IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL APPEAL NO. CBV0003 OF 2013
[Court of Appeal No. ABU 59 of 2008]

BETWEEN : JASWANT LAL

Petitioner

AND : THE NEW INDIA ASSURANCE COMPANY LIMITED

Respondent

Coram : Hon. Justice S. Chandra, Justice of the Supreme Court
Hon. Madam Justice C. Ekanayake, Justice of the Supreme Court
Hon. Justice A. B. Mutunayagam, Justice of the Supreme Court

Counsel : Mr. V. M. Mishra and Mr. R. Prakash for the Petitioner
Mr. J. R. Connors for the Respondent

Date of Hearing : 6 November 2013

Date of Judgment : 26 March 2014

JUDGMENT

Justice Chandra

[1] The Petitioner who had a business in Ba Town made a claim against the Respondent with whom he had taken out an Insurance Policy when his stock-in-trade was destroyed in the aftermath of hurricane Gavin which had occurred in Ba on 7th March 1997. His stock-in-trade was insured by the Respondent and when he claimed under the policy for the value of the stock that had been damaged, the Respondent refused to pay.

High Court Action

[2] In his statement of claim he stated that:

(i) He had insured his goods and merchandise including drapery, garments, textiles, fancy goods and cosmetics, business furniture, fittings and stock in trade for a sum of $ 250,000.00.

(ii) The respondent had agreed to indemnify the petitioner in respect of riot and civil commotion amongst other things.

(iii) On or about the 6th of March 1997 during the currency of the Policy of Insurance the chattels, improvements, contents of premises and furniture and stock to the value of $182,513.40 were destroyed and/or rendered unsafe and without commercial value and/or valueless as a result of riot and or civil commotion and/or malicious damage.

(iv) That the Respondent had made a payment of $5000 for a burglary claim but had refused to pay and or indemnify the Petitioner under the said Policy for other damage caused by riot and/or civil commotion and/or malicious damage.

(v) That the Particulars of Damage were:

a) Trading stock	$178,013. 40
b) Furniture and Fittings	$4,500. 00
	$ 182,513.40
Less Excess of	$500.00
Total	$ 182,013.40

(vi) That due to the Respondent's breach of the contract of insurance and failure to pay the Petitioner had lost income and claimed damages.

(vii) That due to the Respondent's refusal to pay the petitioner, he was unable to properly recommence his business activities and was losing income and thereby suffering further distress and/or damages.

(viii) That he was claiming:

(a) judgment for the sum of $182,013.40

(b) Damages for breach of contract and loss of income resulting from the breach;

(c) Interest at the rate of 12 per centum per annum under the Law Reform (Miscellaneous Provisions) Death and Interest) Act.

(d) costs.

[3] The Respondent in its statement of defence did not admit the position set out by the Petitioner regarding the destruction of the goods due to riot and/or civil commotion and/or malicious damage. However the Respondent admitted the claim regarding the burglary Policy. The Respondent also did not admit the particulars of damage as set out in the statement of claim and put the Petitioner to strict proof thereof.

[4] The Respondent thereafter had filed a more detailed amended statement of defence wherein objections were taken up regarding the non compliance of the requirement of notice within 30 days, the claim not being made in proper form etc. However, they had stated therein that they admit that the insured suffered some damage to the insured stock and business furniture.

[5] The Petitioner's evidence given at the trial was to the following effect:

"(i) the Petitioner's evidence revealed that when he had waded through the flood waters on the 8th of March 1997 into his

shop, he had seen about 10 or 12 people carrying away good and items from his shop and that while picking the goods they were pulling the items down from the shelves and many items were dropped in to the water and that there had been about 2 feet of water in the shop.

(ii) For the goods that were looted the Petitioner had made a claim under a burglary policy he had with the Respondent and had been paid $5000.00.

(iii) The petitioner had made a detailed inventory of numbers and cost prices of what had been taken by the looters. He had also made an inventory of what had fallen into the muddy water and had annexed same to his claim which he subsequently made for the loss of those items that had fallen into the water. This claim had been refused and was the one that he claimed in the action filed by him. The Petitioner had been cross examined on the inventory but the truth of it had not been seriously challenged. He had after washing and drying them after removing them from the shop put them up for sale and had realized $1,000.00 and since what was not sold was unusable he had dumped them. The Respondent had no evidence to counter this, nor had any submissions been made by Counsel regarding same.

(iv) The Respondent had sent their agent Toplis and Harding, Loss Adjusters, to see this stock and on 15 March 1997 Mr. Anthony R. Brown of that Company had sent a written report, which was a preliminary report regarding the claim under the Burglary Policy. In that report, the petitioner's efforts to salvage the clothing by washing and drying had also been mentioned. Photographs too had been attached to the report which showed the garments salvaged from the muddy water. However, they did not make any recommendation for payment but had told the petitioner that he could not make that claim.

(v) The Petitioner in his evidence had stated that the Respondent's local Agent, Anandilal Amin and the Respondent's Manager Western Division had gone to the Petitioner's house where he had taken the damaged goods for washing and drying.

(vi) That the local agent of the Respondent had been visiting his clients immediately after the hurricane and flood and had

been advising them and accepting their claims without their need for written notice to the Respondent's office. The loss adjuster too had been quickly on the scene. The loss adjuster had inspected the damaged goods at the Petitioner's house a week after the flood had subsided. His claim on the burglary policy had been paid. Although the Petitioner had pleaded with the Respondent's agents to allow him to make his claim for the water damaged goods, he had been told that there was no cover and as a result he had not given formal notice nor made his claim.

(vi) That when advised by his lawyer, the Petitioner had sent a notice of the claim and attached to it a formal claim on the Respondent's form for the sum of $182,513.40."

[6] Having considered the evidence and the documents presented to Court by the parties, the learned High Court Judge gave judgment in favour of the Petitioner in a sum of $267,685.35 made up of General damages in a sum of $167,303.95 and Interest on that amount at 6% per annum $100,382.40.

Appeal before the Court of Appeal

[7] The Respondent appealed against the said judgment and set out the following grounds of appeal:

1. *That the learned trial Judge erred in law and in fact in holding that the Respondent suffered loss and damage caused to his stock in trade by the malicious acts of the burglars who entered his shop.*

2. *That the learned trial erred in law and in fact in holding that the Respondent was entitled to payment of damages under the malicious damage extension when clause*

12(13)(a) of the subject policy of insurance under the heading "malicious damage extension" excluded destruction or damage arising out of or in the course of burglary, housebreaking, theft, larceny, or any attempt thereat.

3. *That the learned trial Judge erred in law and fact in holding that it was not a requirement for the Respondent to forthwith give notice in writing of any destruction or damage and shall within 30 days thereafter deliver to the Appellant a claim in writing containing as particular an account of the several articles or portions to property destroyed or damaged and of the amount of destruction of damage thereto and their value.*

4. *That the learned trial Judge erred in law and in fact in not holding that the Respondent had failed to comply with Clause 6 of the subject Policy of Insurance which provided that no claims under the Policy shall be payable under the 3 above had been complied with, and therefore, the Respondent was not entitled to any payment.*

5. *That the learned trial Judge erred in law and in fact in not holding that the discharge of the Appellant given by the Respondent in accepting settlement of the burglary claim had no effect whatsoever on any claim that the Respondent might make for fair compensation of the different loss under the malicious damage extension notwithstanding the fact that the Respondent had given an absolute discharge in writing to the Appellant for all his claims under the subject policy upon receipt of payment and was, therefore, stopped from making any further claims.*

6. *That the learned trial Judge erred in law and in fact in holding that the Respondent was entitled to payment for*

flood damage although the Respondent had not pleaded a claim for flood damage in his statement of claim.

7. *That the learned trial Judge erred in law and in fact in including water damage by burst pipe (which limited any claim to $2,000.00) where there was no evidence adduced by the Respondent that pipe had burst and that damage was caused as a result.*

8. *That the learned trial Judge erred in law and in fact in treating a claim by the Respondent's lawyers dated 15th July 1997 (which was in the Policy) as a valid substitute for a proper pleading although the Appellant had no opportunity to respondent to the issue in its pleading or to make any submissions thereon to the Court.*

9. *That the learned trial Judge erred in law and in fact in no holding that the endorsement to the flood damage extension limited any claim to the maximum sum of $5,000.00.*

10. *That the learned trial Judge erred in law not holding that the Respondent's claim was exaggerated and not supported by any credible or documentary evidence having stated that after some hesitation I accept all the items on the plaintiff's list and failing to give credit for the items for which the Respondent was paid under the burglary claim and the excess required to be deducted.*

11. *That the learned trial Judge erred in law and in fact in not holding that the Respondent's claim was exaggerated and fraudulent and, therefore, he was not entitled to any payment for the alleged damage to his stock-in-trade under clause 7 of the conditions of the subject Policy of Insurance.*

12. *That the learned trial Judge erred in law and in fact in applying wrong principle of law in unilaterally converting a claim for special damages into general damages having*

held that it was a mistake for counsel to claim that this amount is special damages because there is none of the evidence needed to prove this amount as special damages.

13. *That the learned trial Judge erred in law and in fact in holding that to give the Respondent some gratuitous remedy at all must treat the Respondent's claim in general damages, without any pleading for it or any evidence adduced in Court.*

14. *That the learned trial Judge erred in law and in fact in the calculation of interest on the judgment amount for a period of ten(10) years on the basis that "there is no factor reflecting adversely on either party" in that, neither party contributed to the long delay before the action was heard in spite of the fact that on two previous occasions it was the Respondent who sought adjournment, for reasons of his business commitments in New Zealand, one occasion when the Appellant sought adjournment when its counsel had to be evacuated to Sydney for urgent medical treatment, one occasion when the Court adjourned the case because the trial judge had other commitments. The leaned trial Judge also failed to hold that it was the Respondent who failed to prosecute or progress his case diligently that caused the delay.*

15. *That the decision of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence as a whole."*

[8] The Court of Appeal comprising of Justice Calanchini, Justice Basnayake and Justice Kotigalage allowed the appeal setting aside the judgment of the High Court with costs in a sum of $2000.00.

[9] While Justice Basnayake gave the main judgment, Justice Calanchini agreed with the conclusion reached by Justice Basnayake and made some comments on the matter of liability and in particular the approach taken by the learned trial Judge, and Justice Kotigalage agreed with the conclusion reached by Justice Basnayake and the comments made by Justice Calanchini.

The Application for Special Leave to the Supreme Court

[10] The Petitioner has sought special leave to appeal against the said judgment of the Court of Appeal and has set down the following grounds of appeal:

> *"20. The Learned Judges of the Fiji Court of Appeal erred in law in not giving sufficient emphasis to the overall principle of pleading as to damages as to :-*
>
> *(a) put the wronged person (The Petitioner) in the position he would be (as best money could make it) if the wrong had not been done to him in over-ruling the Trial Judge's decision findings of facts on damages when he had heard the evidence and found the same credible.*
>
> *(b) where a breach of contract had been proved is where a claimant claims damage of a kind which is not the necessary or immediate consequence of the wrongful act (here the breach of the contract to indemnify) the claimant then should plead full particulars to show nature and extent of the damage.*
>
> *21. The Learned Judges of the Court of Appeal erred in over-ruling the Trial Judge's decision and finding on damages and did not apply the principle that there is a presumption that a Judge's decision is correct and that a favourable interpretation of his findings ought to be taken and that his findings on fact are rarely upset.*
>
> *22. The Learned Judges of the Court of Appeal in over-ruling the Trial Judge's decision and finding on damages erred in law in not taking into account that the particulars of damage had been given*

as early as the 15th of July, 1997 (Supplementary Record of Fiji Court of Appeal Pages 11 to 13.) and this evidence was before the Trial Judge and further that there is certain flexibility in a Judge and discretion when dealing with damages and assessments thereof.

23. The Learned Judges of the Court of Appeal in over-ruling the Trial Judge's decision and finding on damages when he had the advantage of hearing the witnesses on credibility first had and did not take into account that the Trial Judge had found that normally an insurance company would have had a loss assessor (Page 24 Paragraph 34 of Vol 1 of the FCA Record) and that the Respondent had wrongly refused the claim and that as a result the Petitioner now had no records except his list which he made at the time was at least in part due to the conduct of the Respondent.

24. The Petition raises far reaching questions of law pertaining to:

1. *Whether the Fiji Court of Appeal applied proper principles of law when dealing with an appeal on damages.*

2. *Normal pleading practice when it comes to pleading of damages and when damages need to be specifically particularized and the extent of the same.*

3. *Whether there is a presumption that a Judge's decision is correct and whether a favourable interpretation of the judgment ought to be taken.*
4. *When a judge's findings of fact and credibility particularly relating to damages can be over-ruled.*

5. *The extent to which a Court of Appeal can substitute its own reasoning and fact finding when sitting as a Court of Appeal.*

25. The Petition raises matters of great general or public importance pertaining to:-

1. *What are proper principles of law when dealing with an appeal on damages especially when liability has been found.*

2. *What are the special damages and what are general damages and to what extent they need to be particularized and pleaded.*

3. *Whether there is a presumption that a Judge's decision is correct and whether a favourable interpretation of a Trial Judge's judgment ought to be taken.*

4. *When a Judge's findings of fact and credibility particularly relating to damages can be over-ruled.*

5. *The jurisdiction and powers of a Court when sitting as an Appellate Court when dealing with damages.*

26. The Petition raises matters that is otherwise of substantial general interest to the administration of civil justice pertaining to:-

1. *What are the proper principles of law when dealing with an appeal on damages and how they are to be administered.*

2. *Normal pleading practice when it comes to pleading of damages and when damages need to be specially particularized and the extent of the same.*

3. *Whether there is a presumption that a Judge's decision is correct and whether a favourable interpretation of the judgment ought to be taken.*

4. *When a Judge's findings of fact and credibility particularly relating to damages can be over-ruled."*

And sought the following reliefs:

> *"(a) That special leave be granted to the Petitioner to appeal to the Supreme Court of Fiji against the decision of the Court of Appeal in allowing the Respondent's appeal to it.*
>
> *(b) The decision of the Court of Appeal be reversed and set aside with costs to the Petitioner in all Courts and the decision of the High Court on liability and damages be restored with any further order or directions which to this Honourable Court may seem fit."*

[11] In order to grant special leave to appeal one of the criteria in the provisions in s.7(3) of the Supreme Court Act 1998 has to be satisfied. S.7(3) provides :

> *"In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises –*
>
> *(a) A far reaching question of law;*
> *(b) A matter of great general or public importance;*
> *(c) A matter that is otherwise of substantial general interest to the administration of civil justice."*

[12] The threshold for the granting of special leave to appeal is high as has been expounded in the cases which have dealt with this provision. **Bulu –v- Housing Authority** [2005] FJSC 1 CBV0011.2004S (8 April 20005), **Dr. Ganesh Chand –v- Fiji Times Ltd**. CBV 0005 of 2009 (31st March 2011), **Praveen's BP Service Station – v- Fiji Gas Ltd**., DAV0001 of 2011 (6th April 2011) **Native Land Traust Board –v- Shanti Lal and Several Others** CBV0009 of 2011 (25th April 2012) were cases where the Supreme Court dealt with this provision. According to these decisions special leave to appeal is not granted as a matter of course, and that the grant of special leave, the case has to be one of gravity involving a matter of public interest, or some

important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.

[13] The present case which dealt with an insurance claim had to deal with the nature of damages that were sought by the Petitioner. In the proof of such damages matters relating to special damages, general damages and unliquidated damages have been discussed in the High Court and the Court of Appeal. The basis of a claim of insurance which is one of indemnity has not been considered in the context of an insurance claim in both Courts and as a result the loss claimed by the Petitioner was not considered in the manner that it should have been considered according to law relating to insurance.

[14] In Colinvaux's Law of Insurance 9th Edition at 137 the principle of indemnity is discussed. It is stated therein that:

> *"The essence of insurance is that the assured may recover only what he has lost, i.e. that it provides no more than indemnity."*

[15] Chitty on Specific Contracts 26th Edition at 4205 states :

> *"Most contracts of insurance are contracts of indemnity, whereby the insurer agrees to compensate the assured for the loss that the latter may sustain through the happening of the event upon which the insurer's liability may arise....."*

And at 4264

> *"A claim under a contract of insurance which is a contract of indemnity is a claim for unliquidated damages even, it seems, when the contract is a valued one.* ***Jabbour –v- Custodian of Israeli absente Property*** *[1954] 1W.L.R.139. The measure of damages in the case of valued contracts raises few difficulties. If there is a total loss the assured recovers the agreed value, and if there is a partial loss the assured recovers a proportion (the*

depreciation in the actual value) of the agreed value. ***Elcock –v- Thomson*** *[1949] 2 K.B.755."*

[16] Justice Pathik in **Sharda Nand –v- Dominion Insurance Ltd** [2000] FJHC 167; HBC 57, 1996 (30 June 2000) in a claim regarding a fire insurance policy cited the decision in **Leppard –v- Excess Insurance Co. Ltd** (1979) 2 All E.R. 668 where Megaw L.J. stated:

> *"Ever since the decision of this Court in* ***CASTELLAIN -v- PRESTON*** *(1883) 11 QBD 380 the general principle has been beyond dispute. Indeed, I think it was beyond dispute long before* ***CASTELLAIN –v- PRESTON****. The insured may recover his actual loss, subject, of course, to any provision in the policy as to the maximum amount recoverable. The insured may not recover more than his actual loss."*

[17] Justice Pathik then referred to the dictum of Brett L.J. in **Castellain –v- Preston** which was:

> *"In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation in my opinion, of every rule which has been applied to insurance law is this, namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, because of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."* (emphasis added).

[18] Justice Pathik stated further that :

> *"The amount payable must be the amount of the plaintiff's loss. The amount of an insured's loss is not necessarily measured by reference to the cost of replacement or repair of the property destroyed or damaged and may be measured in other ways. "In the case of chattels, the measure may be the costs of the chattels destroyed, its market value, its value to the owner as part of a going concern, or the cost or repair of the damage ... [**Vintix Pty Ltd –v- Lumley General Insurance Ltd** (1992) 24 NSW LR 627 at 633, Giles J]".*

[19] It would be seen therefore that in a claim under an insurance policy the claimant is indemnified for the loss incurred by him. What he has to establish before Court is the loss incurred to the satisfaction of the Court. The furthest that can be said in terms of damages is that the loss has to be considered as unliquidated damages as the loss has to be ascertained. There is no necessity to go into the ramifications of seeing whether they are special or general damages as in the law of torts or in certain contracts. Insurance is a special contract where indemnity is the basis of granting a claim made by the insured.

[20] In the result the questions raised in the grounds of appeal give rise to serious questions of law involving matters of public interest in the field of insurance claims specially in relation to the granting of damages when liability has been established and special leave to appeal is granted.

[21] In a claim based on an insurance policy what is required to be considered is whether the claim made by the Insured comes within the terms of the policy, whether the conditions necessary to lodge a claim have been satisfied, whether the

Insured is liable if the claim made by the Insurer is not met and if so to what extent is the insured liable for the loss incurred by the Insured. If it is concluded that the Insurer is liable and thereby has caused a breach of the contract, how should the Insured establish his claim regarding the loss he has suffered when claiming damages. In processing a claim under a policy it is usual for the Insurer to get a valuation done through their Loss Adjustors of the loss suffered by the Insured. So the basic questions that would arise in an action on a insurance policy would be whether the Insurer is liable regarding the claim and secondly to what quantum of damages is he liable.

The Approach of the High Court Regarding Liability under the Policy

[22] The Appellant based his claim on the terms of the extended Fire Insurance Policy issued on 23 January 1997 which was in operation as at the time that the damage occurred. The claim was made in terms of the special conditions in the policy covering Riot and/or Civil Commotion and/or Malicious Damage – Clause 12B(1)(a). The Appellant gave evidence regarding the damage caused to the goods and also led the evidence of three other witnesses regarding the incidents that had taken place in the aftermath of the flood. The Respondent did not place any evidence before Court regarding the terms and conditions of the Policy and its exceptions. In their statement of defence they had merely denied the claim of the Appellant. The Petitioner was not cross examined regarding Clause 12B(1)(a) of the Policy either. In **Bond Air Services Ltd –v- Hill** [1955] 2QB 417 it was held that there was a burden on the insurer to plead and prove the facts to bring the case within any exception relied on or breach of any condition relieving them from liability for the loss in question. The learned High Court Judge having examined the evidence before him considered the terms of the Policy from paragraphs [12] to [28] in his judgment regarding the aspects of riot, civil commotion and malicious

damages separately and arrived at the conclusion that the damage to the stock that fell into the muddy water was malicious damage as follows:

> *"[20] In the present case looters were pulling out bundles of clothing. Other bundles of clothing stacked on top of them came too and fell into the muddy water. These people have already been accepted by the defendant as burglars and they were stealing the stock upon which they were laying their hands. Clearly they were not intending to take what was stacked above which they allowed to fall into the muddy water. Equally clearly they knew this was happening and simply cared nothing about it. The damage to what fell into the muddy water was a reasonable foreseeable and observed consequence of the unlawful act of stealing the garments which were taken by hand. The damage to the stock that fell into the muddy water in my opinion was wanton and reckless. It is malicious damage within the definition. On that ground alone I hold against the defendant."*

[23] The Court also considered the objection taken by the Respondent regarding the lodging of the claim after the stipulated period of 30 days which was a condition precedent in the Policy. The learned High Court Judge in his judgment stated thus:

> *[15] Defendant's counsel submitted also that the plaintiff had put himself outside the terms of the policy by two separate breaches of clause 6. This is the clause which requires the insured to lodge written notice of his claim within 30 days and it contains a provision for a statutory declaration. I made some comments about notice. The defendant itself waived the requirement of notice in the days following this hurricane and flood. It met claims without requiring written notice. As for the statutory declaration, the words of clause 6 are "....together with (if demanded) a statutory declaration of the truth of any matters connected therewith....." It is true that in the claim form submitted the plaintiff signed his declaration in front of a person not authorized to take declarations. However, the defendant has never "demanded" any statutory declaration from him and cannot raise that objection now. This is not a significant point for the defendant.*

[16] Any further doubts will be dispelled by reference to Halsbury 4th Edition Vo.l25 para.500 p.269. An insurer's requirement for notice may be waived by the insurer, as it was in this case. Counsel omitted the reference to the two cases that are authority for this, but it would be strange if the law were otherwise."

[24] The High Court had therefore determined that the Petitioner was entitled to claim his loss in terms of the Policy under malicious damage and that the claim made was a proper claim although it was made after the 30 day period and that the declaration though made had not been made strictly in terms of the Policy.

Approach of the Court of Appeal Regarding Liability under the Policy

[25] The Respondent in its notice of appeal to the Court of Appeal challenged the judgment of the High Court on several grounds and specially grounds 1 and 2 dealt with liability and grounds 3 and 4 dealt with the requirement of notice.

[26] In the main judgment of the Court of Appeal which was given by Justice Basnayake these grounds were not dealt with as only grounds 12 and 13 were dealt as being necessary for the purposes of the appeal. Grounds 12 and 13 dealt with the granting of damages. The position regarding liability on the policy and the notice requirement had not been dealt with in the said judgment. The resulting position therefore would be that the finding and the conclusions of the learned High Court Judge regarding liability and the requirement of notice would remain undisturbed.

[27] Although Justice Calanchini agreed with the conclusions arrived at by Justice Basnayake that the appeal should be allowed, the question of liability has been commented on in the following manner:

> *"[3] I do not find it necessary to review the conclusion reached by the learned trial judge that the goods damaged by muddy water during the course of the burglary was malicious damage. That was a finding open to the judge on the evidence the Court."*

[28] As shown above at paragraph 22, the learned High Court Judge concluded that goods damaged by muddy water came within the terms malicious damage. Justice Calanchini has impliedly agreed with that finding, although Justice Basnayake did not deal with liability in his judgment. Even if it is considered that the two judgments, namely that of Justice Basnayake and Justice Calanchini are at variance on the issue of liability, Justice Kotigalage the third Judge by agreeing with the conclusions reached by Justice Basnayake and comments of Justice Calanchini has tilted the balance in favour of the finding of the High Court that there was malicious damage.

[29] There is much substance in the judgments that were cited by the Appellants regarding the finding of trial judges when viewed by the Appellate Courts regarding questions of facts. The Supreme Court in **QBE Insurance (Fiji) Limited –v- Ravinesh Prasad** [2011] FJSC 14; CBV 003 of 2009 (18 August 2011) stated :

> *"27. This is a case where the trial judge had the advantage of hearing and seeing the witnesses examined and cross examined. It is not a case depending on inference to be drawn from admitted evidence. While there are many leading cases of high authority on the point, in my opinion, the words of Lord*

Reid in the House of Lords in ***Benmax –v- Austin Motor Company Ltd*** *(1955) 1 All ER 326 at 328 and 329 are the most applicable to the present case .....*

> *"Apart from the cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard from the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but maybe rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations."*

[30] The learned High Court Judge made a strong finding of fact regarding the liability of the Respondent which remains unchallenged by the Respondent, and they have not lodged any appeal against the decision of the Court of Appeal on the aspect of liability. In terms of the dicta cited above, it is doubtful whether the findings of the trial Judge would have been faulted even if they had been challenged. Therefore the liability of the Respondent remains well established in the present case.

The Approach of the High Court Regarding the Granting of Damages

[31] In Fai Insurance (Fiji) Limited –v- Prasad's Nationwide Transport Express Courier Limited (unreported ABU 90 of 2004 ; 16 April 2008) it was stated that the trial judge has an obligation to assess damages in accordance with principle and if she or he is without assistance from the parties the judge must do the best he or she can on the evidence before the Court.

[32] It is usually seen in claims relating to fire damage or flood damage, a claimant is not able to establish his loss with exact precision by producing all documents necessary to justify the claim as very often such documents are not available after the occurrence of the calamity. What a claimant can do is to produce whatever evidence that is available to justify the claim. It is for this reason that in insurance claims, when the event is brought to the notice of the insurer and a claim made, that the Insurer inspects the premises where goods had been stored and effect a valuation of the damage through its agents or representatives usually referred to as Loss Adjustors to avoid fraudulent or aggravated claims.

[33] In the present case the Agent of the Insurer had been present soon after disaster struck and had examined the goods even after they were salvaged and taken to the Petitioner's house to see what best could be done to them. When the Petitioner had indicated to the Agent that he wanted to make a claim for the damaged goods, he had been discouraged by stating that he would not succeed in making a claim regarding the goods that were damaged. At that moment the Petitioner had only made a claim under the heading of burglary as that was what was recommended by the Agent of the Insurer. Although the Agent had indicated to the Petitioner that the claim for the damaged goods would not succeed, the Petitioner nevertheless had taken an inventory of the damaged goods which would appear to have been the

best available evidence in the circumstances regarding the loss suffered by him. The Insurer's Loss Adjustors had not done a valuation of the damaged goods although they had seen them as they were under the impression that the claim would not succeed. This was a lapse on the part of the Loss Adjustor of the Insurer, which lapse would have to be borne by the Insurer. Even before Court the Respondent in the statement of defence only took up the position that the claim was fraudulent or a fraudulently exaggerated claim.

[34] The question arises therefore as regards the amount of evidence required to prove quantum of the loss made by a claimant and whether the Petitioner had done so to the satisfaction of the Court. The only document presented to court was the list drawn up by the Petitioner setting out the stock and values given to such stock. Apart from that it was the evidence of the Petitioner who was subjected to cross examination, that was available to Court. It would be relevant to consider as to how the learned High Court Judge dealt with such evidence in determining the loss suffered by the Petitioner.

[35] The learned High Court Judge in his judgment set out the nature of the Petitioner's claim as follows:

> *"[29] The plaintiff pleads that his loss covered under the policy was $q78,0103.40 for trading stock and $4,500 for furniture and fittings which after allowing the $500.00 excess is a total of $182,013.40. He seeks judgment for that amount. As well he pleads that "due to the Defendant's breach of the said contract of insurance and failure to pay (he) has lost income and claims damages". He then claims damages under a third head, namely that "due to the Defendant's refusal to pay the Plaintiff has been unable to properly recommence his business activities or rebuild and is long his income and is also unable to service his*

commitments and thereby suffering further distress and/or damages".

This is in para 8 of the Statement of Claim.

[30] He therefore seeks:

(a) judgment for the sum of $182,013.40

(b) damages for breach of contract and loss of income resulting from the breach.

[36] It would be relevant to consider the manner in which the learned High Court Judge proceeded with his analysis of the evidence in assessing the damages and for that matter it would be helpful to set out the relevant paragraphs in his judgment and comment on them.

"[34] .....The plaintiff for his part has now no records except a photocopy of a list which is undated but which he says he made at the time. In the list he states the quantity of each particular items and what he says was the cost price excluding VAT. The sum total of those items at cost price he puts at $152,094.50 and to that he adds VAT of $15,209.45. Questioned about this he said he had to pay VAT and he was thus claiming it back. He adds interest, 10%. Hence his total of $182,513.40 from which he is prepared to deduct the excess of $500.00. The probative value of this list, totally unsupported by any evidence at all, rests entirely on my view of the plaintiff's credibility after cross-examination. As it happens he was cross-examined about some particular items (e.g. scissors at $55.00 imitation jewellery at $4,500). But to challenge the rest defendant's counsel was powerless. The plaintiff expects me to take his word for it. He has made no allowance whatever for the possibility of some mistake in his pricing of these items or in his claim of the number of each particular item. He produced no evidence that he had actually paid VAT of $15,209.45.

[36] The picture grows darker for the plaintiff. When this list was typed up and put in as evidence it was headed 'Particulars of Special Damages (as per paragraph 8 of the Statement of

Claim)". Part of Paragraph 8, I have set out above. The total amount, $182,013.40 is the amount he seeks as judgment in damages under the heading (a) above. It is unclear from the Statement of Claim whether he seeks this as specific performance(not pleaded), general damages or special damages. He has now made it plain that he seeks this sum as special damages. Without documentary evidence he is most unlikely to obtain special damages in that amount.

[37] My final comment is about his second claim (b) above. This claim of damages for breach of contract can be taken to be a claim in general damages. However included with it is a claim "and loss of income resulting from the breach". Here again we are in special damages. This claim for loss of income as special damages is even more tenuous than the other one. It is totally without evidence I have no basis at all on which to make an award and that claim must fail.

[39] ……,what is the measure of the plaintiff's damages? It must be the measure of what he has lost as a result of the defendant's breach. He claims that what he lost was the money he had spent on the destroyed stock. This he claims was $152,094.50 together with the VAT on that, $15,209.45, a total of $167,303.95. ……

[40] ……..That was the conclusion of his evidence in chief and he finished with the words "I want damages for their refusal to cover my loss, their breach in contract." That is all he wants. ***He has proved no loss or injury other than the loss of the stock. ……***

[41] ***So, the measure of his damages is his loss and his loss (he claims) was $167,303.95****. It was a mistake for counsel to claim that this amount is special damages because there is none of the evidence needed to prove this amount as special damages. To give the plaintiff any remedy at all I must treat this claim as a claim in general damages. From his demeanour I concluded during his evidence that he was a credible witness. His list of what he says he lost simply begs for cross-examination but there was no substantial challenge to it at all. By my calculation he claims to have lost 4119 individual items …….*

(In the judgment there are two paragraphs numbered [40] and are reproduced in the same manner)

[41] In cross-examination the plaintiff was asked about tax and other records. He has nothing himself he said everything is kept by his Accountant Jag Narayan who is in New Zealand at the moment. He does not have any records for that year, he did not keep them. He said everything was with him but went out in the flood. He could not have meant that he kept them at home because his house was above the flood. .....

[42] At this point in the cross-examination counsel asked for a short break and after the break the defendant's counsel told the court that he was now holding some uncertified accounts that had been given to him. Thereafter he confined his cross-examination to such items as the scisssors, the china ware (which the plaintiff appeared to have forgotten about), the umbrellas, the imitation jewellery, the furniture, (which the plaintiff said "was flooded and got damages"), and the boys' clothes. Thereafter counsel asked the one question directly on point about the truth of the list. He asked the plaintiff did he make an inventory of what he salvaged from the shop and the plaintiff replied "No I took everything, separated them and came to know the numbers of that garment. (You then made a list?) Yes, this is the list".

[43] So it appears the plaintiff did not rely on his records at all. He made a physical count. The question was not pursued. I have to assume that the uncertified accounts which counsel told me he had were accepted by him as setting out the true position. I proceed from there.

[44] After some hesitation I accept all the items on the plaintiff's list. .....

[46] I therefore, and for those reasons, award by way of general damages the sum of money which the plaintiff spent to acquire the lost items which includes both their purchase price and the VAT paid upon that. This total is $167,303.95."

[37] In the said paragraph [34] the learned Judge's reference to the photocopy of the list, is the document that was filed by the Petitioner through his Lawyers on 10th July 2008. This is a typed copy that is seen in the record. The same contents are seen in a hand written document annexed to the claim which is made by the Petitioner to the Respondent, which has been produced by the Respondent as a document as part of their documents. As stated above in **Fai's case** (Supra) where the evidence is of such a nature the duty is on the Judge to do the best as he can.

[38] In assessing the damages, the learned trial Judge took into account the list as stated above, the petitioner's evidence and the cross-examination of the petitioner by the Counsel for the Respondent. The Judge at paragraph [34] cited above stated that *"The probative value of this list, totally unsupported by any evidence at all, rests entirely on my view of the plaintiff's credibility after cross-examination. As it happens he was cross-examined about some particular items. But to challenge the rest defendant's counsel was powerless. The plaintiff expects me to take his word for it."* Then at paragraph [39] cited above, the learned Judge stated *"So, the measure of his damages is his loss and his loss (he claims) was $1667,303.95. From his demeanour I concluded during his evidence that he was a credible witness. His list of what he lost simply begs for cross-examination but there was n o substantial challenge to it at all. By my calculation he claims to have lost 4119 individual items ....."* . Again at paragraph [41] the learned Judge stated regarding tax and other records *"He said everything was with him but went out in the flood. He could not have meant that he kept them at home because his house was above the flood."* At paragraph [42] the learned Judge stated : *"Thereafter counsel asked the one question directly on point about the truth of the list. He asked the plaintiff did he make an inventory of what he salvaged from the shop and the plaintiff replied "No I took everything, separated them and came to know the numbers of that garment. (You then made a list?) Yes, this is the list".* At paragraph [43] the Judge stated *"So it*

appears the plaintiff did not rely on his records at all. He made a physical count. The question was not pursued. I have to assume that the uncertified accounts which counsel told me he had were accepted by him as setting out the true position."

[39] The trial Judge's consideration of the evidence relating to the loss incurred by the Petitioner as seen from the extracts of the judgments cited in the above paragraph taken as a whole would show that the Judge had accepted the evidence of the Petitioner though limited in terms of documents by being satisfied with his demeanour and accepting as a credible witness and to support him further he had used the cross examination of the Petitioner which virtually was an acceptance of the loss incurred by the Petitioner. In effect the learned Judge had satisfied the requirements in assessing the loss as laid down in **Fai's case** (supra) which is referred to in paragraph [31] of this judgment.

[40] The establishing of the Petitioner's loss is further established by considering the position that arose in **Sharda Nand's Case** (Supra) where in a claim for fire damage, the claimant was unable to produce any records of his sales and purchase. Nor did he call his accountant in spite of the opportunity offered to do so. Justice Pathik stated with reference to the loss incurred by the claimant:

> *"I have carefully analyzed the whole of the evidence in this regard. It is clear from the evidence that after the fire the plaintiff was not able to produce any relevant invoice books and books of accounts to prove his claim as most of his records were destroyed. However, his accountant could have through some light on the plaintiff's business and the stock he carried had he been called; but he did not call him despite opportunity having been given to him. He rested his case on his own evidence."*

The Plaintiff claimed $55,000.00 as his loss, an Insurance assessor assessed the loss at $20,178.68 and the Court assessed the loss at $26,665.00 which was granted to the plaintiff.

[41] In the present case as observed earlier, there was no valuation done by the Insurer's Loss Adjustors. It may be relevant to state here that when a Loss Adjustor does an estimate of the loss complained by an Insured it is usual to deduct 15% to 25% from the value given by the insured to make up for mistakes and exaggerations. The only quantum available was the amount stated by the Petitioner which as shown was accepted by the learned trial Judge as the loss incurred by the Petitioner which was the amount that was granted to the Petitioner ultimately in the judgment of the learned trial Judge. It was really the loss as stated by the Petitioner that was granted as damages.

[42] The learned trial Judge after assessing the loss brought it under special damages and then under general damages, without awarding that amount to the Petitioner and went into the area of the distinction between special damages and general damages which was erroneous as the claim of the Petitioner was a judgment for the loss incurred, the basis of granting such loss being that of indemnity. The learned trial Judge in the first instance stated that the Petitioner had claimed the damages as special damages whereas a perusal of the statement of claim, the pre trial conference, and the closing submissions of Counsel for the Petitioner shows that there was no claim made on the basis of special damages.

[43] The learned trial Judge further fell into error by stating that in order to give a remedy to the Petitioner he should treat the claim as a claim in general damages and

granted the loss that the Judge had concluded as the loss claimed by the Petitioner. It was not necessary to enter into the arena of special and general damages in this case as all that was required was to consider the loss claimed by the Petitioner and if satisfied to grant such loss. Therefore the granting of the said quantum to the Petitioner was correct but the error was the manner in which it was couched by the learned trial Judge.

The Approach of the Court of Appeal Regarding the Granting of Damages

[44] As stated earlier, in the main judgment of Justice Basnayake only the two grounds of appeal which dealt with the grant of damages was considered by the Court of Appeal in allowing the appeal of the Respondent when challenging the judgment of the High Court.

[45] The error committed by the learned High Court Judge in the granting of the damages by delving into the arena of special damages and general damages, and his position that special damages had not been proved and that what was claimed was being granted as general damages was utilized by Justice Basnayake.

[46] Justice Basnayake treated the claim of the Petitioner as being one for special damages and stated that as the Petitioner had not proved his special damages his claim should have been dismissed and set aside the judgment of the High Court. In his judgment the aspects of the claim being an insurance claim and how it has to be considered was not gone into on the basis of indemnifying a loss.

[47] Justice Basnayake in his judgment discussed the distinction between Special and General Damages and cited the decision in Credit Corporation (Fiji) Ltd –v- Khan 2008 FJCA 26, Ratcliffe –v- Evans and Ilkiw –v- Samuels.

[48] Credit Corporation (Fiji) Ltd case was a case which dealt with a claim for damages regarding the seizure of a caterpillar D6D Bulldozer which was alleged to be unlawful. The loss of income as a result of such seizure was claimed as damages whereas such damages should have been claimed as special damages. The purpose of specifying damages as special damages is to warn the defendant of the type of claim and evidence or the specific amount of the claim that which he will be confronted with at the trial.

[49] In Ratcliffe –v- Evans [1892] 2QB 524 Bowen LJ held that special damage "means the particular damage (beyond the general damage) which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.

[50] In Ilkiw -v- Samuels & Others [1963] 2 All ER 879 which was an action in tort where the Court of Appeal held that the loss of earnings which should have been pleaded by way of special damage could not be treated as general damages.

[51] The above three decisions can be distinguished from the present case as they were not based on any insurance claims but were purely matters relating to law of contracts and law of torts.

[52] On the other hand Justice Calanchini who agreed with Justice Basnayake regarding the conclusion reached, went into the question of the nature of an insurance claim and stated at paragraph [5] as follows:

> *"[5] .....The question of damages in an action brought under a contract of insurance was discussed by Pearson J in* ***Fouad Bishara Jabbour and Another –v- Custodian of Absentee's Property of State of Israel*** *[1954] 1 All ER 145 at page 150:*
>
> > *"But the word "damages is puzzling and seems to be used in a rather unusual sense, because the right to indemnity arises, not by reason of any wrongful act or omission on the part of the insurer (who did not promise that the loss would not happen or that he would prevent it) but only under his promise to indemnify the insured in the event of a loss."*
>
> *[6] The point is that the contract of insurance in this case was a contract of indemnity whereby the Appellant agreed to compensate the Respondent for the loss sustained by the Respondent. What the Respondent was entitled to claim was a sum of money that would indemnify him for the loss he sustained. To the extent that the word "damages" includes a claim under an insurance policy when the quantum of the loss has been proved it is being used in a different sense from damages that may be claimed as pecuniary recompense given by process of law to a person for the actionable wrong that another has done him.*
>
> *[7] On the same page Pearson J (supra) said:*
>
> *"It is established by many decided cases that such a claim as this is a claim for unliquidated damages _____. Such claim in liquidated because the Plaintiff has to prove the amount, and even after the adjustment of the amount, the Plaintiff (unless he chooses to sue on an account stated) must still prove the amount, but such evidence might be rebutted, for instance, by proof of a mistake."*

[48] Justice Calanchini in his judgment as seen from the above passages considered the claim of the Petitioner as "unliquidated damages" as opposed to the consideration of same as "special damages" by Justice Basnayake. It may be relevant to state here that the expression "unliqudated damages" is utilized in an insurance claim where there is a sum assured in the Policy which is quantified and the claim is ascertained in relation to the said assured sum. This is clear from the dictum of Justice Pearson in Fouad Bashara Jabbour"s case when he stated at page15l:

> *"The explanation of the use of the expression "unliquidated damages"to describe a claim for an indemnity under an insurance policy may be wholly or partly afforded by the old form of pleading in assumpsit, alleging a breach by non-payment, as in* ***Castelli v Boddington*** *(1852), 1 E. & B.66. But, as the only wrong admitted by the insurer is his failure to pay a sum due under a contract, the amount of which has to be ascertained, he seems to be in much the same position as the person who owes and has failed to pay a reasonable price for goods sold and delivered or a reasonable remuneration for word done or services rendered. The claim is for unliquidated damages, but the word "damages" is used in a somewhat unusual sense."*

[49] Justice Calanchini's conclusion was that the list produced by the Petitioner was not sufficient to establish the value of the loss, as it was not sufficient to satisfy a reasonable man as to the value of the loss. This would mean that if the loss as shown was acceptable the Petitioner would have been entitled to have that sum as the loss incurred by him. That is exactly what happened before the High Court where the learned High Court Judge accepted the amount set out in the list produced by the Petitioner as the loss, which was a question of fact. The learned High Court Judge gathered support to accept the list from the evidence of the Petitioner whose evidence was accepted as being credible when considering his demeanor and further from the nature of the cross examination of the Petitioner by

Counsel for the Respondent. It is to be noted as stated above that the Respondent had accepted the fact that the Respondent's Agent who was at the scene soon after the floods saw the damaged goods, and also saw the attempts made by the Petitioner to salvage the goods but failed to make a valuation or estimate of the damaged goods which would have been usually done by an Agent or Loss Adjustor of an Insurance Company in such a situation.

[49] The evidence regarding the loss claimed by the Petitioner was not confined to the list as referred to by Justice Calanchini, the list was the basis. It was strengthened by the Petitioner's oral evidence which was accepted by the learned trial Judge who stated that he was satisfied with the demeanour and the credibility of the petitioner and also referred to the cross examination by Counsel for the Petitioner regarding which the trial Judge stated that the cross-examination virtually accepted the loss set out by the Petitioner. Further the Respondent's Agent who had seen the damaged goods failed to give a valuation as would have been done through a Loss Adjustor. The reasonable man referred to would be the Judge of the High Court himself in this case as stated in judicial pronouncements regarding the concept of the reasonable man which state that it is the Judge who hears the case who will look at the situation at hand as a reasonable man.

[50] In the present case as shown in the analysis of the judgment of the High Court, there was no doubt that the learned High Court Judge was satisfied with the establishing of the loss claimed by the Petitioner. This manner of establishing the loss in an insurance claim gains support from the decision in Fai's case and Sharda Nand which have been cited earlier in this judgment. The one change that can be made regarding the quantum is the fact that the Petitioner had been able to recover $1000.00 when he tried to re-sell the salvaged garments as was done in the case of

Sharda Nand where $1000.00 was deducted from the claim as the Plaintiff in the case had been able to sell some damaged spare parts and recover that amount.

The granting of Interest

[51] The learned trial Judge granted interest at the rate of 6% per annum which resulted in the grant of a sum of $100,382.40. The respondent in its appeal to the Court of Appeal had in ground 14 challenged the granting of interest. This ground too was not considered by the Court of Appeal in their judgment save for the fact that Justice Calanchini in his Judgment has stated that Interest on claims in regulated by section 34 of the Insurance Law Reform Act 1996 and that interest should have been calculated in accordance with that provision.

[52] Since there has been no conclusion arrived at by the Court of Appeal regarding the grant of interest in this case it would not be necessary to deal with same and the interest granted by the High Court would remain.

Conclusion

[53] The application of the Petitioner for special leave to appeal is allowed and the Court of Appeal judgment is set aside. The judgment of the High Court is affirmed subject to the deduction of $1000.00 from the amount of $ 167,303.95 which was granted as damages by the High Court.

[54] Each party shall bear their own costs.

Madam Justice Ekanayake

[55] I agree with the reasons and the conclusions of Justice Chandra.

Justice Mutunayagam

[56] I also agree with the reasons and the conclusions of Justice Chandra.

Hon. Justice Suresh Chandra
Justice of the Supreme Court

Hon. Madam Justice Chandra Ekanayake
Justice of the Supreme Court

Hon. Justice Brito Mutunayagam
Justice of the Supreme Court