IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA,

CIVIL JURISDICTION

Civil Action No. HBC 210 of 2012

BETWEEN : **SABRA BIBI** of Mulomulo, Nadi, Fiji, Domestic Duties.

PLAINTIFF

AND : **SUN INSURANCE COMPANY LIMITED** a limited liability company duly incorporated under Companies Act (Cap 247, Laws Fiji) having its registered office at 1st Floor, Harbour Front Building, Rodwell Road, Suva, Fiji.

DEFENDANT

Counsel : **Mr.Samuel Kamlesh Ram for the Plaintiff**

: **Mr. Vinisoni Filipe for the Defendant**

Date of Hearing : **Friday, 09th March 2018**
Date of Ruling : **Friday, 25th May 2018**

RULING

(A) INTRODUCTION

(1) The matter before me stems from an application filed by the Plaintiff seeking the following orders;

(i) *A declaration that the Defendant is required to indemnify the insured being Nevote Laudola and Ali Hassan and compensate the Plaintiff for the full judgment sum in High Court Civil Action No. 009 of 2005/L.*

(ii) *A declaration that the Defendant cannot simply refuse to compensate the Plaintiff on the ground that the driver of the CG 232 was driving without a license.*

(iii) *The Defendant be ordered to pay the sum of $62, 868.87 (Sixty Two Thousand Eight Hundred Sixty Eight Dollars and Eighty Seven Cents) ordered in the High Court Civil Action No. 009 of 2005/L against Nevote Laudola and Ali Hassan to the Plaintiff.*

(iv) *The Defendant pay costs of this application.*

(2) The application was made by 'Originating Summons' dated 03rd October 2012. The application is made pursuant to Order 80, rules 8, 10 and 11 of the High Court Rules, 1988 and the inherent jurisdiction of the Court.

(B) THE BACKGROUND

(1) The application is supported by an affidavit sworn on 18th August 2012 by the Plaintiff. The Plaintiff 'Sabra Bibi' **(Bibi's affidavit)** deposes as follows;

1. *I am the Plaintiff herein.*

2. *I was involved in a car accident on or about the 9th of October, 2003 and I filed a claim in the High Court claiming damages.*

3. *On the 17th May, 2010 the High Court made a Judgment in my favour in the sum of $62,868.87 (Sixty Two Thousand Eight Hundred Sixty Eight Dollars and Eight Seven Cents). Exhibited hereto and marked with the letter "**SB-1**" as a copy of the decision of the High Court.*

4. *The Defendants were the Third Party Insurers of the vehicle, which collided and exhibited hereto and marked with letter "**SB-2**" is a copy of the search from the Land Transport Authority showing the Insurers.*

5. *Prior to filing of the action, my Solicitors notified the Insurance Company and exhibited hereto and marked with the letter "**SB-3**" is a copy of the letter that we wrote to the Defendants.*

6. *The Writ was served on the Defendants and exhibited hereto and marked with the letter "**SB-4**" is a copy of letter and Affidavit of Service.*

7. *Sometime had elapsed and the Defendant have not filed a Notice of Intention to Defend. My Solicitors wrote a letter dated 29th December, 2004 and exhibited hereto and marked with the letter '**SB-5**" is a copy of that letter.*

8. *On the 7th of June, 2005 Defendant through their Solicitors wrote to my lawyers and said that the driver of the vehicle was convicted for driving without a Third Party Policy. Exhibited hereto and marked with the letter "**SB-6**" is a copy of the letter.*

9. *The Defendants also filed a Summons on the 31st of August, 2005 seeking certain orders. A copy of the Summons is exhibited hereto and marked with the letter '**SB-7**".*

10. *A copy of the affidavit in Support of the Summons is exhibited hereto and marked with the letter "**SB-8**".*

11. *On the 7th of October, 2005 the Defendant through their Solicitors sought leave to withdraw their application for orders (a) and (b) in the Summons filed on 31st August, 2005. Such leave was granted and an order for costs in the sum of $200.00 was made in my favour.*

12. *On 18th November, 2005 an Order was made on the Summons that Mishra Prakash and Associates of Lautoka Solicitors acting for the First and Second Defendant have ceased to act for the First and Second Defendant.*

13. *My Solicitors then proceeded with the matter and obtained Judgment.*

14. *After Judgment was obtained, my Solicitors wrote to the Defendant and exhibited hereto and marked with the letter "**SB-9**" is a letter dated 23rd March, 2011.*

15. *A copy of sealed Order is exhibited hereto and marked with letter "**SB-10**".*

16. *A copy of the abstract of particulars of road accident is exhibited hereto and marked with letter "**SB-11**".*

17. *I humbly ask for order in terms of my Summons.*

(2) The application is vigorously opposed. An answering affidavit sworn on 20th February 2013 by 'Thomas Naua', **(Naua's affidavit)** the Claims Manager of the Defendant Company was filed. In the 'answering affidavit' the Defendant deposes as follows;

1. *I am the Claims Manager of Sun Insurance Company Limited ("**Sun**"), the Defendant in this action. I am authorized by Sun to make this affidavit on its behalf.*

2. *I am able to depose as follows on the basis of personal knowledge of the matters contained herein or, where matters are not known to me personally, from information derived upon perusing Sun's files and from sources specified.*

3. *I make this affidavit in response to the affidavit of Sabra Bibi sworn on 18th August, 2012 ("**Bibi's affidavit**").*

Response to Bibi's affidavit

4. *I make no comments in respect of paragraph 1 of Bibi's affidavit.*

5. *As to the allegations in paragraphs 2 and 3 of Bibi's affidavit, I accept that annexure SB- 1 is a copy of the unreported Judgment delivered by Justice Y I Fernando in Sabra Bibi v Nevote Laudola and Ali Hassan – High Court Civil Action No. HBC 009 of 2005L on 17th May, 2010 ("**Judgment**").*

6. *According to the Judgment (paragraphs [19] and [20]), Ali Hassan is the registered owner of motor vehicle registration No. CG - 232 ("**Vehicle**"). Paragraph [20] of the Judgment also confirms that Nevote Laudole was Ali Hassan's agent/servant and had the control, management and possession of the vehicle with the (express and/or implied) consent of Ali Hassan to drive the vehicle at the material time.*

7. *As to the allegations in paragraph 4 of Bibi's affidavit, I accept that Sun issued Third Party Insurance Policy Number 189753 ("**Third Party Policy**") for the*

vehicle which was valid for a year from 9th September, 2003 to 9th September, 2004. Annexed hereto and marked "TN - 1" is a copy of the Third Party Policy. I also accept the annexures SB - 2 of Bibi's affidavit is a copy of the vehicle registration certificate and vehicle owner history extract for the vehicle.

8. *As to the allegations in paragraph 5 of Bibi's affidavit, I accept that annexure SB- 3 appears to be a copy of a letter dated 26th November, 2004 from Samuel K Ram to Sun. I have reviewed Sun's files and confirm that Sun did not receive this letter.*

9. *As to the allegations in paragraph 6 of Bibi's affidavit, I accept that annexures SB 4 is a copy of the letter dated 21st January, 2005 from Samuel K Ram to Sun and the first page of the affidavit of service of Anju Mala sworn on 26th January, 2005. I confirm that Sun received the letter of 21st January, 2005 on 31st January, 2005. For completeness, annexed hereto and marked "TN 2" is a copy of the Writ of Summons that was attached to the letter of 21st January, 2005.*

10. *As to the allegations in paragraph 7 of Bibi's affidavit, I accept that annexure SB 5 appears to be a copy of a letter dated 29th December, 2004 from Samuel K Ram to Sun. I have reviewed Sun's files and confirm that Sun did not receive this letter.*

11. *I admit the allegations in paragraph 8 of Bibi's affidavit and accept that annexure SB 6 is a copy of the letter to Samuel K Ram by Mishra Prakash & Associates (Sun's former Solicitors) dated 7th June, 2005.*

12. *I admit the allegations in paragraph 9 of Bibi's affidavit and accept that annexure SB - 7 is a copy of the Summons filed on 31st August, 2005 by Mishra Prakash & Associates in Sabra Bibi v Nevote Laudola and Ali Hassan – High Court Civil Action No. HBC 009 of 2005L.*

13. *I admit the allegations in paragraph 10 of Bibi's affidavit and accept that annexure SB - 8 is a copy of the affidavit in support of Jainendra Prakash Govind filed by Mishra Prakash & Associates in Sabra Bibi v Nevote Laudola and Ali Hassan – High Court Civil Action No. HBC 009 of 2005L.*

14. *As to the allegations in paragraph 11 of Bibi's affidavit, I accept that Sun instructed Mishra Prakash & Associates to "withdraw from the case" by facsimile dated 10th June, 2005 on the grounds that Nevote Laudola did not hold a driving license. Those instructions were re-confirmed by facsimile dated 13th*

April, 2006 from Sun to Mishra Prakash & Associates. Annexed hereto and marked 'TN - 3" are copies of these letter instructions. I have no knowledge of and therefore deny all other allegations in paragraph 11 of Bibi's affidavit.

15. *I have no knowledge of and therefore deny the allegations in paragraph 12 of Bibi's affidavit.*

16. *As to the allegations in paragraph 13 of Bibi's affidavit, I accept that the Judgment was obtained. I have no knowledge of and therefore deny all other allegations in paragraph 13 of Bibi's affidavit.*

17. *As to the allegations in paragraph 14 of Bibi's affidavit, I accept that annexure SB 9 is a copy of the letter dated 23rd March, 2011 from Samuel K Ram to the Sun.*

18. *As to the allegations in paragraph 15 of Bibi's affidavit, I accept that annexure SB - 10 is a copy of the order of 17th May, 2010 made by Justice Y I Fernando in Sabra Bibi v Nevote Laudola and Ali Hassan – High Court Civil Action No. HBC 009 of 2005L that was sealed on 30th June, 2010.*

19. *As to the allegations in paragraph 16 of Bibi's affidavit, I accept that annexure SB- 11 is a copy of the abstract of particulars of road accident and the charges against Nevote Laudola.*

Liability denied

20. *There is no doubt that Nevote Laudole did not hold a valid Driving License at the material time – 9th October, 2003. Paragraphs [7], [8] and [9] of the Judgment confirms this. Annexed hereto and marked "TN - 4" is a copy of the letter from Land Transport Authority dated 19th February, 2013 also confirming this.*

21. *I believe that Sun is entitled to deny liability because Nevote Laudole did not hold a valid driving license at the material time – 9th October, 2003 in breach of clause 6 of the Third Party Policy which reads:*

> *"6. PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THIS POLICY*
>
> *(a) The owner, and*

(b) *Any person who is driving on the owner's order or with his permission:*
Provided that the person driving holds a license permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 above or at any time within the period of thirty days immediately prior to the time of driving has held such a license and is not disqualified for holding or obtaining such a license."

22. *By reason of the breach of the Third Party Policy as explained above, Sun denies liability and seeks an Order that this action be struck out and dismissed with costs.*

General

23. *I am informed by Sun's Solicitors, Haniff Tuitoga that the Plaintiff has not complied with Order 41 Rule 9 of the High Court Rules 1988 and accordingly Bibi's affidavit may not be used without leave of the Court.*

24. *Except to the extent that I have previously expressly admitted an allegation, I deny each and every other allegation of fact contained in Bibi's affidavit as if I had set these down in this affidavit and traversed them specifically.*

(C) ANALYSIS

(1) Whilst most grateful for the benefit of oral submissions and researches of Counsel, I interpose to mention that I have given my mind to the oral submissions made by Counsel as well as to the written submissions and the judicial authorities referred to therein.

(2) At the outset, Counsel for the Defendant raised an objection to the Plaintiff's 'Supporting Affidavit' sworn on 18th August, 2012. Counsel referred to the form of the affidavit and contended that the affidavit is not properly indorsed with a note showing on whose behalf it is filed. In the same breath, Counsel argues that the affidavit cannot provide the necessary underpinning evidence.

I am bound to say that if the Defendant had considered that the affidavit was in an 'irregularity' it could have moved under Order 2, rule 2 before it took another

step. It did not do so. The Defendant responded to the 'irregular affidavit.' Suddenly at the hearing the Defendant changed track. It desired to take issue on the affidavit filed by the Plaintiff. It woke up to the possibility of relying on Order 41, rule 9 of the High Court Rules, 1988.

I now turn to the Plaintiff. Counsel for the Plaintiff frankly admitted that the affidavit is not indorsed and seeks leave pursuant to Order 41, rule 9 (2) for their affidavit to be used in this application.

Of course I accept, as Counsel for the Defendant pointed out that the affidavit is irregular. I am content simply to say that the defect is of little consequence to the actual conduct of the litigation. The Defendant will not be prejudiced in presenting its case on the merits. Therefore, I overrule the Defendant's preliminary objection and grant leave to the Plaintiff pursuant to Order 41, rule 9(2) for their Affidavit to be used in this application.

I take comfort in and adopt the following passage from the case of **"Koroi v Commissioner of Inland Revenue (2001) FJHC 138** where his Lordship Justice Gates said;

> *The Plaintiff's Counsel takes issue on the 2 Affidavits filed by the Defendants, and he raises two arguments in challenge. First he refers to the form of the Affidavits which is non-compliant with the High Court Rules. The Affidavits are not properly indorsed* ***[Order 41 r. 9(2)].*** *Much has been said on this particular type of defect over the last year, see* ***In the Matter of Kim Industries Ltd.*** *(unreported) Lautoka* ***High Court Winding Up No. HBF0036.99L 7 July 2000 pp 1- 4; The State v H.E. The President and 4 Others*** *(unreported) Lautoka High Court, Judicial Review No. HBJ0007.2000L 12 October 2000 at pp 9 – 10;* ***Chandrika Prasad v Republic of Fiji*** *(supra) [Ruling on Respondent's Summons for Stay pending Appeal (No. 2)] 20 December 2000, and again in [Ruling on Proposed Interested Party's Joinder Application] 17 January 2001 pp 2 – 3. Other judges both in Fiji and overseas have referred similarly to this type of defect see* ***Gleeson v J. Wippell & Co. Ltd [1977] 1 WLR 510 at 519C.*** *These mistakes are of little consequence to the actual conduct of the litigation. But since the settling of the format of an Affidavit, a vehicle for the presentation of succinct evidence to the Court, is a relatively simple exercise, these errors should no longer persist. I note the Attorney-General's Chambers have appeared in tree of the above matters. Accordingly, Affidavits emanating from those chambers now should be beyond criticism. The two offending Affidavits which breach the mandatory rule are to be removed from the Court file and re-submitted with the*

correct indorsement. This is to be done within 14 days. I note that both Defendants are exempt from Court filing fees. Meanwhile I overrule the Plaintiff's objection and grant leave to the Defendants pursuant to ***Order 41 r.9 (2)*** *for their Affidavits to be used in this action.*

3.(A) The first ground on which the insurance company seeks to repudiate liability as against its insured, as I understand it, proceeds as follows;

"Sun Insurance Company Limited" did not receive notice of the bringing of the proceedings within seven (07) days of their commencement as required by Section 11(2)(a) of the Motor Vehicle (Third Party Insurance) Act, Cap 17. The failure to comply with the notice requirement avoided its liability to pay the judgment sum to the Plaintiff. The proposition was sought to be vouched by reference to **Sun Insurance Company Ltd v Qaqanaqele (2017) FJSC 23.**

(B) Moreover, in the written submissions the Defendant insurance company elaborated on the above mentioned matter in the following relevant extracts.

In this case, the High Court Action was issued on 19th January, 2005. The Defendant received notice of the proceedings on 31st January, 2005. This is way beyond the 7 days requirement under the Section 11(2) (a) of the Motor Vehicles (Third Party Insurance) Act.

The following was stated in Sun Insurance Co Ltd v Qaqanaqele [2017] FJSC 23; CBV0009.2016 (21 July 2017) ***(Tab 1)***

As the then Lord Chief Justice of England and Wales, Lord Woolf of Barnes observed in Nawaz v Crowe Insurance Group [2003] Lloyd's Rep I.R. 471 observed in paragraph 7 of his judgment, the effect of Section of 152 (1) of the English Road Traffic Act, 1988, which was couched in the same language as Section 11 of the Fijian Motor Vehicles (Third Party Insurance) Act, "is that if there is no proper notice served on an appropriate person for the purposes of the section, then the liability of an insurer comes to an end.....

(C) Counsel for the Plaintiff maintained that there had been substantial compliance

with the notice requirement.

(D) So the first issue to be considered is whether the insurer 'had notice of the bringing of the proceedings' for the purpose of Section 11(2) (a) of **Motor Vehicles (Third Party Insurance) Act**.

In order to address the Defendant's argument based on **Section 11(2) (a)** of the **Motor Vehicles (Third Party Insurance) Act**, it is desirable to cite Section 11(2) (a) of the Act.

Section 11(2) of the Motor Vehicles (Third Party Insurance) Act reads;

> (2) *No sum shall be payable by an approved Insurance Company under the provisions of subsection (1) –*
>
> (a) *in respect of any judgment unless before or within 7 days after the commencement of the proceedings in which the judgment was given, the Insurance Company has notice of the bringing of the proceedings; or*

(E) As I understand Section 11(2) (a), the objective of the requirement of notice was to enable the insurer to take over proceedings promptly. To my mind, the essential purpose of the requirement of notice is that the insurer is not met with information, out of the blue; that it's insured has had a judgment obtained against him. More precisely, the essential purpose of the requirement of notice is to ensure that the insurer is not suddenly faced with a judgment which he has to satisfy without having any opportunity to take part in the proceedings in which the judgment was obtained.

(F) Of such a requirement, the Supreme Court of Fiji said in **'Dominion Insurance Ltd v Bamsforth (2003) FJHC 3;**

> *"Section 11(1) of the Act imposes a statutory liability on the Insurer to pay the sum of a relevant judgment against a person insured to the person in whose favour the judgment has been awarded. That liability is extra-contractual although necessarily conditioned upon the existence of a policy of insurance. It is important therefore, when looking to the provisions of s.11(2), to bear in mind that the section is concerned with the imposition and the conditions of the imposition of a special statutory liability. It is not concerned with the Plaintiff's*

cause of action against the insured person which arises at common law. Nor is it concerned with an insured person's right of indemnity under the policy.

Subsection 11(2) sets the boundaries of this special statutory liability by setting out the conditions under which ***"No sum shall be payable by an approved insurance company under the provisions of subsection (1)".*** *There is no relevant leeway of choice in these words. They define the boundaries of the liability imposed by s. 11(1) by reference to various circumstances in which* ***"No sum shall be payable"*** *under that subsection.*

The Court of Appeal observed:-

> ***"Section 11(2) (a) imports into the policy what is in effect a condition precedent to the liability of Dominion Insurance to make the payment it would otherwise be required to make by s. 11(1)."***

That observation, with respect, is not strictly correct. The condition precedent specified in s. 11(2) (a) applies to the statutory liability created by s. 11(1). It is not imported into the policy. In this connection also the submission made for Dominion Insurance that the Act has been ***"incorporated into the policy by reference"*** *is not apposite as the liability created by s. 11(1) is between the Insurer and the injured party who was not a party to the policy or covered by it.*

It is correct to say, as the Court of Appeal said, that s. 11(2) (a), as a matter of construction in accordance with the unambiguous opening words of s. 11 (2), defines a condition precedent to the liability imposed by s. 11(1). When that point is reached no question of characterization of the condition as mandatory or directory arises even if that characterization were still useful in statutory construction – see ***Project Blue Sky Inc. v. Australian Broadcasting Authority*** *[1998]HCA 28; (1998) 153 ALR 490 at 516;* ***Hawkes Bay Hide Processors of Hastings v. Commissioner of Inland Revenue*** *[1990] 3 NZLR 313 at 316. For the construction question – what is the effect of non-compliance with the condition? – is answered, not by the words of the condition itself but by the clearly defined consequences of the failure to satisfy it –* ***"No sum shall be payable."***

The character of the section as a condition precedent appears to have been recognized early in the life of the equivalent provision in s. 19(2) (a) of the Road

Traffic Act 1934 (UK). In ***Herbert v. Railway Passengers Assurance Co.*** *[1938] 1 ALL ER 650 Porter J. observed at 654;-*

"Without considering the matter thoroughly, the view which I hold at present is that, where an Act of Parliament stipulates that recovery shall not take place except in certain events, those events must take place before the Plaintiff can recover."

In that case it was held that a casual conversation between the insured Defendant and the Insurer's agent in which the Defendant mentioned that an action had been brought against him could not meet the notice of requirement. There was no room for mitigation of the operation of the Section.

.....

The nature of the notice condition as a condition precedent was confirmed recently in the Court of Appeal in ***Wake v. Wylie*** *(2001) RTR 20. Kennedy LJ referred to s.152(a) of the Road Traffic Act 1988 as* ***"not a statutory defence"*** *but* ***"a condition precedent to liability,"*** *and* ***"not a statutory time limit, but a state of affairs which by statute had to exist before the relevant Insurers became liable to pay" (para. 34 and 38).*** *The judgment of Kennedy L.J., with which Laws and Rix LJJ agreed, also provides a helpful review of case law on the section which it is not necessary to reproduce here.*

The task that remains is to define the content of the condition. There is room for debate about the way in which an insurer may have notice of proceedings in which the relevant judgment is given. That was the approach taken by the Court of Appeal in ***Desouza v. Waterlow*** *[1999] RTR 71 (C.A.) in relation to the like provision of s.152(a) of the Road Traffic Act 1988. Cazalet J., at 81, identified* ***'the essential purpose"*** *of the required notice thus:-*

".....that the insurer is not met with information, out of the blue, that his insured has had a judgment obtained against him."

Roch LJ at 82 said:-

"The purpose of the provision is to avoid insurers being asked to satisfy a judgment against their insured in respect of a claim of which they knew nothing, obtained in proceedings of which they had no notice or warning."

In that case the object of the notice requirement had been met. The Plaintiff had provided the insurer with a detailed plan and account of the accident within one month of its occurrence. The insurer's engineer had inspected the Plaintiff's car and had authorized work to be carried out. There was a sequence of letters between the Plaintiff and the Insurer in which the Plaintiff made clear that unless his claim was settled he intended to take proceedings. In that case the Court adopted a purposive approach where the language of the section permitted it to do so. The requirement of notice can be met in a variety of ways. Cazalet J. observed that notice could be given orally and could be given prior to the commencement of the proceedings. This was also the approach of the Privy Council in the earlier case of ***Ceylon Motor Insurance Association Limited v. Thambugala*** *[1953] A.C. 584 concerning s. 134 of Motor Car Ordinance of Ceylon (No. 45 of 1938). Notice was held not to require precise identification of the particulars of the action instituted given that it could be provided prior to commencement of the action.*

It is possible, with a purposive approach to the construction of s. 11(2)(a) to eschew formality in the kind of notice required provided that it meets the substantive object of the provision. That object is to make the insurer aware, one way or the other, of the proceedings which are contemplated or have been commenced against a person covered by the policy. The term ***"notice"*** *is sufficiently wide to allow a wide construction to be adopted which serves the purposes of the section. The language of s. 11(2)(a) itself supports a wide construction as it matters not how the insurer gets notice of the proceedings as long as it* ***"has notice"*** *within the requisite time.*

But the nature of the condition in s.11(2)(a) as a condition precedent which marks out the boundary of the insurer's liability does not allow any ***"substantial compliance"*** *construction. The condition is either met or not. No question of* ***"compliance"*** *arises for, unlike section 16, it does not purport to impose any duty on any person to notify. It simply requires that the insurer* ***"has notice."*** *Who then is to comply?* ***"Substantial compliance"*** *in this context must equate to "substantial fulfillment" of the requirement. So far as the time limit is concerned a construction which permits fulfillment after the expiry of the time limit is a construction which involves a legislative redrafting of the provision. This is not a function which the Court is authorized to undertake. In some jurisdictions the Court is empowered to relieve a party from the effects of non-satisfaction of the condition where no prejudice is suffered by the insurer as the result of the delay – see for example s. 29A of the Motor*

Vehicle (Third Party) Insurance Act (W.A.). To so provide is to provide for the enlargement of the statutory liability imposed on the insurer by the section."

(Emphasis added)

(G) Turning to the 'notice requirement', on 19th January, 2005, the Plaintiff issued the Writ in this action. Seven (07) weeks before the writ was issued (viz, on the 26th November, 2004) the Plaintiff's solicitors wrote to the insurer concerned as follows; (exhibit marked SB-3).

Our Ref: skr/am/1582/03

November 26, 2004
The Claims Officer
Sun Insurance
1st Floor Burns Philip Building
Rodwell Road
G.P.O. Box 16976
SUVA, FIJI

Fax – 3313882

Without Prejudice
Save As To Costs

Dear Sir

Sabra Bibi daughter of Kasim Ali of Mulomulo, Nadi, Fiji
Your Insured Vehicle No.: CG 232
Third Party Policy No. 189753

We act for the above named who was involved in a motor vehicle collision on the 9th October, 2003. Our client sustained severe injuries as a result of the accident.

The collision occurred as a result of the negligence of the driver of vehicle no. CG 232. We are informed that you are the insurers of vehicle no. CG 232 by Third Party Policy Number 189753.

Kindly let us know within the next 14 (Fourteen) days whether liability is admitted. We can then negotiate the quantum if liability is admitted.

Yours faithfully

SAMUEL K RAM

(H) What is more, shortly before the Writ was issued (viz, on the 29th December, 2004) the Plaintiff's solicitor wrote to the insurer as follows; (exhibit marked SB - 5)

Our Ref: skr/am/1582/03

December 29, 2004

The Claims Officer
Sun Insurance
1st Floor Burns Philip Building
Rodwell Road
G.P.O. Box 16976
SUVA, FIJI

Dear Sir,

SECTION 11 NOTICE

We act for the above named who was involved in a motor vehicle accident on the 9th October, 2003 and our client has instructed to take court proceedings. The collision occurred as a result of the negligence of the driver of vehicle No. CG 232.

We are informed that you are the insurers of the vehicle No. CG 232 by Third Party Policy No. 189753.
TAKE NOTICE that we will commence proceedings in this matter against your insured. We will be serving you with the Writ of Summons in this matter.

This notice is given pursuant to Section 11(2) (a) of the ***Motor Vehicles (Third Party Insurance] Act Cap 177 Laws of Fiji.***

Yours faithfully

SAMUEL K RAM

There are two broad grounds on which the Defendant submits that it had not been given a notice of the proceedings required under the provisions of the Motor Vehicle (Third Party Insurance) Act , within the time prescribed by Section 11 (2) (a) of the Act.

In the first place it was maintained that the insurer never received the Plaintiff's two written communications marked SB -3 and SB -5.

Thus, the onus lies on the Plaintiff to show, if she can, that the said written communications were sent by post to the Defendant or they were served at the office of the Defendant.

There is no iota of evidence to show that the said written communications were sent by post to the Defendant or they were served at the office of the Defendant.

Therefore, I uphold the objection raised by the insurance company to the letter of 26th November 2004 (SB – 3) and to the letter of 29th December 2004 (SB – 5).

In the second place it was maintained that the notice it received was by service upon it of the Writ on 31st January 2005. This was 12 days after the Writ was issued.

According to the affidavit of service filed by the Plaintiff the Writ and the Statement of Claim were sent by registered post to the Defendant on the 25th day of January 2005. This was six (06) days after the proceedings were commenced on 19th January 2005. Therefore, the object of Section 11(2) (a) of the Act was satisfied. There can be no room for argument. I state with conviction that the notice by service of the Writ within six (06) days of commencement of the proceedings constitutes 'substantial compliance' with the Act.

(4) Let me now pause here to consider the Plaintiff's claim. The Plaintiff's claim arises in this way. The Plaintiff was travelling in vehicle registration No- CW 665 when it collided with a vehicle with registration no- CG 232 driven by 'Nevote Laudola' (First Defendant in Civil Action no- 009 of 2005/L). The vehicle with registration no- CG 232 was at all material times owned by 'Ali Hassan' (Second Defendant in Civil Action no- 009 of 2005/L). This is an admitted fact. The incident occurred on the 09th October 2003 at the Nadi Back road. The Plaintiff suffered several fractures and lacerations and has been assessed to have a disability of 35%. Paragraph [20] of the High Court judgment dated 17th May 2010 confirms that 'Nevote Laudole' was 'Ali Hassan's' agent/servant and had the control, management and possession of the vehicle with the express and or implied consent of 'Ali Hassan' to drive the vehicle at the material time

On the 17th May 2010, the High Court entered judgment in favour of the Plaintiff in the sum of $ 62, 868.87 plus $1500.00 costs. (Exhibit marked SB-1)

(5) The Defendant issued Third Party Insurance Policy Number 189753 ("Third Party Policy") for the Vehicle CG - 232 which was valid for a year from 9th September 2003 to 9th September 2004. (Annexure TN 1 of Naua's affidavit)

(6) I now turn to 'Nevote Laudole'. He pleaded guilty in the Nadi Magistrates Court (case no – 131 – 01/2004) to three counts ; (1) Dangerous driving contrary to Section 98 (1) and 114 of the Land Transport Act No: 35 of 1998, (2) Driving a motor vehicle without a driving license contrary to Section 56 (6) and 114 of the Land Transport Act, (3) Driving a motor vehicle when not covered under insurance of third party risk contrary to Section 4(1)(2) of the Motor Vehicle (Third party) Act Cap.177. What is more, there is a letter from the Legal services of the Land Transport Authority, dated 19th February 2013 which states that 'Nevote Laudola' did not hold a driving license on 09th October 2003 or at any time before that date. (Annexure TN- 4 of Naua's affidavit).

(7) The specific matter which Mr. Filipe, Counsel for the insurance company says put the insured owner and the driver out of cover at the time of the event on 09th October 2003 was that at the time of the offence the driver did not have a driving license. Thus, the principal issue before this Court is whether the Defendant insurance company can repudiate its statute imposed liability to satisfy any judgment on the grounds that the 1st Defendant in the High Court action, at the time of the accident was driving without a driving license and/or that the vehicle no. CG 232 was not covered by a Third Party Insurance.

(8) Mr. Filipe, in arguing for the Defendant insurance company put his contention, as I understood him, thus; *"There is no insurance policy in force covering an unlicensed driver, because the Policy does not extend to cover an unlicensed driver. The insured was only covered while the vehicle was being driven by a licensed driver"*

The following extracts taken from page four (04) of the submissions by the insurance company filed on 23rd October 2017 are pertinent;

The Defendant submits that it is entitled to be exempted from Third Party liability because Nevote Laudole did not hold a valid Driving License at the material time – 9th October, 2003 in breach of clause 6 of the Third Party Policy which reads:

6. PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THIS POLICY

(a) The owner; and

(b) Any person who is driving on the Owner's order or with his permission: Provided that the person driving holds a license permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 above or at any time within the period of thirty days immediately prior to the time of driving has held such a license and is not disqualified for holding or obtaining such a license.

The Insurance Company cited in support of its argument the following passage from the Supreme Court decision in ***"Sun Insurance Company Ltd v Chandra – Special Leave to appeal No. CBV0007 of 2011*** delivered on 09th May, 2012.

> *The Certificate of Insurance prescribed in the Schedule gives two categories of conditions namely (a) person or class or persons entitled to drive and (b) limitations as to use. If the vehicle is used in breach of any of the conditions coming under these categories, the insurer is exempted from third party liability.*

(9) On the other hand, the principal argument advanced by Mr. Ram, Counsel for the Plaintiff was to the effect that whether by way of a proviso or condition, it was contrary to the spirit and intention of the Act for an Insurer to exclude coverage for liability arising from an act of negligence on the ground that the Driver was unlicensed. As I understand it, this submission depends upon the proposition that the Policy should be applied in a way that reflects the primary purpose of the Act in requiring compulsory Third Party Insurance.

(10) Alternatively, Counsel for the Plaintiff suggests, and put before me with force and ingenuity;

- The Insurance Company is not entitled to rely upon an exclusion clause for which there was no provision in the Act.

- If there was a breach of a permitted conditions of the Policy, then it could not be relied upon against Third Parties, it's only relevance being that it

provided a basis for recourse by the Insurer against the insured for any monies paid to the Third Parties.

(11) Moreover, in the Written Submissions, the Plaintiff elaborated on the above matters in the following relevant extract;

> *Section 6 requires a policy of insurance to be issued "...in respect of* ***any liability*** *which may be incurred by" the insured "person... persons or classes of persons as may be specified in the policy". A policy issued under this legislation must cover both the negligent liability incurred by the driver and the vicarious liability of the owner. Both liabilities arise "...in respect of the... bodily injury to" the Plaintiff "...* ***caused by or arising out*** *of the use of the vehicle...".*
>
> *The use of the phrase "caused by or arising out" in the legislation is clearly to ensure that liability does not have to accrue by the direct act of driving only. Section 2 of the Motor Vehicles (Third Party Insurance) Act defines "use" to mean "use on a road". The word "use" is broader than "drive". If a vehicle is in a stationary position on a road which causes a danger to other road users and another person is injured, then the third-party insurance policy will cover liability caused although the vehicle is not being driven. A third-party policy is not issued for the Driving of the vehicle but the use of it.*
>
> *Using a vehicle on the road covers use with the permission of the owner and one liability arising from such use is the vicarious liability of the owner.*
>
> .....
>
> *If the Defendant is entitled to refuse to pay the Plaintiff because of an allegation of breach by the driver then it is simply refusing negligent liability of the driver. They are not denying the vicarious liability of the owner. They chose to cover both and accepted premium for it.*
>
> .....
>
> *The wording is similar to the Third-Party Policy. The vehicle which injured the Plaintiff (and covered by third party risk) was used by a person permitted by the owner. As a result liability was incurred by "them" (owner and driver) jointly and severally.*
>
> *Therefore, under the terms of the policy the Defendant is liable to indemnify the owner of the vehicle.*

PAYMENT TO THIRD PARTY

The requirement to pay a third party is independent of the obligations between the Defendant, the Insured and the driver. The liability to pay the third party is statutory and the liability to indemnify the Insured is contractual (limited by certain requirement of Statute). There is no contractual relationship between the Defendant and the Plaintiff (third-party).

The third party has to be paid regardless of any contractual issues between the owner, driver and the Defendant (see ***Sun Insurance v Pranish Prakash Chand Supreme Court CBV0005 of 2008S, (15th October 2010)****).*

.....

In ***Sun Insurance Company Ltd v Chandra [2012] FJSC 8 CBV0007.2011 (9 May 2012),*** *the court placed emphasis on the phrase "any such liability as is required to be covered by a policy" used in Section 11. At paragraph 36, the Supreme Court is of the view that the phrase was not considered by the Supreme Court in Sun Insurance v Pranish Prakash Chand (supra). This is not correct as this phrase is considered.*

Section 11 makes it clear that the liability is owed to the third party (that is, the appellant). Therefore, the only time the respondent can deny liability is if they can prove a breach as between them and the third party (the appellant). Any breach between the insurer and the insured is irrelevant to the issue of compensation to the third party under the Act.

.....

The mandatory requirement to pay is there "notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy." Therefore, while the defendant may say that the policy with the insured can be avoided or cancelled (because of a clause within their policy) it does not mean that the insurance company does not have to pay.

If there is a breach of policy between the insured and the third party insurer than it is for the third party insurer or the insured to litigate this issue between themselves.
Once judgment has been obtained against the insured (in this case it has been) the insurance company has to pay. This is a mandatory statutory requirement.

In summary, the relationship between the plaintiff and the insured driver and owner is in Tort (i.e duty of care and breach thereof). The relationship between the insured (defendant in the case in which judgment was obtained) and the insurer (defendant in this case) is contractual. The relationship between the plaintiff and the insurer is created by statute. The compensation to the third party (being the plaintiff) is made in accordance with the statute. The Courts have been very strict on this.

.....

CONCLUSION

It is clear that the owner of the vehicle has incurred a liability (vicarious liability) and the plaintiff has obtained judgment against him for that vicarious liability. This liability of the owner arose within the terms of the third-party policy issued by the defendant. The defendant has not denied or made any allegations of breach against the owner. Its allegation is against the driver whose liability is separate from the owner (being liability arising out of negligence).

Therefore, the defendant has to pay.

(12) The Plaintiffs proposition that the Third Party has to be paid regardless of any contractual issues between the owner, driver and the Defendant was sought to be vouched by reference to the decision ***'Sun Insurance v Pranish Prakash Chand' Supreme Court CBV 0005 of 2008S, 15th October 2010***. In that case, the specific matter which the Insurance Company says put the Insured owner and driver out of cover at the time of the event on 24th March, 2003 was that the vehicle was being used for carrying passengers for hire and reward. In that case the Supreme Court considered the legislative scheme of Cap 177 in terms of the legislative history and the common law in the United Kingdom up to and after the passing of the Road Traffic Act 1930 and the Road Traffic Act 1934. At page 31 of the Judgment, the Supreme Court dealt with the point as follows;

In this Court's judgment the following factors are our reasons for finding against the view that Section 10 in the 1934 Act, which is section 11 of Cap 177 in Fiji only confers third party rights against insurers where at the time of the event the insured and his permitted user of the insured vehicle were not in any breach of conditions in the policy.

(i) *the express words of the legislature are clearly expressed and admit only of the interpretation that the scheme allows third party statutory recovery against the insurer when the insured is out of cover because of breach of condition.*

(ii) *the mischief causing the legislature to act in 1930 was the need for compulsory third party insurance.*

(iii) *the mischief causing the legislature to act in 1934 was the need to make compulsory third party insurance effective. It was the insurance companies' practices that were responsible for the perception and reality that the 1930 Act was not protecting the public as social pressure demanded.*

(iv) *the authority of Goddard L.J. in Morrison and of Mills-Owen CJ in Murtaza Khan in our view reflect the true intent of the United Kingdom legislature in 1930 and 1934 and are authority supporting the view we have ourselves formed.*

(13) The Supreme Court decision in ***'Sun Insurance v Pranish Prakash Chand'*** (supra) has been reinforced in ***'Repeke Naba v Tower Insurance (Fiji) Limited', Supreme Court CBV 0002 of 2011, 12th May 2011*** and ***'QBE Insurance (Fiji) Limited v Ravinesh Prasad', Supreme Court CBV 0003 of 2009, 18th August, 2011.***

(14) Let me pause here to consider the policy conditions. The relevant policy condition is as follows; (Clause 6 of the insurance policy)

6. PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THIS POLICY

(a) The owner; and

(b) Any person who is driving on the owner's order or with his permission:

Provided that the person driving holds a license permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under the paragraph 5 above or at any time within the

period of thirty days immediately prior to the time of driving has held such a license and is not disqualified for holding or obtaining such a license.

(15) The main issue in the present case is in respect of the liability of an Insurer against Third Party risks under Cap 177 in Fiji, which has been considered by the Supreme Court in ***'Sun Insurance v Pranish Prakash Chand' (supra) (15th October 2010)*** and in ***'Sun Insurance Company Limited v Chandra' (supra) (09th May 2012).***

(16) In ***'Sun Insurance v Pranish Prakash Chand'*** (supra) the question at issue was in relation to a Policy which sought to exempt the Insurer from liability against Third Parties in that the vehicle should not be used for carrying passengers for hire and reward. The vehicle was being used for carrying passengers for hire and reward at the time of the event on 24th March 2003. The Supreme Court exhaustively dealt with the development of the statutory provisions in the United Kingdom and in arriving at the final decision was influenced by the decision in ***'Murtaza Khan v Reginam' 11 FLR 161*** and ***'Zurich General Accident and Liability Insurance Co. Ltd v Morrison' 1942 (1) AER 529.***

(17) In ***'Sun Insurance Company Limited v Chandra' (supra) 'Nazim Hussein'*** who was the Driver of the vehicle AC 133 did not have a driving license. He was convicted (a) for dangerous driving occasioning death, (b) driving a motor vehicle without a driving license and (c) for driving a motor vehicle in contravention of the Policy condition regarding the qualification of the driver. That case bears similarities with the present case. The Supreme Court revisited the decision in ***'Sun Insurance v Pranish Prakash Chand'***. The Supreme Court queried whether ***'Sun Insurance v Pranish Prakash Chand'*** was properly decided. The Supreme Court declined to follow the decision in ***'Sun Insurance v Pranish Prakash Chand'***. The Supreme Court said that the decision in ***'Sun Insurance v Pranish Prakash Chand'*** cannot be accepted as containing the proper ambit and operation of the law in respect of Section 11 of the Act. The Supreme Court put the matter thus at paragraph 32, 33, 34, 35, 36 and 37 of the decision;

> *(32). In the judgment of the Supreme Court in Sun Insurance v Pranish Prakash Chand, the Court at paragraph 58 cited the judgment in the Morrison case and quoted exhaustively from the judgment of Lord Justice Goddard who dealt with*

the United Kingdom Motor Traffic Act of S30 and its Reform in 1934. Lord Justice Goddard dealt with S.10 of the U.K. Act (Corresponding to S.11 of the Fiji Act), ***but did not specifically deal with S.10(1) (corresponding S.11(1) of the Fiji Act) which really dealt with the main aspect of the avoidance of liability by the Insurer.*** *His Lordship dealt with S.10(3) which provides for an Insurer obtaining a declaration regarding non-disclosure of a material fact or representation which was false as represented by the Insurer in obtaining the Policy.* ***The main phrase in S.10(1) namely "any such liability as is required to be covered by a Policy" had not been dealt with.***

(33). There is similar reasoning as in Morrison's case cited above in the judgment of Chief Justice Mills Owen in Murtaza Khan v Reginam (infra). His Lordship dealing with S.11 of the Fiji Act (comparable to S.10 of the U.K. Act) stated that "the section presupposes a case of non-liability under the policy by reason of the company being entitled to avoid or cancel the policy. The object, very clearly, is to provide for compensating the third part by way of imposing a statutory obligation on the insurance company to do so, but not by way of extending the indemnity afforded by the policy vis-á-vis the insured. It does not prevent the company from avoiding or cancelling the policy vis-á-vis the insured."

(34). The view expressed in Murtaza Khan's case is in line with the view expressed by Lord Justice Goddard in Morrison's case. As pointed out above in both cases the main phrase "any such liability as is required to be covered by a policy" had not been dealt with and the section had been considered as one imposing a statutory liability on the insurer to safe guard third party rights. As has been stated earlier in this judgment in the analysis of S.11 (a) of the Fiji Act, it has to be read in conjunction with S.6 (1) (b) which entitles the Insurer to enter into a contractual obligation with the insured in setting down the person or class of persons entitled to drive the vehicle that is to be insured. Such contractual freedom has been granted to the insurer to lay down conditions regarding the person or class of persons entitled to drive the vehicle. Such conditions would take away the statutory obligation cast on the insurer as against third parties even though there is no privity of contract between the insurer and the third party.

(35). In Sun Insurance v Pranish Prakash Chand, the Supreme Court at paragraph 68 had concluded thus:

68. In this Court's judgment the following factors are our reasons for finding against the view that Section in the 1934 Act, which is Section 11 of Cap.

177 in Fiji only confers third party rights against insurers where at the time of the event the Insured and his permitted user of the insured vehicle were not in any breach of conditions in the policy.

(i) the express words of the legislature are clearly expressed and admit only of the interpretation that the scheme allows third party statutory recovery against the insurer when the insured is out of cover because of breach of condition.

(ii) the mischief causing the legislature to act in 1930 was the need for compulsory third party insurance.

(iii) the mischief causing the legislature to act in 1934 was the need to make compulsory third party insurance effective. It was the insurance companies' practices that were responsible for the perception and reality that the 1930 Act was not protecting the public as social pressure demanded.

(iv) the authority of Goddard L. J and Mills-Osen C. J. in Murtaza Khan in our view reflect the true intent of the United Kingdom legislature in 1930 and 1934 and are authority supporting the view we have ourselves formed.

*(36). **In view of the position set out above in paragraph 34 and 35, the reasons set out in paragraph 68 in the judgment of Sun Insurance quoted above cannot be accepted as containing the proper ambit and operation of the law in respect of S.11 of the Act. S. 11 (1) as stated above does not provide a situation where an insurer can avoid liability against a third party which depends on the conditions set out in the policy in terms of S.6 (1) (b).***

*(37). **As the cases of Rupeka Naba v Tower Insurance (Fiji) Limited (infra) and Q.B.E. Insurance (Fiji) Limited v Ravinesh Prasad (infra) followed the reasoning in Sun Insurance v Pranish Prakash Chand, it would not be necessary to deal with those judgments in view of the position set out in paragraphs 34, 35 and 36 above.***

(Emphasis added)

(18) In the decision in *'Sun Insurance Company Limited v Chandra'* the Supreme Court took a different view about the ambit and operation of the law in respect

of Section 11 of the Act. After discussing certain further matters the Supreme Court expressed its essential conclusion in the following paragraphs of the decision.

> *21(i) For the use of a motor vehicle, taking out an insurance against Third Party risks is compulsory under the Motor Vehicles (Third Party Insurance) Act. An Insurance Policy is a contract between the Insurance Company and the Insured and therefore the parties could agree on terms and conditions when taking an Insurance Policy provided those conditions are not prohibited or restricted under the said Act. As in any contract any breach of condition would make the policy invalid. In this instance the policy is in relation to the use of the vehicle, therefore any breach of condition in the use of the vehicle would render the policy invalid as long as the breach continues. If a person using a vehicle breaches a condition of a Third Insurance Policy while using the vehicle, he is supposed to be using the vehicle without a Third Party Insurance Policy. By such conduct he is not only committing an offence under Section 4(2) of the said Act but he also becomes personally liable for any death or injuries caused to third parties.*
>
> *(ii) In the above circumstances the Insurance Company would not be liable as the Insurance cover provided to the vehicle becomes invalid and the "certificate of insurance" issued in pursuance of the said Insurance Policy also becomes invalid.*
>
> .....
>
> *46. Therefore as there was a contravention of the condition in the policy issued by Sun Insurance excluding their liability in respect of the person driving the vehicle they cannot be held liable in respect of the claim of the third party. The third party will have to be satisfied with their claim against the insured and take whatever steps they could to enforce same against the insured.*

(19) I am faced with conflicting views of the Supreme Court in ***'Sun Insurance v Pranish Prakash Chand*** and ***Sun Insurance Company Ltd v Chandra.*** **The two decisions of the Supreme Court are in conflict.**

However, to my mind, the Supreme Court decision in the case of ***'Sun Insurance Company Ltd v Chandra'*** is the most instructive for present purposes. The more

precise approach adopted by the Supreme Court decision in ***'Sun Insurance Company Ltd v Chandra'*** is, in my view, the one I should follow. The facts have similarity to those in the present case; (1) The driver had never held a license (2) The policy did not cover an unlicensed driver, and, (3) The cover was circumscribed by the proviso. It would be apparent therefore that in terms of the policy of insurance issued by the Sun Insurance, there has been a contravention of the policy condition regarding the qualification of the driver. The cover was circumscribed by the proviso to clause six (6) of the policy. If a person using a vehicle breaches a condition of a third party insurance policy while using the vehicle , he is supposed to be using the vehicle without a third party insurance policy. In the above circumstances, the insurance company would not be liable as the insurance cover provided to the vehicle become invalid. At the cost of some repetition, I state that the Supreme Court decision in **Sun Insurance Company Ltd v Chandra contained the very significant passage following;**

21.(i) For the use of a motor vehicle, taking out an insurance against third party risks is compulsory under the Motor Vehicles (Third Party Insurance) Act. An insurance policy is a contract between the Insurance Company and the Insured and therefore the parties could agree on terms and conditions when taking an insurance policy provided those conditions are not prohibited or restricted under the said Act. As in any contract any breach of condition would make the policy invalid. In this instance the policy is in relation to the use of the vehicle, therefore any breach of condition in the use of the vehicle would render the policy invalid as long as the breach continues. If a person using a vehicle breaches a condition of a third insurance policy while using the vehicle, he is supposed to be using the vehicle without a third party insurance policy. By such conduct he is not only committing an offence under Section 4(2) of the said Act but he also becomes personally liable for any death or injuries caused to third parties.

(ii) In the above circumstances the Insurance Company would not be liable as the insurance cover provided to the vehicle becomes invalid and the "certificate of insurance" issued in pursuance of the said insurance policy also becomes invalid.

Adopting that approach it is reasonable here to say that the Sun Insurance Company is entitled to rely on the proviso to clause 6 of the policy to repudiate liability. In the light of the later authority in the Supreme Court, the Plaintiff cannot in law recover in this case.

I am unable to accept the submissions of Counsel for the Plaintiff since they cannot be reconciled with the decision of the Supreme Court in ***'Sun Insurance***

Company Ltd v Chandra'. I am bound to follow the law laid down in *'Sun Insurance Company Ltd v Chandra.'*

The Plaintiff's claim against the insurance company fails!

I confess that I reached that conclusion with much reluctance. This is a case in which one feels considerable sympathy for the Plaintiff, and Mr.Ram has said everything that could be said on her behalf. Nevertheless, I am afraid that the law is too strong to give effect to his contentions.

(D) **ORDERS**

1. The Plaintiff's Originating Summons dated 03rd October 2012 is hereby dismissed.

2. The parties to bear their own costs.

HIGH COURT OF FIJI LAUTOKA

25/05/2018.

Jude Nanayakkara
Judge

At Lautoka

Friday, 25th May, 2018