IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0006 of 2023
Court of Appeal No. ABU 102 of 2019

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

Petitioner

AND : **RAJENDRA SINGH**

First Respondent

AND : **SUDESH SINGH**

Second Respondent

Coram : **The Hon. Justice Anthony Gates**
Judge of the Supreme Court

The Hon. Justice Brian Keith
Judge of the Supreme Court

The Hon. Justice Lowell Goddard
Judge of the Supreme Court

Counsel : **Mr. S. Krishna for the Petitioner**
Mr. S. Heritage for the Respondents

Date of Hearing : **4 April 2024**
Date of Judgment : **26 April 2024**

JUDGMENT

Gates, J

1. I have read in draft the judgment of Keith J. I agree with it and with the orders proposed.

Keith, J

Introduction

2. In the early hours of the morning of 14 January 2013, an explosion occurred in a shop in Nadi which was operated by the plaintiffs, Rajendra Singh and his wife Sudesh. Rajendra was there at the time with a man who worked in the shop, Mukesh Kumar, but Sudesh was not. As a result of the explosion, a fire broke out. Mr Singh managed to escape, though his clothes were set alight, and he suffered very severe burns. Mr Kumar was not so fortunate: tragically, he died in the fire. The shop was insured with the defendants, the New India Insurance Company Limited ("the insurers"), and in due course Mr and Mrs Singh made a claim against the insurers on the policy of insurance. The claim was not accepted, and Mr and Mrs Singh issued proceedings in the High Court. That claim was struck out on the basis that Mr and Mrs Singh were not the proper plaintiffs. They appealed to the Court of Appeal. The Court of Appeal took the view that it had not been open to the insurers to contend that Mr and Mrs Singh had not been the proper plaintiffs and allowed the appeal. The insurers now apply for special leave to appeal to the Supreme Court.

The relevant facts

3. The policy of insurance was called a fire insurance policy. It was dated 15 November 2012. It related to the shop operated by Mr and Mrs Singh. It covered fire and other listed perils but excluded damage by cyclone. The cover was for 12 months from 22 October 2012. Accordingly, the fire on 14 January 2013 was one of the perils covered by the policy and occurred during the period of the cover. The policy named the insured as HIZZ & HERZ, with a P O Box in Nadi.

4. HIZZ & HERZ was the name of the shop. It was a retail drapery. It was on the ground floor of a building owned by Manji Jadavji & Sons Ltd. There was no evidence as to who the shop was leased to. Such evidence as there was before the High Court related to the application for the registration of HIZZ & HERZ as a business name. That application was dated 3 May 2011 and was lodged by Ramani & Co., a firm of accountants in Nadi. There was no evidence on whose behalf Ramani & Co lodged the application. However, the application form required "the corporate name of every corporation which is … a partner in the firm". That name was given as Khoobh Surat Dolhan Limited ("the Company"), which

was described as a private limited liability company, whose registered office in Nadi was also given. The Company's seal was stamped next to that entry on the form. Mr and Mrs Singh's name did not appear on the form.

5. Following the fire, a claim was made on the policy using the insurers' fire claim form. The form had to be completed by the policyholder, and it was Mrs Singh who completed it. It was dated 13 February 2013. In it, she wrote that she did not know how the fire had started. As a result of Mr Singh's injuries, it was she rather than him who gave instructions to their solicitors and gave evidence at the trial.

6. The insurers instructed Forensic Consulting Services Pty Ltd to investigate the cause of the fire. They reported that residues of hydrocarbon flammable liquids had been found at the seat of the fire. These had subsequently been identified by chemical analysis to have been remnants of kerosene and possibly petrol or thinners. Their conclusion, in the absence of any other explanation from Mr Singh, was that the fire had most likely been started deliberately using a flammable liquid accelerant which had spread onto clothing on the display rack at the front of the shop. They also concluded that it was very likely that flammable vapours evaporated off the flammable liquid prior to the explosion and had been ignited unintentionally when either Mr Singh or Mr Kumar had tried to set fire to the contents of the shop. An investigation by the National Fire Authority reached a similar conclusion. They suspected that the fire had been deliberately lit inside the shop using accelerants causing a vapour explosion due to the insufficiency of space for the flammable vapours to escape.

7. In these circumstances, the insurers avoided the policy relying on the fraud exemption in the policy which provided:

> *"If the claim be in any respect fraudulent, or and [sic] if any false description be made or used in support thereof, or if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under this Policy or if any destruction or damage be occasioned by the wilful act or with the connivance of the Insured, all benefit under this Policy shall be forfeited."*

The proceedings in the High Court

8. The Statement of Claim referred to the plaintiffs as Mr and Mrs Singh trading as HIZZ & HERZ, and described them as prosperous business people trading under that name and style. The policy of insurance was pleaded at paragraph 3 of the Statement of Claim. It stated that in consideration of the premiums paid and to be paid by the plaintiffs, the insurers insured the plaintiffs against loss and damage by fire. That paragraph was admitted by the insurers in their Defence. So although the insured was named in the policy as HIZZ & HERZ, the insurers were admitting that Mr and Mrs Singh were the policyholders, albeit trading as HIZZ & HERZ, and they were therefore entitled to benefit under the policy. Indeed, the insurers made that admission not only in its Defence. The minutes of the pre-trial conference recorded that one of the agreed facts was as follows:

> *"The Plaintiffs at all material times owned and operated a business trading as HIZZ & HERZ at [the address]."*

9. The insurers' solicitors became aware of the Company when they did a search on the business name HIZZ & HERZ. That search resulted in them being provided with the application for the registration of HIZZ & HERZ as a business name. They included it in the bundle of documents disclosed by them on discovery. However, they did not seek to amend their Defence by pleading in the alternative that the proper plaintiff was the Company, not Mr and Mrs Singh. According to the minutes of the pre-trial conference, the question whether Mr and Mrs Singh were the proper plaintiffs was not even highlighted as one of the issues to be determined at trial. It looks, therefore, as if the insurers were waiting to ambush Mr and Mrs Singh with that revelation at trial. However, whether that is so or not, the inescapable fact is that neither Mr and Mrs Singh nor their legal team knew before the trial that the capacity of Mr and Mrs Singh to bring the case was going to be an issue at the trial, despite the admission in the Defence and the agreed fact recorded in the minutes of the pre-trial conference.

10. Although not relevant to the narrow issue raised on this appeal, the minutes of the pre-trial conference reveal something very surprising. The documentary exhibits – which included the reports of those who had investigated the fire and had expressed opinions about how it had started – were to be admitted without formal proof – no doubt on the basis that their authenticity was not challenged. Not surprisingly, though, they were to be admitted without formal proof "without prejudice to the right of all parties to impugn or challenge the truth of their contents." What was surprising was that the only witness to be called by the insurers was one of their employees. It was not proposed to call any of the experts who had examined the site of the fire and who had expressed opinions about what had caused it. Nor was it proposed to call the police officers who investigated the fire. How Mr and Mrs Singh's legal team were going to challenge those reports – and how the judge was going to make his findings on the critical issue about whether the fire was started deliberately – without the makers of the reports being cross-examined is a mystery.

The course of the trial

11. At the start of the trial on 4 February 2019, the trial judge, Nanayakkara J, ruled that the burden of proof was on the insurers. He required them to present their evidence first. He also ruled – apparently without having warned the parties beforehand – that the trial would address the issue of liability first. The insurers' solicitors were alive to the possibility that the penny may drop with Mr and Mrs Singh's solicitors about the need to cross-examine the makers of the documents about their views on the cause of the fire, and the insurers therefore had the makers of the documents in court in case they needed to call them. However, Mr and Mrs Singh's counsel told the judge that he did not wish to cross-examine any of them. How he hoped to challenge the insurers' case is impossible to understand, but that resulted in the insurers only calling the one witness who they had said at the pre-trial conference would be called, and that was one of their employees, Ashneel Lal. In his evidence-in-chief, Mr Lal gave little more than formal evidence about the reason for the rejection of the claim and the expenses which had been incurred in investigating it.

12. The first anyone might have known about the allegation that Mr and Mrs Singh were not the proper plaintiffs was when the insurers' counsel asked Mr Lal about the business name HIZZ & HERZ. In a leading question, he asked Mr Lal whether it was "owned" by the Company. Mr Lal replied that it was. The only other questions he was asked on the topic came in cross-examination and when answering questions from the judge. The questions related to who were the directors of the Company. His evidence was that he thought that Mr and Mrs Singh were directors of the Company. That was all that Mr Lal was asked on the topic. He was not even asked what had caused him to believe that, nor whether there was any documentary evidence about who the directors of the Company were.

13. Mrs Singh was the only other witness. She too gave little more than formal evidence in chief about the taking out of the policy, the claim for indemnification and the rejection of the claim by the insurers. Her counsel asked her only one question about whose business it was:

> *"Q. You had a business by the name of HIZZ & HERZ?*
>
> A. *Yes, my lord."*

She was asked that question simply as part of the narrative. When she was cross-examined, she initially agreed that it was the Company which had been trading as HIZZ & HERZ. A few questions later, it was put to her that it had not been her and Mr Singh who had been trading as HIZZ & HERZ. She did not answer that question. She simply responded: *"The plaintiff is HIZZ & HERZ."* Because she had not answered the question she was asked, the following question was put to her:

> *"So it's not Rajend Singh and Sudesh Singh trading as HIZZ & HERZ you have given before. Isn't that correct?"*

She replied: *"That's correct."* That was where the matter was left. The evidence of the only witnesses at the trial would have taken no more than an hour or so, and the questions about the relationship between Mr and Mrs Singh and the Company would have taken no more than a few minutes. I have to say that the point that Mr and Mrs Singh were not the proper plaintiffs was so obliquely taken during the evidence that I wonder whether I would have picked it up if I had been representing Mr and Mrs Singh.

14. The trial was then adjourned for the preparation of the transcript of the trial, and then for written submissions. Since the insurers had presented their evidence first, the written submissions on behalf of Mr and Mrs Singh were filed first. That was on 14 May 2019. They did not mention at all the allegation that Mr and Mrs Singh were not the proper plaintiffs. The written submissions on behalf of the insurers were filed on 4 June 2019. In contending that Mr and Mrs Singh were not the proper plaintiffs, they relied on Mrs Singh's admission in cross-examination and the fact that the Company had been identified in the application for the registration of HIZZ & HERZ as the business name of the "corporation which is … the partner in the firm". They asked for the claim to be struck out under Ord 18 r 18 of the Rules of the High Court. Both sets of submissions addressed the question whether the insurers had proved fraud on the part of Mr and Mrs Singh.

15. In his judgment dated 12 July 2019, the judge agreed with the insurers for the reasons they advanced. He struck out Mr and Mrs Singh's claim on the basis that they were not the proper plaintiffs and that the claim had been an abuse of the court's process as "an attempt to use the court's machinery improperly" had been made. He did not address the question whether the insurers had proved fraud on the part of Mr and Mrs Singh. I make four observations about this judgment:

> (i) The use of Ord 18 r 18 was inappropriate. Ord 18 r 18 only permits pleadings and indorsements on writs to be struck out. It does not permit claims to be struck out. The order which the judge should have made in the light of his finding as to who should have been the plaintiffs was to dismiss Mr and Mrs Singh's claim, not to strike it out.
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> (ii) There was no basis on which the judge could have found that the claim should be struck out as an abuse of process. As Gates J pointed out in the course of argument, naming the wrong plaintiff would have been no more than a mistake. An abuse of process connotes something akin to a litigant playing fast and loose with the Court's machinery.
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> (iii) The judge did not deal with the insurers' other contention that the claim should be struck out as failing to disclose a reasonable cause of action on the basis that the cause of action under the policy did not vest in Mr and Mrs

Singh. That contention would have had to be rejected. No evidence is admissible on an application to strike out a pleading on the basis that the statement of claim did not disclose a reasonable cause of action. The basis of the application to strike out, though, *was* based on the evidence: the reference to the Company on the application to register the business name and Mrs Singh's admission in her oral testimony.

(iv) In case he was found by an appellate court to have erred in his conclusion that Mr and Mrs Singh were not the proper plaintiffs, the judge should have gone on to decide whether the insurers had proved fraud against them. If the decision of the Court of Appeal stands, the case will have to be remitted to the High Court for that issue to be relitigated (the trial judge now having retired). That would have been avoided if the judge had gone on to resolve the dispute on its merits.

The appeal to the Court of Appeal

16. Mr and Mrs Singh appealed to the Court of Appeal. The Court of Appeal concluded that Mr and Mrs Singh had properly been named as plaintiffs. It therefore allowed the appeal and ordered the case to be remitted to the High Court for the claim to be decided on its merits. The Court's reasoning in the clear and comprehensive judgment of Jameel JA (with which the other members of the Court agreed) was that the insurers' contention was diametrically opposed to both the admission in the Defence and the agreed fact that it was Mr and Mrs Singh who owned and operated the business trading as HIZZ & HERZ. Moreover, Ord 15 r 6 of the Rules of the High Court provided that no cause or matter should be defeated by reason of the misjoinder or nonjoinder of any party, and it gave the Court the power to order anyone who ought to have been joined as a party to be added as a party. The Court of Appeal took the view that if an objection was being taken to the misjoinder or nonjoinder of a party, that objection should be made at the earliest possible opportunity. In these circumstances, the insurers' conduct in not raising their objection to the misjoinder of Mr and Mrs Singh and the nonjoinder of the Company – coupled with the admission in the Defence and the agreed facts – prevented the insurers from pursuing their objection.

17. I should add that only in one passage in Jameel JA's judgment was any reference made to whether the evidence supported the judge's conclusion that the Company was the proper plaintiff. In para 29 of the judgment, she said that the insurers knew at all times that they were dealing with natural persons behind the business, even if Mr and Mrs Singh had been the directors of the Company. But that begged the question which the High Court had had to decide. When running the business, had Mr and Mrs Singh been acting in their capacity as directors of the Company, or in their own right as the owners of the business?

The proper approach

18. The insurers now seek special leave to appeal to the Supreme Court. They want the judgment of the High Court to be restored. In written submissions in support of the petition, their solicitors relied heavily on well-known principles in company law – (a) the rule in *Foss v Harbottle* (1843) 2 Hare 46, a case known to all law students, that a company is a separate legal entity from its members, and only the company can sue to enforce rights which are those of the company, (b) the principle established in *Salomon v Salomon and Co Ltd* [1897] AC 22 that the company's rights and duties are separate from the rights and duties of its directors and shareholders, and (c) the limited circumstances in which "the corporate veil" can be lifted. They contended that the Court of Appeal ignored these principles.

19. In my opinion, that criticism of the Court of Appeal is misplaced. It is incontrovertible that the cause of action on a policy of insurance vests in the insured, usually called the policy-holder. In the present case, the policy named HIZZ & HERZ as the insured. But HIZZ & HERZ was not a legal entity. It was merely a trading name. The insured was therefore whoever was trading as HIZZ & HERZ. The question was whether that was the Company or Mr and Mrs Singh. That depended on such evidence as the parties placed before the High Court. To say that the Court of Appeal erroneously lifted the corporate veil is a little unfair on the Court of Appeal. The Court of Appeal was alive to the fact that the Company and Mr and Mrs Singh were separate legal entities, and that it was necessary to identify which of them had been trading as HIZZ & HERZ. Its focus was on (a) whether it was open to the insurers to contend that Mr and Mrs Singh were not the proper plaintiffs, and (b) if it was still open to the insurers to advance that argument, whether the evidence showed that the Company was the proper plaintiff.

20. The difficulty for Mr and Mrs Singh was that their legal team had no idea prior to the trial that this issue was to be raised. Indeed, the admission in the Defence and the agreed facts would have led them to believe that there was no dispute that it was they who had been trading as HIZZ & HERZ, not the Company. The consequence was that their solicitors were wholly unprepared to meet the allegation that the Company was the proper plaintiff when it was raised at the trial. They were taken completely by surprise. Indeed, it looks as if the few exchanges at the trial on the topic may not have been enough to alert Mr and Mrs Singh's solicitors that this was a live issue. No application had been made by the insurers' solicitors to amend their Defence to take the point, nor had they applied to withdraw their admission in their Defence that Mr and Mrs Singh had been the policyholders, nor had they applied to resile from the agreed facts. Indeed, the fact that the Mr and Mrs Singh's solicitors had not appreciated that it was being said that Mr and Mrs Singh were not the proper plaintiffs is borne out by the absence of any reference to the point in their written submissions after the conclusion of the evidence.

21. We do not know, of course, what steps Mr and Mrs Singh's solicitors would have taken if they had been alerted to the insurers' solicitors' intention to take the point when they first obtained a copy of the application to register HIZZ & HERZ as a business name, but in my opinion a competent lawyer would have taken the following steps:

(i) At the pre-trial conference they would have informed the court that it would not be open to the insurers to take the point at trial unless they had successfully applied for leave to amend their Defence, and to withdraw the relevant agreed fact.

(ii) They would have applied to amend the Writ and Statement of Claim to add the Company as a second plaintiff, and to plead in the alternative that the Company had been trading as HIZZ & HERZ if that was the conclusion which the trial judge reached.

(iii) They would have obtained a copy of the lease of the shop to find out whether the Company or Mr and Mrs Singh were the lessees.

(iv) They would have spoken to whoever at Ramani & Co had prepared the application to register HIZZ & HERZ as a business name to find out who the firm's client was – the Company or Mr and Mrs Singh – and why the Company rather than Mr and Mrs Singh had been named on the application.

(v) They would have made a company search of the Company to find out who its shareholders and directors were, and what its principal activity was.

(vi) They would have made inquiries about who owned the stock in trade of the business – in particular whether the clothes which were obtained from wholesalers had been bought by the Company or Mr and Mrs Singh.

(vii) They would have made inquiries about how the profits and losses of the business had been reported to Fiji Revenue and Customs Service – in other words, whether they had been declared on the Company's tax return or Mr and Mrs Singh's tax return.

The insurers' solicitors' failure to alert Mr and Mrs Singh's solicitors to the new point to be taken prevented Mr and Mrs Singh's solicitors from taking any of these (dare I say it?) obvious steps.

22. Mr Krishna for the insurers valiantly argued that once Mr and Mrs Singh's solicitors had been alerted to the point at the trial, they could *then* have taken all these steps. I do not agree. As I have said, it looks to me that Mr and Mrs Singh's solicitors did not realize that the point was being taken until they saw the insurers' solicitors' closing written submissions. But even if they had been alive to the point as a result of the questions at trial (something which I doubt), it is not certain that the judge would then have adjourned the case to allow all these steps to be taken when the evidence had already been completed, and then allowed the parties to call such additional evidence as they chose on the topic.

23. Mr Krishna also reminded us of the authorities which show that a "preliminary objection" can be taken on a point of law at any time in the trial. The insurers could not therefore be criticized for taking the point when they did. There are, in my view, two answers to that. First, the issue here was not a point of law. It was an issue of fact: who was trading as HIZZ

& HERZ, the Company or Mr and Mrs Singh? Secondly, although you can take a "preliminary objection" at any time in the trial, you have to live with the consequences of that if you take it so late that the other side is denied a fair opportunity to deal with it.

24. The consequence of all this is that in my opinion Mr and Mrs Singh were denied a fair trial on the issue as to who was the proper plaintiff because they were not given a sufficient, let alone any, opportunity to address it properly and take the steps which competent lawyers would have taken to address it. If that had been where matters stood, I would have decided that the only fair course to take was to set aside the judge's finding that Mr and Mrs Singh had not been the proper plaintiffs, and to remit the case to the High Court for a fresh trial on that issue (as well as on the merits of the dispute).

25. But that is not where matters stand. As the Court of Appeal said, the insurers face the difficulty that in their Defence they admitted that Mr and Mrs Singh were the policyholders, and they agreed as a fact that Mr and Mrs Singh owned and operated the business which traded as HIZZ & HERZ. In the absence of applications for leave to amend the Defence, to withdraw that admission, and to resile from the agreed fact, the question whether Mr and Mrs Singh were the proper plaintiffs was not an issue before the court. I acknowledge that the presence of the Company's name on the application to register the business name is powerful evidence that it was the Company which was trading as HIZZ & HERZ rather than Mr and Mrs Singh, but the insurers' difficulty still remains: the issue over who was the proper plaintiff was, in the light of the pleadings and the agreed facts, not an issue at the trial. The upshot of all this is that I agree with the Court of Appeal that the trial judge was wrong to make the finding which he did.

Conclusion

26. For the reasons which I have endeavoured to give, I would refuse the insurers special leave to appeal. In addition, I would order the insurers to pay Mr and Mrs Singh $6,000 towards their legal costs of the appeal.

Goddard, J

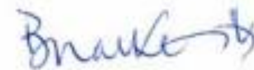
27. I am in agreement with the orders of Keith J and his reasons for judgment.

Order:

(1) Application for special leave to appeal refused,

(2) The petitioners must pay to the respondents the sum of $6,000 towards their costs of the petition.

The Hon. Justice Anthony Gates
Judge of the Supreme Court



The Hon. Justice Brian Keith
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