IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 95 OF 2014

BETWEEN : **GENERAL MACHINERY HIRE LIMITED**

PLAINTIFF

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

DEFENDANT

Appearance : Ms Lidise & Ms Yee Joy for the Plaintiff
Ms Ravai for the Defendant

Date of Hearing : 27 November 2017, 3-4 & 12 October 2018, 4 December 2019

Date of Judgment : 7 February 2020

DECISION

1. As the list of hearing dates above shows, this case has had an eventful history. It arises from events that occurred in Suva on 11 May 2011, when a truck-mounted side-lifter owned and operated by the plaintiff General Machinery Hire Limited (vehicle registration # DI836) collapsed in the course of lowering a 22 tonne container of wheat to the ground at the premises of Pacific Foods in Lami, Suva. As a result of, or in the course of the incident the side-lifter (used for lifting shipping containers on and off the truck on which the side-lifter is mounted) was badly damaged and cost $91,277.65 to repair.

2. At the time of the incident the side-lifter, along with the other vehicles and equipment of the plaintiff was insured by the plaintiff with the defendant The New India Assurance Company Limited under a motor vehicle insurance policy initially taken out in 2000 and still current at the time of the incident referred to. The plaintiff made a claim on this insurance, but that claim was eventually declined by the defendant. In response the plaintiff commenced this proceeding in 2014 by writ of summons.

3. The proceeding initially came to trial in November 2017 before Justice Mackie. After a day of evidence the case was adjourned and did not resume until

October 2018, when the evidence was completed. However before submissions were filed, and before he could give judgement on the case, Justice Mackie retired (in early 2019). Rather than start the process all over again, the parties have sensibly agreed that I should decide the case on the basis of the evidence given before Justice Mackie, and written and oral submissions made before me. I heard counsel on 4 December 2019, and have received and read their helpful submissions (including supplementary submissions on matters I raised at that hearing). I have also read the transcript of evidence. Since I was not present when any of this evidence was given it would obviously be difficult to reach conclusions about the credibility or otherwise of any witnesses. In the event, for the reasons which will become apparent in the course of this judgment, except in relation to one important issue, which I will discuss later in more detail, issues of credibility don't arise as a factor in the findings I have made.

PLEADINGS

4. In its statement of claim (filed with the writ of summons in June 2014, and not since amended), the plaintiff referred to the terms of its insurance policy with the defendant, referred to the incident that occurred on 11 May 2011 as described above, and claimed:

   i. judgment for the repair costs of $91,277.65
   ii. consequential losses to be quantified at trial
   iii. costs.

5. In a second cause of action the plaintiff alleges:

   1. *that in issuing the [insurance policy to the plaintiff] there was an implied term and or an implied representation that the Defendant would have systems in place to allow swift processing of any claim so as to minimise the damages caused by an incident.*
   2. *Although the Plaintiff's claim was not formally submitted to the Defendant until about the qst of June 2011, the Defendant had been made aware of the accident through the Plaintiff's insurance brokers who were corresponding with the Defendant regarding the Plaintiff's claim.*
   3. *Consistent with the implied term or implied representation under the policy to act swiftly in the processing the claim, on or about 26 May 2011 the Defendant appointed an assessor to carry out the inspection and assessment.*
   4. *However in breach of the implied term and or implied representation, the Defendant concluded its processing of the claim approximately 12 months after the claim was lodged when it conveyed in a letter dated 12 May 2012 that it had declined the Plaintiff's claim.*
   5. *Consequently, the Defendant has in trade or commerce engaged in conduct that was misleading or deceptive or was likely to mislead or deceive, contrary to s.75 of the Commerce Commission Decree 2010.*

Accordingly the plaintiff claims loss and damages ($91,277.65 plus consequential losses and costs) supposedly arising from the alleged deceptive conduct, plus interest of 10% per annum from 1 July 2011 (presumably allowing a 'reasonable' time to process and allow the plaintiff's insurance claim) to the date of judgment.

6. I am puzzled by this second claim. Obviously the reference to the Commerce Commission Decree 2010 should now be read as referring to section 75 of the Fijian Competition and Consumer Commission Act 2010, which prohibits misleading and deceptive conduct in trade. Under section 146 of the Act a breach of section 75 certainly gives rise to an action for damages by any person/organisation who suffers loss or damage as a result of the contravention. But it is not clear to me how performance by the defendant of an implied term or implied representation (even if such a thing is possible) about prompt handling of an insurance claim might have resulted in the incident being covered under the policy rather than not covered as the defendant argues (see below). However promptly the claim was processed, if the defendant is correct in its position, the claim would not be covered. The plaintiff's ability or otherwise to claim under the policy depends on the meaning of the policy and how that meaning applies to what happened to the plaintiff's vehicle. If the policy does not apply, that is not a consequence of the slow processing of the plaintiff's insurance claim, which according has not caused the losses claimed. It is conceivable that the slow processing might have caused other losses, but the plaintiff has made no such claim, and has provided no evidence of what these losses might be. Particularly in a commercial transaction like this no claim can be made in the nature of general damages for stress and anxiety caused by the defendant's delays.

7. The defendant in its statement of defence and counterclaim admits to the existence and terms of the insurance policy as set out in the policy document. It denies that it was aware that the plaintiff's side-lifter was used by the plaintiff in its business as a haulage contractor (a completely pointless denial given the nature and terms of the policy), denies that the side-lifter was accidentally damaged, and that a formal claim was lodged in terms of the policy. It also denies:

   i. that the defendant became liable under the policy to indemnify the plaintiff for damage caused by incident, and that its declining the claim was wrongful and in breach of the policy.
   ii. that the plaintiff has suffered loss and damage arising from the denial of the claim,
   iii. that there was an implied term of the insurance contract that the claim would be processed swiftly or that the defendant would have systems in

place to allow the swift processing of the claim so as to minimise the damage caused.

iv. that the defendant only responded to the claim on 15 May 2012, approximately 12 months after the claim was lodged (it doesn't say when it did respond to the claim).

v. that the plaintiff has suffered loss or damage arising from the defendants failure to swiftly process the claim.

8. The statement of defence also avers (in pleadings that are repetitious, irrelevant and full of evidence, and alongside complaints about lack of particulars in the statement of claim that the defendant has obviously chosen not to pursue or learn from):

i. that the side-lifter was not accidentally damaged within the terms and meaning of the policy; but rather damage occurred due to equipment failure, which was not covered under the policy

ii. that the plaintiff was required to keep the side-lifter in proper mechanical, structural and running order (but does not say that the plaintiff failed to do so)

iii. that the plaintiff had failed to disclose material facts in relation to any structural repairs or mechanical repairs to the side-lifter, its engine, chassis, lifting arm and booms, but in particular had done welding work on the side-lifter to repair a break or crack in the lifting arm or beam of the side-lifter

iv. that the plaintiff knew or ought to have known that if it had disclosed the repairs referred to the Defendant would not have accepted the risk

v. that the failure to disclose this repair was a breach of the Insurance Law Reform Act 1996 (the nature of the breach or the section of the Act said to have been breached was not specified)

vi. that the side-lifter at the time of the incident was being operated by a driver who was not sufficiently qualified to operate the machine, in that he did not hold a class 9 Driving Licence

vii. that the claim was declined because of a combination of these factors

viii. that the Commerce Commission Decree 2010 does not apply to the defendant because it carries on business under the Insurance Act 1998 (under the control of the Reserve Bank of Fiji - the logic of this is not explained).

9. In response to the plaintiff's second cause of action (misleading and deceptive conduct in trade or commerce) the defendant says:

i. it denies making any representations as alleged

ii. it admits that a formal claim was lodged, but denies that it was otherwise aware of the incident involving the plaintiff's side-lifter through the plaintiff's insurance brokers who were corresponding with the defendant regarding the claim
iii. it admits that it appointed an assessor to carry out an inspection of the claim and damage, and provide an assessment, but denies that the appointment was consistent with or required by an implied term or representation under the policy to act swiftly in processing the claim
iv. it admits that it declined the claim, but denies that the claim was declined only in May 2012, and that the time taken to process the claim breached an implied term or representation in relation to the policy. Again it does not say when it declined the claim or for what reason
v. it denies that it has engaged in conduct that was misleading or deceptive, contrary to section 75 of the Commerce Commission Decree, and that the plaintiff suffered any loss from such conduct.

10. The defendant has also lodged a counterclaim, in which it says that in breach of its obligation of utmost good faith, and duty to disclose, and an obligation the plaintiff had under the policy to ensure that the side-lifter was operated by someone who was qualified to do so, the plaintiff had:

i. failed to notify the defendant of unspecified previous damage to and repair of the side-lifter (undertaken without the approval or supervision of the manufacturer) at the last renewal of the insurance policy
ii. acted in bad faith at the time of such renewal (it is not clear whether this is in addition to or simply a repetition of what is alleged in (i))
iii. allowed an unqualified driver to operate the side-lifter
iv. carried out unspecified modifications to the side-lifter that were contrary to the manufacturers 'speculations' (presumably 'specifications'), that weakened the strength of the original structural components in unspecified ways.
v. allowed unqualified personnel to carry out unspecified repair works on the side-lifter without notice to and approval of or supervision by the manufacturer
vi. failed to disclose unspecified material costs to the defendant in breach of unspecified terms of policy, and unspecified obligations that the plaintiff is said to have under '*the* [unspecified] *relevant Insurance Laws of Fiji*'
vii. failed to disclose the fair and current market value of the side-lifter at the time of the renewal of the policy

And that these breaches meant that the plaintiff knew very well that the damage to the side-lifter was not covered under the policy.

11. Accordingly, the defendant says, the plaintiff's claim should not have been lodged, and the costs of $14,4400 incurred by the defendant in investigating and declining the claim are claimed from the plaintiff. Also claimed are unspecified general damages (a novel proposition – particularly in a commercial insurance agreement like this) for breach of contract, non-disclosure and acting in bad faith. These general damages – the defendant pleads in its counterclaim – are to be assessed by the unfortunate court that has to rule on these matters. Happily the general damages aspect of the counterclaim has not, at the end, been pursued, and although the defendant in its closing submissions maintains its claim for special damages (the cost of investigating and processing the claim) no evidence – e.g. proof of the costs incurred, or how the unauthorised repairs were material to the incident or caused any loss to the defendant - has been presented by the defendant in support of this claim.

12. Also abandoned by the defendant in the course of the hearing was the defence related to the qualifications of the driver to operate the side-lifter.

THE EVIDENCE

13. There is very little argument about the events that led to the damage to the side-lifter, and there is no dispute about the written terms of the insurance policy. The debate is about what it means.

14. The only witness who was able to provide any evidence of the incident itself was the plaintiff's driver who was present when it happened, Mr Salen Kumar Raj. Mr Raj is no longer employed by the plaintiff; he left his job there when he had the opportunity to move to New Zealand where he now lives. He still works as a truck driver, now on 26 x wheel truck and trailer vehicles.

15. Mr Raj described what happened at around 8.15 on the morning of 11 May 2011 from the time he collected the full container of wheat at the yard of his employer the plaintiff for delivery to Pacific Feeds in Lami, Suva. This was only a 3 minute drive from the plaintiff's yard. When he was shown where the container was to be put down – the same place as he had often placed containers previously - he put, as was his invariable practice, planks of heavy timber on the ground. This is to provide a stable base for the stabilizers of the side-lifter. As Mr Raj pointed out in the course of his evidence, operators don't always know how hard the ground is, and the timber is used (even if the floor is concrete) as a safeguard to spread the load. With the timber in place he then extended the hydraulic stabilizer arms, which are incorporated in the lifting machinery at each end of the container, onto the timber planks. The purpose of the stabilizer arms is to hold the truck and side-lifter level and steady as the weight of the container swings to the side of the truck in the course of loading and unloading.

Mr Raj then operated the side-lifter (which has hydraulic lifting arms at each end of the container) to lift the container up off the deck of his truck, and to swing the container to the side of the truck where he would lower it to the ground. This operation is controlled by him using a remote device that allows him to stand at a safe distance while operating the equipment.

16. Mr Raj described what happened next. He said that as the 22 tonne container swung outside the deck of the truck the rear stabilizer started to sink into the ground. He tried to lower the container quickly to alleviate this dangerous situation, but before he could do so there was a load sound, hydraulic oil gushed from a broken pipe, and the rear lifting arm of the side-lifter collapsed, sending that end of the container crashing to the ground. The front lifting arm of the side-lifter remained intact, and held the other end of the container hanging in the air.

17. In the course of cross examination by counsel for the defendant Mr Raj insisted that he had told his employer after the incident about the sinking of the stabiliser into the ground. He was referred to the plaintiff's claim document, which makes no mention of this. He was also asked about whether he had created unsafe conditions by not trying to put the container in a safe place. He answered this by pointing out that he was directed by the supervisor at Pacific Foods to put the container down where he did, and that he had put containers down in that spot on numerous occasions previously. He says that neither he nor anyone else could possibly have anticipated that the stabilizer would sink into the ground.

18. The importance of the stabilizer being placed on solid ground is emphasised in the evidence of the defendant's sole witness, its assessor Mr Ronald Rickman. Mr Rickman's conclusion from his investigation of the incident, was that the break in the side-lifter arm was the result of 'equipment failure', and the side-lifter was therefore not 'accidentally damaged' as the policy required. Instead, he thought, the incident fell within one of the exclusions under the policy.

19. In the course of his evidence Mr Rickman (who has been an insurance assessor since 1992) emphasised the importance of a scene examination, and of interviewing the witnesses. In relation to incidents of this sort involving a side-lifter he spoke of the importance of establishing that ground subsidence was not a factor, and referred to two previous incidents he had advised on which were the result of ground subsidence, and which had been accepted by the insurer as accidents. Mr Rickman also gave a useful explanation of why firm ground is important, and the mechanics of subsidence causing the collapse of the machinery.

20. However it was apparent that Mr Rickman had made certain wrong assumptions in reaching the conclusion he did. Perhaps because he interviewed the plaintiff's driver and management, and inspected the damaged side-lifter at the plaintiff's premises in Lautoka, it seems that Mr Rickman assumed that the incident had occurred at those premises (which he was familiar with) and so did not go to Suva to inspect the Pacific Feeds yard where the incident actually occurred. He refers to the fact that he interviewed the driver/operator, but says that part of the statement/interview was in Hindi, and was translated by one of the plaintiff's managers. His report therefore refers to the 'fact' that *the operator was discharging a container in the normal manner on firm ground when the main beam component failed … .* Because he had identified that at some point previously welding repairs of inferior quality had been carried out on the arm of the side-lifter near, but not exactly in the same place as where the arm broke on the 11th May 2011, Mr Rickman then assumed – being unaware of the evidence of ground subsidence, and in the absence of any other explanation for why the failure had occurred - that this earlier repair had been a factor in that breakage. In making that assumption Mr Rickman also mistakenly thought that it was not possible in Fiji to obtain metallic analysis of the breakage, and so none was attempted. The plaintiff produced evidence in court that such analysis is available in Fiji, but by then it was too late to have the damaged equipment analysed to establish whether the earlier repairs were a significant factor in the 2011 failure.

21. But even if they were, Mr Rickman's own evidence of the importance of stable ground means that the driver's evidence of subsidence cannot be ignored. This evidence, if accepted, provides the missing external causal element without which Mr Rickman concluded that the incident was caused by 'equipment failure'. The defendant then relied on that conclusion in declining the plaintiff's insurance claim.

22. In the course of her cross-examination of Mr Rickman counsel for the defendant Mr Sharma objected to the thrust of Ms Lidise's cross-examination. He queried the questions about the importance of ground stability and suggested that this was something that the plaintiff had not pleaded as a cause of the incident, and/or was something that the plaintiff had previously failed to disclose as a factor in the collapse of the side-lifter. Mr Sharma pointed out that the information about subsidence was not included in the plaintiff's claim form (or the accompanying Investigation Report by the plaintiff). It was also true however that the issue of subsidence was first raised in the evidence of the driver/operator Mr Raj on the first day of the trial in November 2017, a year before Mr Rickman gave his evidence as the sole witness for the defendant. Mr Sharma had cross-examined Mr Raj on the issue (see paragraph 17 above), including referring to the absence of any reference to it in the claim document.

23. This matter was left to be dealt with in submissions, and Ms Lidise was permitted to continue with her cross-examination. In the event the defendant's counsel has not referred to this issue in her closing submissions, but I think it is nevertheless important to deal with it. It might be that the failure to make submissions on this matter arises from the change of representation for the defendant, but I would not want it to be said that the defendant was prejudiced in its defence of the claim by the inability of Justice Mackie to give judgment on the matter.

24. Evidence was also given, for the plaintiff, touching on this issue by Mr Osea Tuinivanua, a Senior Technical Officer with the National Occupation Health and Safety Service at the Ministry of Labour. Mr Tuinivanua explained the role of his unit in the inspection of machines such as the plaintiff's side-lifter, and how these machines are inspected and tested. Mr Tuinivanua confirmed, contrary to what Mr Rickman had assumed, that the OHS Service does have the ability to test the adequacy and safety of welding work, such as that done on the plaintiff's machine prior to the incident. However, of course, no such testing was done on the plaintiff's machine, and we don't know what that testing would have revealed had it been carried out. In cross-examination by counsel for the defendant this witness was asked questions about the lifting capacity of the plaintiff's side-lifter, which he confirmed was 36 tonnes, and invited to comment on the fact that the side-lifter had collapsed while carrying only 22 tonnes. Mr Tuinivanua agreed that this meant that there must have been *some kind of equipment failure.* Although I accept that Mr Tuinivanua gave his answer honestly, he is not an expert, had no knowledge of the particular incident, how it happened or what caused it. The defendant invites me to attach some weight to this expression of opinion. I am not prepared to do so.

25. Nor do I attach much weight to the evidence of Mr Mohammed Asim, called by the plaintiff. Mr Asim, who has a great deal of experience in the insurance industry, had been engaged by the plaintiff to assist in its vain attempts to persuade the defendant that the incident with the side-lifter was an accident that was covered by the policy. Counsel for the plaintiff explains in her submissions that Mr Asim was called, not as an expert in insurance, but rather as a person with extensive experience as an insurance broker. I am not sure that there is a distinction; he is either a witness of fact, or he is an expert giving his opinion (which may include providing factual evidence of how he reached that opinion). In whatever capacity he was called, his evidence seemed to dangerously intrude into the role of the Court. His opinion (given at some length and with many detours) that the incident with the plaintiff's side-lifter was an accident, is exactly the question I have to decide. In so far as his evidence dealt with the way insurance companies operate I don't find it

particularly useful in this case. It is also important to note that neither Mr Asim or Mr Tuinivanua were aware of the driver's evidence of the ground subsidence, and without that information their thoughts on the cause of the incident are of little value, however honestly given.

FINDINGS ON EVIDENCE AND ON NON-DISCLOSURE

26. Although I have not had the benefit of seeing or hearing the witnesses give their evidence I have read the transcripts of evidence carefully, and have come to a clear conclusion about the cause of the incident on 11 May 2011, which in turn leads to a clear finding in the case. The key to the case is I believe the driver's evidence of subsidence occurring immediately before the side-lifter arm collapsed, accompanied by Mr Rickman's explanation of how and why unstable ground can cause stress to and breakage of the lifting machinery. As I have mentioned previously, if the driver's evidence of subsidence is accepted, this may be the external causative factor that means – as Mr Rickman acknowledges in his evidence - that the incident was clearly an accident, rather than merely equipment failure. Although I am not satisfied that there is any evidence (as opposed to Mr Rickman's conjecture) of a component failure arising from the earlier repairs, even if there had been, the fact that unexpected ground subsidence also contributed – if that is my conclusion - makes this an accident and means that the plaintiff's claim is covered by the insurance policy.

27. There are a number of factors that together persuade me that the driver's evidence of subsidence is truthful, and is not merely an after the event reconstruction of what happened to answer the defendant's reliance on 'equipment failure:

i. The first factor is the way the evidence emerged. It was given quite early in the driver's evidence, and was volunteered, seemingly spontaneously, in the course of a narrative by the driver of the sequence of events leading up to the breakage. I have reproduced this part of the evidence here:

Q. Could you just tell us what happened that morning when you reported in for work?

A. On that given day My Lord, I had taken the container from our yard; it takes about three minutes to reach there. I took the container My Lord, and parked the truck on the side of the road, we asked the customer where this container needs to be put, My Lord.

We were shown a place beside the gate My Lord, where the container had to be put, I put the truck inside the yard, I put the timber on the ground and put the stabilizer on the timber, My Lord, as there was gravel on the ground. I used the machine, My Lord to put the container on the side with the help of the arm.

My Lord, when I had lifted the container and was taking it outside; the rear stabilizer of the truck, My Lord, started to sink to the ground. I tried quickly to put the container on the ground, My Lord. The place where the ram is; it gave a big sound and the oil spilt from outside, from that place, My Lord. The arm of the machine fell on the right hand side of the truck, My Lord, at the back.

The detail about the ground sinking was one of a number of details ('it takes about three minutes', 'we were shown a place beside the gate', 'there was gravel on the ground') that are not essential to the story, but are obviously part of what the witness recalls of what happened that day. It is hard to imagine that these are lies. If the evidence was untrue one would have expected it to be given in a much less natural way. As can be seen, there were no pointed questions by counsel in her examination in chief relating to the state of the ground or other detail included in the passage, or invited evidence as to what lead to the side-lifter arm collapsing. Questioning of this sort in examination in chief points to an awareness at least by counsel, usually by the witness as well, of what components of the evidence are important. So the manner in which the comment about subsidence was given by Mr Raj suggests to me that it was as much a surprise to the plaintiff's counsel as it obviously was to the defendant. i.e. it was not something that had been previously discussed or planned by the plaintiff or the plaintiff's counsel.

ii. Second was the way in which the driver gave all of his evidence. Again I am well aware that I was not present when this evidence was given, and have only read it in a transcript, but the impression I have is of someone who was telling the story as honestly and fully as he could. He knew what he knew, and was there to tell, and also what he didn't know. He did not try to exaggerate or embellish his evidence and he did not attempt to give evidence on matters that he couldn't comment on. It is important too to recall that he no longer worked for the plaintiff at the time he gave evidence, and had come from New Zealand to do so. There was no obvious reason for him to be trying too hard to help the plaintiff, and this is consistent with how he gave his evidence. One passage illustrates the point. Mr Raj was being asked in cross-examination whether he or his assistant put the timber on the ground for the stabilizer. Mr Sharma had just reminded the driver that he was on oath, to which Mr Raj replied that he was not lying, then this exchange occurred:

Q. *Now on that day witness, who put the wood?*
A. *My Lord, on the given day I'm not aware who put the timber but without putting the timber we won't put the stabilizer down, regardless if is a concrete floor still we have to put the timber under the stabilizer.*

This suggests, to me, someone who is not easily intimidated, but also is not trying too hard to please his questioner. He is not afraid to say, in effect, 'I don't know' or 'I can't remember'.

iii. Thirdly, my impression from his cross-examination, is that Mr Sharma, counsel for the defendant, believed that Mr Raj was an honest witness. Although he legitimately tested aspects of the driver's evidence (e.g. the lack of any previous reference to the subsidence), there was none of the close questioning or accusations of lying that I would have expected if Mr Sharma – who unlike me was there when the evidence was given, and was able to observe the demeanour of the witness - believed that the evidence of subsidence was an invention.

iv. Finally I have taken into account what was <u>not</u> said in evidence on behalf of the plaintiff, and how the plaintiff's case was <u>not</u> presented. Had the plaintiff and its counsel been aware of the detail about the subsidence I would have expected it to be relied on in its pleadings, and to have been referred to in the extensive correspondence between the plaintiff and its broker and the defendant that preceded and followed the defendant's decision to decline the claim. Furthermore, none of the other witnesses for the plaintiff refer to this issue in their evidence. If, as the defendant would no doubt have suggested had it addressed submissions on this point, the evidence of subsidence is simply a story invented by the plaintiff to counter the 'equipment failure' narrative relied on by the defendant in declining the claim, I would have expected more evidence from other witnesses for the defendant referring to the issue and explaining their failure to mention this previously. I would also have expected the plaintiff to have called its own evidence about the importance of ground stability, rather than relying on the defendant calling Mr Rickman, and hoping to get from him in cross-examination the evidence he fortuitously gave.

28. The impression I have is that the evidence of subsidence emerged unexpectedly from the driver in the course of his evidence. I believe him. He may or may not have mentioned this previously (it is certainly not included in his statement immediately following the incident) but it is the sort of detail the significance of which might easily be missed, and the fact that it emerged only when it did does not mean that it is untrue. I assume that the driver did not mention this when he was interviewed by Mr Rickman, and it is easy to imagine that Mr Rickman, being under the mistaken impression that the incident had occurred in Lautoka in the plaintiff's yard which he was already familiar with, might well not have questioned Mr Raj on the stability issue. The fact that the interview was

conducted partly in Hindi and translated to Mr Rickman would not have helped. I therefore accept that the stabilizer arm of the side-lifter subsided into the ground as described by Mr Raj, and that this caused the breakage that occurred, with the resulting damage to the plaintiff's machine.

29. What then is the significance of the fact that this evidence emerged so late in the day, and was not referred to in the pleadings of the plaintiff? Counsel for the defendant, in the course of his objection to Ms Lidise's questioning of Mr Rickman about the importance of ground stability as a factor in the breakage, referred to the obligation of disclosure, the need for utmost good faith, that this new evidence/argument had not been pleaded, and the possibility that the case would need to start again. Dealing with each of these arguments:

    i. The purpose of the statement of claim is to plead assertions of fact sufficient to found the relief sought. In the present case this means that the statement of claim needed to contain pleadings as to the existence of an insurance policy, that the terms of the policy provided cover for certain events, that such an event had occurred, and that the plaintiff's property was damaged in the course of that event such that the plaintiff was entitled to be indemnified for that damage. The statement of claim must also contain sufficient detail to fully and fairly inform the defendant of the nature of the claim against it. Except to the extent that it is necessary to fulfil this last objective, evidence and argument have no place in the statement of claim (Order 18, rule 6(1) High Court Rules). A defendant who complains that the pleadings contain inadequate information as to the claim, is entitled to ask for amended pleadings, or further particulars of the claim. If that information is not provided (normally and most conveniently that information would be provided in the form of an amended statement of claim) the defendant is entitled to ask the Court to order the plaintiff to do so. A defendant who does not ask for it cannot complain that the statement of claim has insufficient information, and will be assumed to have what it requires to file a statement of defence. This is the position in which the defendant finds itself here. There is no question that the plaintiff's statement of claim is sufficient to properly plead its cause of action. It refers to the policy of insurance, the terms of that policy, the items that are covered by the policy, the occurrence of the incident in which that property was damaged, and the cost of repairing the damage. That the statement of claim is sufficient is demonstrated by the statement of defence, which presents all the responses that the defendant now relies upon, including the assertion (a 'fact' from the perspective of the defendant) that the damage to the plaintiff's side-lifter occurred as a result of 'equipment failure' rather than an 'accident' and so is not covered by the policy.

Again, this is a sufficient assertion, and again, the plaintiff is entitled to ask for more clarity in the pleadings or more particulars to be fully and fairly informed about the basis for the defence. It would not be unusual in an insurance case for the insurer/defendant to have more information about the incident than the plaintiff. This case illustrates the point. The defendant engaged Mr Rickman who provided information known only to the defendant (except to the extent that it chose to share it with the plaintiff) providing reasons that it might, if the defendant chose, rely on to decline the claim. This included information about the importance of stable ground. I do not accept that the plaintiff was obliged to include in its statement of claim the assertion that the ground had subsided immediately prior to the side-lifter collapsing and being damaged. That information is evidence about how the collapse occurred that became relevant to the case only when the defendant relied on 'equipment failure'. In this case it has turned out to be supremely important evidence, but that does not mean that it needed to be pleaded, any more than it was necessary to plead the weight of the container (yet if the container had weighed 2 rather than 22 tonnes it probably would not have been sufficient for the side-lifter to break, whether or not the ground subsided). I do not accept that the absence from the statement of claim of an assertion about subsidence means that the statement of claim is inadequate, or – particularly in the circumstances of this case, where the hearing of evidence was spread over nearly 12 months – that the defendant was taken by surprise to the extent of being prejudiced in its defence.

ii. On the issue of disclosure I also find against the defendant. While it is true that under the common law an insured had onerous obligations of disclosure and utmost good faith, fortunately those obligations have been modified by statute, and so I don't need to rule on what under the common law might have been the significance of the failure to include reference to the subsidence, however inadvertent that was, on the success or otherwise of the plaintiff's claim. In Fiji section 14 of the Insurance Law Reform Act 1996 provides:

> I***nsurer to inform of duty of disclosure***
>
> *(1) The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure.*
>
> *(2) An insurer who has not complied with subsection (1) may not exercise a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.*

There is no evidence here that the defendant provided the information referred to in section 14(1) either at the inception of the policy, or at the time of each annual renewal. I am also satisfied that any failure by the plaintiff to provide the information about subsidence was inadvertent (only the defendant had access to the information from Mr Rickman about the importance of ground stability) not fraudulent, and the defendant is not entitled to decline the claim or cancel the policy (which it has not sought to do) for non-disclosure of this information. This also answers the defendant's complaint about the non-disclosure of the other information including the repairs carried out on the side-lifter by the plaintiff prior to the incident which it the subject of this case.

30. I do not therefore accept that there is any basis for the defendant's objection to the admission of evidence about the subsidence. That evidence, which I accept for the reasons discussed above, is relevant to the issue whether the plaintiff's claim is one that is covered by the insurance policy, or falls within an exception to the policy, and the plaintiff is entitled to rely on it in support of its case.

IS THE DAMAGE TO THE SIDE-LIFTER COVERED BY THE POLICY?

31. Turning then to the crux of the matter, is the damage to the plaintiff's side-lifter on 11 May 2011 covered by the plaintiff's insurance policy with the defendant? This depends on whether the incident is covered, and not excluded by the terms of the policy issued by the defendant. The relevant wording of the policy (reproduced as it appears in the policy document) includes the following (I have omitted sections that don't appear to apply to this case):

INTRODUCTION

Thank you for taking out Motor Vehicle Insurance Policy with The New India .
This is your Policy – it includes a schedule and recommend that you carefully examine the document and keep it in a safe place. This Policy is written in everyday English for easy reading. Please ensure that you understand the terms of the Cover if you require further explanation, please contact any of our nearest Branch Offices.

DEFINITIONS

"Vehicle" means the vehicle described in the schedule plus, whilst on or in the vehicle is standard accessories its standard tools and spares and those additional accessories, tools and spares which specifically have been declared in writing to The New India.
"Market value" of the vehicle means the retail value of vehicles of a similar type, age and condition.

TERMS OF POLICY

SUM INSURED

Your vehicle is insured for its current market value at the time of the loss or damage, but if the Sum Insured is stated in the Schedule then it is Limited to that sum or the current market value whichever is the less.

WHAT YOU ARE COVERED FOR:

(These sections should be read in conjunction with what you are not covered for (exclusions) & Section on claim)

Section 1: Loss or Damage to your vehicle

Accident

If your vehicle is accidentally damaged or it is maliciously damaged by a person other than yourself, The New India will pay the Cost of repairs or if The New India consider that it is uneconomical to repair, The New India will pay you its current market value or sum insured whichever is less.

WHAT YOU ARE NOT COVERED FOR (EXCLUSIONS)

You have no protection under this policy if, at the time the loss or damage occurs, your vehicle or any other vehicle this policy states it will cover):

Unsafe Condition

3. *Is being used in an Unsafe Condition or unroadworthy condition or without proper Certificate of fitness or is loaded contrary to law.*

Hiring

8. *Loss of use of your vehicle, depreciation, wear, tear, rust corrosion and existing defects;*
9. *Damage to or failure or breakage of the engine, transmission, mechanical or electrical systems unless arising from an external accidental cause;*

32. In spite of the claim that it is written in 'everyday English' the policy is not particularly easy to read and understand. Apart from the grammatical errors (the above extract – omitting irrelevant parts - is reproduced exactly as per the policy) the layout is not helpful. What, for example, is the significance of the heading 'Hiring' above clauses 8 and 9? Does it mean that these exclusions apply only if the vehicle is being hired out? For the purposes of my analysis below I have ignored this heading.

33. In this case, the plaintiff argues that the incident is covered by the wording under the heading *Accident* above, whereas the defendant says:

i. That side-lifter was not *accidentally damaged* in the incident so as to fall under that clause.
ii. That the exclusion in clause 9 above applies to this machine because the failure did not arise from an *external accidental cause*.

34. The parties agree in their submissions from counsel, and I accept, that the burden of proof of the allegation in paragraph 33(i) above rests with the plaintiff, while the defendant has the onus of showing that the exclusion referred to in paragraph 33(ii) applies.

35. Section 29 Insurance Law Reform Act 1996 sets out the principles to be applied in interpreting a policy of insurance:

> ***29***. *Notwithstanding any law or agreement to the contrary, the following rules of construction shall be observed in the interpretation of any proposal for insurance or any policy of insurance or endorsement on a policy of insurance:*
>
> *(a) the intention of the parties, ascertained from the face of the documents, documents incorporated therewith and surrounding circumstances, shall prevail;*
> *(b) the whole of a document shall be looked at and not a particular clause;*
> *(c) written words shall ordinarily be given more effect than printed words;*
> *(d) wherever possible, the grammatical construction shall be adopted, but the intention of the parties shall be of paramount consideration;*
> *(e) words shall be construed in their plain, ordinary, popular, commonsense and natural meaning except that terms of art or technical words shall be understood in their strict, technical and proper sense unless the context controls or alters the meaning;*
> *(f) the meaning of a word is to be ascertained with reference to its context and may be restricted or modified thereby, and where, from the context, it appears that the parties intended to use the word in a special and peculiar sense, and not in a meaning which it might otherwise bear, the word shall be construed in accordance with their intention;*
> *(g) subject to the precise terms, subject matter and context of a clause, where specifications of particular things belonging to the same genus precede a word of general signification, the latter word of general signification, shall be confined in its meaning to things belonging to the same genus and shall not include things belonging to a different genus;*
> *(h) where a word of general signification is followed by words of limitation or definition, which introduce words of narrower signification, the first word shall not be taken in its full sense but shall be construed as limited by and applying only to the particulars specified;*

(i) *words shall be construed to mean what they say, unless there is some strong ground for placing a different construction on the words from what they naturally import;*

(j) *words shall be construed liberally so as to give effect to the real intention of the parties and the document shall not be so construed as to defeat the object of the transaction or as to render it illusory;*

(k) *in any case of ambiguity, where words are capable of more than one construction, the reasonable construction shall be taken to represent the intention of the parties;*

(l) *the language of a document shall not be strained in favour of or against any party but if there is any ambiguity, the ambiguity shall be resolved in favour of the person insured;*

(m) *every effort shall be made to reconcile inconsistencies, but where there is an inconsistency between the wording of a policy and that in the proposal or any earlier document, the policy shall be regarded as expressing the true intention of the parties in the absence of sufficient evidence to the contrary;*

(n) *an express term shall override any implied term inconsistent with it.*

36. This is a formula for interpretation that arguably should be applied more widely than only to insurance policies, but that is an issue for another day. In the context of the present case there are two clauses from the section that deserve particular attention. These are clauses (e) relating to giving words in the policy in their *ordinary popular commonsense and natural* meaning, and clause (k), which requires that any ambiguity shall be *resolved in favour of the person insured*. This latter stipulation reflects the fact that the policy document, as is obviously the case here, is usually a standard document written up by the insurer. The insurer has the opportunity not only – from the breadth of situations that it encounters – to understand the significance and all the implication of using particular words, but also to decide how the risk that is to be covered is defined, and what situations are to be excluded, and how those exclusions will be expressed. The insured usually has very little in-put into the policy document, and often does not have a full appreciation of the whole range of risks that the insurance needs to cover (certainly less appreciation than the insurer, which will have encountered a myriad of claims across its portfolio, and will have a very good understanding of what situations might arise with any particular client depending on the nature of that client's business).

37. Therefore, if the insurer wishes to exclude a claim in unambiguous terms, it has the opportunity to do so. But of course, at the time the cover is issued, the incentive for the insurer is to represent its cover as being broad, and its exclusions as being limited. Only when a claim is made does the insurer become interested in construing the policy more narrowly. This is why it is proper, and fair, that any ambiguity be construed against the insurer, and in favour of the insured.

38. So the issues here are what is the meaning of the phrases *accidentally damaged* and *external accidental cause* used in the policy? The expressions *accidentally* and *accidental* are not defined in the policy. They are not terms of art or technical terms, and they are therefor to be given their *plain, ordinary, popular, commonsense and natural meaning* as required by section 29 of the Insurance Law Reform Act 1996 as quoted above. I accept that in the expression *external accidental cause* the use of the surrounding words affect the meaning of the phrase beyond what it would be if the expression were simply *accidental cause* or *by accident,* but that is not because the meaning of *accident* or *accidental* is different, rather it is because whatever is meant by that term is qualified by the requirement that it arise from an *external cause* (whatever that might mean has also to be decided applying the same principles of interpretation).

39. As one would expect the words have attracted a great deal of judicial attention, usually in the context of similar issues as arise in this case. In New Zealand because of its Accident Compensation scheme, there is a large body of work around the interpretation of the words *personal injury by accident* and it is clear that there is a valid distinction to be drawn between what is deliberate for some, and accidental for others. Hence an assault that is deliberate from the perspective of the perpetrator, is nevertheless likely to be accidental from the perspective of the victim. In Stroud's Judicial Dictionary (1971) 4th Ed three pages are devoted to 'accident' and another page to 'accidental' referring to numerous court decisions. In the Concise Oxford English Dictionary (2011) 12th Ed (which I prefer as a the source of a plain, ordinary, popular, commonsense and natural meaning to Stroud and its cases) the definition of 'accident' is:

> *An unfortunate incident that happens unexpectedly and unintentionally*

And the definition of 'accidental' is:

> *happening by accident.*

40. In **Fenton v Thorley & Co Ltd** [1903] AC 443 at 453 Lord Lindley stated in the House of Lords:

> *The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause, and if the cause is unknown, the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness, but for legal purposes it is often important to distinguish carelessness from other uninvited and unexpected events.*

and in the decision of the Supreme Court of Canada in **Can, Indemnity Co v Walkem Mach. & Equip. Ltd** (1975) 3 DLR 1, at page 6 Pigeon J said:

> *With respect, this is a wholly erroneous view of the meaning of the word 'accident' in a comprehensive business liability insurance policy. On that basis, the insured would be denied recovery if the occurrence is the result of a calculated risk or of a dangerous operation. Such a construction of the word 'accident' is contrary to the very principle of insurance, which is to protect against mishaps, risks and dangers. Whilst it is true that the word 'accident' is sometimes used to describe unanticipated or unavoidable occurrences, no dictionary need be cited to show that in everyday use, the word is applied as Halsbury say in the passage above quoted, to any 'unlooked for mishap or occurrence'.*

41. In the present case I have no hesitation in accepting that the incident with the plaintiff's side-lifter was an accident in the normal use of that expression. In my view, where the phrase *accidentally damaged* is used in the part of the policy headed <u>WHAT YOU ARE COVERED FOR</u> it is used in its ordinary meaning of being damaged by an '*unlooked for mishap or occurrence'*, or through a*n unfortunate incident that happens unexpectedly and unintentionally.* The purpose of this part of the policy (see my comments in paragraph 37 above) is to express what is covered by the policy in broad and relatively unconstrained terms that will give comfort to the insured. There is no need for the words in this section to be construed narrowly or restrictively, because the insurer has excluded those risks that it does not wish to cover under the heading <u>WHAT YOU ARE NOT COVERED FOR (EXCLUSIONS)</u> further on in the policy document. In answer to the first part of the questions posed in paragraph 32 above, I therefore find that the side-lifter was 'accidentally damaged' and the incident is one that is covered by the policy, unless excluded.

42. The exclusion in clause 9 of the policy relied on by the insurer refers to:

> *Damage to or failure or breakage of the engine, transmission, mechanical or electrical systems unless arising from an external accidental cause;*

Use of the word *external* is a common device adopted by insurers to distinguish cases of inherent or internal weakness (which are not intended to be included in accident cover –as distinct from life cover, where what is insured against is more usually death from whatever cause). It's purpose when used in the policy issued in this case by the defendant is to exclude cover for damage that occurs through inherent weakness (whether this arises from wear, defective work, or design flaws). It is generically the same as the exclusion in clause 8 for 'rust, corrosion' etc. These are risks that can and should be managed by the insured,

and the insurance policy is not designed to protect the insured against the consequences of poor management, maintenance or use of its vehicles.

43. That this is the focus of this exclusion is shown by the instructions given by the defendant to, and the work done by Mr Rickman, who was asked by the defendant to investigate and report on the plaintiff's claim. As I have mentioned previously, it seems that Mr Rickman made certain assumptions about how the incident occurred that meant that he did not look more closely at the causal effect of ground subsidence. Instead, in his search for what caused the accident, he looked at the likely impact of some previous repairs to the side-lifter machinery. Of course he was hampered in this too by his belief that there was no-one in Fiji qualified or equipped to examine the adequacy and strength of the repairs, and hence he was obliged to act on assumptions not supported by any evidence. But it is the fact that this was the focus of his attention that I am interested in. Mr Rickman was looking, as I am sure he knew the defendant expected him to, for evidence that would enable him to say whether the breakage arose from an external accidental cause or from something else. This reinforces for me my interpretation of the respective sections of the insurance policy as set out above.

44. The defendant accepts that it has the burden of showing that an exclusion applies. It has not discharged that burden. In part that is because no tests were done that showed that the break to the side-lifter was caused or contributed to in any way by the earlier repairs that the plaintiff had carried out. Although Mr Rickman speculated that these earlier repairs may have been a factor in the breakage that occurred in May 2011, his evidence does not go beyond pointing to the nearby repairs and wondering whether they were a factor. He was asked in examination-in-chief where exactly, in relation to the earlier repairs, the side-lifter broke, but was unable to say with any certainty. There was then the following question and answer (still in examination-in-chief) (at p144 of the Notes of Evidence):

> *Q. Now the plaintiff, Mr Rickman, is saying that the accident was not caused by welding or equipment failure, what do you have to say about this?*
>
> *A. Well if the plaintiff says that; I will ask them to say what was it caused by; either they can say that it wasn't well, because they were responsible for … well; but if its not well, as they said earlier, its just my interpretation. There is nothing outside, no outside influence if the operator, who is an experienced operator and his … If the operator had not … lever, ……. It will put additional stress on old equipment but had … anyway; but if it's not an accident, I don't know. What did fail, how did it happen if it wasn't an accident, if it wasn't caused by failure of the equipment. Its equipment failure. People might decide to call this an accident but it is basically an equipment failure.*

Essentially this is a guess in the absence of other evidence. It falls a long way short of persuading me, as the defendant must do on the balance of probabilities, that the incident arose from a failure or breakage to the side-lifer that did not arise from an external accidental cause. The defendant's argument for equipment failure is further weakened by the late emerging evidence of ground subsidence. Without this evidence we can only speculate about why the failure happened. With it, there is suddenly a probable (Mr Rickman emphasises the importance of ground stability) explanation; but one which is not reconcilable with the exclusion the defendant seeks to rely on.

CONCLUSION AND JUDGMENT

45. There appears to be no dispute about the amount claimed by the plaintiff for the cost of repairs to the side-lifter. Judgment is therefore entered for the plaintiff against the defendant in the first cause of action in the sum of $91, 277.65.

46. In addition to this amount the plaintiff has claimed interest, and costs on an indemnity basis. In the plaintiff's original closing submissions the interest rate claimed was 6% per annum, but in supplementary closing argument (provided at my request covering certain aspects of the burden of proof and the effect of the Insurance Law Reform Act 1996 on the right to cancel for non-disclosure) counsel for the plaintiff referred to the stipulation in section 34 of the Act in relation to interest on unpaid claims. The section provides:

> ***34 Interest on claims***
> *(1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this Section.*
> *(2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is earlier of the following days:*
> *(a) the day on which the payment is made;*
> *(b) the day on which the payment is sent by post to the person to whom it is payable.*
> *(3) The rate at which interest is payable in respect of a day included in the period referred to in sub-section (2) is the rate that is prescribed by regulation*

In the Insurance Law Reform (Interest Rates) Regulations 2004 the interest rate is set at 10% per annum , and is to apply from the date specified in subsection 2 (to be determined by the Court) as the commencement date, to the date on which the amount due has been paid by the insurer.

47. In the present case the information about subsidence, which has proved to be important to the plaintiff's claim, emerged only at trial. However in my view this is as much the fault of the defendant as it is of the plaintiff. Had its assessor carried out a more thorough exploration of what had occurred, rather than making assumptions about where the incident happened, the firmness of the ground, and the significance of the previous repairs and whether they could be tested for, he might have arrived at a different outcome, which might have enabled the defendant to reach a better, and better-informed, decision on whether or not to allow the plaintiff's claim, and if not to provide a more definitive reason for declining it. In all the circumstances I find that it was unreasonable of the defendant to have withheld payment beyond the first anniversary of the incident, i.e. 11 May 2012, and interest under s.34 of the Act is to run from that date to the date of eventual payment by the defendant.

48. The defendant's counterclaim is dismissed, as is the claim in the plaintiff's second cause of action

49. The plaintiff is entitled to costs to be fixed on a party and party basis. This is not a case that calls for indemnity costs.

At Lautoka this 7th day of February, 2020

SOLICITORS:
Young & Associates – Plaintiff
Vijay Naidu & Associates – Defendant