column *'Wakelin'* and the '*difference'* is stated as $145,390. A comment is made in that line to the effect that '*Punja responsible for FEA installations'.*

[53] There is also a Report dated 28.10.2004 prepared by *Godfreys* (Godfrey & Company Limited) on behalf of the Respondent and it is addressed to the Appellants (at page 561 of Volume 3 of the High Court Record). At page 3 of this report, it is stated under '*Electrical Services'* as follows–

> *"During our discussions on the cost of electrical services to the plant, it became apparent the insured was claiming for the transformer installed by Fiji Electricity Authority at a cost of approximately $250,000 (which would always be subject to an indemnity adjustment that we have tentatively indicated at $160,000.00). As previously reported, we have been willing to include this item subject to adequate evidence that the insured is responsible for the transformer in a way that entitle it to claim. As at that date of reporting no such evidence has been submitted by the insured. This matter remains unresolved.*
>
> *Please note that in our last report included the amount of $160,000 we estimated for the transformer. Because we have not yet received adequate supporting evidence that the insured is responsible for and entitled to claim for this item, we have eliminated it from our calculation as summarised at the foot of this section"*
>
> (at page 563 of Volume 3 of the High Court Record).

[54] At paragraph 104 of his Statement of Evidence (at page 601-603 of Volume 3 of the High Court Record) Respondent's witness Godfrey states that *"the amount at cost is included in the insured's claim at $147,200, so the value in the claim is half that, $73,600".* Further, in his evidence before the Master, witness Godfrey has said - *"So to clarify within the insurance electrical claim is the FEA Transformer which from which recollection is passed at about $147,000.00. And so the assumption is that an indemnity value at half that number because I have adjusted the electrical claim half of the replacement cost"* (at page 1560 of Volume 5).

[55] These documents formed part of the evidence before the Master and they had been exchanged between the parties well ahead of the hearing before the Master. It can be seen that the Appellants had claimed a sum of $147,200 as indemnity value. There is clear reference to this amount by witness Godfrey who testified on behalf of the Respondent and at a particular point there is reference to a suggestion to pay half of that sum. Therefore, if the Respondent wished to dispute this amount, it could have done so by cross examining Appellant's witness Faire or by proposing an alternative figure.

[56] The Respondent did not do so probably in the belief that a value would not become necessary since they were taking up the position that the Appellants did not have an insurable interest. The learned counsel for the Respondent submitted that he was not able to cross examine the Appellants' witnesses since these reports were tendered just prior to evidence being led. These however, are reports that had been exchanged between the parties previously and the Respondent should have been aware of the contents.

[57] Considering the above evidence, I am unable to agree with the Master's finding that the indemnity value has not been established. In the absence of a challenge to the figure of $147,200 by the Respondent, the said figure has to be accepted as the indemnity value for the transformer. I therefore hold that the Appellants are entitled to its claim of $147,200 in respect of the transformer.

VAT Claim of $375,000 - (Grounds 2 and 8 (xix) & (xx))

[58] The Appellants claimed a sum of $375,000, being the VAT component of 12.5% on the sum of $3 million that the Respondent paid under the MD claim. The Appellants submit that the Respondent at that time relied on the malicious damage limitation under the policy and avoided the payment of VAT that was payable on that sum. On the basis that VAT is payable in respect of insurance payments, they claimed the sum of $375,000. In support of their claim that VAT was payable, they produced letters from the Fiji Revenue and Customs Authority (page 865 of Volume 4) and PwC (page 866 of Volume 4) dated 16.07.2003 and 25.10.2005 respectively.

[59] It must be noted that the letter issued by the Fiji Revenue and Customs Authority with the heading *"Re: VAT on Insurance Indemnity Payments"* specifically states that *'indemnity payments received' with the exception of indemnity payments in respect of loss of profits fall within the provisions of Section 3 (8) of the VAT Decree 1991 and hence liable to VAT"*. The letter issued by PwC also clearly explained that indemnity claims are subject to 12.5% VAT.

[60] The learned counsel for the Appellants pointed out that in addition to the aforesaid documentary evidence, they led the evidence of Daniel Lee in this regard. The witness has explained that VAT was payable on the MD indemnity payment of $ 3 million and that he had claimed that sum from the Respondent on many occasions but the Respondent had cited the malicious damage limitation and denied payment.

[61] The position of learned counsel for the Respondent was that the Appellants must produce evidence of payment of VAT if it was to be reimbursed. On the basis that the Appellants had failed to produce evidence of payment, he submitted that the Respondent was not liable to make such payment. The learned counsel for the Appellants explained that VAT is paid by the 2nd Respondent company in respect of all its earnings and that it was therefore not possible to produce a particular receipt for this sum and that as a company it has to invariably make such payments.

[62] In the Decision of the Master, there is no detailed finding on VAT but at paragraph 274 he states that *"If VAT is applicable for BI and MD claims that should also be paid by the Defendant. I cant see applicable VAT exceeding the limits for BI or MD, but for completeness these should be limited for limitations".*

[63] There is a clear and unambiguous statement from the Fiji Revenue and Customs Authority that VAT was payable in respect of indemnity payments except for indemnity payments in respect of loss of profits. There was no necessity for any further evidence in this regard. Since the liability judgment decided that there was no malicious act on the part of the Appellants, the Respondent cannot seek cover under the malicious liability limit. Most importantly, there is a clear finding by the Master that the Appellants would be entitled to VAT.

[64] There was no basis for the learned High Court judge not to have pronounced on this claim when the Master had made a finding and it was urged as a ground of appeal. That was clearly an error on the part of the learned High Court judge. I hold that the Appellants are entitled to its claim of VAT in the sum of $375,000.

Increased cost of working- $44,973 and Services – Non Electrical - $64,350 – (Ground 8 (ii), (iii), (vi),(vii)

[65] The Appellants have heavily relied on what they have termed as the "rule in Browne v Dunne" in order to fault the findings of the Master in general and in respect of these two claims in particular. The rule that was postulated in this case has been summarized by learned counsel for the Appellants in paragraph 121 of his written submissions as follows:

> *"The principle of the rule is simple. It is elementary and standard practice to put to each opposing witness so much of one's own case (or defence) as concerns that witness, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is both unfair and improper to let a witness' evidence go unchallenged in cross examination and later argue that he should not be believed. The rule finds its clearest exposition in Browne v Dunn [1893] 6 R 67 in the speech of Lord Halsbury……."*

The Appellant has cited several other judgments as well in support of this position.

[66] However, it is important to note what was said by Newton J in the case of **Bulstrode v Trimble** [1970] VR 840, at page 848, because that demonstrates how too much reliance cannot be placed on this rule alone. He said as follows:

> *"In its second aspect the rule in Brown v Dunne is, in my opinion, as I earlier said, a rule to weight or cogency of evidence…… in this aspect the rule says no more than, that if a witness is not cross examined upon a particular matter, upon which he has given evidence, then that circumstance will often be very good reason for accepting the witness' evidence upon the matter. If I may say so, this is little more than common sense.* ***I have used the word 'often' advisedly, because if a witness' evidence upon particular matter appeared in his evidence-in-chief to be incredible or unconvincing, or if it was contradicted by other evidence which appeared worthy of credence, the fact that the witness had not been cross examined would, or might, be of little importance in deciding whether to accept his evidence".*** (emphasis added)

[67] Whilst this rule has been recognized and taken note of by judges in several cases it is important to bear in mind that a counsel cannot simply be complacent in the conduct of his case with the intension of relying on this rule at the end of the case. If the counsel for the defendant in cross examining a witness of the plaintiff has not confronted him with the position that the defendant's witness has taken when such witness was giving evidence, then it is up to the counsel for the Plaintiff to raise that in cross examination of that witness and propose to him the position that his witness had taken up earlier, in giving evidence. He has to demonstrate that such position was never put to the witness called by the plaintiff and confront the defendant's witness regarding the correctness or acceptability of what he is saying. One cannot expect the counsel for the plaintiff to simply keep quiet and complain at the stage of submissions. If that happens, then the trial judge has to consider both versions and accept what in his view is the most acceptable proposition under the circumstances.

[68] The proceedings reveal that during cross examination and when questioned by court, the witnesses who testified on behalf of the Appellants were unable on many occasions to justify the contents of the reports or the calculations contained therein with supporting documents. In certain instances the witnesses have stated that they had not brought the supporting documents. This was a complex claim and it was necessary for the witnesses of the Appellants to be thorough with what they said since it was up to the Appellants to prove their assessments on a balance of probability. Their evidence could not have been accepted without demur. The witnesses had given the impression at times that they were ill prepared to give evidence. Witness Kumar who testified on behalf of the Appellant regarding the claims under these heads had admitted that he was informed that he would be called to give evidence in court only the day before.

[69] On the other hand, witnesses Godfrey and Wakelin who testified on behalf the Respondent had been able to justify their calculations and have given reasons for their calculations and conclusions. Having seen the manner in which the witnesses gave evidence and having gone through the contents of their reports and the calculations, the Master has decided that the evidence placed by the Respondent was more reliable and that was why the Master preferred to accept their figures.

[70] The Master in his decision with regard to this head of claim has stated that:

> *"considering the evidence of Mr.Wakelin and Mr.Kumar it was evident that Mr.Wakelin had produced a detailed analysis of his costs for the damage and this proves indemnity value for the item. Mr.Kumar's round off figures were not supported by any documentation and cannot be relied, as there was no such detail as to how he arrived at such amounts".*

[71] The claim under *All Services – except electrical* was one that related to piping, pumps and related services and was best explained by an engineer. The witness called by the Respondent Mr.Wakelin was an engineer by profession and had substantial experience in plant and equipment valuation and had been able to explain the contents of his report in a professional manner as opposed to Mr.Kumar and Mr. Faire who testified on behalf of the Appellants.

[72] Taking the above matters in to consideration, I am convinced that the Master has arrived at his assessment on these two heads of claim having relied on the evidence placed before him and the Appellants have failed to convince me as to why that finding should be disturbed.

MD Claim – Personal Effects - $1350 Ground 8 (iv)

[73] This claim by the Appellants was in respect of lost personal items of employees. The items belonged to two directors and the Appellants had taken up the position that they were also employees. However, the Master refused this claim on the basis that the Appellants failed to prove that the two directors were employees as well.

[74] Although witness Lodhia testified that they were employees in addition to being directors and that they were paid salaries and FNPF deductions were made, he did not provide any documentary evidence to support such position.

[75] In order to succeed under this head, it was necessary for the Appellant to specifically prove that the two of them were employees of the company in addition to being directors. If the Appellants fail to provide concrete evidence on such issue they cannot expect to succeed since the onus was on them to prove it to the satisfaction of the Master. The Master has come to a conclusion on this matter of fact and I do not find any legal basis to set aside that finding.

Claim for Interest and starting date of interest- (Ground 8 (xviii))

[76] In his judgment, the learned High Court judge has not gone in to the matter of interest, except to note that the Appellants had abandoned their claim for compound interest (para 7 of the judgment). In his Decision, the Master awarded the Appellants interest from 06.05.2011, which was the date of the liability judgment of the High Court.

[77] The Appellants contend that the Master should have awarded interest from 19.08.2004, which was eighteen months from the date of the fire, which period according to them was sufficient for the Respondent to investigate the cause of the fire and admit the claim. In the alternative they state that it should be from 01.12.2004 which is the date on which the loss adjuster of the Respondent broke off discussions with the claims preparer of the Appellants to resolve the outstanding claims (paragraph 159 of their written submissions).

[78] The Respondent on the other hand takes up the position that there was no delay and that the time taken was for them to conclude their own investigations. Further, that the Appellants' claims for progressive payments had to be accompanied by 'reasonable evidence' for it to make those payments, in terms of the policy. The Respondent states that the Master was justified in ordering interest from the date of the liability judgment.

[79] In considering this issue, it is necessary firstly to advert to the applicable statutory and contractual provisions. Section 34 (1) of the Insurance Law Reform Act of 1996 provides for the payment of interest in respect of insurance claims. Section 34(1) states that:

"Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this Section".

Section 34(2) stipulates the time period for which interest is payable. Section 34(2) is as follows:

"The period in respect of which interest is payable is the period ***commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount*** *and ending on whichever is earlier of the following days*

(a) the day on which payment is made

(b) the day on which the payment is sent by post to the person to whom it is payable" (emphasis added)

[80] Provisions relating to progress payments is found in the insurance policy and it states that

> *"In the event of loss or damage giving rise to a claim under this policy, the Company will make progress claim payments on production of acceptable evidence of insured's loss.*
>
> *Provided that, if the aggregate of progress payments exceeds the total amount of the adjusted loss, the Insured will immediately refund the difference between the amount of adjusted loss and the aggregate of payments actually made".*

[81] In determining as to whether interest should be paid and if so from when, it would be necessary to consider the above provisions along with the facts. In doing so, the following milestones will become relevant. They are:

- 19.02.2003 – date of the fire
- 29.04.2003 – Appellants' claims preparer claimed a nonspecific progress payment of $3,500,000 plus VAT
- 13.06.2003 – Respondent admitted liability and invoked malicious liability limitation of $3 million
- 19.06.2003 – Respondent paid $1 million as progress payment
- 04.07.2003 – Respondent paid $500,000 as progress payment
- 28.08.2003 - Respondent paid $500,000 as progress payment
- 11.04.2004 - Respondent paid $1 million as progress payment
- 18.05.2003 - Mr.Yee (on behalf of Appellant) informed Respondent by letter that Respondent will be liable to pay interest in view of delay in payments
- 28.05.2003 – Appellants made claim of $ 1 million under Business Interruption (BI) claim
- 25.11.2003 - Respondent paid $250,000 under Business Interruption (BI) claim
- 20.05.2004 - Respondent paid $500,000 under Business Interruption (BI) claim
- 08.06.2004 - Respondent paid $250,000 under Business Interruption (BI) claim
- 29.08.2005 – Writ of Summons issued
- 28.12.2005 - Respondent paid $981,359 under Business Interruption (BI) claim (after Summary Judgment was obtained in October 2005)
- 06.05.2011 – liability judgment delivered by High Court
- 16.10.2012 – assessment of damages hearing begins before Master
- 12.04.2013 - assessment of damages hearing before Master concluded
- 24.03.2016 – Decision of Master on assessment of damages

[82] Both parties have referred to the case of **Bankstown Football Club v CIC Insurance Ltd** (1997) 187 CLR 384, where the Supreme Court of New South Wales held that the date on which the interest starts to accrue '*must be determined objectively'*. This was a case where section 57 of the ICA, which was identical to Section 34 of the Insurance Law Reform Act of 1996, came up for consideration.

[83] The above case was relied upon by Nicholas J in the case of **Sayseng v Kellog Superannuation Pty Ltd** [2007] NSWSC 857, where he said

> *"In my opinion it should now be accepted that the correct approach to be taken by the court on this question is that taken by Cole J in Bankstown Football Club. In my assessment, the cases to which I have referred establish that the question of reasonableness is to be judged by reference to the true position in respect of the claim with allowance to be made for the insurer to have a reasonable period of time within which to investigate the claim and to consider its position. The discretionary determination is to be made having regard to the particular circumstances of the case, including the probable issues which require investigation……It is not relevant that the insurer acted bona fide in denying the claim, or when the judgment of the court established the insurer's liability to pay it. In short, the award will be calculated on the basis of what the court finds is a reasonable time for completion of the insurer's investigation of the claim……"*

[84] Further, Sutton on Insurance Law, 4th Ed (2015), Vol 2 at page 180 states that

> "*….an insurer is not entitled to wait until a judgment of the court holding her or him liable has been given. Bona fides on the part of the insurer is not the test……..In other words, an insurer disputes liability at her or his peril and once he or she has been adjudged liable to indemnify the insured, the insurer's obligation to pay interest will run from the elapse of a reasonable time after a formal claim has been made".*

Citing several judgments, the authors also state that the common law position is the same.

[85] The above, in my view comprehensively sets out the manner in which a court should approach the determination of the date from which interest should accrue. I do not wish to refer to the evidence that has been placed by the parties with regard to their conduct in the

aftermath of the fire since the Master has already come to a finding on the relevant facts. He states categorically in his Decision that

> *"It should be noted that long before the date the parties have tried to settle the claims and had also agreed certain claims**, but no payments regarding the said claims were settled by the Defendant. So the Defendant had unreasonably held claims due to the Plaintiff for a considerable time period.** It was not my duty to evaluate the insurance claim payment process, but the time taken was too long and the Defendant had stopped the process of engaging professionals……"* (para 261 of his Decision). (emphasis added)

He has also concluded that

> *"The defendant contends that the above clause contemplates that payments were to be made in the aggregate, not against specific items. I do not agree. If so why did they pay a part payment? The test was reasonableness of the nonpayment of Defendant for the claims already settled between the parties.* ***There was nothing preventing them paying the amount according to their adjustments, leaving disputed amount to be settled through other means including litigation"***
>
> (para 264 of his Decision). (emphasis added)

[86] As stated earlier, the Appellants contend that by 19.08.2004, the Respondent had admitted liability and a period of 18 months had elapsed from the date of the fire and that it should be the cutoff date. Evidence has been placed before the Master that after a protracted process of exchanging information between the parties, the Appellants' claims preparer provided financial information as required by the loss adjuster of the Respondent on 14.10.2004. The Profit and Loss accounts of the 2nd Appellant had been handed over on that date. The loss adjuster had in turn acknowledged receipt of the financial information and had promised to finalize the claim.

[87] This position has been clearly acknowledged by the parties in their written submissions. However, thereafter the Respondent has discontinued the services of the loss adjuster and that is when further communication and attempts at any mutual resolution of the claims came to an end. That is why the Appellants have taken up the position that in the alternative, interest should accrue from 01.12.2004.

[88] Notwithstanding his findings as aforesaid, the Master has decided that interest should accrue from the date of the liability judgment. I do not find any cogent reasons as to why interest should start to run from that date which is more than eight years after the fire broke out. To my mind that would not be commensurate with what is envisaged under Section 34(2) of the Insurance Law Reform Act of 1996, namely "*commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount"*. The discretion to decide such date has to be exercised reasonably and rationally.

[89] Taking in to consideration all matters as discussed by me herein before, I am of the view that by 01.12.2004, the Respondent had a reasonable period of time for completion of its investigation of the claim and thus I hold that interest should accrue from that date until the date of payment.

[90] The Appellants conceded that they are not seeking compound interest and therefore they will be entitled to simple interest at 10%.

Breach of contract – consequential loss (litigation related costs)- (Ground No.8(xiv) and (xv))

[91] The Appellants sought damages for consequential loss suffered as a result of breach of contract. This was in addition to the claims under the insurance policy. They rely on the delay on the part of the Respondent in making progress payments and settlement of the insurance claim and wrongly invoking malicious damage limitation as the breaches.

[92] The damages sought are entirely litigation costs. It is stated in paragraph 65 of their written submissions that the claim under this head was for legal costs of the summary judgment, of the liability hearing, of expert and other witness costs, accommodation in Suva during trial, air fare and additional claims preparation cost of Mr. Faire. This claim is for a total sum of $666,844.24 and the particulars of the claim are contained at page 642-782 of Volume 3 of the High Court Record.

[93] The learned counsel for the Appellants submitted that the learned High Court judge and the Master has rejected this claim without any justification and that the reasons given in

the Master's decision are wrong and not based on the evidence or the applicable law. He submits that the issue as to whether there was a breach of contract on the evidence is a question of law.

[94] The learned counsel for the Respondent took up the position that the Appellants were not entitled to maintain this cause of action on two grounds. Firstly, he took up the position that the claim under this head is entirely made up of alleged litigation costs for the liability hearing and that such a cause of action was not pleaded in the Statement of Claim of the Appellants. Secondly, he asserted that this claim is entirely made up of their alleged litigation costs for the liability hearing. He contended that this in effect amounts to a claim for indemnity costs. He took up the position that they are not entitled to any damages since the High Court in the liability judgment ordered costs to be taxed on a standard basis if not agreed upon. I will now consider as to whether the claim could have been maintained.

Has the cause of action been specifically pleaded?

[95] He referred to paragraph 13 of the Statement of Claim and pointed out that it was a reference to the Appellants' Bankers having an interest in the property and that the Banks were entitled to receive payment of insurance proceeds. Paragraph 14, on the other hand had broadly referred to the Appellants suffering consequential loss as a result of the undue delay in progress payments and settlement of the claim under the policy, but did not specify what the said consequential loss was.

[96] Learned counsel for the Respondent asserted that it was necessary for the Appellants to specifically set out the nature of the consequential loss in the Statement of Claim and that it was not possible for the Appellants to produce at the trial, a calculation in respect of a claim that was not pleaded in the Statement of claim.

[97] In his written submissions he has also pointed out that the folder claiming litigation costs of the Appellant did not form part of the High Court Record and that the Respondent was not served advance notice of such claim until the Appellants' witness took the witness stand. On that basis he states that the Respondent was denied the opportunity of contesting

its contents. It is also pointed out that the Folder with the accompanying documents was not disclosed to the Respondent in the Appellants' affidavit verifying list of documents.

[98] A perusal of the Statement of Claim filed by the Appellants reveals that although there is a specific claim under the insurance policy with details of the amounts claimed (para 12), the claim in respect of consequential loss (para 14) does not specify as to what the 'consequential loss' was. The prayer in respect of consequential loss (para B) states that it is to be quantified at the trial. Presumably due to this unspecific nature of the claim, there were no *agreed issues* in that regard.

[99] When the Appellants were suing for breach of contract on account of consequential loss, it was necessary to specifically plead as to what the consequential loss was. This is particularly so when such claim was in addition to specific claims under the policy. The Respondent was entitled to know what such loss was and the quantum. It would however have been possible for the Appellants to provide a detailed calculation of the said loss and provide supporting evidence at the stage of the trial. However, it was not possible to ambush the Respondent by coming out with a claim of which no prior notice had been given. I am of the view that on the basis that the claim could not have been maintained, the Master could have refused to grant relief under that cause of action.

Are the Appellants entitled to claim litigation costs as consequential losses?

[100] In addition, the learned counsel for the Respondent also took up the position that the Appellants were not entitled to maintain this claim considering the nature of the loss alleged. He contended that this in effect amounts to a claim for indemnity costs which the Appellants did not seek in the High Court. He pointed out that the High Court in the liability judgment ordered costs to be taxed on a standard basis if not agreed upon.

[101] The learned Counsel for the Respondent submitted that there was no appeal by the Appellants on this award of costs and that since there was relief granted to the Appellants by the High Court, they were precluded from claiming damages on account of such costs. He also said that the amount claimed was in any event excessive. The response of the

learned counsel for the Appellants was that the costs awarded by the High Court was not adequate.

[102] The learned counsel for the Appellants in his written submissions has relied on several authorities (**State Insurance Limited v Cedenco Foods Ltd** (1998) (CA) (unreported, CA 216 of 1997, delivered on 6/6/98), **Fai Insurance (Fiji) Ltd v Prasad's Nationwide Transport Express Courier Ltd** [2008] FJCA 101, **Land transport Authority v Lal** [2012] FJSC 23 **Protean (Holdings)Ltd & Ors v American Home Assurance Company** *(1986) 4 ANZ Insurance Cases 60-683)* in order to impress upon court the legal position with regard to an insured's right to maintain a claim for consequential loss for breach of the contract of insurance in addition to making claims under the policy of insurance. Whilst it may be possible for an insured to sue the insurer for damages for breach of contract under the common law principles in addition to claiming under the policy, the issue before us is whether the particular consequential loss that is alleged in this case, namely litigation costs, would be so recoverable. None of the cases cited by the Appellants related to this issue.

[103] The consequential losses the Appellants claim are entirely costs of litigation at the liability hearing. What is important therefore is to decide as to whether costs of litigation could form the basis for a damages claim. Halsbury's Laws of England (4th Ed) (Volume 12(1)) at para 807 clearly states that *'çosts are distinct from damages'*. It goes on to explain at foot note 13 of the same page, that *"Thus in a personal injury case, the costs of medical treatment is part of damages, but the cost of a medical examination for the purpose of litigation forms part of the costs"*.

[104] In the case of **Ambaram Narsey Properties Limited v Lautoka City Council and others** [2014] FJSC 18 (14 November 2014), the Supreme Court had to consider as to whether the Court of Appeal was correct in refusing to grant costs incurred for photocopying and obtaining expert reports as damages. Chandra J citing the cases of **Bolton v Mahadeva** [1972] 1 WLR 1009 and **Hutchison v Harris**, Court of Appeal (Civil Division) 10 Build LR 19 pronounced that such costs cannot be recovered as damages.

[105] The Appellants also relied on the dicta of the case of **Hadley v Baxendale** (1854) 9 ex Ch 341, in support of their claim. However, it would be impossible to conceive that litigation costs were *'such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it'.* I am unable to agree with that proposition.

[106] If the Appellants had incurred considerable costs, it was open for them to bring that to the attention of the learned High Court judge and move that such costs be awarded. They could have moved for indemnity costs if they so wished. Infact, Calanchini P who delivered the liability judgment of the High Court, awarded costs to the Appellants and stated that *"The question that was before the Court for determination is answered in favour of the Appellants who are entitled to costs which if not agreed are to be taxed on the standard basis".* The Appellants did not appeal against that part of the judgment relating to costs.

[107] I wish to also point out that payment of interest for the delayed period is a means by which the Appellants can be compensated. I have already held that the Appellants are entitled to interest from 01.12.2004.

[108] For the above reasons, I hold that the Appellants are not entitled to recover litigation costs as consequential losses.

Ultimate reliefs sought by the Appellants

[109] For the purpose of clarity it is important to consider what relief the Appellants have sought from this court and what they are entitled to by virtue of this judgment.

[110] The relief sought by the Appellants from this court has been specifically identified by the Appellants and is contained in paragraph 171 of their written submissions. They are;

"A. POLICY CLAIMS

Material Damage Claim

1. Non Electrical – balance *64,350*

	2. Transformer	*147,200*
	3. Personal effects	*1 ,350*
		$212,900
1.	*Business Interruption Claim*	
	Increased Cost of Working (ICW)	*$ 44,974*
2.	*VAT unpaid on $3 million MD Claim*	*$ 375,000*
B.	*DAMAGES CLAIM*	
	Litigated related costs	*$666,844*
		$ 1,295,518
C.	*SIMPLE INTEREST at 10%*	
	From 19 August 2004 to the date of payment (S34) on	*$ 1,295,518*
	From 19 August 2004 to date of liability judgment on 6 May 2011 (under paragraph 168) above on	*$694,699*
D.	*COSTS*	

Costs of this appeal."

[111] It is clear that 'A' and 'B' above, are the claims covered under ground 8 and identified by me under paragraph 32 in this judgment and the sum of $ 1,295,518 is the total of these claims. However, it was unclear as to how the sum of $694,699 mentioned in the second paragraph of 'C' had been arrived at. Although the Appellants had given some explanation in paragraph 168 of their written submissions, it still was not clear and hence, at the hearing of this appeal, court wanted the learned counsel for the Appellants to explain as to how this figure has been arrived at. He explained that although the Master at paragraph 278 of his Decision had given a chart containing the final assessment, the figures contained therein were erroneous and that the parties had after delivery of the said Decision arrived at the figure of $694,699 as being the total sum awarded by the Master to the Appellants. The learned counsel for the Respondent concurred with the said position. Therefore, it is clear that the Appellants are claiming this sum (with interest from 19 August to 6 May 2011) in addition to the sum of $ 1,295,518 (with interest from 19 August 2004 until date of payment).

The decision

[112] I must make it clear that by virtue of this judgment, in addition to what the Master has awarded, I have allowed the claims of the Appellants in respect of the transformer ($147,200), VAT ($375,000) and Interest (from 01.12.2004). Accordingly, the judgment of the High Court dated 31.08.2017 is set aside. The appeal of the Appellants is allowed in part. The Decision of the Master dated 24.03.2016 is varied. The Appellants will be entitled to $5000 as costs of this appeal.

The Orders of the Court are

1. *The Judgment of the High Court dated 31.08.2017 is set aside*
2. *The appeal of the Appellants is partly allowed*
3. *Decision of the Master dated 24.03.2016 is varied*
4. *The Appellants will be entitled to a sum of $147,200 as indemnity costs in respect of the loss of the transformer*
5. *The Appellants will be entitled to a sum of $375,000 on account of the VAT claim*
6. *The Appellants will be entitled to receive simple interest at the rate of 10% on the sum of $694,699, on the sum of $147,200 and on the sum of $375,000 from 01.12.2004*
7. *The Appellants are entitled $5000 as costs of this appeal.*

Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Mr. Justice V. Dayaratne
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