WESTPAC BANKING CORPORATION & BARRY J. SHELTRUM *t/a* DAYDREAM CRUISES LIMITED

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v.

DOMINION INSURANCE LIMITED

[HIGH COURT, 1996 (Fatiaki J) 8 October]

B Civil Jurisdiction

Insurance- whether failure to pay a premium results in the lapse of the policy- Marine Insurance Act (Cap. 218) Sections 22, 23 53.

Several months after failing to pay a premium for the renewal of a policy of insurance the insured submitted a claim which was declined by the insurer on the C ground that the policy had lapsed as a result of non payment. The High Court HELD: absent a specific condition in the contract to the contrary while mere non payment of a premium may entitle an insurer to cancel the policy or sue for the premium it does not result in a policy lapsing.

Cases cited:

D *Australian Guarantee Corporation Ltd. v. D. Jagr* [1984] V.R.483
Bowen-Jones v. Bowen-Jones [1986] 3 All E.R. 163
Bradley v. Essex and Suffolk Accident Indemnity Society [1912] K.B. 430
Dillon and Others v. Baltic Shipping Co. (1991) 2 Lloyds Rep. 155
Dixon v. Kennaway & Co. Ltd. [1900] 1 Ch. 838
E *Ellery & Anor. v. Beck & Anor* (1991) 6 A.N.Z. Insurance Cases 77.042
Fowkes v. Manchester and London Life Assurance Association (1863) 129 R.R. 607
Handler v. Mutual Reserve Fund Life Association (1904) 90 L.T. 192
Holliday v. Western Australian Insurance Company, Ltd. (1936) Vol. 54 Lloyds Rep. 373
F *Jai Narayan v. Savita Chandra* Civil Appeal No. 37 of 1985
London Chatham & Dover Railway Co. v. South Eastern Railway Co. (1893) A.C. 429
Lundberg v. Royal Exchange Assurance Corporation (1933) N.Z.L.R. 605
Macbeth & Co. Ltd. v. Maritime Insurance Co. Ltd. 24 T.L.R. 559
Maganlal Bros. Ltd. v. L.B. Narayan & Co. Civil Appeal No. 31 of 1984
G *Packer v. Meagher* [1984] 3 N.S.W.L.R. 486
Police Service Commission v. Beniamino Naiveli Civ. App. 52/95S (FCA Reps 96/302)
Thomson v. Swan Hunter and Wigham Richardson Ltd. [1954] 2 All E.R. 859
Wooding v. Monmouthshire & South Wales Mutual Indemnity Society Ltd. [1939] 4 All E.R. 570

M. Daubney for Plaintiffs
R. Krishna for Defendant

Fatiaki J:

This claim arises under a Private Pleasure-Craft Marine Insurance Policy issued by the defendant company in favour of the second plaintiff and in which the plaintiff bank is noted as an Interested Party.

On the date fixed for the trial of the action, counsel for the plaintiff bank opened his case and it became quite clear that many of the facts were common ground between the parties and had been earlier agreed to and were contained in the Minutes of a Pre-Trial Conference filed in Court on the 2nd of April 1996. On that basis counsel proposed only to call evidence as to quantum or measure of indemnity.

With a view to further expediting the proceedings, the case was stood down in order to allow counsel an opportunity to agree on a figure and I am pleased to record that after a short adjournment all parties agreed that the indemnity figure under the policy was $139,000 (nett) in the event that the Court found the defendant company liable under the policy.

It is convenient at this stage to briefly set out the factual background to this claim as agreed by the parties :

1. It is agreed that the first plaintiff holds a registered mortgage over a vessel known as 'Adi Litia' owned by the first-named second plaintiff.

2. It is agreed that the second plaintiffs and the defendant entered into a contract of insurance in respect of the vessel, namely a Marine Pleasurecraft Policy in October 1990.

3. It is agreed that the first plaintiff was noted as an "Interested Party" on the policy to whom loss would be payable.

4. It is agreed that since the policy inception in 1990 and for each annual renewal, the policy premiums were paid by instalments during the currency of each period of insurance and each renewal thereof and the defendant accepted payment of the premiums by such instalments. It is further agreed that the said policy was renewed for further periods through to October, 1993.

5. It is agreed that from 17 October 1990 to 17 October 1993 the defendant accepted and paid on claims by the second plaintiffs and on at least two occasions off-set the amount of claims payable against premium payments owing from the second plaintiffs to the defendant.

13. It is agreed that on 26 March 1994 the vessel was damaged beyond repair and the second plaintiffs made a claim under the policy in respect of the damage.

17. It is agreed that by letter dated 31 March 1994 the defendant declined the second plaintiffs' claim in respect of the damaged vessel.

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In terms of the policy the defendant company agreed to indemnify the second plaintiff against any physical loss or damage accidentally occurring to the vessel the "Adi Litia" including its hull, machinery, gear and equipment and a dinghy and outboards. The original cover note and policy were both issued sometime in early November 1990 and provided an initial cover for the period : "17.10.90 to 17.10.91".

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The policy was thereafter renewed for two successive years in 1991 and 1992 and purported to be renewed from 17.10.93 to 17.10.94, during which renewal period, on the 26th of March 1994, the "Adi Litia" was damaged beyond repair. It is common ground that no premium in respect of the last-mentioned renewal period had been paid at the date of above-mentioned loss.

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The fact however, that no premium had then been paid does not of itself affect the coming into existence of an insurance contract.

As was said by Viscount Maugham in Wooding v. Monmouthshire and South Wales Mutual Indemnity Society Ltd. [1939] 4 All E.R. 570 at 581 :

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> "There is, I think no principle of law that there must be implied in a contract of insurance a provision that the right to indemnity by the assured is conditional on his previous payment of the premiums. As a matter of commercial good sense, there is a great deal to be said for the terse phrase "no premium, no cover". It is doubtless for that reason that insurance companies usually require that the consideration for which they undertake
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> to indemnify the assured must be paid before the risk attaches. There is, however, no doubt that a contract of insurance may involve merely a promise by the assured ... to pay the premium and this is implicitly acknowledged in such marine insurance cases as Roberts v. Security Co., Universo Insurance Co. of Milan v. Merchants Marine Insurance Co. and Bhugwandass v. Netherlands India Sea & Fire Insurance Co. of Batavia."

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[see also : Sections 22 & 23 of the Marine Insurance Act (Cap. 218)]

Be that as it may, the second plaintiff as the insured party lodged a claim under the policy with the defendant company which was declined in March 1994 on the basis "... that there was no cover in place at the time of the loss".

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Thereafter the plaintiffs' and their solicitors exchanged various correspondence with the defendant company with a view to getting it to reconsider its earlier decision declining the claim. The defendant company remained adamant however, and finally, on the 20th of September 1994 the plaintiff bank's solicitors issued a Writ of Summons claiming various declarations and consequential orders; damages for breach of the contract of insurance, interest and costs.

On 30th September 1994 a comprehensive Statement of Claim was filed in Court

and served on 3rd October 1994 on the defendant company's solicitors. On 15th November 1994 a Statement of Defence was filed in which it was pleaded inter alia:

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> "23 - The defendant says that the insurance cover for the period 17th October, 1993 to 17th October, 1994 was conditional upon payment of the agreed insurance premiums but says that such premium was not paid. The policy, therefore, did not come into effect and was not valid and binding at the date of the risk."

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The primary issue or question which the Court must decide is :

> "Whether or not there was a valid and subsisting policy of insurance in existence as at the 26th of March 1994 notwithstanding that no part of the renewal premium for the period 17th October 1993 to 17th October 1994 had ever been paid ?"

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In this regard the defendant company's position may be simply and broadly stated as being that the renewal premium for the year commencing 17th October 1993 to 17th October 1994, had never been paid and therefore as at the date of the loss of the vessel, (i.e. 26th March 1994) no contract of insurance existed.

Counsel also referred in his written submissions to Section 53 of the Marine Insurance Act which provides:

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> "Unless otherwise agreed, the duty of the assured or his agent to pay the premium and the duty of the insurer to issue the policy to the assured or his agent are concurrent conditions and the insurer is not bound to issue the policy until payment or tender of the premium."

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No attempt was made however to indicate what relevance or bearing the Section might have on the case, but in any event, having independently considered the matter, I am satisfied that the Section does not apply in a case concerning the renewal of a marine insurance policy where the policy document has in fact been issued by the insurer, and notwithstanding that the full agreed premium had not been paid.

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Plaintiff's counsel on the other hand, submitted that the policy of insurance was never cancelled at any time by the defendant company in terms of the policy conditions, nor was the payment of premium expressly made a condition precedent either to the inception of the policy or its renewal. Furthermore, counsel forcefully submits that there was a clear course of conduct between the parties as to the renewal of the insurance cover and the payment of premiums which estopped the defendant company from denying that the policy of insurance was on foot at the time of the loss of the vessel.

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In this latter regard the following relevant passage appears in MacGillivray and Partington: Insurance Law (7th edn.) at para. 920 :

"Notwithstanding the provisions in the policy, the insurers may extend the time for payment of the premium or may waive any of the conditons precedent to the continuance of the risk, and even after the policy has lapsed the insurers may be held to have revived the insurance upon the same terms by any word or act which leads the assured to believe that the insurers have reassumed the risk."

At the outset having considered the various terms and conditions of the policy in question and mindful that the original period of insurance extended from : "17.10.90 to 17.10.91 at 4 p.m." and further, that there is nothing expressed in the policy terms and conditions as to the renewal or continuation of the policy, I hold that the original contract of insurance was initially for a year only, and did not extend beyond the 17.10.91 except by mutual agreement.

Equally, and here too, in the absence of any express terms or conditions regarding the payment of premium, I hold that the contract of insurance or more accurately, the liability undertaken by the defendant company in terms of its contract of insurance was not conditional upon the pre-payment of the premium. The following passage in MacGillivray and Partington: Insurance Law (7th edn.) is relevant, where the learned authors say at para. 861 :

"There is no rule of law to the effect that there cannot be a completed contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment ..."

In similar vein is a passage in Vol.25 of Halsburys Laws of England (4th edn.) at para. 464 entitled "Prepayment of Premium" which reads :

"In practice, payment of the premium in advance is usually a condition precedent to liability, not only in the case of the first premium but also of the renewal premium. The assured is then precluded from recovering for a loss which happens before the premium is paid unless the circumstances are such that the insurers are estopped from denying that that they have received payment or have by their conduct waived the condition."

The final citation I would make on this aspect is taken from the judgment of Collins M.R. in Handler v. Mutual Reserve Fund Life Association (1904) 90 L.T. 192 where the learned Master of the Rolls said at p.195 :

"... It seems to me that the burden in this case is most distinctly upon the plaintiff. He begins the discussion with a policy of insurance that has lapsed, and if he is going to assert that notwithstanding the fact that it has lapsed the company are estopped from averring the truth that it has lapsed, it seems to me the burden is upon him to show that he has been misled ... If he showed, for instance, that the receipt which they sent him had som

ambiguous phraseology in it which might reasonably be construed to mean that the policy was still alive, then I could understand his raising a question of fact for the jury, whether or not the form of the receipt was such as to mislead him into supposing that the policy was still alive." A

In this latter regard in late September, 1993 as was the previous practice of the defendant company, an unsolicited renewal certificate was sent to the second plaintiff under cover of a letter written by its Underwriting Manager.

The renewal certificate is a pre-printed form of the defendant company and B contains the following notice printed in the upper body of the form. It reads :

"PLEASE NOTE: Your policy, as detailed below, will expire at 4.00 p.m. on the date shown. As you are a valued client we have protected your interest by renewing your policy for the period stated. Please forward the premium payable to reach us by the expiry date. If you have any enquiries C about this or any other policy please do not hesitate to telephone or call at our office."

(My underlining)

The top of the renewal certificate contains a printed panel divided into four boxes as follows : D

Client reference	Expiry date	Renewed to	Agents Reference
122570 MPP001	17.10.93	17.10.94	1000

(my underlining)

and the bottom panel of therenewal certificate contains the following printed notice: E

"IMPORTANT NOTICE IMPORTANT NOTICE IMPORTANT NOTICE

Renewal Terms are on a cash basis and your premium must be received by the expiry date shown if you wish the cover to continue."

(my underlining) F

Needless to say on the strength of this latter notice, counsel for the defendant company submits that any renewal of insurance cover was conditional upon payment of the agreed insurance premium by the expiry date shown and counsel lays considerable emphasis on the use of the word 'must' in the above notice.

I confess that on my reading of the above-mentioned notices in the renewal G certificate, there appears to be some inconsistency or conflict between them; certainly the notices are not free of all ambiguity nor in my view are they easily reconciled and neither counsel sought to reconcile the notices in their respective submissions.

On the one hand, the customer is told that he is a valued client and that his interest in the policy has been protected (note the use of the past tense) by the policy has

been having been renewed to a stated date, and this is followed by a courteous request for payment of the premium by the expiry date; but on the other hand, and in the same breath (so to speak), he is advised that renewal is provided on a cash basis and there is a requirement that the premium must be received by the expiry date if the customer desires cover to continue.

In neither notice however, are the consequences of the customer's failure to pay the premium by the due date clearly and unambiguously set out, nor in my view do the notices plainly and unequivocally make the payment of premium a pre-requisite to the renewal of the insurance.

In such a circumstance, the contra preferentum rule of construction requires the Court to adopt a construction favourable to the assured and against the insurer from whom the document emanates. (per : Blackburn J. in Fowkes v. Manchester and London Life Assurance Association (1863) 129 R.R. 607 at p.615)

In Bradley v. Essex and Suffolk Accident Indemnity Society [1912] K.B. 430 Farwell L.J. in discussing the contra preferentum rule of construction said :

> "It is especially incumbent on insurance companies to make clear both in their proposal forms and in their policies the conditions which are precedent to their liability to pay, for such conditions have the same effect as forfeiture clauses, and may inflict loss and injury to the assured and those claiming under him out of all proportion to any damage that could possibly accrue to the company from non-observance or non-performance of the conditions. Accordingly it has been established that the doctrine that policies are to be construed contra preferentes applies strongly against the company."

Viewing the defendant company's renewal certificates(s) in that light there is little doubt in my mind that a customer receiving such a document might reasonably construe it as meaning that his insurance policy had been renewed and was still alive albeit that no premium had been paid.

Defence counsel also relies upon the defendant company's letter of 21st September 1993 which accompanied the renewal certificate. The letter seeks inter alia, information concerning the qualifications of the Captain of the "Adi Litia" and the second plaintiff's loss experience for the previous five years. It also seeks to justify the not insubstantial increase in the Marine Hull renewal premium and continues :

> "We would also appreciate an early settlement of above premium which as per renewal certificate must reach us by 17th October on both policies."

Here again, the letter nowhere clearly and unambiguously explains the consequences of non-payment of the renewal premium nor in my view, does it support counsel's submission that :

> "... the letter emphasised the fact ... that the policy would not be renewed unless the premium was paid prior to 17th October, 1993."

That this was so is clearly demonstrated in my view, by the correspondence that followed the defendant company's letter and renewal certificate of September 1993 and which included an amended renewal certificate for the period 17.10.93 to 17.10.94 at a substantially reduced premium and a circular letter dated 1st November, 1993 (i.e. after the relevant policy would have lapsed) which reads in its material parts :

> "Payment of the renewal premium is essential to ensure that your insurance remains current. If any change is required to the policy such as an increase to the sum insured or you have a problem with payment please contact our office or the agent concerned as soon as possible.
>
> In the meantime we look forward to receiving your premium payment as we would not wish you to face the difficulties of an uninsured loss."

Undoubtedly there is an element of urgency in the letter concerning the payment of the renewal premium but equally, there can be no denying that the very fact that it was sent and its contents, suggests to my mind that the defendant company accepted that the policy had not lapsed and indeed had been renewed, and (was then) current.

The next relevant document was a letter dated 10th January 1994 from the auditors of the defendant company which sought the second plaintiff's confirmation as to the amount of his indebtedness to the defendant company as set out in a Statement (of Account) as at the 30.10.93 in which the second plaintiff had been debited with the unamended renewal premium for the year 1993/94.

This was followed by a further reminder letter from the defendant company's auditors dated the 5th February, 1994 in which the second paragraph reads :

> "Your account in the books of the company at 31 December, 1993 showed that you owed them $10,941.00."
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> (my underlining)

This latter figure however appears to have been deleted and a handwritten figure of $8,076.00 inserted in its place.

The final letter addressed to the second plaintiff before the "Adi Litia" was damaged beyond repair, originated from the Credit Controller of the defendant company and is dated the 18th February 1994. In it he makes reference to the outstanding insurance premiums owed in respect of the relevant policy for the period 17.10.93-94 and ends :

> "Please be good enough to send your payments as discussed with our Underwriting Manager."

It is noteworthy that even at this very late stage where the premium had been outstanding more than 90 days, there was still no suggestion from the defendant company that cover had lapsed, or was subject to full payment of premiums

before renewal (as per its letter of 1st March 1993) or, that payment was due on a certain date (as in its letter of 21st April 1993) or, that the policy would be cancelled if payment was not received (as in its letter of 14th June 1993).

If anything the defendant company's relevant letters of 1st November 1993 and 18th February 1994 were considerably less threatening in tone than its earlier letters of 21st April 1993 and 14th June 1993 which referred to the outstanding renewal premium for the period 17.10.92 to 17.10.93 during which time, it is common ground, the policy was in fact renewed and the defendant company had remained on risk as clearly evidenced by its acceptance of a claim lodged by the second plaintiff and paid by a company cheque dated 23rd August 1993.

I also note in particular, the second paragraph in the defendant company's letter of 14th June 1993 which appears to accept that the second plaintiff had been granted credit terms in respect of the payment of premium.

This is further confirmed by the defendant company's Statement (of Account) which clearly shows that ever since inception, the second plaintiff had never paid the premiums either in full or in advance, and yet the defendant company had remained on risk.

From the foregoing I am satisfied that the liability of the defendant company under the policy was not dependant on the premium having first being paid. If I should be wrong however on my interpretation of the renewal certificate(s) and the relevant correspondence, then I find that there was an established course of business dealings between the parties in which credit was given for the payment of the premium due and the defendant company had also recognised that the policy was in force although no premium had been actually paid, and furthermore such premium formed an item in a debit and credit statement of account maintained and submitted by the defendant company in respect of the second plaintiff's insurance.

In not dissimilar circumstances in Lundberg v. Royal Exchange Assurance Corporation (1933) N.Z.L.R. 605 in which without payment of any premium, the insurer issued to the assured a Fire Renewal Receipt which stated inter alia, "the policy is hereby renewed" and which was accompanied by a circular letter which read in part "the policy having been renewed", Reed J. in upholding the assured's claim under the policy said at p.615 :

> "I think the defendant corporation is estopped from denying that the policy was renewed. The Fire Renewal Receipt states the policy "is hereby renewed" and the letter accompanying it says "the policy having been renewed". In the past it had been the practice to renew without payment of premium, and these statements are a representation that the policy had in fact been renewed with the result of inducing the plaintiff on the faith of such representation to alter his position to his detriment, which does not mean an active alteration is necessary, but that it is sufficient if the person

to whom the statement is made rests satisfied with the position taken by him in reliance on the statement, so that he suffers loss Dixon v. Kennaway & Co. Ltd. (1900) 1 Ch. 838."

Then in Holliday v. Western Australian Insurance Company, Ltd. (1936) Vol. 54 Lloyds Rep. 373 in which the course of business between the assured and the insurer was described as follows :

"... for a couple of years before the crucial date ... premiums have always been paid by being carried to the assured's debit in the accounts between the parties and settled sometimes two, sometimes three, five or six months after the rendering of the account, by payment sometimes of the whole amount and sometimes of a payment on account followed by a payment of the balance ...",

Branson J. in upholding the arbitrator's award in favour of the assured in that case said at p.376 :

"I know no principle of law relating to insurance which prevents a company agreeing with an assured that they will cover him for twelve months for a certain premium and that he shall be given credit for that premium for any period that the parties might like to agree. It is not part of the essence of a policy that the premium should be paid at any particular time, provided you have an agreement that the insurance shall cover the assured in respect of a certain period at a certain premium and then they agree that that premium shall be paid at any time they like."

Finally at p.377 the Court dealt with two letters of the insurance company sent to the assured just prior to the claim and which were in terms not entirely dissimilar to the defendant company's letters of 1st November 1993 and 18th February 1994 (op cit) when he said of the later of the letters :

"They send a letter which assumes he owes them money and they demand it be paid. They do not ask him whether he intends to renew the policy. They are sure he did. They do not ask him whether he would like to have a fresh account rendered to him with the amounts adjusted to the duration of the risk assuming that the risk had terminated ... They demand the whole amount."

More recently in Ellery & Anor. v. Beck & Anor (1991) 6 A.N.Z. Insurance Cases 77,042 where the renewal notice sent by the insurer read :

'[Your policy] is renewed for a further twelve months from 15 February 1987. Payments should be made by this date to ensure protection of your interest.'

and where the insurer's Statement of Account sent out in June 1987 indicated that the renewal premium had been owing for 5 months, Sinclair J. in considering the above wording in the renewal advice said at p.77,045

"... that statement does not plainly and unequivocally state that there is no insurance cover until payment of the premium is made. It could mean that if payment was not made by the date specified then the company might resort to cancellation of the policy or that it could sue for the premium."

and later at p.77,047 his Honour said :

"... (the insurer) by issuing the type of renewal advice that it did, notified the insured that the policy was renewed and that renewal was not made subject to the condition that the premium had to be paid before the renewal took effect. I have no doubt that the insurance company expected to get the premium paid but if it did not then, ... the insurer could ... sue if it wished to go that far."

Bearing the above in mind I am satisfied that the defendant company is estopped from denying that the second plaintiff's insurance policy had been renewed for the period 17.10.93 to 17.10.94 and I therefore answer the primary question earlier posed in the affirmative, and enter judgment in favour of the first plaintiff bank in the sum of $139,000.00.

The plaintiff also seeks interest "... at the rate of 13.5% per annum from 26 March 1994 (the date when the loss occurred) to the date of judgment" and costs on a solicitor/client basis.

As to the claim for interest, Section 3 of the Law Reform (Miscellaneous Provisions) (Death and Interest) Act (Cap. 27) provides :

"In any proceeding tried in the High Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

Furthermore the rationale for an award of interest is as stated by Lord Herschell L.C. in London Chatham and Dover Railway Co. v. South Eastern Railway Co. (1893) A.C. 429 when he said at p.437 :

"... I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use."

Defence counsel submits however that the subject policy makes no provision for the payment of interest and, on the facts, the plaintiff are not entitled to any interest. No particular facts were drawn to the attention of the Court but in any event I disagree with the submission.

On the facts as found by the Court, the defendant company was not justified in declining the second plaintiff's claim. Additionally, the defendant company would have been aware of the interest of the first plaintiff bank as mortgagee, and, given the fact that it was common ground that the vessel had been damaged beyond repair and therefore could no longer be utilised in the second plaintiff's business to generate income, it would have been plainly obvious that an early settlement of the plaintiff's claim was being sought from the very outset.

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As long ago as 1908, Walton J. said in Macbeth & Co. Ltd. v. Maritime Insurance Co. Ltd. 24 T.L.R. 559 (a marine insurance case) at p.560 :

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> "It was an ordinary practice in cases of this kind to allow interest from a date which would have given a reasonable time for adjustment and payment of the claim ..."

In all the circumstances I am satisfied that the plaintiff should be compensated by way of an award of interest on the judgment sum from the date of the issuance of the Writ namely 20th September 1994 to the date of judgment at the rate of 13.5% per annum. (see : the unreported judgments of the Fiji Court of Appeal in Maganlal Bros. Ltd. v. L.B. Narayan & Co. Civil Appeal No. 31 of 1984- FCA Reps 84/368 and Jai Narayan v. Savita Chandra Civil Appeal No. 37 of 1985- FCA Reps 85/156)

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I turn next to the plaintiff's claim for costs on a solicitor/client basis. In this regard defence counsel whilst recognising the wide discretion of the Court, nevertheless, submits that in "the circumstances of the case no costs should be awarded to the plaintiffs even if they succeed." What those particular circumstances are has not been elaborated upon and such vagueness runs contrary to the generally accepted principle in the awarding of costs as set out in para.717 of Halsbury's Laws of England (4th edn.) Vol. 37 which states :

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> "On the principle that costs follows the event there is such a settled practice that a successful party should receive his costs that it is necessary for the unsuccessful party to show some ground for the Court to exercise its discretion to refuse an order which would give them to him ..."

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(see too: the wording of Order 62 r.3(2) of the High Court Rules 1988)

Counsel also submits that "In any event, Order 62 does not appear to have any provision for such (Solicitor/client) costs." In making this submission counsel was undoubtedly unaware of the recent judgment of the Fiji Court of Appeal in Police Service Commission v. Beniamino Naiveli Civil Appeal No. 52 of 1995S (delivered on the 16th August 1996) in which the Court of Appeal upheld an award of indemnity costs made by Scott J. on the basis that such an award was an award in terms of Or.62 r.26(1) of the High Court Rules which is entitled : Costs payable to a barrister and solicitor by his own client and which would result in all costs being allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred.

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In its judgment the Fiji Court of Appeal also observed at p.6 :

> "... neither considerations of hardship to the successful party nor the over optimism of an unsuccessful opponent would by themselves justify an award beyond party and party costs. But additional costs may be called for if there has been reprehensible conduct by the party liable - see the examples discussed in Thomson v. Swan Hunter and Wigham Richardson Ltd. [1954] 2 All E.R. 859 and Bowen-Jones v. Bowen-Jones [1986] 3 All E.R. 163."

In similar vein in Dillon and Others v. Baltic Shipping Co. (1991) 2 Lloyds Rep. 155 Kirby P. in discussing the nature of costs on the above basis said at p.176 :

> "In a series of cases it has been suggested that the order of costs on a solicitor and client basis should be reserved to a case where the conduct of a party or its representatives is so unsatisfactory as to call out for a special order. Thus if it represents an abuse of process of the Court the conduct may attract such an order. See e.g. Packer v. Meagher [1984] 3 N.S.W.L.R. 486. See also Australian Guarantee Corporation Ltd. v. D. Jagr [1984] V.R.483."

Bearing the above in mind, I turn then to consider whether there was something unmeritorious, high-handed or reprehensible on the part of the defendant company or its representatives, in the conduct of the present litigation.

In this regard counsel for the plaintiffs submits that the Court should consider the commercial nature of the case which concerns the liability of a leading insurance company in this country to pay out on an insurance policy and counsel states that if people are to do business in this country they should not be encouraged to litigate in the knowledge that the cost sanction (whatever that may mean) will not be imposed against them.

Against that submission one must weigh defence counsel's agreement (albeit somewhat belatedly) as to the agreed facts and issues in the case and then later, the measure of indemnity which the plaintiffs were entitled to receive in the event their claim succeeded. Both of these elements contributed significantly to a substantial saving in the court's time.

In all the circumstances I am satisfied that this is not such an exceptional case which would warrant the Court departing from the general rule and accordingly I order the defendant company to pay the plaintiffs' costs to be taxed however, on a common fund basis [see: Or. 62 r.25(3) and (4)], if not agreed.

(Judgment for the Plaintiff.)