

**GURBACHANS FOODTOWN LTD v NEW INDIA ASSURANCE CO LTD  
(HBC0029 of 2003L)**

5 HIGH COURT — CIVIL JURISDICTION

WICKRAMASINGHE–J

23 March 2012

10 **Insurance — act of God — indemnity — damage to property — tropical cyclone — floods — whether proximate cause of damage was cyclone or floods — ambiguous clause — contra preferentum rule of construction.**

15 The plaintiff sought indemnity under two insurance policies for damage caused to its stock and machinery during tropical cyclone Ami. The defendant declined to indemnify the plaintiff on the ground that the policies did not cover damage caused by floods. The parties asked the Court to hear the cause of the peril as a preliminary issue. The issue before the Court was whether the proximate cause of the damage was cyclone Ami or floods.

**Held –**

20 (1) The sole and proximate cause of the damage to the property was cyclone Ami. The floods meant in the policy are more like the floods caused with some abnormal violent situation such as a rainstorm or thunder storm that results in a great flowing or overflowing of water. The floodwater that damaged the plaintiff's property was either the sole or a dominant consequence of the cyclone.

25 (2) The special condition at clause 1(b)(i) in Insurance Policy 1 is ambiguous and the Court is unable to give a proper construction to the clause. In the circumstances, this is a fit case to apply to contra preferentum rule of construction. On an application of that rule, the special condition 1(b)(i) should be construed in favour of the plaintiff.

Writ to be fixed for further hearing.

**Cases referred to**

30 *Fai Insurance (Fiji) Ltd v Prasad's Nationwide Transport Express Courier Ltd* [2008] FJCA 101, applied.

35 *Brightwell Home Units Pty Ltd v The United Insurance Co Ltd* NSW Supreme Court 22 May 1980 No 11812 of 1979; *Caine v Lumley General Insurance Ltd* (2008) 15 ANZ Ins Cas 61; *Harper v Zurich Australian Insurance Ltd* [1987] 4 ANZ Ins Cas 60-779; *Lasermax Engineering Pty Ltd v QBE Insurance (Australia) Ltd & Anor* NSW SC 50052/03, 16 March 2005; *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* by (1918) AC 350; *Oddy v Phoenix Assurance Co Ltd* (1966) 1 Lloyd's Rep 134 Veale J at 138; *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corporation Ltd* [1973] 3 All ER 825; *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691; *Young v Sun Alliance & London Insurance Ltd* (1976) 3 All ER 561, considered.

*H.K. Nagin* for the plaintiff.

*A. Narayan* for the defendant.

45 [1] **Wickramasinghe J.** The plaintiff by its writ of summons seeks indemnity under two insurance policies, for the damage caused to its stock and machinery during *Tropical Cyclone Ami* (cyclone Ami) that occurred in mid January 2003. The defendant declined to indemnify the plaintiff on the ground that the policies do not cover damages caused by 'floods'.

50 [2] At the hearing, the parties requested the court to hear as a preliminary issue the cause of the peril. The parties agreed that if the proximate cause is held to be cyclone Ami, than the matter would proceed to hearing on the other defences and

quantum. If floods are found to be the proximate cause of the damage, the plaintiff's claim is to be dismissed with costs.

[3] Therefore, the parties by consent requested me to determine the following issue as a preliminary issue.

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*What was the proximate cause of the damage to the plaintiff's goods and equipment?*

[4] The plaintiff led the evidence of three witnesses, ie, PW1 - Mr Charan Jeath Singh on behalf of the plaintiff, PW2 - Mr Ravind Kumar of the Fiji Meteorological Services Department and PW3 - Hemant Kumar Charan of the Hydrology Department. The defendant did not lead its own witnesses but in the written submissions says that it would rely on the evidence of the plaintiff's witnesses together with the documentary evidence adduced before the court in the agreed bundle of documents produced marked **ABD** consisting of 17 documents.

[5] At the conclusion of the hearing both parties filed helpful written submissions. The plaintiff also filed reply submissions to determine the preliminary issue.

[6] The parties by consent transferred the matter to Lautoka, where I heard the case. The cause otherwise falls within the jurisdiction of Labasa.

### **Background**

[7] The property damaged is a supermarket situated in Labasa town. It is common ground that the plaintiff's stock and machinery were damaged during cyclone Ami due to floodwater seeping inside the supermarket.

[8] It is common ground that the property in issue was insured under two policies covers. The principle fire policy No 922625/1111/06913/2001 dated 4 July 2002<sup>1</sup> was issued to cover the peril of fire and upon payment of an additional premium, the cover had been extended to include storm and/or tempest. It was further extended by renewal certificate No- 922625/1111/002517 to include hurricane.<sup>2</sup> The second policy No - 922625/1122/06915 dated 1 July 2003<sup>3</sup>, covered consequential loss rising from peril of fire and upon the payment of an additional premium the cover was extended to include perils *inter alia* cyclone but expressly excluded floods. Both policies clearly exclude perils relating to floods hence the issue before me.

[9] The plaintiff asserts that the sole or proximity cause of the floods was a direct consequence of cyclone Ami that damaged plaintiff's property. The defence is twofold:

(i) *amended statement of Defence filed on 7 December 2009 at paragraph 10 states that the alleged loss and damage were consequences of flooding or sea tidal wave, high water that affected Labasa and outlying areas on 14 January 2003, which is a peril not covered by the terms of the policies.*

(ii) *At paragraph 11 of the statement of defence the defendant alleges in the alternative that the damage to the property was not covered by water or rain entering the building through opening in the walls or roof(s) made by storm or tempest.*

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1. ABD - doc 2  
2. ABD - doc 1  
3. ABD- doc 3

## Evidence

[10] **PW 1 Charan Jeath Singh**, the Managing Director of the plaintiff, in his evidence said that the insured property is situated on the ground floor of a two-storey building where he carries on a supermarket. He said the cyclone caused damage to his stock and equipment. It was his evidence that Labasa had always been a flood prone area but the type of flooding he saw during cyclone Ami was his first experience despite living there his entire life. In cross-examination, he admitted that the river in Labasa is a tidal river, where the water level rose considerably due to excess rain, brought by the cyclone Ami. He also said that during the cyclone the river broke its banks and water overflowed and flooded the town. The water from the floods had then seeped into the building through the gaps under the doors thereby damaging the stock and equipment. The witness also admitted that the building did not suffer any damage caused by wind in the cyclone and the roof and other fixtures of building were intact.

[11] **PW 2 Ravind Kumar**, a Senior Scientific Officer of Fiji Meteorological Service based at Nadi, said he had over 23 years of experience in the Meteorological Service and was of the view that the heavy rain brought on by Cyclone Ami was the cause of flooding in Labasa Town. However, he said that it was the Hydrology department that could best determine the cause of flooding. He also confirmed that his office prepared the Tropical Cyclone Ami Preliminary Report. (ABD 4). It was his view that there are three contributing factors for the flooding. The first was the heavy rainfall brought on by the cyclone. The second was an exceptional high tide. Third was the piling of water through storm surges along the coastal areas. Under cross-examination, the witness accepted that the Labasa river is tidal; storm surge is caused by actions of the sea (also known as sea surges); low pressure depression precedes a cyclone; Fiji experiences a lot of rain even outside the rainy season during April to November.

[12] **PW 3-Hemant Kumar Charan**, has 34 years of experience in the Hydrology Department. In his evidence, he admitted that he did not prepare the report titled “**The Exceptional Flooding on Vanua Levu Island, Fiji, during Tropical cyclone Ami in January, 2003**” (ABD 17) nor did he conduct any research relating to Cyclone Ami. He confirmed that the report was prepared by his office and admitted its contents *inter alia* that the flooding in Labasa was due to the heavy rain brought in by Cyclone Ami.

[13] The following excerpts of the two reports filed in the agreed bundle ie, **ADB 4 and 17** are significant, and merit reproducing.

**ABD 17: “The Exceptional Flooding on Vanua Levu Island, Fiji, during Tropical Cyclone Ami in January, 2003”**

- Introduction to document 17 Exhibit ABD states:

*‘TC Ami rapidly developed into an intense system with very destructive hurricane force winds. Its track passed across the large, well-populated island of Vanua Levu in northern Fiji. Resulting destruction was extensive and severe due to high winds, heavy seas, and torrential rainfall.’*

- In item 3 under the heading ‘Cyclone Effects’ the reporters note:

*‘Massive waves and strong storm surges led to both coastal and inland inundation in many areas along Ami’s path. Deep flooding in Labasa on Vanua Levu had severe effects on the town’s population.....Torrential rain led to many valley slopes failing in landslides, and on low lying flood plains huge quantities of sediment deposited by the swollen rivers ruined many sugar cane farms.’*

- In item 5 the authors continue and reported:

5 *'During Tropical Cyclone Ami in mid-January 2003 very large rainfalls occurred. The mountainous terrain of the island rapidly transferred this moisture to river channels producing record breaking floods in 5 of 8 rivers for which long term hydrological information exists. Nasekawa River had an extreme peak flow exceeding 6100m<sup>3</sup>/s. In the Labasa area, 3 rivers simultaneously delivered large amounts of water to the same coastal hinterland, at the time there was cyclone-generated storm surge. This produced flood heights of more than 4 meters on some flood plains.'*

**ABD 4: Tropical Cyclone Ami (05F) 12 -15 January 2003 - Preliminary Report**

10 *'Ami was a relatively intense tropical cyclone with maximum (10-minute) average winds of about 80 knots and momentary gusts of 120 knots at its peak intensity. The cyclone caused destructive to very destructive storm to hurricane force winds over Fiji's Northern and Central Divisions, and damaging gale force winds over Tonga and Tuvalu. Damage in Fiji was extensive and severe due to high winds, heavy seas and torrential rainfall that led to the worst ever flooding in the northern town of Labasa. 14 lives were lost with at least 3 persons still missing.'*

15 *"TC Ami maximum flood levels are shown in comparison to those of other severe floods of recent decades. In 5 of the 8 rivers, Ami produced the largest floods on record. At the other 3 stations, the magnitude of Ami's deluge was surpassed only by other cyclone-generated flood events."*

***Fiji and Rotuma***

20 *In Fiji, damage was extensive and severe especially to roads, infrastructure, buildings, houses, crops and vegetation over Macuata, Cakaudrove and Lau Provinces in the Northern and Eastern Divisions. To date, the confirmed total number of fatalities is 1 with 3 people still missing. Communication to and within the two divisions was severed for several days after the passage of Ami. Severe flooding in Labasa from its river took a heavy toll on the Township's residents and cause serious health and environmental risks. Water supply in the Northern Division was severely disrupted, leaving residents without clean drinking water for several days and forcing Government to cart fresh water from mainland Viti Levu to the affected areas. Torrential rain also caused landslides. High waves and heavy surge generated by Ami caused coastal and inland inundation in many areas along its path, some quite severe. The extent of damage requiring immediate Government attention has been valued at \$F60 million; however*  
 25 *the socio-economic loss is likely to exceed \$F100 million.*  
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**LEGAL MATRIX**

35 [14] I have considered at length the well-researched written submissions of the counsel replete with authorities. I have considered them all, but due to several admissions by both counsel, which I will discuss later on in the judgment, I have only used the most relevant material in deciding the issue.

[15] Mr Narayan argues that the policy conditions are only extensions and not exclusions therefore it was the duty of the plaintiff to prove the cause of the peril. Let me first consider this submission.

**Extension vis a vis exclusion**

[16] The relevant conditions of the policy relating to flood are as follows. I have referred to the two policies as **policy 1** and **policy 2** for clarity.

**Policy 1 - Policy No 922625/1111/06913/2001**

The special conditions (b) (i) and (ii) in the endorsement provides:

*'In consideration of the payment by the Insured to the Company of an Additional Premium it is hereby agreed and declared that the insurance under this Policy, shall subject to the Special Condition hereinafter contained extend to include destruction of or damage to the Property insured caused by Storm and/or Tempest'*

**Special conditions**

50 .....

(b) "No claim will be admitted in respect of:

(i) Loss or damage to the insured interest by water or rain, **unless** such loss or damage is caused by water or rain entering the building through openings in the walls or roof(s) made by Storm and/or Tempest.

5 (ii) Loss or damage caused by sea, tidal wave, high water, **flood**, erosion, subsidence or landslide." (emphasis added)

.....  
**Policy 2** - Policy No. - 922625/1122/06915 renewed on 1 July 2003

Extension clause

'Fire and other listed perils including Cyclone and excluding floods'.

10 [17] As said in the case of *Fai Insurance (Fiji) Ltd v Prasad's Nationwide Transport Express Courier Ltd* [2008] FJCA 101; ABU0090.2004S (16 April 2008):

15 *'An exclusion clause can be one of three types. The first type operates to exclude rights a party would otherwise possess under a contract by reason of the other terms of the contract, or a rule of law. The second type restricts the rights of one party without necessarily excluding the liability of the other. The third type qualifies the rights of a party by subjecting them to specified procedures'.*

20 [18] In my mind, the exclusion in both policies in the instant case falls within the third limb stated above.

[19] The principle policy of insurance was extended by the policy 1 and policy 2 to include perils other than fire, but subject to certain limitations. A consideration of the wording therein clearly manifests that the purpose of the limitation provisions stated above are to exclude the liability on the extended perils. Therefore, the onus lies with the insured to prove that the damage is a result of the extended peril and the insurer to thereafter prove the exclusions. The plaintiff must therefore prove that the damage was caused by a cyclone and the defendant must prove the damage was caused by floods, which would justify declining the claim.

### 30 **Cyclone and floods**

[20] The documentary evidence, its regurgitation by the witnesses along with the defendant's own admission manifests the existence of cyclone and that floodwater seeped inside the supermarket, which caused damage to the plaintiff's stock and machinery.

35 [21] Both counsel concur that I must use the proximity cause to determine the cause for damage.

### **Proxima causa**

40 [22] In *Caine v Lumley General Insurance Ltd* (2008) 15 ANZ Ins Cas ¶161-756 it was held that: '*proximate cause is a concept which requires an assessment of the qualities of reality, predominance and efficiency in the circumstances in which a number of factors contribute to the happening of the damage in question.*'

45 [23] In *Lasermax Engineering Pty Ltd v QBE Insurance (Australia) Ltd & Anor* NSWSC 50052/03 (16 March 2005) the Supreme Court held:

1. The law of insurance looks to the proximate and not the remote cause of loss or damage.

2. The proximate cause is the active, efficient cause that sets in motion a train of events without the intervention of any independent force.

50 3. The proximate cause rule is based upon the presumed intention of the parties to an insurance policy.

[24] In *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 706; cited in *National & General Insurance Co Ltd v Chick* (1984) 3 ANZ Ins Cas 60-579 at 78,483; [1984] 2 NSWLR 86 at 97 Lord Wright said the:

5 “choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician would understand it”.

[25] In *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* by [1918] AC 350 at 369, Lord Shaw of Dunfermline:

15 “To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but ... it is not wholly so ... Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause ... The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed .... In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the results. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency.”<sup>4</sup>

[26] In the case of *Employers Liability Assurance Corporation Ltd v Wayne Tank & Pump Co Ltd* [1973] 3 All ER 825 Lord Denning and Lord Roskill held that: ‘for the purposes of insurance law, in cases where there were two competing causes, the dominant or effective cause was to be taken as the proximate cause even though it was more remote in point of time’.

[27] The defendant at paragraph 3.11 of its written submission admits that the cyclone at Labasa at the material time would qualify as a tempest and that the disturbance brought by the cyclone was accompanied both by rain and wind as documented in **ABD 4, 14, 16 and 17**.

[28] To determine whether flood was the proximate cause of the damage, I will first set out the dictionary meanings and the authorities that have considered them.

[29] The Macquarie Dictionary 3rd Edition defines the words cyclone, tempest and storm and they are as follows:

**Cyclone** – an atmospheric pressure system characterized by relatively low pressure at its centre, and by clockwise wind motion in the southern hemisphere, anticlockwise in the northern.

45 **Tempest** – an extensive current of wind rushing with great velocity and violence, especially one attended with rain, hail or snow; a violent storm.

**Storm** – a disturbance of the normal condition of the atmosphere, manifesting itself by winds of unusual force or direction, often accompanied by rain, snow, hail, thunder and lightning, or flying sand or dust. A heavy fall of rain, snow or hail, or a violent outbreak of thunder and lightning, unaccompanied by strong wind

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4. [1918] AC 350 at 369:

**Floods** – “(a) a great flowing or overflowing of water esp. over land not usually submerged (b) any great outpouring or stream (c) to overflow in or cover with a flood; fill to overflowing.”

[30] The Little Oxford Dictionary meanings of the words cyclone, storm, 5  
tempest and floods are as follows:

**Cyclone** - wind rotating around low- pressure region; violent destructive form of this.

**Storm** - violent disturbance of atmosphere with high winds and usually thunder, rain, or snow;

**Tempest** - violent storm

10 **Floods** - overflowing or influx of water, esp over land, outburst, out pouring; in flow tide. ...

[31] In the case of *Oddy v Phoenix Assurance Co Ltd* (1966) 1 Lloyds Rep 134  
Veale J at 138, defined storm and tempest as:

15 *‘Tempest in my view only means a severe storm. Therefore the operative word is storm. I must approach this question much as a jury would approach it. Storm means storm, and to me it connotes some sort of violent wind usually accompanied by rain or hail or snow. Storm does not mean persistent bad weather nor does it mean heavy rain or persistent rain by itself.’*

20 [32] In the case of *Young v Sun Alliance & London Insurance Ltd* [1976] 3 All ER 561 their Lordships considered at length what is meant by flood and storm, with Shaw LJ stating:

25 *‘That is to say, ‘storm’ meant rain accompanied by strong wind; ‘tempest’ denoted an even more violent storm; and ‘flood’ was not something which came about by seepage or even by trickling or by dripping from some natural source, but involved “an overflowing or irruption of a great body of water” as one of the definitions in the Shorter Oxford English Dictionary, 3rd ed (1944), puts it. The slow movement of water, which can often be detected so that the loss threatened can be limited, is very different from the sudden onset of water where nothing effective can be done to prevent the loss, for it happens too quickly. It is because the word “flood” occurs in the context it does, that I have come to the conclusion that one must go back to first impressions, namely, that it is used there in the limited rather than the wider sense; that it means something which is a natural phenomenon which has some element of violence, suddenness or largeness about it.’<sup>5</sup>*

35 Lawton LJ said:

*‘I agree with Shaw LJ that the essence of “flood” in ordinary English is some abnormal, violent situation. It may not necessarily have to be sudden, but it does, in my judgment, have to be violent and abnormal. This seepage of water through a rise in the water level was not violent, and it was not all that abnormal; it was the sort of incident which householders sometimes have to suffer as a result of “rising damp.”’<sup>6</sup>*

40 Cairns LJ agreed with both Shaw and Lawton LJJ and said:

*‘Therefore, the only way in which one can interpret it is by asking oneself what is the meaning that an ordinary Englishman reading this word in the context in which it appears would give to it. I think in such circumstances one’s first impression may be the best guide to the real meaning. Giving oneself for the moment the credit of assuming that one is an ordinary Englishman, when I first looked at this case my reaction to it was: “No; you really could not call this a flood.” But when one began to analyse it, and to listen to the argument of Mr Jacob, I, like Shaw LJ, was almost persuaded that this could be called a flood. That it could be called a flooded floor, that an ordinary man or an ordinary housewife would say, “The water is flooding my floor,” I have no doubt. But*

50 5. Ibid at 563

6. Ibid at 564

*we come back to the question: Is it a flood? Is it a flood in a clause which refers also to "storm and tempest"?-which I think, contributes to giving a colour to the meaning of it.*

5 [33] In the case of *Brightwell Home Units Pty Ltd v The United Insurance Co Ltd* NSW Supreme Court 22nd May 1980 No 11812 of 1979 per Yeldham J cited in *Harper v Zurich Australian Insurance Ltd* (1987) 4 ANZ Ins Cas 60-779 said:

10 *"For myself I would not be prepared to hold that high wind, or indeed any wind at all, is necessary for there to be a 'storm' within the policy. I think that what is commonly known as a 'rain storm', which denotes something going beyond an ordinary heavy fall of rain and involves rain of unusual violence or tumultuous force, or at least a very heavy fall over a long period, would suffice. In common parlance a 'storm' is sometimes used to refer to a sudden shower of rain. That is its use in what might be called a wider sense. But just as in *Young v Sun Alliance and London Insurance Ltd* (supra) Shaw LJ held that the word 'flood' was used in its limited rather than its wider sense and meant something which was a natural phenomenon with some element of violent suddenness or largeness about it, so also, in the case of the present policy, should the word 'storm' be so construed.*

15 *In my opinion the evidence in the present case does not establish that the plaintiff's building was damaged as a consequence of such an occurrence... I am not satisfied that [the rain] constituted a storm within the meaning of the policy. It is not sufficient that rainwater in fact did build up over several days (the rain in fact beginning at about noon on 18th March). In other words, in my opinion, a heavy downpour, even extending over some hours, is not in itself a storm within the meaning of the policy unless it has the other characteristics to which I have adverted."*

20 [34] In *Harper v Zurich Australian Insurance Ltd* (1987) 4 ANZ Ins Cas 60-779.

25 *"The expressions 'thunderstorm' or 'rainstorm' are used in ordinary language to describe events which may or may not be associated with heavy wind. I see absolutely no reason why in general one should need to be satisfied of the existence of violent wind before categorising a violent rainstorm as 'a storm'. Furthermore, in my opinion, there is nothing in the context of the clause under consideration which requires one to adopt a meaning at variance with the common one."*

In dealing with the difference between storm and tempest His Honour said:

30 *"It seems to me that there is a distinction in substance between 'storm' and 'tempest' where those words are used in the policy. In the former one is concerned to focus upon the disturbance of the atmosphere manifested by, for example, a sudden heavy rainfall, loud and disturbing thunder, snow falls or lightning outbreaks. In the second attention is directed towards the violence of the wind whether or not attended with rain. True it is that tempest would usually involve disturbance beyond the mere creation of wind of high velocity but nonetheless it seems to me that, in the context of this policy, violent and disturbing wind rushes could be regarded as a 'tempest' whether or not, for instance, rain fell. Likewise the falling of rain, if sufficiently dramatic to attach the description 'storm', could be regarded as falling within the former category."*

35 [35] Persons or entities not necessarily having scientific or technological knowledge of the meaning of words often enter into the insurance policies.  
40 Therefore, I would prefer an interpretation of the perils in a context that a reasonable prudent person would understand. On a consideration of the dictionary meaning, a cyclone is an atmospheric disturbance resulting in violent, sturdy winds, swirling at high speed causing hazardous weather conditions and destruction. Depending on the severity of the cyclone, natural phenomenon such as rain, hail, or snow can accompany the cyclonic winds. Admittedly, in the  
50 present case, cyclone Ami included both wind and rain.



[36] ABD 17 at part 2 sets out the history of cyclone Ami. It appears that the tropical depression that commenced on 10 January 2003, in Funafuti Atoll in Tuvalu had undergone a rapid maturation into a storm by 12 January 2003. On that date the storm was named *Tropical Cyclone Ami*, while it was located near  
5 Niulakita Island. By 13 January 2003, the destructive winds were recorded to be of 110km/h with momentary gusts of 140km/h. By 14 January, there had been a rapid intensification, which led to issuing a hurricane warning. By then the ‘eye’ of the storm was located about 225km northeast of Labasa Town in Vanua Levu and it was observed that the radius of its damaging gale and storm force winds  
10 had increased. It had then accelerated its travel with hurricane force winds. The report then states that the peak intensity of the cyclone was observed on 14 January 2003 at 12 noon. It had then left Fiji waters and had brushed past Tongatapu in the Kingdom of Tonga, driving enormous seas and causing widespread damage due to gale force winds and heavy rain and had finally  
15 dissipated on 16 January 2003 after remaining another 18 hours in New Zealand – Wellington area. It is also documented in the same report that massive waves and strong storm surges had caused both coastal and island inundation in many areas along Ami’s path especially heavy flooding in Labasa with severe effects on the town’s population. The torrential rains had also led to landslides occurring in  
20 many valley slopes, low lying flooding and sediment deposited by swollen rivers ruining cane farms.

[37] In the same record, it is documented that large-scale rainfall was widespread. The data records at Labasa airfield confirms 245mm of rain whilst at  
25 Labasa Sugar Mill 145mm.

[38] Both the above reports established that on 14 January 2003 high winds and torrential rainfall were brought on by Cyclone Ami, which led to one of the worst ever incidents of flooding in Labasa. Neither of the reports were challenged by  
30 the defendant.

[39] The defendant also depends on the same evidence presented by the plaintiff to support its defence. It has not been documented that the floods on 14 January originated from some other natural cause except Cyclone Ami. The overwhelming documentary evidence together with the oral testimony of  
35 witnesses, especially of (PW3) **Hemant Kumar Charan** buttress the proposition that the torrential rain that caused the flooding in Labasa were a direct consequence of Cyclone Ami. I have no doubt and conclude that the sole cause of the floods on 14 January 2003 was Cyclone Ami.

[40] Moreover, in my mind the floods meant in the policy are more like the floods caused with some abnormal violent situation such as rainstorm or thunder storm that results a great flowing or overflowing of water.

[41] In my view, even the proximity cause in this case is in favour of the plaintiff.

45 [42] The World Book Encyclopedia 2001 page 237 defines seacoast floods as follows:

“ *Most of the seacoast floods are caused by storms. Others can result from usually high tides or from tsunami, a series of powerful ocean waves generated by an earthquake, landslide, volcanic eruption or asteroid impact. Hurricanes and other  
50 powerful storms create giant rushes of seawater called storm surges that can travel far inland.*”

[43] It appears that tidal waves and sea surges that are caused by storms or other natural phenomenon also result in flooding. In the present instant, there is ample evidence of a storm. Hence, even if I consider the defence under the proximate cause, i.e., whether the floods were caused due to tidal waves and/or sea surges, the dominant cause for flooding still remains a cyclone and not any other natural phenomenon.

[44] In the circumstances, I conclude that the floodwater that damaged the plaintiff's property was the either sole or a dominant consequence of the cyclone.

[45] Now that I have concluded that the cause of floods is Cyclone Ami let me turn to interpret its applicability in the exclusion clauses.

**Policy No 922625/1111/06913/2001**

[46] The defendant in paragraph 8.2 of its written submissions argues:

8.2 *In relation to Special Conditions clause 1(b)(i), the policy excludes water or rain damage. The exception to this clause is if water or rain were to enter the building through openings in walls or roofs made by the storm/cyclone. The evidence before the court from Mr Singh establishes this was not the case. The evidence does however show that water entered into the building from under doors ie existing openings. This is also an agreed fact. The Plaintiff did not lead any evidence to suggest that flood waters entered from openings made by the cyclone.*

[47] The plaintiff was not cross-examined to establish his understanding of the special condition. Nor had the defendant adduced any evidence to establish it. PW1 Charan Jeath Singh confirmed that the roof of the building was intact after the cyclone although several other buildings and trees in Labasa were destroyed. The disruption caused by cyclone can vary. Some buildings would survive unharmed whilst others could sustain damage.

[48] My understanding of the defendant's argument is that the exclusion in the special condition 1 b(i) is only non-conditional if the storm water 'entered through the roof or opening of the walls'. Accordingly the insurer becomes liable only if the cyclone destroys the roof and walls, allowing the water to enter the building. The defendant seems to foster an argument that if the same water had seeped through the floor or any other way other than through the roof or the walls the claim is excluded.

[49] Admittedly, the plaintiff's business was on the ground floor and it was the ground floor that was insured under the policy as an extended cover after receiving additional premium. Hence, the defendant knew at the time of extending the policy that the insured property did not have a roof thereby the condition could not have applied to the plaintiff's business. It is a natural consequence that floodwater rises from the ground level upwards and not vice versa. If the insured property were on the upper floor then interpretation of the conditions would have been different. Then it would have been a natural consequence for the roof to have blown off and the walls destroyed due to the strong winds created by the cyclone. However, I am unable to give the same construction to a premises situated on the ground floor.

[50] Due to the forgoing reasons, I am of the opinion that the special condition at clause 1(b)(i) is ambiguous and I am unable to give a proper construction to the clause. In the circumstances, it is my considered opinion that this is a fit case for me to apply the *contra preferentum* rule of construction.

[51] In *Fai Insurance (Fiji) Ltd, v Prasad's Nationwide Transport Express Courier Ltd* supra) their Lordships considered the rule and said (for clarity I have maintained the same numbering):

[58] *The contra preferentem rule only has application when a clause or provision in a document is truly ambiguous, in which case the interpretation which is against the interests of the party who proffered the document. In other words, against the interest of the party who drafted or presented the document to the other party, the other party having no input into the drafting or revising of the provision.*

[59] *It is a rule of construction by which an exclusion clause is construed against the party for whose benefit it is intended to operate: McRae v Commonwealth Disposals Commission (1951) 84 CLR 377.*

[60] *The rule, as Kirby J says in McCann v Switzerland Insurance Australia Ltd (Allens Case) [2000] HCA 65; (2000) 203 CLR 579, is now generally regarded as one of last resort.*

[61] *It is true that an exclusion clause is ‘ordinarily construed strictly against the proferens’: Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd (1966) 115 CLR 353 at 376.*

[71] *Any clause purporting to have the construction that the appellant contends for clause 2.2 would need to be in clear and unambiguous terms, and if there was any ambiguity the contra proferentem rule would come into play: Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd (supra).*

[52] In the circumstances I conclude that on an application of the “contra preferentem rule” of construction, the special condition 1(b)(i) in Insurance Policy No. 1 should be construed in favour of the plaintiff.

[53] Policy No 922625/1111/06913/2001

There is no ambiguity relating to the exclusion in Policy 2. I have given detailed reason above and accordingly I hold that Policy 2 should also be held in favour of the defendant.

### **Determination**

I conclude and determine that the sole and the proximate cause of the damage to the property in issue was Tropical Cyclone Ami.

### **Order**

The writ to be fixed for further hearing on the other defences and liability.

*Writ to be fixed for further hearing.*