

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

**Civil Appeal No. ABU 0010 of 2017**  
**(High Court Action No.155 of 2012)**

**BETWEEN** : **DOMINION INSURANCE LIMITED**

**Appellant**

**AND** : **PITA ILAISA WAQA**

**1<sup>st</sup> Respondent**

**AND** : **STANDARD CONCRETE INDUSTRIES LIMITED**

**2<sup>nd</sup> Respondent**

**Coram** : Basnayake, JA  
Almeida Guneratne, JA  
Jameel, JA

**Counsel** : Ms. N. Choo for the Appellant  
Mr. D Singh for the 1<sup>st</sup> Respondent  
Mr. A. Pal for the 2<sup>nd</sup> Respondent

**Date of Hearing** : 11 September 2018

**Date of Judgment** : 05 October 2018

**JUDGMENT**

**Basnayake, JA**

[1] I agree with the reasoning and conclusions of Jameel, JA.

**Almeida Guneratne, JA**

[2] I agree with the reasoning, conclusions and proposed orders of (Madam) Jameel, JA.

**Jameel, JA**

***Introduction***

- [3] This appeal raises two questions arising from a Liability Insurance Policy (“**the Policy**”): whether a finding of negligence against an insured employer covered under a Policy requires the insurer to indemnify the insured employer; and what conduct of the insured amounts to a “failure to take reasonable precautions to avoid an accident”, so as to relieve the insurer of liability for indemnification under the Policy.
- [4] This is an appeal by the Original Third Party (“**the Appellant**”) who, by the judgment of the High Court of Fiji at Suva dated 3 February 2017, was ordered to indemnify the original 1<sup>st</sup> Defendant (“**the 2<sup>nd</sup> Respondent**”) employer, in respect of the sums ordered by the court as damages to be paid by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, as a consequence of the finding of negligence entered against the 2<sup>nd</sup> Respondent.
- [5] The learned trial Judge found that the 2<sup>nd</sup> Respondent had been negligent and awarded damages under several heads, in favour of the 1<sup>st</sup> Respondent, against the 2<sup>nd</sup> Respondent.
- [6] The Appellant as insurer, whilst not challenging the fact of the work-related injury, declined to indemnify the insured, on the basis that the 2<sup>nd</sup> Respondent (the insured), was in breach of a condition of the policy of insurance.
- [7] For the reasons set out below, I am of the view that a finding of negligence against the insured employer in respect of a workplace injury, does not, by itself, in the absence of a finding of reckless disregard for known danger on the part of the insured, entitle the insurer to repudiate liability for a breach of a Condition of the Policy.
- [8] The 1<sup>st</sup> Respondent’s Noticed dated 22 March 2017, seeks a variation of the judgment of the High Court, enhancing the award of \$15,000.00 as General Damages to \$30,000.00; and enhancing the sum of \$2000.00 awarded for nominal partial loss, from to \$15, 000.00. This will be considered in due course.

### *The 1<sup>st</sup> Respondent's Statement of Claim*

- [9] The 1<sup>st</sup> Respondent claimed that the 2<sup>nd</sup> Respondent's failure to provide a crane, a pulley, chains, ropes, lifting tackle, lifting machine or other mechanism to open and close the lid of the Kumbee crusher ("**the crusher**"), amounted to negligence, and failure to provide a safe system of work in terms of section 9 (2) (a) of the Health and Safety at Work Act, 1996 ('HSAWA'), which thus exposed the 1<sup>st</sup> Respondent to risk of damage or injury of which it knew, or ought to have known existed.

### *The 2<sup>nd</sup> Respondent's Statement of Defence*

- [10] Whilst admitting that the injuries took place, the 2<sup>nd</sup> Respondent pleaded contributory negligence on the part of the 1<sup>st</sup> Respondent. On the day of the accident, the 1<sup>st</sup> Respondent reported to work despite having a hangover, pretended that he was not suffering from a hangover, failed to listen, and was slow to react to instructions given and struggled to stand steady. Whilst the 1<sup>st</sup> Respondent was, with two other workers in the process of pushing the lid of the crusher to close it, in order to avoid losing his balance, he grabbed the inside portion of the crusher with his left hand while the lid was closing, and thus his fingers were caught between the lid and the metal edge of the crusher, due to his negligence.

### *The Appellant's Statement of Defence*

- [11] The Appellant admitted that the 2<sup>nd</sup> Respondent had a Workers Compensation Insurance Cover, but denied liability to indemnify the 2<sup>nd</sup> Respondent on the basis of breach of Condition 8 of the Insurance Policy and moved that the claim against it be struck off with costs.

### *The Judgment of the High Court*

- [12] Although this is not an appeal against the finding of negligence entered against the 2<sup>nd</sup> Respondent however, because the Appellant denies liability on the basis of this finding, it becomes relevant to examine some of the facts, in order to determine the matters raised in the appeal. The 1<sup>st</sup> Respondent testified on his behalf. Three witnesses testified on behalf of the 2<sup>nd</sup> Respondent, and two witnesses testified on



behalf of the Appellant. There was no dispute about how the accident occurred. The dispute was only in respect of the causation. Although he was employed as a welder, on the day of the accident, the 1<sup>st</sup> Respondent was instructed to assist a group of workers to close the lid of the crusher. He was wearing overalls provided by the 2<sup>nd</sup> Respondent. Whilst carrying out the instructions given to him, the sleeves of his overalls caught on to a part of the crusher, and in order to avoid falling off the platform he was standing on, he held on to the opening of the crusher, when the lid descended, resulting in two of his fingers getting crushed.

- [13] The 2<sup>nd</sup> Respondent alleged that because of the hangover, the 1<sup>st</sup> Respondent was incapable of acting rationally, and therefore was contributorily negligent in sustaining the injuries. For failure to adduce medical evidence in this regard, this allegation and the defence of contributory negligence was rejected. The learned trial Judge found that the 2<sup>nd</sup> Respondent had been negligent and was solely responsible for the injuries sustained by the 1<sup>st</sup> Respondent. Damages were ordered against the 2<sup>nd</sup> Respondent, and the Appellant was ordered to indemnify the 2<sup>nd</sup> Respondent for the sum ordered as damages. This appeal is from the order of indemnification made against the Appellant.
- [14] The Appellant repudiated liability under the Policy on the basis that the 2<sup>nd</sup> Respondent was in breach of Condition 8 of the Policy of Insurance ("the Policy"), for failure to take reasonable precautions to prevent accidents, and failed to comply with all statutory obligations relating to employee safety and occupational health. The Appellant alleged that the 2<sup>nd</sup> Respondent had breached section 9 of the Health and Safety at Work Act 1996 ("HSAWA"), and sections 34 and 80 of the Factories Act (Cap 99). In this respect, it is significant that in paragraph 43 of the Judgment, the learned trial Judge found that the Appellant had not verified from the relevant statutory body whether the 2<sup>nd</sup> Respondent had breached the law. Thus, the allegation of breach of statutory obligations was also not established.
- [15] The learned trial Judge found that the policy did not provide that the Appellant (as insurer), could repudiate liability for failure to comply with Condition 8 of the policy. The learned trial Judge held that the payment of the premium was designed to cover precisely a contingency such as this, and therefore it was not open to the Appellant to

deny liability to indemnify the 2<sup>nd</sup> Respondent. I must, at this point state, that I agree with the findings and orders of the learned trial Judge in respect of the liability of indemnification imposed on the Appellant. However, in view of the matters raised by the Appellant, I must set out below further reasons, why the Appeal should be rejected.

### **Grounds of Appeal**

[16] The Appellant pleaded the following grounds of appeal:

1. *The Learned Judge erred in law and in fact in holding that the Third Party is obliged to indemnify the Defendant against the Plaintiff's claim;*
2. *That the Trial Judge erred in law and in fact when he held that Condition 8 of the Workers Compensation Insurance Policy cannot be relied upon or repudiation of liability where Defendant has failed to take reasonable precaution;*
3. *That the Trial Judge erred in law and in fact when he failed to consider that the Policy was subject to strict terms and conditions, in that the repudiation of the Policy for failing to take reasonable precaution was an implied term of the Policy;*
4. *That the Trial Judge erred in the law and in fact when he awarded special damages when there were no specific/ particularized and/ or evidence of Special Damages pleaded by the Plaintiff;*
5. *That the Appellant reserves the right to add further grounds of appeal at a later stage upon receipt of the Court Records.*

[17] However, grounds 3 and 4 of the grounds of appeal have been abandoned, as confirmed in its written submissions dated 13 August 2018, and I therefore do not need to deal with them.

### ***The First Ground of Appeal – The Issue of Indemnification***

[18] Although two grounds of appeal have been pleaded, they are intrinsically linked, that is, whether indemnification could have been ordered by the learned trial Judge upon his having arrived at a finding of negligence against the insured; and what amounts to a breach of Condition 8 of the Policy, so as to entitle the Appellant to repudiate liability for breach of Condition 8 of the Policy. For convenience, I have identified



the first ground of appeal, as the Indemnification Issue, and the second ground of appeal as the Reasonable precautions issue, although there is an overlap.

*The Insurance Policy in this case*

- [19] In this case, the Policy is titled "Policy Terms and Conditions". It states inter alia as follows:

*"The Dominion will indemnify you in respect of any legal liability (as defined) which occurs during the period of insurance and subject to the Terms and Conditions of this Policy.*

*WHAT YOU ARE INSURED FOR*

*"The Dominion agrees to indemnify you by payment if any workman employed by you shall sustain any personal injury or illness by accident or disease and you shall be liable to pay compensation for such injury or illness under the Workmen's Compensation Act, or any amendments thereof in force at the commencement of this policy or any renewal date.*

*In addition, Dominion will be responsible for all costs and expenses incurred with the written consent of the Dominion in connection with any claim for such compensation".*

- [20] The Policy specifically provides for Exclusions and Conditions. It provides for "What You are Not Insured For" and under this heading there are three specific exclusions.

- [21] There are 9 conditions under the Heading "Conditions". They are: (1) Fraud, (2) Claims, (3) Other Insurance, (4) Cancellation and Variation, (5) Jurisdiction (6) Premium Payment, (7) Inspection (8) Precaution (9) Wages record.

- [22] Condition 2B states as follows:

*"the insured shall not without the written consent of the Dominion:*

- 1. Incur any expense of litigation.*

2. *Negotiate, pay or settle, admit or repudiate ant Common Law claim.*

Condition C provides as follows:

*"In the event of any claim the Dominion shall be entitled:*

*To take proceedings in the name of the insured to obtain relief from any third party and to undertake, the conduct, control and compromise of the any such proceedings"*

- [23] Condition 8 is the matter under consideration, and states as follows:

*"Precautions: The Insured shall take all reasonable precautions to prevent accidents relating to employee safety and occupational health".*

#### *General principles -interpretation of contracts of insurance; indemnity*

- [24] A contract of liability insurance is a contract of indemnity.

**British Cash and Parcel Conveyers Ltd v Lamson Store Service Co. Ltd.** [1908]

1 K.B.1006 at 1014, per Fletcher Moulton LJ (cited in Halsbury's Laws of England, Vol 25 Fourth ed. 2003 Reissue, para. 662). Although there are numerous authorities on this matter, they all reveal the vexed question of the extent to which an insurer can escape the liability of indemnification, and to what extent an insured is guaranteed fulfilment under the policy, and the balance that is to be struck between the two competing commercial interests. There is no statutory definition of insurance, and insurance contracts are governed by the general law of contract, subject to some additional principles such as that of good faith. (Halsbury's Laws of England, Vol 25 Fourth ed. 2003 Reissue, para. 2)

- [25] Insurance business is defined in the Insurance Act 1998 as follows:

*"insurance business" means—*

*(a) the business of undertaking liability by way of insurance (including reinsurance) in respect of lives, or any loss or damage, including liability to pay damages or compensation contingent upon the happening of a specified event;"*



- [26] In this regard, the question that arises is whether a finding of negligence on the part of the insured, automatically entitles the insurer to deny the obligation of indemnification under the Policy. To determine this question, it is necessary to understand the nature of liability insurance, which is the Policy in this case. The fundamental purpose of an Insurance Policy is to indemnify the insured in the event that liability is imposed on the insured. Indemnification will be limited to the amount of the loss actually incurred, and this is why the policy will usually contain a clause giving the insurer the right to intervene in proceedings instituted against the insured. Such a clause is contained in the Policy which is the subject matter of this appeal. Amongst other reasons, this enables the insurer to make a commercial decision as to whether, and to what extent the action should be defended or settled.
- [27] Although the value of the *contra proferentem* rule has been subject to doubt in recent times, its applicability depends on the facts of the case. The terms must not be construed so as to result in the insured being deprived of the entirety of the cover afforded to him by the description of the risks in the Policy. An interpretation that places a limitation on the clearly expressed obligation to indemnify must be read restrictively. If a clause in an insurance Policy is ambiguous, or capable of more than one meaning, then in view of the *contra proferentem* rule, it must be interpreted in favour of the insured.
- [28] In respect of the interpretation of insurance contracts, the correct principle is that where the parties have used unambiguous language, even if contrary to commercial common sense, the courts will give effect to it. If, however, there is a genuine ambiguity so that there are competing constructions of a contractual provision, the court will favour the construction that accords best with the commercial purpose of the contract, and business sense. This will, of course, have to be in the context of the contract and must always be viewed in the particular factual matrix. Superimposed, will be the duty to ensure that the obligation of indemnification is not repudiated lightly.
- [29] In view of the very nature of an insurance contract, and the trigger for liability, legal liability arising from a Policy has been described as:



*“the event upon which the obligation of the insurers to indemnify the insured depends is the happening of the liability insured against”.*  
**Lancashire Insurance Co. v IRC** [1899] 1 QB 353 at 359, (cited in Halsbury’s Laws of England, Vol 25 Fourth ed. 2003 Reissue, para. 663).

- [30] The liability of the insurer must be described in the policy, and it is only liability arising from the specific act or situation provided for which will trigger liability to indemnify. Therefore, the description of the risk covered which gives rise to the liability, defines the scope of the liability.
- [31] The decision in **Fedgen Insurance v Leyds** [1995] ZACSA20; [1995] 2 All SA357 (A)(27 March 1995), was relied upon by Counsel for the Appellant as well as Counsel for the 2nd Respondent. In this case, the insurer repudiated liability under a comprehensive policy. The insured’s car was stolen, and the insured claimed under the policy. The court held that irrespective of the purpose for which it was being used at the time it was stolen, it was necessary to determine whether liability remained on the part of the insurer for the loss resulting from the theft of the car. In holding that the ordinary rules of interpretation of contract must apply in construing an insurance policy, it was the duty of the court to ascertain the intention of the parties. In order to ensure that the full import of the *ratio* is not lost, I can do no better than to reproduce the relevant portion of the judgment. Smalberger J said:

*“The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at 464/5). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (Auto Protection Insurance Co Ltd v Hanmer - Strudwick 1964(1) SA 349(A) at 354C-D); for it is the insurer's duty to make clear what particular*

*risks it wishes to exclude (French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd 1931 AD 60 at 65; Auto Protection Insurance Co Ltd v Hanmer-Strudwick (supra) at 354D-E). A policy normally evidences the contract and an insured's obligations, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd 1961(1) SA 103 (A) at 108C)".*

- [32] The commercial purpose of a contract of insurance is to provide for indemnification in the event the risk covered occurs. If the policy is to be interpreted in the way suggested by the Appellant, then there would be no reason for entering into a contract of insurance. Condition 8 is a standard clause in insurance policies. Generally, such a clause is inserted by the insurer who seeks to exclude liability for loss caused by the negligence of the insured, if the loss was caused by wilful and reckless disregard for known dangers. A contract of liability insurance would be rendered of little or no value, if an insurer were able to repudiate liability merely on the finding of negligence on the part of the insured towards its employee. This cannot be presumed to be the basis of insurance business, as defined in the Insurance Act.
- [33] In construing an insurance policy, the words used by the insurer cannot be determinative of the matter, because the Policy is almost invariably drawn up by the insurer. Instead, it must be construed to mean what a premium-paying insured could reasonably expect the words to mean. **Sentry Security Systems Inc. v Detroit Auto. Inter- Insurance Exchange** (1974) Mich App 182, 223 (cited in Couch, Cyclopedia of Insurance Law, second ed. The Lawyers Co-operative Publishing Co.1984, para.15:16, p171).
- [34] The interpretation of similar and identical clauses have been considered in several cases and several jurisdictions. The common thread of reasoning that runs through them is that such a clause is not to be restrictively interpreted so as to deprive the insured of the benefit of indemnity, based merely on negligence of the insured.



Something more must be established, that is, recklessness on the part of the insured. This necessarily requires the establishment of a mental element of knowledge and disregard for known consequences.

- [35] In Fraser v B.N. Furman (Productions) Ltd. (Miller Smith & Partners, Third Parties) [1967] 3 All ER 57, which is regarded as the seminal authority on this point, an employee was awarded damages against her employer in an action based on negligence and breach of statutory duty under the Factories Act, 1961. The employer sued the insurance broker for failing to effect the employer's liability insurance covering the risk. The broker contended that the insurers would have been entitled to deny liability on the basis of breach of condition 4 of the policy which stated that "*the insured shall take reasonable precautions to prevent accidents and disease*". The broker's claim was rejected, and Lord Diplock held that in order to repudiate or escape liability under this clause, the insurer would have to establish that on a true construction, the employer's failure to take safety precautions was a reckless failure, that is, the employer recognised the danger to the employees, but deliberately refrained from taking measures to avert it. His Lordship went on to say that the condition must be construed in the context of the policy, and that was to provide indemnity in respect of the risk it ran, by employing persons.
- [36] The recklessness test formulated by Lord Diplock was adopted by the Court in Fraser (supra) and can be summarised as follows:
- (a) The insured is expected to take measures to avert only dangers which he foresees, or can, in the circumstances be reasonably expected to foresee.
  - (b) It would be repugnant to the commercial purpose of the contract to require the assured to foresee a hypothetical situation, because failure to foresee unexpected dangers is one of the commonest grounds of risk insured. There would be no purpose in entering into the contract, if the risk undertaken is then denied.
  - (c) Where the insured recognises a danger, he should not deliberately court it by taking measures which he himself knows are inadequate to avert it.

- (d) Negligence alone will not suffice to repudiate liability under the policy, the insured must be shown to have been reckless, that is, intentional omission to take steps to avoid a known danger, with no concern for the known consequences.
- (f) The purpose of such a condition is to prevent an insured from being deliberately indifferent to a known danger, in the hope that the insurer will indemnify him.

[37] The gravamen of the Appellant's complaint then, is that the learned trial Judge erred in finding that the Policy does not contain a specific provision that permits the Appellant to repudiate liability, in the event the insured fails to take reasonable precautions. The Appellant argues in paragraph 14 of its Written Submissions before this court, that this was an express term of the Policy, and a condition precedent to the award of indemnification. It proceeds to argue that the learned trial Judge erred in relying on the concession made by Counsel during the hearing in the court below to the effect that condition 8 of the Policy did not specifically state that liability will be repudiated if reasonable precaution is not taken, and that it was the duty of the trial Judge to have analysed the evidence before him and given the insurance contract a restrictive interpretation. But this argument runs counter to the rules of interpretation applicable to a policy of insurance and cannot be accepted.

[38] It is only the intention of the parties as declared by the words of the policy that may be considered. The issue in this case is the meaning to be given to the words:

*"reasonable precautions to prevent accidents and must comply with all statutory obligations relating to employee safety and occupational health"*  
contained in Condition 8 of the Policy.

[39] The 2nd Respondent denied liability by letter dated 18 June 2013, even before any evidence of how the accident occurred, was available to it. The Statement of Claim is dated 5 June 2012. The 2nd Respondent appointed a Private Investigator in 2012, but he submitted his Report only in 2014. Trial commenced on 23 January 2017. On page 2 of this letter, the Appellant states:



*"Maybe if the Cover was lowered back in its position again with the help of the loader, it may have prevented the Plaintiff from receiving the injury as the process would not have required manual pushing of the Cover by the workmen whilst standing on the metal platform some 8 feet above the ground level". (Emphasis added).*

- [40] A close reading of this statement made by the Appellant reveals that even in the eyes of the Appellant, it was *only a mere possibility*, that using a loader to close the lid *may* have prevented the accident. It was not a definitive and unequivocal position that the failure to provide a loader, was undoubtedly the specific cause for the accident, and which fact the 2nd Respondent had knowledge of, and deliberately chose to ignore, or "court danger", which is the test for recklessness. Therefore it is not open to the Appellant to claim that the failure to ensure the secured platform amounted to failure to 'take all reasonable precautions' to prevent accidents, entitling it to repudiate liability of indemnification.

*Was Condition 8 of the Policy, a 'condition precedent'?*

- [41] Learned Counsel for the Appellant argued that condition 8 is a condition precedent to the duty of indemnity by the Appellant. I do not agree that this was a condition precedent, as the conduct of the parties precludes such a finding. Had it been regarded by the parties as a condition precedent, it is reasonable to assume that the insurer would have first inspected the premises and machines, in respect of which it agreed to insure. This was not the case, and the evidence in this regard was clear that the machine was not examined prior to the execution of the policy. Learned Counsel for the 2nd Respondent submitted that Condition 8 as it stands, is not sufficient to permit repudiation of liability. He contended that liability could be repudiated only if the right to do so had been specifically excluded in the exclusion's clause. There is merit in this argument. Taking that further, if the Appellant had included such a clause under the exclusions, then it is doubtful that the agreement would have even been entered into. This indicates that an exclusion clause in a Policy of Insurance, cannot contain an exclusion which would render the contract itself nugatory. Accordingly, the first ground of appeal fails, and is dismissed.

*The Second Ground of Appeal- The Issue of "All Reasonable Precautions"*

- [42] In Woodfall & Rimmer Ltd v Moyle & Another [1942] 1 K.B. 67 too, like in this appeal, under the Heading "Conditions", the court had to determine the meaning of the words:

*"the assured shall take reasonable precautions to prevent accidents and to comply with all statutory obligations"*

In regard to the insurer's argument that the condition, which was identical to Condition 8 in the instant case, Lord Greene M.R. said at p.73:

*"I consider that a policy of this kind is not to be approached with the idea that a large part of the benefit of the insurance which any employers would obviously wish to get, and which is at the outset given in wide terms, is to be eliminated by a "condition" tucked away at the end of the policy in the context in which the condition is found, for, be it observed, all the other conditions relate to matters of comparatively minor importance... I approach it, with a strong desire to avoid such a result if the language used legitimately permits it. If the construction urged on behalf of the underwriters is right, I do not think it would be an exaggeration to say that this document is really a trap for the assured. By that expression let it not be thought that I mean to imply that a trap was intentionally set. I mean nothing of the kind. All I mean is that the underwriters, if their intention was to limit their risk in the way in which Mr. Beney would have it limited, have used language which entirely fails to make that intention clear. I cannot help thinking that, if underwriters wish to limit by some qualification a risk which prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is".*

- [43] Based on the reasoning cited above, and all the circumstances of this case, I am fortified in my view that Condition 8 in the instant case is not a condition precedent to the liability of the Appellant to indemnify the 2<sup>nd</sup> Respondent.



- [44] In the same case, Lord Goddard drew a distinction between obligations that exist between employer and employee, and between underwriter and assured, and in rejecting the appeal of the underwriters, he said at p. 77:

*"... but in my opinion, it is fallacious to read this condition as meaning that the underwriters are to be excused from indemnifying the assured if they are guilty of any breach of the duty which the law imposes as between employer and employed in not taking some precaution which a jury or a court think ought to have been taken, and so become liable to the employed for negligence. That would be granting an indemnity with one hand and taking it away with the other. A perfectly satisfactory meaning can be given to this condition in the light of the fact that it occurs in an undertaking between the underwriters and the assured, and, in my opinion, it ought not to be construed in the way for which the underwriters have contended"*

It is clear that the correct position is that the relationship between employer and employee, cannot determine the relationship between insurer and insured. Accordingly, the finding of negligence against the 2<sup>nd</sup> Respondent is not determinative of the Appellant's liability under the Policy.

- [45] As decided in London Crystal Window Cleaning Company Limited v National Mutual Indemnity Insurance Company Ltd [1952] 2 Lloyd's LR, the court had to consider the meaning of the words:

*"The insured shall take all reasonable precautions to prevent accidents".*

Lord Goddard said:

*"what was necessary to be construed is the condition as between the underwriters and the assured, not as between employer and employee"*

The court said the right to repudiate liability under the policy will depend on whether the insured had been knowingly reckless, about whether or not his conduct will result in an accident.

- [46] The meaning to be given to the phrase ‘all reasonable precautions’ or similar phrases have been considered in different contexts. In **IBM United Kingdom Ltd v Rockware Glass Ltd** [1980] F.S.R. 335, a contract required a buyer to use its “best endeavours to obtain planning permission”. Buckley L.J. said:

*“ I can feel no doubt that, in the absence of any context indicating the contrary, this should be understood to mean that the purchaser is to do all that he reasonably can to ensure that the planning permission is granted. ”*

Geoffrey Lane L.J. said:

*“Those words as I see it, oblige the purchaser to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission would have taken. ”* (Emphasis added).

This indicates the level of care that is expected to be taken by the insured for his conduct to be regarded as compliant with the conditions of the Policy.

- [47] The Diplock test formulated in **Fraser** (supra) was developed further in **CGU Insurance Ltd. v Lawless**, [2008] VSCA 38, and relied on by Counsel for the Appellant as well as Counsel for the 2<sup>nd</sup> Respondent. The court said:

*“[17] The test is wholly subjective. A failure to take reasonable precautions will occur only where there is a deliberate course of action or inaction which the insured realizes exposes him to the risk of someone being injured by the danger which has been recognized. Hence the phrase ‘a deliberate decision to court the danger’.[12] The insured might establish compliance with the condition by showing one or more of the following things:*

- (1) There was no recognition of the danger or the extent of the danger of bodily injury;*
- (2) Particular precautions would not have been reasonable in the circumstances;*
- (3) No particular precaution was considered or it was not regarded as reasonable or practicable in the circumstances;*
- (4) The failure to take the precautions was not due to a lack of desire and concern to prevent bodily injury.”*



- [48] In Patterson v Aegus (1989) (3) SA 478, an all-risks cover required the insured to take “all reasonable precautions” for the maintenance of the property insured. On the facts, the court held that indemnity could not be repudiated. King J concluded that:

*“The condition here is not clear, certainly so far as it purports to apply to the all-risks section; it should not be construed so as to entitle the insurer to avoid liability where insured has been negligent for that would be to render the cover for the accidental loss nugatory and manifestly this was not the intention of the parties; the object of the insurance must not be defeated or rendered practically illusory as it would be if an accidental loss occurred and the insurer was able to avoid liability by the application of the ” reasonable precautions “ provision in such a way so as to abrogate its obligation to make good the loss merely on the basis of the negligence of the insured”.*

- [49] In London Crystal Window Cleaning Company Limited v National Mutual Indemnity Insurance Company Ltd. [1952] 2 Lloyd’s LR 360, the court had to consider the meaning of the words:

*“The insured shall take all reasonable precautions to prevent accidents”.*

Lord Goddard said:

*“what was necessary to be construed is the condition as between the underwriters and the assured, not as between employer and employee”*

*“Those words as I see it, oblige the purchaser to take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission would have taken.”*

(Emphasis added).

- [50] An employer may take reasonable precautions to prevent accidents, and despite this if person is injured, the employer may be liable under a statutory provision. However, if injury is suffered despite the precautions taken, then the insured will yet be able to claim indemnification under the policy, because it cannot be claimed that he failed to take reasonable precautions. Thus, the distinction between negligence as an

employer, and breach of condition in the policy are two distinct matters and are judged by distinct criteria.

- [51] The Appellant relies on the following dicta of Lord Diplock in **Fraser v B N Furman (Productions) Limited (Miller Smith and Partners, Third Parties)** [1967] 3 All ER 57 (CA):

*“What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer’s omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e. made without actual recognition by the insured himself that a danger exists, not caring whether or not it is averted.”*

- [52] In **CGU Insurance Ltd v Graeme Robert Lawless** VSCA 38 (13 March 2008) Redlich J said:

*“The test is wholly subjective. A failure to take reasonable precautions will occur only where there is a deliberate course of action or inaction which the insured realises exposes him to the risk of someone being injured which has been recognised.”*

- [53] The Appellant relied on the judgment in the case of **Canny v Primepower Engineering Pty Ltd** [2015] WADC 81, in which the court which adopted the three principles in **Brescia Furniture Pty Ltd. V QBE Insurance (Australia) Ltd** [2007] NSWCA 598 which are:

- (i) *Where the onus lies depends on the proper construction of the provisions of the policy.*
- (ii) *The appropriate test of reasonableness is the test of whether the insured perceived and deliberately courted the risk.*



- (iii) *In order to attribute a state of mind to a company, the collective states of mind of officers of the company relevantly connected with it are treated as being the state of mind of the company.*

- [54] Applying the test laid down in Fraser v BN Furman (Productions) Limited (Miller Smith and Partners, (Third Parties)) (supra), liability can be repudiated only if there is recklessness in respect of a known danger that was foreseeable on the part of the insured, with no concern for whether the event will occur or not. In other words, recklessness goes beyond negligence, which is callous disregard for known consequences.
- [55] Learned Counsel for the Appellant submitted that because the lower court found that the lid of the crusher weighed more than 50 kg, the 2<sup>nd</sup> Respondent ought to have foreseen the danger involved in having a manual system for closing of the lid. It was only after the accident that the 2<sup>nd</sup> Respondent introduced a railing, and started using a chain block. Learned Counsel for the Appellant submitted that these post-accident steps taken by the 2<sup>nd</sup> Respondent was proof that it had failed to take all precautions to prevent accidents and by failing to do so, deliberately ‘courted danger.’ It is significant that the policy requires the insured to take only “all reasonable precautions, not all precautions whatsoever.
- [56] In response, the learned Counsel for the 2<sup>nd</sup> Respondent submitted that the crusher had been in operation from 1998, that is for a period of eleven years prior to the accident, it has always been manually operated by three persons, there had never been an accident of this nature before. Every workman was provided with safety boots, helmets, overalls, and safety glasses. Gloves were not given for the hands, as it would have not been possible to work with them, considering the nature of the work involved and the machine itself. It was in evidence (at page 157 HCR), that even after the accident the 2<sup>nd</sup> Respondent was yet not using a loader to push the cover. There was no specific finding by the learned trial Judge that injuries caused to the 1<sup>st</sup> Respondent’s fingers, were caused because of the failure to provide gloves. Historically, the machine had been operated in this manner with no accidents. In any event, the nature of the machine was such that it had to be manually operated, and had been so operated by at least three persons at a time. In my view, the cumulative effect

of the evidence available was that it was not practicable to have changed the mode of operation of the crusher, so as to ensure that a worker's fingers do not get crushed. Thus, the 2<sup>nd</sup> Respondent was not in breach of the condition of the Policy.

- [57] Although learned Counsel for the Appellant relied on the test formulated in CGU Insurance Ltd. v Lawless (supra), the attention of this court was not drawn to evidence that established that the conduct of the 2<sup>nd</sup> Respondent fell within the description contained in any of the limbs set out in the test.
- [58] Whilst it is unfortunate that the supervisor on the day directed the 1<sup>st</sup> Respondent, who did not regularly work on the crusher, to assist the group of employees to close the lid of the crusher, in all the circumstances of the case, I am of the view that the 2<sup>nd</sup> Respondent's conduct does not amount to reckless disregard of known or foreseeable dangers, because in the circumstances, there was no foreseeable danger. The 2<sup>nd</sup> Respondent was therefore not in breach of Condition 8, so as to entitle the Appellant to repudiate liability under the policy.
- [59] Whilst an employer will be required to maintain a reasonable standard of safety, commensurate with standards maintained in similar industries, an insured employer will be expected to do only what is reasonable, which means what is practicable as well as what is commercially viable.
- [60] Failure to take reasonable precautions must be viewed in the context of the evidence that the Appellant did not examine the crusher before the policy was issued. Therefore, there is no basis on which the Appellant could contend that a particular type of precaution was required, or that the 2<sup>nd</sup> Respondent knew of the danger and risk, and had reckless disregard for the need to put in place a different system to ensure the health and safety of its workers. This also, as I have said before, precludes the finding that Condition 8 was a condition precedent to the formation of liability.
- [61] The Appellant also denied liability on the basis that that the 2<sup>nd</sup> Respondent had failed to comply with statutory obligations relating to employee safety and occupational health. This limb of the denial was not established by evidence, and in paragraph 43 of the Judgement, the learned trial Judge did find that the Appellant did not check



with the statutory body whether there had been a breach of statute. Such an allegation must be established by evidence of a conviction or finding by a competent court. A mere allegation unsupported by the required evidence, is not sufficient to found the allegation, therefore, this ground of repudiation is without legal basis. Thus, the second ground of appeal fails, and is accordingly dismissed.

*The 1<sup>st</sup> Respondent's Notice of Appeal*

[62] In view of the fact that the 1<sup>st</sup> Respondent has undoubtedly suffered permanent disability, as well as pain as a result of the accident, there is no doubt that damages should be adequate. Although the 1<sup>st</sup> Respondent was gainfully employed after the accident, and was earning more than he did at the time of the accident, nevertheless, in view of the nature of the injuries suffered, in all the circumstances of the case, on the evidence available, I consider it fair and reasonable, for General Damages to be awarded in a sum of \$ 30,000, in substitution of the sum of \$15,000.00 awarded by the High Court. Accordingly, this court makes an award of \$30,000 as General Damages due to the 1<sup>st</sup> Respondent from the 2<sup>nd</sup> Respondent.

[63] The 1<sup>st</sup> Respondent's application for a variation of the award of the High Court in respect of nominal partial loss is, in all the circumstances of the case, refused.

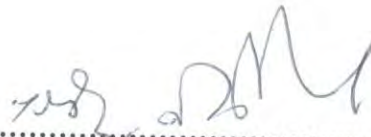
*Conclusions*

[64] The purpose of a contract of insurance is a commercial decision made to provide for an unforeseen event. In that context, it would be counterintuitive to require the insured to take all reasonable precautions in respect of all dangers. The insurer agrees to cover a risk, the insured hopes that if the risk covered ever materialises, then, he will not be financially prejudiced because the contractual obligation of the insurer will ensure that the financial cost of paying for the risk that has been provided for, will be taken care of by the insurer.

[65] For the reasons set out above, I see no basis to interfere with the Judgment of the learned trial Judge, except to vary the sum awarded as General Damages to the 1<sup>st</sup> Respondent, as I have done.

*The proposed Orders of the Court are:*

1. *The Appeal is dismissed, and the Judgment of the High Court is affirmed, subject to the variation that the 1<sup>st</sup> Respondent is entitled to a sum of \$30,000.00 as General Damages.*
2. *The 2<sup>nd</sup> Respondent is ordered to pay to the 1<sup>st</sup> Respondent a further sum of \$15,000.00 as General Damages (in addition to the sum of \$15,000.00 already paid).*
3. *The Appellant is ordered to indemnify the 2<sup>nd</sup> Respondent all sums ordered by the learned trial Judge in Judgment dated 3 February 2017, in addition to the sum of \$15,000.00 ordered by this court, together with interest at the rate of 4% per annum from the date of payment by the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, until the date of indemnification by the Appellant.*
4. *The Appellant is ordered to pay the 1<sup>st</sup> and 2<sup>nd</sup> Respondents a sum of \$2,500.00 each, as costs of this appeal.*



.....  
**Hon. Mr. Justice Eric Basnayake**  
**JUSTICE OF APPEAL**



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**Hon. Justice J. Almeida Guneratne**  
**JUSTICE OF APPEAL**



.....  
**Hon. Madam Justice Farzana Jameel**  
**JUSTICE OF APPEAL**