IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 211 of 1988

BETWEEN : **DOMINION AUTOPARTS AND ACESSORIES LIMITED** a limited liability Company having its registered office at Ba.

1st Plaintiff

AND : **RAHMAT ALI** of Namosau, Ba, Businessman.

2nd Plaintiff

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED** a duly incorporated company having its registered office in Suva.

Defendant

Counsel : Mr. Padarath of Samuel K Ram for the Plaintiffs
Mr. Kumar of Krishna & Company for the Defendant

Date of Trial : 11 June 2018
Date of Judgement : 26 October 2018

JUDGEMENT

BACKGROUND

1. I am mindful that this case has been long pending for some thirty two years or so before it was tried before me earlier this year. I caution at the outset that some of the common law I discuss below and apply in this case have been reformed or modified slightly by Part VI of the Insurance Law Reform Act 1996. That said, the background to this case is as follows.

2. In a fire which occurred on 02 November 1986, the 2nd plaintiff's building (**"premises"**) situated at Lot 19 Tauvegavega in Ba was partly destroyed. Also allegedly destroyed was some stock-in-trade (motor spare parts) which belonged to the 1st plaintiff company. The second plaintiff is the "proprietor" of the 1st plaintiff company.

3. The very next day, on 03 November 1986, the plaintiffs lodged a claim under an insurance policy it had with the defendant-insurer. However, the defendant would avoid the indemnity contract on the ground that the plaintiffs had committed a material non-disclosure. The material non-disclosure was allegedly committed through a lie which the plaintiffs made in response to a question on the standard *Proposal For Fire Insurance Form* (**"Proposal"**). The plaintiffs then filed the current action in 1989 seeking **special damages** in the sum of $66,000 (Sixty Six Thousand Dollars). This is made up as follows:-

(i) $50,000 as damages suffered for spare parts.
(ii) $16,000 as damages suffered to the said premises by the second plaintiff.
(iii) Interest at 13.5% per annum from 03 November 1986 to date of judgement.

TRIAL

4. The trial of this matter was held on 11 June 2018. The plaintiffs called one witness only, namely, Rahimat Ali (**PW1**). The defendant also called one witness only, namely, one Avinesh Chand Rai (**DW1**). Samuel K. Ram filed written submissions for the plaintiffs on 27 August 2018. The defendant has not filed any written submissions, despite being granted an extension just last week.

THE ALLEGED MATERIAL NON-DISCLOSURE

5. The plaintiffs had applied to the defendant for two separate fire policies. One was to cover the premises. The other, the stock in trade at the premises. As is the usual case, the applications were made through the standard Proposal which PW2 had filled out. It is alleged that prior to taking out the insurance policies with the defendant, the plaintiffs each had a policy with another insurer. It is alleged that these other policies were either declined or refused by that other insurer.
6. Clause 8 of the Proposal relates to the plaintiff's *"Previous Insurance History"* and asks specific questions of the plaintiffs to declare if they have had previous policies cancelled, declined or refused. It is these

declinations/refusals which the plaintiffs allegedly failed to disclose in the Proposal (see below).

8.	(a)	Has the property been insured in the past or at the present time? If so, give full particulars.	***Yes. National Insurance Co. Ltd.***
	(b)	Have you ever sustained loss by fire? Give full particulars.	***No***
	(c)	Has any Office, Insurance Co, or underwriters – (1) Cancelled ..... (2) Declined ..... (3) Refused to renew ..... Any insurance or repudiated claim under any one or more policies of insurance either for you or any one of your partner/s & Co-owner/s	***No***

THE BASIS CLAUSE

7. At the end of the Proposal, is the following **"basis clause"** duly executed by the plaintiffs:

> *I/We hereby declare that the statement made by me/us in this Proposal Form are true to the best of my/our knowledge and belief and* ***I/We hereby agree that this declaration shall form the basis of the contract between Me/Us and THE NEW INDIA ASSURANCE COMPANY LIMITED.****.*
> .....
> .....*I/We further declare that I/We have read and understood particulars entered herein and I/We have signed this after verifying the same to be true and complete.....*
>
> (my emphasis)

THE DEFENDANT'S CASE

8. The defendant takes the position (as per paragraph 1 of statement of defence) that it is either an express or an implied condition precedent that the plaintiff

will disclose all material facts. A failure on the part of the plaintiffs to disclose a material fact would be a breach of a condition precedent which would then entitle the defendant to avoid the contract and to reject any claim.

THE PLAINTIFFS' CASE

9. The plaintiffs' response is that the Fire Insurance policies in question contain no express stipulation that a material non-disclosure will entitle the defendant insurer to avoid the policy. The insurer may only avoid the policy if the duty to disclose material facts was a condition precedent. A condition precedent can only be expressly stipulated. It cannot be implied into an insurance contract.

THE LAW

10. Again, as I have said above, most of the common law applicable in this case have now been reformed or modified slightly through the Insurance Law Reform Act 1996 which came into force some ten years or so after the occurrence of the peril in this case in 1986. Part VI of the Act deals with utmost good faith, non-disclosure and misrepresentation.

Utmost Good Faith & Duty To Give Full Disclosure

11. A policy of insurance is a contract of *"utmost good faith"*. It is the principle of utmost good faith which, *inter-alia*, obligates a person applying for insurance to give full disclosure of all material facts when applying for insurance.

12. In **Blueshield (Pacific) Insurance Limited v Maureen Chandra Wati** Civil Appeal No. ABU0048 OF 1995, the Fiji Court of Appeal said thus

> The duty of disclosure ..... arises out of the fact that a contract of insurance is a contract *uberrimae fidei*.

Duty Begins From Proposal

13. The duty of utmost good faith is so fundamental in an insurance contract. The duty begins from the time when the party seeking to be insured is filling out the Proposal to the insurer. In doing this, the applicant is required to set forth the risk to be insured against. In setting forth the risk, he is required by law to disclose all material facts material to the risk to be insured and not to conceal them.

14. The insurer relies on the applicant to be truthful in the information in the Proposal. Whatever information an applicant provides will become the basis upon which the insurer or its underwriters will assess and decide as to whether or not to accept the Proposal and if so, on what terms it will provide insurance including the premium.

15. Lord Mansfield by his oft cited comments in **Carter v Boehm** (1766) 3 Burr 1905 explains this thus:

> Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the 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, and to induce him to estimate the risk as if it did not exist. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

16. Romer LJ in **Seaton v Heath** [1899] 1 Q.B. 782 at 793 said:

> Contracts of Insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or not the same means.

And earlier at 792:

> There are some contracts in which our courts of law and equity require what is called *"uberrimae fidei"* to be shown by the person obtaining them....Of these, ordinary contracts of marine, fire and life insurance are examples, and in each of

them, the person desiring to be insured must, in setting forth the risk to be insured against, not conceal any material fact affecting the risk known to him.

Breach of Duty Entitles Insurer to Avoid Policy

17. At common law, an applicant who fails to disclose a material fact in his application (Proposal) breaches the principle of utmost good faith. Because the principle of good faith is so fundamental in an insurance contract, any breach of the principle is a fundamental breach, hence, the insurer's entitlement to avoid the policy.

18. In **Brij Bushan Lal v Queensland Insurance Co. Ltd.** [1967] FJLawRp 2; [1967] 13 FLR 203 (19 December 1967), Gould VP of the Fiji Court of Appeal said:

> It is an elementary principle of insurance law that if the utmost good faith is not observed by either party the contract may be avoided by the other party. .....The short question therefore, upon the answer to which the right of the respondent company to repudiate liability depends, is whether the fact of the cancellations was a material fact.

Onus

19. The burden of proving breach of the duty to disclose material facts falls on the insurer who alleges breach. There are three things which an insurer must prove to discharge this burden. First, he must prove as a matter of fact that a previous insurer had declined to renew a policy or refused indemnification for the insured. Second, that the insured had failed to disclose this fact and thirdly, that the said fact is a material fact.

Tests for Materiality

20. There are two different tests to determine whether a fact is material. The first is the **"Prudent Insurer Test"**. Under this test, a fact is material if it would reasonably affect the mind of a prudent insurer in assessing whether or not it will accept a proposal and if so, on what premiums and terms it will provide insurance (see for example **Mayne Nickless Ltd v. Pegler** [1974] 1 NSWLR 228).

21. The second test is the **"Reasonable Insured Test"** which asks "whether a reasonable insured and with his knowledge of the relevant circumstances would have realised that they were material to the risk" (**Joel v Law Union And Crown Insurance Company** [1908] 2 KB 863.

22. The Fiji Court of Appeal in **Blueshield (Pacific) Insurance Limited v Maureen Chandra Wati** Civil Appeal No. ABU0048 of 1995 applied **Mayne** and said that a material fact is any fact :

> ..... which would affect the mind of a prudent insurer in deciding whether or not to provide cover (**Mayne Nickless Ltd v. Pegler** [1974] 1 NSWLR 228).

23. As to what sort of facts would affect the mind of a prudent insurer in deciding whether or not to provide cover – this question was answered in **Glicksman v. Lancashire and General Insurance Co. Ltd.** [1925] 2 KB 593) which is cited in **Blueshield** as authority that:

> "the manner in which a person seeking insurance generally finds out what the intended insurer regards as material is by reference to the questions which the intended insurer requires him to answer".

24. Hence, the questions which an insurer poses in a Proposal for an applicant, are material questions. The answers to these are material to the insurer's estimation and assessment of the risk and also the terms of the insurance contract to be.

25. As I have said, the Proposal in this case contains what is commonly known in the insurance world as a **"basis clause"** (see paragraph 7 above). The effect of the basis clause in this case before me is (i) to give contractual effect to the statements and representations in the Proposal and (ii) to then elevate those statements and representations to the status of warranties.

26. In **Genesis Housing Association Limited v Liberty Syndicate Management Limited** [2013] EWHC Civ 1173, the issue before the English Court of Appeal was whether or not statements and declarations in an Insurance Proposal were contractual warranties. The Court of Appeal

agreed with the Court at first instance[1] that the basis clause in question gave contractual effect to the statements in the Proposal. Hence, when Genesis executed an incorrect proposal, it had breached a warranty. That breach then discharged the insurers from liability under the policy.

27. In **Brij Bushan Lal** (supra), the Fiji Court of Appeal held that the truth of the answers to the questions in the insurance proposals in question, having been made a condition precedent to the insurer's liability, the insurer was entitled to disclaim liability by reason of the untrue answers made by the appellant.

28. **Brij Bushan Lal**[2] also concerned an allegation of material non-disclosure. The insured in that case had denied in the Proposal form that he has had an insurance cancelled. Later, it was discovered that he has had two previous cancellations. It was found that the insured knew perfectly well that his answer was false. The headnotes read:

> Held: I. The truth of the answers to the questions in the proposals for the motor vehicles having been made a condition precedent to the respondent company's liability the company was entitled to disclaim liability by reason of the untrue answers made by the appellant.
>
> 2. On the basis that the Marine Certificates evidenced unconditional contracts of insurance governed by common law principles the appellant was under a duty to make disclosure of every material fact.
>
> 3. Materiality is a question of fact and in the circumstances of the case the non-disclosure of the earlier cancellations was clearly material. (Per Marsack J.A.: to determine materiality in such a case the test may be applied whether or no a prudent underwriter would take the fact into consideration in estimating the premium or underwriting the policy.) (Per Gould V.P.: the cancellations were not

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[1] Genesis Housing Association Limited v Liberty Syndicate Management Limited [2012] EWHC 3105 (TCC).

[2] The headnotes summarise the facts as follows:

> In September 1965, and March 1966, the appellant signed proposals to the respondent company for comprehensive insurance over two motor vehicles. In each he answered in the negative the question whether he had ever had an insurance cancelled. He had in fact had a motor vehicle policy and a marine open policy cancelled by the United Insurance Co. Ltd. in October, 1964, and August, 1964, respectively and his answer to the question abovementioned was to his knowledge false. The policies issued pursuant to the proposals contained a proviso that the truth of the answers in the proposal should be a condition precedent to any liability of the respondent company to make any payment under the policy.
> In June, 1966, the appellant insured with the respondent company merchandise (to be loaded onto the two motor vehicles abovementioned) against road risks and in relation thereto the respondent company issued documents called Marine Certificates. The fact of the earlier cancellations by the United Insurance Co. Ltd. was not disclosed to the respondent company.

so remote in time that they would have ceased to influence a reasonable insurer.)

4. The respondent company was therefore entitled to avoid the contracts.

29. Notably, in **Brij Bushan Lal**, the policies issued pursuant to the proposals contained a proviso that the truth of the answers in the proposal should be a condition precedent to any liability of the respondent company to make any payment under the policy.

30. In this case before me. Mr. Padarath has argued that, in order for the answers to the Form to be a condition precedent, there has to be a similar express provision in the insurance policy such as the one in the **Brij Bushan Lal**. He highlights that in this case, there is no such express provision. He adds that in the absence of an express provision, it is not open to this Court to imply such a provision.

31. Notably, section 16 of the Insurance Law Reform Act 1996 has somewhat overhauled the common law position in **Brij Bushan Lal** in Fiji with regards to "basis clauses". However, the Act was not in operation even at the time this case was filed. In my view, the common law position in **Brij Bushan Lal** would apply in this case to render the basis clause in question as warranties, so that any falsity in the Proposal would entitle the insurer to avoid the policy.

Warranties of existing facts to be representation

16. A statement made in or in connection with a contract of insurance, being a statement made by or attributable to the insured, with respect to the existence of a state of affairs does not have effect as a warranty but has effect as though it were a statement made to the insurer by the insured during the negotiations for the contract but before it was entered into.

THE EVIDENCE

Defendant's Evidence

32. DW1 has been working with the defendant for the last ten years. He attends to all litigation claims and is familiar with the plaintiff's case. In chief, he recited the particular disclosures in Clause 8 of the Proposal (see above). He said that "the policy was issued as per the Proposal". DW1 said the plaintiffs' two fire claims were not paid by the defendant for reasons stated in the defendant's letter dated 05 November 1986 to the plaintiff (DEX 2, see below):

Mr Rahmat Ali f/n Dildar Ali
P.O Box 472
BA *Without Prejudice*

Dear Sir

Re: Alleged fire loss to Bulk Store on 2 October 1986 covered under our Policy No. 622/21/1487

We regret to note from your telephonic report of this date that your Bulk Store covered under the above policy was damaged.

In this connexion we draw your kind attention to important notice affixed to the above policy that if premium in full is not paid within 30 days from the date of the cover, the policy will be automatically deemed to have been cancelled and no further notice will be required.

We note from your records that you have not paid the full premium within 30 days from the date of cover viz 13 December 1985. Hence we formally reject your proposed claim on the above condition.

However, without prejudice to our above repudiation, we enclose herewith one claim form which we request you to return duly filled in and signed by you. We also ------M/s Toplis & Harding, Independent Adjusters without prejudice to our above stand to assess the loss.

Kindly note that this letter if written without any admission of liability and without prejudice to our rejection of your proposed claim on the above noted grounds and other grounds which are unknown at present and might come to our attention later.
Yours faithfully

C. Chandar Sekaran *Manager, Western Region* *Encl.* *CC/sr*	*Cc: M/S Toplis & Harding – Please assess the loss without prejudice. Policy copy attached.* *Cc: M/s Ambika Prasad Investigation* *This is a connected claim.* *Cc: Mr. H.G Ganatra* *Chief Manager for Fiji* *This is for your kind information*

33. DW1 said it was revealed through investigations that Fiji Insurance Company Limited (**"FICL"**) and National Insurance Company of Fiji Limited (**"NICFL"**) had previously "refused" the plaintiff's claim and declined to renew policies. The plaintiffs had failed to disclose in Clause 8. Had the defendant known of these facts, it would have **"reconsidered its stance in providing cover"**. The claim was investigated by Jim Nash & Associates. That investigation led to an Investigation Report (see below). Notably, the Report was not part of the defendant's list of documents.

34. Mr. Kumar did not seek to tender the Report after examination in chief. However, when Mr. Padarath cross-examined DW1, he insisted that DW1 produce the Report. The case was then stood down for a short while to allow DW1 time to fetch the Report. When the case resumed, Mr. Padarath said that he wanted the Court to note only that there was a Report and which the defendant had failed to discover or include in their List of Documents. DW1 said he had no idea why the defendant's former solicitors had not included the Report in their List. He said the Report had always been with the defendant.

35. Mr. Kumar said the defendant had no reason to withhold the Report as it was not adverse to the defendant's case. In any event, it was Mr. Padarath who had exposed the Report to examination by calling for it. Mr. Padarath replied that, in any event, the Report is hearsay evidence because the maker, Jim Nash, is not available to speak to it. Mr. Kumar responded that this was an Investigation Report pertaining to an investigation which the defendant had directed in the course of its business.

36. I did allow the Report (DEX2 – reproduced below). After balancing the prejudices, I formed the view that, at the end of the day, it is to be a matter of legal submissions by both counsel as to what weight, if any, I should attach to the Report.

Dated: 25th November, 1986
Our Ref: D614/86

Your Ref

The Manager Western,
The New India Assurance Co Ltd.,
P.O. Box 257,
LAUTOKA.

Dear Sir,

Re : Fire Claim – Dominion Auto Parts and Accessories Limited – Ba – Policy No's: 622/21/1447 and 622/31/7865/86.

We refer to the above insured's claim and the details requested, supplied to us by your office following our advice that we were in possession of comprehensive historical data concerning this insured and although the Assessment and the Adjustment of this claim was delegated to Messrs. Toplis & Harding – Nadi, we considered that it was our responsibility to assist the Insurance Industry within Fiji especially in respect of dubious claims, however we make the request that the information that follows be confidential between us and that it not be disclosed to Toplis & Harding and further, not actioned, until after Toplis & Harding's final report has been received.

With our knowledge of this gentleman and his companies we sent a member of our staff to Suva to confirm or otherwise our knowledge of his claim History together with whether insurance on application had ever been declined by Fiji Insurance or National Insurance.

We now list the results of this survey.

FIJI INSURANCE CO LTD

Dominion Auto Parts & Accessories Limited

Policy 01	Stock Insurance	Paid $1409.32	5/83	Cyclone Oscar
Policy 02	Building	Paid $ 558.85	3/83	Cyclone Oscar
Policy 01	Stock Insurance	Paid $2830.00	5/85	Cyclone Nigel
Policy 02	Building	Paid $ 282.46	5/86	Cyclone Nigel
Policy 01	Stock	Claim $18239.26	-	Cyclone Gavin

(Rejected and currently being subjected to Judicial Processes).

Rahimat Ali

Policy 01	Building	Paid $ 700.00	5/85	Cyclone Oscar
Policy 02	Travel P.A. Accident	Paid $ 2278.00	9/83	
Policy 03	Travel P.A. Accident	Paid $3661.00	8/86	

June/July 1985 Fiji Insurance long before a decision was made to close operations in Fiji, due to this clients Claim History refused to re-instate or renew this clients policies therefore they totally went off risk.

NATIONAL INSURANCE CO OF FIJI LTD

Dominion Auto Parts & Accessories Ltd

July 19th, 1985, Nationals Suva Office received a completed proposal form for Insurance from Dominion Auto Parts & Accessories Ltd., of Ba from their Lautoka Office – declined to go on risk 08/10/85 following investigations and associated anticipated claims and problems.

On receipt of the above confirmation of our thinking we then perused your completed proposals for Fire Insurance by Dominion Auto Parts and Accessories Ltd and from which you raised policies 622/21/1447 – 15/11/85 to 15/11/86 and 622/31/7865/86 – 17/03/86 to 17/03/87 when blatant is the only word, misrepresentation of material facts were there, that automatically would void these policies, **the proposal being the Basis of the Contract**.

On the Proposal for House owners and Householders Policy 622/21/1447, Section 8 (a) and (b) both answers – NO – **Deliberate misrepresentation** – of course there had been claims, whilst two entirely unconnected Insurance Companies had declined to reinstate, renew or accept the risk. Proposal for Fire Insurance & Endorsements Policy No: 622/31/7865/86. Section 8 (a), (b) and (c)

again are raised blatant **misrepresentation of material facts voiding the Policy** as for reason stated concerning Policy 622/21/1447.

Our material as now submitted was shown to Mr G. P. Shankar & Co., Barristers & Solicitors, Ba who unhesitatingly agreed with us by stating both claims 622/31/7865/86 Stock $50,000, 622/21/1447 Building $16,000 Total $66,000 must be rejected – cause, misrepresentation of material facts.

We may add that your form of Proposal covering Fire Policy 8 (b) gave cause for much concern – Fire Policies today not only cover fire but have many special risks endorsements – your question here Quote – "Have you ever sustained loss by FIRE? Give full particulars" – Unquote requires immediate correction in order to obtain full claim particulars from the proposer for Insurance. Your Proposal covering House owners & Householders Insurance, Section 8 (a) is certainly an improvement where it states Quote – "Ever been a claimant under a Fire or Special Risks Insurance Contract," – Unquote but we consider that an open statement such as "Ever been a claimant under any Insurance Contract – If so give particulars" allows no room by a proposer for Insurance to give answers other than honest, as it relates to their Claim History – a must when evaluation of a risk arises.

Yours faithfully,
JIM ASH & ASSOCIATES

Jim Ash. J.P.
JA/rl

P.C. Mr Ganatra, manager for Fiji, The New India Assurance Co Ltd., Suva.
Mr G.P. Shankar, Barrister & Solicitors, Ba.

Plaintiffs' Evidence

37. In chief, PW1 said that the fire happened on Diwali day on 02 November 1986. He lodged a claim the very next day. The defendant has never bothered to respond to his claim. He then decided to instruct Sahu Khan & Sahu Khan to write to the defendant with follow ups. Letters dated 10 February 1987 (PEX 4) and 25 March 1987 (PEX5) by Sahu Khan to the Manager, New India Assurance Company Limited were tendered. On 08 April 1987, the defendant responded to the second letter as follows:

We refer to your unsigned letter Ref: 5/10 dated 25 March 1987 and wish to advise that the claims are receiving the attention of our investigators/assessors **and your client is already in the know of the full facts.**

Yours faithfully

(V K Bhasin)
Manager, Western

(my emphasis)

38. PW1 said the defendant never ever bothered to get in touch with him after the above letter. He was of the impression that the defendant was investigating and its assessors were working on his claim. However, no assessors ever came to inspect his premises or his stock in trade. To this day, the defendant has never communicated with him regarding his claim. He was under stress and his business was running at a loss as he struggled to meet clients' contracts.

39. In cross-examination, PW1 admitted that he had had insurance policies with FCIL and NICFL prior to his insurance with the defendant. He denies that he had shifted to the defendant because of NICFL's refusal to renew his cover. PW1 also denied that he had failed to disclose any previous refusal or declination by NICFL.

Q. *Look at 2nd page of Proposal. Clause 8. Notice the reference to NICL. You said they never cancelled or refused to renew. That answer is misleading. 8(c) is a lie.*
A. *I did not answer any question as a lie.*
Q. *I will be calling a Claims Officer who works with the defendant. He will show 8(c) is a lie. His name is Avinesh Rai.*
A. *If he can prove that – fine! He must prove that they rejected because of previous non-renewal by previous insurer.*

40. Mr. Kumar also asked the following questions relating to PW1's migration to New Zealand.

Q. *You said you moved to New Zealand. When did you migrate to New Zealand?*
A. *1987.*
Q. *You filed this claim in 1988? Since then, you have not pushed your lawyers to expedite the claim.*
A. *I keep contacting lawyer Sahu Khan. He keeps on saying GP Shankar wants to*

make settlement. The years just went. Just talking settlement. Last year, I told Sahu Khan I don't want settlement. I wanted trial. He applied for hearing. GP Shankar passed away. Sahu Khan has since lost his business.

Q. *I put to you that defendant did make you aware that your claim declined due to material non-disclosure of your prior policy with NIFL which they did not renew.*

A. *Not true.*

41. In re-examination, PW1 said he had lodged supporting documents with his claim.

ANALYSIS

42. The defendant relies on the letter from Jim Nash (DEX3) as evidence of the alleged previous declinations and/or refusals. DEx3 was tendered through DW1. That the Report has always existed, I accept as fact. The question is whether I should also accept the Report as evidence of its contents. While the Report is already admitted as an exhibit, it can only be proof of the previous declinations and/or refusals mentioned in it if confirmed by a reliable witness.

43. Is DW1 such a reliable witness?

44. DW1 strikes me as a very knowledgeable and truthful witness who is on top of his job as well as the background pertaining to the plaintiffs' case. However, he was not in the employ of the defendant insurer at the time the Report was made. Nor was he involved in the investigation. In my view, he is in no safe position to comment on the veracity of the Jim Nash Report. All he can ever say is that the Report is part of the records of the defendant insurer pertaining to the plaintiffs' case. That, in fact, is all he ever said in court.

45. As I have said above, I am mindful that this case has been long pending for some thirty two years or so before it was tried before me earlier this year. In the circumstances, I am cautious that a strict application of the rules of evidence may, potentially, benefit a dilatory party to the prejudice of the diligent party. While both parties are extremely prejudiced by the long delay, the greater prejudice lies with the defendant who, while it bears most of the onus, is at the mercy of the seemingly tardy plaintiffs in the driver's seat of this litigation. I can only imagine the great difficulty the defendant would

face in getting anyone from Jim Nash & Associates to attend court to testify to the Report. In fact, I have never heard of the name "Jim Nash & Associates" and I suspect that they have not been in business for quite a number of years now.

46. However, having said all that, without any written submissions forthcoming from the defendant's counsel, I regret I must refuse to accept DEX 1 as evidence of its contents. The short-point of all this is that the defendant has failed

47. That said, it is hardly necessary for me to consider whether or not there was a non-disclosure, or, if there was, whether it was a material non-disclosure. The only question I have to ask now is whether the plaintiffs have proven their loss?

HAVE THE PLAINTIFFS PROVEN THEIR LOSS?

48. Mr. Kumar did cross-examine PW1 on their losses. He specifically asked PW1 to verify his losses as follows:

Q. *You said you suffered $50,000 and $16,000 worth of damages?*
A. *Yes*
Q. *Any Accounts with you to verify loss?*
A. *Not at the moment.*
Q. *You agree damages could be more than $50,000?*
A. *I had all materials in written record. Its 30 years. Floods and Hurricanes have happened affecting shop. House blown away. It's a long time. Documents destroyed.*
Q. *Any records with Accountants?*
A. *No.*
Q. *I put to you that damage sustained in loss ins less than $50,000.*
A. *I am pretty sure stock was there as claimed.*
Q. *Put to you did not suffer any damage from fire.*
A. *I did suffer.*
Q. *You agree you also made a claim to New India for $150,000?*
A. *I do not recall*
Q. *I put to you also made claim to defendant for $150,000*
A. *Not true*

49. In re-examination by Mr. Padarath, PW1 simply agreed that he had submitted all supportive documentation with his claim to the defendant.

50. There is no evidence before me to prove the quantum of losses allegedly suffered by the plaintiffs as a result of the fire.

51. The alleged losses are pleaded as special damages. As a rule, special damages must be specifically pleaded and strictly proved. The plaintiffs of course have pleaded specific amounts. But have they proven these?

52. The Fiji Supreme Court in **Jaswant Lal v The New India Assurance Limited** Civil Appeal No. CBV0003 OF 2013 is authority that *"[insurance] loss has to be considered as unliquidated damages as the loss has to be ascertained"* and it is therefore useless to try and classify them as special or general damages.

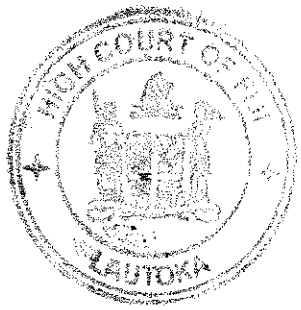
> [19] It would be seen therefore that in a claim under an insurance policy the claimant is indemnified for the loss incurred by him. What he has to establish before Court is the loss incurred to the satisfaction of the Court. The furthest that can be said in terms of damages is that the loss has to be considered as unliquidated damages as the loss has to be ascertained. There is no necessity to go into the ramifications of seeing whether they are special or general damages as in the law of torts or in certain contracts. Insurance is a special contract where indemnity is the basis of granting a claim made by the insured.
> [20] .....
>
> [21] In a claim based on an insurance policy what is required to be considered is whether the claim made by the Insured comes within the terms of the policy, whether the conditions necessary to lodge a claim have been satisfied, whether the Insured is liable if the claim made by the Insurer is not met and if so to what extent is the insured liable for the loss incurred by the Insured. If it is concluded that the Insurer is liable and thereby has caused a breach of the contract, how should the Insured establish his claim regarding the loss he has suffered when claiming damages. In processing a claim under a policy it is usual for the Insurer to get a valuation done through their Loss Adjustors of the loss suffered by the Insured. So the basic questions that would arise in an action on a insurance policy would be whether the Insurer is liable regarding the claim and secondly to what quantum of damages is he liable.

53. The plaintiffs in this case before me have not adduced any evidence to prove their alleged special damages or unliquidated damages. Accordingly, I dismiss the claim. The parties are to bear their own costs.

ORDERS

(i) Claim dismissed.

(ii) Parties to bear their own costs.



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Anare Tuilevuka
JUDGE
Lautoka

26 October 2018