IN THE SUPREME COURT OF REPUBLIC OF VANUATU

Civil Case No.24 of 2000

(Civil Jurisdiction)

BETWEEN: LAHO LIMITED
Plaintiff

AND: QBE INSURANCE (VANUATU) LIMITED
Defendant

Mr. Stevenson and Mr. Morrison for the Plaintiff
Mr. Nell and Mr.Hurley for the Defendant

JUDGMENT

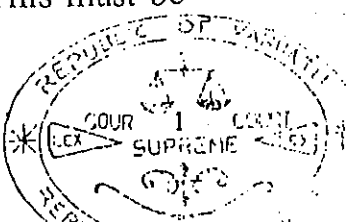
The Motor Vessel Latua was owned by the plaintiffs, Laho Ltd. On 7th May 1999 she left Port Vila bound for Emae in the Shepherds Group with twenty-seven people on board. At 9.30am her captain reported her to be two nautical miles west of Lelepa Island. Between 11.30am and noon she was seen off Moso Island. From that time on neither the vessel nor anyone aboard has been seen again.

The defendants are an insurance company incorporated in Vanuatu. The plaintiffs sought declarations that the defendants are obliged to indemnify the plaintiffs in respect of the loss of the vessel and any claim made against the plaintiffs arising out of the loss of the vessel. The plaintiffs say they have a contract of insurance with the defendants

The defendants resisted the claim under the following heads:-

1. Seaworthiness

The plaintiffs had failed to prove on the balance of probabilities that the vessel was seaworthy when she set off on 7th May. This must be



shewn, in the absence of evidence as to why she was lost, to raise the presumption she was lost as a result of 'perils of the sea'.

2. Non-disclosure - namely the failure to disclose material circumstances to the defendants that

   (a) the vessel had taken on a substantial quantity of water on 24 December 1998 whilst alongside,

   (b) she had been slipped from December 1998 to April 1999 and undergone substantial repair work,

   (c) a request had been made to the Vanuatu Ports and Marine Department to permit an increase in the number of passengers from 15 to 25.

3. Breach of Express Warranty in that the number of passengers carried and the crewing of the vessel on the final sailing were not in accordance with the safety certificate

4. Breach of Implied Warranty as to legality concerning the number of passengers and crew carried and the absence of a coastal trading licence.

5. Unseaworthiness of the vessel at the commencement of the voyage with the privity of the assured.

6. The Relief Sought was inappropriate in that the declarations requested were too wide and related to future contingent events.

The Plaintiffs responded that the vessel was seaworthy, under the proper construction of the express warranties clause there had been compliance and that there had been disclosure or any non-disclosure did not induce the making of the contract.

There was little dispute concerning the law, save for the construction of the express warranty. The plaintiffs called John Mark Bell, Henri Ouchida, Joseph Kalsakau, Watson Firiam and Daniel Sule. The defendants called Leitare Tanga, Peter Latemore and Warren Holmes. Bundles of documents and other exhibits were placed before the court.

1. **Seaworthiness**

I consider the law on the defendants first point, namely the seaworthiness of the vessel.

It has been accepted throughout that the Australian Marine Insurance Act 1909 is the applicable law.

Section 7 states *"A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the insured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure".*

Section 9 (1) and (2) (a) state

> *"(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.*
>
> *(2) In particular there is a marine adventure where:*
>
> *(a) any ship, goods or other movables are exposed to maritime perils. Such property is in this Act referred to as "insurable property".*
>
> *and "Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind, or which may be designated by the policy."*

The Certificate of Insurance in this case is found in the Agreed Bundle (Ag) at page 115. The policy covers, as stated at paragraph 6.1.1. "total loss (actual or constructive) of the subject-matter caused by perils of the seas ..."

Have the plaintiffs shewn the MV Latua was lost as a result of the perils of the seas?

In the head note to "The Marel" (1994 2 Lloyds L.R.Vol 1 p624 at p625 at paragraph 3) it is stated that

"If it was known that a ship was seaworthy when she set out, and she had never been seen since and nothing had been heard of her crew, then on

the balance of probabilities she must have sunk and, on the balance of probabilities, the sinking must have been due to the "peril of the seas" since she was seaworthy when she set out; if it was not shewn that the vessel was seaworthy when she left on her last voyage, the presumption did not apply since it could not be held on the balance of probabilities that her presumed sinking was due to perils of the seas rather than to her unseaworthy condition."

In Skandia Insurance Company Ltd v Skaljanev and Another [1979, 142 CLR p375] the High Court of Australia set out the same principle. The Australian Marine Insurance Act 1909 is closely based on the United Kingdom Marine Insurance Act 1906.

I accept the principle set out in 'The Marel' as the applicable law. I now consider the evidence concerning the question of seaworthiness.

I have before me the report dated 12 March 2001 from the Vanuatu Meteorological Service dealing with conditions from 7 to 9 May 1999. There were strong wind warnings and moderate to rough seas expected. There was a large cloud over Vanuatu and heavy rain sometimes thundery was expected.

There is no evidence of any explanation for the loss of the MV Latua and those aboard. All that was ever found was a juice carton with the vessel's name written on it. Therefore, provided that plaintiffs can shew the vessel was seaworthy when she set out I can presume it was lost as a result of the perils of the seas.

The plaintiffs said the vessel was seaworthy. They say she was surveyed on 8th December 1998 found to be sound and seaworthy and a Safety Certificate was issued. After she took in water on 24 December 1998 she was slipped for three months and substantial hull and other work was carried out. On 5th and 12th April 1999 surveys took place and the refit was found to bring the vessel up to a standard far in excess of her class and she complied fully with the requirements for a vessel of her class. Sea trials were undertaken and two uneventful trips to the Shepherds completed before the 7th May.

The respondents replied that no cause had been found for the taking in of the water on 24 December. The person who conducted the surveys on 5th

and 12th April was more experienced in machinery than hull survey, there is no evidence as to what sea trials took place and their result, and the only record of the surveys was to be found in the letter of 17 May which they contended was not reliable as it was written or signed after the loss was known. The vessel was short-crewed. There was a list which had been compensated. There had been no stability tests. The weather and sea conditions during the sea trials and two successful trips were not known. There were other unknowns.

The respondents argued therefore that as the seaworthiness of the vessel had not been proved the loss was unexplained and the plaintiffs were not entitled to the presumption.

I must look at the evidence to ascertain on the balance of probabilities whether the plaintiffs have proved the Latua was seaworthy when she set out on 7 May. Joseph Kalsakau was apparently qualified to make engine and hull surveys even if his experience was greater in the former. On 5 and 12 April he conducted the surveys and found the vessel was upto the required standard.

However, there is no documentation concerning these two surveys other than Joseph Kalsakau's letter of 17 May, dated ten days after the Latua set out on her final voyage, and when it was public knowledge she was lost.

Joseph Kalsakau stated the letter had been composed and sent for typing 3-4 weeks earlier. He had kept the draft, but didn't know where it was. He said it had only been typed once. Later, when a slightly different typed version was put to him, he agreed there were two versions, due to spacing. The difference was the letter was then on one page and 'pf' had been corrected to 'of'. He said when referring to the extra passengers the figure should have been '10' and not '5'. He agreed on one draft there were two "cc", copies to, on the other, a third "cc" had been added, namely QBE Insurance, the defendants.

When it was put to him he had no trouble having typed up two versions of his letter of 17 May 1999 he at first gave no reply. When the question was repeated, he replied 'Yes'.

It was then put to him that he drafted the letter of 17 May on that day and not before, and that he did this because there was no record of his earlier

discussions and he knew there would be a problem because the vessel had disappeared with 27 people on board. He replied No.

Joseph Kalsakau was then asked in detail about his evidence concerning the increase in the number of passengers. The safety certificate allowed 15 passengers. There was evidence of calculations in which that figure was increased. There were 23 passengers on board when she set sail. He had said that the figure for the extra passengers in his 17 May letter should have been 10 and not 5, to bring the permitted total up to 25 passengers.

He was asked about telling the Commission of Inquiry into the loss of the Latua that in the draft of his letter the increase was to 25, including crew. He at first replied "No", and when pressed said "I explained at the time I was in a rush, I should refer to my progress report of 17 May, it was 25". He had earlier agreed in evidence he had told the Commission "on my report it says 25 passengers including crew".

If that answer was correct then it would be consistent with a safety certificate allowing 15 passenger spaces and requiring 5 crew, plus the extra five passengers requested. It is also consistent with the figure 5 in the letter of 17 May being correct, and not a typing error.

Mr. Kalsakau was asked about the calculations he made concerning the licensing for more passengers. There are detailed regulations setting out how much deck-space is required per passenger, and what areas cannot be included. He detailed what areas would be available for passengers, but could not recall his calculations. He could not recall if there was any increase available for passengers on the deck itself. He said the top of the deckhouse could be used and that he took into account the strength of the accommodation roof and stability.

It was an accepted fact the vessel had had substantial work carried out to her hull and that after that work there was a list which was compensated by the placing of stones. It is not clear if Joseph Kalsakau knew of the list problem. It was put to him he had had a conversation with an employee of the plaintiff, but he could not recall it. He was then asked "You never carried out stability tests", he replied "what tests. I didn't carry out stability tests on this vessel".

Joseph Kalsakau said it was his conclusion that the vessel complied with all regulations and if Mr. Ouchida the managing director had asked for a safety certificate – at the time of the sailing – one would have been issued.

He stated that a coastal trading licence had been approved as the result of an application dated 22 March 1999, but by April, because of typing difficulties it was still being processed.

I have assessed the entirety of the evidence of Joseph Kalsakau carefully. I am not satisfied he is a reliable witness, particularly when he gives evidence of the various surveys and actions he says he undertook and their results and findings.

I find I cannot rely upon his recollection of events. There was little documentary evidence to support them and the letter of 17 May, put at its highest, is an unsatisfactory and unreliable document. Joseph Kalsakau gave little detail of his qualifications and expertise and little detail of the examinations, tests, checks and assessments he carried out. I am not satisfied that the opinions he gave about the Latua itself are reliable.

There is no other evidence impinging directly upon the sea-worthiness of the vessel. It is not disputed that Mr. Kalsakau says he found the Latua to be sound and seaworthy on 8th December and recommended the issue of a safety certificate, yet whilst alongside in port on 24 December she took in a substantial quantity of sea water. Thereafter she was slipped, the copper sheeting stripped from her hull and replaced by fibreglass. No cause was found or apparently even investigated for that taking in of water.

She was found to be seaworthy by Mr. Kalsakau without the carrying out of any sea trials known to him. She had a list which had been compensated. She made two successful voyages to the Shepherds. There is no evidence of the weather conditions. She was lost on a third voyage in weather which could not be described as unusual. When she set out she had only four not five crew as required on board. There is no reliable evidence that the increase in the number of passengers beyond 15 was or had been lawfully approved, nor that the proper calculations and any extra work to increase the number had taken place.

For all these reasons I find the plaintiffs have not proved on the balance of probabilities that the MV Latua was seaworthy when she set off

on 7 May 1999. I have examined the rest of the evidence for matters inconsistent with this finding and can find none. I do not specifically say she was unseaworthy. In the absence of any other explanation for her loss I cannot say the MV Latua was lost as a result of the perils of the seas. In these circumstances, I must dismiss the action.

I have considered whether I should make further findings concerning this case and have concluded I should do so.

2. **Non-Disclosure**

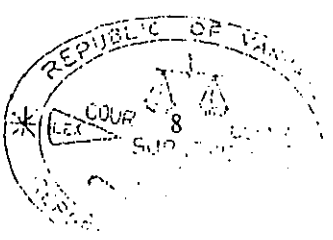
On 11 December 1998 the plaintiffs approached QBE, the defendants to arrange insurance. Mrs. Tanga of QBE asked for a survey report and a safety certificate. During the next week she completed the proposal form with the plaintiffs and the details were passed to Associated Marine, the reinsurer, on 18 December 1998 by facsimile transmission. There are differences in the evidence with which I will deal later.

On 24 December Associated Marine faxed a quote to QBE. Mrs. Tanga was on leave thereafter and the quotation was not relayed to the plaintiffs until February 1999. They did not wish the cover to commence then, but eventually took it up on 13 April 1999. I find the policy commenced from this date. No other date is suggested.

Section 23 of the Act states *"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party".*

Sections 24 (1) and (2) of the Act state:-

> *"(1) Subject to the provisions of this section, the insured must disclose to the insurer, before the contract is concluded, every material circumstances which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.*



(2) Every circumstances is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

There is no dispute that a safety certificate dated 8th December 1998 was issued for the MV Latua. Further, that on 24 December she took in water. Descriptions vary as to quite how much: low in the water, 20 – 30% of the engine compartment.

She was beached and bailed out then slipped. The outer copper sheeting around the hull was removed, the timbers dried out and replaced with fibreglass. There is no evidence as why the MV Latua took in water on 24 December.

It is not suggested that these circumstances were disclosed to the defendants. Are they "material"?

The definition of what is a material circumstance is set out in section 24 (2). Warren Holmes was put forward by the respondents as an independent expert. He set out his qualifications and experience. I accept him as an independent expert. He stated that in his opinion the fact of the ingress of water into the hull and the repairs were material circumstances within the meaning of section 24 (2).

Before making a specific finding I must consider the meaning of "material circumstances" and in particular whether it means a circumstance "that would have an effect on the mind of the prudent insurer in entertaining the risk" or a circumstance that would " have a decisive effect on his acceptance of the risk or on the amount of premium demanded".

In the case of Pan Atlantic Insurance Ltd and Pine Top Insurance Company Ltd ([1995] IAC 501) the House of Lords, by a majority of three to two found the former to be the correct test. Further the House of Lords stated that before an underwriter could avoid a contract for non-disclosure of a material circumstance he had to shew that he had actually been induced by the non-disclosure to enter into the policy on the relevant terms.

This "two stage" test for materiality was adopted by Byrne J. in Akedian and Co Ltd v Royal Insurance Australia Ltd and others (SC (V) 148 ALR page 480). The head note states

"The first stage requires an assessment of the impact of the non-disclosure or the misrepresentation upon the mind of a hypothetical prudent insurer; the second, which is anchored in the facts of the actual case, requires the court to determine whether the misrepresentation or the non-disclosure did in fact induce the underwriter who issued the policy to assume the risk that it did".

With respect I adopt this two-fold test. I accept the evidence of Mr. Holmes. I find that there was a failure to disclose material facts namely the taking in of water on 24 December and the substantial work to the hull. I am satisfied that the non-disclosure of the facts would have an effect upon the mind of a prudent insurer in estimating the risk.

Did the non-disclosure in fact induce the underwriter who issued the policy to assume the risks? There is a degree of artificiality in considering if a "non-disclosure" can induce an action, but I must consider it

- The plaintiffs argued that in fact Associated Marine was the party that agreed to assume the risk, and nothing has been heard from them. The respondents say the matter lay with QBE in Vanuatu, and specifically Mrs. Tanga and Mr. Latemore, the manager. Mrs. Tanga stated that had she known the non-disclosed circumstances she would not have issued cover; she would have asked Laho, the plaintiffs, to provide a new safety certificate.

Mr. Latemore stated that although he was not directly involved in the arranging of this insurance he would not have taken on the risk if the non-disclosed facts had been known to him. He went on to say that "we had a relationship with AM (Associated Marine). QBE was the insurer, AM was the reinsurer. They took a portion of the risk. A.M. would view and review most risks underwritten by QBE ... they gave guidelines to the decision making process."

On each occasion when Mrs. Tanga and Mr. Latemore were asked what they would have done had they known about the non-disclosed facts counsel for the plaintiff objected. Mr. Latemore was cross-examined in detail about the arrangement between QBE and AM, and also about the general instructions in QBE Vanuatu about marine insurance.

I have only the evidence of Mrs. Tanga and Mr. Latemore concerning the making of the decision concerning the issue of a policy. I find the decision was in two parts. Before QBE would go on risk they had to be satisfied and A.M. had to be satisfied. There was necessarily liaison between QBE and AM before risks were undertaken as the latter were sharing some of the risk with the former. Mrs. Tanga stated in her evidence she would refer matters to AM, and if they were happy she was. I accept that had she known of the non-disclosed facts then the proposal would not have been sent to AM and no policy issued. I accept her evidence, although there were one or two errors in her recollection e.g the fact she helped Mr. Ouchida fill in the proposal in December and not February as she said.

The plaintiffs argued strongly that QBE was an imprudent insurer and whether or not these facts were disclosed as long as there was a safety certificate (or at the least everything done bar the formal issuing of the certificate itself) then they would have gone on risk. They cited in support the evidence of Mr. Latemore and the conduct of Mrs. Tanga. It would appear that had there been no taking in of water on 24 December 1998 the policy would have issued on the strength of the survey certificate and a safety certificate from the Vanuatu Maritime Authority (VMA). (It also appears possible that had the certificate been issued in accordance with Mr. Kalsakau's letter of 17 May before any approach was made for insurance then cover might have been issued on the strength thereof. That is speculation).

Mr. Latemore in cross-examination agreed insurance had been written on the strength of certificates written by the Vanuatu Authorities. He said the certificates didn't necessarily mean they would go on risk, they might ask for a survey. Mr. Latemore said he knew Joseph Kalsakau. He was asked, if he would go on risk on the strength of 8 December survey and certificate, would he have gone on risk after 5 and 12 April surveys had a certificate been issued. Mr. Latemore said he would but he may ask for a survey. "*I wouldn't rely on what he (Joseph Kalsakau) said ... Presently I would have no problem. I would have a problem with the safety certificate. I meant the quality of the safety certificate. I heard things that made me doubt the quality of surveys of Ports and Marine. My knowledge of Kalsakau was after the loss. I would now have concerns about the quality of documents issued by Kalsakau... It wouldn't have given me any confidence if I had a Ports and Marine certificate... I did tell Tanga I had concerns about Vanuatu certificates. My view is they were of limited reliability*".

These are extracts from the evidence of Mr. Latemore. I do not make a finding as to whether they are true or not. In the specific circumstances of the case I find that had Mr. Latemore known of the non-disclosed facts QBE would not have assumed the risk.

There did appear to be a lack of clear office policy at that time as to whether or not a survey and safety certificate issued by the Vanuatu authorities would have been sufficient, without anything, else for QBE Vanuatu to go on risk. Mrs. Tanga was making the actual decision, and therefore this would not have affected her assessment.

[I did not utilise the opinion of Mr. Latemore in coming to my conclusions concerning the evidence of Mr. Kalsakau]

I therefore find that the defendants (irrespective of my findings on the sea worthiness of the vessel) are entitled to avoid the contract for the non-disclosure of the facts that the MV Latua took in water on 24 December 1998 and thereafter was slipped for 3-4 months and underwent substantial repairs to her hull.

Still under the heading of non-disclosure I consider the increase in the number of passengers from 15 or 20 to 25. There were 23 passengers on board when she was lost.

There is confusion as to whether the insurers were originally told 20 when this proposal was first made. Mrs. Tanga in cross-examination accepted 20; the form is unclear. The only properly issued certificate talks of 15 passengers. The evidence of Mr. Kalsakau, cannot be relied upon. Mr. Ouchida, after buying the boat wanted to increase the number from 15. He says in April he asked Joseph Kalsakau if he could increase the number to 25 plus 5 crew. He says Mr. Kalsakau replied yes and said he would confirm it in writing, he said the work being carried "*out was appropriate for what I was asking*".

Nearly all of the evidence of Mr. Ouchida is uncontentious. However the purchase price of Vt8½ million was placed in the proposal form when in evidence he said he bought the vessel for Vt3½ million. The form asks "Number of Passengers licensed to Carry", and the answer is given 20. If that meant 20, not including the crew of 5, then it was an incorrect answer as

the Latua was only licensed by its safety certificate to carry 15. If it meant 20 including the crew then the later passenger increase requested was one of 10, from 15 to 25, and not 5. It must be taken into consideration that this form was being translated into Bislama for Mr. Ouchida by Mrs. Tanga, and then his answers translated back into English by her and entered on the form. The entry in brackets – "15" is crossed out and then "5 Crew including pass"-may have arisen from this.

Mrs. Tanga placed this conversation in 1999. I find that was an error, and it took place in December 1998. In cross-examination she accepted Mr. Ouchida said "20 passengers to be carried". She "didn't think to check that number against the safety certificate". She said she was not aware of an increase in passengers from 20 to 25.

I find on the balance of probabilities that the defendants were aware it was proposed to carry 20 passengers. However, at no stage were they notified there was a proposal to increase the number to 25. I accept the evidence of Mr. Holmes. This was a material circumstance. The liability of the insurers for passengers was being increased by 25%. Such an increase, in my judgment, would have an effect upon the mind of the prudent insurer in estimating the risk, particularly when the boat's current safety certificate limited the passengers to 15, and on the premium to be required. For the same reasons as set out above I also find the insurer was induced by this non-disclosure to enter into the policy on the terms it did.

For these reasons the insurers were entitled to avoid the contract and by paragraph 12 of their defence did so.

3. Breach of Express Warranty

The defendants sought to rely on section 39 of the Act which states:

"(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some conditions shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be expressed or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be

not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

A warranty must be exactly complied with. If it is not then the insurer is discharged from liability from the date of breach.

An express warranty of this contract was that the vessel would be "manned, operated and equipped at all times in strict accordance with the regulations of maritime authorities of the Republic of Vanuatu"

The plaintiffs argued that this meant in accordance with the written and verbal requirements of the Vanuatu maritime authorities. I cannot accept such an interpretation. It is vague and in practical terms, unrealistic. I find it means the assured must act in strict accordance with the body of law and regulations administered by the authorities and governing its rights, powers and duties.

There are clear breaches of this warranty:-

1. The vessel set off on 7th May 1999 with 23 passengers on board. Its safety certificate limited the number to 15. Joseph Kalsakau had no authority to verbally alter that certificate. As an experienced licensing officer he was or should have been aware of the procedures to be followed before a vessel could increase the number of passengers carried.

2. The vessel should have carried three ratings. It only carried 2. There might be a common practice that a passenger, if qualified, becomes crew for a journey, when a crew member is missing. It cannot be described as a "customary practice" and in this case, although three people might have been qualified to be a crew member there is no evidence anyone did. There is no suggestion of any authority being granted for anyone in that regard for this sailing.

3. The safety certificate required a 'Mate1' to be on board. The highest qualification held by any member of the crew was 'Mate 2'.

[The safety certificate makes it clear its requirement is a "Minimum Manning Scale]

In these circumstances I find the insurer was discharged from liability under the contract from the time the Latua left the wharf in Port Vila on 7th May 1999.

The defendants further argued breaches of the implied warranty of legality, unseaworthiness with the privity of the assured and questions about the relief sought. In the circumstances I need not consider these further arguments.

Therefore, for the reasons I have set out above this action must fail and I dismiss it.

I order the plaintiff to pay the defendants costs on a party and party basis as agreed or taxed.

DATED at Port Vila, this 02nd Day of April 2001

BY THE COURT

R. J.

R. J. COVENTRY
Judge