

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 038 of 2023
[In the High Court Lautoka Case No. HBC 135 of 2019]

BETWEEN : **MOHAMMED AZAM**

Appellant

AND : **SUN INSURANCE COMPANY PTE LIMITED**

Respondent

Coram : **Prematilaka, RJA**
Clark, JA
Andrée Wiltens, JA

Counsel : **Mr. R.P. Singh for the Appellant**
Mr. A. Vulaono for the Respondent

Date of Hearing : **11 September 2024**

Date of Judgment : **27 September 2024**

JUDGMENT

Prematilaka, RJA

1. Having had the benefit of reading in draft the judgment of Andrée Wiltens, JA. I am in agreement with the conclusions and orders.

Clark, JA

2. I have had the advantage of reading in draft the judgment of Andrée Wiltens, JA. For the reasons be given I too would dismiss the appeal.

Andrée Wiltens, JA

A. Introduction

3. On 4 March 2018, the fishing charter vessel known as Bill Fever was berthed at Port Denerau Marina. For reasons unclear, it took in water and partially sank, resulting in considerable damage. The vessel was insured by Sun Insurance Company PTE Limited (“Sun Insurance”). The owner, Mr Mohammed Azam, sought to claim his losses, in reliance on the insurance contract, pursuant to s 147 of the Fijian Compensation and Consumer Commission Act 2010. However, Sun Insurance declined to indemnify Mr Azam due to material non-disclosure, which led to the dispute being litigated.
4. The case was heard on an agreed basis in the High Court at Lautoka, namely that a single issue required determination. That issue was whether the alleged non-disclosure entitled Sun Insurance to refuse the claim. Judgment, in favour of Sun Insurance, was issued on 24 March 2023. Mr Azam filed a Notice of Grounds of Appeal against the judgment on 5 May 2023, citing 9 grounds of appeal.

B. Facts

5. Mr Azam’s broker, Mr Lalesh Kundan, applied on 14 December 2017, in the usual fashion when brokers are involved, by e-mail as opposed to utilising a proposal form, for Sun Insurance to provide a quote for a prospective new client to cover 6 named marine vessels, previously insured by another insurer. The vessel known as Bill Fever was one of those named; another was known as Zikr. The email further disclosed brief details of the proposed client, what the client’s vessels were used for, and seeking to immediately insure a new vessel as well as insure the existing fleet when the current insurance expired as from January 2018.
6. Mr Avikash Ram from Sun Insurance, responded. He thanked Mr Kundan for his e-mail and requested that Mr Kundan advise details of the directors/owners, and “Claims history of the client for current covers”. Mr Ram’s e-mail was forwarded to Azam Seafood (Mr

Azam), who responded providing details of two Directors for the corporate entities which owned the vessels and disclosed: “Only zikr got claims \$52677.60 USD ONLY.” That response was forwarded by Mr Kundan to Mr Ram. Subsequently, Mr Kundan further advised Mr Ram: “The claim was for boat ‘Zikr’ which hit a floating object and had sustained damage.”

7. Mr Ram explained in his evidence that his query related to Mr Azam’s other/previous Marine Hull Policies, and was not restricted to any particular vessel or vessels. Mr Ram indicated that Sun Insurance had relied on the information disclosed as it realised Mr Azam’s duty of utmost good faith meant that he was required to disclose all relevant material for Sun Insurance to provide terms and conditions and to decide whether to quote or not. He went on to state that the disclosure sought was material to Sun Insurance’s decision-making. Mr Ram stated that had the additional information of three further insurance claims been disclosed, Sun Insurance would have made a different decision and declined to issue the policy. There was no challenge to this evidence, and no evidence led to gainsay it.
8. Mr Ram was cross-examined, but his evidence remained consistent. When asked if he had ever refined the query he forwarded to Mr Kundan, he responded that there was no need for greater particularity “...because the broker fully understood what the request was for.” Significantly, he was also not challenged as to this evidence.
9. Mr Ram confirmed that this was a new policy for Sun Insurance, and because of that, Sun Insurance needed to know the client’s history as opposed to any vessel’s history.
10. On or about 15 December 2017, Sun Insurance’s quote was accepted, and on 21 December 2017 the parties entered into a formal Marine Hull Insurance contract, agreeing to insure the 6 named vessels for a period of one calendar year.

11. Sun Insurance maintains that, prior to the contract being entered into, Mr Azam ought to have additionally disclosed three other previous marine vessel insurance claims (which lack of disclosure is not disputed), namely:

- (i) On 25 April 2010, relating to the sinking of Mr Azam's vessel known as Exclusive at Yanuca Beach, Shangri La Resort, Nadroga;
- (ii) On 26 October 2014, relating to the theft of Mr Azam's vessel known as KOICA 1 Nabila, while it was moored at Yanuca Beach, Shangri La Resort, Nadroga; and
- (iii) On 4 April 2016, relating to the sinking of Mr Azam's vessel known as Lewa Ni Wai while berthed at Denerau Marina, Nadi.

C. Marine Insurance Regime

12. The Common Law established the notion of utmost good faith being required of both the insurer and the assured. As Lord Mansfield stated in *Carter v Boehm* (1766) 3 Burr. 1905:

“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué is really difference from the risqué understood and intended to be run at the time of the agreement....The policy would be equally void against the underwriter if he concealed....Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.”

13. The proposition that a breach of the duty to disclose all material facts and circumstances allows the insurer to avoid the contract is subject to the insurer demonstrating that such non-disclosure induced the making of the contract or the relevant terms: *Pan Pacific Insurance Co Ltd v Pine Top Insurance Co* [1995] AC 501. It follows that the non-disclosure must have been an effective cause of the underwriter making the contract on the

terms agreed, but it need not have been the sole cause: *Brit UW Ltd v F & B Trenchless Solutions Ltd* [2015] EWHC 2237.

14. The rules of disclosure developed from *Carter v Boehm* have been codified in many jurisdictions, and in Fiji in the Marine Insurance Act 1961 (“the Act”). The relevant sections in relation to this case are set out below:

18. Insurance is uberrimae fidei

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

19. Disclosure assured

- (1) *Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him or her. If the assured fails to make such disclosure, the insurer may avoid the contract.*
- (2) *Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he or she will take the risk.*
- (3) *In the absence of inquiry the following circumstances need not be disclosed, namely-*
 - (a) *any circumstance which diminishes the risk;*
 - (b) *any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his or her business, as such, ought to know;*
 - (c) *any circumstances as to which information is waived by the insurer;*
 - (d) *any circumstance which is superfluous to disclose by reason of any express or implied warranty.*
- (4) *Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.*
- (5) *The term “circumstance” includes any communication made to, or information received by, the assured.*

20. Disclosure by agent effecting insurance

Subject to the provisions of section 19 as to circumstances, which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-

- (a) Every material circumstance which is known to himself or herself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him or her; and*
- (b) Every material circumstance which the assured is bound to disclose, unless it comes to his or her knowledge too late to communicate it to the agent.*

21. Representations pending negotiation of contract

- (1) Every material representation made by the assured or his or her agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.*
- (2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he or she will take the risk.*
- (3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.*
- (4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.*
- (5) A representation as to a matter of expectation or belief is true if it be made in good faith.*
- (6) A representation may be withdrawn or corrected before the contract is concluded.*
- (7) Whether a particular representation be material or not is, in each case, a question of fact.*

D. Judgment

- 15. The High Court Judge had the advantage of seeing and hearing Mr Ram give evidence, which he detailed in his decision. Having set out the sole issue to be determined and the evidence available to him, he held that the non-disclosure of the three previous claims by Mr Azam was in breach of Ss 18 and 19 of the Act. He considered the non-disclosure was material from Sun Insurance's perspective. He also focussed on a submission made by counsel for Mr Azam relating to the role of the broker. His Honour stated:

“It appears that the plaintiff is trying to blame the broker for his own mistakes....In this instance knowing very well that there were three other previous insurance claims, it appears that the plaintiff had purposefully withheld that information. The broker acted as the agent of the plaintiff and any mistake of the broker is considered as a mistake of the principle [sic]and the principle must suffer for his agent’s mistakes. The defendant cannot be held liable for the mistakes of he plaintiff’s agent.”

16. Ultimately, His Honour determined that Sun Insurance had the right to repudiate Mr Azam’s claim.

E. Appeal

17. Mr Singh, acting for Mr Azam on the appeal, advised the Court several of the filed grounds of appeal would not be advanced, and further that other grounds were to be combined. Accordingly, this Court will deal with the grounds advanced at the hearing only.
18. Mr Singh submitted firstly, that Mr Azam, in the absence of a proposal or any other declaration to obtain the Policy, had answered Mr Ram’s query honestly, completely, and without misleading Sun Insurance. He advanced this submission on the basis that the query was imprecise, and that Mr Azam was entitled to consider the phrase “history for current cover” as seeking information regarding previous insurance claims involving the named vessels in the insurance request. Of those vessels, Mr Azm had claimed on his insurance involving only one, the vessel known as Zikr - which is what he properly disclosed. Mr Singh went on to submit that if Mr Azam was incorrect in so interpreting the phrase used then the consequence of is that he should not be disadvantaged and lose his insurance misinterpretation cover – any disadvantage should fall to Sun Insurance as it was their obligation to be precise regarding the information sought.
19. This submission is unsupported by any evidence from Mr Azam as to his understanding. However, even if he had formed such an understanding, Sun Insurance was in the contract on an incorrect basis as material information had not been disclosed to enable it to properly understand and accept the risk.

20. There is nothing in the point relating to the lack of a proposal form. As evidenced by Mr Ram, without challenge, this is normal in situations where brokers are involved in insurance transactions. Mr Vulaono, for Sun Insurance, referred to *Sunflame Investments Limited v The New India Assurance Company Limited*: Civil Action No. HBC 90 of 2015, where the Court discussed the involvement of brokers or intermediaries, essentially confirming Mr Ram's evidence.
21. Mr Singh further submitted that by asking the question Mr Ram had asked on behalf of his employer, Sun Insurance had waived its right to further disclosure, and sought to pray in aid of this submission the provisions of s19(3)(c) of the Act. It was submitted that by fully and correctly answering the only queries made, Sun Insurance had waived the right to further disclosure. He implied there was an obligation on Sun Insurance to make further enquiry if it had wanted to know about other claims made by Mr Azam.
22. This submission is simply incorrect and a misreading of s 19(3)(c) of the Act. The Act does not impose obligations on Sun Insurance to make full, or indeed, any enquiries. It was for Mr Azam, bound by utmost good faith, to disclose to Sun Insurance all material information within his peculiar knowledge, so that Sun Insurance was in a position to accurately assess the risk; and accordingly able to determine whether to insure or not, and if to insure on what terms and conditions. In not disclosing the additional claims, Mr Azam failed to make a material disclosure and put Sun Insurance in the position of not being able to properly assess the risk. That results, in my view, in Sun Insurance being able to avoid the contract.
23. Section 19(3)(c) of the Act refers to the circumstances which need not be disclosed. To ask for details of "claims history of client for current covers" does not amount to a request for circumstances covered by s 19(3)(c) and does not amount to a waiver by Sun Insurance of the need to be told of all material circumstances. Sun Insurance was entitled to know, and Mr Azam was obliged by utmost good faith, to disclose all of his insurance claims history.

24. Thirdly, Mr Singh advanced the submission that the High Court judge had erred in law and in fact when he determined that Mr Azam was seeking to blame the broker for his own mistakes – he submitted there was no evidence to support this. Mr Vulaono did not seek to uphold this finding, but instead submitted that it did not undermine the validity of the judgment - I agree. In my view, this was an unnecessary conclusion for His Honour to deal with, and it does not affect the correctness of the judgment.

F. Result

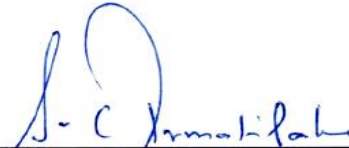
25. For the reasons set out above, the appeal is dismissed.

26. Sun Insurance is entitled to the costs of this appeal, which are set at \$5,000.

Orders of the Court:

1. *The appeal is dismissed.*
2. *Mr Azam is to pay costs of \$5,000 to Sun Insurance within 21 days.*





The Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



The Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL



The Hon. Mr. Justice Gus Andrée Wiltens
JUSTICE OF APPEAL

Solicitors:

Patel & Sharma Lawyers for the Appellant
Siwatibau and Sloan Lawyers for the Respondent