

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal NO.ABU 00 50 of 2014 & 51 OF 2014
(High Court of Labasa Case No. HBC 2 of 2006)

BETWEEN : **MOHAMMED ALAM**
(Plaintiff -Appellant in ABU 50 of 2014
& 1st Respondent in ABU 51 of 2014)

AND : **QUEENSLAND INSURANCE (FIJI) LIMITED**
(2nd Defendant-Appellant in ABU 51 of 2014
& 2nd Respondent in ABU 50 of 2014)

AND : **COLONIAL NATIONAL BANK**
(1st Defendant-1st Respondent in ABU 50 of 2014
& 2nd Respondent in ABU 51 of 2014)

AND : **REGISTRAR OF TITLES**
(3rd Defendant & 3rd Respondent in both appeals)

AND : **MOHAMMED SHAHEEM AIRUD KHAN**
(4th Defendant & 4th Respondent in both appeals)

Coram : Basnayake JA
Lecamwasam JA
Hamza JA

Counsel : Mr. A. Sen with Mr. G. O'Discroll for the Plaintiff- Appellant
(Mohammed Alam)
Mr. J Apted for the 2nd Defendant-Appellant (QBE)
Ms. S. Devan for the 1st Defendant-Respondent (Colonial National Bank)
Mr. J. Pickering for the 3rd Defendant-Respondent (Registrar of Titles)
4th Defendant-Respondent in person

Date of Hearing : 9 May 2017

Date of Judgment: 26 May 2017

JUDGMENT

Basnayake JA

- [1] There are two appeals in this case. The 1st appeal was filed by the plaintiff-appellant (plaintiff) to have the judgment of the learned High Court Judge dated 2 June 2014 set aside as against the reliefs granted in favour of the 1st defendant Colonial National Bank (CNB). The learned Judge had in her judgment awarded a sum of \$20,681.15 (inclusive of pre-judgment interest at the rate of 6% for 7 years) having discharged the injunction against the mortgage sale, allowing CNB to proceed to finalize the mortgage sale.
- [2] The 2nd appeal is by the Queensland Insurance (Fiji) Limited who was the 2nd defendant (QBE). QBE's appeal is to have the judgment against the 2nd defendant set aside and to have the plaintiff's originating summons dismissed. By her judgment the learned judge had awarded a sum of \$105,987.75 to the plaintiff against QBE inclusive of interest at the rate of 6% from 1 March 2004 until the date of the hearing and at 4% until payment in full together with costs in a sum of \$5000/-.

The Plaintiff's case

- [3] The plaintiff is the owner of the building in the property related to this case. This building was admittedly used for commercial as well as residential purposes. The plaintiff describes the building in the writ of summons (Tab 4 pgs. 61-67 of the Record of the High

Court (RHC)) as a building used for commercial as well as residential purposes. It appears from the material before court that the building consists of three floors and a basement. The first floor had been used as a grocery. According to the plaintiff he has had six freezers six feet in length and one freezer four feet in length in the grocery. He stated while giving evidence that the value of those freezers was ten to fifteen thousand dollars. He had had a stock worth \$55,000.00. The 2nd floor had been used to play billiards (four billiard tables). He stated that he used to earn an average income of \$35 to \$ 40 per day from the billiard tables. He said that one billiard table was purchased at \$1,800.00. The 3rd floor had been used as the residence of the plaintiff.

- [4] The plaintiff had mortgaged this property to CNB in the year 2001. The CNB required the plaintiff to obtain an insurance policy and a policy was taken from QBE. Apparently it was the CNB that had taken the policy from QBE for the plaintiff. The CNB had taken the policy for several buildings with the owners names mentioned in a list. The plaintiff had been furnished with a copy of a summary of the insurance cover. The master policy document was held by the CNB. The insured according to this policy is "CNB and others as may be declared for their respective rights and interests". The insurance premium was paid by CNB for the plaintiff and the plaintiff's account was debited. The plaintiff states that QBE agreed to indemnify the plaintiff inter alia, for damage caused by fire up to \$240,000.00.
- [5] The plaintiff claims that on 26 October 2003 the plaintiff's property was destroyed by fire and that he suffered loss in a sum of \$267,000.00. The plaintiff claims that at the time of the loss the plaintiff owed the CNB a sum in the vicinity of \$100,000.00. The plaintiff claims that, he is entitled to a sum of \$240,000.00 from QBE and after settlement with the CNB that the plaintiff would be left with a balance of at least \$140,000.00.
- [6] The plaintiff claims that although the CNB had a duty to recover the loss suffered as a result of the fire, the CNB is proposing to sell the property by way of a mortgage sale. The plaintiff claims that the CNB is not entitled to sell the property by way of a mortgage sale without having the plaintiff adequately compensated by QBE.

- [7] The plaintiff has also relied on the provisions of the Consumer Credit Act and the Fair Trading Decree 1992. The plaintiff mainly claims a sum of \$140,000.00 from the defendants and an order against the 1st defendant (CNB) to have the mortgage discharged. The plaintiff also claims a sum of \$15,000.00 per annum for loss of the business. The plaintiff claims that the CNB had sold the property to the 4th defendant (4th respondent) pursuant to a mortgage sale. Hence the plaintiff is seeking that the courts issue an injunction restraining the CNB from exercising its powers of the mortgage sale.

The statement of defence of the Bank (CNB)

- [8] The CNB in their statement of defence (Tab 6 pgs. 77 to 80 of RHC) while moving for a dismissal of the plaintiff's action, in a counter claim prayed that the plaintiff pay CNB a sum of \$101,950.92. The CNB also admits to having sold the property for a sum of \$33,000.00 under a mortgage sale as the plaintiff had defaulted payment. The CNB in response to the plaintiff's amended statement of claim has admitted that the property was sold pursuant to a sale & purchase agreement dated 9 May 2005. The CNB submitted that the plaintiff had failed to pay the debt prior to settlement.

The statement of defence by the Insurance (QBE)

- [9] QBE in a statement of defence (Tab 5 pgs. 72-75) while admitting the policy stated that the policy covered a residential premises. Further that the policy contained certain terms and conditions. The QBE also stated that the policy did not cover the contents of the property.

The Judgment of the High Court

- [10] The learned Judge has observed that there were no agreed facts. Issues to be tried had not been framed. There was no pre-trial conference.

Summary Cover

- [11] The learned Judge observed that the insurance policy was taken by the CNB. The name of the insured is "CNB and others". Several persons had mortgaged their properties with the CNB. CNB is the mortgagee. A requirement of the mortgage is to have an insurance cover. Hence the CNB had taken an insurance cover for all those who had mortgaged their properties with the CNB. Insurance was taken from QBE. The insured are the CNB and the mortgagors. Hence the CNB had the master policy. It is the master policy that contained the terms and exclusive clauses. The plaintiff had been given a summary of the policy. The plaintiff had tendered this document marked P Ex-7. It was marked for the CNB as D Ex-12. This document states underneath that, *"The above is a brief summary of your policy. Please refer to the master policy document held by the Colonial National Bank for full details, terms and conditions and exclusions of policy coverage"*.
- [12] At the trial the plaintiff and the CNB produced the summary cover. The master policy was not produced in evidence. QBE admitted the policy in their statement of defence. The policy is described in the summary as House Owners/House holders Insurance. The policy had been described in the master policy as a domestic building. QBE's position is that the building in question is largely a commercial property and only a portion of it had been used as a residence.
- [13] I will now reproduce what is stated in paragraph 163 of the judgment, for the reason that it is one of the issues raised in the appeal, by QBE. Paragraph 163: *"I may appear to be foul of the rules of evidence in referring to the policy which was not tendered in evidence when it should have been because the entire case is about that document and the parties to the same. When Mr. Mc Donnel (counsel for QBE) offered not to tender evidence, I would have expected other parties to have made an application in court for tendering of the policy through their witness. The existence of the policy is not denied by any party. Even if I am in foul of the rules of evidence, I find that this is a material document which in the interest of justice must be taken into account"*.

- [14] Apparently this document was found in a bundle of documents filed by QBE in court. This bundle contained 10 documents. The cover of the file clearly states the purpose of filing these documents, namely, "Documents that the second defendant (that is QBE) intends to tender at the trial". However no evidence was called on behalf of QBE and no documents were marked or tendered. As the learned Judge has noted, no party had moved to get this document produced in court as a document of court.
- [15] The learned judge has also placed reliance on documents tendered and marked as P Ex- 8 to 11. These are preliminary reports prepared by the insurer's (QBE) agent McLarens Young International dated 5 November 2003, 11 December 2003, 30 January 2004 and 23 February 2004.
- [16] The learned Judge (in paragraph 177) had come to a finding that, "*the bank not only acted as a beneficiary but as a trustee for the owner of the property*". (In paragraph 181) The learned Judge finds that, "*the bank insured the property for the full value and is a trustee for the owner of the property for the surplus amount*".
- [17] The learned Judge also observed that the Bank acted on behalf of the owner and gave an indemnity to the Insurance Company. Having known that the owner did not wish to accept the sum of \$79,000.00 it was improper for the Bank to have accepted the money on behalf of the plaintiff. The learned Judge held that (paragraph 187) even if the Bank had given a discharge and the insurer obtained one, that does not prevent the plaintiff from suing the Bank for failing to obtain a proper value under the policy to cover the debt and the insurer for failing to give a true value for the loss.
- [18] The learned Judge states that (paragraph 188) the debt according to the transaction history was \$ 180,580.09 (as at 30 October 2003). McLarens Young International in their final report had (P Ex-11) proposed a sum of \$145,000.00 by way of a settlement and the first call on the proceeds claim was to be by the Bank. Having given the amount of \$79,000.00 and obtained a discharge from only the Bank, the insurer (QBE) is not

however abdicated from its responsibility to the plaintiff. If the Insurance Company had given the true value of the loss, it would have discharged its obligation under the policy.

- [19] The learned Judge found (paragraph 198) that the proper sum that ought to have been disbursed was \$149,000.00 as the contractor had agreed to replace the building in that amount.

Material non-disclosure

- [20] The learned Judge found that the building was partly commercial and partly residential (Valuation Report P Ex-3). The learned Judge also found that the bank and the insurer were aware that the property was commercial. There is evidence of them having visited the place. Thus the learned Judge dismissed the defence of non-disclosure due to lack of prudence on the part of the Bank and the Insurer.

- [21] The learned Judge observed that the onus is on the insurer to prove non-disclosure of material fact known to the proposer. If the material fact is disclosed that would influence the insurer in either not entering into the contract or to make it on different terms. However the plea of non-disclosure will fail in the following cases mentioned in, "The Law of Insurance Contracts" by M. A. Clarke (pg. 587 para. 23-1C) that;

- (a) *"The information was not disclosed because its disclosure was waived by the insurer;*
- (b) *The information was not disclosed because it was a matter in which the insurer could be presumed to know already;*
- (c) *The information was not disclosed because it was a matter in which the insurer was insufficiently interested because it diminished the risk;*
- (d) *The information was disclosed, but the insurer made an error of judgment, perhaps not appreciating the significance of the information, and ignored it; he was not a prudent insurer;*

(e) The information was disclosed and was of a type that would put the prudent insurer on inquiry to make further investigations; but the particular insurer made no inquiry”.

[22] Further the plaintiff in the originating summons pleaded that it was used for commercial cum residential purposes. There is clear evidence of a grocery and a billiard centre being operated. The plaintiff claimed that he had a stock worth \$55,000.00 in addition to the value of four billiard tables. The value of the property for which it was insured and the premium paid too had come to light. The plaintiff had never pretended that it was only a residence. Right throughout the plaintiff had claimed that he used this premises for commercial purposes as well as for his residence. Thus it could be argued that there was no substantial nondisclosure by the plaintiff.

[23] The learned judge did not find a breach of the provisions of the Consumer Credit Act. However the learned Judge found in paragraph 211 that the Bank and the Insurance Company had breached sections 54 and 55 of the Fair Trading Decree. The learned Judge found that the conduct of the bank and the Insurance Company were misleading and deceptive in dealing with the plaintiff under the contract of Insurance.

Damages

On account of the counter claim by CNB against the plaintiff

[24] The learned Judge ordered the plaintiff to pay CNB a sum of \$20,681.15. This sum was arrived at after a meticulous calculation of the figures. The amount that the plaintiff owed CNB at the time the fire broke out amounted to \$180,580.09. The amount that was due to CNB as at 28 February 2005 was \$205,192.52. This is the date that QBE paid a sum of \$79,000.00. Learned counsel for the plaintiff submitted that even on 28 February 2005 the amount due to CNB remained at \$180,580.09. This was on the basis that the fire stopped the CNB from recovering interest on the debt. The learned Judge had correctly rejected this argument. The sum of \$205,192.52 included a sum of \$10,000.00 which was

a loan for a motor vehicle. After deducting \$10,000.00 the amount stood at \$195,192.52. A further sum of \$1150.00 was taken off this sum on account of interest charged. Now the amount stood at \$194,042.52.

[25] The learned Judge had already decided that the sum that was reasonably due from the Insurance (QBE) was \$149,000.00. After deducting that amount from the debt, the amount due stood at \$45,042.52. The learned Judge had considered the CNB's move to sell the property and had come to the conclusion that it was correct for the reason that the plaintiff was not able to pay the debt due. The plaintiff had only offered \$20,000.00. Considering the fact that CNB was entitled to interest the amount due was increased to \$47,414.36.

[26] The property was sold under a sale and purchase agreement on 6 October 2005 for \$33,000.00 thus reducing the debt to \$14,414.36. The debt was written off on 28 October 2005. Considering the fact that the CNB was entitled to recover interest till then, the sum payable was computed at \$20,681.15, which sum the plaintiff was ordered to pay with interest.

[27] The learned Judge had correctly found that it was due to the fault of CNB that a loss of \$70,000.00 was suffered by the CNB. Having considered a loss of \$70,000.00 the learned Judge considered inappropriate to make an award based on FTD.

Award in favour of the plaintiff against QBE

[28] The learned Judge found that the Insurance Company (QBE) cannot escape liability merely by paying the Bank. The learned Judge found that the insurer should have paid the Bank \$149,000.00 by at least 1 March 2004 (as per the recommendation of the insurer's own agent McLarens Young International). The amount the insurer failed to pay the Bank was \$70,000.00. The Bank had to suffer this loss due to the fault of the Bank. The Insurance was found liable to pay this amount to the plaintiff together with interest

computed at \$35,987.75 totaling \$105,987.75 and post judgment interest at 4%. The Bank did not appeal against the judgment. The plaintiff and the Insurance did.

Grounds of appeal of the plaintiff-appellant (ABU 50 of 2014 (Tab-1))

[29] Twelve grounds have been set out which are as follows:

- i. The learned trial Judge has erred in law and in fact in discharging the injunction against the 1st respondent in stopping the mortgage sale of the appellant's Native Lease No. 20503 and allowing the 1st respondent to proceed to finalise the mortgagee sale without considering that the appellant was entitled to settle the debt and have the mortgage discharged.
- ii. The learned trial Judge has erred in law and in fact in failing to hold that the appellant was entitled to equity redemption in the factual matrix of facts, law and circumstances of the case.
- iii. The learned trial Judge has erred in law and in fact in failing to hold that the mortgage sale of Native Lease No. 20503 by the 1st respondent was unlawful and wrong in law entitling the appellant the reliefs as prayed for in the writ of summons.
- iv. The learned trial Judge has erred in law and in fact in failing to hold that the mortgagee sale of the appellant's property being Native Lease No. 20503 by the 1st respondent was in breach of section 80 of the Consumer Credit Act.
- v. The learned trial Judge has erred in law and in fact in failing to hold that the appellant was entitled to damages against the 1st respondent for losses caused by reason of the 1st respondent's unconscionable conduct.
- vi. The learned trial Judge has erred in law and in fact in failing to award the appellant general damages.
- vii. That the learned trial Judge has erred in law and in fact in failing to hold that the conduct of the respondents was unconscionable entitling the appellant exemplary/punitive damages.

- viii. The learned trial Judge has erred in law and in fact in holding that the appellant owed a sum of \$10,000.00 to the 1st respondent for a motor vehicle which was to be added to his mortgage debt thereby increasing his indebtedness to the bank in a sum of \$10,000.00 when no sufficient evidence was adduced by the 1st respondent justifying such addition.
- ix. The learned trial Judge has erred in law and in fact in failing to take into consideration relevant matters and taking into consideration irrelevant matters when analyzing the evidence and coming to a decision in giving an appropriate award against the 1st respondent for the loss sustained by the appellant.
- x. The appellant reserves the right to add/amend the grounds of appeal and adduce further evidence for the purpose of appeal once the same becomes available.
- xi. And such further and other grounds as the appellant may be advised on in due course upon receipt of the copy of the record of proceedings.
- xii. Wherefore the appellant prays that the damages against the 1st respondent be reassessed by the Appellate Court and the order discharging the injunction against the mortgagee sale of the appellant's Native Lease be reversed and the appellant be granted the orders as was prayed by him in the statement of claim.

Grounds of appeal by the QBE (2nd defendant and appellant in ABU 51 of 2014 (Tab 2)

[30] Thirteen grounds of appeal have been set out which are as follows:

- i. The learned Judge has erred in law in considering and relying on the terms of an insurance policy that had not been tendered in evidence.
- ii. The learned Judge has erred in law and in fact in finding that the appellant was liable under a contract of insurance to indemnify the plaintiff, and had failed to do so in full, when the terms of the contract were not in evidence. She made no finding as to the express terms of the contract which she considered obliged the appellant to pay the 1st respondent the amount that the learned Judge held was due.

- iii. The learned Judge has erred in law in her construction of the 2nd respondent's (CNB) rights under its mortgage with the 1st respondent to settle insurance claims in respect of the mortgage property on behalf of the 1st respondent.
- iv. The trial Judge has erred in law in applying the implied duty of good faith which had not been pleaded, and in finding that the duty prevented the appellant from entering into a compromise with the 2nd respondent (CNB) as mortgagee without the consent of the 1st respondent (plaintiff) as owner of the property.
- v. The learned Judge has erred in law and in fact in not finding that as the 1st respondent's building was dominantly commercial, and the insurance policy in question being residential and for dwelling did not relate to the loss in question.
- vi. The learned Judge has erred in law and the manner in which the principles of material non-disclosure were applied.
- vii. The learned Judge has erred in law and in fact in finding that the appellant knew or ought to have known that the property in question was commercial.
- viii. The learned Judge has erred in law and in fact in her understanding of the meaning of "indemnity cover" in a contract of insurance and in her understanding of the basis of the compromise reached between the appellant and the 2nd respondent.
- ix. The learned Judge has erred in law and in fact in concluding that the compromise reached between the appellant and the 2nd respondent did not represent the true value of the loss so that the appellant was not discharged of its obligations to the 1st respondent under the insurance policy.

- x. The learned Judge has erred in law and in fact in finding that the appellant was bound by the contents of the report and the recommendations of the loss adjuster, McLarens Young International, regarding the loss in question.
- xi. The learned Judge has erred in law in finding that the appellant had breached sections 54 and 55 of the Fair Trading Decree 1992 when the elements of section 54 had not been pleaded or addressed on a claim under section 55.
- xii. The learned Judge has erred in law and in fact in concluding that the appellant was liable to the 1st respondent (plaintiff) despite the discharge given to the appellant by the 2nd respondent (CNB).
- xiii. The learned Judge has erred in law in assessing and awarding damages, interest and costs against the appellant.

Submissions by the learned counsel for the plaintiff/Appellant

- [31] Mr. Sen submitted that the CNB never made an offer to the plaintiff prior to the sale. He submitted that CNB sold the premises for \$33,000.00 when the plaintiff was willing to pay \$33000.00. Mr. Sen submitted that the Bank should have given a notice prior to the sale. Mr. Sen also found fault with the Bank for not selling the property to the highest bidder. The learned counsel submitted that he is now relying on grounds 1, 2 and 3 only. His submission is based on equity and damages. He relies on paragraph 210 of the judgment at page 53 of the Record of the High Court (RHC).

“I however do not find that if the Bank opted to settle without reference to the mortgagor, it should have waited for the mortgagor to make a separate claim and suspended its rights of mortgagee sale until finalization of the claim or accepted a proper value of the loss...”

- [32] The learned counsel relied on the case of **Cuckmere Brick Co Ltd. V Mutual Finance Co** [1971] 1 Ch D 941 where the court held that, “a mortgagee, when exercising his

power of sale, owed a duty to the mortgagor to take reasonable care to obtain a proper price". The learned counsel submitted that according to the plaintiff the plaintiff had to pay only a sum of \$20,000.00. He complained that the plaintiff was not informed of the sale and is entitled to exercise his equity of redemption. If the plaintiff had to pay only \$20,000.00, why did he offer \$33,000.00? The learned counsel once admitted that he offered only a sum of \$20,000.00 which was not acceptable to the Bank.

- [33] The learned counsel admitted the plaintiff's offer of \$20,000.00 was reasonable. He submitted that the amount outstanding on or before 30 November 2003 was \$181,824.64. This included the vehicle loan of \$10,000.00. Leaving the \$10,000.00, the balance of the mortgage debt was \$171,824.64. If \$149,000.00 was paid the balance sum would have been \$22,824.64. The learned counsel submitted that had the Bank put the correct figure to the plaintiff and if he had refused, the Bank would have been at liberty to sell the property and pay the balance to the plaintiff.
- [34] The learned counsel for the plaintiff stated in the written submissions dated 21 May 2016 that (paragraph 41) his only complain is the Bank's failure to adequately consider the plaintiff's right to redeem the mortgage.

Submissions of the learned counsel for CNB on the counter claim (ABU 50 of 2014)

- [35] Ms. Devan for the Bank (CNB) drew the attention of court to paragraph 218 of the judgment (at pg. 55 of RHC) which states that the plaintiff was able to pay the Bank only a sum of \$20,000.00. That amount would not be sufficient to settle the debt owed to the Bank. The submission of the learned counsel that one Prassard had offered \$55000.00 for this property was met successfully by Ms. Devan. Ms. Devan had admitted that there was an offer by one Mr. Prassard for \$51,500.00. However this was not a steady offer. Although the Bank had made several attempts to reach Mr. Prassard it was not successful. Ms. Devan also submitted that the plaintiff was given adequate notice with regard to the sale.

- [36] The learned counsel also submitted that the plaintiff was aware that the Bank wanted to sell the property. She had drawn the attention of court to page 912 (Tab 58 Vol 111) where the plaintiff had admitted to having seen the advertisement in the newspapers. The learned counsel further submitted that the plaintiff chose not to act on default notices even prior to the building catching fire. One of those notices is the one dated 4 December 2000 reminding the plaintiff to pay a sum of \$8750.00 within 30 days (Pg. 722 Vol. 111). This sum was made up as follows:-

	\$1250.00-Due on-30 May 2000
	\$1250.00- Due on 30 June 2000
	\$1250.00-Due on 31 July 2000
	\$1250.00-Due on 31 August 2000
	\$1250.00-Due on 30 September 2000
	\$1250.00-Due on 31 October 2000
	<u>\$1250.00-Due on 30 November 2000</u>
Total	<u>\$8750.00</u>

On this date the debt stood at \$ 148,595.62.

- [37] The second default notice was sent on 5 February 2002. By then the debt had increased to \$ 154,852.74. The learned counsel submitted that the Bank did not receive any response to the default notices. Hence the amount due kept on increasing. If payments were made regularly the amount was bound to have come down. The learned counsel also showed a diary note at page 786 (vol. 111) where it is evident that the plaintiff was not cooperative in the settlement of the debt.

The Right of Redemption

- [38] The learned Judge deals with the right to redemption in paragraph 208 onwards under the heading "The Right of redemption, The CCA and the mortgage sale". The learned Judge stated in the judgment that the Bank gave notice under section 80 of the CCA but was not remedied. The building caught fire on 26 October 2003 and payment was received by the Bank from the insurance (QBE) on 28 February 2005. The amount due on 20 October 2003 (as at 30 October 2003) was \$ 180,580.09. On 28 February 2005 the amount stood

at \$ 205,192.52. The learned Judge said that according to the learned counsel for the plaintiff the plaintiff was liable to pay only \$ 180,580.09. The learned Judge correctly said that the calculation of interest would not stay. Interest continues until payment in full. At the time of the settlement of \$79,000.00 by the insurance the amount due was \$205,192.52. This includes an amount of \$10,000.00 taken as a car loan. Having reckoned that the interest paid on \$10000.00 was \$ 1150.00 the learned Judge deducted \$1150.00 from the mortgage loan and arrived at the figure of \$194,042.52. If \$149,000.00 was paid in settlement of the claim the mortgage loan would have been \$ 45,042.52.

[39] The learned Judge finds that there is no evidence that the plaintiff was able to pay this amount. The learned Judge stated that the plaintiff was prepared to pay a sum of \$20,000.00 which would not be sufficient. The learned Judge also considered the amount recovered at the mortgage sale on 6 October amounting to \$ 33,000.00. From 28 February 2005 till 6 October 2005 the Bank could not be stopped from recovering interest on \$ 45,042.52. After interest the amount stood at \$ 47,414.36. After the sale the amount payable was \$ 14,414.36. The debt was written off on 28 October 2005. The amount due by then was \$ 20,681.15. This is the amount the plaintiff was ordered to pay the Bank. There appears to be no argument to counter the calculations of the learned Judge.

[40] The calculations of the learned Judge appear to be more convincing and therefore acceptable. The learned counsel could not show court where the learned Judge had gone wrong in her arithmetic. It appears that the plaintiff had been very lethargic in his obligations. He could not afford to ignore the default notices. He could not wait with his arms folded to find fault with the Bank on a future date. He also should have been vigilant. He admitted in evidence that he knew about the mortgage sale but did nothing. If the building did not catch fire how could he have settled the loan which was steadily on the increase? At the time of the fire according to the learned counsel the amount payable was \$ 180,580.09. The plaintiff had not been paying interests. He had been ignoring the default notices. Apparently the plaintiff had taken no interest in the settlement of the loan. The Bank would have got the impression that the plaintiff was not being corporative. The

Bank also would have had a fear of recovering the debt. The learned counsel could not challenge any of these accusations. The plaintiff in the amended statement of claim filed on 28 July 2006 gives the amount payable as \$100,000.00 when that amount was admittedly \$180,580.09. It appears that the plaintiff had not been truthful in these matters.

[41] The court will not grant equitable relief to a litigant unless he comes with clean hands. *“Many cases have occurred in which injunctions are applied for, and are granted or refused, not upon the ground of the right possessed by the parties, but upon the ground of their conduct and dealings before they applied to the court for the injunction to preserve and protect that right (Pettit on Equity and Law of Trusts fourth edition at page 417 citing Lord Eldon in **Blakemore v Glamorganshire Canal Navigation** (1832), 1 My. & K. 154, 168”*

[42] Considering the above principle of law I am of the view that the plaintiff's claim on equity fails.

Submissions of the learned counsel for QBE and the Plaintiff (ABU 51 of 2014)

[43] The learned counsel for the 2nd defendant appellant (QBE) submitted that the QBE owed nothing to the plaintiff and the learned Judge has erred in ordering QBE to pay the plaintiff \$ 105, 987.85 for the reason that:-

1. Plaintiff did not prove his case.
2. QBE paid \$79,000.00 and discharged the QBE from its liability.

[44] The learned counsel submitted that this is a case of contract. When one sues another based on contract, the basic principle is to produce the contract. The contract in this case is the insurance policy. The policy itself is admitted. However when the plaintiff alleges breach, the court is required to go into the terms. The terms are found in the policy. The policy has not been produced through evidence. Therefore the learned Judge should have dismissed this case.

- [45] The learned counsel also submitted that the policy was for domestic premises. However the building was predominantly a commercial one. This is a house policy. The building which caught fire was not a house. The particular building in question was not covered by the policy. This was the reason for declining payment. The learned counsel submitted that the summary of the policy (pg. 902 in Vol. 111) is not the contract. Therefore the summary cannot be considered as the policy. Although several grounds have been mentioned in the grounds of appeal the learned counsel essentially made submissions on the above matters.
- [46] The learned counsel for the plaintiff submitted that when the contract is admitted the contract itself need not be produced in court. The summary could be used to examine the terms. With regard to the description of the property the learned counsel submitted that it was the CNB that described the property as residential. He admitted that the building was a commercial as well as a residential premises. He found fault with the CNB for having described this premises as residential. It appears that the policy was issued after an inspection by the officials of the Bank (CNB) and the Insurance Company (QBE).

Legal Matrix

- [47] The learned counsel for the plaintiff-appellant did not address court with regard to all the grounds of appeal filed of record. Therefore it may be a futile exercise to consider each ground separately. The learned Judge had awarded judgment in favour of the plaintiff against the Bank. The learned Judge had gone to the extent of excluding a sum of \$10,000.00 from the mortgage sum on the basis that the \$10,000.00 was relating to a loan taken for a motor vehicle. If this sum was also taken into account the award in the counter claim would have been \$10,000.00 more.
- [48] In all, the plaintiff would have received a sum of \$149,000.00. Out of this sum, the Bank had received a sum of \$79,000.00 which was set off against the mortgage. Even if the entire sum of \$149,000.00 was received, it would not have been sufficient to cover the

debt. At the time of the fire the debt amounted to \$180,580.09. The learned Judge believed the evidence led by the Bank on the notices and has dealt with them exhaustively in her lengthy judgment.

[49] The main dispute in this case is the validity of the policy. The validity was not challenged. The insurer admitted the existence of the policy. The building was insured for a sum of \$240,000.00. There is no issue with regard to payments of premium. There was no issue with regard to the damage caused as a result of the fire. It is a fact that the contract itself was not before court. It was a document filed of record for the insurer. This document was in a bundle. A copy of this bundle was sent to the plaintiff by the Solicitor for the insurer (QBE). However it was never produced. The learned counsel for QBE mentioned in his written submissions that this document is filed under tab 37 pgs. 293 to 305 of the Record of the High Court. There were no issues before court with regard to any terms of the contract other than the fact as to whether it was a commercial policy or a house policy. I am of the view that the learned Judge had answered this issue correctly in her judgment.

[50] The important question raised by the learned counsel for QBE was with regard to the non- production of the policy. When the policy is admitted there cannot be an issue with regard to the non-production of it. Despite an admission of the policy by the Insurance Company could a court dismiss the plaintiff's action for non-production of the policy in court? The master policy was in the custody of the Bank. The plaintiff was issued with only a summary which the plaintiff produced. The Insurance company, (QBE) answering to the writ of summons, has admitted the existence of the policy.

[51] If the policy was denied, the plaintiff would have moved for a writ to have the Insurance Company or the Bank to produce it in court. The Bank was the insured along with the others including the plaintiff. A list had been annexed to the policy which contained the name of the plaintiff. Originally the defendants, namely, CNB and QBE, disputed the status quo of the plaintiff on the basis that the plaintiff was not a party to the contract. The learned Judge had answered that issue well and it was never challenged. If the

Insurance Company found the terms to be more in favour of the Insurance, they could have produced the policy and questioned the witnesses. Instead the defendants merely admitted the existence of the policy. With that it is presumed that they admitted the terms. If there was a non-disclosure or if the policy is for a house and the building is a commercial one why did the QBE make a payment of \$79,000.00. How can the Insurance Company (QBE) say that, it was a house policy without producing it?

[52] *“Admissions of the contents of a document whether made orally, in writing or by conduct, are primary evidence thereof against a party, without notice to produce and without accounting for the absence of the original, such proof not being open to the same objections as is parol evidence from other sources (Slatterie v Pooley (1840) 6 M & W 664). Thus to prove that a certain debt was included in a composition deed, which was inadmissible because it was not duly stamped, the defendant’s admission to that effect was received (Haughton v Ewbank (1814) 4 camp 88)”* (Phipson on Evidence Sixteenth Edition (2005) at 41-11 (pg 1195). In the case of fire insurance, the broker’s slip has been held to be a binding contract, and where no policy existed has been itself enforced (Thompson v Adams (1889) 23 Q.B.D. 361 (Phipson 41-09 pg. 1194).

[53] With regard to non disclosure too, I am of the view that the learned Judge had adequately dealt with the matter. The learned Judge deals with this from paragraphs 199 to 207. In the policy under the heading and in bold letters it is stated as follows:- “PROPERTY USED FOR BUSINESS TRADE OR PROFESSIONAL PURPOSES”. Under this heading it is stated that; “Notwithstanding anything contained in the policy to the contrary, it is understood and agreed that the property used for business trade or professional purposes are deemed to be covered”. I am of the view that the learned Judge rightly rejected the argument that there was a non-disclosure. Also that if there was such a non-disclosure the QBE could have proved it by producing the policy.

[54] The only other matter that was raised by the learned counsel for QBE is with regard to the learned Judge relying on the reports of the agent, namely, McLaren’s Young International Reports recommending a settlement. These reports were produced through the plaintiff as

P EX 8 to P Ex-11. They were not objected to by the Insurance. These reports are from the insurer's agent. At that time the insurer did not dispute them.

- [55] The learned Judge was in favour of the reports of the insurer's agent recommending \$145,000.00 by way of a settlement. The learned judge referring to the evidence relating to these reports states in paragraph 190 as follows; "Three distinct matters appear clearly from the report by the insurer's agent. One, that they accepted the quotation provided by the plaintiff in a sum of \$149,000.00 less depreciation value resulting to the loss in the sum of \$145,000.00..." In Para 191 the learned Judge stated; *"Even the Bank wrote to the agents on 4 May 2004 and stated that it was not willing to accept the sum of \$79,000.00 but will consider the sum of \$149,000.00... P Ex 12"*. Para 192, *"Both the Bank and the insurer knew that the loss was in the vicinity of \$149,000.00 to \$153,000.00"*.
- [56] The learned counsel for QBE did not make submissions with regard to arithmetic. I am of the view that the learned Judge had painstakingly considered all the figures and I see no reason to interfere with her findings.
- [57] Therefore I am of the view that both these appeals are without merit and should be dismissed. The plaintiff's appeal (ABU 50 of 2014) is thus dismissed with costs payable to the Colonial National Bank in a sum of \$2500.00. The appeal of the Queensland Insurance (Fiji) Limited (ABU 51 of 2014) is dismissed with costs in a sum of \$5000.00 payable by the appellant to the plaintiff-1st respondent.

Lecamwasam JA

- [58] I have read the judgment in draft of Basnayake JA and agree with his reasons and conclusions.

Hamza JA

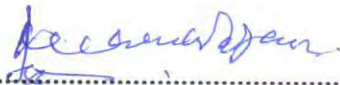
[59] I have read the judgment in draft of Basnayake JA and agree with his reasons and conclusions.

The Orders of the Court are:

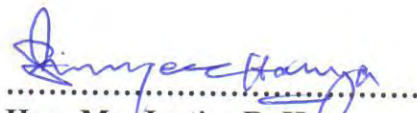
1. *Appeal No. ABU 50 of 2014 is dismissed with costs in a sum of \$2500 payable by the plaintiff-appellant to the 1st defendant-1st respondent Colonial National Bank.*
2. *Appeal No. ABU 51 of 2014 is dismissed with costs in a sum of \$5000 payable by the 2nd defendant-appellant to the plaintiff-1st respondent.*



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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL



.....
Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL



.....
Hon. Mr. Justice R. Hamza
JUSTICE OF APPEAL