

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

[CIVIL JURISDICTION]

CIVIL ACTION NO. HBC 109 OF 2022

BETWEEN : **RABEN BHAN SINGH** of Vitogo Parade, Lautoka,
Businessman. **PLAINTIFF**

AND : **SUN INSURANCE COMPANY PTE LIMITED** a Fiji owned and
operated commercial and personal lines insurance company
having its Head Office located at Kaunikula House, Suva.
DEFENDANT

Before : Master P. Prasad
Counsels : Mr. A. Prasad for Plaintiff
Mr. R. Vananalagi for Defendant

RULING

(Strike out)

1. The Plaintiff brings this action against the Defendant for the alleged breach of an insurance policy.
2. The Plaintiff through his Amended Statement of Claim (**Claim**) filed on 6 September 2023 states as follows:
 - a. The Plaintiff was the owner of the property situated at California Street, Lautoka described as Lovu C/N 401 (**Plaintiff's Property**).
 - b. On 14 October 2020, via an insurance policy number 10033200HOUP006947 (**Policy**) the Defendant insured the Plaintiff's Property for a sum of \$150,000.00.
 - c. The Plaintiff has two separate agricultural leases in the Lovu area being Lovu C/N 326 and Lovu C/N 401. Lovu C/N 326 is a vacant land and Lovu C/N 401 has a house built on it.
 - d. The Plaintiff's insurance cover for the house on Lovu C/N 401 was for fire.
 - e. The Plaintiff did not insure Lovu C/N 326 as it is a vacant land.
 - f. The Policy was renewable every year and was valid when on 25 April 2021, the Plaintiff's Property was destroyed in a fire.

- g. On 29 April 2021, the Plaintiff lodged an insurance claim with the Defendant.
- h. On 21 October 2021, the Defendant rejected the Plaintiff's claim on the grounds that the Plaintiff's Property had been unoccupied for more than 30 consecutive days.
- i. On 24 November 2021, the Plaintiff's solicitors advised the Defendant that the Plaintiff's Property was not unoccupied and that the Defendant needed to compensate the Plaintiff for the loss incurred from the fire.
- j. In breach of the Policy the Defendant has failed to proceed with the Plaintiff's insurance claim.

3. The Plaintiff then claims the following reliefs:

- a. \$150,000.00 being amount covered by the Policy.
- b. General damages for breach of contract.
- c. Compensation under section 127 of the Fair Trading Decree.
- d. Interest on the sum of \$150,000.00 at the rate of 13% per annum from April 2021 to the date of judgment.
- e. Costs of the action on Solicitor/Client basis.
- f. Such further or other relief as this Honourable Court deems just.

4. The Defendant filed its Statement of Defence (**SOD**) to the Amended Statement of Claim on 21 September 2023 stating as follows:

- a. The Plaintiff was the insured party under the Policy for property situated at California Street, Lautoka described as Lovu C/N 326.
- b. The Plaintiff had proposed the property known as Lovu C/N 326 on the basis of which the Policy was issued.
- c. The sum insured was \$150,000.00.
- d. The Policy was current at the time of the fire.
- e. The fire took place on a property situated at California Street, Lautoka described as Lovu C/N 401 and not on the property situated at Lovu C/N 326.
- f. The insurance claim by the Plaintiff was denied on the basis of an express term of the Policy which did not cover loss to property which was left unoccupied for more than 30 consecutive days, which exclusion applied to the property in respect of the Plaintiff's insurance claim.
- g. The Plaintiff fraudulently concealed/failed to disclose and/or misrepresented to the Defendant that: (i) at the time of contracting the Policy, the Plaintiff's tenants had vacated the Plaintiff's Property sometime in July or August of 2020; (ii) the property damaged by the fire was Lovu C/N 326; (iii) the Plaintiff's Property was unoccupied prior to and at the time of the issuance of the Policy and during the term of the Policy; (iv) the Plaintiff's Property had suffered loss and damage and was infested with termites; and (v) the Plaintiff's Property was freehold.
- h. The insurance proposal made and signed by the Plaintiff contained untrue statements and relevant facts were withheld.

- i. The Plaintiff is thus not entitled to an indemnity for his alleged loss and the Defendant was entitled by the aforesaid reasons to decline the insurance claim.
5. On 14 March 2024, the Defendant filed a Summons to strike out (**Summons**) the Plaintiff's Claim pursuant to Order 18 Rule 18(1) (a) to (d) of the High Court Rules (**HCR**). The Defendant filed an Affidavit in Support deposed by one Binay Dutt, Manager Claims of the Defendant stating the following:
 - a. On 17 September 2020, the Plaintiff made a proposal for House Owners Policy. The proposal form is annexed to the Affidavit marked as "BD-2".
 - b. Relying on the information on the proposal form, the property Lovu C/N 326, an Instrument of Tenancy was insured with the Policy.
 - c. The Plaintiff claimed for loss of his property by fire on 25 April 2021 in the claim form.
 - d. The Plaintiff alleges that the property that was destroyed by the fire is known as Lovu C/N 401 but this property was not covered by the Policy.
 - e. Lovu C/N 401 is another Instrument of Tenancy for a separate land held by the Plaintiff.
 - f. The Defendant is not liable to indemnify the Plaintiff for the alleged loss.
 - g. The Defendant only became aware of the different titles and properties after the Plaintiff lodged his claim for loss and during the Defendant's investigation and in the course of this action.
 - h. The Plaintiff's claim does not disclose a reasonable cause of action and/or is frivolous and abuse of process.
6. The Plaintiff opposed the Summons and filed an Affidavit in Opposition stating as follows:
 - a. The property described as Lovu C/N 326 is located at B.S Charan Road, Lovu, Lautoka and is vacant and cannot be insured.
 - b. The property Lovu C/N 401 is located at California Road, Lovu, Lautoka, has a house on it, and it was this property that the Plaintiff had insured.
 - c. The Defendant negligently and fraudulently entered the Policy for Lovu C/N 326 when it was supposed to be Lovu C/N 401.
 - d. Lovu C/N 326 is vacant land, and the Defendant would not have been paying insurance for this property.
 - e. The property destroyed by fire was on Lovu C/N 401 and not on Lovu C/N 326.
 - f. Before issuing the Policy, the Defendant would have undertaken a survey and noted that Lovu C/N 326 was vacant and cannot be insured.
 - g. The Defendant fraudulently and negligently entered the Policy for Lovu C/N 326.
 - h. The Plaintiff's Claim does have a reasonable cause of action.

7. The Defendant filed an Affidavit in Reply which was also deposed by Binay Dutt stating as follows:

- a. The Defendant denies any fraud or negligence on its part as to the entry of the information on the description of the property stated in the Policy.
- b. The proposal form provided information given by the Plaintiff and relying on this information the property on Lovu C/N 326 was insured.
- c. It was for the Plaintiff to provide correct information.
- d. The Defendant did not have knowledge of the property details.
- e. The Plaintiff had not taken any issue with this Policy prior to this Claim.
- f. There is no requirement for the Defendant to carry out a survey of the property and reliance is placed on the information that is provided in the proposal form for the formation of the Policy.

8. Both parties made oral submissions at the hearing of the Summons and filed written submissions as well.

9. The Defendant is relying on Order 18 Rule 18(1) (a) to (d) of the HCR.

10. Order 18 rule 18 provides:

"18 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

- (a) it discloses no reasonable case of action or defence, as the case may be;*

- (b) it is scandalous, frivolous or vexatious;*

- (c) it may prejudice, embarrass or delay the fair trial of the action; or*

- (d) it is otherwise an abuse of the process of the Court,*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

11. The following excerpts from the 1997 Supreme Court Practice provide the scope of the rule together with guiding factors when dealing with an application for the strike out of a pleading.

12. Footnote 18/19/3 of the 1997 Supreme Court Practice reads:

"Striking out or amendment—The rule also empowers the Court to amend any pleading or indorsement or any matter therein. If a statement of claim does not disclose a cause of action relied on, an opportunity to amend may be given, though the formulation of the amendment is not before the Court (CBS Songs Ltd v. Amstrad [1987] R.P.C. 417 and [1987] R.P.C. 429). But unless there is reason to suppose that the case can be improved by amendment, leave will not be given (Hubbuck v. Wilkinson [1899] 1 Q.B. 86, p.94, C.A.). Where the statement of claim presented discloses

no cause of action because some material averment has been omitted, the Court, while striking out the pleading, will not dismiss the action, but give the plaintiff leave to amend (see "Amendment," para. 18/12/22), unless the Court is satisfied that no amendment will cure the defect (Republic of Peru v. Peruvian Guano Co. (1887) 36 Ch.D. 489)."

13. Footnote 18/19/7 of the 1997 Supreme Court Practice reads:

"Exercise of powers under this rule—It is only in plain and obvious cases that recourse 18/19/7 should be had to the summary process under this rule, per Lindley M.R. in Hubbuck v. Wilkinson [1899] 1 Q.B. 86, p.91 (Mayor, etc., of the City of London v. Horner (1914) 111 L.T. 512, C.A.). See also Kemsley v. Foot [1951] 2 K.B. 34; [1951] 1 All E.R. 331, C.A., affirmed [1952] A.C. 345, H.L. It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action (Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.)."

14. Footnote 18/19/11 of the 1997 Supreme Court Practice on no reasonable cause of action or defence reads:

"Principles—A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, C.A.). So long as the statement of claim or the particulars (Davey v. Bentinck [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (Moore v. Lawson (1915) 31 T.L.R. 418, C.A.; Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A.);..."

15. The legal principles regarding striking out pleadings are clear and widely understood. The Court of Appeal in **National MBF Finance v Buli** [2000] FJCA 28 determined the principles for strike out. In **Attorney-General v Shiu Prasad Halka** 18 FLR 210 at 214 Justice Gould V.P. in his judgment expressed "that the summary procedure under O.18, r.19 is to be sparingly used and is not appropriate to cases involving difficult and complicated questions of law."

16. Justice Winter (as his Lordship then was) in **Ah Koy v Native Land Trust Board** [2005] FJHC 49 aptly stated:

"The practice in Fiji of preemptively applying to strike out a claim is wrong and must cease. Counsels ability to overlook the purpose of this summary procedure is astounding. The expense to the administration of justice, let alone clients, is a shameful waste of resources...."

Apart from truly exceptional cases the remedy should not be granted. The

approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be provided at trial. If a legal issue can be raised on the facts as pleaded then the courts will not strike out a pleading and will certainly not do so upon a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of such a factual contention....

The rule of law requires the existence of courts for the determination of disputes and that litigants have the right to use the court for that purpose. The courts will be alert to their processes being used in a way that results in an oppression or injustice that would bring the administration of justice into disrepute. However, the court cannot and must not deny proper access to justice by the glib use of a summary procedure to pre-emptorily strike out an action no matter how weak or poorly pleaded the Statement of Claim supporting the case is....

It is not for the court in deciding whether there is a reasonable cause of action to go into the details of the issues that are raised by the parties. This summary jurisdiction of the court was never intended to be exercised by a detailed examination of the facts of the case at a mini hearing to see whether the plaintiff really has a good cause of action merely a sufficient one. This is not the time for an assessment of the strengths of either case. That task is reserved for trial. The simple fact that these parties engaged in argument by opinion over statutory interpretation must bring into existence a mere cause of action raising some questions fit to be decided by a judge.”

17. The clear and unambiguous wording of Order 18 Rule 18 indicates that the power to strike out pleadings is discretionary rather than obligatory.

No reasonable cause of action

18. The first ground to consider under Order 18 Rule 18 is (1) (a) – no reasonable cause of action. For this ground, the Court may only conclude an absence of a reasonable cause of action on the pleadings itself with no evidence being admissible. His Lordship Chief Justice Mr. A.H.C.T. Gates (as His Lordship then was) held in **Razak v Sugar Corporation Ltd** [2005] FJHC 720 that:

“To establish that the pleadings disclose no reasonable cause of action, regard cannot be had to any affidavit material [Order 18 r.18(2)]. It is the allegations in the pleadings alone that are to be examined: Republic of Peru v Peruvian Guano Company [1887] UKLawRpCh 186; (1887) 36 Ch.D 489 at p.498”.

19. It was held in **Ratunaiyale v Native Land Trust Board** [2000] FJLawRp 66; [2000] 1 FLR 284 (17 November 2000) that:

“It is clear from the authorities that the Court’s jurisdiction to strike out on the grounds of no reasonable cause of action is to be used

sparingly and only where a cause of action is obviously unsustainable. It was not enough to argue that a case is weak and unlikely to succeed, it must be shown that no cause of action exists (**A-G v Shiu Prasad Halka** [1972] 18 FLR 210; **Bavadra v Attorney-General** [1987] 3 PLR 95. The principles applicable were succinctly dealt by Justice Kirby in **London v Commonwealth** [No 2] 70 ALJR 541 at 544 - 545. These are worth repeating in full:

1. It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the Court, is rarely and sparingly provided (**General Street Industries Inc v Commissioner for Railways (NSW)** [1964] HCA 69; (1964) 112 CLR 125 at 128f; **Dyson v Attorney-General** [1911] 1 KB 410 at 418).

2. To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action (**Munnings v Australian Government Solicitor** (1994) 68 ALJR 169 at 171f, per Dawson J.) or is advancing a claim that is clearly frivolous or vexatious; (**Dey v. Victorian Railways Commissioners** [1949] HCA 1; (1949) 78 CLR 62 at 91).

3. An opinion of the Court that a case appears weak and such that it is unlikely to succeed is not alone, sufficient to warrant summary termination. (**Coe v The Commonwealth** (1979) 53 ALJR 403; (1992) 30 NSWLR 1 at 5-7). Even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and argument and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.

4. Summary relief of the kind provided for by O 26, r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer. (**Coe v The Commonwealth** (1979) 53 ALJR 403 at 409). If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do so in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.

5. If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a court will ordinarily allow that party to reframe its pleadings. (**Church of Scientology v Woodward** [1982] HCA 78; (1980) 154 CLR 25 at 79). A question has arisen as to whether O

26 r 18 applies only part of a pleading. (*Northern Land Council v The Commonwealth* (1986) 161 CLR 1 at 8). However, it is unnecessary in this case to consider that question because the Commonwealth's attack was upon the entirety of Mr. Lindon's statement of claim; and

6. The guiding principle is, as stated in O 26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit.

20. As discussed in *London v Commonwealth [No 2]* 70 ALJR 541 at 544 - 545, the mere fact that a case is weak and not likely to succeed is no ground for striking out. A court should not dismiss or strike out a case simply because a plaintiff's arguments or evidence may not be particularly strong or because the case may face challenges in succeeding at trial. Instead, courts generally allow cases to proceed to trial where there is a reasonable basis for the claim, even if it is not guaranteed to succeed, so that all relevant evidence and arguments can be fully examined and evaluated in the appropriate legal proceedings.
21. The pleadings suggest that the Plaintiff is challenging the Defendant's decision not to pay out the insurance claim to the Plaintiff.
22. To ascertain if there is a reasonable cause of action, this Court needs to determine whether the Plaintiff was covered by the Policy with the Defendant for the property which the Plaintiff allegedly lost in a fire.
23. The counsel for the Defendant submitted that the property which was insured by the Defendant was Lovu C/N 326 whilst the Plaintiff's Claim relates to the property described as Lovu C/N 401, and as such the Plaintiff's Claim has no reasonable cause of action against the Defendant.
24. The counsel for the Plaintiff submitted that as per the Claim, the land described as Lovu C/N 326 was a vacant land and was not insured by the Plaintiff. The counsel also submitted that the reason for refusal of the insurance claim by the Defendant was that the insured property was unoccupied for more than 30 consecutive days and not that the different property was insured.
25. The pleadings as they currently stand do disclose some cause of action against the Defendant and they do raise some questions to be decided at the trial of the action. Issues such as: (i) whether the insured property was Lovu C/N 401 rather than Lovu C/N 326; and (ii) what the precise grounds for the Defendant's refusal to honour the insurance claim were, cannot be definitively resolved merely on the basis of pleadings and submissions alone. These are critical

questions that require thorough examination and presentation of evidence during trial.

26. I therefore find that there is a reasonable cause of action against the Defendant.

Scandalous, frivolous or vexatious claim and abuse of court process

27. On scandalous claims, Footnote 18/19/12 of the 1997 Supreme Court Practice reads:

The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding (even in bills of costs, Re Miller (1884) 54 L.J.Ch. 205). As to scandal in affidavits, see O.41, r.6.

Allegations of dishonesty and outrageous conduct, etc., are not scandalous, if relevant to the issue (Everett v. Prythergch (1841) 12 Sim. 363; Rubery v. Grant (1872) L.R. 13 Eq. 443). "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (per Brett L.J. in Millington v. Loring (1881) 6 Q.B.D. 190, p.196). But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (Blake v. Albion Assurance Society (1876) 45 L.J.C.P. 663).

"The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed"

28. Frivolous and vexatious is described in Footnote 18/19/13 of the 1997 Supreme Court Practice as:

By these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable,...

29. It thus follows that an action which is filed without serious purpose and having no use but intended to annoy or harass the other party is frivolous and vexatious.

30. Halsbury's Laws of England (4th Ed) Vol. 37 explains the abuse of process in para 434 which reads as follows:

An abuse of the process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show that it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the

literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court.

31. The Defendant has filed affidavits to support the ground that the Plaintiff's Claim is scandalous, frivolous and vexatious and an abuse of the process of the Court. These affidavits are admissible under Order 18 Rule 18 (1) (b) and (d) to support the Defendant's application.
32. Counsel for the Defendant referred to the proposal form which was used to form the Policy. A copy of the proposal form is annexed to the Defendant's Affidavit in Support of the Summons and marked as "BD-2". This form has been allegedly filled by the Plaintiff and states under "Situation of Property" as "Lovu, Ltka (California Street)", and further hand-written on top of the word "Lovu" are the words "C/N 326". Based on this proposal form the Defendant issued the Policy, a copy of which is attached to the same Affidavit and marked as "BD-3". The "Location" in the Policy is referred to as "Lovu C/N 326, California Street, Lautoka". Further, the insurance claim form also refers to the "name and address of person causing damage" as "property at Lovu C/N 326, California Street, Ltka".
33. Relying on the above and on the case of **Natadola Taxi and Tours v Marlin Cruise Lines (Fiji) Ltd** [2014] FJHC 446 the counsel for the Defendant submitted that the Plaintiff's Claim was unsustainable considering the Policy documents and was factually weak and worthless or futile.
34. On abuse of process, the counsel for the Defendant submitted that the Plaintiff in this matter has not acted in good faith and relied on section 11 of the Insurance Law Reform Act 1996 which reads as follows:

Duty of utmost good faith

11. A contract of insurance is a contract based on utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

35. The Defendant's counsel submitted that the proposal form and the insurance claim form both refer to the insured property as Lovu C/N 326 and as such the Claim for the property described as Lovu C/N 401 amounts to an abuse of court process.
36. In response, the counsel for the Plaintiff also referred to the proposal form and in particular to clause 4 which refers to "Construction of buildings" and the information filled in this part refers to mixed walls and partitions, iron roof and

concrete floor. Counsel submitted that this description clearly refers to the house which is situated on Lovu C/N 401 and not Lovu C/N 326. The counsel for the Plaintiff then referred to averments in the Affidavit in Opposition that the proposal form had been tempered with by the Defendant and submitted that the words "Lovu C/N 326" was fraudulently and negligently entered into the proposal form by the Defendant.

37. During oral submissions on this point, this Court reminded the Plaintiff's counsel that there were no pleadings to this effect (i.e. allegation of fraud and document tempering) and as such the Plaintiff's counsel could not rely on the same.

38. Plaintiff's counsel further submitted that the proposal form, the Policy and the insurance claim form all refer to the address of the insured property as "California Street" and that the only property on California Street is Lovu C/N 401 whereas Lovu C/N 326 is on B.S Charan Rd. The Plaintiff's counsel hence submitted that it was obvious that the property which was insured was on Lovu C/N 401 and not on Lovu C/N 326 which is a vacant land.

39. Derrington Ashton in ***The Law of Liability Insurance*** (2nd Ed.) at page 236 describe good faith as follows:

"Good faith" has proved difficult to define, but it has generally come to mean fair dealing in which one party puts the interest of the other at least at the same level of protection as his or her own. The principle requires good faith to be utmost. This is more than 'simple' good faith, for recklessness or wilfully blind and negligent conduct would also amount to a breach. It does not mean a measure of good faith. It means utmost good faith. The level of fidelity must be appropriate to the moment. While it is not necessary that the seriousness of the offending conduct be of some specific or defined degree, honesty is at the heart of the principle. But honesty alone may not be enough. Negligent and unwarranted delay by an insurer in deciding whether to accept liability to indemnify may constitute a breach of utmost good faith, and such delay flowing from an ulterior motive is even more likely to do so. The insured need not go to the extent of proving fraud.

It is sometimes said that the principle does not require the parties to act generally in good faith, but rather prescribes a set of specific duties. This includes the duty upon the one party not to do anything that injures the right of the other to receive the benefits of the agreement, but in practice, the good faith principle finds its chief manifestation in the duty of disclosure owed by the insured to the insurer. Apart from the requirement of material disclosure, in the absence of express or implied exclusion, the parties have a duty to observe good faith towards each other at all material times and in

all material particulars. These specific duties are not exhaustive, and the general duty will no doubt give rise to others, depending on the circumstances. The essential obligation is one of honesty, though an intention to deceive the insurer may not be necessary. Conversely, non-disclosure or error does not amount to a breach of this duty unless there is dishonesty.

[emphasis added]

40. Further, in **Vernmeulen v SIMU Mutual Insce Assn** (1987) 4 ANZIC 60.812 Hardie Boys J on breach of duty of utmost good faith said as follows:

In light of these conclusions, I turn to the allegation of breach of the duty of utmost good faith. Despite dicta apparently to the contrary (as for example in G.R.E. Insurance Ltd v Ormsby & Ors (1992) 2 ANZ Insurance Cases, 77, 683) the duty extends beyond the making of a claim which the insured knew was false, for if that be all that is prohibited, there would be no need for the duty. I have considerable difficulty with the decision in the Ormsby case (accepted, I must acknowledge, by Hillyer J in Forbes v N.Z Insurance Co Ltd (1986) 4 ANZ Insurance Cases 74, 366, 74, 372) that it is no breach of the duty to support a claim with false evidence so long as the claim is a valid one. However the cases are decisions on their own facts and it is I think clear that the essential obligation is one of honesty. An intention to deceive the insurer may not be necessary (Sampson v Gold Star Insurance Co Ltd [1980] NZLR 742) but what is necessary is an honest disclosure of all material facts. The converse of this, which may be the better way of expressing it in view of the onus of proof, is that non-disclosure or error does not amount to a breach of the duty unless there is dishonesty. For the reasons given, I do not consider that dishonesty has been established in this case, and accordingly I hold that no breach of the duty has been made out.

41. Applying the above principle, I find that there is not enough evidence before the Court at this stage to establish that the Plaintiff was dishonest and has breached the duty of good faith.

42. Furthermore, there is insufficient evidence before this Court on whether: (i) the Defendant was required to, and if so did carry out, any due diligence to establish if Lovu C/N 326 was indeed a vacant property; (ii) the reference to Lovu C/N 326 in the different documents is an error; (iii) it is indeed Lovu C/N 401 which is geographically situated on California Street and not Lovu C/N 326; and (iv) the reason for the Defendant declining the claim was based on the incorrect land description or the property being unoccupied for 30 consecutive days, or any other reason.

43. The issue of whether the Plaintiff acted dishonestly and consequently bears responsibility for the misrepresentation or error in the description of the property, is not one that can properly be determined from affidavit evidence alone. In the Court's view, such a matter requires full examination at trial, with the benefit of oral testimony and the testing of evidence under cross-examination.

44. For the aforementioned reasons, I find that the Plaintiff's claim raises issues which cannot be dismissed as either unsustainable or lacking in serious purpose and is not an abuse of court process.

45. Therefore, I make the following orders:

- (a) The Defendant's Summons to Strike out the Plaintiff's Claim is dismissed; and
- (b) The Plaintiff is entitled to costs summarily assessed in the amount of \$1,500.00, payable by the Defendant within 1 month.



A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke.

P. Prasad
Master of the High Court

At Lautoka
23 January 2026

Solicitors: Messrs Anil Prasad Lawyers for Plaintiff
Messrs AK Lawyers for Defendant